[HIGH COURT OF AUSTRALIA.]

ROEDER . . . . . APPELLANT;
PLAINTIFF,

AND

THE COMMISSIONER FOR RAILWAYS (NEW SOUTH WALES) . . . . . } RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 7, 8; *July* 27.

Latham C.J., Rich, Starke, Dixon and Evatt JJ.

Negligence—Contributory negligence—Railway—Personal injury—Passenger protruding elbow from window of railway carriage—Injury to elbow—Direction to jury—Accuracy—Sufficiency.

If a passenger travelling by train allows his arm to project through a window beyond the line of the outer wall of the carriage, and is injured by contact with some object whose presence is due to the negligence of the railway servants, the question for the jury to decide, under the heading of contributory negligence, is whether in the given circumstances a man paying ordinary reasonable regard to his own safety would not have had his arm out; the question of contributory negligence is not necessarily to be concluded against the plaintiff by reference solely to the fact that his arm was projecting, or the distance to which it was projecting.

A passenger, seated next to an open window in a train, was struck a violent blow on his arm while a goods train was passing in the opposite direction. In an action for damages for negligence brought against the Commissioner for Railways of New South Wales, the trial judge summed up in a manner which in the view of *Rich*, *Dixon* and *Evatt* JJ. conveyed that the question of contributory negligence should be decided against the plaintiff if the plaintiff's elbow was projecting more than one or two inches from the edge of the carriage in which he was travelling and did not explain the considerations upon which the

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question whether projecting the elbow amounted to contributory negligence should be decided, but which in the opinion of *Latham* C.J. and *Starke* J. amounted to a proper and adequate direction upon the question of contributory negligence.

Held, therefore, by *Rich*, *Dixon* and *Evatt* JJ. (*Latham* C.J. and *Starke* J. dissenting), that a new trial should be granted.

Decision of the Supreme Court of New South Wales (Full Court) reversed.

APPEAL from the Supreme Court of New South Wales.

In an action brought in the Supreme Court of New South Wales, William Edward Roeder claimed from the Commissioner for Railways of New South Wales the sum of £2,000 as damages for injuries sustained by the plaintiff whilst being carried as a passenger for reward in a carriage and on a railroad under the management and control of the defendant.

The accident out of which the claim arose occurred on an electric railway train which the plaintiff boarded at Hurstville, at about 9.40 o'clock p.m. on 3rd April 1936, to travel to Oatley. The plaintiff was the holder of a workman's periodical ticket which entitled him to travel at all times. The train consisted of four carriages. Each carriage was comprised of three compartments, that is, one large compartment in the centre and a small compartment at each end of the carriage. The plaintiff was seated in the centre compartment of the last carriage and faced the way the train was going. He was seated next to an open window, outside which was a guard-rail. He said he was resting the point of his right elbow on the guard-rail. A goods train passed the train in which the plaintiff was seated, going in the opposite direction. Whilst the two trains were passing each other he received a violent blow on his right arm which fractured it and caused him serious injury. The evidence of a number of witnesses called by him was to the effect that the blow was very severe and sudden. None of the witnesses called was able to state what it was that struck the plaintiff. The accident occurred either under or near an overhead bridge whilst the trains were in a cutting. The train in which the plaintiff was seated was moving at the rate of about thirty miles per hour and the goods train at the rate of about four miles per hour. The goods train consisted of an

engine and tender, a milk-tank waggon, a number of louvred milk vans, some trucks containing coal, and a guard's van, which also contained passenger compartments. The only persons in the goods train were the train crew. The greater portion of the goods train had, at the time of the accident, passed the position where the plaintiff was seated.

At the hearing of the action an admission was made by the defendant's counsel that each milk van had a double door on each side the halves of which opened outwards, that each half of the door was 2ft. 7in. in width and that, as the trains passed, the distance from the side of the milk vans to the guard-rail on which the plaintiff's arm was resting was 2ft. 7in. According to the evidence of an engineer employed by the defendant, the clearance between the window of the electric train and the milk vans would be 2ft. 5in. and the door of the vans, if opened, would " foul the side of the carriage (in which the plaintiff was seated) by $\frac{3}{4}$in." He also said that the doors of the passenger compartments in the guard's van, if opened, would clear the side of the electric carriage guard-rail by $4\frac{1}{8}$in.

There was evidence that there would be a small amount of oscillation in the electric train whilst travelling at thirty miles per hour.

The plaintiff claimed that he was struck by something projecting from the goods train. He was unable to say what it was that struck him; his case was that he could not have received the blow unless there was something projecting from the goods train. An examination of the goods train almost immediately after the accident revealed that nothing was projecting therefrom and no door was unfastened. The electric train was examined within a short space of time after the accident and no marks were found on it. The defendant claimed that the accident could not have been due to anything connected with the goods train and suggested as an explanation of the occurrence a stone thrown from the overhead bridge. A medical witness called by the plaintiff expressed the opinion that the plaintiff's injuries were more consistent with a " lateral blow " than with a " downward blow " and that they were unlikely to have been caused by an article, such as a stone, having been thrown at the train.

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The trial judge left it to the jury to say whether in all the circumstances, including the warning notice, of which he admitted knowledge, that passengers must keep their arms and bodies inside the train, the plaintiff's conduct amounted to negligence. In answer to a juryman he directed the jury that in coming to a conclusion they should have regard to the distance which they might find the plaintiff's arm to have projected beyond the carriage. The judge then directed the jury as to the legal position which arose if they found that the plaintiff was negligent. He said: "The plaintiff has to show that it was the defendant's negligence which was the real cause of the accident, and if in the course of the evidence it appears that, although the defendant was negligent, the accident would not have happened if it had not been for the plaintiff's own negligence, then the defendant succeeds." Later he said: "The defendant is not responsible for an accident which is due to the plaintiff's own negligence; he is only responsible when the accident is shown to have been directly caused by the defendant's negligence. If the plaintiff contributed to it, if the substantial cause of it was his putting his arm out beyond the line of the carriage, then the plaintiff is responsible and the defendant is not." To those directions no objection was taken. Objection, however, was taken by counsel for the plaintiff to the concluding passage in the summing up, which was as follows:—"Now, I have tried to put before you the varying possibilities of the case and to point out to you that very important consideration in regard to contributory negligence. The plaintiff is not entitled to a verdict if you think that the accident could not have happened but for the plaintiff's own negligence in protruding his arm beyond the line of the carriage." Counsel for the plaintiff asked the trial judge to withdraw from the jury that direction and all the other directions with respect to contributory negligence, and to direct the jury in terms of the decision in *Cashmore* v. *Chief Commissioner for Railways and Tramways* (*N.S.W.*) (1). The judge declined to accede to these requests, and also declined to put to the jury other directions suggested by counsel for the plaintiff.

The jury, by a majority, returned a verdict for the defendant.

(1) (1915) 20 C.L.R. 1.

A motion by the plaintiff for a new trial was dismissed by the Full Court of the Supreme Court.

From that decision the plaintiff appealed, *in forma pauperis*, to the High Court.

Further facts and excerpts from the summing up appear in the judgments hereunder.

Shortland (with him *H. Mitchell*), for the appellant. The jury was misled by the trial judge's summing up and his exposition of the law relating to negligence and contributory negligence as applying to the protrusion by the appellant of his arm. Once initial negligence on the part of the respondent was shown, then the onus was on the respondent to show not only contributory negligence on the part of the appellant, but also that that contributory negligence was a proximate cause of the accident (*Williams* v. *Commissioner for Road Transport and Tramways* (*N.S.W.*) (1)). The question was one for the jury to determine (*Cashmore* v. *Chief Commissioner for Railways and Tramways* (*N.S.W.*) (2)).

[LATHAM C.J. referred to *Tuff* v. *Warman* (3).]

Even assuming negligence on the part of the appellant, he is entitled to recover damages unless he might, by the exercise of ordinary care, have avoided the consequences of the respondent's negligence (*Davies* v. *Mann* (4); *Radley* v. *London and North Western Railway Co.* (5); *British Columbia Electric Railway Co. Ltd.* v. *Loach* (6); *M'Lean* v. *Bell* (7)). The respondent must show that the appellant's negligence was the direct and effective cause of the accident (*Swadling* v. *Cooper* (8)). The consequences of the appellant's neglect, if any, could have been avoided by the exercise of reasonable care by the respondent (*A. G. Healing & Co. Pty. Ltd.* v. *Harris* (9); *Joseph* v. *Swallow & Ariell Pty. Ltd.* (10)). The jury should have been directed that the mere fact that the appellant protruded his arm from the carriage did not amount to negligence

(1) (1933) 50 C.L.R. 258.
(2) (1915) 20 C.L.R. 1.
(3) (1858) 5 C.B. N.S. 573; 141 E.R. 231.
(4) (1842) 10 M. & W. 546; 152 E.R. 588.
(5) (1876) 1 App. Cas. 754.
(6) (1916) 1 A.C. 719.
(7) (1932) 48 T.L.R. 467.
(8) (1931) A.C. 1.
(9) (1927) 39 C.L.R. 560, at p. 566.
(10) (1933) 49 C.L.R. 578.

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on his part (*Cashmore's Case* (1)). The summing up was inaccurate and insufficient and, therefore, misleading.

Bradley K.C. (with him *Kinsella*), for the respondent. The only principle laid down in *Cashmore's Case* (1) is that it is a question for the jury to determine whether or not the plaintiff had been negligent. The evidence does not establish negligence on the part of the respondent. The accident could be attributed to a number of causes some of which have no connection with, and were beyond the control of, the respondent. There was nothing to go to the jury for which the respondent was liable. In strict accordance with the law the trial judge directed the jury of the matters to be considered in connection with the questions of negligence and contributory negligence ; that the jury had to consider all the facts and circumstances, and that the matter was one entirely for the jury. What are proper directions was dealt with in *Swadling* v. *Cooper* (2), and is set forth in *Salmond* on *Torts*, 8th ed. (1934), pp. 484 et seq. Here, the trial judge (*a*) gave a full and proper direction to the jury as to what constitutes negligence, (*b*) dealt fully with all the facts of the case which the jury was required to consider when dealing with those matters, and (*c*) directed the jury properly as to the onus of proof in the case of contributory negligence. A summing up must be considered as a whole, and, so considered, the test is : What observations were conveyed by the judge ? (*R.* v. *Mansfield* (3) ; *R.* v. *Wilson* (4) ; *R.* v. *Sorlie* (5)). Applying that test, the trial judge informed the jury that it had to find (*a*) what was the substantial cause, (*b*) what was the real cause, and (*c*) whose negligence caused the accident. The summing up was amply sufficient ; was not misleading ; and directed the jury's attention correctly and properly to the various matters which had to be considered. At the end of the appellant's case there was not any evidence by which negligence on the part of the respondent could be established (*Hanson* v. *Lancashire and Yorkshire Railway Co.* (6)).

(1) (1915) 20 C.L.R. 1.
(2) (1931) A.C. 1.
(3) (1916) 16 S.R. (N.S.W.) 187, at pp. 194, 195 ; 33 W.N. (N.S.W.) 56, at pp. 59, 60.
(4) (1916) 16 S.R. (N.S.W.) 295, at p. 303 ; 33 W.N. (N.S.W.) 103.
(5) (1925) 25 S.R. (N.S.W.) 532, at pp. 536-539 ; 42 W.N. (N.S.W.) 152, at pp. 153-155.
(6) (1872) 20 W.R. 297.

Even if the principle of *res ipsa loquitur* applied the onus of proof passed to the appellant when the respondent's evidence was tendered (*Davis* v. *Bunn* (1); *Mercer* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (2)). That onus has not been discharged.

Shortland, in reply.

Cur. adv. vult.

July 27.

The following written judgments were delivered :—

LATHAM C.J. The appellant was a passenger on a railway train controlled by the servants of the respondent, the Commissioner for Railways of New South Wales. He was resting his arm on the sill of a window in the carriage in which he was travelling. His arm was struck and broken by some object as another train passed that in which he was sitting. He sued the commissioner for damages for negligence. By a majority the jury returned a verdict for the defendant. The plaintiff moved the Full Court for a new trial, basing his motion upon alleged misdirection of the jury. The motion was refused by a majority decision (*Halse Rogers* and *Milner Stephen* JJ., *Owen* A.J. dissenting) and an appeal now comes to this court.

The plaintiff's evidence was that his arm was resting on the window sill against a bar which ran across the window. In examination-in-chief he said that his elbow did not project beyond the carriage, but in cross-examination he said that it might have projected one or two inches. The train in which he was travelling was travelling at about thirty miles per hour when it was passed by a goods train travelling in the opposite direction at about four miles per hour. As the train passed, the plaintiff's arm was struck a very severe blow by something. The accident happened as the end of the other train passed the plaintiff's carriage. The plaintiff's elbow was dislocated and both the upper and lower arm were broken—the blow being received upon some portion of the lower arm. The actual fracture of the lower arm was three inches below the elbow.

There was no evidence that any object which could have caused the injury entered the carriage, and the evidence as to the carriage

(1) (1936) 56 C.L.R. 246.

(2) (1936) 56 C.L.R. 580, at p. 592.

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itself having been struck was conflicting, plaintiff's witnesses saying that they felt and heard a blow on the carriage, and defendant's witnesses saying that there were no marks or scratches on the side of the carriage. There is little to support the suggestion that the injury was caused by a piece of coal falling from one of the coal trucks on the other train, or by a stone thrown from an overhead bridge. There is no evidence that a piece of coal did fall off or that any stone was thrown. The blow was received as the end of the goods train was passing the carriage in which the plaintiff was travelling, and I agree with the contention for the plaintiff that the evidence was such as to lead very strongly to the conclusion that the plaintiff was struck by a swinging door on the guard's carriage (which included two passenger compartments) at the rear of the goods train, even though a considerable degree of oscillation would be required to make this possible. The learned judge ruled that there was evidence from which the jury could properly draw the inference that the injury was caused by something projecting from the goods train, and that they could find that the defendant was guilty of negligence. In my opinion this ruling was clearly right.

The actual happening of the accident proved that the plaintiff's elbow must have projected beyond the carriage to some extent. This fact was relied upon as evidence of contributory negligence. The questions which arise upon this appeal depend upon the directions of the learned judge upon the subject of contributory negligence.

In the present case there was no room for the application of the doctrine of the last chance. The accident occurred at night, and there is not the slightest suggestion that the plaintiff had any opportunity of avoiding any swinging door or other projection from the goods train. Further, if the plaintiff's protrusion of his arm was an act which amounted to negligence, the defendant, after his initial negligence, had no opportunity, when the peril became imminent, of avoiding the consequences of the plaintiff's negligence. The case must, therefore, be considered independently of the doctrine of the last chance. Indeed, it was not suggested by either party that the jury should be directed with respect to that principle of law.

The result is that the case must be dealt with on the principle of *Tuff* v. *Warman* (1), and not on the principle of *Davies* v. *Mann* (2). In *Tuff* v. *Warman* (3), in a judgment which has always been regarded as of the highest authority, it was laid down that where contributory negligence is in issue the proper question for the jury is " whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened. In the first case, the plaintiff would be entitled to recover, in the latter not ; as, but for his own fault, the misfortune would not have happened." A direction in accordance with this statement must, in the present case, be regarded as accurate.

Under rule 151B of the *Regulae Generales* of the Supreme Court the plaintiff upon the motion for a new trial is limited to the grounds of objection to the directions of the learned judge which were taken at the trial. It is, therefore, important to see exactly what directions were given to the jury and what objections were taken.

In his summing up to the jury the learned trial judge dealt with contributory negligence in the following manner. He said :—" The plaintiff has to show that it was the defendant's negligence which was the real cause of the accident, and if in the course of the evidence it appears that, although the defendant was negligent, the accident would not have happened if it had not been for the plaintiff's own negligence, then the defendant succeeds. . . . The defendant is not responsible for an accident which is due to the plaintiff's own negligence ; he is only responsible where the accident is shown to have been directly caused by the defendant's negligence. If the plaintiff contributed to it, if the substantial cause of it was his putting his arm out beyond the line of the carriage, then the plaintiff is responsible and the defendant is not. It is a matter for you, but it does seem to me that that is a very real dilemma. I find it very difficult to understand how the accident could have happened

(1) (1858) 5 C.B. N.S. 573 ; 141 E.R. 231.
(2) (1842) 10 M. & W. 546 ; 152 E.R. 588.
(3) (1858) 5 C.B. N.S., at p. 585 ; 141 E.R., at p. 236.

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inside the carriage." A juryman asked: "If the plaintiff's arm was protruding, say one or two inches beyond that bar, would that be sufficient to assume negligence on his part?" His Honour: "That is one of the matters you have to decide, gentlemen." His Honour also said:—"If the plaintiff's arm only protruded one or two inches you might not think that negligence—it is a matter for you as to whether you think it was or not. . . . The defendant does not say necessarily that if the plaintiff's arm were protruding one inch or two inches it would be contributory negligence, but he says it is not open to you reasonably to find that on the facts. That is a matter for you." His Honour then re-stated what he described as a very important consideration in regard to contributory negligence in the following words: "The plaintiff is not entitled to a verdict if you think that the accident could not have happened but for the plaintiff's own negligence in protruding his arm beyond the line of the carriage." In later discussion the word "would" is properly substituted for the word "could."

The objection taken was as follows:—"With regard to your Honour's directions to the jury with respect to contributory negligence I am going to ask your Honour formally to withdraw all those directions. Your Honour said if the accident would not have happened but for the negligence of the plaintiff then the defendant is entitled to a verdict—the plaintiff is not entitled to succeed. I ask your Honour to withdraw that direction from the jury. I am going to ask your Honor to direct the jury in terms of the decision in *Cashmore* v. *Chief Commissioner for Railways and Tramways (N.S.W.)* (1) that that is only a very small point to be considered and that the whole of the facts must be considered." His Honour:—"I do not propose to withdraw it. I repeat it. Of course you have to consider all the facts, but if on all the facts you come to the conclusion that the accident would not have happened but for the negligence of the plaintiff himself, then you must find for the defendant." Mr. *Shortland*:—"That is the ruling to which I object. I ask your Honour formally to rule this way to the jury that even if the plaintiff was negligent the plaintiff is entitled to a verdict unless the jury is satisfied that the negligence of the plaintiff

(1) (1915) 20 C.L.R. 1.

and not the negligence of the defendant was the effective cause of the accident." His Honour :—" I am not going to make the matter any more complicated than it already is. I think I have told the jury expressly that they can only find for the plaintiff if the negligence which caused the accident was the negligence of the defendant, but if they find it was the negligence of the defendant which caused the accident then they must find for the plaintiff." Mr. *Shortland* :—" I ask your Honour to direct that even if the plaintiff was negligent the plaintiff is entitled to a verdict unless the jury is satisfied that the negligence of the plaintiff was the effective cause of the accident. I would also ask your Honour to make it clear that the onus of proof of contributory negligence is on the defendant." His Honour (to the jury) :—" On the question of contributory negligence it is for the defendant to satisfy you. If you are left in doubt on that on all the evidence then you give the plaintiff the benefit of that doubt. You find for the plaintiff if you are in doubt about that, just as on the other question, that is, the question of negligence on the part of the defendant, if you are left in doubt by the evidence on that then you give the defendant the benefit of that doubt. But where the defendant sets up contributory negligence, then the onus is on him to satisfy you as to that."

Thus, the learned judge directed the jury in accordance with *Tuff* v. *Warman* (1), and, at the request of the plaintiff's counsel, he added (or repeated) a direction that if the negligence of the defendant and not the negligence of the plaintiff caused the accident they must find for the plaintiff. I agree with the Full Court that the directions given are in accordance with the law.

Another question arises, however, by reason of the request that the learned judge should direct the jury (as it was put) " in terms of the decision of *Cashmore* v. *Chief Commissioner for Railways and Tramways (N.S.W.)* (2)." In that case it was held that the mere fact that a passenger in a train protrudes his arm from a window is not in itself negligence. The contrary had been held by the Full Court of New South Wales. This court held that all the circumstances of the case must be taken into consideration, and attention was naturally directed, in view of the decision of the Full Court, to such

(1) (1858) 5 C.B. N.S. 573; 141 E.R. 231.

(2) (1915) 20 C.L.R. 1.

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circumstances as might be properly taken into account by a jury as tending to show that there was, in a particular case, no negligence in fact in such protrusion (See the passages quoted in the judgment of my brother *Evatt* (1)). These passages, however, do not state any propositions of law. They recite matters of fact which may properly be taken into account by a jury as relevant considerations, and as to all these matters it is added : " These are all matters of doubt " (2). There are other considerations which may also properly be taken into account by a jury in reaching a conclusion whether or not protrusion of an arm or some other portion of the body from a rapidly moving vehicle amounts in a particular case to negligence. Among such considerations may be mentioned the obvious danger of collision with some external object ; the provision of a bar on a window as an indication of and a warning against danger ; warnings against such protrusion (which in the present case were displayed in the railway compartment and were seen by the plaintiff) and the existence of any law prohibiting such protrusion (in the present case there was such a by-law). All these matters are elements which may be taken into account by a jury.

But it does not appear that the request that the jury should be directed in accordance with *Cashmore's Case* (3) referred to such matters as these mentioned. I repeat what was said when *Cashmore's Case* (3) was mentioned. Counsel said : " With regard to your Honour's directions to the jury with respect to contributory negligence I am going to ask your Honour formally to withdraw all those directions. Your Honour said if the accident would not have happened but for the negligence of the plaintiff then the defendant is entitled to a verdict—the plaintiff is not entitled to succeed. I ask your Honour to withdraw that direction from the jury. I am going to ask your Honour to direct the jury in terms of the decision in *Cashmore* v. *Chief Commissioner for Railways and Tramways (N.S.W.)* (3) that that is only a very small point to be considered and that the whole of the facts must be considered." His Honour refused to withdraw, and, in my opinion, for reasons which I have stated, rightly refused to withdraw, the direction in accordance with *Tuff* v. *Warman* (4)

(1) *Post*, pp. 332, 333.
(2) (1915) 20 C.L.R., at p. 9.
(3) (1915) 20 C.L.R. 1.
(4) (1858) 5 C.B. N.S. 573 ; 141 E.R. 231.

to which exception had been taken, and went on to say to the jury : " Of course you have to consider all the facts," &c., as already quoted. The reference to *Cashmore's Case* (1) was made (as *Halse Rogers* J. says) as a basis for asking for the withdrawal of a direction in accordance with *Tuff* v. *Warman* (2). *Cashmore's Case* (1) affords no ground for such a request.

If, however, the reference to *Cashmore's Case* (1) was made for the purpose of urging that the jury should be referred to all or to certain facts or circumstances which they might relevantly take into account for the purpose of determining whether there was negligence on the part of the plaintiff or not, then the request should have been much more distinctly made. Even if it had been distinctly made, I would not have been inclined to agree that a trial judge is bound to put to a jury in such a case as this all the matters mentioned in *Cashmore's Case* (1) as possibly supporting a negative conclusion as to contributory negligence, together (as a matter of fairness) with any other matters which might conceivably be used as a basis for argument to support either a positive or a negative conclusion.

The case for the appellant in this court was argued as if the learned judge directed the jury that protrusion of the arm was necessarily negligent and as if he had been asked to direct the jury that protrusion of the arm was not necessarily negligent and had refused to do so. The record shows that no such direction was given, that no such request was made to the learned judge, and that no such request was refused by him. His Honour explained the facts in great detail and very fully to the jury and said that the real dispute was as to the proper inferences to be drawn from the facts and that " those inferences are a matter for you."

If any part of the summing up meant that the plainly proved fact that the plaintiff's arm was projecting from the window was conclusive evidence of contributory negligence on the part of the plaintiff, there would not have been the slightest necessity for telling the jury again and again that all questions of negligence, whether of plaintiff or of defendant, were matters for them to decide, and the following part of the summing up would have been quite out of place :—" On the question of contributory negligence it is for the defendant to

(1) (1915) 20 C.L.R. 1.
(2) (1858) 5 C.B. N.S. 573 ; 141 E.R. 231.

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satisfy you. If you are left in doubt on that on all the evidence then you give the plaintiff the benefit of that doubt. You find for the plaintiff if you are in doubt about that, just as on the other question, that is, the question of negligence on the part of the defendant, if you are left in doubt by the evidence on that then you give the defendant the benefit of that doubt. But where the defendant sets up contributory negligence, then the onus is on him to satisfy you as to that."

I agree with what *Halse Rogers* J. said in delivering the judgment of the majority of the Full Court except that I substitute " would not have happened " or " occurred " for " could not have happened " or " occurred " :—" The whole matter lay in inference. The learned judge in effect told the jury that the plaintiff's action " (in placing his arm beyond the window) " was relevant only if they regarded it as negligence contributing to the accident, and followed that statement by the direction that if the accident would not have happened but for such negligence the plaintiff could not succeed. On the facts which were presented to the jury I think that was a correct summary of the situation. Assuming the jury found both parties to have been negligent, here was a case of an accident occurring at a moment of continuing negligence on the part of each—the accident would not have occurred but for the negligence of both. The negligence of each was *an* effective cause of the accident. . . . The learned judge did no more than say that if the accident was due to the combined negligence of both parties the plaintiff could not succeed. In my opinion that was not a misleading direction."

Agreeing as I do with these reasons, I am of opinion that the appeal should be dismissed. The majority of the court is of opinion that the appeal should be allowed. As the appeal to this court was *in forma pauperis* the appeal will be allowed without costs.

Rich J. This is an appeal from a decision of the Full Court of New South Wales (*Halse Rogers* J., *Stephen* J., *Owen* A.J. dissenting) by which an application for a new trial was refused. The action was brought by a passenger in a railway train, whose arm was broken by some object by which it was hit as another train passed. His forearm was broken three inches from the elbow and his upper

arm was broken. The jury found a verdict for the defendant, the Commissioner for Railways. The two issues at the trial were substantially (*a*) whether the plaintiff's arm was struck by some door or other object belonging to the passing train, and owing to the negligence of the defendant's servants, (*b*) whether the plaintiff was disentitled by contributory negligence from recovering. A general verdict was taken, and no one can tell whether the jury found against the plaintiff on the first or on the second issue, or on both. The question, what struck the plaintiff's arm, could be answered only by inference from circumstantial evidence. The case for the commissioner was that all the doors of the passing train, which was a goods or mixed train, were shut, that although the louvre doors of some waggons might, if open, have reached across to the train by which the plaintiff was travelling, these vans had passed before the plaintiff was hit; that the doors of the brake van would not reach across even if open; that conceivably some coal might have fallen from a coal hopper, but that none was found on the track. Clearly the jury were at liberty to infer that the arm was injured by a door of the passing train or by some object connected with that train which should not have been able to strike him if due care had been exercised by the defendant's servants in shutting doors and seeing that the passing train was free from projections. It is difficult to discover any other reasonable explanation of the accident unless there was some projection from the passing train or something emanating from that train. It should be added that there were no passengers carried by the passing train. I feel no doubt that the trial judge was right in leaving to the jury the issue whether the plaintiff was struck by something in connection with the passing train owing to the negligence of the defendant's servants. The contributory negligence imputed to the plaintiff consisted in his having his elbow extended through the window by which he was sitting in the railway carriage. The plaintiff in the witness box was reluctant to admit that it projected at all, but it is evident from his injuries that he must be wrong. His appeal to us is based upon the contention that the legal significance of the projection of his arm was presented by the learned trial judge to the jury in a way which would mislead them and was erroneous. The passages in his

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summing up dealing with the question were discussed and re-discussed during the hearing of this appeal. The summing up, so far as it relates to the question, must be read as a whole, and criticisms of the accuracy of particular statements or sentences should not receive effect. But it must be remembered that the cumulative effect of the restatement of the same or similar sets of ideas is the chief source of guidance upon which a jury relies, and if the impression which would be created is one likely to put a jury upon the wrong track, if that expression may be used, or to militate against the probability of their finding the right track, it will be enough to warrant a new trial, particularly where the verdict is not such as upon the particular issue appears to be demanded by the evidence. Now the question how far the protrusion of an arm from a railway carriage window should disentitle its owner from recovering damages if a negligent act or omission on the part of the railway servants leads to its being struck is one of some nicety. According to the decision of this court in *Cashmore* v. *Chief Commissioner for Railways and Tramways* (*N.S.W.*) (1), it is a question for the jury under the head of contributory negligence. What the jury has to decide is whether in the given circumstances a man paying ordinary reasonable regard to his own safety would not have had his elbow out. As is stated by *Isaacs* J. (as he then was) in *Cashmore's Case* (2), if you travel by a train you are entitled to rely on the commissioner taking due care for the safety of the train from all danger attending the journey. The standard of reasonable care is fixed by the common habits of mankind. This applies both ways. Thousands of people travel with their elbow sticking out of the carriage window to some extent. This, I suppose, I am entitled to know from the observation permitted even to a judge. It is a consideration to be weighed in deciding that it is negligence to do it. No doubt also it is one of the many reasons for keeping doors on the off-side of a train closed. What strikes me as the matter for the consideration of the jury was whether, having regard to the duty of the commissioner's servants to look after the doors and other possible projections of passing trains; to the tendency of passengers to project their arms; to the nature of the bar across the window; and to

(1) (1915) 20 C.L.R. 1. (2) (1915) 20 C.L.R., at p. 10.

the kind of damages to be looked for by anyone doing it, protruding an elbow really ought to be held unreasonable conduct amounting to a want of prudence preventing the plaintiff from recovering damages. *Isaacs* J. says this or much the same in *Cashmore's Case* (1). Mr. *Shortland*, on behalf of the plaintiff, at the conclusion of the summing up requested the judge to direct the jury on the basis of that case. The direction which the jury in fact received seems to me to rivet their attention on the question whether the plaintiff is not in the dilemma that he either put his arm out, in which case he was guilty of negligence, or he did not, in which case he could not have been injured as he said. I do not think this was the true issue. It is as nearly certain as a fact can be that the plaintiff had his elbow out some inches. The issue was whether his having it out ought to be found contributory negligence, having regard to all the relevant considerations. His Honour conceded to the jury the right to hold an inch or two inches not to be contributory negligence, but I think that he left the impression that the jury ought to find the plaintiff guilty of contributory negligence if his elbow extended any more, if they ought not to find it in any case. I shall not set out the material passages in the summing up textually. As I have said, I feel more concerned with the total impression which the jury would derive. My conclusion is that it would be unsatisfactory to allow a verdict to stand which may be based on contributory negligence when the jury turned to the consideration of that question under the guidance of the direction I have described.

In my opinion the appeal should be allowed and a new trial ordered.

STARKE J. The plaintiff—the appellant here—brought an action against the defendant—the respondent here—in the Supreme Court of New South Wales founded upon an allegation of negligence on the part of the defendant whereby he sustained injury.

The action was tried with a jury, which found for the defendant, and a motion for a new trial on the ground of misdirection on the part of the trial judge was dismissed by a majority of the learned judges who heard the motion.

(1) (1915) 20 C.L.R. 1.

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Against this decision an appeal is brought to this court. The plaintiff was a passenger on one of the respondent's trains running between Hurstville and Oatley. He was sitting on the right-hand side of a compartment facing in the same direction as the train was travelling. He was seated at the window, which had a bar across it. He opened the window and rested his arm across the bar guarding the window. Another train passed travelling in the opposite direction. The train in which the plaintiff was seated was travelling at a speed of some thirty miles per hour, whilst the other train was travelling at a speed of some three or four miles per hour. As the trains passed one another the plaintiff was struck a violent blow on his arm which broke the forearm about three inches from the elbow, dislocated the elbow, and broke the lower part of the upper arm.

It was suggested at the trial that the plaintiff must have been struck by a swinging door or something protruding from the passing train. But the evidence does not disclose what struck the plaintiff, and the respondent led evidence tending to negative the suggestion made by the appellant. The plaintiff admitted that he had seen notices posted in the respondent's railway carriage warning passengers against protruding any part of their bodies from the doorways or windows of railway carriages. A railway by-law purporting to have been made pursuant to the provisions of the *Government Railways Act* 1912-1930 (N.S.W.) was also proved. It provided:— "Passengers not to lean out of carriage doors or windows. No passenger shall project or lean out his head or other part of his person out of any doorway, window or other aperture of any carriage of the Board of Commissioners and the board shall not be liable for injury which a passenger may sustain in consequence of the non-observance of this regulation" (See Act, secs. 64-68). But it does not appear that the by-law was known to the plaintiff before the accident. It is unnecessary in the view I take of this case to consider the validity of this by-law or its effect upon the rights of the parties.

At the close of the plaintiff's case the learned trial judge ruled that there was a prima facie case of negligence against the defendant to go to the jury. This decision was affirmed on appeal and was, in my judgment, correct. "Inference may be drawn from circumstances just as much as results may be arrived at from direct testimony."

The plaintiff was a passenger in a railway train controlled by the defendant and was struck a heavy blow on the arm while another of the defendant's trains was passing. But it is a legitimate inference in the absence of countervailing evidence that he was struck by something protruding from the passing train which ordinarily would not happen if due care and caution were observed on the part of those controlling the railway (Cf. *Simpson* v. *London, Midland and Scottish Railway Co.* (1)). It was not disputed at the close of the defendant's case that there was evidence fit to be submitted to the jury of negligence on the part of the plaintiff causing or contributing to the accident. The learned trial judge in his charge to the jury first explained the meaning of the term negligence. It is unnecessary to go through the charge in detail, but the following is a summary of the relevant directions. That the defendant was liable to the plaintiff if the jury found that the real cause of the injury to the plaintiff was the negligence of the defendant. That the defendant was not liable to the plaintiff if the jury found that the real cause of the injury to the plaintiff was his own negligence. But he also turned to the case of a combination of negligence on the part of both the plaintiff and the defendant. In *The Bernina* (2) *Lindley* L.J. thus stated the law :—" 3. A is injured by B by the fault more or less of both combined, then the following further distinctions have to be made :—(*a*) if, notwithstanding B's negligence, A with reasonable care could have avoided the injury, he cannot sue B . . . (*b*) if, notwithstanding A's negligence B with reasonable care could have avoided injuring A, A can sue B . . . (*c*) if there has been as much want of reasonable care on A's part as on B's, or, in other words, if the proximate cause of the injury is the want of reasonable care on both sides, A cannot sue B. In such a case A cannot with truth say that he has been injured by B's negligence, he can only with truth say that he has been injured by his own carelessness and B's negligence, and the two combined give no cause of action at common law."

In the present case, if the jury concluded that the injury to the plaintiff was due to a combination of negligent acts or omissions on the part of the plaintiff and the defendant, there was no room

(1) (1931) A.C. 351.

(2) (1887) 12 P.D. 58, at p. 89.

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for the application of the distinctions *a* and *b* mentioned by *Lindley* L.J., for those acts or omissions were contemporaneous, or so nearly contemporaneous as to make it impossible to say that either the plaintiff or the defendant could have avoided the consequences of the other's acts or omissions, or that one had a better or a later opportunity of avoiding the accident with reasonable care (*Swadling* v. *Cooper* (1); *The Eurymedon* (2)).

It was not a case, as in *British Columbia Electric Railway Co. Ltd.* v. *Loach* (3), in which either of the parties had incapacitated himself or itself by previous negligence from exercising such care as would have avoided the consequences of the accident. "In a summing up it is essential that the law should be correctly and fully stated; but it is hardly of less importance that it should be stated in simple and plain terms so that a jury unskilled in the niceties of legal phraseology may appreciate the direction which is being given to them. Such direction should be adapted to the special circumstances of the case. It is not the whole law of negligence that needs exposition in every case, but only that part of it which is essential to a clear understanding of the issue which the jury has to determine" (*Swadling* v. *Cooper* (4)).

It would have been useless and positively misleading in the present case had the jury been instructed to consider which party had the last opportunity of avoiding the accident with reasonable care if the cause of the injury was a combination of negligent acts on the part of the plaintiff and the defendant. The learned trial judge directed the jury that the plaintiff must show that it was the defendant's negligence that was the real cause of the accident, but if on the evidence it appeared that, although the defendant was negligent, the accident would not have happened but for the plaintiff's own negligence, then the defendant succeeded. And in another portion of the charge he added: "The plaintiff is not entitled to a verdict if the accident could not have happened but for the plaintiff's own negligence in protruding his arms beyond the line of the carriage." "Would" was the word used later by both the learned judge and counsel (Cf. *Beven* on *Negligence*, 3rd ed. (1908), vol. I, p. 152).

(1) (1931) A.C. 1.
(2) (1938) P. 41.
(3) (1916) 1 A.C. 719.
(4) (1931) A.C., at p. 10.

The direction to the jury in this case did, I think, sufficiently explain to the jury the considerations to which they had to apply their minds and the law applicable to the facts. The learned counsel for the plaintiff objected to the charge on the ground that it amounted to a direction that it was negligence on the part of the plaintiff if he protruded his arm from the window, and he relied upon *Cashmore's Case* (1). But in this I think he was mistaken: the learned judge gave no such direction, and made it clear that the question whether the plaintiff was guilty of negligence in protruding his arm from the window was one of fact depending upon all the circumstances of the case. The learned counsel also contended that the jury should have been directed that even if the plaintiff had been negligent still he was entitled to a verdict unless the jury were satisfied that the negligence of the plaintiff was the effective cause of the accident. But I do not think that he was entitled to a direction in this form on the facts disclosed in this case. Either the negligence of the defendant or of the plaintiff was the cause of the accident or else the cause was a combination of negligent acts on the part of both the plaintiff and the defendant which neither could have avoided with reasonable care. It was for the jury to determine the cause, and they found for the defendant. Other criticisms of the charge were suggested during the argument. But rule 151B of the *Regulae Generales* of the Supreme Court precludes in my opinion the consideration of these matters.

The appeal should be dismissed.

DIXON J. The circumstantial evidence affords ample support, in my opinion, for the inference that the plaintiff's arm was struck by some object belonging to the passing train. The direct evidence supports the conclusion that, whatever it was, it hit the carriage in which he was sitting. But the evidence of the subsequent examination of the train and the failure to find marks of anything that had scraped along the outside wall of the carriage or had inflicted a violent blow, if accepted, would appear to suggest that whatever hit the carriage wall did so momentarily. It would, in my opinion, be open to the jury to infer that, under oscillation, an open door

(1) (1915) 20 C.L.R. 1.

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of the louvre trucks had touched the carriage where the plaintiff was sitting and had inflicted the injury to his arm, or, if they accepted the evidence that the louvre trucks had already passed, then that one of the shorter doors of the brake van had touched the carriage and inflicted the injury. As an alternative explanation it was suggested that, at the moment when the plaintiff's compartment passed, a large piece of coal had fallen vertically from a coal hopper forming part of the goods train, and that the plaintiff's arm had been carried against the piece of coal as it fell or hit against his carriage. On the whole, I think that the jury was at liberty to adopt the suggestion, if it saw fit, as an explanation consistent with what the jury found to be the facts.

The passing goods train was said to have been moving only at four miles an hour, and the train carrying the plaintiff at about thirty miles an hour. The doors of the brake van of the goods train, if fully open, would, it was said, fall short by four and one-eighth inches of the outside guard-rail of the passenger train, supposing that neither swayed and each travelled perfectly over the centre of the tracks. But, notwithstanding this evidence and evidence of the small lateral swing or oscillation of carriages in motion, the jury might, I think, have adopted the view that for some reason the bodies of the two carriages swung together enough to allow the door of the one to touch or almost touch the side of the other.

For a train to travel with a door swinging or for a large piece of coal to fall against or very close to a passing train from a coal hopper is an occurrence of such a nature that a presumptive inference might be drawn of neglect in securing the door or loading the hopper or in taking some other precaution against the danger. The inference in the case of the coal, no doubt, has less force than in the case of the open door. But that, I think, is a matter for the consideration of the jury.

In my opinion there was evidence upon which the jury might reasonably have found that the injury received by the plaintiff was brought about by the negligence of the defendant's servants. The application to withdraw the case from the jury was properly overruled.

But, although the plaintiff did not admit it, little doubt can be entertained that to some extent his arm projected from the window by which he was sitting. Whatever object caused his injury it did not enter the carriage, and it is reasonably clear that his arm could not have been struck unless some part of it went beyond the line of the wall of the carriage in which he was riding.

The defendant relied upon this consideration as necessarily implying an act of contributory negligence on the part of the plaintiff forming a cause of his injury. The defence of contributory negligence was left to the jury, and it is now impossible to say whether the verdict given for the defendant by the jury arose from a finding of contributory negligence on the part of the plaintiff or from a finding in the defendant's favour on the question whether the injury was occasioned by some neglect by the servants of the defendant.

The plaintiff complains of the manner in which the issue of contributory negligence was dealt with in the charge of the learned judge presiding at the trial, and contends that a finding of contributory negligence arrived at under such a direction ought not to be allowed to stand and that, accordingly, as it is not known whether the verdict is founded on such a finding, a new trial should be ordered.

If the state of facts assumed is that a passenger travelling by train allows his arm or elbow to extend through a window beyond the line of the outer wall of the carriage and is thus injured by contact with some object the presence of which is due to the negligence of the railway servants, it might be thought that the passengers' right to damages could raise nothing but a question of law. But apparently it is regarded as a question of contributory negligence, the decision of which lies with the jury. At first sight the question might seem to depend less on any question of fact than upon the definition of the measure of duty resting upon the railway authority for the care of passengers and upon the definition of the standard of care incumbent upon the passenger to avoid injury from the neglect of this duty by the railway authority. For it is evident that in such a case the injury arises from the concurrence of the two things which are alleged to amount respectively to negligence on the part of the defendant and contributory negligence on the part of the plaintiff. The hypothesis is that the door or other object

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belonging to the passing train does not smash the side or wall of the train in which the passenger is travelling but inflicts injury upon him only because part of his body, his elbow, extends beyond the side of the carriage. So far as causation goes, the act of the passenger in putting his arm outside the window and the default of the railway authority in allowing the projection from the passing train are both necessary conditions of the accident and contribute directly to it in equal degrees. If the duty of the railway authority requires due care to avoid injuring passengers whose elbows are thrust out of windows, it would be absurd to say that to put an elbow out of the window is negligence on the part of the passenger disqualifying him from complaining of the breach of duty.

In the United States the matter was first dealt with in this manner, but the somewhat surprising conclusion was reached that railway companies were under no duty of care to prevent injuries to the limbs of passengers if they extended beyond the side of the vehicle. Afterwards this doctrine was widely displaced in favour of the view that there was a duty of general care for the safety of passengers, and that this duty included the avoidance of any injury from the working of the system which ought reasonably to be anticipated, but that if in all the circumstances of the case the act of the passenger in allowing part of his body to extend beyond the side of the vehicle was unreasonable according to the ordinary standards by which the average man is governed in avoiding dangers to himself, then he ought not to recover. This appears to be the doctrine which found favour with this court in *Cashmore's Case* (1) (See particularly per *Isaacs* J. (2)).

The Commissioner for Railways of New South Wales is declared by statute to be a common carrier of passengers (sec. 33, *Government Railways Act* 1912, as amended). This means that whatever obligations of care for the safety of passengers rest upon common carriers must be fulfilled by the commissioner (*Clarke* v. *West Ham Corporation* (3)). But the duty is only one of reasonable care to prevent injury (*Readhead* v. *Midland Railway Co.* (4)). And what is reasonable care is matter of fact for the jury.

(1) (1915) 20 C.L.R. 1.
(2) (1915) 20 C.L.R., at pp. 8-10.
(3) (1909) 2 K.B. 858.
(4) (1869) L.R. 4 Q.B. 379.

As the authorities stand, I do not think that we are able to deal with the question as one upon which the definition of the commissioner's duty is decisive. That duty must be taken simply as a general duty of care to avoid occasioning to passengers or others in the course of the commissioner's operations harm of a kind against which it is reasonable to guard. The passenger, on his side, is entitled to rely on the fulfilment of this duty, and it does not amount to negligence on his part if he takes no special precautions against dangers which the observance of due care on the part of the servants of the commissioner would exclude altogether or so reduce that the risk of their occurrence might reasonably be encountered. But skill and care cannot always prevent dangers arising, and there are some which, either because of the frequency with which they happen even where there is no neglect, or because of their seriousness, the average prudent man would himself exercise care to avoid. The question is one of fact whether a given risk is so great in kind or frequency that it is unreasonable to do any act involving exposure to it. In considering the question, the ordinary habits and conduct of reasonable men in like circumstances must be taken into account. It is the application of this principle to the case of a passenger who puts his arm or some other part of his body beyond the line of the carriage wall which makes it necessary to submit the question whether he is guilty of contributory negligence to a jury. For notwithstanding that a passenger is entitled to rely upon the exercise by the commissioner's servants of proper care to prevent objects falling or projecting from a train so as to be a source of danger to those travelling in other trains and a failure to take precautions against the consequences of a breach of duty on their part cannot be imputed to him as contributory negligence, yet the danger of things projecting or falling may be considered one that cannot be altogether avoided by care on the part of the commissioner's servants and is so great or so serious that ordinary prudence requires a passenger to exercise care on his side in order to guard against injury from passing trains. I understand this to be the bearing of the observations of *Isaacs* J. in *Cashmore's Case* (1). A court can only pronounce upon the question

(1) (1915) 20 C.L.R., at p. 9.

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whether there is any evidence fit to be left to a jury that a given case does amount to negligence.

In the Supreme Court, *Owen* A.J. remarked that, in spite of all warnings to the contrary and whether it be negligence or not, passengers commonly do allow portions of their arms to project outside windows. The existence of such a common habit or tendency is entitled to weight, but I am not prepared to say that a finding of contributory negligence could not be supported. There is no evidence that the plaintiff was behaving in any peculiar or remarkable manner, as, for instance, by thrusting his elbow out as far as he could. But, if the jury concluded that his elbow was struck by a door of the brake van, the measurements and the evidence as to the smallness of the sway or oscillation of the cars, if accepted, would afford some basis for an inference that his elbow projected an unusual distance. It is clear, however, that a finding of contributory negligence ought not to be made except upon one or other of two grounds.

It might be based upon an opinion formed by the jury that, in the exercise of the reasonable care for his own safety which an ordinary man would take, a passenger may not project his arm at all, because of the seriousness or frequency of the risks against which due care on the part of the servants of the commissioner cannot guard. In the second place, a finding of contributory negligence may be based on the view that, although a projection to some extent of a passenger's elbow does not imply negligence, yet the plaintiff's elbow was pushed out to an unusual and unreasonable degree, which for some reason involved a greater risk of injury and implied a want of ordinary care in the plaintiff. But even if this view were taken, it would not be fatal to the plaintiff's cause of action unless the jury was also of opinion that his elbow would not have been hit had it not been thrust out beyond the distance to which a passenger may without negligence project his arm.

Not without some hesitation I have come to the conclusion that the summing up to the jury presented the question of contributory negligence in such a way that a finding against the plaintiff upon that issue ought not to be supported. Read as a whole, I think that the material part of the summing up would be likely to lead the jury to believe that,

if the plaintiff's elbow was projected more than one or two inches, as having regard to the place of fracture it probably was, then they ought to find that the accident was caused by his contributory negligence. At one point the learned judge said: "If the plaintiff contributed to it, if the substantial cause of it was his putting his arm out beyond the line of the carriage, then the plaintiff is responsible and the defendant is not."

This evoked from a juryman the question: "If the plaintiff's arm was protruding, say one or two inches beyond that bar, would that be sufficient to assume negligence on his part?" His Honour replied: "That is one of the matters you have to decide," and, after elaborating this answer by reference to the unlikelihood of the accident occurring if the plaintiff's arm projected no greater distance, he said: "The defendant does not say necessarily that if the plaintiff's arm were protruding one inch or two inches it would be contributory negligence, but he says it is not open to you reasonably to find that on the facts. That is a matter for you. He says that the oscillation could not bridge such a big gap as that. However, that is a matter you have to determine."

The summing up did not at any point draw the attention of the jury to the considerations by which they should determine the question whether the projection of an elbow by a passenger amounted to contributory negligence on his part. A request was made for a direction in the terms of the decision in *Cashmore's Case* (1), counsel adding that the whole of the facts must be considered. I think that what Mr. *Shortland* said by way of objection to the summing up is enough to enable him to rely upon the matters I have mentioned.

For these reasons I think that there should be a new trial.

EVATT J. At the trial of this action the presiding judge left to the jury the question whether the plaintiff had been guilty of contributory negligence. While it is not contended that he was wrong in doing so, it is strongly contended that the charge was calculated to mislead the jury as to the legal position, and to overemphasize the evidence suggesting that the plaintiff was himself at

(1) (1915) 20 C.L.R. 1.

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fault. In my opinion the summing up suggested that the question of contributory negligence should be decided for or against the plaintiff according to the distance by which the plaintiff's arm or elbow was projecting from the edge of the carriage in which he was travelling as a passenger. Dissatisfied with the learned judge's direction, counsel for the plaintiff said, *inter alia* : "I am going to ask your Honour to direct the jury in terms of the decision in *Cashmore* v. *Chief Commissioner for Railways and Tramways (N.S.W.)* (1) that that is only a very small point to be considered and that the whole of the facts must be considered." In spite of this request no adequate direction in accordance with *Cashmore's Case* (1) was given because the jury's attention was never drawn to any of the circumstances which tended to exonerate or exculpate the plaintiff from being deemed guilty of contributory negligence. The one fact treated as relevant and decisive was the fact or degree of protrusion of the plaintiff's elbow.

In *Cashmore* v. *Chief Commissioner for Railways and Tramways (N.S.W.)* (1), to which attention was specifically directed by counsel, *Isaacs* J. carefully pointed out the considerations and circumstances which, at the very least, would tell very strongly in favour of a finding that the present plaintiff was not guilty of any negligence at all.

> "Now," said *Isaacs* J., "among the relevant considerations are the known and constant habits of 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" (2).

It will be observed that in the charge to the jury nothing whatever was said as to the circumstances which *Isaacs* J. rightly emphasized

(1) (1915) 20 C.L.R. 1.

(2) (1915) 20 C.L.R., at p. 9.

and which, in my view, would probably be regarded by a jury as practically decisive of the issue of the plaintiff's negligence.

A further factor emphasized by *Isaacs* J. in *Cashmore's Case* (1) was that the alleged want of care of the plaintiff had to be considered in relation to what a reasonable passenger might fairly anticipate.

> "There was," said *Isaacs* J., "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" (2).

For the above reasons there should be a new trial subject to the defendant's contention that in the present case the jury was not entitled to find that the plaintiff's elbow was smashed by an open door of the passing train. In my opinion the plaintiff's case was not only entitled to go to the jury but was a very strong one. Indeed, the charge to the jury on this primary aspect of the case was, I think, far too favourable to the defendant. As was pointed out in *Martin* v. *Osborne* (3), in dealing with circumstantial evidence the probability of one hypothesis is relative to the probability of the competing hypotheses. Upon the facts of the present case, the theory that a stone or missile was hurled from a bridge and hit the plaintiff is simply fantastic. The chances against a missile happening to hit the plaintiff at the very moment when the trains were passing is so infinitely small that it can be disregarded. The only other causes suggested were (*a*) a piece of coal falling from one of the trucks, and (*b*) a collision between a door of the passenger train and the plaintiff's elbow. But the former possibility was practically excluded by the fact that, shortly after the accident, a search was made but no trace of coal or other foreign object was discovered at the scene. The extreme weakness of all opposing hypotheses greatly strengthens the probability that it was an open door of the passing train which caused the plaintiff's serious injury.

Counsel for the defendant suggested that the evidence of certain railway employees to the effect that the door had never been left

(1) (1915) 20 C.L.R. 1. (2) (1915) 20 C.L.R., at p. 10.
(3) (1936) 55 C.L.R. 367.

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open and, after the accident, was discovered to be shut, excludes the possibility that an open door caused the accident. I am unable to agree.

One is reminded of a similar argument which was rejected by the Court of Appeal in *Chaproniere* v. *Mason* (1) (the case of the stone in the bun). There *Collins* M.R. said :—" A second misapprehension was likely to arise from the learned judge's statement that it was for the plaintiff to make out a specific act of negligence. It would be very difficult for the plaintiff to make this out. The facts were in the knowledge of the defendant, and not of the plaintiff " (2).

Nor does the fact that the plaintiff cannot point to the particular employee who was guilty of negligence affect the matter. For, as was said in *Grant* v. *Australian Knitting Mills Ltd.* (3) (cited by *Owen* J.), " according to the evidence, the method of manufacture was correct : the danger of excess sulphites being left was recognized and was guarded against : the process was intended to be fool proof. If excess sulphites were left in the garment, that could only be because someone was at fault. The appellant is not required to lay his finger on the exact person in all the chain who was responsible or to specify what he did wrong."

It may be that, in the present case, the plaintiff is entitled to succeed on his argument that, even if negligence was attributable to him, a jury might still find that the defendant was responsible for the injury. I note that, in *Cashmore's Case* (4), *Isaacs* J. says that " the lowest ground " upon which the plaintiff was entitled to succeed was that the jury *could* exonerate the plaintiff from contributory negligence—a remark which rather supports the contention ably argued for by Mr. *Shortland* on the present appeal. But I do not think that it is necessary to examine this matter further. The question may never arise. In my view the evidence that a door allowed to remain open through gross negligence caused the plaintiff's injury is so strong, and the evidence that the plaintiff was guilty of contributory negligence is so weak, that no question of

(1) (1905) 21 T.L.R. 633.
(2) (1905) 21 T.L.R., at p. 634.
(3) (1936) A.C. 85, at p. 101; 54 C.L.R. 49, at pp. 61, 62.
(4) (1915) 20 C.L.R., at p. 10.

ultimate negligence, last chance, proximate cause, &c., &c. (Cf. *Wheare* v. *Clarke* (1)), is likely to confuse the simple question—whether there was any contributory negligence at all.

For the reasons given I think the appeal should be allowed, the order of the Full Court set aside and a new trial ordered.

Appeal allowed without costs. Order of Full Court set aside. Respondent to pay appellant's costs of motion before Full Court for new trial. New trial ordered. Costs of first trial to abide result of new trial.

Solicitors for the appellant, *Alfred J. Morgan & Son.*

Solicitor for the respondent, *Fred. W. Bretnall,* Solicitor for Transport.

J. B.

(1) (1937) 56 C.L.R. 715.