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DETTMAN v. WILLIAMS.

Barton J.

That they should mean the same thing is a construction to be struggled against unless there is something in the context to necessitate such a construction. I see nothing of that kind here. Mr. Armstrong has striven manfully to support a very difficult position. It may be that there is a hardship on the appellant, but if there is a hardship it is one created by the law. I therefore concur with the Chief Justice in the opinion which he has stated.

O'CONNOR J. I am of the same opinion.

C. B. Stephen, for the respondent, asked that the appeal should be dismissed with costs.

[GRIFFITH C.J.—If the Crown asks for costs we cannot refuse to allow them.]

Appeal dismissed with costs.

Foll *McDonogh* v *Cth* 61 LGRA 232 Foll *McDonogh* v *Commonwealth* (1985) 61 ACTR 22

Solicitor, for appellant, *A. J. McDonald.*

Solicitor, for respondent, *The Crown Solicitor of New South Wales.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

MILLER . . . . . APPELLANT;

NOMINAL DEFENDANT,

AND

McKEON . . . . . RESPONDENT.

PLAINTIFF,

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ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

SYDNEY, *Sept.* 12, 13, 14, 15.

Negligence—Construction of road—Unprotected cutting—Liability of Government—Reasonable care under circumstances—No evidence of breach of duty—Nonsuit.

Griffith C.J., Barton and O'Connor JJ.

The Government of a new country, when forming for the first time a practicable road upon waste land of the Crown which has been technically dedicated as a highway, is not bound by the rules which govern private

persons who interfere with the surface of an ancient highway, as that term is understood in England. They are not bound to make the surface absolutely safe, nor are they liable for accidents which are due to mere imperfections in the road, or to non-repair; they are only bound to exercise, in the construction of the roadway, such care to avoid danger to persons using it as is reasonable under the circumstances.

The Government of New South Wales made a cutting through the bank of a river, in order to facilitate access to the crossing place, on a country road in a sparsely settled district. The road was fenced, and the cutting was nearly in the middle of it and occupied about one-third of its width, having steep sides up to ten feet in height. No fence was put up to prevent persons travelling along the road from going upon the uncut part of the road at the side of the cutting. Twenty years or more afterwards, the respondent, who was driving along the road on a dark night without lights, got out of the vehicle, and walked along the ground at the side of the cutting, into which he fell and was injured.

Held, in an action against the Government for negligence in making the cutting on a highway, and for nuisance, that upon proof of these facts there was no evidence to go to the jury of breach of duty on the part of the Government.

Decision of the Supreme Court, *McKeon* v. *Miller* (1905), 5 S.R. (N.S.W.), 128, reversed, and judgment of *Pring* J. restored.

APPEAL from a decision of the Supreme Court.

The respondent sued the appellant as nominal defendant on behalf of the Government of New South Wales, for personal injuries caused by falling down the side of a cutting on a road constructed by the Government.

The declaration contained four counts, in which the cause of action was stated in different ways. The first alleged that the Government by its servants negligently and improperly removed earth from a public and common highway; the second that a bank on a highway was wrongfully cut down so as to leave a dangerous place; the third that the approaches to the cutting were negligently constructed and left steep and dangerous; and the fourth that the road leading to the cutting was negligently left steep and dangerous. It was alleged also that the highway and the part of it where the cutting was made and the approaches thereto were left without any fence, signal or light in the night time to prevent or warn the public, travelling along the highway, of the dangerous nature of the place, and that the plaintiff while so travelling fell over the cutting and broke his leg.

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The pleas were not guilty and a traverse of the allegation that the plaintiff was lawfully travelling along the highway. Issue was joined on these pleas.

Pring J., who presided at the trial, nonsuited the plaintiff, and the Full Court set aside the nonsuit and ordered a new trial: *McKeon* v. *Miller* (1).

The facts are stated in the judgments.

Garland and *A. Thomson*, for the appellant. The evidence of the plaintiff did not disclose any liability on the part of the Government under the circumstances. The Government allowed the public to use the road, and the public must take it with all its defects. The Crown is in no worse position than a private owner who dedicates a road, and it has been held that in such a case the public cannot complain of any erection or excavation that may exist upon the road at the time of dediction: *Fisher* v. *Prowse* (2); *Robbins* v. *Jones* (3). In this case the whole of the new road was the cutting. There was no duty cast upon the Government to protect the cutting, nor even to make the road a good one. The powers of the Government with regard to making roads are defined in the *Public Roads Act* 1902. Once the road is dedicated, the Government is not liable for accidents caused by defects in the roadway unless they are in the nature of a trap: *Wakely* v. *Lackey* (4); *Longmore* v. *Great Western Railway Co.* (5). Even municipalities, which have the care, control, and management of roads are not liable except for misfeasance: *Bourke* v. *Municipal Council of Sydney* (6); *Turner* v. *Borough of Goulburn* (7).

There is no obligation on the part of the Government to fence at all: *Cornwell* v. *Metropolitan Commissioners of Sewers* (8). Even if they alter the nature of the surface after the road is formed, they are only bound to use ordinary care and skill towards persons to whom they owe a duty of ordinary care and skill.

[GRIFFITH C.J. referred to *Hurst* v. *Taylor* (9).]

(1) (1905) 5 S.R. (N.S.W.), 128.
(2) 2 B. & S., 770; 31 L.J.Q.B., 212.
(3) 15 C.B.N.S., 221; 33 L.J., C.P., 1.
(4) 1 N.S.W. L.R., 274.
(5) 19 C.B.N.S., 183.
(6) 16 N.S.W. L.R., 84; (1895) A.C., 433.
(7) (1903) 3 S.R. (N.S.W.), 91.
(8) 10 Ex., 771.
(9) 14 Q.B.D., 918.

The plaintiff must give evidence of a distinct breach of duty on the part of the defendant. The mere happening of an accident is not sufficient in such cases as this. The jury will not be allowed to infer negligence where the evidence is consistent with there having been no negligence at all: *Cornman* v. *Eastern Counties Railway Co.* (1); *Crafter* v. *Metropolitan Railway Co.* (2); *Campbell's Ruling Cases*, vol. 19, pp. 203, 204, citing *Wakelin* v. *London and South-Western Railway Co.* (3); *Smith on Law of Negligence*, 2nd ed., p. 185. What might be negligence in the construction of a street or a road much frequented would not necessarily be negligence in the case of a country road. It is not sufficient therefore to prove merely that certain things by way of protection were not done. The plaintiff must give evidence of what ought to have been done in such a place. [He referred to *Coucher* v. *Corporation of Newcastle* (4).] But, even if the place is dangerous, no evidence was given to show that it is not in the same condition as when it was when dedicated, or that there was any negligence in the original construction.

It would be impracticable to fence all cuttings and embankments on roads through the country, and no reasonable man would expect to find them fenced. There was no evidence whatever that it was usual or proper to fence such places. The Government, when they made the cutting, could not reasonably have been expected to foresee that a person would drive there without lights on a dark night. The conduct of the plaintiff himself was negligent and contributed to the accident, and he has not shown that the defendant could by reasonable care have prevented it. Although he was not himself driving the buggy, he could have interfered, and was therefore responsible for anything that the driver did. The doctrine of identification applies. [He referred to *The Bernina*; *Mills* v. *Armstrong* (5); *Waite* v. *North-Eastern Railway Co.* (6); *Thorogood* v. *Bryan* (7); *Mathews* v. *London Street Tramways Co.* (8).]

Piddington, (*J. Young* with him), for the respondent. The appellant is not entitled to rely now on the doctrine stated in

(1) 29 L.J., Ex., 94.
(2) L.R. 1 C.P., 300.
(3) 12 App. Cas., 41.
(4) 8 S.C.R. (N.S.W.), 309.
(5) 13 App. Cas., 1.
(6) E., B. & E., 719.
(7) 8 C.B., 115.
(8) 58 L.J.Q.B., 12.

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Fisher v. *Prowse* (1), because the declaration alleged that the cutting was made *in the highway*, and there was no plea which raised any issue as to whether the cutting was made before or after the dedication. In the case above mentioned there was a plea in confession and avoidance which raised this issue as to the order of time. The respondent could have given satisfactory evidence that the road was used as such before the cutting was made if any such issue had been raised.

As to the liability of the Government for not fencing a cutting, no express authority can be found; but it was a question for the jury whether, under the circumstances of this case, a fence or some protection should not have been placed there.

[GRIFFITH C.J.—May it not be laid down as a general principle that persons using country roads with which they are not acquainted should take care to make themselves familiar with their condition, by inquiry or otherwise?]

If a traveller is entitled to expect the roadway to be in a reasonably safe condition, there can be no duty upon him to ask questions as to its condition. The road should be made reasonably safe for persons travelling by day or by night. The Government is practically placed in the same position as a municipality as regards liability for the acts of its servants: *Farnell* v. *Bowman* (2); *Wakely* v. *Lackey* (3).

[O'CONNOR J.—It was stated in *Turner* v. *Walsh* (4) that the liability of the Government is a common law liability.]

The present case is on the same footing as a case of negligence in the construction of any other public work, such as a school building. It is not a case of mere non-feasance. The making of the road in this way without proper safeguards was a misfeasance: *Newton* v. *Ellis* (5). The conduct of the defendant must be looked at as a whole; an omission to do a thing may be as much a positive wrong as the doing of a wrong thing: *Poulsum* v. *Thirst* (6); *Bull* v. *Mayor &c. of Shoreditch* (7). If there is any evidence that the place was dangerous, the jury must be allowed to say whether reasonable care was taken to safeguard it. The fact

(1) 2 B. & S., 770; 31 L.J., Q.B., 212.
(2) 12 App. Cas., 643.
(3) 1 N.S.W. L.R., 274, at p. 283.
(4) 6 App. Cas., 636.
(5) 5 E. & B., 115.
(6) L.R. 2 C.P., 449.
(7) 18 T.L.R., 171; 19 T.L.R., 64; 20 T.L.R., 254.

that few people will pass along there does not make the question any the less one for the jury. That might affect the degree of finish or durability necessary, but not the duty to make it safe. The Court cannot take judicial notice of a possibility that few persons will use the road; the jury are the only persons in a position to decide such questions as that. It is the original act of constructing the cutting in this way of which the plaintiff complains, and the frequency or infrequency of user at that time cannot affect the liability. The Government dedicated the road to all such as were likely to use it, and their duty to them was to make it reasonably safe for them, whether they should be few or many, and keep it safe: *Heaven* v. *Pender* (1); *Corby* v. *Hill* (2); *Harvey* v. *Truro Rural Council* (3); *McAleer* v. *Municipality of Hurstville* (4); *In re Williams* v. *Groucott* (5). A jury might well have thought that the failure to erect fences was negligent. [He referred to *Hertfordshire County Council* v. *New River Co.* (6); *Scott* v. *Mayor &c. of Collingwood* (7); *Hill* v. *Tottenham Urban District Council* (8).]

[GRIFFITH C.J.—If the evidence was equally consistent with negligence and with the absence of negligence, the plaintiff was rightly nonsuited. Is there any more evidence than this, that this was a cutting of such a nature as under some circumstances ought to be fenced?]

Yes. There was evidence that persons using ordinary care got into a very dangerous place and injury resulted. The facts proved were more consistent with negligence than with the absence of negligence. The plaintiff was where he had a right to be, and was not merely in the position of a licensee. He was therefore one of the persons to whom the Government owed a duty to protect dangerous places: *Le Liévre* v. *Gould* (9); *Bolch* v. *Smith* (10). The fact that no accident had happened for so many years did not establish that reasonable precautions had been taken by the Government in making the cutting. That was a question for the jury to consider; *Longmore* v. *Great Western*

(1) 11 Q.B.D., 503, at p. 509.
(2) 4 C.B. N.S., 556.
(3) (1903) 2 Ch., 638.
(4) 12 N.S.W.L.R., 165.
(5) 4 B. & S., 149.
(6) (1904) 2 Ch., 513, at p. 518.
(7) 7 V.L.R. (L.), 280.
(8) 79 L.T., 495.
(9) (1893) 1 Q.B., 491.
(10) 7 H. & N., 736.

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Railway Co. (1). The caution required on the part of the constructing authority is in proportion to the magnitude and apparent imminence of the risk: *Pollock on Torts*, 6th ed., pp. 418, 460; *Daniel* v. *Metropolitan Railway Co.* (2). The traveller is not obliged to look for dangers. [He referred to *Thompson* v. *North-Eastern Railway Co.* (3); *Turner* v. *Borough of Goulburn* (4); *Indermaur* v. *Dames* (5).]

This was a continuing nuisance, and the defendant must justify the keeping and maintaining in an improper condition: *Tarry* v. *Ashton* (6); *McIntosh* v. *Municipality of Ryde* (7).

There was no evidence of contributory negligence. The driving without lights was not negligent, and the evidence showed that, as soon as danger was feared, the driver and plaintiff took precautions to discover their whereabouts; it was while they were doing so that the accident happened. The plaintiff was not responsible for the driver's mistakes, unless he was negligent in choosing him or in interfering with him. [He referred to *The Bernina*: *Mills* v. *Armstrong* (8).]

If a new trial is ordered the costs of the first trial should be costs in the cause.

Thomson, in reply. There was no duty to repair. A person dedicating a road with defects is not responsible for accidents caused by the defects, unless they were concealed, and he failed to inform the persons using the road of their existence: *Robbins* v. *Jones* (9).

[GRIFFITH C.J.—It must be taken that on the pleadings it is admitted that the place was a highway, and that the cutting was made in the highway.]

Nothing has been proved but the fact of the accident, and that is equally consistent with the absence of negligence as with negligence. There was therefore nothing to go to the jury: *Cotton* v. *Wood* (10); *Simkin* v. *London and North-Western Railway Co.* (11); *Gautret* v. *Egerton* (12); *Pollock on Torts*, p. 440.

(1) 19 C.B.N.S., 183.
(2) L.R., 5 H.L., 45.
(3) 2 B. & S., 106.
(4) (1903) 3 S.R. (N.S.W.), 91.
(5) L.R., 1 C.P., 274.
(6) 1 Q.B.D., 314.
(7) 8 N.S.W.W.N., 353.
(8) 13 App. Cas., 1.
(9) 15 C.B.N.S., 221.
(10) 8 C.B.N.S., 568.
(11) 21 Q.B.D., 453.
(12) L.R., 2 C.P., 371.

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September 15.

GRIFFITH C.J. This was an action brought by the plaintiff, respondent, against the appellant, as nominal defendant appointed for that purpose on behalf of the Government of the State of New South Wales, for negligence in executing certain works upon a highway, and for negligence in not maintaining the highway in a condition of safety for persons lawfully using it. The negligence is alleged to have consisted in making a cutting some 172 feet in length, and 24 feet in width, through the bank of the Namoi river, on a country road leading from Gunnedah to Manila. The road or highway, which had a fence on either side, was 66 feet wide, and, up to the time of the making of the cutting, ran up to within a short distance of the river and then turned to the left, to a crossing over the river. The cutting led straight on from the place where the road had originally turned off to a new crossing place, some distance to the right of the former ford. The old road was cut off at the turn, and a fence erected at each side of the cutting, making a new road through Crown lands down to the river. No fence was put up to shut off the part of the road that was not cut. The respondent, who was being driven along the road by a friend in a buggy on a dark night, got out of the buggy at his friend's request to see whether they had reached the mouth of the cutting. Inadvertently they had passed the entrance, and had driven along the top of the bank between the cutting and the fence. The respondent, while endeavouring to find out where the cutting was, fell down the steep bank at the side of it, and was injured.

It appears that the cutting was made about twenty or twenty-five years ago, and there was no evidence of any other accident having occurred from that time to the present. These facts having been proved, *Pring* J., who presided at the trial, nonsuited the plaintiff. The Full Court set aside the nonsuit and ordered a new trial. The learned Chief Justice, in delivering judgment, said (1):—"We have not to say whether this cutting was a dangerous place or not, that is for the jury to decide, and we are not called upon to lay down anything more than the general principle that where there is a dangerous place on a public road constructed by the Government, it is the duty of the

(1) (1905) 5 S.R. (N.S.W.),128, at p. 130.

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Government to take steps to protect the public from injury. Here the evidence showed that no steps had been taken to protect this alleged dangerous place, and it should have been left to the jury to say whether it was a dangerous place within the general principle I have just referred to, that is, a dangerous place which should have been protected by a fence, or some such safeguard." The learned Chief Justice appeared to think it a mere question for the jury whether the cutting ought to have been fenced, and that it was open to them upon these facts to find a verdict for the plaintiff without further evidence.

Now, it is important to consider what is the real nature of the action. It is not brought for an interference with an existing highway without lawful excuse, but for negligence in constructing a cutting while forming a practicable road upon the highway—that is, for negligently performing an act which was otherwise perfectly lawful. Now, negligence for which an action will lie has been well defined by *Brett* M.R. in the case of *Heaven* v. *Pender* (1). He says :—" Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property." Now, ordinary care or skill is very much the same as reasonable care or skill under the circumstances. Reference was made during argument to a great number of cases dealing with the law relating to highways in England and the doctrines that were to be applied to them. There is certainly an identity in name between highways in England and highways in this country, but the similarity is to a great extent in name only, and when we come to the question of highways on their first dedication the similarity becomes even more shadowy. In England when a new highway is dedicated by a private owner to the public there is a change of effectual ownership. The soil ceases to belong effectually to the individual and becomes the property of the public. And it has been held that, when a private person dedicates a road to the public, the public must take it as it stands, with all its defects, but they need not take it unless they like. That was decided in *Fisher* v.

(1) 11 Q.B.D., 503, at p. 507.

Prowse (1) and seems to be settled law. Here in general a dedication is made by some action of the Government. There is now in force a provision that it must be made by proclamation, but it was formerly the practice to prove dedication of a highway by evidence of facts, such as the publication of an official map showing the road marked upon it, or the issue of a grant from the Crown describing land as being bounded by the road. In these cases there was no change of effectual ownership. In my opinion the doctrine of *Fisher* v. *Prowse* (1) is not applicable in its entirety. We must turn then to other considerations.

Now, in all new countries one of the first functions of government is to create means of communication. It is not a duty imposed by positive law, but a duty of imperfect obligation which is always undertaken. It would be a very singular thing if the responsibility of the government for the maintenance of its roads, and in respect of accidents occurring upon them, were to depend upon whether the land had been formally dedicated as a highway or not before the road was formed. The evidence of dedication might be that fifty years ago a deed of grant was issued describing the land as bounded by a road, and the road might have remained in a state of nature ever since. It would, I say, be a singular thing if the liability of the Government in respect of the construction of that road depended on whether the jury thought that a formal dedication before the making of the road had been proved or not. I apprehend that the true doctrine is this:

If the Government voluntarily undertakes the care and management of a road, it is bound to use reasonable care, just as any person who renders voluntary services is bound to use such care as is reasonable under the circumstances. The rule that governs the application of this general principle to such cases as the present may be thus stated. The Government of a new country, forming for the first time a practicable road upon land which has been technically dedicated as a highway, but is impassable for wheeled traffic, is not bound by the rules which govern persons (other than the highway authority) who interfere with the surface of an ancient highway, as that term is understood in England. If the Government improve the so-called highway, and render it more

(1) 2 B. & S., 770; 31 L.J., Q.B., 212.

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useful to the public than it previously was, they are not guilty of a misfeasance merely on the ground that they have interfered with a highway. The analogy is rather to the case of a private owner who invites the public to pass through his land by a track which he has there constructed, and which is reasonably safe for persons using ordinary care. If such an owner, after granting the permission, puts, or allows to be put upon the track which he so offers, a new obstacle or danger by which persons using reasonable care would be liable to be injured, he is liable for the consequences: *Corby* v. *Hill* (1). But in the absence of such acts of commission, he is not liable merely by reason of the imperfections of the road which he offers. So the Government of a newly-settled country, which undertakes the first formation of a road, whether the soil has or has not been formally dedicated as a highway, is bound to use such care to avoid danger to persons using it as is reasonable under all the circumstances. These circumstances include the nature of the locality, the extent of the settlement, the probabilities as to the persons by whom the road is likely to be used, and the moneys available to the Government for the purpose; it being always assumed that the persons using the road will themselves take ordinary care. If the Government use such care they are not guilty of misfeasance. And if, by reason of altered circumstances, the conditions of the locality become such that, if the road were to be made anew, further precautions might reasonably be taken, the original act does not therefore become unlawful. In such a case the only ground of complaint is non-feasance, and for that an action will not lie, as was laid down by the Privy Council in the case of *Municipal Council of Sydney* v. *Bourke* (2). In delivering the judgments of their Lordships Lord *Halsbury* L.C., speaking of the position of municipalities with respect to maintenance of roads, said (3): "No duty or liability in respect of their repair rested on any one prior to the Acts which committed their management and repair to the corporation of Sydney. It is quite true, therefore, to say that the duty, if there be one, is original and not transferred. But if there be a duty or liability at all, it follows that it can only be because it has been

(1) 4 C.B. N.S., 556; 27 L.J. C.P., 318.

(2) (1895) A.C., 433.

(3) (1895) A.C., 433, at p. 444.

imposed by an Act of the legislature." I quote that passage with reference to the suggested duty to make a place safe which was, when originally made, safe having reasonable regard to then existing circumstances, but which, by reason of altered circumstances, has since become unsafe. In my opinion there is no duty cast upon the Government except that in doing the work they must take reasonable precautions not to cause injury to people who are invited to make use of the work when completed.

To apply these considerations to the present case. Here is a road which has been used for some twenty years. Up to twenty years ago it had turned off at the spot where the accident happened towards the left in order to avoid a steep bank. Then the Government constructed this cutting, which has been used ever since with perfect safety, or at any rate without accident, up to the time of the accident in question. The complaint of the plaintiff is—for this is what it amounts to—that when the Government made the cutting twenty years ago they should have fenced it, and did not do so. Now, is that omission *primâ facie* evidence of want of reasonable care on the part of the Government? To answer that we must consider the question what is reasonable care in the case of a road like this which has never been formed. It is simply a strip of land between fences in a country locality. The road apparently was not likely to be much used, and in fact up to the present time it has never been formed or metalled. Is the Government, when it undertakes the construction of a road in a place like this, bound to fence every cutting which it makes? The case was treated in argument as if it were analogous to that of a person digging a hole on a highway and leaving it unfenced. Here what the Government did was to make the place a practicable highway, the hole was the highway. I confess that I do not know of any principle of law on which I can found the proposition that it was the duty of the Government to fence that cutting, not now, but when it was made twenty years ago, or that it was open to the jury to find such a duty on the evidence adduced by the plaintiff. Every one who knows anything about the circumstances and conditions of life in Australia, must know that in hundreds and thousands of cases the Government are obliged, when first making a road, to leave it in a condition

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that for a crowded street would be dangerous. When they make a road, they must take into consideration all the circumstances, of which I have mentioned some, and consider whether, in the state in which they leave it, it is reasonably safe for persons who exercise reasonable care in using it. It was contended that the test is this, whether a total stranger using the locality on a dark night, without having made any inquiries as to the state of the road, might walk there with as perfect safety as if he were on a floored passage in a building. There can be no such absolute duty upon the Government as that. The care that is required on the part of the authorities controlling a street is very different from that required of the constructing authority in the case of a bush road. Take the case of a road on the side of a hill. All that can be done at the time is to make a portion of it sufficiently level for vehicles to pass along it. There is always a certain risk to a stranger who chooses to drive upon such a place at night without lights. He runs a risk of having his vehicle overturned if he goes too far on either side. Surely it is a reasonable precaution for a person using such a road as that in question here, to make inquiries of the persons living near, and to take reasonable precautions for his own safety in using the road. That is one of the elements that must be taken into consideration in determining the precautions which the Government might reasonably be expected to take when they made the cutting. I cannot think that in the case of such a road in such a part of the country the Government was bound to take into consideration the possibility that a person would negligently drive along without lights and without making inquiries, as the plaintiff did in this case. There seems to me, therefore, to have been no evidence to go to the jury of a want of reasonable care on the part of the Government, at the time when it constructed the cutting. In my opinion *Pring* J. was right in nonsuiting the plaintiff, and the appeal should be allowed.

BARTON J. Having had the opportunity, in consultation, of considering the matter with the Chief Justice, and discussing the principles which he has already laid down in his judgment, I do not wish to add anything to what he has said, but to express my

entire concurrence in the conclusion at which he has arrived, and the reasons he has given for so doing.

O'CONNOR J. I am of the opinion that the learned Judge who presided at the trial was right in nonsuiting the plaintiff.

The plaintiff rests his case upon two grounds, nuisance and negligence. In my view they come to the same thing. The mere construction of a work by the Government upon a public road is not in itself a nuisance, if it is for the more convenient exercise by the public of their right of passage over the road, and if the work is carried out without negligence. If there is any negligence the work is a nuisance, if there is no negligence, there is no nuisance. From whichever point of view we regard the matter the question for determination is the same, namely, is there any evidence that the Government has been guilty of negligence. I propose, therefore, to deal with that question only.

The plaintiff, before he can succeed, must give affirmative evidence of negligence. There must be evidence of a breach of duty, that is, of some duty of the Government in regard to a road of this kind. Now, what is the duty, and what evidence is there of a breach of it? The Government in this country have placed upon them no statutory obligations in regard to making roads. Their power in that respect is simply the power which they have as the executive of the community, to carry out any works for the more convenient use of the territory. They may if they think fit proclaim roads, dedicate them to the public, and leave them in a state of nature. If they choose, however, to construct any work on, or to make any alterations in a road, they are in the same position as they would be in carrying out any other work of Government. If, by reason of their negligence in carrying out the work, any person lawfully using the road suffers injury they are liable to an action for damages. Their responsibility, therefore, for the construction of this cutting is on the same footing as their responsibility in carrying out any public work. In order to ascertain what the duty of the Government was in this case, we must have recourse to general principles. I entirely agree with the principles laid down by my learned brother the Chief Justice. The Government, if they undertake such a work

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as making a road, or interfering in any way with the natural surface of the road, must see that in so doing they do not make the road dangerous to persons using it in a reasonable way. The duties, however, of the Government and of the person using the road are correlative. The Government are entitled to expect that persons using the road will take reasonable care in so doing. And, on the other hand, the passengers using the road are entitled to expect that the road will be in a reasonably safe condition to those using reasonable care when going upon it. But the degree of care to be used by the Government and by the passengers must in each instance depend entirely on the circumstances of the particular case. For instance, in a crowded locality, where much traffic at night is to be looked for, a person driving will naturally expect more precautions in the way of lighting to be taken by those in charge of the place than in a locality of the kind in question here. What, therefore, under the circumstances of this case must be taken to be the duty of the Government? The Chief Justice has stated the circumstances, and I shall only shortly refer to them. The road as proclaimed was 66 feet wide, and the Government, in order to make access to the river more convenient, made the cutting, not extending across the whole width, but occupying only 24 feet in width of the road. That was the portion of the road on which the Government invited the public to drive. The first duty that might reasonably be expected to be observed by persons using the road is to keep on that portion of the road. I can understand that, if there were evidence that in other places of this kind it was customary or proper to have a fence, the driver might not be considered bound to look after himself. But there was no evidence of that kind. And I think we must use our knowledge of the ordinary facts of life and conditions of travelling in Australia, and if we do, we are bound to come to the conclusion that this place is in no way different from thousands of places in different parts of Australia which are driven on without accident day after day, and year after year. The question is whether, in a place of that kind, the Government in the construction of this road had any reasonable ground for expecting that the persons using the road would take so little care of themselves as not to see that they were not keeping upon that

part of the road which the Government had cut down for traffic. Now, what is the duty of a traveller under these circumstances? First of all it is to keep to the portion of the road which has been made easy and convenient for traffic. Of course if there were any danger or obstruction placed there by the Government, the Government would be responsible if there were not sufficient protection. But it seems to me that if that is not so and the road is perfectly safe, then the driver must take reasonable precautions to keep on that part of the road which has been made fit for use by vehicles. Now under the circumstances, on a dark night, if the driver was not able to see this cutting and distinguish it from the rest of the road, he ought to have used a light or proceeded with such caution as not to get himself into such a position as he did. That being the duty of the driver, I cannot see any obligation on the part of the Government which could be founded upon the anticipation that persons using the road at night were likely to get off the road where the cutting begins. If the case had gone to the jury, and they had found that the Government were liable to fence the edge of the cutting, and that the injury to the plaintiff had been caused by reason of their negligence in not doing so, I should say that there was no evidence on which a jury could reasonably come to that conclusion. Under the circumstances, therefore, I think there was no evidence to go to the jury in support of the alleged duty that is sought to be thrown upon the Government, that the nonsuit was right, and that the appeal should be allowed.

Appeal allowed. Order appealed from discharged. Rule nisi for a new trial discharged with costs, and nonsuit restored.

Solicitor, for appellant, *The Crown Solicitor of New South Wales.*

Solicitor, for respondent, *J. M. Proctor.*

C. A. W.