[HIGH COURT OF AUSTRALIA.]

KEY . . . . . APPELLANT;
PLAINTIFF,

AND

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

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1941.

SYDNEY, *July* 30, 31; *Sept.* 8.

Rich A.C.J., Starke, McTiernan and Williams JJ.

Master and Servant—Duty to take reasonable care for servant's safety—Accommodation provided for servant—Safety of means of access thereto—Railway employee—Access along permanent way—Employee killed by train—Whether evidence of negligence—Volenti non fit injuria—Compensation to Relatives Act 1897-1928 (*N.S.W.*) (*No.* 31 *of* 1897—*No.* 8 *of* 1928).

An employee of the Commissioner for Railways was provided with accommodation in a railway van standing on a siding close to the running lines. Although there were means of access to the van other than by proceeding along or across the running lines, these other means of access were inconvenient, and the situation of the van was such that a person proceeding from or to it might be expected to pass along or across the running lines.

Held, by *Rich* A.C.J., *McTiernan* and *Williams* JJ. (*Starke* J. dissenting), that the leaving of the van in the situation referred to and the failure to provide other convenient means of proceeding to or from it afforded no evidence that the commissioner had been guilty of a breach of his duty to take reasonable care to avoid injury to the employee by reason of the state or condition of the premises where the employee was required to work or live under the contract of employment.

Jury v. *Commissioner for Railways* (*N.S.W.*), (1935) 53 C.L.R. 273, followed.

The application of the maxim *volenti non fit injuria* considered.

Decision of the Supreme Court of New South Wales (Full Court): *Key* v. *Commissioner for Railways*, (1941) 41 S.R. (N.S.W.) 60; 58 W.N. (N.S.W.) 72, affirmed.

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APPEAL from the Supreme Court of New South Wales.

An action under the *Compensation to Relatives Act* 1897-1928 (N.S.W.) was brought in the Supreme Court of New South Wales by Winifred Mary Key, the widow of Edwin Alva Key, on behalf of herself and the two children of the marriage, against the Commissioner for Railways (N.S.W.), to recover damages for the death of Key.

The declaration contained two counts, alleging (*a*) that the deceased was an employee of the defendant and was required by the conditions of his employment to live in a van on the defendant's premises, and that the defendant negligently omitted to provide for the safe passage of the deceased over the said premises, and to make the same as safe as the exercise of reasonable skill and care would permit, whereby the deceased while lawfully using the said premises was struck by an engine and received injuries whereof he died, and (*b*) that the van was on a line of railway and that the defendant was negligent in the management of the said line, and of the railway trains thereon, and in the situation of the van, and in failing to provide safe and proper means of entry and egress to and from the van, whereby the deceased while lawfully using the said line of railway was struck down by a train and received injuries whereof he died.

The pleas which were relied upon by the defendant were: (*a*) not guilty, and (*b*) not guilty by statute.

According to the evidence given at the trial the deceased had been for about fifteen years employed by the commissioner as a bridge labourer and bridge carpenter. His work consisted in repairing and maintaining bridges upon which the running lines were carried over which the trains passed. At the time of his death he was temporarily in charge of his gang. During the whole period of his service he had been housed in different parts of the State in vans provided by the railway department and stationed on sidings in close proximity to the ordinary running lines. These vans were provided pursuant to the terms of an industrial award, made in April 1937, which, so far as material, was in the following terms: "Employees engaged on work which does not permit them to return to their home stations shall be paid expenses at the following rates . . . (*a*) if a van be provided 2s. 6d. per night . . . (*b*) if no van . . . be provided and it is necessary for the employee to arrange for accommodation 8s. per day."

When he met with the accident which caused his death, the van in which he and other members of his gang were living was standing on a siding close to the running lines. At this point there were two pairs of rails, the eastern pair constituting the "down" line

from Sydney to Wollongong, and the western pair constituting the "up" line to Sydney. The van was situated about a quarter of a mile from Wollongong railway station in the direction of Sydney, on a siding on the eastern side of the down line. From the siding a bank sloped down to a cess, or path, about three feet wide, which fringed the easternmost side of the down line. Evidence showed that at the relevant time the tank containing the water supply for the van was situated on the westernmost side of the two sets of rails, so that it was necessary for the inmates of the van to cross the rails to obtain water. No latrines were provided at the van. The nearest latrine was at a foundry not owned by the commissioner and situated off the railway premises almost opposite to the van, beyond the westernmost side of the two sets of rails. There was a latrine on railway premises situated about two hundred yards away from the van in a north-westerly direction on the western side of the two sets of rails, and also at Wollongong railway station.

The means of access to the van ordinarily used was the permanent way. It was also possible to get to and from the van, (*a*) by descending the sloping bank from the van to the adjacent cess, proceeding along the cess for a short distance in a northerly direction, descending a slope beside the buttress of a bridge, and, near the foot of the slope, scrambling over the lower end of the buttress, and (*b*) by walking along the cess towards Wollongong. These ways were awkward, and involved skirting blackberry bushes.

The permanent way was not lighted away from the railway station, and there was considerable traffic along it.

On the evening of the accident, which occurred on 17th August 1939, the deceased was seen to leave the van at about 5.30 o'clock and to go along the adjacent cess and down over the buttress into Victoria Street. He was seen again in Wollongong between 7 and 7.15 p.m. A train from Sydney arrived at Wollongong at 8.54 p.m. A man's hat having been found on the front of the engine, and a spot of blood on the framework below the tender, a search was made along the line, and the dead body of the deceased was found in the middle of the four-foot way of the down line to Wollongong about twenty yards from the van. The left arm and left leg were broken. Blood marks were found on the permanent way, beginning about twelve feet from the end of the van. No-one saw the accident. A train proceeding northward from Wollongong passed the down train at a point two hundred yards north of the scene of the accident.

The jury returned a verdict for the plaintiff in the sum of £2,100, which was reduced to £2,000 in order to comply with sec. 145 of the *Government Railways Act* 1912-1934 (N.S.W.)

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The Full Court of the Supreme Court allowed an appeal by the commissioner, set aside the verdict and judgment for the plaintiff, and entered judgment and verdict for the commissioner on the ground that there was not any evidence of negligence on the part of the commissioner: *Key* v. *Commissioner for Railways* (1).

From that decision the plaintiff appealed to the High Court.

Further facts appear in the judgments hereunder.

Miller K.C. (with him *McClemens*), for the appellant. Drivers of trains should have been warned of the possibility of the presence on or near the permanent way of other employees, including the deceased. The evidence shows that the respondent failed in his duty to take reasonable care to provide reasonably safe access to the van (*Jury* v. *Commissioner for Railways* (*N.S.W.*) (2)). That case, however, is distinguishable on the facts. Whether reasonable care was so exercised by the respondent was essentially a question for determination by the jury. In the circumstances the deceased was compelled to use the permanent way for necessary purposes. Reasonably safe access to the van other than by the permanent way should have been provided by the respondent. An employer must take reasonable care for the safety of his employees (*Wilsons and Clyde Coal Co.* v. *English* (3); *Naismith* v. *London Film Productions Ltd.* (4)). There was not any attempt made at the trial to apply the maxim *volenti non fit injuria*. The evidence does not show that the deceased accepted the risks involved; whether he did so or not is a matter for the jury (*Smith* v. *Baker & Sons* (5); *Williams* v. *Birmingham Battery and Metal Co.* (6); *Charlesworth* on *Negligence*, (1938), pp. 452-454). The liability of an employer in respect of injuries sustained by an employee on, in, and about residential accommodation provided by the employer was discussed in *London and North Eastern Railway Co.* v. *Brentnall* (7). The circumstances in which inferences may be drawn was dealt with in *Grand Trunk Railway Co.* v. *Griffith* (8): See also *Caswell* v. *Powell Duffryn Associated Collieries Ltd.* (9). It was not necessary for the appellant as plaintiff to show what means of access should have been provided by the respondent; the onus of so doing was upon the respondent (*Markland* v. *Manchester Corporation* (10); *Manchester Corporation* v. *Markland* (11)).

(1) (1941) 41 S.R. (N.S.W.) 60; 58 W.N. (N.S.W.) 72.
(2) (1935) 53 C.L.R. 273, at pp. 283, 292, 294.
(3) (1938) A.C. 57, at pp. 84, 86, 87.
(4) (1939) 1 All E.R. 794, at pp. 796, 797.
(5) (1891) A.C. 325, at pp. 338, 345, 355.
(6) (1899) 2 Q.B. 338.
(7) (1933) A.C. 489.
(8) (1911) 45 Can. S.C.R. 380.
(9) (1940) A.C. 152.
(10) (1934) 1 K.B. 566, at pp. 582, 588, 589.
(11) (1936) A.C. 360, at p. 364.

Fuller K.C. (with him *Kinsella*), for the respondent. The only obligation upon the respondent was to provide to the van a means of access which was as reasonably safe as the circumstances of the case might require. The appellant has not discharged the onus of showing what other means the respondent could have taken in order to provide a more reasonable or a more safe means of access. The relationship between the deceased and the respondent arising out of the deceased's occupancy of the van was as stated in *Halsbury's Laws of England*, 2nd ed., vol. 22, p. 117 : See also *Philbin* v. *Hayes* (1). The deceased must have been conversant with all the risks attendant on the occupancy of a van, which, by its very nature, was required to be on a siding or permanent way. The circumstances must be regarded as ordinary incidents of the employment. The position in this case is parallel to the position which was dealt with in *Jury* v. *Commissioner for Railways* (*N.S.W.*) (2). Definite evidence should be called for the guidance of juries; they should not be allowed to speculate as to what is safe or unsafe (*Pritchard* v. *Peto* (3); *Cole* v. *De Trafford* [*No.* 2] (4)). The test is that the place should be reasonably safe as a railway yard, and, in the absence of some evidence to guide them, the jurymen were not competent to express an opinion as to whether it was safe or unsafe.

Miller K.C., in reply. The deceased was on the property of the respondent in pursuance of his employment; whether or not he was actually working at the time is irrelevant.

Cur. adv. vult.

Sept. 8.

The following written judgments were delivered :—

RICH A.C.J. This is an appeal from a decision of the Full Court of New South Wales setting aside a verdict for the plaintiff and entering a judgment for the defendant in an action under *Lord Campbell's Act* against the Commissioner for Railways. The question, in my opinion, is simply whether there was sufficient evidence of negligence on the part of the commissioner.

The deceased whose death is the subject of the action was killed by a train as he was walking on the track near Wollongong. In the judgment under appeal *Jordan* C.J. states the material facts as follows :—" According to the evidence given at the trial, the deceased had been for about fifteen years employed by the defendant as a bridge labourer and bridge carpenter. His work consisted in repairing and maintaining bridges upon which the running lines were

(1) (1918) 34 T.L.R. 403; 87 L.J. K.B. 779.
(2) (1935) 53 C.L.R. 273.
(3) (1917) 2 K.B. 173, at p. 176.
(4) (1918) 2 K.B. 523, at p. 530.

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carried over which the trains passed. At the time of his death he was temporarily in charge of his gang. During the whole period of this service he had been housed in different parts of the State in vans provided by the Railway Department and stationed in sidings in close proximity to the ordinary running lines. When he met with the accident which caused his death, the van in which he and other members of his gang were living was standing in a siding close to the running lines. At this point there were two pairs of rails, the eastern pair constituting the 'down' line from Sydney to Wollongong, and the western pair the 'up' line to Sydney. The van was situated about a quarter of a mile from Wollongong in the direction of Sydney, on a siding at the eastern side of the down line. From the siding a bank sloped down to a cess, or path, about three feet wide, which fringed the easternmost side of the down line" (1).

His Honour then proceeds to set out the various means of access to the van and to state the movements of the deceased and the circumstances in which his body was found. It is unnecessary for me to repeat this statement. It is sufficient to say that it was natural and convenient for the deceased to use the permanent way in going to and from the van.

The law applicable to this case is fully dealt with in *Jury* v. *Commissioner for Railways* (*N.S.W.*) (2), where the facts were on the same lines as those in the present case, except that there was a fettlers' camp instead of a movable van. I shall repeat passages from the joint judgment of *Dixon* J. and myself:—"Those who come in the character of servants obtain from the common law no right to protection from risks of injury which arise out of or are fairly incident to the nature of their employment, and among those risks is that of want of care on the part of their fellow servants. But the common law does impose upon the employer a duty to take reasonable precautions against injury to his employees through an unnecessarily dangerous condition or character of his premises or plant" (3). "There is no longer an independent rule demanding ignorance in the servant and knowledge in the master. But negligence in the master, or those for whom he is responsible, if any there be, must be proved, and knowledge is one way but not the only way of proving it. The servant must not have consented to the consequences of the master's negligence, but his mere knowledge does not prove consent. He must not have been guilty of contributory negligence, but still less does his mere knowledge prove that he

(1) (1941) 41 S.R. (N.S.W.), at pp. 60, 61; 58 W.N. (N.S.W.), at p. 74.
(2) (1935) 53 C.L.R. 273.
(3) (1935) 53 C.L.R., at p. 281.

was" (1). "The consequence in the present case is that in providing a camp on his premises for the deceased to inhabit in his character of employee the commissioner incurred to the deceased a duty of reasonable care for his safety. It was incumbent upon him to take all reasonable precautions in providing a place for a camp including approaches and means of access . . . The case for the plaintiff appellant must depend upon the danger inherent in the use by foot passengers of a railway track by night as a path or way and upon the supposed failure of the commissioner adequately to provide against those dangers by pitching the camp where a safer and more ready means of access existed or providing or improving other approaches to the place where it was in fact pitched or by lighting the railway track between the camp and the station or possibly by taking some other measures to lessen the risk of pedestrians falling" (2).

In *Jury's Case* (3) we were all of opinion that the commissioner could not be considered guilty of negligence because he did not provide a better means of access to the camp than the permanent way and the cess. I adhere to this view, and it seems to me to be as much applicable to the present case as to that in which it was expressed. I cannot see any evidence of negligence, and I agree in the reasons given by *Jordan* C.J. for this conclusion.

The appeal should be dismissed.

STARKE J. This was an action by the widow of Edwin Alva Key deceased on behalf of herself and her children to recover damages for the death of her husband based upon the *Compensation to Relatives Act* 1897-1928 of New South Wales. The declaration contained two counts, the first alleging in substance that the respondent had negligently omitted to provide a safe approach to a railway van, provided by the respondent for the accommodation of the deceased and other workmen in connection with the work upon which they were employed, the second alleging in substance that the respondent negligently managed and controlled his railway in and about which the deceased was employed.

It was tried before a judge with a jury. Key had been employed by the respondent on his railways in repairing and maintaining bridges. In August 1939 Key was working near the Wollongong station and had living accommodation provided for him by the respondent in a railway van standing near the station and alongside the Sydney-Wollongong railway line. This accommodation was

(1) (1935) 53 C.L.R., at p. 282. (2) (1935) 53 C.L.R., at p. 283.
(3) (1935) 53 C.L.R. 273.

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provided pursuant to the terms of an industrial award of April 1937 which, so far as material, was in the following terms:— "Employees engaged on work which does not permit them to return to their home stations daily shall be paid expenses at the following rates—(*a*) If a van . . . be provided 2s. 6d. per night . . . (*b*) If no van . . . be provided and it is necessary for the employee to arrange for his own accommodation 8s. per day . . ." It was from the van so provided that the deceased went to and from his work and also for his food and water, and other purposes, for the van had none of the amenities of a dwelling house. Access to the van might be obtained by walking along the main lines of a fairly busy railway. It was an ordinary method of going to or coming from the van. Other means of access to the van also existed, such as using a cess or waterway alongside the railway line, or through bushes, or along a bank, or by climbing over the buttress of a bridge. But there was no defined way or track of any sort to or from the van, though it was, I should think, having regard to the surroundings, quite practicable to make a safe approach to the van.

It appears from the evidence that Key left the van at about 5.30 o'clock in the afternoon of 17th August 1939 and proceeded to Wollongong, where he probably had his evening meal, and was seen there between 7 and 7.15 p.m. A train from Sydney to Wollongong arrived there at a few minutes before nine o'clock. A man's hat was found on the front of the engine and some blood on the cross bar under the bogey frame. A search was then made along the line, and the dead body of the deceased was found in the middle of the down line to Wollongong about twenty yards from the van. Blood marks were found on the permanent way beginning at about twelve feet from the end of the van. The left arm and left leg of the deceased were broken. No-one saw the accident, but the facts are amply sufficient to warrant a jury inferring that the deceased was proceeding to or from the van in an ordinary and usual manner and for a legitimate purpose, probably to sleep in the van, but perhaps to use a latrine or obtain water across the line, and that the commissioner sanctioned, if he did not actually require, his employee, the deceased, to use the railway line for this purpose. In these circumstances it was incumbent upon the commissioner, and created a duty in him towards the deceased, to provide a reasonably safe approach or means of access to and from the van (*Jury* v. *Commissioner for Railways* (*N.S.W.*) (1); *Smith* v. *Baker & Sons* (2); *Williams* v. *Birmingham Battery and Metal Co.* (3)).

(1) (1935) 53 C.L.R., at p. 290.
(2) (1891) A.C. 325.
(3) (1899) 2 Q.B. 338.

The first count in the declaration is founded upon this duty. And it is to this count that I shall first address myself. The question whether the approach or means of access was reasonably safe in the circumstances was one of fact for the jury. The evidence amply warrants a finding that it was not, and on the evidence the jury might conclude that the death of Key was caused by the commissioner's negligence or breach of duty.

But it was suggested that the deceased voluntarily took upon himself the risk of access to and from the van along the railway line. The risk, it was said, was palpable and visible and the only inference open on the evidence was that the deceased knew and appreciated that risk and voluntarily encountered it. There is no negligence in any person omitting to do that which he is relieved from doing: See *Smith* v. *Baker & Sons* (1); *Pollock* on *Torts*, 14th ed. (1939), pp. 131, 132; *Beven* on *Negligence*, 4th ed. (1928), vol. 1, p. 796; *Dann* v. *Hamilton* (2). Where a person undertakes to do work which is intrinsically dangerous, notwithstanding that reasonable care has been taken to render it as little dangerous as possible, he no doubt voluntarily subjects himself to the risks inevitably accompanying it, and cannot, if he suffer, be permitted to complain that a wrong has been done him, even though the cause from which he suffers might give to others a right of action (*Smith* v. *Baker & Sons* (3)). Apart, however, from cases such as this, the question whether a person was *volens* or *nolens* is a question of fact and not of law (*Yarmouth* v. *France* (4); *Smith* v. *Baker & Sons* (5); *Williams* v. *Birmingham Battery and Metal Co.* (6)). "In order to defeat a plaintiff's right by the application of the maxim relied on," said *Halsbury* L.C. in *Smith* v. *Baker & Sons*, "who would otherwise be entitled to recover, the jury ought to be able to affirm that he consented to the particular thing being done which would involve the risk, and consented to take the risk upon himself" (7). "A man is not bound at his peril to fly from a risk from which it is another's duty to protect him, merely because the risk is known" (*Pollock* on *Torts*, 14th ed. (1939), p. 132; *Dann* v. *Hamilton* (2); *Thrussell* v. *Handyside & Co.* (8)). A workman may know that he is running a risk, but he may still for economic reasons be unable to give up his place or to refuse employment, and may well rely upon his employer's duty to use reasonable care, and upon his right, or that of his dependants, to bring an action if he is injured or killed. This was the view of *Mellish* L.J. in *Woodley* v. *Metropolitan District*

(1) (1891) A.C., at p. 344.
(2) (1939) 1 K.B. 509.
(3) (1891) A.C., at p. 360.
(4) (1887) 19 Q.B.D. 647, at p. 659.
(5) (1891) A.C. 325.
(6) (1899) 2 Q.B. 338.
(7) (1891) A.C., at p. 338.
(8) (1888) 20 Q.B.D. 359.

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Railway Co. (1), and it is this view that, as a text-book writer says (*Beven* on *Negligence*, 4th ed. (1928), vol. 1, p. 792), is now to be preferred. Consequently, apart from the special cases referred to, the question whether a workman is *volens* or *nolens* is a question of fact and not of law. And since *Smith* v. *Baker & Sons* (2) it is open to question whether *Thomas* v. *Quartermaine* (3) was rightly decided. The majority of the court in that case held, on the facts proved, that as a matter of law the plaintiff voluntarily undertook the risk, whereas it was in truth a matter of fact: See *Smith* v. *Baker & Sons* (4).

The respondent in the case now before the court moved for a nonsuit at the trial, which was refused, and also for a direction at the conclusion of the whole of the evidence that a verdict should be found for the defendant, which was also refused. It was contended, as I gather from the transcript, that the plaintiff had not proved any negligence, that, assuming negligence had been proved, the plaintiff had failed to prove that such negligence was the cause of the accident, and that the plaintiff had failed to give any evidence of what reasonable and proper precautions should have been taken to avoid the accident.

At this stage of the case, the question whether the deceased voluntarily took upon himself the risks attendant upon his access to the van along the railway line was not raised, or at all events it was not expressly mentioned. In his charge to the jury, the trial judge instructed the jury that the respondent stood in a relationship of duty towards the deceased. He pointed out that the deceased was familiar with the running of the trains and the lay-out of the railway. But the position, he said, between the deceased and his employer, the respondent, both as regards his work and his accommodation in the van, was that there was a duty on the part of the respondent to take reasonable care to provide reasonably safe access to and egress from the van and to take reasonable care so to carry on his operations as not to subject the deceased to unnecessary risks. And he further instructed the jury that if they were satisfied that the respondent was guilty of negligence, still they had to consider whether that negligence caused the accident to the deceased.

A direction upon the subject of contributory negligence was also given to the jury upon the application of the learned counsel for the respondent. But the doctrine of *volenti non fit injuria* stands outside the defence of contributory negligence (*Thomas* v. *Quartermaine* (5)).

(1) (1877) 2 Ex. D. 384, at p. 393.
(2) (1891) A.C. 325.
(3) (1887) 18 Q.B.D. 685.
(4) (1891) A.C., at p. 366.
(5) (1887) 18 Q.B.D., at p. 697.

Some other directions appear to have been sought on the part of the respondent, but I gather that they reiterated the submission made at an earlier stage of the case for a nonsuit or a direction. Again, the question whether the deceased voluntarily took upon himself the risks already mentioned was not raised, or at all events was not expressly mentioned. And rule 151B of the *Rules of the Supreme Court* provides:—"No direction, omission to direct . . . given by the judge presiding at the trial shall without the leave of the court be allowed as a ground" of a motion for a new trial.

A verdict was found for the plaintiff. The respondent moved the Supreme Court of New South Wales that the verdict be set aside and judgment entered for the respondent or that a new trial be had upon, among other, the following grounds: that the trial judge should have nonsuited the plaintiff, or directed a verdict for the respondent, that there was no evidence of negligence on the part of the respondent, or from which the jury might legitimately infer any act or omission on the part of the defendant amounting to negligence on its part or, assuming negligence on the part of the respondent, that there was no evidence that such negligence was the effective cause of the accident, and, generally, that the verdict was against evidence and the weight of evidence. Again, the question whether the deceased voluntarily undertook the risks already mentioned was not raised, or at all events was not expressly mentioned.

The appeal was allowed by the court, the verdict set aside, and a verdict entered for the respondent. The learned Chief Justice, in delivering the judgment of the court, agreed that "the evidence in the case enabled the inferences (1) that the permanent way of a railway line is dangerous as a way for pedestrians because of the risk of injury by moving trains, (2) that the situation of the van and the nature of its approaches were such as to make it necessary or natural that the occupants of the van should use the permanent way as a means of access, (3) that when he met with the accident which caused his death the deceased was using the permanent way as a means of access to the van, and that the fact that he was so using it caused or materially contributed to the accident." "I feel no doubt," said the Chief Justice, "that it was natural and inevitable that the occupants of a van so situated should habitually use the permanent way as a means of access . . . It was their workshop. . . . Can this state of things be regarded as indicating negligence on the part of the defendant commissioner?" (the respondent) "I am of opinion that it cannot. The presence of the permanent way was obvious. The deceased knew that it was there. The risks involved in using it as a thoroughfare were equally obvious.

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During his working hours he worked on it. He was as fully alive to the risks involved in its user as is a citizen of Sydney to the risks involved in crossing a city street. The question then is whether the fact that the defendant did not, after working hours, prevent the deceased from using, or hold out special inducements to him not to use, as a thoroughfare, the permanent way which he was using throughout his working hours, supplies evidence of failure on the defendant's part to take proper care for the deceased's safety. I am of opinion that it does not. There is no evidence that, short of preventing the deceased from going on to the permanent way at all, there were any practicable means of safeguarding him with respect to it" (1).

If the Chief Justice means that the deceased voluntarily took upon himself the risks attendant upon his access to the van along the railway line, then the learned judges, as it appears to me, took upon themselves the determination of a question of fact which was for the jury. The inference that the deceased accepted the risks is not, I think, for reasons stated above, the only one open upon the evidence. Moreover, the question was not raised at the trial, or as I have said, it was not expressly mentioned. And if the Chief Justice means that the respondent did everything reasonably practicable to provide a reasonably safe approach or means of access to and from the van, then again the learned judges, as it appears to me, took upon themselves to determine a question of fact, which was for the jury, and had been found in favour of the appellant here. In fact, the respondent had done absolutely nothing to provide any approach to the van, though it was placed in a position which involved risks to workmen for whose accommodation it was provided. It was not impossible, as I have already indicated, to provide a safe approach to the van by making some defined track or way, and it was for the respondent to satisfy the jury that he had done all that was reasonably practicable in the circumstances. The jury, however, found a verdict against the respondent, and in circumstances and upon evidence which, in my opinion, amply warranted their finding.

The second count remains for consideration. It was contended before the Supreme Court that this count was improperly left to the jury and that evidence was admitted in respect of the driving of trains which introduced matters outside the terms of the statutory notice of action and also matters relating to the safety of the railway premises. The trial judge did not actually withdraw this count from the consideration of the jury. But he instructed it that there

(1) (1941) 41 S.R. (N.S.W.), at pp. 67, 68; 58 W.N. (N.S.W.), at pp. 75, 76.

was no evidence at all of negligence on the part of the driver or fireman of the train or on anyone else's part in failing to tell them that workmen were accommodated in the van on the siding close to the running tracks so that extra precautions should be taken. "I can see," said the trial judge, "nothing . . . indicating negligence in the actual running of that train; so that what you have to ask yourselves is, has negligence been established in the sense I have indicated with regard to the provision or failure to provide for reasonably safe means of getting to and from this van?" Still, it is contended that the second count went to the jury and also evidence only relevant to that count and that it is possible that the verdict of the jury was founded upon this count or that the evidence admitted under it may have influenced the verdict. But the court should presume that the jury acted in accordance with the clear and precise direction of the trial judge, and consequently that no substantial miscarriage of justice has occurred.

This appeal should be allowed and the verdict entered at the trial in favour of the appellant restored.

McTiernan J. The appellant, with the aid of the *Compensation to Relatives Act* 1897-1928 (N.S.W.), brought an action against the respondent to recover compensation for the pecuniary loss suffered by herself and children in respect of the death of her husband, who was killed on the railway line near Wollongong on 17th August 1939. The action was for breach of the duty owing by an employer to an employee. The appeal is from the judgment setting aside the verdict obtained by the appellant in the action.

At the time of the accident the deceased was employed as a bridge carpenter in the respondent's service. The evidence showed that he was killed at a place about a quarter of a mile from the Wollongong station by a train that arrived from Sydney at that station at 8.45 p.m., that is to say, some hours after his day's work had ended. However, he then retained the character of employee which he held during his working hours.

It was a condition of the employment that for the duration of the current job his quarters should be a van standing on a siding adjacent to the permanent way, which the respondent provided for that purpose. The jury could quite properly find that the fatality occurred at a spot within the only reasonable practicable approach to the van. The deceased lived in the van and used the approach to it in his character as an employee (*Jury* v. *Commissioner for Railways* (*N.S.W.*) (1)). He was not a stranger or a mere licensee on the premises

(1) (1935) 53 C.L.R., at p. 283.

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when he was killed, but was present in the course of his employment (*Tunney* v. *Midland Railway Co.* (1); *Coldrick* v. *Partridge, Jones & Co. Ltd.* (2)).

The pleadings in the action raised the issue whether the respondent failed in his duty as employer to exercise reasonable care for the safety of the deceased while on the premises in the course of his employment. In my opinion there was no evidence upon which the jury could properly find in favour of the appellant. The facts relied on to establish the affirmative were that the respondent had caused the van to be shunted to a position near the permanent way, but left the deceased no practicable way of leaving it for any purpose, especially a necessary or reasonable purpose, unless he went across the railway line, which there consisted of an up line and a down line, carrying considerable traffic and unlighted except at the Wollongong station, which was a quarter of a mile away.

The duty of the employer is to take reasonable care to avoid injury to the employee by reason of the state or condition of the premises where he is asked to work or live under the contract of employment (*Wilsons and Clyde Coal Co.* v. *English* (3); *Naismith* v. *London Film Productions Ltd.* (4)). In the present case these duties apply to the condition and situation of the van in which the deceased was asked to live. There would be a want of reasonable care for the safety of the deceased if the approach to the van were unduly dangerous to him. The question whether it was or not is one of fact, but it must be determined on evidence and reasonably, and not out of motives of compassion or sympathy. It must be remembered that the deceased was a railway-bridge carpenter, accustomed to railway premises and to walking about on them and to trains, sounds, directions and movements. The frontager of the street or road is habituated to the dangers of crossing, and no-one thinks of suggesting that it is negligent on anyone's part to establish a home on a congested highway which is not free of traffic of a description even more threatening to human life than the orderly movement of trains on a railway line. It is commonplace for a railway man to cross a permanent way and look out for trains. There is no difficulty in avoiding them, though it is true that inattention or a lack of vigilance which familiarity with risks begets may lead to disaster. But in my view it would be an extreme and unreasonable conclusion to say that the respondent was negligent merely because—and this is the substantial ground taken—it allowed this travelling van to be placed on a siding in such a situation that the deceased and the

(1) (1866) L.R. 1 C.P. 291.
(2) (1909) 1 K.B. 530.
(3) (1938) A.C. 57.
(4) (1939) 1 All E.R. 794.

other men living there might or would inevitably cross the line. There is no evidence that the prudence and caution which the deceased as a railway man could exercise in crossing the metals were not sufficient to guard him against the danger of being struck by the train. This was the view adopted by this court in *Jury* v. *Commissioner for Railways* (*N.S.W.*) (1) and by the judges of the Supreme Court. "The mere relation of the master and servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself" (*Priestley* v. *Fowler* (2), per *Abinger* C.B.). There was no expressed condition in the deceased's contract of employment with respect to the respondent's duty of care. It is clear from *Jury's Case* (3) that it was not an implied condition of the contract that the respondent was to insure his safety. There is no evidence that the deceased was exposed to any risk which was unusual or which he could not be expected to anticipate. There was no evidence that there was anything unusual about the running of the train which struck him that might have prevented him from being aware of its approach and avoiding it. The jury could not reasonably draw this conclusion from the evidence that it arrived at Wollongong about one and one-half minutes later than the time at which it was due according to the time table, and that its powerful headlight was dimmed out of consideration for the people on the station.

There was another allegation that the respondent was negligent in the management of the trains. I cannot doubt that the trial judge's direction that there was no evidence to support this allegation was correct.

In my opinion the appeal should be dismissed.

WILLIAMS J. The appellant is the plaintiff in an action which she brought as the widow of Edwin Alva Key under the *Compensation to Relatives Act* 1897-1928 (N.S.W.), on behalf of herself and their children, against the respondent, the Commissioner for Railways, as defendant, alleging that her husband, who was run over by a train on the permanent way near Wollongong at about 9 p.m. on 17th August 1939, lost his life as the result of the negligence of the respondent.

The declaration contained two counts, alleging (1) that the deceased was an employee of the defendant and required by the conditions of his employment to live in a van on the defendant's

(1) (1935) 53 C.L.R. 273.
(2) (1837) 3 M. & W. 1, at p. 6 [150 E.R. 1030, at p. 1032].
(3) (1935) 53 C.L.R. 273.

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premises, and that the defendant negligently omitted to provide for the safe passage of the deceased over the premises, and to make the same as safe as the exercise of reasonable skill and care would permit, whereby the deceased was killed; and (2) that the van was on a line of railway and that the defendant was negligent in the management of the line and of the railway trains thereon, and in the situation of the van, and in failing to provide safe and proper means of entry and egress to and from the van, whereby the deceased was killed.

At the trial the defendant objected to the plaintiff proceeding with the second count and to the evidence tendered in support of it, on the ground that it was outside the scope of the notice of action which the plaintiff had given, as required by sec. 144 of the *Government Railways Act* 1912-1934 (N.S.W.); but, for reasons which will appear hereafter, it is unnecessary to deal with this objection, and I shall discuss the appeal on the basis that both counts were open to the plaintiff and that the whole of the evidence to which the defendant objected was properly admitted.

A great deal of the evidence was common ground. It is adequately summarized in the judgment of the learned Chief Justice of the Supreme Court, and it is unnecessary for me to repeat it. I shall assume that the van, in which the deceased was lodging at the date of his death, was so situated that the only practicable way by which he could proceed to or from Wollongong for his meals or other purposes or obtain water or use a latrine was to walk along or across the permanent way. In doing this he was exposed to the danger of being run over by passing trains. The van was stationary in a siding on the eastern side of the line a quarter of a mile from Wollongong, so that to go to and from that place involved walking along the permanent way for about five minutes, while it could be crossed in a few seconds. The permanent way comprised the up and down sets of rails, the space between each set being called "the four foot"; a cess two to three feet wide on the outside of each set; and the space between the inner rail of each set, known as "the six foot". The two cesses form the outer edges of the earth platform which carries the sleepers to which the two sets of rails are attached, and their function is to act as a drain; but both they and the six-foot space already mentioned, although somewhat rough, can be used by pedestrians. In the daytime approaching trains can of course be seen and heard. At night the engines carry a powerful headlight known as a pyle light. At places the headlight is switched off except for a dimmer. They also carry a toplight and a left marker. At the time of the accident the headlight was dimmed.

The negligence charged against the defendant at the trial was that he was under a duty to provide suitable access from the van to the road into Wollongong, and water and a latrine on the eastern side of the permanent way, so that the deceased need not have walked along or across it for these purposes, and his failure to do so was the cause of the death of the deceased.

At the conclusion of the evidence the commissioner's counsel submitted that the learned judge should direct a verdict for the defendant, one of the grounds being that there was no evidence that the defendant had been negligent. His Honour refused to do this, and the jury returned a verdict for the plaintiff. The defendant appealed to the Full Court of New South Wales, which considered there was no such evidence, and directed that the appeal be allowed, the verdict of the jury set aside and one entered for the defendant. The question on this appeal is whether the Full Court was right.

The deceased had been employed by the defendant as a bridge carpenter and labourer for about fifteen years. His duties took him to all parts of the State, so that he was engaged on work which did not permit him to return home except at week-ends, and it was a term of his employment that he should lodge in the van during the working week and receive two shillings and sixpence expenses per night. He had been living in vans in this way for about twelve years. He enjoyed good sight, hearing, and general health. I shall assume the circumstances of his death were such that it was reasonable for the jury to infer that he was killed while lawfully using the permanent way for one of the above purposes, and also that the employment was such that the defendant owed the same duty to the deceased during the whole twenty-four hours of every day. But it is obvious that this duty could not be higher when he was not working, but merely lodging on the defendant's premises, than while he was at work, and that its extent must be determined having regard to the risks that were ordinary incidents of a job which necessarily involved the deceased working and lodging and moving from place to place on the permanent way. The sidings where the van might be situated from time to time would vary in their distances from public roads and in the difficulty of providing access thereto. In places the only access would be across private land. The danger to a railway employee as a pedestrian on the public roads under modern conditions is probably as great as when he is walking along the railway. There is ample room on the permanent way for him to avoid a train going in either direction, and, when two trains are passing one another, he is safe on the six foot or on the cess and can in the last resort get off the cess on to the adjoining railway land.

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The risk is similar in character to that of being run over on a highway incurred by an employee of the Main Roads Board who works on and camps by its side, or by a seaman of being swept off the decks and drowned, or by a member of a hospital staff of catching a contagious disease. Docks and factories and other industrial enterprises often have upon their premises wharves, roads and paths along which any vehicular traffic passes, so that employees who are obliged to use these means of access are subjected to a similar risk to that in question. The learned author of *Pollock* on *Torts*, 14th ed. (1939), p. 83, where the modern authorities are collected, states :—" The master is bound, as between himself and his servants, to exercise due care in selecting proper and competent persons for the work (whether as fellow-workmen in the ordinary sense, or as superintendents or foremen), and to furnish suitable means and resources to accomplish the work, and to use reasonable care to keep the premises and appliances safe." A railway employee would therefore be entitled to expect that the permanent way and rolling stock would be kept in good order and repair, so that he would not be injured on the former by falling into some unexpected hole or by a vehicle leaving the rails and colliding with him because of some failure to keep them or it in good repair ; and that the system of working the railways would be such that whilst he was employed in some place of danger, such as a tunnel, he would receive adequate warning of an approaching train, and that his van would not be run into when stationary in a siding as a result of defective points or a faulty system of shunting ; but such an employee would not be entitled to any special protection against the risk of danger from oncoming trains travelling in an ordinary manner, while walking along the permanent way with nothing to distract his attention, whether he was proceeding along or across it to or from his work or lodging or on some other lawful errand. Otherwise there would be a duty imposed on a railway commissioner to provide a means of access from the adjoining land to wherever any of his employees were working on the permanent way and to build some overhead bridge or provide some other means by which they could avoid crossing the tracks. But this would obviously be impracticable.

When one of a large number of employees is so unfortunate as to lose his life there is always a tendency to consider his case in isolation ; but, in determining whether the employer has been guilty of a breach of duty, the question whether the means which he has taken to ensure his employees' safety against the risks they have to undergo are reasonable or not must be determined having regard to the necessities of the undertaking as a whole. As *Isaacs* J. said in

Bellambi Coal Co. Ltd. v. *Murray* (1), the employer is not bound "to adopt means which either guarantee the security of his workmen in all circumstances, or render his operations physically impracticable or ineffective, or commercially impossible or disproportionately onerous." He pointed out that employers must not negligently subject their employees to unnecessary danger, but this means danger in a region of conduct where they have not agreed to encounter it. In *Thomas* v. *Quartermaine* (2) *Bowen* L.J. said: "Where the danger is one incident to a perfectly lawful use of his own premises, neither contrary to statute nor common law, where the danger is visible and the risk appreciated, and where the injured person, knowing and appreciating both risk and danger, voluntarily encounters them, there is, in the absence of further acts of omission or commission, no evidence of negligence on the part of the occupier at all. Knowledge is not a conclusive defence in itself. But when it is a knowledge under circumstances that leave no inference open but one, viz., that the risk has been voluntarily encountered, the defence seems to me complete." This statement was approved by the Privy Council in *Letang* v. *Ottawa Electric Railway Co.* (3).

It is suggested in *Charlesworth* on *Negligence*, (1938), p. 453, that *Thomas* v. *Quartermaine* (4) has been overruled by *Smith* v. *Baker & Sons* (5). But this case is distinguishable, because the accident to the workman there in question did not occur as a result of a risk incidental to his own employment. The danger to which he was exposed was quite outside any such risk. It was not necessary to his work of drilling a hole in the rock in the railway cutting that a crane should be working lifting stones and swinging them over his head without warning. As Lord *Watson* said, "there was no intrinsic danger in the operation of drilling in which the plaintiff was engaged; the peril from which he suffered was not evoked by his act, but was brought into contact with him by workmen employed in a different operation" (6). In *Bellambi Coal Co. Ltd.* v. *Murray* (7), *Barton* J. explained the case as follows: "There the danger arose from an operation in another department of the works, under the same employer, which it was impossible for the workman to influence by any action of his own." *Thomas* v. *Quartermaine* (4) was followed by this court in the *Bellambi Case* (8), and I can see no reason to believe that it has been overruled.

Sciens is not the same thing as *volens*, so that where it is reasonably open to doubt whether the employee has voluntarily accepted the

(1) (1909) 9 C.L.R. 568, at p. 604.
(2) (1887) 18 Q.B.D., at p. 697.
(3) (1926) A.C. 725, at p. 730.
(4) (1887) 18 Q.B.D. 685.
(5) (1891) A.C. 325.
(6) (1891) A.C., at p. 357.
(7) (1909) 9 C.L.R., at p. 592.
(8) (1909) 9 C.L.R. 568.

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risk or not the question must be determined by the jury (*Smith* v. *Baker & Sons* (1); *Baker* v. *James* (2)); but where the only reasonable inference from the facts, as in the present case, is that the employee freely and voluntarily and with full knowledge of the nature and the extent of the risk has expressly or impliedly agreed to accept it as an ordinary incident of his employment, the accident cannot be attributed to the employer's negligence and the judge should direct the jury to return a verdict for the defendant; (*Thomas* v. *Quartermaine* (3); *Yarmouth* v. *France* (4); *Membery* v. *Great Western Railway Co.* (5); *Brooke* v. *Ramsden* (6); *Cutler* v. *United Dairies (London) Ltd.* (7); *Torrance* v. *Ilford Urban District Council* (8); *Hall* v. *Brooklands Auto Racing Club* (9); *Bellambi Coal Co. Ltd.* v. *Murray* (10)). As *Asquith* J. said in *Dann* v. *Hamilton* (11), "as a matter of strict pleading it seems that the plea *volenti* is a denial of any duty at all, and, therefore, of any breach of duty, and an admission of negligence cannot strictly be combined with the plea."

That an employee who accepts a lodging in a railway van agrees to undergo the risks of using the permanent way as a means of access appears to have been the view of the majority of this court in *Jury* v. *Commissioner for Railways (N.S.W.)* (12). There the deceased had been killed while walking along the permanent way under circumstances very similar to those in the present case. He was living in a fettler's camp within the railway fence near Leura. The road to Leura skirted the railway line on the down side and passed close to the place where Jury was encamped. To reach it, it was necessary to get through the fence, scramble down a bank and over a ditch, and, in consequence, the men occupying the camp were accustomed to use the railway lines to go to and from Leura as well as to go to and from the station where they obtained water. The learned trial judge directed the jury that the deceased had an implied contractual right of access to and from the camp over the defendant's land through which the permanent way ran for all reasonable purposes and by any reasonable way, and the defendant owed a duty to him to see that any such way across that land was as safe as it could be made by the exercise of reasonable care. The jury found a verdict for the defendant. This court held the charge to

(1) (1891) A.C. 325.
(2) (1921) 2 K.B. 674.
(3) (1887) 18 Q.B.D. 685.
(4) (1887) 19 Q.B.D., at p. 660.
(5) (1888) 4 T.L.R. 504; (1889) 14 App. Cas. 179 (H.L.).
(6) (1890) 63 L.T. 287.
(7) (1933) 2 K.B. 297, at p. 304.
(8) (1909) 25 T.L.R. 355.
(9) (1933) 1 K.B. 205.
(10) (1909) 9 C.L.R. 568.
(11) (1939) 1 K.B., at p. 512.
(12) (1935) 53 C.L.R. 273.

the jury was sufficient. *Rich* and *Dixon* JJ. said :—" Its use might be safe enough if men walked not between the rails but along the cess at the side of the ballast. The danger of walking in darkness between the metals is not hidden or a matter of acquired knowledge. Such as it is, it is obvious. Thus the degree of risk likely to arise from the situation of the camp and the circumstances, depended upon matters of common knowledge and an appreciation of the features of the locality. Would a finding be reasonable that by failing to guard against it by providing better and more convenient access to each camp the commissioner negligently caused the deceased to expose himself to the danger which proved fatal ? The finding must extend to each camp because of the uncertainty as to the deceased's goal. In our opinion such a finding would involve a degree of precaution which reasonable care for the safety of the men did not demand. The finding, if made, could not be sustained " (1). *McTiernan* J. said :—" The danger which overtook the deceased was one of the usual dangers incident to walking along the way by which he was returning to the camp. For the deceased it was an obvious and palpable danger. If the deceased were an invitee, the respondent's duty did not extend to providing him with a safe way to and from the camp, by eliminating from any road he might have chosen to take the dangers which were usual and well known to him as a fettler. If the part of the permanent way, where he was run over, were within the area of respondent's invitation, assuming deceased to have been an invitee on the premises, he used that road subject to its usual dangers which included those usually caused by the trains " (2).

The conclusion is that the appellant has failed to establish the defendant was guilty of negligence in respect of the matters alleged in the first count.

With respect to the second count her counsel suggested that it was negligence on the part of the defendant not to issue instructions to the driver of the train to take special precautions, apparently by whistling, in the vicinity of the van. But it appears to me, looking at the railway undertaking as a whole, to be obvious that it would be impracticable to expect the defendant to instruct all the drivers of all the trains on the whole railway system to take such precautions, and, as a necessary consequence, to indicate to the drivers every place on the permanent way where employees might be likely to be present. It would be necessary to do this in every case or none, because, otherwise, where it was not done and an accident occurred,

(1) (1935) 53 C.L.R., at p. 286. (2) (1935) 53 C.L.R., at p. 295.

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it would be so easy to suggest to a benevolent jury that the omission constituted negligence.

It is because employees and their dependants have no redress at common law in cases such as the present that it was found necessary to introduce the various *Workers' Compensation Acts* which provide insurance against accidents arising out of and in the course of the employment. In *McCullum* v. *Northumbrian Shipping Co. Ltd.* (1), Lord *Macmillan* said: "The seaman who on his way back to his ship has left the public highway with its risks common to all wayfarers and has entered the private premises of the harbour in which his ship lies with its special risks, to which only those who have business at the harbour are exposed, seems to me to have come within the protection of the Act, for if he sustains an accident while using this access he sustains it by reason of risks incidental to his employment, which he would not have encountered but for his employment"—See also *Weaver* v. *Tredegar Iron and Coal Co. Ltd.* (2), where the cases relating to accidents to workmen going to or departing from work are summarized.

It is unnecessary to discuss whether there was sufficient evidence for the jury to draw the inference, as opposed to mere conjecture or surmise, that the alleged negligence of the defendant in not providing a safer access to the van was the effective cause of the accident. Nothing was known except that the engine of the train carrying three lights in front and travelling at twenty-five miles per hour ran into the deceased on the eastern track on a clear night. It is therefore difficult to see how the accident could have happened if he had been exercising due caution by keeping a proper look-out (*Dublin, Wicklow and Wexford Railway Co.* v. *Slattery* (3); *Sharpe* v. *Southern Railway* (4)). If it became material to decide the point finally, I would find it difficult to distinguish the case from *Wakelin* v. *London and South Western Railway Co.* (5), applied by Lord *Atkinson* in delivering the leading judgment in the House of Lords in *Marshall* v. *Owners of S.S. Wild Rose* (6), and by this court in *Fraser* v. *Victorian Railways Commissioners* (7)—See also *Imperial Smelting Corporation Ltd.* v. *Josephine Constantine Steamship Line Ltd.* (8). In *Simpson* v. *London, Midland and Scottish Railway Co.* (9), Viscount *Dunedin*, after referring to *Wakelin's*

(1) (1932) 147 L.T. 361, at pp. 366, 367.
(2) (1940) 3 All E.R. 157; 164 L.T. 231.
(3) (1878) 3 App. Cas. 1155, at pp. 1166, 1172, 1193, 1197, 1213, 1216.
(4) (1925) 2 K.B. 311, at p. 321.
(5) (1896) 1 Q.B. 189 (C.A.); (1886) 12 App. Cas. 41 (H.L.).
(6) (1910) A.C. 486, at pp. 490, 491.
(7) (1909) 8 C.L.R. 54.
(8) (1940) 1 K.B. 812, at p. 833; (1941) 165 L.T. 27.
(9) (1931) A.C. 351, at pp. 361, 362.

Case (1) and *Marshall's Case* (2) and stating: "There being no available evidence as to how the accident really happened, it was held that the plaintiffs had not made out their case," proceeded to say: —"I venture to think that the criterion in such a case is somewhat different from the criterion in workmen's compensation cases. There, to succeed, the plaintiff had to establish the negligence against the defendant corporation. But under the *Workmen's Compensation Act* the point to be established has nothing to do with negligence. I may be wrong as to this, but at any rate I am not alone in my view. Lord *Haldane* in *Thom or Simpson* v. *Sinclair* (3) said, speaking of workmen's compensation cases: 'I think that the court is directed to look at what has happened proximately, and not to search for causes or conditions lying behind, as would be the case if negligence on the part of the employer had to be established.'" And Lord *Tomlin* pointed out in the same case that "where the evidence establishes that in the course of his employment the workman was properly in a place to which some risk particular thereto attaches and an accident occurs capable of explanation solely by reference to that risk, it is legitimate, notwithstanding the absence of evidence as to the immediate circumstances of the accident, to attribute the accident to that risk, and to hold that the accident arose out of the employment" (4).

In view of the absence here of evidence of the immediate circumstances, their Lordships' remarks appear to me to be very apposite and to show how inadvisable it is, in such a conjectural atmosphere, to embark on an action of negligence instead of accepting the benefits conferred by the *Workers' Compensation Acts*, even if these benefits are less lucrative than the amount a jury might be expected to award.

The appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *C. Jollie Smith & Co.*

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

J. B.

(1) (1896) 1 Q.B. 189; (1886) 12 App. Cas. 24.
(2) (1910) A.C. 486.
(3) (1917) A.C. 127, at p. 135.
(4) (1931) A.C., at p. 369.