[HIGH COURT OF AUSTRALIA.]

FRASER . . . . . APPELLANT;
PLAINTIFF,

AND

THE VICTORIAN RAILWAYS COMMISSIONERS . . . . . } RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *March* 2, 3, 8.

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

Negligence—Level crossing on railway—Evidence—Burden of proof—Nonsuit.

In an action for negligence where the evidence called for the plaintiff is equally consistent with the wrong complained of having been caused by the negligence of the plaintiff and with its having been caused by the negligence of the defendant, the case should not be left to a jury.

Where a railway crosses a road at a level crossing without gates and an approaching train is visible from all material positions to persons about to pass over the crossing, although it is the duty of the owners of the railway to take reasonable precautions to prevent such persons from being injured by trains, it is equally the duty of such persons to look for approaching trains, and they are not excused from looking by the omission of precautions on the part of the owners of the railway.

A regulation issued by the owners of a railway, directing their engine-drivers to sound a whistle when approaching a level crossing without gates, is evidence that the sounding of a whistle is a reasonable precaution to be taken in such circumstances, and the omission to sound a whistle is evidence of negligence.

In an action in a Victorian County Court by the representative of a man who had been killed by a train at a railway crossing against the Victorian Railways Commissioners, alleging that the death of the deceased had been caused by the defendants' negligence, at the close of the plaintiff's case the plaintiff was nonsuited.

Held (*Isaacs* J. dissenting) that, the evidence being equally consistent with the death of the deceased having been caused by the omission of the engine-driver to sound a whistle, and with its having been caused by the negligence of the deceased in that he either did not look or, if he did look, voluntarily undertook the risk of crossing, the plaintiff was properly nonsuited.

Wakelin v. *London and South Western Railway Co.*, 12 App. Cas., 41, applied.

Dublin, Wicklow and Wexford Railway Co. v. *Slattery*, 3 App. Cas., 1155; *Smith* v. *South Eastern Railway Co.*, (1896) 1 Q.B., 178, and *Toronto Railway Co.* v. *King*, (1908) A.C., 260, distinguished.

Decision of the Supreme Court of Victoria affirmed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the County Court at Melbourne by Bridget Fraser, administratrix of James Alexander Fraser, deceased, against the Victorian Railways Commissioners, alleging that by reason of the negligence of the defendants the deceased was killed, and claiming £1,000 damages. The particulars of demand alleged that the deceased was killed by a train running into the waggon which he was driving across a level crossing on the defendants' railway, and among the acts of negligence alleged were the omission to keep the crossing lighted, and the omission of the engine-driver to sound the whistle when approaching the crossing. The action was tried before His Honor Judge Box and a jury of four.

The material evidence sufficiently appears in the judgments hereunder.

At the close of the plaintiff's case the Judge on the application of counsel for the defendants nonsuited the plaintiff, who thereupon appealed to the Supreme Court under sec. 134 of the *County Court Act* 1890.

The Supreme Court (*Madden* C.J. and *à Beckett* and *Hood* JJ.) having dismissed the appeal, on the ground that the case was governed by *Wakelin* v. *London and South-Eastern Railway Co.* (1), the plaintiff now appealed to the High Court.

Macfarlan (with him *Braham*), for the appellant. The defendants were negligent in not having the crossing lighted.

(1) 12 App. Cas., 41.

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There is also evidence from which a jury might infer that the omission to whistle in approaching the crossing was negligence. The fact that there is a regulation in the department requiring engine-drivers to whistle when approaching a crossing such as this was is evidence that that is a reasonable precaution to take, and the omission to take that precaution is evidence of negligence. This case is distinguishable from *Wakelin* v. *London and South Western Railway Co.* (1). In that case there was no evidence as to how the man who was killed got on the line. All that was known was that the man was killed by a train which did not whistle when approaching the crossing. Here the movements of the deceased are traced until shortly before he reached the crossing, and he was then driving at a walking pace towards the crossing. There is abundant evidence from which a jury could reasonably infer that his death was caused by the omission to whistle throwing him off his guard. Apart from the evidence of a person who actually saw the accident happen, no evidence could be stronger.

[GRIFFITH C.J.—If the deceased had looked he must have seen the train coming, and so was not misled. If he did not look, that was negligence on his part: *Commissioner of Railways* v. *Leahy* (2).]

There is no evidence that from some point at which it might have been reasonable for the deceased to look his view was not obstructed, and, even if he did look, he might have thought the train further away than it really was, and might have been deceived as to the distance by the omission to whistle. If he did not look, then it could be inferred that he was thrown off his guard—that he was practically told "You need not look"—by the omission to whistle. The facts of this case bring it within *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery* (3), rather than within *Wakelin* v. *London and South Western Railway Co.* (1). See also *Smith* v. *South Eastern Railway Co.* (4).

[ISAACS J.—*Toronto Railway Co.* v. *King* (5) supports your contention.

(1) 12 App. Cas., 41.
(2) 2 C.L.R., 54.
(3) 3 App. Cas., 1155.
(4) (1896) 1 K.B., 178.
(5) (1908) A.C., 260.

BARTON J. referred to *Cotton* v. *Wood* (1).]

The facts are more consistent with the cause of the accident being the negligence of the defendants than with its cause being some negligent act on the part of the deceased. There is no question of contributory negligence here, for there is no evidence of it, and the burden of proof of it is upon the defendants.

Starke (with him *Maxwell*), for the respondents. There is no evidence of any negligence on the part of the defendants and, even if there were, there is no evidence fit to be submitted to the jury that that negligence was the cause of the accident. The absence of lights at the crossing is not evidence of negligence.

[GRIFFITH C.J.—We do not wish to hear you upon that point.]

Apart from the regulation, there is no evidence that at that particular crossing whistling was either a necessary or a prudent precaution. The departmental regulation is not an admission that whistling is a reasonable precaution to be taken at every level crossing in Victoria. It must depend on the character of the locality. Even if there is evidence from which a jury might infer that whistling was a reasonable precaution, and that the omission to whistle was negligence, the evidence in this case is quite as consistent with the accident having been caused by the negligence of the deceased as by that of the defendants. It is the plaintiff's duty to show that the circumstances are more consistent with the one than with the other. The duty to be careful does not rest on the defendants alone, but there was a correlative duty in the deceased to be careful also. There was no trap laid for the deceased in this case. It would be a "rash presumption" in the words of *Bowen* L.J. in *Wakelin* v. *London and South Western Railway Co.* (2) to infer from the facts in this case that the accident was caused by the negligence of the defendants. Some connection must be established between the accident and the negligence of the defendants, and whether there is any evidence supporting such a connection is a matter of law. To say that a certain act is a reasonable precaution to be taken to avoid an accident does not mean that, if the act is not done, those for whose protection it ought to be done may themselves be

(1) 8 C.B. N.S., 568.

(2) (1896) 1 Q.B., 195 (*n*).

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negligent. The case of *Smith* v. *South Eastern Railway Co.* (1) was dealt with as if a trap had been laid for the man who was killed. The omission of a person crossing a level crossing to look for a train is negligence on his part: *Commissioner of Railways* v. *Leahy* (2). *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery* (3) is a dubious decision on the question of the burden of proof. See *Beven on Negligence*, 3rd ed., vol. I., pp. 138, 143. In *Toronto Railway Co.* v. *King* (4) it was proved that the defendants had been guilty of negligence, and the only question was whether the deceased had been guilty of contributory negligence.

Macfarlan in reply. Whether the omission of a usual signal is such as to throw the deceased off his guard is a question for the jury. See *Wright* v. *Midland Railway Co.* (5).]

[ISAACS J. referred to *Coyle* v. *Great Northern Railway Co. of Ireland* (6).]

Cur. adv. vult.

March 8.

GRIFFITH C.J. It was for a long time a standing reproach to English law as administered in Courts of justice that it consisted in great part of a "wilderness of single instances" through which no clue of guiding principle was found. Occasionally some eminent lawyer pointed out that decided cases were only of value in so far as they declared or enunciated some principle of law. In comparatively late years an effort has been made by distinguished Judges to remove this reproach, and this Court from its establishment resolutely set its face in the same direction, and I had hoped that their efforts had met with some success. Latterly, however, I have observed an increasing—or renewed—tendency in the profession to resort to the old method of research amongst the wilderness of instances, in which there is only too much danger that both counsel and the Court, if led by them, may lose their way.

Of that the present case, I think, affords a very good illustration. It is an action for negligence. In an action for negligence

(1) (1896) 1 Q.B., 178.
(2) 2 C.L.R., 54.
(3) 3 App. Cas., 1155.
(4) (1908) A.C., 260.
(5) 1 T.L.R., 406.
(6) 20 L.R. Ir., 409.

the plaintiff must establish two things, first, the negligence of the defendant, and, secondly, that it was the cause of the injury to the plaintiff. Reported instances of actions for negligence are innumerable. One of them at least lays down principles. I mean the decision of the House of Lords of comparatively recent date in *Wakelin* v. *London and South Western Railway Co.* (1). In that case Lord *Halsbury* L.C., after pointing out that the fact to be proved was that the injury complained of had been caused by some negligence of the defendants, went on to say (2):—"If that fact is not proved the plaintiff fails, and if in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails, for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition; '*ei qui affirmat non ei qui negat incumbit probatio.*' . . . . . If the simple proposition with which I started is accurate, it is manifest that the plaintiff, who gives evidence of a state of facts which is equally consistent with the wrong of which she complains having been caused by—in this sense that it could not have occurred without—her husband's own negligence as by the negligence of the defendants, does not prove that it was caused by the defendants' negligence. She may indeed establish that the event has occurred through the joint negligence of both, but if that is the state of the evidence the plaintiff fails, because '*in pari delicto potior est conditio defendentis.*' It is true that the onus of proof may shift from time to time as matter of evidence, but still the question must ultimately arise whether the person who is bound to prove the affirmative of the issue, *i.e.*, in this case the negligent act done, has discharged herself of that burden. I am of opinion that the plaintiff does not do this unless she proves that the defendants have caused the injury in the sense which I have explained." Lord *Watson* said (3):—"It" (the evidence) "affords ample materials for conjecturing that the death may possibly have been occasioned by that negligence, but it furnishes no data from which an inference can be reasonably drawn that as a matter of fact it was so occasioned."

(1) 12 App. Cas., 41.
(2) 12 App. Cas., 41, at p. 45.
(3) 12 App. Cas., 41, at p. 49.

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Now the facts of the case are these, so far as they are known. The deceased man was driving a heavy waggon with two horses across the defendants' railway at a level crossing without gates. A plan was put in evidence at the trial which shows the locality in detail. The place is a country district and the country is open. The train was proceeding in a direction about 30 degrees east of north at a speed of from 30 to 35 miles an hour. For about half a mile—that is about a minute before reaching the crossing—the train was on a downward grade, so that steam would be shut off. The track for that distance was practically straight and ran on the surface or on a low embankment, and was in full sight from the westward for all that distance. The road along which the deceased was driving crossed the line in a direction almost due east and west. The time was about 7 p.m. on Sunday 11th August. The night was dark, but the train, which was a mixed goods and passenger train running to a time table, was lighted with head lights and carriage lights which were visible from the road along which the deceased was travelling. The approach to the crossing rises about 20 feet in the last 500 feet, the last 100 feet being at a grade of 1 in 17. There was a strong north-west wind blowing, which at that time of the year would be very cold. The deceased was familiar with the road. The collision took place at the crossing. The waggon was found on one side of the line and the horses on the other. That is all that is known about the accident.

The only negligence relied upon before this Court was the omission to whistle. Evidence was given from which a jury might have found that that omission took place, and I will assume that such omission was negligence on the part of the defendants. Are then these facts, in the language of Lord *Halsbury* L.C., equally consistent with the wrong of which the plaintiff complains having been caused by the negligence of the deceased, and with its having been caused by the defendants' negligent omission to whistle? Now I take it that a duty is imposed upon persons crossing railways at level crossings. There is a mutual duty. It is the duty of the owner of the railway to give reasonable warning to horse and foot passengers and persons with vehicles, but it is equally the duty of horse and foot

passengers and persons with vehicles to look and see whether a train is approaching. Usually the warning is given, "Look both ways before crossing," as it was in this case. But in my opinion it is the imperative duty, as this Court laid it down in *Commissioner of Railways* v. *Leahy* (1), of a person crossing a railway line to look and see whether a train is approaching which is likely to run over him, and the omission to do so is negligence on his part. If the local conditions are such, as in this case they were, that a person looking must have seen the train coming, there are only two alternatives, either he looks or he does not. If he looks and sees the train, the omission to whistle does not mislead him. In this case, moreover, attempting to cross under the circumstances, knowing of the approach of the train, would be rash in the extreme and would be negligence. If he does not look, negligence is established at once.

Under these circumstances I think the best that can be said for the appellant is that it is equally consistent with the facts that the accident was caused by the negligence of the deceased and that it was caused by the negligence of the defendants. But the case against her is really stronger, because contributory negligence is established on the plaintiffs' own evidence, since if the deceased had looked he must have seen the train. Beyond that the case is mere conjecture.

There is, it is true, another possibility. The horses may have jibbed on the crossing and may have been then run down. The probability is that in the face of the strong wind the deceased kept his head down and did not look to his right and therefore did not see the train.

The case of *Smith* v. *South Eastern Railway Co.* (2), was referred to and relied upon by the plaintiff. That was a case in which the circumstances were very special. It was a case of a foot passenger crossing a railway at a station where a train could have been seen approaching for a long distance. But it was the practice of the defendant company to notify the immediate approach of a train, after it came in sight, by a flag or a light held up on the platform. The Court thought that the deceased, who was aware of this practice, might have been

(1) 2 C.L.R., 54.

(2) (1896) 1 Q.B., 178.

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entitled to rely upon it. The only principle to be deduced from that case is that the course of conduct of the railway authorities may be such as to entitle persons crossing to rely on a further warning after a train has come into sight. That case is very analogous to what we see every day in the streets of Melbourne where tramways intersect. A man stands with a green flag at the crossing and, although *primâ facie* it is the duty of a person crossing to look for an approaching tramcar, yet if he sees the man wave his flag to indicate safety he is excused from looking to see whether a tramcar is coming which might run him down. But to generalize from this that an omission to whistle excuses the traveller from looking denies the independent obligation to look. In a case in which, after becoming aware either by sight or by sound of the coming train, the traveller is entitled to expect a further warning, that case may have some application, but it has none to the present case. The cases of *Wright* v. *Midland Railway Co.* (1), and *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery* (2) are practically to the same effect.

The case of *Toronto Railway Co.* v. *King* (3), was a decision upon the particular facts of the case, which were all ascertained, and there was no room for conjecture. The negligence of the defendants was proved and contributory negligence was negatived. In my opinion the decision of the Supreme Court was right, and this appeal should be dismissed.

BARTON J. The deceased, whose widow the plaintiff is, was employed by a carrier named Watson to drive from Collingwood to Greensborough, leaving empty milk cans on his way out and picking up full cans when coming back. He had been at that work for about four months, travelling, so far as we can discover, about the time at which the train towards Greensborough, which was a regular train, passed a certain level crossing over a road called Grimshaw Street. On the evening in question he had a number of empty cans in his waggon, which was a heavy one weighing over a ton. He had motor car lamps on his waggon. At the spot where the crossing is approached on

(1) 1 T.L.R., 403.

(2) 3 App. Cas., 1155.

(3) (1908) A.C., 260.

Grimshaw Street there is an upward grade in the direction in which the deceased was travelling, that is, from west to east. His lights appear to have been shining strongly according to the evidence of observers who saw him shortly before the accident. He had good sight and hearing. Although one of his horses is said to have been very nervous with steam, there is nothing to show that they were not easy to drive. It was a wild and stormy night. The wind was in the north north west and, as the line runs approximately north and south—a little east of north—the wind would be blowing somewhat across the line, but it was against the direction in which the train was coming. The train was a mixed one, and there was evidence that a mixed train makes more noise than a passenger train. At the same time it is said that the train runs very silently there. The crossing at which the accident happened is on a down grade. Part of the down grade which the train would have to traverse before reaching the crossing is fairly steep; nearer the crossing it is not so steep, and close to the crossing it is steep again. It was necessary therefore for the engine to shut off steam on this down grade. There is no evidence that there was any obstruction to the view of the deceased as he approached the line. Nobody saw the accident happen, but a crash was heard which evidently was the crash caused by the train and the waggon meeting. A witness swears that he heard the train rolling down the incline 60 or 70 yards from the crossing, and rattling, and that three or four seconds afterwards he heard a crash. A farmer from Bundoora, was with two friends about 150 yards from the crossing, and knew the train was about due—as indeed the deceased knew, or ought to have known. He speaks of the darkness of the night and says that the train would not be heard rolling down the incline on that night, though the immediately preceding witness had heard the train rattling. There is a railway regulation which was put in evidence and was as follows:—"No. 247. —Enginemen must in all cases when approaching cattle pits keep a specially sharp lookout and give a long and loud whistle of not less than 5 seconds duration at such distance from the crossing as will give ample warning of the approaching train. They must give this matter special attention both by day and by night and

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they will be held fully responsible for careful and intelligent obedience to this order."

Now witnesses who were in the train as it approached the crossing say that they heard no long whistle, such as should have been given at some distance from the crossing. The case has been properly argued upon the assumption that there was no such whistle, and taking that to be the fact, I think that the omission to whistle was negligence. But whether it was negligence causing the accident is another thing.

One witness who was to the east of the crossing says that he was listening for the train, and that he heard the hissing of the steam, which the deceased, as he had good hearing, also ought to have heard. This witness pulled up his pony about 60 yards from the crossing, either because he apprehended the immediate arrival of the train or in order that his companion might get down to ease the pony up the grade. If, however, he pulled up because he expected the train, that was a very natural and proper thing to do, and it would have been a very natural and proper thing for the deceased to have done. His companion says that it was the noise of the train which attracted his attention, and that it must have been the steam escaping 200 or 300 yards from the crossing. Then a woman who lives about 400 yards from the crossing says she went down the road towards the crossing, that she saw the train approaching the crossing, and that she could hear it when she left her house. So that the train was both to be heard and to be seen, for this woman was about 400 yards away when she saw the train, and nearly as distant when she heard it. The deceased could have seen the train for about 700 yards. For a distance of about 35 chains it appears that anyone who looked along the line could see the train coming. Another witness saw the waggon going up the hill and noticed the train coming along. She saw that the lights of the waggon were burning. Another witness saw the train coming down the slope, although when the crash occurred she was still about 400 yards away.

That is a summary of the evidence in the plaintiff's case, and the question which arises upon it is whether this accident or injury is to be attributed to the negligence of the defendants.

That involves the questions, first, whether there is actual evidence that they were guilty of negligence which substantially contributed to the accident, in the sense of there being no interfering circumstance, and, next, whether, notwithstanding the interfering circumstance of any contributory negligence apparent on the plaintiff's case, it can still be said that there was evidence to go to a jury that it was the negligence of the defendants that really caused the accident.

This is a different case from *Commissioner of Railways* v. *Leahy* (1), because in that case, as I pointed out in my judgment, for the purposes of the argument, negligence causing the injury complained of was admitted, and that is the very point disputed here. There, too, the train was a special one and not a regular one, such as that in the present case.

Now it is plain that if the plaintiff had looked he would have had a clear view for nearly half a mile up the line. The train had its head lights and the carriages were lighted. He had good lamps and, if he did not look as early as he might have done, he still could have seen a good distance ahead of him when the train began to approach. Another thing is clear, viz., that with that heavy waggon it was an easy thing to pull up, especially on an up grade. So that if the deceased wished to know the whereabouts of the train, which came at the same time every night, he would have the opportunity of checking his vehicle before he got on the line.

I am of opinion, first, that independently of any question of contributory negligence, there is no such evidence as could properly be left to a jury that it was the absence of a whistle, which is now the only negligence charged, which caused this injury. Truly, on the plaintiff's case, the whistle was absent, but I do not find any particle of evidence connecting that fact with the injury to the deceased.

In the case of *Wakelin* v. *London and South Western Railway Co.* (2), there are one or two passages which I may advantageously read. They were cited by *Williams* J. in *Kirby* v. *Victorian Railways Commissioner* (3), and have an important

(1) 2 C.L.R., 54.

(2) 12 App. Cas., 41, at p. 44.

(3) 24 V.L.R., 657; 20 A.L.T., 190.

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bearing on a case of this kind. Lord *Halsbury* L.C. said:—"My Lords, it is incumbent upon the plaintiff in this case to establish by proof that her husband's death has been caused by some negligence of the defendants, some negligent act, or some negligent omission, to which the injury complained of in this case, the death of the husband, is attributable. That is the fact to be proved. If that fact is not proved the plaintiff fails, and if in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails, for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition; '*Ei qui affirmat non ei qui negat incumbit probatio.*'" That is the same principle as was laid down by *Earle* C.J. and *Williams* J. in *Cotton* v. *Wood* (1). A few lines further on the Lord Chancellor said:—"If the simple proposition with which I started is accurate, it is manifest that the plaintiff, who gives evidence of a state of facts which is equally consistent with the wrong of which she complains having been caused by—in this sense that it could not have occurred without—her husband's own negligence as by the negligence of the defendants, does not prove that it was caused by the defendants' negligence." And Lord *Watson* said (2):—"It appears to me that in all such cases the liability of the defendant company must rest upon these facts,—in the first place that there was some negligent act or omission on the part of the company or their servants which materially contributed to the injury or death complained of, and, in the second place, that there was no contributory negligence on the part of the injured or deceased person. But it does not, in my opinion, necessarily follow that the whole burden of proof is cast upon the plaintiff. That it lies with the plaintiff to prove the first of these propositions does not admit of dispute. Mere allegation or proof that the company were guilty of negligence is altogether irrelevant; they might be guilty of many negligent acts or omissions, which might possibly have occasioned injury to somebody, but had no connection whatever with the injury for which redress is sought, and therefore the plaintiff must allege and prove, not merely that

(1) 8 C.B.N.S., 568.

(2) 12 App. Cas., 41, at p. 47.

they were negligent, but that their negligence caused or materially contributed to the injury." In that case the facts were that a railway line crossed a public footpath on the level, the approaches to the crossing being guarded by hand gates. A watchman, who was employed by the railway company to take charge of the gates and crossing during the day, was withdrawn at night. The dead body of a man was found on the line near the level crossing at night, the man having been killed by a train which carried the usual head lights, but did not whistle or otherwise give warning of its approach. No evidence was given of the circumstances under which the deceased got on the line. An action on the ground of negligence having been brought by the administratrix of the deceased, the jury found a verdict for the plaintiff. It was held that, even assuming (but without deciding) that there was evidence of negligence on the part of the company, yet there was no evidence to connect such negligence with the accident, and, therefore, that there was no case to go to the jury, and that the railway company were not liable.

I should have been glad if I could distinguish the present case from *Wakelin's Case* (1), but I am not able to do so. It is true that in this case the deceased was seen approaching the line and within a somewhat short distance of the crossing. It is true that others saw and heard the approaching train. It is true that more of the surrounding facts are known than in *Wakelin's Case* (1). But equally there is an absence of any evidence as to whether the real or assumed negligence of the defendants was the cause of the accident, because what happened at that moment is shrouded in mystery. It seems to me that, unless we are going to restrict the authority of *Wakelin's Case* (1), we must hold that, where the Court is in the dark as to the way in which an accident of this kind has actually occurred, notwithstanding there may be evidence of the facts up to a short time before the occurrence of the accident, still if those facts do not throw the necessary light upon the cause of the accident, even the existence of negligence does not establish the plaintiff's case, because he fails to establish the connecting link, namely, that that negligence was the cause of the accident.

(1) 12 App. Cas., 41.

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The case of *Smith* v. *South Eastern Railway Co.* (1), was very much relied upon on the part of the appellant, but it seems to me to differ very materially from this case. There the deceased had reason to expect a certain signal if danger was approaching. It was a case in which an accustomed signal had been neglected by a gate-keeper, who gave the deceased no warning and did not go out to signal the train. The deceased attempted to cross but was caught by the train and killed. The train carried lights which were visible by any one about to traverse the level crossing for a distance of more than 600 yards, and the engine-driver had whistled ten seconds before the train passed over the crossing, which it did at the rate of from 35 to 40 miles an hour. The engine-driver saw the light on the gates but did not receive any hand-light from the gate-keeper. It was held that there was evidence to go to the jury of negligence on the part of the defendants by which, and not by any negligence on his part, the death of the deceased was caused, and therefore that the Judge at the trial was right in not withdrawing the case from the jury.

That was a decision in which everybody, I think, must concur, but it seems to me widely different from this case, because, although they are alike in this that nobody saw the accident occur, still there was this evidence, that the deceased, who lived near the place where the train passed—a regular train running every night—had been accustomed to see the gate-keeper make the ordinary signal when the train was approaching. The deceased went to see the gate-keeper that night and found him sitting in his lodge reading, and must have observed that the gate-keeper did not go out on to the crossing or make the signal which he ought to have made. That must have misled the deceased. In that case there could be little doubt as to what caused the accident. It was the absence of the hand-signal, because, taking all the facts into consideration, the injury could not be traced to any other cause. That is not by any means the case we are considering.

In the case of *Toronto Railway Co.* v. *King* (2), the facts again were different from those in the present case because a witness saw how the accident occurred. In the judgment of the

(1) (1896) 1 Q.B., 178.

(2) (1908) A.C., 260.

Privy Council it is made plain that, although the deceased had traversed part of the route of the tramcar and was crossing in front of it, the driver did not slow down, but seeing, as he must under the circumstances have seen, the deceased driving his cart and crossing the line, and driving his tramcar moreover in a largely populated city such as Toronto is, made no effort to check the speed of the tramcar after the period at which he must have seen the deceased crossing the line in front of him. That is again a case in which there could be no doubt whatever as to the way in which the injury was caused. Obviously it was caused by the driver not pulling up the tramcar, a thing which in the circumstances it was shown to be his duty to do. The difference between that case and this is about as wide as it can be.

In *Wakelin's Case* (1), before the Court of Appeal, there are some remarks of *Bowen* L.J. which seem to me to apply to this case. In concluding his judgment he said :—" Presumptions are not excuses for guessing in the dark. They are inferences drawn by sound reason from something which is proved or taken for granted as proved. Here there is nothing proved or to be taken for granted as proved, which leads you to any further conclusion about the conduct of the plaintiff. It is always a matter of regret when the facts of a case are so imperfectly known that justice is baffled in coming to a conclusion, but we cannot help it if there are no materials for coming to any further conclusion in the matter." Not only, apart from contributory negligence, is there a failure of evidence to go to a jury that any negligence of the defendants was the cause of the accident, but there is moreover this fact, that any person traversing a railway crossing whether by night or by day, whether on horseback or on foot, has for his safety to behave according to ordinary common sense, and therefore ought to look up and down the line. If this unfortunate man had done so, there is little enough doubt that the accident would not have happened. Even assuming, as we are assuming, that there was no whistle, I am of opinion that does not of itself absolve a person from the ordinary duty to look up and down the line. If in a sense he is led into a trap, as in *Smith* v. *South Eastern Railway Co.* (2), that may absolve

(1) (1896) 1 Q.B., 189*n.*, at p. 196. (2) (1896) 1 Q.B., 178.

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him. But it would be wrong to lay down that a trap is laid in all cases where a whistle is not sounded. *Smith's Case* (1) was one in which the absence of a special but usual signal acted as a lure and led the deceased on to the line, and that was held to excuse him from the ordinary duty of looking. Here it appears to me to have remained the duty of this unfortunate man to look up and down the line before attempting to cross, having in his hands the very means of preventing the waggon on the instant from crossing the line.

Not only when he approached quite close to the crossing could the deceased have looked up and down the line, but the line was fully in his view for a considerable distance before he approached the crossing at all. There was nothing to obstruct his view, and other persons 400 yards away from the line both heard and saw the approach of the train. So that as the deceased approached from a distance of 400 yards towards the crossing, every yard he advanced he would more and more be able to see and hear the train until he got quite close to the line. With his habitual knowledge of the running of the train it was not only his duty to look, but when the train was about due it would have been a reasonable precaution to pull up his waggon and listen as well.

On the whole of the circumstances it seems to me, first, that the negligence in not whistling is not connected with the injury alleged, and secondly, if it were, to the same extent is connected with it the contributory negligence of the deceased. In these circumstances there is only one course open, and that is, however reluctantly, to dismiss the appeal.

O'CONNOR J. read the following judgment:—The Supreme Court of Victoria were, in my opinion, clearly right in upholding the nonsuit in this case. The deceased was killed by a train of the defendants at a spot where a public road crosses the railway line. The defendants were entitled by law to run their trains across the road. The deceased, on the other hand, was entitled as a member of the public to the free use at all times of the road where it crossed the railway line. But, just as between foot passengers and the drivers of vehicles equally entitled to the

(1) (1896) 1 Q.B., 178.

free use of public streets for the purpose of passing and repassing thereon, so as between Railway Commissioners entitled to run their railways across a public road and the members of the public entitled to use that road, the law imposes mutual obligations. Each is bound to exercise his right with reasonable regard to the safety of others lawfully exercising their rights; and each person is bound to take all reasonable precautions for his own safety. Having regard to the danger to the public of trains crossing a highway in such a locality, the law no doubt imposed on the Railway Commissioners the duty of giving some distinct warning of the approach of the train. Apart from the instruction to engine-drivers, which is in evidence, I think it was therefore clearly the duty of the engine-driver, having regard to the proximity of the crossing to a centre of population, to give full warning by whistle of the approach of his train. But there was a duty no less binding on the deceased whether the engine-driver whistled or not to keep a look out for trains as he approached the crossing, and to take care that he did not begin to cross if there was any likelihood of the train striking him before he got over. Such being the rights and obligations of the Railway Commissioners and the deceased, what were the material facts proved? When I speak of facts proved, I mean facts which on the evidence a jury might reasonably find to have been proved. The night was dark, the train was travelling more quickly than usual. As it approached the crossing it was on a slight down grade, had shut off steam, and was not making as much noise as if actually using steam. It was a wild night, and a strong wind blowing from the north was likely to have made it difficult for the deceased to hear the approach of the train. On the other hand, the train was well lighted, the waggon of the deceased was also well lighted, namely, by two powerful motor lamps, which threw a light twenty yards in front of the horses. The waggon was not hooded, and from all the evidence, including the plan put in by the plaintiff, it might, I think, be reasonably inferred that there was nothing to prevent the deceased as he approached the crossing from seeing the train half a mile off. The evidence traces him up to a hundred and fifty yards from the crossing. He was then on the road driving at a walk towards the crossing up the slight incline

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on its western side. That was the last that was seen of him alive. Very shortly afterwards two sharp whistles were sounded, a crash followed almost immediately, and the plaintiff was picked up dead, his waggon and horses smashed and scattered.

The negligent act charged against the defendants as being the cause of the death was the engine-driver's failure to whistle as his train approached the crossing. Before the case could go to a jury or be such as to call upon the defendants for an answer, the plaintiff must adduce evidence from which a jury could reasonably infer that it was that negligent act that caused the death of the deceased. In *Wakelin* v. *London and South Western Railway Co.* (1), the House of Lords had to deal with a very similar state of facts. The principle there laid down by Lord *Halsbury* L.C., as follows, is applicable in all such cases. "It is incumbent upon the plaintiff in this case to establish by proof that her husband's death has been caused by some negligence of the defendants, some negligent act, or some negligent omission, to which the injury complained of, in this case the death of the husband, is attributable. That is the fact to be proved. If that fact is not proved the plaintiff fails, and if in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails, for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition; '*Ei qui affirmat non ei qui negat incumbit probatio*'" (2). No case since then has thrown any doubt on that clear statement of principle. When the deceased came to the crossing he was either on the look out or he was not. If he was on the look out he must have seen the train if it were within half a mile. If he saw it coming there was obvious danger in crossing in front of it, having regard to the well known difficulty of judging the distance of a rapidly approaching light on a dark night. Under such circumstances it would be only a reasonable precaution to wait until the train had passed. But if, unfortunately, he took the chances of getting across in safety, his death was caused, not by the neglect to whistle, but by his neglect of reasonable precautions for his own safety. If, on the other hand, he neglected to look when he

(1) 12 App. Cas., 41.

(2) 12 App. Cas., 41, at p. 44.

came to the crossing and drove on to it without looking, there again it was his neglect of reasonable precaution for his own safety, and not the engine-driver's neglect to whistle, that caused the death. These considerations are, it may be said, matters merely of surmise and conjecture. That is so. But on the other hand there is no evidence upon which a jury could reasonably find that the deceased was killed by the engine-driver's neglect to whistle rather than by his own neglect of precaution for his own safety in the ways I have indicated. Whatever conclus on they might come to on that issue would be based necessarily on surmise and conjecture, not on evidence. It was urged on behalf of the plaintiff that the deceased was relieved from the obligation to look out for himself at the crossing, because he was justified under all the circumstances in supposing that he would get warning by the engine-driver's whistle of an approaching train, and *Smith* v. *South Eastern Railway Co.* (1), was relied on. I was at first much impressed by Mr. *Macfarlan's* strenuous argument as to the applicability of that authority. But on examination of that case it appears clear that the decision turned on the special facts there under consideration—that is, on the conduct of a railway gate-keeper living in a gate-house at the crossing whose special duty it was to the knowledge of the deceased to walk out to the crossing and hold up a flag on the approach of a train. The Court held that, under the circumstances proved, the deceased, acting as a reasonable man, might fairly have been misled and thrown off his guard by the conduct of the gate-keeper on that occasion. But there can be no analogy between such facts and those on which the plaintiff has relied in this case. There is nothing special in the circumstances surrounding the failure to whistle at this crossing, which would distinguish it from a failure to whistle at any other of the numerous railway crossings in the neighbourhood of small centres of population throughout Australia. It would indeed be a startling inroad on the principle that a man using a public road must take reasonable precaution for his own safety, if this Court were to hold that a person using a public road where it crossed a railway line was relieved of the necessity of looking out for trains in all cases

(1) (1896) 1 Q.B., 178.

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where an engine-driver was under an obligation to give a warning whistle as his train approached the crossing. It is clear to my mind that nothing was proved in this case which relieved the deceased from the duty of looking out for the train when he came to the crossing. Under all these circumstances I am unable to see how on the evidence a jury could reasonably find that the plaintiff's death was caused by the defendants' neglect, rather than by failure on the part of the deceased to take reasonable precautions for his own safety. On that view taken by the learned Judge of first instance the plaintiff was properly nonsuited. It follows, in my opinion, that the Supreme Court were right in upholding the nonsuit, and that the appeal must be dismissed.

ISAACS J. read the following judgment:—The question on this appeal is entirely one of law, namely, whether there is any evidence from which a jury might reasonably infer that the defendants were guilty of negligence causing the accident. The Supreme Court of Victoria held, in accordance with the ruling of the learned County Court Judge, that there was not such evidence, and on the ground that the whole case is parallel to *Wakelin's Case* (1), and that the Court was bound by that case. My learned colleagues follow that opinion. For myself, as was said not long ago by an English Judge in a somewhat similar situation, I am painfully conscious of the great weight and authority of the judgments in which that position has been maintained, and of the force of the reasoning by which they are supported. Nevertheless, after the best consideration I have been able to bring to the matter, the contrary view appears to me to be the correct one, and to be the only one consistent with the express decisions of the English Courts, the House of Lords and the Privy Council, the latest being that of the Judicial Committee last year.

Between *Wakelin's Case* (1), and the present I can see no similarity whatever, and I cannot help thinking the observations of the learned Lords in that case are being pressed far beyond their meaning. There, the man was killed, it is true, by contact

(1) 12 App. Cas., 41.

with the moving train, but beyond that nothing whatever was known of the manner in which he died. He was last seen alive as he left his cottage after tea, the next time he was seen was as his body lay late that night on the down line near the crossing. How he came there nobody knew; when he came, in what condition he came, whether he walked on to the line in full sight of a train and deliberately stood in front of the engine, whether he was passing over in the ordinary use of the way, or whether he went to sleep on the line, all this was utterly unknown.

Lord *Halsbury* L.C., said (1):—"The peculiarity about this case is that no one knows what the circumstances were. The body of the deceased man was found in the neighbourhood of the level crossing on the down line, but neither by direct evidence nor by *reasonable inference* can any conclusion be arrived at as to the circumstances causing his death." Lord *Watson* said practically the same thing. In a later case, *Pomfret* v. *Lancashire and Yorkshire Railway Co.* (2), Lord *Collins* M.R., speaking of *Wakelin's Case* (3), said:—"There was merely the naked fact that the body of the deceased was found lying on the line near a level crossing, and there was no presumption as to negligence one way or the other; in that case it was held, and I entirely agree with the decision, that the onus of establishing the fact that the man's death was caused by the negligent act of the defendants had not been discharged by the plaintiff, and that, therefore, she could not recover." But how can it be said that here the circumstances are unknown, so that the "peculiarity" of that case, as Lord *Halsbury* L.C., termed it, is to govern the present?

The occasion, manner and time of the deceased's coming to within a few yards of the rails are all perfectly known. He was still driving towards the crossing. Mrs. Wilson says:—"Noticed cart going up the hill towards railway. Noticed train coming along. I noticed train slowing down. About length of train from crossing when it was slowing down." Up to within about two or three seconds at most before the collision the movements of the deceased are established by direct evidence. There can

(1) 12 App. Cas, 41, at p. 46. (2) (1903) 2 K.B., 718, at p. 726.
(3) 12 App. Cas., 41.

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scarcely be any doubt how he actually reached the rails. At all events the jury had abundant material to infer it. He was engaged in his ordinary occupation of milk carrying. He had left home about 5.30 p.m. on his way to Greensborough, had partly fulfilled his task in that direction of delivering the empty cans, and was proceeding farther to complete it. He was for 4 months accustomed to the work, and the place, and, from the nature of the employment, in all probability to the time. He was driving a four-wheeled milk waggon drawn by two horses, both quiet, one nervous at steam, but easily controlled. The waggon and cans weighed a little over 1 ton 4 cwt. He had watered his horses a little way back from the crossing and was coming gently up the hill. The night was dark—one witness described it as pitch dark—it was very windy, a wild rough night. The wind came from the north or north-west and, as is usual in this locality with such a wind, probably carried considerable dust. He was on the main road leading to Greensborough, the available metalled portion being, according to the plan, about 20 feet wide. There appears to have been a fair amount of traffic at this time, because, from the evidence given, some ten or twelve persons passed either across or in the immediate vicinity of the level crossing. Some of the traffic was vehicular and some on foot. It was obviously a task of some care to keep to the metalled portion (his bright lights must have materially helped in this), and to watch that he did not come into collision with other traffic on the same road. His duties in driving on this rough night, caring for his own safety and that of others, must have occupied his attention to a great extent. At all events he was not as entirely free to watch along the line as if he had been on foot and the only person on the road. Being accustomed to the road, and, I agree with my learned brother *Barton*, about that time, he therefore probably knew that about this time a train would be due. If he did, he also knew the practice existing since 1898 of whistling according to the regulation and perhaps relied on it. In that event, *Smith* v. *South Eastern Railway Co.* (1), applied. If he did not know of the probable arrival of a train about that time, he would not be expected to be so very watchful. But as he approached the

(1) (1896) 1 Q.B., 178.

crossing there were no gates and therefore no gate-keeper. As to that sec. 10 of Act No. 1299 protects the defendants from any charge of negligence. Still the absence of those usual safeguards is a material circumstance in relation to other means of precaution. There was no light at the crossing. The advancing train had lights in front, and its interior was lighted. But it was approaching at a swift rate—faster than usual according to one of the witnesses. It is admitted that it was travelling at from 30 to 35 miles an hour; that is 15 to 17½ yards per second. The wind carried the sound of the wheels away from deceased. The train was rocking. It might have been, and probably was, very difficult for anyone however intently gazing at it to judge with any accuracy the distance of the train from the crossing and the rate of its approach. But even supposing a passenger on the road might, if free of all other considerations, have been able by concentrating all his attention on the train to form some fair estimate of the danger, still Fraser was not so favourably situated. He was even more hampered and less called upon to be alert than the deceased in *Slattery's Case* (1). But there comes into consideration one circumstance of the highest importance. Regulation 247, issued as far back as 1898, is in these terms:— "Enginemen must in all cases when approaching cattle pits keep a specially sharp look-out and give a long and loud whistle of not less than 5 seconds duration at such distance from the crossing as will give ample warning of the approaching train. They must give this matter special attention both by day and by night and they will be held fully responsible for careful and intelligent obedience to this order." It is evidence to go to the jury that it was a reasonable and proper precaution at that place that the engine-driver should keep a specially sharp look-out, and also to give a long and loud whistle of not less than 5 seconds duration at such distance from the crossing as would give ample warning of the approaching train. Special attention had to be given to this both by day and by night. It stands to reason that the necessity would be greater on a dark wild night, when the wind was blowing from the crossing place.

(1) 3 App. Cas., 1155, at p. 1166, per Lord *Cairns*.

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The observations of Lord *Cairns* C. (1), and Lord *O'Hagan* (2), in *Slattery's Case*, and of *Lopes* L.J. in *Smith* v. *South Eastern Railway Co.* (3), and the case of *Toronto Railway* v. *King* (4), before the Privy Council sufficiently establish the position that such a regulation is evidence that the precautions it requires are reasonable and proper, and that consequently the omission to observe them is negligence. There is therefore ample evidence upon which the jury may find—and as the matter at present stands could scarcely do otherwise than find—that, where cattle pits exist, the precautions stated in the regulations are necessary for the purpose of averting danger to human life at the level crossing, *in addition to* all other means of avoiding peril that are available to those who pass along the roads. There is also evidence that no such whistling took place and therefore no careful lookout was kept, that Fraser was using the road in the ordinary manner and in the ordinary course of his daily vocation, with all his senses about him, and under all the circumstances that I have mentioned 5 seconds warning would have enabled him, if driving at 6 miles an hour, to go forward 40 feet and easily escape any danger. No want of caution on his part is proved, much less such as to amount to contributory negligence so strong and clear as to entitle the Court to take the matter out of the hands of the jury. What then is the effect of all this evidence, added to the fact that the man was killed while passing across the level? Is it correct to say as Lord *Collins* said of *Wakelin's Case* (5), that there was merely the naked fact of the man being found dead on the line? Is it as consistent with the evidence to say, for instance, that he voluntarily exposed himself to certain death as that the want of the regulation precautions imperilled his life and led to his death? If these precautions are reasonable to prevent injury to those who are exposed to collision with the defendants' trains and while travelling in the ordinary course over the crossings, surely when the precautions are omitted, and a person, who is proved to have been travelling in no unusual way along the crossing, meets the very danger which the precautions are designed to avert, there is sufficient founda-

(1) 3 App. Cas., 1155, at p. 1164.
(2) 3 App. Cas., 1155, at p. 1184.
(3) (1896) 1 Q.B., 178, at pp. 184, 185.
(4) (1908) A.C., 260.
(5) 12 App. Cas., 41.

tion for what Lord *Halsbury* calls "reasonable inference," as opposed to "direct evidence," that the negligence and the damage are in the relation of cause and effect. It seems to me that on the facts I have stated the requirement of Lord *Watson* in *Wakelin's Case* (1), is amply satisfied, that there must be evidence of negligence materially contributing to the injury. The objection to this conclusion as stated in the judgment appealed from, and affirmed by the judgments preceding mine, is that the jury are not entitled to find that the negligence caused the death because the connection between the two is not established, the facts of the case being consistent with both. Now the facts of the case consist partly of the direct testimony, and partly of the inferences which the jury legitimately draw from that testimony. The case for the respondents must therefore depend on the question whether it is legitimate for the jury if they so please to infer that the absence of whistling was the *causâ causans* of the death. The contention adverse to this inference being open to them must rest upon one of three grounds—either that direct evidence is necessary to connect the negligence with the damage, or that it is the duty of the plaintiff to negative contributory negligence, or that contributory negligence has been conclusively established. These are all matters of principle, and I thoroughly agree that this case must be determined on principles of law applicable to all. The facts of other cases are only valuable as enabling us to understand the doctrines of law enunciated by the Judges. That direct evidence is not necessary where the character of the negligence is such as to lead naturally to the result complained of seems clear from what Lord *Cairns* L.C. says in *Metropolitan Railway Co.* v. *Jackson* (2). He says:—"The negligence must in some way *connect itself*, or be connected by evidence, with the accident. It must be, if I might invent an expression founded upon a phrase in the civil law, *incuria dans locum injuriæ*." Negligence "connects itself" with damage, as I understand the meaning of the learned Lords who used the expression, if it is *primâ facie* likely in the circumstances proved and according to the natural course of human experience to produce the result

(1) 12 App. Cas., 41.

(2) 3 App. Cas., 193, at p. 198.

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complained of. If this class of negligence does not connect itself with this kind of injury, it is difficult to imagine what direct evidence could be given to connect it, unless either of the other grounds above mentioned is sustainable. In *Jackson's Case* (1), as the nature of the act complained of was not intrinsically or extrinsically connected with the damage, the plaintiff failed. But the case recognizes that direct external proof is not always essential; and the use of the word "connected" in that relation was apparently adopted by Lord *Watson* in *Wakelin's Case* (2), from *Jackson's Case* (1) and from *Slattery's Case* (3), where it is repeated.

The second ground of objection, namely, that it rests upon the plaintiff to negative any fault on the deceased's part in causing the injury, is a survival of the doctrine which the House of Lords condemned in *Wakelin's Case* (2). It is, in my opinion immaterial whether the objection is put that unless the plaintiff shows that the deceased was reasonably careful he does not establish that the injury was caused by defendants' negligence, or whether it is put in the form of an answer to the plaintiff's *primâ facie* case; in either event, if there be an absence of evidence as to the care or negligence of the deceased, then, as there is no presumption either way, the onus as to this lies on the defendants. Lord *Watson* (4), put it that:—"Whether the question of such contributory negligence arises on a plea of 'not guilty,' or is made the subject of a counter issue, it is substantially a matter of defence."

The third ground is that it does appear from the evidence that the deceased was guilty of such negligent conduct as disentitled the plaintiff to succeed. Of course, that is really contributory negligence, and if the evidence showed it in such a way that no jury could reasonably find otherwise, it would be a complete and sufficient answer. But where is the evidence? Mr. *Starke* said, there were the head lights of the train, the carriage lights, the opportunity to see the train coming along the line, and the knowledge that it was about due, and consequently either the deceased looked and saw the train, and thereby volun-

(1) 3 App. Cas, 193.
(2) 12 App. Cas., 41.
(3) 3 App. Cas., 1155.
(4) 12 App. Cas., 41, at p. 48.

tarily and recklessly incurred the risk, or he did not look and suffered the penalty of his negligent omission. This is a clear and distinct legal argument, and if sound, I admit the appeal should fail. But if not sound, it is I think equally clear it should succeed. Now, it is a remarkable coincidence that all these circumstances were urged in *Slattery's Case* (1), by the appellant company, and though some of the learned Lords agreed with them, the House of Lords decided that the contention could not be supported. To show how strikingly alike the two cases are in this respect, I shall quote some of the observations of the learned Lords. Lord *Hatherley*, who dissented, said (2), that the deceased "knew that a down train was expected, but I pass that by, and ask whether it is not negligence for a man to pass over a railway at all, without looking to see whether or not a train is approaching. It is clear that the lights of the down train were visible to anyone looking before he crossed the line, but the deceased was beckoning to his friends, and they saw the lights which he did not. If he saw the lights, his negligence was greater in his attempting to cross; if he did not see the lights, he cannot have looked for them." How was that objection answered. First of all Lord *Cairns* L.C. answered it in this way. He says the night was perfectly clear—a circumstance of difference which tells in favour of the appellant here. He also says the line was a straight line for several hundred yards. The advancing train was perfectly lighted. As soon as the deceased got on to the six-foot way he could see up the line for several hundred yards. If he had looked to the left he must have seen the train, and his conduct was open therefore to the two alternatives, either he did see or he ought to have seen the train. But, says the learned Lord, it was night though clear, the man was apparently in an anxious and perhaps flurried state of mind, desiring to help his friend across to get a ticket in time for a train about to leave. And then he says (3):—"He might therefore be supposed when he got to the six-foot way, to have omitted, in his haste, the precaution of stopping and looking up the line to his left, while on the other hand, had the advancing train

(1) 3 App. Cas., 1155. (2) 3 App. Cas., 1155, at p. 1170.
(3) 3 App. Cas., 1155, at p. 1166.

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whistled, as on this hypothesis it failed to do, his attention would have been called to the danger, and his movement across the line might have been arrested. Now I cannot say that these considerations ought to have been withdrawn from the jury. I think they should have been submitted to the jury, in order that the jury might say whether the absence of whistling on the part of the train, or the want of reasonable care on the part of the deceased, was the *causâ causans* of the accident."

Lord *Penzance* said (1):—"To whatever degree the plaintiff's husband may have been to blame in the course which he took, and in whatever degree that course may have contributed to the accident which befell him, I think it is clear that the absence of that whistling which is usual in all railways as the signal of an approaching train, may reasonably have been considered by the jury to have influenced the course taken by the deceased man, and thus caused the accident. I think it is impossible to deny this: it might be that being accustomed to the station, and aware of the usual time at which the train from Dublin passed, he expected the whistle as usual, and not hearing it, did not think the train was coming; or it might be that had the whistle sounded it would have awakened him to his danger in attempting to cross the line, though his mind was so occupied with the desire of getting his friends across to where he stood that he failed to hear the sound of the wheels, and did not look up the line, as he ought to have done, to see if a train was coming." "And it is, I think, equally impossible to say, as I have just pointed out, that the absence of this particular species of notice of an advancing train might not have influenced the plaintiff's husband in attempting to cross the line, and so caused the accident" (2).

Lord *O'Hagan* says (3):—"We were told much of the flaring lights, and the means of warning through the noise of the engines, and the rushing of the train; but again the defendants answer their own argument by the fact, that, in addition to these things, they practically admitted the need of something more, and taught the public to expect the signs of danger,—not through one sense

(1) 3 App. Cas., 1155, at p. 1174. (2) 3 App. Cas., 1155, at p. 1175.
(3) 3 App. Cas., 1155, at p. 1184.

only, but by the ear as well as by the eye, by the whistle as by the lamp."

Lord *Selborne* says (1):—"But it is said that the deceased ought nevertheless to have been on the look-out for the lights of any approaching down-train; that it was impossible for him to have been run down but for his omission to do so; and, therefore, that the company cannot be liable for his death. From this way of putting the case it seems to follow that, however proper and usual it may be for a company to give notice in a particular way of the approach of a train, where, without such notice there is a known danger, the omission to do so carries with it no responsibility; and that the case of any man who is run down is to be judged in the same way as if there had been no such usage, and no such obligation. Putting law (for a moment) aside, this does not seem to me to be sound reason."

This case therefore finds its parallel in principle not in *Wakelin's Case* (2), but rather in *Slattery's Case* (3). In each case there was negligence in not whistling, the deceased was killed by the train, his movements towards the line were traced, no proof was given one way or the other as to whether he in fact looked out for an advancing train. Slattery could easily have seen it if he had looked; it is very doubtful how far Fraser could have seen it. Slattery was held to have been conceivably put off his guard by the absence of whistling, so as to make the question of his want of care a question for the jury, and Fraser's situation appears to me in every way more favourable to the appellant's view in this respect than Slattery's. The House of Lords held that the Court could usurp the functions of a jury in determining whether there was contributory negligence. On the authority, therefore, of *Slattery's Case* (3) alone this appeal ought, in my opinion, to succeed.

But last year the Privy Council determined the case of *Toronto Railway Co.* v. *King* (4) and reversed the judgment of the Ontario Court of Appeal, which decided what appears to me to be the precise point upon which the respondents rely. A tram-car, negligently as it was held, came into collision with a delivery

(1) 3 App. Cas., 1155, at p. 1191.
(2) 12 App. Cas., 41.
(3) 3 App. Cas., 1155.
(4) (1908) A.C., 260.

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van crossing the intersection of two streets and at right angles to the direction of the tramcar. The driver of the van was killed. Apart from the nature of the negligence, undue speed, and not keeping a proper look-out, there was no connection proved between the negligence and the death. Yet it was evidently self-connecting; and the Privy Council held there was evidence of negligence causing the damage. Their Lordships in that case, as already mentioned, regarded the omission to conform to a regulation of the company as to speed in such circumstances as evidence of negligence. They also held that one driver has a right to assume another driver will conform to known traffic regulations, and I would add traffic practices, and consequently Fraser, not seeing the train, had a right to rely on the warning from the whistle. If he had seen the train at close quarters that would, of course, have been different, because a train cannot be pulled up as quickly as a tramcar.

On the whole, therefore, I am of opinion that evidence of negligence on the part of the defendants has been given, which naturally would conduce to the damage that occurred; that that raises a *primâ facie* case for the jury; that at the most the defendants may contend that there is evidence for the jury of contributory negligence; but certainly that there is no justification for the entire withdrawal of the case from the jury and nonsuiting the plaintiff.

Appeal dismissed with costs.

Solicitor, for the appellant, *C. J. McFarlane.*

Solicitor, for the respondents, *Guinness,* Crown Solicitor for Victoria.

B. L.