REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1915.

[HIGH COURT OF AUSTRALIA.]

CASHMORE . . . . . APPELLANT;
PLAINTIFF,

AND

THE CHIEF COMMISSIONER FOR RAILWAYS AND TRAMWAYS (NEW SOUTH WALES) . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 8, 9, 15.

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

Negligence—Action for personal injury—Contributory negligence—Railway—Passenger protruding his arm from window of railway carriage—Injury to arm by open door of passing train.

The fact that a passenger in a railway train protrudes his arm from a window of the carriage in which he is travelling is not of itself negligence on his part which disentitles him to recover damages for injury to his arm which is caused by its being struck by the door of a passing train negligently left open, and which, but for his arm being so protruded, he would not have received; but it is a question for the jury whether, in so protruding his arm, he failed to take such care to avoid danger from passing objects as was reasonable in the circumstances.

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Decision of the Supreme Court of New South Wales: *Cashmore* v. *Commissioner for Railways*, 14 S.R. (N.S.W.), 61, reversed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by William Cashmore against the Chief Commissioner for Railways and Tramways of New South Wales to recover damages for injuries to the plaintiff's arm received when he was travelling as a passenger in a railway carriage, and alleged to have been caused by the arm having been struck by the door of a passing train which had negligently been left open. The action was tried by a jury, who found a verdict for the plaintiff for £100. The verdict was a general verdict for the plaintiff, but, in answer to a question put to them by the learned Judge, the jury found that the plaintiff's elbow was outside the window when it was injured. The defendant moved to set aside the verdict, and to enter a verdict for the defendant or for a new trial. On the hearing of the motion, the Full Court ordered that the verdict should be set aside, and that a verdict should be entered for the defendant: *Cashmore* v. *Commissioner for Railways* (1).

From that decision the plaintiff now, by special leave, appealed to the High Court.

Other material facts are stated in the judgments hereunder.

Ralston K.C. (with him *Pitt*), for the appellant.

Lamb K.C. (with him *Pickburn*), for the respondent.

During argument reference was made to *Beven on Negligence*, 3rd ed., pp. 988, 989; *Gee* v. *Metropolitan Railway Co.* (2); *King* v. *Victorian Railways Commissioners* (3); *Bridges* v. *North London Railway Co.* (4); *Municipal Tramways Trust* v. *Buckley* (5); *Grand Trunk Railway Co. of Canada* v. *Barnett* (6); *Balmain New Ferry Co. Ltd.* v. *Robertson* (7); *Grand Trunk Railway Co.* v. *McAlpine* (8); *Marriott* v. *Yeoward*

(1) 14 S.R. (N.S.W.), 61.
(2) L.R. 8 Q.B., 161.
(3) 18 V.L.R., 250; 13 A.L.T., 293.
(4) L.R. 7 H.L., 213.
(5) 14 C.L.R., 731, at p. 737.
(6) (1911) A.C., 361.
(7) 4 C.L.R., 379, at p. 386.
(8) (1913) A.C., 838, at p. 844.

Brothers (1); *Fletcher* v. *Commissioner of Railways* (2); *Todd* v. *Old Colony and Fall River Railroad Co.* (3); *Dun* v. *Seaboard and Roanoke Railroad Co.* (4); *Tuff* v. *Warman* (5); *Butler* v. *Manchester, Sheffield and Lincolnshire Railway Co.* (6); *Burdick's Law of Torts*, 3rd ed., p. 425.

Cur. adv. vult.

The following judgments were read :—

GRIFFITH C.J. The plaintiff while travelling as a passenger on the defendant's railway between Sydney and a suburban station sustained injury to his elbow from the impact of some object attached to a train passing in the opposite direction. The circumstances under which the injury was sustained are peculiar. The plaintiff was riding in a car having a passage running through it from end to end, access to the car being obtained by doors opening on to platforms at the ends. He was sitting with his face towards the engine at the window of a small compartment at the rear of the car on the right hand side, containing only one seat. Just outside the window, three or four inches above the sill, was a small iron bar running across the opening. It is suggested that it was originally one of three bars, such as are used to prevent exit through the windows of railway carriages, and that the two upper bars had been removed to avoid certain dangers which experience had shown to be incident to the prevention of egress by the window in case of accident. The position of the bar was such that a passenger might lay his arm upon the sill below and inside the bar, or upon the bar itself. The outer edge of the sloping window-sill projected for a further distance of two or three inches.

When the other train passed that in which the plaintiff was riding, the side doors of three compartments in it had by some means become unlatched, and were open and swinging backwards but were prevented from swinging further than ninety degrees by leather straps. As the train passed, sounds were heard as of some object striking the plaintiff's car and the one immediately in front

(1) (1909) 2 K.B., 987.
(2) 7 N.S.W.L.R., 251.
(3) 89 Mass., 207; 83 Am. Dec., 679.
(4) 49 Am. Rep., 388.
(5) 5 C.B. (N.S.), 573.
(6) 21 Q.B.D., 207.

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of it. When the train had passed it was found that the plaintiff's right arm had been struck by some object which had lacerated the muscles of the outer side of the arm, entering about three inches below the elbow and tearing its way onwards to the point of the elbow. Two or three days afterwards a small iron screw, about three-quarters of an inch in length, was found completely embedded in the tissues of the joint. The distance between the two lines of rail, the width of the car in which the plaintiff was riding and the dimensions of the passing car and of its swinging door were such that, allowing for the greatest lateral oscillation that could be obtained by experiment, there would be a space of a little more than two inches between the edge of the door and the outer edge of the window-sill of the plaintiff's car. The extremity of the handle bar, if in a horizontal position, would extend a little further. It must be taken to be an established fact that by some means some part of the swinging door actually came into contact with the plaintiff's arm and caused the injury complained of.

A door, said to be one of those which were swinging, was produced at the trial. On examination it appeared that the lock was let into the framework of the door through the outer edge in the usual manner, and that on the inside of the door, opposite the spindle of the handle, was a small metal plate, four or five inches long, fastened with two screws to the woodwork, the screws being apparently of about the same size as that found in the plaintiff's elbow. The purpose of this plate seems to have been to strengthen the attachment of the lock to the door. Apparently, therefore, the immediate cause of the accident was that the handle of the swinging door had during an unusually great oscillation struck some part of the train in which the plaintiff was riding, with the result that the small plate I have spoken of was wrenched from its place so as to project outwards with one of its screws still in it, and that this projecting object struck the plaintiff's arm, with the result already stated. Two other passengers in the plaintiff's train had their arms injured by swinging doors.

The defendant contends that under these circumstances the plaintiff's arm must necessarily have been outside the window,

since otherwise, he says, it could not have been reached by such a projection, and evidence was given to that effect. He did not dispute liability for negligence if the plaintiff's arm was within the line of the window, but relied on the defence of contributory negligence, which he contended was established by the mere fact of the arm being outside. The plaintiff denied that his arm was outside the window, but the jury in answer to a question put to them by the trial Judge found that it was. The Supreme Court held that this was conclusive evidence of contributory negligence, and entered a verdict for the defendant. Some American decisions were cited in which that doctrine has apparently been laid down, but on examination it appears that in each of them the facts were such as to show that to protrude any part of the body from a train passing along the line in question would, under the actual conditions of the line, have been to incur an obvious danger. I am unable to accept the proposition put to us by Mr. *Lamb* that if a passenger in a train protrudes a part of his body outside the window—it may be for the purpose of flicking ash from the end of his cigar, or some other equally innocent purpose—he is making an unauthorized use of the carriage in which he rides, and is, therefore, so far as regards an accident owing to that unauthorized use, in no better position than a trespasser. In my opinion, a passenger on a railway has implied authority to make such use of the open window of a carriage as is reasonable and usual under the circumstances. For instance, I do not think that an infant with its hands resting on the outer edge of the window-sill can be said to be making an unauthorized use of the carriage. But the passenger while making a permitted use of the carriage is bound to take such care and observe such caution as a reasonable person would take and observe for the purpose of avoiding any risks that may be reasonably expected or anticipated. What these risks are depends, in my opinion, upon the circumstances. There are in Australia thousands of miles of single-line railways on which the probability of injury being done to a passenger, who has his hand or arm out of window, from being struck by a passing train or other object passed by his train would be infinitesimal.

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There are other places on other lines in which the danger of such an accident would be obvious.

In my judgment, therefore, the question in this case, so far as regards the defence of contributory negligence, was whether the plaintiff failed to take such care to avoid danger from passing objects as was reasonable under the circumstances. Before answering that question, the jury had first to satisfy themselves as to what he actually did. They found that his arm was outside the window—that is, as I understand their answer, not wholly inside. They may have thought that his elbow was, not projecting outwards at right angles or nearly right angles to the window-sill, as suggested by the defendant, but lying along the top of the bar already described, in which case the outer part of his arm would have been outside the window. If they thought so—and, indeed, wherever they thought the plaintiff's arm was—they had next to consider the question whether having his arm in that position, whatever it was, was a failure to take the reasonable care that a passenger in such circumstances ought to take. In dealing with this question they had to consider all the circumstances, and in particular the probability of any appreciable risk being incurred by such an exposure as the plaintiff actually made of his arm. If they thought that there was no such risk, they were justified in negativing the alleged negligence of the plaintiff.

The defendant relied also upon a notice which was kept posted in the carriages, by which passengers were requested, in order to avoid accidents, not to put their heads or arms out of the windows. A notice couched in such terms cannot be relied upon as importing a condition of the contract of conveyance, even if proved to have been brought to the actual notice of the traveller. Regarded as a warning of danger of which notice was given, it is only a circumstance to be taken into consideration with all the other circumstances in determining whether the plaintiff was guilty of contributory negligence.

For these reasons, I am of opinion that the jury were at liberty as reasonable men to find upon the evidence that the plaintiff had not been guilty of such want of reasonable care as contributed to the injury.

The appeal should therefore be allowed.

ISAACS J. The single ground upon which the Supreme Court set aside the verdict for the plaintiff, and directed a verdict to be entered for the defendant, is entirely novel in British jurisprudence. Primary negligence on the defendant's part in not properly securing the carriage door of the approaching train, was considered by the Court to have been established, and also that that negligence was a *causa causans* of the injury to the plaintiff's arm.

The obligation of the defendant to prove contributory negligence by the plaintiff was conceded, but it was held that the defendant had satisfied his obligation by reason of one circumstance.

The Court held that where an adult person of ordinary faculties travels in a vehicle, whether train, tram, omnibus, carriage or boat, and in fact protrudes, to any extent whatever, any portion of his body beyond the outer edge of the vehicle, he is thereby, as a matter of law, precluded from complaining of another by whose admitted negligence, however gross, the projecting part of his body has been injured. The mere fact that he projects his arm or foot or head beyond the external line of the vehicle is, as the Court holds, negligence *per se*; and no jury is to be permitted to consider the circumstances and to say it is not. Now, such a doctrine is, as I have said, entirely novel in the annals of British law. If it is a part of the common law of England, one would have expected to see it judicially acknowledged before this. Not only is there no such acknowledgment, but so far as any reported occasion has arisen for its discussion in British Courts, it has been discountenanced.

In *Gee* v. *Metropolitan Railway Co.* (1) *Cockburn* C.J. and *Blackburn* J. in the Court of Queen's Bench, and *Kelly* C.B. in the Exchequer Chamber, clearly thought there was nothing necessarily improper—that is, negligent—in a passenger by train putting his head out of the carriage window; *Martin* B. thought it a matter for the jury, according to the circumstances, and none of the other Judges said anything to the contrary.

(1) L.R. 8 Q.B., 161.

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In *Simon* v. *London General Omnibus Co.* (1) the plaintiff's arm projected from the omnibus, and was thereby injured by being brought into contact with a fire-alarm finger-post. The Court held that there was no proved negligence on the driver's part, because there was no evidence that he either saw or knew of the post. But, said *Bray* J., "if it could have been shown that there was an obstruction of such a nature that with reasonable care the driver ought to have seen it and ought to have realized the fact that it would or might hit a passenger on the omnibus, there might have been evidence of negligence. No such evidence was given, and the appeal therefore failed."

Now, that seems to me, by necessary implication, a recognition of the position that the protrusion of the plaintiff's arm was not *per se* contributory negligence, for otherwise the observations of the learned Judge were not only useless but misleading.

The Victorian case of *King* v. *Victorian Railways Commissioners* (2) is an express decision opposed to the view taken in the judgment now under appeal. The dissenting judgment of *Williams* J. was relied upon for the respondent, not on the point of contributory negligence, but on other points to be mentioned presently.

The rule applicable to such cases is not doubtful. It is to inquire whether the plaintiff, by want of ordinary care, has contributed to his injury; if he has, then he is the author of his own wrong. And when the facts are looked at, if they are found by the Court, having regard to all the circumstances of the particular case, to be such that no reasonable men could find otherwise than that the plaintiff was negligent, and that his negligence was an effective cause of his injury, then the Court should hold as a matter of law that a verdict to the contrary cannot stand. But that is not by reason of any general rule prescribing conduct: it is simply because, as the result of a review of the circumstances of the particular case, reviewed in their totality, it appears that the plaintiff has failed to take ordinary care, and has thereby brought the mischief upon himself.

(1) 23 T.L.R., 463.

(2) 18 V.L.R., 250; 13 A.L.T., 293.

But what is ordinary care? It depends entirely on the circumstances. The nature of the vehicle, its construction, the position of the seats, the height of the window-sill, the position of the bar or bars, the proximity of the route travelled to other objects, stationary or moving, the fact of the journey being in a crowded city or in open country, the weather, the defendant's own conduct, and all the other actual circumstances of the occasion, are relevant to the one consideration, viz.—What would an ordinary prudent person in the position of the plaintiff have done in relation to the event complained of? Would he have anticipated the probability of such an event occurring, and so guarded against it? Or would he have considered it so remote and unlikely as not to be seriously entertained? Would he have relied on the defendant acting differently?

In *Pollock on Torts*, 9th ed., p. 41, it is said:—"If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behaviour we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things."

Now, among the relevant considerations are the known and constant habits of ordinary passengers, and the probable effect upon those habits of the arrangements of the vehicle. Instinctively a person rests his arm upon a ledge beside him, particularly when reading; and instinctively he at times holds his arm at an angle. Comfort is a natural object of solicitude, and carriers of passengers cannot disregard the promptings of human nature. A ledge is to many an invitation to rest the arm upon, and a single bar as in this case, placed as this bar was, may be reasonably regarded by some persons, in the absence of a clear intimation to the contrary, as a sufficient protection to prevent a too extensive protrusion, quite as much as a prohibition against any protrusion whatever. These are all matters of doubt, particularly when it is in the hands of the defendant to remove all doubt by making his own arrangements.

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Now, there was one thing that the plaintiff was certainly entitled, as a passenger of the defendant, to put aside in the first instance as an event which he could not reasonably anticipate. I mean the likelihood of the defendant being so negligent as to imperil the plaintiff's safety by leaving open the doors of an approaching train, coming at a speed which, added to that in which the plaintiff travelled, made impossible any immediate opportunity of seeing and avoiding the danger. The defendant cannot be heard to say that his own negligent disregard of human safety was conduct to be reasonably apprehended by the passengers he undertook to carry.

The lowest ground, therefore, on which it can be put for the plaintiff, is that the jury may consider the circumstances of the moment and say whether, having regard to them all, the plaintiff negligently exposed himself to the danger which overtook him.

It is a question of law what duty of care for his own safety is incumbent on the plaintiff, and the law prescribes the ordinary care of a reasonably prudent man. It is also a question of law whether there is any evidence upon which a jury can find he failed to observe that degree of care. But the law does not prescribe any rigid standard of fact as necessary to conform to the legal duty of ordinary care; and, except in a case so clear that reasonable men could not form different opinions, the question of whether the duty has been observed or neglected is a question of fact and not law.

Mr. *Lamb* referred to some observations in *Beven on Negligence*, 3rd ed., p. 989, and called in aid some American State decisions, notably *Todd* v. *Old Colony and Fall River Railroad Co.* (1), a decision of the Massachusetts Court in 1861, and *Dun* v. *Seaboard and Roanoke Railroad Co.* (2), a decision of the Virginia Court in 1884, both referred to in *Beven*, and some other cases quoted in *Dun's Case*.

The principle insisted on is stated in *Dun's Case* (3) in these terms:—"The protrusion of the limbs of the passengers, even to the minutest distance out of the windows of the car, will be

(1) 3 Allen, 18 (80 Am. Dec., 49); 7 Allen, 207 (83 Am. Dec., 679).

(2) 49 Am. Rep., 388.

(3) 49 Am. Rep., 388, at p. 393.

regarded as necessarily and under all circumstances such contributory negligence on the part of the passenger as will deprive him of all right to claim compensation from the carrier for injuries which may be occasioned thereby, however incautious the latter may have been in guarding against such accidents."

Strangely enough, that case concludes with a declaration of intention to adhere to the doctrine of *Tuff* v. *Warman* (1), by which the plaintiff is disentitled to succeed if by his own ordinary negligence or wilful wrong he contributed to his own hurt.

There is, however, a large body of American opinion to the contrary. The standard work of Judge *Thompson on Negligence*, 2nd ed. (1902), in vol. III., sec. 2972, shows that that doctrine is not universally accepted in America. He himself rejects those views with extremely severe and scathing observations, and regards it as gratifying from a humanitarian standpoint that *some* of the American Courts have supported the doctrine that the question is one for the jury.

Some of the more important of those decisions, including cases not there referred to, may be briefly mentioned:—In 1863, *Spencer* v. *Milwaukee and Prairie du Chien Railroad Co.* (2), a Wisconsin decision; in 1882, *Summers* v. *Crescent City Railroad Co.* (3), from Louisiana; in 1884, *Dahlberg* v. *Minneapolis Street Railway Co.* (4), from Minnesota; in 1889, *Francis* v. *New York Steam Co.* (5); in 1896, *Cummings* v. *Worcester, Leicester and Spencer Street Railway Co.* (6), in which the Court seems to have greatly qualified the rigidity of its earlier decision in *Todd's Case* (7), unless that case is to be limited to the special constructional features of the local railways of the State, as presenting dangers either obvious or to be reasonably anticipated; and finally (1903), *McCord* v. *Railroad Co.* (8), which collects nearly all the authorities on each side, and quotes approvingly many of the above decisions. At p. 223 the Court says:—"In many instances a street car passenger riding with part of his body projecting beyond the line of his car cannot be held, as matter of law, to be guilty of negligence, or to have assumed the risk of contact

(1) 5 C.B. (N.S.), 573.
(2) 84 Am. Dec., 758.
(3) 44 Am. Rep., 419.
(4) 50 Am. Rep., 585.
(5) 114 N.Y., 380.
(6) 166 Mass., 220.
(7) 3 Allen, 18; 7 Allen, 207.
(8) 134 N.C., 53.

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with things outside of the car; and those are questions for the jury."

The learned Chief Justice of New South Wales refers to the case of *Fletcher* v. *Commissioner of Railways* (1) as analogous in principle. It is not necessary to approve or dissent from that case. But should it ever be necessary to consider it and to determine what risks a passenger in such circumstances incurs, it will be useful to refer to the judgment of *Holmes* J. (now a Justice of the Supreme Court of the United States) in *Powers* v. *City of Boston* (2). The eminence of that learned Judge induces me to quote a passage bearing both on *Fletcher's Case* and the present. He says (3):—"So far as the request for a ruling that the plaintiff was negligent was put upon the ground that he was standing on the running board and allowed his person to project beyond the outer edge of the board, there can be no doubt, we think, that the question would be left to the jury in an action against the railroad company."

The reasons for which the verdict was directed to be entered in this case are, therefore, not supportable.

Mr. *Lamb*, however, urged that for other reasons the same judgment should be given.

The first of these was, that from the nature of the contract of carriage it must be taken that the passenger is not authorized to pass the outer edge of the vehicle, and if he does so, he is a trespasser on the defendant's land, and *quâ* that portion of his body so trespassing, the duty of the defendant is not one of diligence, but merely to abstain from wilful injury and to avoid concealed danger: *Barnett's Case* (4). The implication as to the liberty given by the contract, is one of fact arising from the known and permitted conduct of passengers in that situation, and the mutual understanding of the parties resulting from the continued course of conduct and permission. The jury must, if asked, determine it. In this case either they have determined it against the defendant, or the defendant did not raise the issue and cannot do so now. The dissenting judgment of *Williams* J. in *King's Case* (5) was relied on by the defendant upon this point. But, as that learned

(1) 7 N.S.W.L.R., 251.
(2) 154 Mass., 60.
(3) 154 Mass., 60, at p. 63.
(4) (1911) A.C., 361.
(5) 18 V.L.R., 250; 13 A.L.T., 293.

Judge admits (1) that the passenger has a right to rise from his seat and lean out of the window if he likes to do so, though at his own risk, it is difficult to see how his Honor's opinion supports the theory of trespass. And at the same time (2) he concedes that he does not rest upon the American reasoning. The observations of *Holroyd* J. are much more in consonance with the common law.

Then another ground was as to the suggested warning. Clearly it was in no sense a condition of the contract, because there was no evidence that the plaintiff knew or had the means of knowing it before the contract was made. But, said Mr. *Lamb*, it was at least a warning putting the plaintiff on his guard. I think, reading the charge to the jury as a whole, that they found that a man of ordinary eyesight would not be likely to observe it. Its effect even if seen is by no means certain. Complaint was made that the jury were improperly asked to take into consideration the defective vision of the plaintiff. It is not necessary to determine that now, but I am not prepared, without further consideration, to assent to the argument that that course was improper. See *per Tindal* C.J. in *Sarch* v. *Blackburn* (3); *Wright* v. *Lefever* (4).

In my opinion the appeal should be allowed, and the verdict of the jury restored.

GAVAN DUFFY J. I entirely agree with what has just been said, but I think it right to add a few words for myself. Counsel for the defendant put their argument in two ways. First, they say that, as the plaintiff protruded his arm beyond the alignment of the window sash, where under his contract of carriage with the defendant he had no right to place it, the defendant was not bound to take any care to prevent an open door of his passing train from striking that arm, and that even if the door was negligently left open by the defendant's servants, that negligence was no breach of his duty towards the plaintiff. If this defence is open to the defendant on the pleadings—about which I say nothing—he has not secured any finding of fact on which to

(1) 18 V.L.R., 250, at pp. 263-264.
(2) 18 V.L.R., 250, at p. 265.
(3) 4 C. & P., 297, at p. 301.
(4) 51 W.R., 149, at p. 150.

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establish it. The jury have not been asked any question as to the nature or effect of the contract, and, in the absence of any such finding, this Court cannot decide as a matter of law that the contract did not permit the plaintiff so to protrude his arm. They next say that the evidence as to contributory negligence is all one way, and that the jury's finding for the plaintiff on that issue cannot be supported. The jury may have thought that the act of the plaintiff in protruding his arm was not negligent, or they may have thought that the plaintiff would have sustained the injury even if he had not protruded his arm; or they may have adopted both of those views. If the evidence justified one of those conclusions, the plaintiff would still be entitled to hold his verdict. In my opinion, it justifies each and every one of them.

I think that the appeal should be allowed, and the plaintiff's judgment restored.

Appeal allowed. Order appealed from discharged and verdict restored. Motion to set verdict aside dismissed with costs. Respondent to pay costs of appeal.

Solicitor, for the appellant, *R. A. Monro King.*

Solicitor, for the respondent, *John S. Cargill.*

B. L.