[HIGH COURT OF AUSTRALIA.]

THE CHIEF COMMISSIONER FOR RAILWAYS AND TRAMWAYS (NEW SOUTH WALES) . . . . . DEFENDANT, } APPELLANT;

AND

BOYLSON . . . . . PLAINTIFF, RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1915.

SYDNEY, *April* 1, 7, 8.

Griffith C.J., Isaacs, Gavan Duffy and Rich JJ.

Negligence—Railway—Level crossing—Neglect to look before crossing—Damages—Fatal accident—Prospective loss—Evidence—Compensation to Relatives Act 1897 (*N.S.W.*) (*No.* 31 *of* 1897), *sec.* 4.

A person who is injured while passing over a level crossing on a railway is not guilty of contributory negligence merely by reason of the fact that he did not look before attempting to cross it, if, had he looked, he would have seen nothing which should have led him to think that it was unsafe to cross.

In an action under the *Compensation to Relatives Act of* 1897 (N.S.W.) to recover damages on behalf of a relative of a deceased person it is sufficient to prove a prospective pecuniary loss by that relative.

Taff Vale Railway Co. v. *Jenkins*, (1913) A.C., 1, followed.

Decision of the Supreme Court of New South Wales: *Boylson* v. *Chief Commissioner for Railways*, 14 S.R. (N.S.W.), 220, affirmed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by Francis Boylson, administrator of the estate of Mary Ann Boylson, deceased, on behalf of Eleanora May Boylson, May Boylson and Marcella Boylson, children of the deceased, against the Chief Commissioner for Railways and Tramways of New South Wales

H. C. OF A. 1915.

CHIEF COMMISSIONER FOR RAILWAYS AND TRAMWAYS (N.S.W.) v. BOYLSON.

to recover damages in respect of the death of the deceased, which was alleged to have been caused by the negligence of the defendant.

The deceased was on 15th July 1913 a passenger by a down train from Sydney which arrived at Beecroft station about 6.30 p.m. She alighted there, and while passing over a level crossing to the opposite side of the railway line was run down by an up train and killed.

The action was tried before a jury, who were asked the following questions, and gave the answers following them :—

1. Was the action caused by negligence on the part of the defendant's servants ? Answer: Yes. Blame is attachable to the neglect of the officer in charge in not giving warning to passengers of approaching train.

2. Was the deceased guilty of negligence which contributed to the accident ? Answer : No.

3. After the deceased put herself in a position of danger, could the accident have been avoided by the use of ordinary care on the part of the driver and fireman ? Answer : No. Considering excessive speed it would be impossible for driver to avoid the accident.

The jury awarded £225 damages to Eleanora May Boylson, £225 to May Boylson, and £300 to Marcella Boylson.

It appeared from the evidence that the deceased was the principal of a successful and improving school ; that the three daughters had their home at the school ; that Eleanora May and Marcella assisted their mother ; that at the time of the accident May Boylson was working as a governess and living away from the school, but sent all her earnings to her mother, from whom she received what money she required, and she intended, when the profits at the school were sufficient, to return to her mother ; and that the death of the mother broke up the school.

The defendant moved by way of appeal to enter a nonsuit or a verdict for the defendant, or for a new trial, but the Full Court dismissed the appeal : *Boylson* v. *Chief Commissioner for Railways* (1).

From that decision the defendant now appealed to the High Court.

(1) 14 S.R. (N.S.W.), 220.

The other material facts are stated in the judgment of *Griffith* C.J. hereunder.

Ralston K.C. and *C. E. Weigall*, for the appellant.

Carlos and *John Hughes*, for the respondent, were not called upon.

During argument reference was made to *Stubley* v. *London and North Western Railway Co.* (1); *Bilbee* v. *London, Brighton and South Coast Railway Co.* (2); *Skelton* v. *London and North Western Railway Co.* (3); *Wakelin* v. *London and South Western Railway Co.* (4); *Fraser* v. *Victorian Railways Commissioners* (5); *Commissioner of Railways* v. *Leahy* (6); *Curtin* v. *Great Southern and Western Railway Co. of Ireland* (7); *Davey* v. *London and South Western Railway Co.* (8); *Halsbury's Laws of England*, vol. XXI., p. 448; *Cliff* v. *Midland Railway Co.* (9); *Macleod* v. *Edinburgh and District Tramways Co.* (10); *Grand Trunk Railway* v. *McAlpine* (11); *Hull* v. *Great Northern Railway Co. of Ireland* (12); *Indermaur* v. *Dames* (13); *Cavalier* v. *Pope* (14); *Norman* v. *Great Western Railway Co.* (15); *Latham* v. *R. Johnson & Nephew Ltd.* (16); *Bolch* v. *Smith* (17); *Gallagher* v. *Humphrey* (18); *Elliott* v. *Chicago, Milwaukee and St. Paul Railway Co.* (19); *Railroad Co.* v. *Houston* (20).

GRIFFITH C.J. So far as regards the question of negligence on the part of the defendant, I think that there was abundant evidence. It is not necessary to refer to it in detail. I need only mention the position of the station close to a deep cutting, the curve in the line, the speed of the train, the darkness of the night, the absence of whistling or other warning. These matters,

(1) L.R. 1 Ex., 13, at p. 18.
(2) 18 C.B. (N.S.), 584.
(3) L.R. 2 C.P., 631.
(4) 12 App. Cas., 41.
(5) 8 C.L.R., 54.
(6) 2 C.L.R., 54, at p. 61.
(7) 22 L.R. Ir., 219.
(8) 11 Q.B.D., 213.
(9) L.R. 5 Q.B., 258.
(10) (1913) Ct. Sess., 624.
(11) (1913) A.C., 838.
(12) 26 L.R. Ir., 289.
(13) L.R. 1 C.P., 274.
(14) (1906) A.C., 428, at p. 432.
(15) (1914) 2 K.B., 153.
(16) (1913) 1 K.B., 398.
(17) 7 H. & N., 736.
(18) 6 L T. (N.S.), 684.
(19) 150 U.S., 245.
(20) 95 U.S., 697.

H. C. OF A. 1915.

CHIEF COMMISSIONER FOR RAILWAYS AND TRAMWAYS (N.S.W.) v. BOYLSON.

Griffith C.J.

when taken in conjunction, afford ample evidence to justify the jury in coming to the conclusion that the defendant was guilty of negligence.

With respect to the main point, that the deceased was guilty of contributory negligence in not looking to see whether a train was coming before she crossed the line, I will mention some facts which appear from the evidence. The distance from the point from which she started to cross the line on the road provided by the defendant for that purpose, and which he invited her to use, to the point where she was struck by the engine was about five yards. At the rate at which she would probably be walking on such a night, it would have taken her at any rate seven or eight seconds to walk that distance. The engine-driver says that when he passed the distance signal, which is sixty-three yards from the crossing, the train was travelling at the rate of twenty miles an hour, or about ten yards in a second. Allowing for the slowing down over the short distance of sixty-three yards, the train must, in the seven or eight seconds during which the deceased was walking over the crossing, have travelled at least fifty or sixty yards, and must have been at least that distance from her when she started. At that distance, owing to the nature of the ground, the engine would have just come into view around a curve from a deep cutting. Assuming that the deceased had then looked, she might or might not have been able to distinguish the head lights of the train. Under these circumstances—without in any way infringing the rule that it is the duty of a person about to cross a railway line on which trains are running to look before crossing, and that, whether he looks or not, he is to be treated as having all the knowledge that he would have acquired by looking—it is sufficient to say that there was evidence which would justify the jury in finding that if she had looked before leaving the end of the platform, and after she had an open view of the line, she would not have heard or seen anything to lead her to think that the train was so near as to make it unsafe for her to set out upon the short distance of twenty-one feet across the lines; and that while she was picking her steps in the dark the train, owing to its excessive speed, came suddenly upon her. If that was so, she was not guilty of any negligence which con-

tributed to the accident. If she did not look, her omission to look did not contribute to the accident, because if she had looked she might reasonably have thought it safe to cross. There was also positive evidence to the same effect. One passenger had already crossed before the deceased started. Another, who lived in the neighbourhood and was familiar with the station and its conditions, deposed that when he saw the deceased on the up line he thought she had plenty of time to cross. Under these circumstances I am of opinion that the jury were justified in finding that the deceased was not guilty of any negligence which contributed to the accident.

With respect to the subsidiary point, whether Miss May Boylson suffered any pecuniary loss by reason of the death of her mother, it is sufficient to refer to *Taff Vale Railway Co.* v. *Jenkins* (1) as an authority for the proposition that it is not necessary that there should be an immediate pecuniary loss, but that a prospective pecuniary loss may be taken into consideration. There was ample evidence to warrant the jury in finding that there was in her case a prospective pecuniary loss.

For these reasons I am of opinion that the appeal fails, and should be dismissed.

ISAACS J. I agree that the appeal fails. For myself I think it sufficient to say that there was ample evidence to justify the jury in finding that the defendant was guilty of negligence, and also that the deceased was not negligent, or, if she was, that her negligence did not contribute to the accident.

I also think that there was sufficient evidence from which they could find that Miss May Boylson had a reasonable expectation of pecuniary advantage if her mother had not been killed.

GAVAN DUFFY J. I think that the appeal should be dismissed. The jury have found that the accident was caused by the negligence of the defendant and that the deceased was not guilty of contributory negligence. I think that there was ample evidence to justify both findings. I also agree that Miss May Boylson was entitled to the share of the damages assessed for her by the jury.

(1) (1913) A.C., 1.

H. C. OF A. 1915.

CHIEF COMMISSIONER FOR RAILWAYS AND TRAMWAYS (N.S.W.) v. BOYLSON.

RICH J. I agree that there was evidence to support the findings of the jury as to negligence on the part of the defendant and the absence of negligence on the part of the deceased. I also agree that prospective loss accrued to Miss May Boylson from the death of her mother.

Appeal dismissed with costs.

Solicitor, for the appellant, *John S. Cargill.*
Solicitor, for the respondent, *T. J. Purcell.*

B. L.

[HIGH COURT OF AUSTRALIA.]

KELLY . . . . . APPELLANT;
DEFENDANT,

AND

KELLY AND OTHERS . . . . . RESPONDENTS.
PLAINTIFFS AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1915.

SYDNEY, *April* 20.

Griffith C.J., Isaacs and Rich JJ.

Will—Construction—Gift to persons living at a certain time—Exception of person not then living—Implication of gift to person then deceased.

A testator gave part of his estate "upon trust for all my brothers and sisters living at the date of this my will . . . and who shall survive me and the children or child living at the time of my death of every such brother or sister of mine (living at the date of this my will) who shall predecease me (except the children of my deceased brother G.C.K. who are otherwise well provided for) . . . as tenants in common in equal shares as between brothers and sisters but so that the children collectively of any such deceased brother or sister of mine if more than one shall take equally between them