[HIGH COURT OF AUSTRALIA.]

MIDDLETON . . . . . APPELLANT;
PLAINTIFF,

AND

THE MELBOURNE TRAMWAY AND OMNIBUS COMPANY LIMITED . } RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Sept.* 9, 10, 17.

Barton A.C.J., Isaacs and Rich JJ.

Practice—Appeal—Trial before jury—Setting aside verdict—Appeal from County Court of Victoria—Appeal from refusal to grant a new trial—Ordering new trial before Judge of Supreme Court—County Court Act 1890 (*No.* 1078), *sec.* 133.

Negligence—Injuries caused partly by negligent act—Apportioning damages—Burden of proof.

Where there has been a trial before a jury, a Court of appeal ought not to disturb their verdict on the ground that it is against the weight of evidence unless there is such a preponderance of evidence as to make the verdict unreasonable in the sense that the jury have not really performed their judicial duty.

Where, in an action to recover damages for personal injuries caused by the defendant's negligence, the injuries are such as might with reasonable certainty be attributed to the defendant's negligent act as an effective and proximate cause, but may have been caused partly by the act of the defendant which was negligent and partly by an act of his which was not negligent, the burden is on the defendant to prove that the injuries were not wholly caused by his negligent act, and to show what portion of them was not so caused.

Therefore, where the plaintiff was knocked down by a tramcar and injured by being dragged along and then run over by it, in an action against the

owners of the tramcar alleging that the injuries were caused by the fact that the tramcar after striking the plaintiff had not been stopped within as short a distance as it might reasonably in the circumstances have been stopped,

Held, that there was no onus upon the plaintiff to show how much of the injury was attributable to the movement of the tramcar after it had passed the spot at which it might have been so stopped.

Sec. 133 of the *County Court Act* 1890 provides that on an appeal from the County Court the Supreme Court "may either dismiss such appeal or reverse or vary the judgment decree or order appealed from, and may direct the cause to be re-heard before any Judge of the Supreme Court."

Semble, that, on an appeal from a refusal by a County Court Judge to grant a new trial of a cause heard before a jury, the Supreme Court may, under sec. 133, direct the cause to be re-heard before a Judge of the Supreme Court.

Decision of the Supreme Court of Victoria reversed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by Harold David Middleton, an infant, by his next friend Horace Sydney Middleton, against the Melbourne Tramway and Omnibus Co. Ltd., claiming damages for injuries alleged to have been sustained by the plaintiff by reason of the negligence of the defendants' servants. The action was remitted to the County Court, and was heard before a jury who found a verdict for the plaintiff for £950, and judgment was accordingly entered. An application by the defendants to the learned County Court Judge for a new trial having been refused, the defendants appealed to the Supreme Court from his decision refusing a new trial. The Full Court allowed the appeal, and directed that the cause should be re-heard before a Judge of the Supreme Court.

From this decision the plaintiff now appealed to the High Court.

The material facts are sufficiently set out in the judgments hereunder.

J. R. Macfarlan, for the appellant. There was abundant evidence to support the verdict of the jury. A Court of appeal will not interfere with the finding of a jury unless it is so unreasonable as to be almost perverse: See *Aitken* v. *McMeckan* (1); *Jones* v.

(1) (1895) A.C., 310.

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Spencer (1); *Taff Vale Railway Co.* v. *Jenkins* (2). Where a County Court Judge has refused to grant a new trial, the Supreme Court on an appeal from such refusal has no power under sec. 133 of the *County Court Act* 1890 to direct a re-trial before a Judge of the Supreme Court. The only order that can be made by the Supreme Court is the order which should have been made by the County Court Judge.

Mitchell K.C. and *McArthur* K.C. (with them *Williams*), for the respondents. The plaintiff put the gripman in a position of sudden emergency and the jury did not give sufficient weight to that fact: See *The "Bywell Castle"* (3). The jury could not reasonably find that the gripman did not do his best to pull the tramcar up as soon as he could. The evidence is practically all one way, that the gripman put on the brakes as soon as the tram struck the boy, which was the proper thing to do in the circumstances; and there is no evidence of negligence unless it can be inferred from the difference between the distance within which this tramcar stopped and the distance within which it is said that it could have been stopped. Taking all the evidence into consideration, that is an unreasonable inference. [They referred to *Miles* v. *Commercial Banking Co. of Sydney* (4); *Scown* v. *Haworth* (5); *The "Utopia"* (6).] There is not sufficient evidence that the injury in respect of which the jury awarded damages was caused by the movement of the tramcar after it passed the point at which the jury found it ought to have been stopped. This is a case in which the Supreme Court had a discretion under sec. 133 of the *County Court Act* 1890 to direct a re-hearing before a Judge of the Supreme Court.

Macfarlan was not called upon to reply.

Cur. adv. vult.

The following judgments were read :—

Sept. 17.

BARTON A.C.J. This is an action in which a lad, by his next friend, sues the tramway company for negligence of the company's

(1) 77 L.T., 536.
(2) (1913) A.C., 1, at p. 5.
(3) 4 P.D., 219.
(4) 1 C.L.R., 470, at p. 473.
(5) 24 V.L.R., 313; 20 A.L.T., 102; 25 V.L.R., 88; 21 A.L.T., 36.
(6) (1893) A.C., 492.

servants in the management of a tramcar and dummy, with consequent injury to the plaintiff. The action was begun in the Supreme Court, and remitted by order of a Judge thereof to be tried in the County Court, £2,000 damages being claimed. Particulars of the negligence were given, but the claim was eventually confined to the fourth of these, which was that "after striking the plaintiff the gripman did not pull up his car as quickly as he should or could have done." The defences were (1) no negligence; (2) contributory negligence of the plaintiff; and (3) that the accident was caused solely by the negligence of the plaintiff. The case was heard by Judge Eagleson and a jury in December 1911, and resulted in a verdict for the plaintiff for damages £950, for which amount, with costs, judgment was entered. The defence now rests upon the first ground.

The defendant company applied to the learned County Court Judge for a new trial, which was refused. From that refusal they appealed to the Supreme Court, which allowed the appeal, and ordered a new trial, and the plaintiff now appeals to this Court.

It appears that on the morning of 7th April 1911 the plaintiff, in going to his school in Latrobe Street, had to cross Elizabeth Street. He was running across that street diagonally from the eastern to the western side, near the intersection of the two streets, and in doing so passed behind a tram which was going along Elizabeth Street into the city. As he emerged from behind that tram another tram, which was going towards Brunswick and which had been obscured by the first mentioned tram, appeared close to him. As usual, the estimates of several witnesses who saw the accident varied as to the distance of the boy from the tram when he was first seen in front of it. The lowest estimate was a yard, and the highest 20 feet. The dummy of the tram struck the boy, and knocked him some distance along the tram line. He appears to have tried to get out of the way, and it is plain that up to that time the most serious of his injuries, a broken leg, had not occurred. The tram which had struck him, and which at the moment of doing so was, according to its gripman, travelling at the rate of 11 or 12 miles an hour, overtook him before he could get clear of the rails, and struck him again. He was carried along for

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some distance, and ultimately his right leg at least was drawn under the front of the dummy. Both legs were badly torn, and both bones of the right leg were crushed and the larger one broken. By the application of the brakes the tram was pulled up at some little distance from the point at which it had struck the plaintiff the second time. This distance, again, was very variously estimated—by the gripman at 35 feet, and by other witnesses at shorter and longer distances. One of them put it at 10 feet, which appears to have been impossible; another at 70 or 80 paces; but that was far beyond any other estimate, and the witness probably meant 70 to 80 feet. Other witnesses gave estimates of from 40 to 74 feet. One witness for the plaintiff, a constable of police, who had been employed on the trams himself, latterly as a gripman, came upon the scene a few minutes after the accident. He was shown marks along the tram track, just outside the slot, such as would be made by the heel of a boot. These marks continued for 15 paces. There was a space of 5 paces free of marks, and then, for $2\frac{1}{2}$ paces along the same line, blood marks. The total of that distance was $22\frac{1}{2}$ paces. The constable estimated his paces at a yard in length, but there was nothing to show that they were not slightly longer or shorter. Another witness, who went with the constable as he paced the distance, made it about 70 feet from the first mark to the last. He saw the accident and pointed out the marks to the constable. It did not appear to be seriously contested that the marks for the 15 paces were made by the dragging of the boy's booted foot while held by the dummy, or that the blood marks extending for $2\frac{1}{2}$ paces in length were caused by the crushing and tearing which followed when his leg was afterwards caught under the dummy. It was open to the jury to infer that after the first 15 yards the boy extricated his foot and was rolled along in front of the dummy, which then again caught his leg and inflicted the tearing and crushing which made amputation necessary. If the jury relied on the constable, and it was open to them to do so, then the tram after it caught the boy travelled a distance which included, and may have exceeded, a space of about 67 feet. I say *may* have exceeded, because there is nothing to show that the boy's foot was held by the dummy as soon as he received the second blow

from it. Whether the gripman applied the brakes before or after the first impact is another matter upon which witnesses differed. Some, indeed, said that he did not apply the brakes until after the boy had been struck the second time, some two or three yards beyond the place where he was first struck. One went so far as to say "he went over 50 feet before he put the brakes on." The gripman himself says: "I applied the brakes with all my ability . . . I put the brakes hard on at first. Had the brakes on all the time." One witness said that the gripman first put on the brakes, then looked over the side of the tram, and when the boy screamed the gripman put the brakes on harder. If this is correct, he did not apply his full brake power at once. The gripman says that after he struck the boy he did not look over the side of his car until he went to get the boy out. There was evidence that there was a dusty north wind on the day, and a perfectly dry road, which facts, so the constable who had been a gripman said, would render it an easier task to pull up promptly. Speaking apparently from his experience, that witness expressed the opinion that the tram should have been pulled up in about 35 feet. The gripman, it seems, did not think that too short a distance in which to stop his tram, for he said that he actually did stop in 35 feet from the time when he applied the brake. The jury might well conclude that the actual distance was longer on 7th April 1911. If they believed the constable and the witness who saw him step the 22½ paces, they had plenty of evidence that it was nearly twice as long. And they might, in reason, think that this pointed to a somewhat tardy application of the full brake power. From the time of the application of the brakes the tram, of course, was slowing down. Certain calculations were made as to the time within which the tram was pulled up, but the jury were entitled to disregard them, because they were based on a speed of 11 or 12 miles an hour, but ignored the fact that this pace would progressively diminish after the grip of the cable was released and the brakes were applied. As to the distance within which a tram could be brought to a stop, the defendant company called Mr. Denham, their chief inspector. His evidence related to certain tests which were made in the course of a case tried some two or three years ago. On that occasion the best result was a stop

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in 39 feet 6 inches from the order to apply the brake. That distance corresponded to the combined length of the dummy and car then engaged, which, by reason of the coupling space, would be about one foot more than the bare addition of their respective lengths. The cars on the Brunswick line are 8 feet longer than those employed in the tests. But Mr. Denham's view was that the shortest distance in which a tram could, according to these tests, be stopped is really the length of the tram itself. In the present instance that distance would be 47 feet 9 inches, comprising 16 feet 8 inches, the length of the dummy, a space of one foot between dummy and car, and 30 feet 1 inch, the length of the car. Thus, by inference from the tests of two years ago, Mr. Denham would allow about 8 feet more for the best possible stop than was shown by the results of that test. But it does not appear that any test was made in order to ascertain the distance in which such a tram as that which injured the plaintiff could be stopped, and it was open to the jury to place their own value on Mr. Denham's apparent conclusion, which, after all, was an argument based upon a prior test made with a car of different length, and without any statement of the difference in weight between the two sorts of cars, or of the number of people on the trams tested, or on the tram which injured the plaintiff, and the consequent weights of the respective loads. I point this out because Mr. Denham's evidence was relied on by the respondent company as affording an actual measure, approaching exactitude, of the stop which could be made by a driver with a Brunswick tram on level ground. Moreover, at the place where the accident took place, the grade of Elizabeth Street to the north is slightly upwards. I think the jury were entitled to consider the tests as a rather fallible guide in coming to a conclusion as to the events of 7th April 1911.

The issue of contributory negligence having apparently been abandoned, the learned Judge, in charging the jury, left the following questions to them :—(1) Did the gripman stop the tram after striking the plaintiff as quickly as he reasonably could under the circumstances ? (2) If nay to question 1, how many yards did such tram go after striking the plaintiff further than it would have gone had the gripman stopped the tram as quickly as he reasonably could under the circumstances ? (3) What injuries were inflicted

upon the plaintiff by the tram travelling such extra or further distance? (4) Damages? The jury answered the questions as follows:—(1) No. (2) Six and one-third yards. (3) The tearing of the flesh and the crushing of the bones which rendered the amputation of the leg necessary. (4) £950. They distributed this figure into items which need not concern us now.

The case for the plaintiff is that the injuries to him were increased by the negligence of the gripman in allowing the car to run further than it would have done if carefully handled; and this is what the jury have found. That they had evidence before them sufficient to entitle them in reason to come to that conclusion can scarcely be doubted upon a survey of the facts which I have stated.

It is not for a Court of appeal to say whether the verdict was right or wrong in the sense that the Court itself would or would not have given it. The real question is whether it was such a verdict as reasonable men *might* have given. If it is, we have no right to say that they have ignored the duty cast upon them. There was a considerable body of evidence before the jury on both sides, and while there does not appear to have been much contest as to veracity, the question largely turned upon the credence which the jury would give to this witness or that on the score of reliability. As to positions and distances the estimates were very various, and the extreme ones probably mere guesses. There was ample cross-examination, and the jury had the fullest opportunity of arriving at a just selection of the evidence upon which it was safe to place reliance. That is an opportunity denied alike to the learned Judges of the Supreme Court and to ourselves. This is no case of evidence given upon different planes, as in *Aitken* v. *McMeckan* (1), a case which was strongly pressed upon us. Nor can it be said here, as it was in that case, that the minds of the jury were diverted from the real issue. Whether the gripman released the cable and applied the brakes as speedily as he might and should have done, whether he applied them in full force at once or a little late, whether in all things he was using due care and skill, are of the kind of questions on which eye-witnesses actually seen and heard by the tribunal of first instance are the best guides vouchsafed to Courts of Justice. On such ques-

(1) (1895) A.C., 310.

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tions a mere printed record is, on the other hand, fallacious. It is true that, as *James* L.J. said in *The "Bywell Castle"* (1), "You have no right to expect men to be something more than ordinary men." It is true that in a sudden emergency caused by the default or negligence of the other party a man may do something "which he might under the circumstances as known to him reasonably think proper; although those before whom the case comes for adjudication are, with a knowledge of all the facts, and with time to consider them, able to see that the course which he adopted was not in fact the best" (see *per Cotton* L.J. in the same case (2)); and that he is not guilty of negligence if, upon fair consideration of that position, the tribunal of fact sees that it was reasonable on his part to deem a certain course the proper one, and take it. That would be a case of mere error of judgment under difficulties, not of carelessness or unskilfulness.

Here it is not the defendants' case that the gripman was put in such a position by any negligence of the plaintiff. Still, the company are exempt if their servant acted reasonably, even if erroneously. But that question of reasonableness was for the jury. Was the conduct of the gripman such as, under the circumstances as known to him, it would be reasonable for him to choose as the proper course? They have evidently not thought so. Whether he bungled or did that which they thought reasonable as the case was unravelled before them, are questions for the jury upon which they had evidence substantial enough to guide them, and I do not think that we have any real criterion upon which we can say that they came to a conclusion which was manifestly out of reason.

The defendant company raised a further question as to the damages. They contended that it was for the plaintiff to show the specific damage applicable to that part of their conduct which is found to have been negligent, and further to show that the physical injury for which the jury awarded £950 was clearly caused after the failure to bring the tram to a stop within a reasonable distance. If that were necessary, the material for it is possibly to be found in the evidence of the constable and the eye-witness who accompanied him, when they traced the blood marks in the last two or three yards

(1) 4 P.D., 219, at p. 223. (2) 4 P.D., 219, at p. 228.

of the course of the tram. But that it is not the plaintiff's duty, but the defendants', to show facts involving an apportionment of the damage is, I think, apparent from the case of *Nitro-Phosphate and Odam's Chemical Manure Co.* v. *London and St. Katherine Docks Co.* (1): See the judgments of *Fry* J. (2), and of the Court of Appeal, *per James* L.J. (3).

A question was raised for the plaintiff which, if this appeal is allowed on the grounds I have given, it is not now strictly necessary to decide; that is, whether the Supreme Court acted beyond its power, or in law wrongly, in directing that the re-hearing should be before a Judge of the Supreme Court. As the point is of some importance I think it as well to express an opinion upon it, though, especially as it was not fully argued, an opinion cannot have the weight of a decision. It appears to me that the words in sec. 133 of the *County Court Act* 1890 "may either dismiss such appeal or reverse or vary the judgment decree or order appealed from, and may direct the cause to be re-heard before any Judge of the Supreme Court" &c., amply warrant such a direction as is here complained of, in any appeal from the County Court where the Supreme Court orders a re-hearing, even where in doing so it is reviewing the original judgment only indirectly by allowing an appeal from the refusal of the County Court Judge to grant a new trial. It is true that there may be cases in which such a direction is not applicable, but that does not affect the power to give it in cases to which it is appropriate, and I think the present is a case in which, if the order for a new trial had stood, the direction would have been unimpeachable.

On the whole case I am of opinion that this appeal should be allowed, and that the plaintiff should retain his judgment.

ISAACS J. The law governing applications for new trial in cases tried by a jury, on the ground that the verdict is against the weight of evidence is well settled. In view, however, of the argument, it is perhaps desirable to refer to some of the authorities in which it is stated.

Metropolitan Railway Co. v. *Wright* (4), in 1886, is the leading case. The jury in a negligence case found a verdict for the plaintiff for

(1) 9 Ch. D., 503.
(2) 9 Ch. D., 503, at p. 519.
(3) 9 Ch. D., 503, at p. 527.
(4) 11 App. Cas., 152.

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£300. A new trial was moved for on the ground that the verdict was against the weight of evidence. The Divisional Court granted it on that ground. The Court of Appeal (Lord *Selborne* L.C., *Brett* M.R. and *Lindley* L.J.), reversed the decision. Lord *Selborne* L.C. said (1):—"It is not enough that the Judge, who tried the case, might have come to a different conclusion on the evidence than the jury, or that the Judges, in the Court where the new trial is moved for, might have come to a different conclusion, but there must be such a preponderance of evidence, assuming there is evidence on both sides to go to the jury, as to make it unreasonable, and almost perverse, that the jury when instructed and assisted properly by the Judge should return such a verdict."

In the House of Lords, which upheld that view, Lord *Herschell* L.C. said (2):—"The verdict ought not to be disturbed unless it was one which a jury, viewing the whole of the evidence reasonably, could not properly find." Lord *Halsbury* agreed with Lord *Herschell*, who, he said (3), "has put the proposition in a form which is not open to objection, but which perhaps leaves open for definition in what sense the word 'properly' is to be used. I think the test of reasonableness, in considering the verdict of a jury, is right enough, in order to understand whether the jury have really done their duty. If their finding is absolutely unreasonable, a Court may consider that that shows that they have not really performed the judicial duty cast upon them; but the principle must be that the judgment upon the facts is to be the judgment of the jury and not the judgment of any other tribunal."

In 1896, in *Riekmann* v. *Thierry* (4), Lord *Halsbury* L.C., speaking of a jury trial, said:—"The constitution has placed in the hands of the jury, and not in the hands of the Court, the jurisdiction to find the fact, and in such a case the Court can only disturb the verdict where, in their judgment, the jury have not done their duty; short of that, the Court is bound to accept the finding of the jury, though they may think they would have found a different verdict."

In *Cox* v. *English, Scottish, and Australian Bank Ltd.* (5), the

(1) 11 App. Cas., 152, at p. 153.
(2) 11 App. Cas., 152, at p. 154.
(3) 11 App. Cas., 152, at p. 156.
(4) 14 R.P.C., 105, at p. 116.
(5) (1905) A.C., 168.

Privy Council, speaking by Lord *Davey*, expressly quoted and adopted the words of Lord *Selborne* in *Wright's Case* (1), and referred to the judgments in the House of Lords in that case as being to the same effect. There were several intermediate cases before the Privy Council which the later one renders it unnecessary to cite.

It comes to this, then: Where there is a jury, it is the jury, and the jury alone, that have the jurisdiction to determine the issues of fact upon the evidence. The Court has so far control that it must see that the jury do their duty properly. Beyond that the Court cannot go. And if the jury have, in the opinion of the Court, found a verdict which reasonable men *might* have found upon the evidence before them, the Court is not at liberty to look further and set that verdict aside as being against the weight of evidence. If the finding is unreasonable, in the sense that the jury could not have really performed the judicial duty cast upon them, but must have been guided or moved by considerations other than the value and weight to be given to the evidence—considerations that ought not to have been entertained, and which vitiate the finding, because, as Lord *Herschell* phrases it in *Jones* v. *Spencer* (2), it cannot be said "the jury have found their verdict upon the evidence,"—then there is, as that learned Lord and also Lord *Shand* there both say, "a miscarriage," and the finding is, in the requisite sense, "against the weight of evidence," and the verdict may be set aside. The preponderance of the evidence itself may, as Lord *Selborne* points out, be such as to establish this absolute unreasonableness—a term for which (as Lord *Coleridge*, in *Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery* (3), pointed out) there is no definite standard; but, except for the purpose of ascertaining whether that test is established, which every Court must determine for itself, the Court has nothing to do with the weight of the evidence—that is for the jury.

The Supreme Court were asked to set aside, and did set aside, the verdict and grant a new trial on the ground that the verdict was against the weight of evidence, and the question for us is whether, having regard to the law applicable, that decision was justified.

(1) 11 App. Cas., 152. (2) 77 L.T., 536, at p. 538.
(3) 3 A.C., 1155, at p. 1197.

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The only issue as to negligence, as the case ultimately developed, was that stated in the first question submitted to the jury:— "Did the gripman stop the tram after striking the plaintiff as quickly as he reasonably could under the circumstances?" Those circumstances, so far as they are in dispute, were, like all other material facts, for the determination of the jury, and, to the extent necessary to support the finding, must be assumed as found in favour of the plaintiff.

The chief ground relied on by learned counsel for the respondents, and, I think, by the Supreme Court, was that the jury had acted on two sets of figures—namely, Peverell's 22½ paces and Denham's best test stop. It was said that the jury had simply deducted the latter from the former, and so arrived at 19 feet as being the excess which the gripman negligently drove. This process, it was said, was an erroneous basis, and the verdict consequently could not be supported. Other considerations appear in the judgments, including appreciations of the evidence itself in respect of probabilities, which I pass by as immaterial in an application of this nature, and also some observations as to the rate of travel after putting on the brakes, which overlook the possibility that the negligence found by the jury might consist, not in the time in which the brake was applied, but in the force with which it was applied in the first instance. In the latter event the checked speed entirely alters the calculation. But the main and really substantial charge of error is the assumed arbitrary adoption by the jury of the two sets of figures. I say "arbitrary adoption," because closely connected with that assumption, is the view that there was no evidence that the car could, in the circumstances of the case, be reasonably stopped within the distance of 47 or 48 feet, or a less distance. Careful examination of the evidence shows that that assumption, which perhaps lies at the root of the matter, is not sustainable.

Peverell's 22½ paces extended from the first mark on the tram track to the last. First there were continuous markings for 15 paces, then a break for 5 paces, and lastly new markings for 2½ paces. He describes the first set as marks apparently made by the heel of a boot, and the last as blood marks. But that is by no means necessarily coincident with the distance from original impact

to stop. The original impact occurred some time before the earliest mark—how long or how far before is left to the tribunal that has to judge of the facts.

And if the testimony of the boy himself, French, Kidd and Fingleton, as to the happenings before the dragging commenced, was accepted by the jury, it is clear the 22½ paces were not assumed by the jury as the total distance occupied by the attempt to stop. Middleton himself says he was first bumped by the middle of the dummy, the knock spun him round and he tried to run across the road again, and then the corner of the tram hit him again. This time he says it spun him right round and caught his foot underneath the tram. It seemed to him his foot dragged along for a good while, and his foot and leg slowly got under the dummy. According to him, therefore, there were two separate impacts, and his account fits in exactly with Peverell's independent observation.

French confirms the appellant. He says:—"The tram struck the boy. It knocked the boy away from the tram in a northerly and westerly way. Before the boy could recover, the tram was on him again" . . . "The tram travelled about three yards between the first and second time it struck the boy. The boy was all but down after the first impact, and then the car caught him again."

Kidd's account is generally of a corroborative character. After some time he heard the boy scream; that is when, as it appeared to Kidd, the wheel passed over the boy's leg; and the tram then pulled up. The point of Kidd's evidence, whatever the precise details may be, is that some appreciable period of time after the first impact, there was a second impact, and after that a scream.

Fingleton's evidence is in the same direction. He adds:—"The boy kept grabbing at tram. His foot gradually worked under the front of dummy."

So there is, notwithstanding the denial of this by the gripman, a clear and strong body of evidence that the boy was struck twice, and in such a manner that the marks described by Peverell commenced some time after the first impact.

Then the gripman Rankin himself admits that he saw the boy 6 or 7 feet away from the dummy running on his track, and that so

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soon as he saw the boy he immediately did all he could to stop the accident, which meant, as he described it, that he at once applied the brakes.

The order of events so far, then, is this :—The gripman's view of the boy on the track, the application of the brakes, the first impact, the impulsion of the boy north and west away from the tram, the boy's dazed endeavour to recover himself and get over the track, the second impact, the gradual drawing under of the boy's leg, the pressure of the heel on the line producing Peverell's markings, the blood marks, the stoppage of the tram. Three yards is French's estimate between the two impacts, but that is independent of any additional distance of brake application the jury may have allotted to the period before the first impact.

Unless we assume the jury were blind to all these obvious considerations, the first branch of the basic assumption of the learned Judges of the Supreme Court on which the supposed fundamental error of the jury was built, must fail.

Further, it is not to be overlooked that the length of Peverell's paces was not measured, but estimated as equivalent to yards. He says each of his paces was "about three feet."

There is nothing in Peverell's evidence, therefore, inconsistent with Fingleton's estimate that, from the time the tram struck the boy until it pulled up, it went 70 to 74 feet, or that from the first mark to the last mark on the track of the boy being dragged was "about 70 feet."

Then, with regard to the supposed adoption of the "Denham best possible test." It is assumed that his evidence necessarily meant that according to experiments a tram length is in all cases the best possible distance. I do not agree that so wide a generalization is the necessary meaning of that evidence or could be derived from it. The trams experimented with were only 39 feet 8 inches in length, some of them were in the ordinary course of travel, and all the experiments were on level ground. Whether the trams—or which of them—were full or empty at the time of the respective tests, we are not informed, nor as to the rate of speed. Nothing but conjecture remains to assist us to a comparison with the Brunswick tram on this occasion. The latter had certainly different

conditions—greater length, greater weight, and an up-grade of track, also, possibly, different momentum, loading and wind conditions. Without clear demonstration it is attributing to the jury, in my opinion, too great a want of ordinary sense and experience to assume that they lost sight of these variations actual and possible, and jumped at once to the conclusion that in all conceivable circumstances of trams, loading, speed, weather and grade, the best possible stop for a Brunswick tram was 47 feet 9 inches.

And when we come to apply the actual figures suggested, they do not fit. Peverell's 22½ paces, assuming each measured exactly 3 feet, would be 67 feet 6 inches; the car length was exactly 47 feet 9 inches—leaving a difference of 19 feet 9 inches. The jury said "6⅓ yards," showing a desire for fractional precision. But that ignores the 9 inches. Conjecture that is compelled to alter the very figures necessary to the assumption it makes is doubly frail.

Setting aside, then, this groundwork, two ordinary questions present themselves. Is there evidence upon which the jury could reasonably find that the gripman was in fault either as to the time within which he applied the brakes, or the force with which he applied them?

As to time, which in substance is the aspect exclusively considered by the Supreme Court, I need say nothing, because we may start with the position which the jury may very well have taken—that the gripman commenced to put down the brakes practically as soon as he saw the boy. They may have arrived at this conclusion especially in view of the withdrawal of all charge of negligence before the impact.

But, then, did the gripman at the beginning do all in the way of *force* that he reasonably could? This is a point of importance, and Mr. *McArthur* did not fail to observe it. He certainly touched it, but I am not able to dispose of it so lightly as he invited us to do. I have already referred to Kidd's evidence as to the boy's scream after the second impact. Fingleton says:—"When the boy screamed the brakes appeared to go harder. The gripman first put on the brakes, then looked over the side of the tram, and when the boy screamed the gripman put the brakes on harder."

Now, that is an extremely material point in the evidence. The

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jury may well have believed that the gripman, seeing the boy running across, had put down his brake, to meet the emergency, to some extent but not to the full. That by no means attributes—as learned counsel for respondents argued an adverse finding must attribute—callousness or disregard of ordinary humane feelings on the part of the gripman, but he may have thought he had sufficiently slowed down to permit the boy at the rate he was running to get clear. Then the jury may have thought that the boy, struck but unhurt, struggled to get clear but failed, and after the second impact became entangled and got under the tram and screamed. The gripman, they may have believed from Fingleton's evidence, looked over the side, to see what had become of the boy, expecting him to have escaped, but, on the instant, hearing him scream, put the brakes down still harder, and so continued to the end. If the jury took that view, it is plain they may have considered the gripman carelessly took some unnecessary chances of the boy getting clear, instead of making as sure as he could at once by the firmest brake pressure available.

The gripman Rankin, it is true, stoutly swears he applied the brakes to the full from the beginning. But between the gripman and Fingleton, who was a disinterested witness as well as an apparently observant man, the jury could choose, and if they believed the latter, his evidence is perhaps the key to the whole matter.

In choosing between the two, there was some distinct and consistent evidence which materially bore on the question of reliability. First of all, the gripman Rankin himself describes his attitude of preparation. He was about to pass the approaching tram, and says :—" You have to keep your hand on the brake handle to be prepared for any emergency such as a person coming from behind a car passing. You have one hand on brake and one hand free." In other words, he had, as usual in such a case, to be specially alert; and there is no reason why the jury should not have thought the appearance of a little boy on the track, in the position indicated, called for the instant application of the fullest brake power possible, just as much as the word " stop " in an experiment. The gripman's asserted action, indeed, substantially admits so much.

But if he had done so at once, within what distance would the

tram have pulled up? Rankin swore he stopped in 35 feet. He had made out a form and put in the distance—evidently an official report at the time. He is an experienced man—a gripman for 18 or 19 years, and all the time on the Brunswick line. He says he is a good judge of distance; he gives a margin of a foot or two either way. But, whatever may be said as to his error in the actual distance that day, his statement that he had pulled up in 35 feet, and that that was a good stop, is certainly some evidence that in such circumstances 35 feet may be regarded as a "good stop," and not an extravagantly short distance for such an emergency. Smith, with 22 years' experience, speaks of 40 feet as a very good stop. From him the jury might think a few feet more might be a fair stop in such a case. Neither of them swears, nor does any other person assert, that 60 or 70 feet would be a reasonable or any ordinary distance. Coming after the evidence of the plaintiff's witnesses as to the actual distance travelled, the silence of the defendants' witnesses on this point is important.

But more than that: Peverell, a police constable, and formerly a gripman for 12 months besides other 3½ to 4 years' experience on the trams, says:—"I think the tram should have been pulled up in a little over half the distance, about 35 feet." He says "about 35 feet." Scholes, a tram conductor on the Brunswick line, in charge of the tram that passed, and therefore in possession both of general experience and of the special circumstances of the moment, says:—"39 feet would be a very fair stop."

In these circumstances, the jury, taking all things into consideration, may, with great reasonableness as it seems to me, have preferred to believe the view conveyed by Fingleton that the full pressure was not applied at the beginning when it should have been. With the necessary alteration of one word, the jury may have considered, and evidently did consider, that the test applied by the Privy Council in a case of sudden peril (*The "Utopia"* (1))—viz., whether Rankin "acted with that care and skill which might reasonably be expected of a competent gripman"—should be answered in the negative.

In my opinion, therefore, the jury cannot be held to have failed

(1) (1893) A.C., 492, at p. 501.

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in doing their judicial duty, and the verdict cannot be set aside as being against the weight of evidence.

Learned counsel for respondents raised a question as to the damages. He said that as the injuries to the appellant may have resulted, in part at all events, from those acts of the respondents which preceded the 19 feet of excess, the appellant was bound to give some evidence to discriminate between those injuries and the injuries resulting from the negligent 19 feet.

It is true that the respondents are not to be held responsible except for their actionable negligence, on the rules laid down in *Nitro-Phosphate Case* (1) and *Workman* v. *Great Northern Railway Co.* (2).

But, where the evidence for the plaintiff, if believed, is sufficient not only to establish liability, but also to enable a jury with reasonable certainty, if they so conclude, to attribute to the defendant's wrongful conduct as an effective and proximate cause the injuries complained of, the plaintiff has so far discharged his burden of proof; otherwise he might be left without redress against an admitted wrongdoer. The onus then is on the defendant—unless he can succeed in satisfying the jury upon the plaintiff's evidence—to negative the inference of his total responsibility, or to distribute the damage arising by showing, if he can, that the damage accrued, or must in any case have accrued, wholly or partly from some other cause. See, for instance, *Dodd* v. *Holme* (3). Here the presence of the blood marks for the last few feet might reasonably lead the jury to the conclusion that the substantial and permanent injuries sustained by the appellant occurred wholly within the limits assigned as excess.

In my opinion, therefore, this appeal should be allowed.

With regard to the point taken for the appellant that there is no power given by sec. 133 of the *County Court Act*, in such a case as this, to direct a new trial before the Supreme Court, the question does not now call for actual decision, but, as at present advised, I am not prepared to assent to it.

RICH J. I have had an opportunity of reading the judgments

(1) 9 Ch. D., 503, at p. 519. (2) 32 L.J.Q.B., 279.
(3) 1 A. & E., 493.

which have just been delivered, and have nothing to add. I agree that the appeal should be allowed.

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Appeal allowed. Order appealed from discharged with costs. Order of the County Court Judge refusing a new trial, and verdict and judgment in that Court on the trial, restored. Respondent company to pay costs of appeal.

Solicitors, for the appellant, *A. E. Jones.*

Solicitors, for the respondents, *Malleson, Stewart, Stawell & Nankivell.*

B. L.

[HIGH COURT OF AUSTRALIA.]

THE MERCHANT SERVICE GUILD OF AUSTRALASIA . . . . . CLAIMANT;

AND

THE NEWCASTLE AND HUNTER RIVER STEAMSHIP CO. LTD. AND OTHERS RESPONDENTS.

[No. 1.]

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MELBOURNE, *June* 6, 9, 10, 11, 12, 13, 16, 23, 25, 26.

SYDNEY, *Sept.* 4.

Barton A.C.J. Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ.

Industrial Arbitration—Case stated by President of Commonwealth Court of Conciliation and Arbitration—Question arising in the proceeding—Propriety of President sitting on determination of question—Question of law—Opinion of President—Facts to be stated in case—Inferences of fact—Jurisdiction of Commonwealth Court of Conciliation and Arbitration—Threatened, impending or probable dispute—Power to arbitrate—Conference—Parties not summoned—The