[HIGH COURT OF AUSTRALIA.]

THE VICTORIAN RAILWAYS COMMISSIONERS Appellants; Defendants,

AND

HENNINGES . . . . . Respondent. Plaintiff,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. of A. 1917.

Melbourne, *March* 9.

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

Negligence—Verdict of jury—Setting aside verdict—New trial—Misdirection—Case not made at trial—Substantial wrong or miscarriage—County Court Rules 1891 (*Vict.*), *r.* 192.

An action was brought in a County Court of Victoria to recover damages for personal injuries alleged to have been sustained by the plaintiff by reason of the negligence of the servants of the defendants. The defences were that there had been no negligence, and that, if there had been, the plaintiff had sustained no injuries by reason thereof. The jury found a general verdict for the defendants, and a motion for a new trial was refused by the County Court Judge. On appeal the Supreme Court ordered a new trial.

Held, on the evidence, that the County Court Judge had properly refused a new trial.

Decision of the Supreme Court of Victoria reversed.

Appeal from the Supreme Court of Victoria.

An action was brought in the County Court at Melbourne by Rose Ball Henninges against the Victorian Railways Commissioners to recover damages for personal injuries alleged to have been sustained by the plaintiff through the negligence of the defendants' servants.

H. C. OF A. 1917.

VICTORIAN RAILWAYS COMMISSIONERS v. HENNINGES.

The defences taken were that there was no negligence, and that, if there was, the plaintiff had sustained no injuries by reason thereof. The action was heard before a jury, who found a general verdict for the defendants. A motion by the plaintiff to the learned County Court Judge for a new trial was dismissed, but on appeal the Full Court of the Supreme Court by a majority (*Madden* C.J. and *Cussen* J., *Hood* J. dissenting) ordered a new trial. From that decision the defendants now, by special leave, appealed to the High Court.

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

Cussen, for the appellants.

Magennis, for the respondent.

[During argument reference was made to *Ryan* v. *Horton* (1); *Hawkins* v. *Alder* (2); *Vidal* v. *Temperley* (3); *Angus* v. *London, Tilbury and Southend Railway Co.* (4).]

GRIFFITH C.J. This is an action against the appellants for alleged negligence causing injury to the respondent, who was about to be a passenger in their train. The negligence alleged is suddenly driving an engine against a stationary train in which the plaintiff was seated, waiting for the train to start, in such a manner as to cause a bump which threw her off the seat, with the result that she suffered serious injuries, although they were not visible. That was the plaintiff's case. The defendants deny that they were guilty of negligence, and also deny that the plaintiff suffered any injuries from the accident even if it was caused by their negligence. The jury found a general verdict for the defendants. They may have negatived negligence or found that the alleged injuries were not caused by it, or they may have done both. We do not know.

A majority of the learned Judges of the Supreme Court were of opinion that the verdict was against evidence on both points. Whether, if it could be supported on either, a new trial could be granted is an interesting question which it is not necessary to decide.

(1) 12 C.L.R., 197.
(2) 18 C.B., 640.
(3) 20 N.S.W.L.R., 223.
(4) 22 T.L.R., 222.

As to the alleged negligence the facts are these :—An engine while being backed on to the front of the train stopped about three feet from the front carriage. It was necessary then to close that gap. The driver had two possible courses open to him. He could move the engine forward and then again back it on to the train, or by moving his reversing gear a little he could back the engine a little further than its existing position. He elected to adopt the latter course, with the result that the engine struck the train harder than usual so as to cause a bump. The case is put for the plaintiff in this way :—There was a course open to the driver which was perfectly safe, so that, if he had taken it, the accident would not have happened ; he did not take that course, and therefore he was guilty of negligence. But that is not the true way to look at the matter. The question is whether in doing what he did he took such reasonable care as he was bound to take under the circumstances. He swore that what he did was, in his opinion, the natural and reasonable thing to do under the circumstances, and there was no direct evidence to the contrary. But it is said that when two courses are open one of which is certainly safe and the other probably safe, if a man does not take that course which is certainly safe he is guilty of negligence. But that is not so. The question is whether what he did was what a reasonable and prudent man should have done under the circumstances. Supposing that there were 500 chances to 1 against injury happening by taking a particular course, are the jury bound to say that a person who took that course was guilty of negligence because he did not adopt another course ? I think not. There was, therefore, evidence upon which the jury could come to the conclusion that the driver was not guilty of negligence. If so, there is no liability on the part of the defendants.

On the question of damage the plaintiff's case was that she was extremely ill for a long time suffering from neurasthenia, and, if that was so and the defendants were responsible for it, she was entitled to substantial damages. Medical evidence was called to support that view. Medical evidence was also called on the other side, which, if believed, would show that she was not really injured at all by the accident, and that either she was a conscious imposter or her story was unconsciously imaginative. It was for the jury

H. C. OF A. 1917.

VICTORIAN RAILWAYS COMMISSIONERS v. HENNINGES.

Griffith C.J.

to say which evidence they accepted. I am unable to say that they were bound to find that the present state of the plaintiff's health was owing to the bump of the train. The jury saw her in Court, and one of the medical witnesses deposed that, having seen her behaviour in Court and having previously examined her, he was of opinion that her alleged condition was purely subjective and imaginary. Were the jury then bound to accept her story? There is nothing to justify us in saying that they were.

The case was then put in another way. It was said—on the assumption, of course, of negligence—that the plaintiff was in fact thrown off her seat, which must have caused some injury, however slight, and that she had in fact a slight swelling on one knee. That might or might not have been caused by the bump. The jury were not bound to believe that it was. Nothing was made of that point at the trial, and I think it would be a monstrous thing to allow a new trial merely because there was a possibility that if the jury's attention had been drawn to the point they might have awarded the plaintiff a nominal sum for damages. The plaintiff did not, however, put forward any case of that sort. There is no instance in which the Court has granted a new trial on the ground that the verdict is against evidence where the substantial case made by the plaintiff has totally failed, and the suggestion is made for the first time on the new trial motion that the plaintiff was entitled on a different ground to nominal damages. That was not the practice of the Courts in Great Britain, at any rate up to the time of the *Judicature Act*, and, so far as I know, the practice has not been altered since.

Reference was also made to rule 192 of the *County Court Rules*, which provides that a new trial shall not be granted on the ground of misdirection unless some substantial wrong or miscarriage has been thereby occasioned. Even if the plaintiff was technically entitled to a verdict for a small sum, no substantial wrong or miscarriage has been occasioned if she failed on the substantial case she made at the trial. Further, the learned Judge of the County Court expressly told the jury that if the plaintiff suffered any injury at all she was entitled to recover compensation. There is still another objection in the plaintiff's way, namely, that on the

application to the County Court for a new trial no objection was taken to the Judge's failure to call attention to that right of the plaintiff. If it had been taken, the answer would have been that as a matter of fact the learned Judge did call attention to that right.

For all these reasons I have come to the conclusion that the learned County Court Judge and *Hood* J., who agreed with him, were right, and that the appeal should be allowed.

BARTON J. I am of the same opinion, and I do not propose to add anything at length. It is to my mind clear that the jury did not ignore their duty. They might have found the other way, but they were within their constitutional right in finding as they did, because there was evidence on which they might, as reasonable men, so find, and therefore their verdict should not be disturbed.

ISAACS J. I agree in the result, and substantially adopt the reasons given by *Hood* J.

RICH J. I agree.

Appeal allowed. Order appealed from discharged and appeal to the Supreme Court dismissed with costs.

Solicitor for the appellants, *E. J. D. Guinness*, Crown Solicitor for Victoria.

Solicitor for the respondent, *T. Backhouse.*

B. L.