[HIGH COURT OF AUSTRALIA.]

BRESSINGTON . . . . . 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. 1947.

SYDNEY, *Nov.* 27, 28; *Dec.* 12.

Latham C.J., Starke, Dixon, McTiernan and Williams JJ.

Master and Servant—Negligence—Commissioner for Railways—Duty to take reasonable care for servant's safety—Shunting yard—Trucks impelled forward—No special warning—Railway employee, whilst on duty, killed—Failure of Commissioner to carry out duty—Evidence to establish—Compensation to Relatives Act 1897-1928 (*N.S.W.*) (*No.* 31 *of* 1897—*No.* 8 *of* 1928).

B. sued the Commissioner for Railways for damages in respect of the death of her husband, a fireman employed by the Commissioner. The deceased and an engine-driver, in order to sign off duty, passed, by a customary course, over several lines in a large shunting yard where shunting was continuously in operation. They proceeded to cross a line two or three yards behind some brake-vans on their left. At that moment the vans were moved forward by the impact of some coupled ballast trucks which had been impelled forward by a shunting engine. No warning of the movement was given. The leading van struck the deceased who suffered injuries from which he died. Only members of the running staff, of which the deceased was one, were allowed in the yard. It was well-known that any truck or set of trucks was likely to move from the left at any time without warning unless the trucks were specially marked by a prominent red signal. These trucks were not so marked. A witness for the defendant admitted in cross-examination that had a shunter been placed at the stationary vehicles to warn people that they might suddenly move, "that would have been a safe precaution to take." The trial judge refused to leave to the jury an issue whether there was evidence of negligence on the part of the Commissioner in the method employed for shunting trucks, in particular in not providing some means of warning persons

H. C. OF A. 1947.

BRESSINGTON v. COMMISSIONER FOR RAILWAYS (N.S.W.).

that trucks were about to be moved, and in not placing an employee in the vicinity of trucks liable to move so as to warn or prevent persons from crossing the line at a critical place and time.

Held, by *Latham* C.J., *Dixon*, *McTiernan* and *Williams* JJ. (*Starke* J. dissenting) that there was no evidence that the absence of a warning system constituted negligence.

Decision of the Supreme Court of New South Wales (Full Court): *Bressington* v. *Commissioner for Railways* (1947) 47 S.R. (N.S.W.) 472; 64 W.N. (N.S.W.) 165, affirmed.

APPEAL from the Supreme Court of New South Wales.

In an action brought by her in the Supreme Court of New South Wales under the *Compensation to Relatives Act* 1897-1928 (N.S.W.) against the Commissioner for Railways (N.S.W.), Florence Mabel Bressington claimed damages in the sum of £2,000 on behalf of herself and her daughter, aged about seventeen years, for the loss caused by the death of her husband, Baden John Bressington, which was alleged to have been due to the negligence of the defendant and his servants.

The deceased had been in the employment of the Commissioner for Railways for about twenty years and was, and for some time prior to his death, had been working as a locomotive fireman, though qualified as engine-driver.

On 4th December 1945, the deceased was on duty, in company with the engine-driver, in charge of the locomotive of a goods train which proceeded from Enfield. At Teralba they were both relieved and, in accordance with their duty, they travelled in the brake-van of the train to the shunting yard at Broadmeadow, near Newcastle, where they were required to "sign off" at the loco depot, which was situate on the western side of the yard. To reach this building, after the arrival of the train at about mid-day, they had to pass by a customary course over several sets of railway lines upon which shunting operations were being continuously carried out. The several shunting lines all converged in a curving direction towards a shunting point, the precise distance of which from the site of the accident did not appear, but it may be estimated to be at least 150 to 200 yards. The two men were on the inside of the curve. They left the train on No. 6 set of lines, crossed Nos. 5 and 4 set of lines and came to No. 3 set of lines upon which were standing about twelve of the smaller type of goods brake-vans. Keeping these vans on their left—the nearest van being about two or three yards distant—they proceeded to cross No. 3 set of lines. At that moment, however, the vans were moved forward by the impact of some heavy

ballast waggons or trucks which had been impelled forward by an unattached engine, but which at that moment were apparently coupled together and were running free and unattended.

The object of the manoeuvre which moved the vans and trucks was to propel them forward and allow them to run down by their own momentum to the bottom of the yard where they were to form part of a train that was being made up. No special warning of the movement was given. The engine-driver said that when close to the brake-vans it was not possible to see round the curve, and added that neither he nor the deceased touched the vehicles, but when walking two or three yards behind the last brake-van and having just stepped clear of the rails he heard a bump and on looking round saw the deceased, who was about a pace or two behind him, with his hands in the air falling under the wheels of the leading brake-van which knocked him down and he suffered injuries from which he subsequently died.

The shunting yard at Broadmeadow is about one and a half miles long by a quarter of a mile in width. It contains fourteen sets of railway lines. It is a very busy yard with numbers of trucks moving on the different lines, all such movements being designed to sort out various trucks so that on arrival at the bottom end of the yard they might be incorporated in various goods trains. All moving vans and trucks would come from the deceased's left-hand side and he was in no jeopardy from any traffic coming from the right. Only members of the running staff of the trains or employees in the shunting yard were permitted to be in the yard. It was admitted that the deceased was experienced in the conditions prevailing in shunting yards, and that the stationary vans were on a very slight grade where they would remain motionless even lacking application of the brakes. It was known and accepted that any truck or set of trucks was likely to move at any time without warning unless the trucks were specially marked by a prominent red signal. These brake-vans were not so marked.

The normal practice in handling a set of trucks such as those in question was that an engine-driver with a locomotive, from a considerable distance beyond the shunting point, would "kick" another set of trucks which would be switched by the shunter on to the same set of lines as the stationary vans and force them into motion. Thus without further impulse they would run to a suitable point to be linked up in a train. Three men in addition to the one at the points normally were in charge of such an operation, namely, the driver of the locomotive, a "middleman" and a "bottom man." The middleman's duty was said to be that he would ride

H. C. OF A. 1947. BRESSINGTON v. COMMISSIONER FOR RAILWAYS (N.S.W.).

on the outside of the last of the ballast trucks, so that, if necessary, he could apply the hand brake. This means of control was also on the outside of each of the trucks. From his position, however, he could not see if anyone was near to the end of the stationary brake-vans. The bottom man attends to the final connection of all the vans or trucks into a train at a more distant part of the lines but may take them in charge at an earlier stage. At the time of the accident he was some distance away in another direction. As was usually the case, there was much noise in the yard. The engine-driver who accompanied the deceased gave evidence that they could not see anyone accompanying the moving trucks, nor was anyone stationed at the end of the line of stationary vans to give warning of movement, but he did not expect to see anyone in that position. It had never been done, in his experience, in the past for the reason that any truck in the yard was liable to be moved at any moment and without warning. There was evidence that the unaccompanied trucks were moving at a normal shunting speed, slightly faster than an ordinary walking pace, and the whole operation was a perfectly normal procedure carried out in the normal manner habitually used by the staff in the shunting operations in the yard. There was not an overhead bridge at the yard. There was some evidence that the matter of constructing an overhead bridge at the shunting yard had been the subject of representations to, and consideration by the Commissioner during the period 1937-1945.

The Chief Inspector in the Traffic Branch of the railway department, who had been employed in this branch for about forty-two years, and as well as his experience in shunting yards in New South Wales he had studied the practice yards in France, England, the United States of America and Canada, gave evidence that he had a complete knowledge of the management of the shunting in the shunting yard at Broadmeadow, and stated that the practice and procedure as described above was the normal standard practice universally observed in the operation of shunting and in marshalling trains. In answer to a question put in cross-examination he stated that if a shunter had been stationed at one end of the stationary vehicles to give warning that they might suddenly move, that would have been a safe precaution to take, but in re-examination and in relation to this particular question, he said that it would not be practicable to place a man at every stationary truck in the yard and he further said that he had never seen it done and all trucks were liable to move without warning except those carrying a special red sign.

The plaintiff's counsel contended that there was evidence of negligence on the part of the defendant: (i) by reason of the failure of the shunting crew to warn the deceased and the failure of the shunting crew to be engaged in the whole of the operations; (ii) with regard to the running of the trucks and the keeping of a lookout by the shunting crew; and (iii) in the failure to erect an overhead bridge to avoid the danger to employees lawfully passing through the shunting yard.

The trial judge accepted a submission by the defendant's counsel that the stationing of a man in a proper position to give a warning was unnecessary, unless there was evidence that such a course in the circumstances was reasonable or the mere happenings themselves would suggest it, and that there was no such evidence.

After argument the trial judge refused to leave to the jury an issue concerning points (i) and (ii), but left an issue on point (iii) upon which the jury found a verdict in favour of the defendant.

An appeal by the plaintiff to the Full Court of the Supreme Court (*Street* and *Roper* JJ., *Davidson* J. dissenting) was dismissed: *Bressington* v. *Commissioner for Railways* (1).

From that decision the plaintiff appealed to the High Court.

Webb K.C. (with him *Richards*), for the appellant. The respondent did not provide reasonable protection for his employees who had occasion to cross and re-cross the shunting yard. The fact that so long ago as 1937 it was recognized that because of the risks involved an overhead bridge should be erected at the shunting yard, shows that greater precautions than are disclosed in the evidence should have been taken by the respondent. A warning by human agency or mechanical contrivance should have been provided to indicate when a truck or series of trucks was or were about to be moved. Failure to provide such protection or warning constituted negligence on the part of the respondent (*Jones* v. *Great Western Railway Co.* (2); *Charlesworth* on *Negligence* (1938), p. 113.

Fuller K.C. (with him *Chambers*), for the respondent. The jury found against the appellant on the issue of whether or not there should have been an overhead bridge. Suggestions to the court as to what, in the circumstances, should be done must be based on evidence. No such evidence has been tendered in this action. In this case the respondent was not under a duty to do anything.

(1) (1947) 47 S.R. (N.S.W.) 472; 64 W.N. (N.S.W.) 165.

(2) (1930) 47 T.L.R. 39, at p. 40.

H. C. OF A. 1947.

BRESSINGTON v. COMMISSIONER FOR RAILWAYS (N.S.W.).

Reliance is placed on standard railway practice. It is not incumbent upon the respondent to provide against all elements of danger, or to take precautions wherever there is an element of danger (*Key* v. *Commissioner for Railways* (*N.S.W.*) (1)). By virtue of his knowledge as a railway employee the deceased must have been aware of the dangers attendant upon the crossing of railway lines in a shunting yard, and of the direction from whence those dangers might be expected to come. A jury is not entitled to speculate as to how shunting operations should be carried out. In the absence of such evidence a plaintiff must fail unless he prove by evidence that what was being done at the crucial time was negligent or unreasonable in the circumstances. The duty owed to the public by the respondent as Commissioner for Railways is altogether different from the duty owed by him to his employees. It was on that basis that *Jones* v. *Great Western Railway Co.* (2) was decided, the important distinction being that as regards precautions which should be exercised by a railway authority towards the public the jury may be said to be proper judges because they themselves are members of the public, but they are not proper judges of the duty owed by the railway authority towards its own employees because they, the jurors, are entirely ignorant, apart from expert or other evidence, as to what that obligation entails. Where a plaintiff relies on negligence evidence of negligence must be given and unless he discharge that onus he must fail. In cases in which the plaintiff relies on negligence in individual or complicated undertakings the details of which are not generally known to ordinary members of the public, he cannot succeed in such an action unless specific evidence be given of what precautions are necessary in the circumstances (*Pritchard* v. *Peto* (3) ; *Cole* v. *De Trafford* [*No.* 2] (4)). The risks involved in this case were fairly incident to the employment, they fairly arose out of the nature of the occupation and did not arise by reason of the respondent not having taken some precaution which was open to him and which he had failed to take. Evidence of what the respondent ought to have done was not tendered. There was no lack of exercise of ordinary care : *Beven* on *Negligence*, 4th ed. (1928), p. 766. There was not any evidence to show what were reasonable standards of railway management (*Jury* v. *Commissioner for Railways* (*N.S.W.*) (5)).

Richards, in reply. There was a duty upon the respondent, by his servants, to give reasonable warning that trucks were about

(1) (1941) 64 C.L.R. 619, at p. 632.
(2) (1930) 47 T.L.R. 39.
(3) (1917) 2 K.B. 173, at p. 176.
(4) (1918) 2 K.B. 523, at p. 529.
(5) (1935) 53 C.L.R. 273, at p. 285.

to be moved (*Jones* v. *Great Western Railway Co.* (1)). The evidence shows that one or more of the normal shunting crew did not take part in the shunting operations. The absence of trained members from the shunting crew was a material fact and such as to render technical evidence unnecessary. No warning of any sort was given of the intention to move the trucks although it must have been known that moving trucks are a source of danger. In a case such as this case it is unnecessary to call expert evidence, or for evidence to be given that what was done in this particular case was or was not dangerous; that was something upon which the jury was entitled to make its own conclusions after proper direction by the trial judge. This case is distinguishable from *Jury* v. *Commissioner for Railways* (*N.S.W.*) (2) and *Key* v. *Commissioner for Railways* (*N.S.W.*) (3): see also *Smith* v. *Baker & Sons* (4). The jury was entitled to be allowed to consider all factors of the employment, the factor of the nature of the particular shunting operation. A general proposition is not necessary. In the circumstances where the members of the shunting crew were engaged upon shunting operations in the vicinity of the accident, with the trucks on the railway lines, and with the knowledge that the deceased and his companion were about to cross those lines, there were ample facts to establish negligence, that is, failure to give a warning (*R. & W. Paul* (*Ltd.*) v. *Great Eastern Railway Co.* (5)). The *quantum* of negligence in this case was far greater than the *quantum* of negligence in *Grant* v. *Great Western Railway Co.* (6).

Cur. adv. vult.

Dec. 12.

The following written judgments were delivered:—

LATHAM C.J. This is an appeal from an order of the Full Court of the Supreme Court of New South Wales refusing a motion for a new trial in an action by a widow under the *Compensation to Relatives Act* 1897-1928 (*Lord Campbell's Act*). Her husband was killed on 4th December 1945 by being run over by railway trucks while he was crossing railway lines in the shunting yard at Broadmeadow. The plaintiff sued the Commissioner for Railways claiming that the death of her husband was caused by the negligence of the servants of the Commissioner. The plaintiff alleged negligence in relation to three matters:—

1. There were no notices warning persons in the yards of the danger of crossing the lines.

(1) (1930) 47 T.L.R. 39.
(2) (1935) 53 C.L.R. 273.
(3) (1941) 64 C.L.R. 619.
(4) (1891) A.C. 325.
(5) (1920) 36 T.L.R. 344.
(6) (1898) 14 T.L.R. 174

H. C. OF A. 1947.

BRESSINGTON v. COMMISSIONER FOR RAILWAYS (N.S.W.).

Latham C.J.

The learned trial judge refused to allow this matter to go to the jury and it is no longer in controversy.

2. There was no overhead bridge for the purposes of crossing the lines.

This issue went to the jury who found for the defendant. No question arises as to this matter.

3. There was no system of providing a warning when stationary trucks standing in the shunting yard were about to be moved.

The trial judge was of the opinion that there was no evidence to support the allegation of negligence in this respect and declined to allow this matter to go to the jury. The jury, as already stated, found for the defendant. An application to the Full Court for a new trial was dismissed (*Street* and *Roper* JJ., *Davidson* J. dissenting) (1).

The deceased was a fireman. He had finished his day's work at Teralba and with the engine-driver of his engine returned in accordance with his duty to Broadmeadow where they had to sign off at the loco depot which was on the western side of the yard. He travelled on a goods train which stopped in the yard. The two men got off the train which was on track No. 6 and walked over tracks Nos. 5 and 4 to track No. 3. If they walked straight across the lines they would have to travel a distance of some thirty feet. On track No. 3 there were some twelve stationary vans and trucks. As the two men crossed the line, the trucks were on their left hand. The engine-driver crossed safely but the trucks were suddenly pushed forward by four ballast trucks which were kicked on to the line of waggons and vans and the plaintiff's husband was knocked down and run over and killed.

The shunting yard is about one and a half miles long by a quarter of a mile in width. It contains fourteen railway lines. Trains are broken up and made up in the yard by the redistribution of carriages and trucks. The yard exists for the purposes of moving and distributing railway vehicles as required. The vehicles which are not to be moved are marked by a red disc in the day time and by a red light at night. The line of twelve vehicles was not so marked.

Only persons on the running staff of the railways were allowed in the shunting yard. The deceased was a member of the running staff and was familiar with the yard. He knew that trucks might be moved at any moment and he also knew that, owing to the lay-out of the yard, all movement would be from the left, so that he only had to keep a lookout on his left.

(1) (1947) 47 S.R. (N.S.W.) 472; 64 W.N. 165.

The movement of vehicles in the yard is controlled by a senior shunter, who directs an engine which operates at the southern portion of the yard some hundreds of yards away from the place where the deceased was run over. The engine moves trucks towards points which are controlled by a pointsman who directs the moving trucks on to the desired lines. The trucks travel at about a walking pace or a little faster. The other persons engaged in handling vehicles during shunting operations are a middle man, who has to do with controlling trucks which are in motion, and a bottom man, whose duty it is to couple up the engine to a train and to "make the train good." None of these men have a duty to warn persons against the danger of crossing the lines.

It was argued for the plaintiff that the particular circumstances of this case showed negligence on the part of the shunter. It was put that the shunter knew or should have known that the train which in fact carried the deceased and his companion as passengers had entered the yard; that he should have known that, although it was a goods train, passengers might have been travelling on it; and that in these circumstances a warning should have been given that the stationary trucks were about to be moved and that it was dangerous to cross the line. In my opinion, no case is made out for negligence in failing to give a warning on the ground that the shunter knew or ought to have known that the train had arrived in the yard. The train was a goods train and he had no grounds for supposing that there would be passengers travelling on it, or that if there were passengers they would get off in the shunting yard, or that, if they got off, they would walk towards the loco depot.

But the plaintiff relies also upon a more general contention which does not depend upon the particular circumstances of this case. It is contended that there should have been a system of warning persons who were about to cross lines when trucks were about to be moved. The only evidence relating to this matter is to be found in the evidence of Mr. I. C. Theyer, Chief Inspector of the Traffic Branch in the Department of Railways:—In cross examination: "Q. Will you agree with this: that had a shunter been stationed at the stationary vehicles to warn people that they might suddenly move, that it would have been a safe precaution to take? A. Yes." In re-examination: "Q. You were asked by my friend whether it would add to the safety (I think that was the way he put it) to place a man on every stationary truck; would that be practicable? A. No."

H. C. OF A. 1947.

BRESSINGTON v. COMMISSIONER FOR RAILWAYS (N.S.W.).

Latham C.J.

If a man had been placed at the stationary vehicles to give warning that they might move and the deceased had heeded the warning the accident would not have happened. But evidence to this effect is no evidence of negligence. In every case of injury caused by accident, it would be possible to show that if some other course of action had been followed by the defendant the accident would not have happened. But this fact does not show that the defendant did not take reasonable precautions. The omission to do something is not negligence unless the doing of that thing was required by a duty to take care. Before it can be held that the duty to take care involved the doing of a particular act it must be shown that the act was required as reasonable in the circumstances in the observance of the duty to take care. In the present case there is no evidence that it would have been practicable to station men to give warning in the case of every truck or alternatively of every group of trucks that were about to be moved. Unless it is shown that a suggested precaution is practicable it cannot be found that it is reasonable.

It is argued that the jury could, on the basis of its own knowledge, form an opinion that a system of warning should have been in operation. In my opinion there are two answers to such a suggestion. In the first place, when the consideration of the questions involved requires technical knowledge and experience, a jury, in the absence of evidence on the matter, is not entitled to find negligence upon the basis of its own ideas of what ought to be done. The practicability of providing a hitherto unknown system of warnings in a large railway shunting yard is not a question to be determined in the light only of the common knowledge which is attributable to juries. In the second place, a finding that the absence of a system of warning amounted to negligence is directly contrary to the only evidence given on the subject. Mr. Theyer gave evidence that he was familiar with all the main shunting yards in France, England, the United States of America and Canada, and that he had never seen or heard of a man in any of those shunting yards being stationed at a stationary vehicle for the purpose of giving warning of movement. Mr. Theyer said that a system of stationing men to give warnings would not be practicable. This was direct evidence which was not controverted in any way. Proof that the defendant has acted in accordance with the common practice of responsible and skilful persons is evidence, though not conclusive evidence, of absence of negligence: *Vancouver General Hospital* v. *McDaniel* (1): see *Phipson* on *Evidence* 8th ed. (1942), pp. 105, 106. In the present

(1) (1934) 152 L.T. 56.

case there is no evidence that that practice does not conform to the standard of care required of a reasonably prudent manager of a railway system. Thus in my opinion in the present case there is no evidence of negligence and there is strong evidence of absence of negligence.

I refer to *Key* v. *Commissioner for Railways (N.S.W.)* (1). In that case the Court was considering the liability of the Commissioner for Railways in respect of an employee (a carpenter) who was run over by a passenger train while he was crossing a railway line. In the present case the deceased person was a fireman who was familiar with railways and who was crossing the shunting yard where he knew that trucks were liable to be moved at any moment. What *McTiernan* J. said appears to me to be applicable in principle to the facts of the present case :—" 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 " (2).

The dangers of a shunting yard are so obvious that they advertize themselves. There was not only no evidence that the absence of a warning system constituted negligence, but the evidence was actually to the contrary effect.

In my opinion the decision of the majority of the Full Court of the Supreme Court was right and the appeal should be dismissed.

STARKE J. Appeal from a judgment of the Supreme Court of New South Wales in Full Court dismissing by a majority a motion, by way of appeal, for a new trial.

An action was brought in the Supreme Court of New South Wales by the appellant against the respondent pursuant to the *Compensation to Relatives Act* 1897-1928 (N.S.W.) for negligence on the part of the respondent or its servants whereby the appellant's husband was killed.

(1) (1941) 64 C.L.R. 619. (2) (1941) 64 C.L.R., at p. 632.

H. C. OF A. 1947.

BRESSINGTON v. COMMISSIONER FOR RAILWAYS (N.S.W.).

Starke J.

The respondent maintained marshalling and shunting yards at Broadmeadow near Newcastle in New South Wales. The yards comprised some seven up sidings and eight down sidings. But this case is only concerned with numbers one to six down sidings.

The deceased was a fireman employed by the respondent.

In December 1945 he had been on duty in company with an engine driver on a goods train. At a station known as Teralba they were both relieved and travelled back, as was their duty, in a brake-van, to the marshalling or shunting yards at Broadmeadow. The engine-driver and the deceased left the brake-van on No. 6 down siding and proceeded to cross the rails of the other five down sidings to reach what is called the loco depot where they were required to sign off.

And it was not in dispute that the course followed by these two men was in accordance with the customary and required method of reaching the loco depot and that they were allowed five minutes walking time from the brake-van, in which they arrived, to the loco depot.

Shunting was going on constantly in the shunting yards.

The two men walked across down sidings five and four and the engine-driver got across down siding No. 3 but the deceased was struck by a truck on No. 3 siding, knocked down and killed. Shunting operations were in progress.

On No. 3 down siding there were ten or twelve connected and stationary, mostly goods, brake-vans. Some heavy ballast waggons were being shunted. They were given a knock or pushed by a locomotive engine and ran in No. 3 siding down to the stationary brake-vans which they struck and the deceased, who was in the act of passing behind them, was knocked down and killed.

The brake-vans appear to have run approximately 100 yards after they were struck. And there was evidence that the stationary vans obscured to some extent the shunting operations. The engine-driver, who was with the deceased, deposed :—Q. When you were close up to the trucks was it possible for you to see all the way up the line ? A. You could see so far : you could not see round the corner. Q. There is a turn in the line there ? A. Yes. Q. When you attempted to cross there did you think it was quite safe to do so ? A. I did.

In these circumstances the respondent was under a duty, towards his employees, who in the course of their duty were required to and did cross the siding lines to get to or from the loco depot, to conduct his shunting operations with a reasonable regard for their safety.

And the law also requires that the employees of the Commissioner should take reasonable care in crossing the siding lines.

The doctrine of common employment however is abolished in New South Wales (*Workers' Compensation Act* 1926-1946, s. 65).

It is plain, I think, that the respondent did nothing to protect his employees who were required to cross the sidings going to or from their work in the course of their duty.

The trial judge directed the jury that there was no evidence which enabled the appellant to succeed on any complaint made against the method of shunting the trucks or the distribution of the employees in this yard and likewise in regard to the posting of some suggested notice. So he said the only matter of any importance for their consideration that the appellant raised was that there was an unsafe method of ingress and egress to the working place, the engine and loco shed, and that an overhead bridge with steps leading into various points of the shunting yard should have been provided. You must, he said to the jury, seek an answer to the question whether it was reasonably practicable and reasonably to be expected that this overhead bridge should have been provided on the day the appellant's husband was killed.

A jury might well and properly find that the omission to provide an overhead bridge across the siding lines did not constitute negligence on the part of the respondent or in other words that no reasonable and prudent railway manager would have regarded such a bridge as necessary, reasonable or practicable in the circumstances of the case.

But the respondent provided no way of any kind across the sidings. His employees were required to find their way, amongst constantly-moving trucks, across them as best they could and in a few minutes.

Again there were no warnings of any kind, human or mechanical, of the movements of trucks which might be a source of danger to employees crossing the sidings or who might reasonably be expected to cross them to or from their work. There was no signalman or officer of any sort to give any such warning. And it is clear that the shunting crew gave none. There were no mechanical warnings of which I should think many might be suggested such as whistles, red flags and so forth and it was for the jury to determine whether a warning was reasonable and practicable in the circumstances. But I do not think that the appellant is bound to specify the precise warning required: she is entitled to rely upon the fact that no warning was given.

H. C. OF A. 1947.

BRESSINGTON v. COMMISSIONER FOR RAILWAYS (N.S.W.).

Starke J.

Apparently employees crossing the sidings are supposed to look after themselves and the respondent claims that he is not responsible if an accident happens.

But, in my opinion, there was evidence of negligence on the part of the respondent which was wrongly withdrawn from the consideration of the jury and the trial judge was in error in directing the jury that the only question for their consideration was whether it was practicable and reasonable to expect that an overhead bridge across the sidings should have been provided on the day the appellant's husband was killed.

The learned trial judge also directed the jury that an employee is taken to accept the risk of all dangers which are obvious and inherent in his employment and against which protection was either impracticable or unnecessary. Protection in this case was neither impracticable nor unnecessary and as for the rest the direction rests, I take it, upon the proposition that no act or omission is actionable as a tort if a party has expressly or impliedly assented to it. *Volenti non fit injuria.*

But whether the deceased assented or not in the present case was a question of fact for the jury and not a matter of law for the judge.

Again he left the question of contributory negligence to the jury which also in this case was a question of fact for the jury.

The jury returned a general verdict for the defendant but unfortunately it is impossible to say on what issue that verdict is based, whether negligence on the part of the respondent in not providing an overhead bridge, or that the deceased assented to the risk he ran or contributory negligence on his part.

Therefore, in my opinion, there should be a new trial of the action.

DIXON J. This is an appeal from a decision of the Full Court of the Supreme Court of New South Wales refusing to disturb a verdict for the defendant returned by the jury in an action under *Lord Campbell's Act.*

The action was brought against the Commissioner for Railways by the widow of a fireman employed by the Commissioner. He had lost his life in the Broadmeadow shunting yards outside Newcastle on 4th December 1945. While crossing the lines on his way to the loco depot from a goods train from which he had alighted he was run down and killed by a string of brake-vans and other vehicles that were suddenly set in motion in the course of shunting.

The widow, who is the appellant, based her action on negligence at common law and at the trial her counsel attempted to establish

negligence on the part of the Commissioner in more than one respect. But *Herron* J., before whom the action was tried, withdrew from the consideration of the jury all items of negligence but one. The question of negligence which he submitted to the jury was whether, in the exercise of reasonable care for the safety of the running staff, the Commissioner ought to have provided an overhead foot-bridge across the yards and, if so, whether the deceased's death was due to the Commissioner's neglect to erect a bridge. The jury must be taken to have found upon this question in favour of the Commissioner, although it is conceivable that their verdict against the plaintiff is to be explained by the hypothesis that they considered that the deceased had been guilty of contributory negligence in the way in which he crossed the line where the brake-vans were standing that were suddenly put in motion.

The circumstances of the accident were not proved with the exactness of detail which in a court of appeal may go far to govern a question whether some issue or allegation should have been submitted to the jury, an exactness of detail which, however, at a trial commonly is regarded as little to the purpose in influencing the verdict.

The question for our decision is whether *Herron* J. was right in withdrawing from the jury all other allegations of negligence, except the omission to provide a bridge, or, in other words, whether there is evidence upon which a jury might reasonably find that, as a cause contributing to the accident, there was a failure of due care on the part of the Commissioner or his servants in some other respect.

Common employment is not a defence in New South Wales.

For the purpose of the question stated, when more than one inference or interpretation is open upon the evidence, we must adopt that most favourable to the plaintiff's case. On this footing I think the material facts appearing in evidence may be stated briefly as follows. The deceased and an engine-driver named Cole had that day worked a train from Enfield to Teralba, where they had been relieved about noon. It was their duty then to proceed by the first available train, whether passenger or goods train, to Broadmeadow and there sign off at the loco depot. For the purpose of pay the time was reckoned which they had occupied in travelling to Broadmeadow until arrival there together with five additional minutes to cover the time taken to walk from the train across the yards to the loco depot. They caught a goods train at Teralba and travelled in the brake-van. The goods train travelled on the main line to Adamstown, which is at the southerly end of the

H. C. OF A. 1947.

BRESSINGTON v. COMMISSIONER FOR RAILWAYS (N.S.W.).

Dixon J.

Broadmeadow yards. There it was put through the down shunting-neck and run on to one of the down sidings, where it was brought to a standstill. From the circumstances it might reasonably be assumed that the train drew up with its brake-van about opposite the loco depot and with its engine at the northerly end of the siding, that is, well down the yard. There appear to be eight down sidings running parallel and side by side, with a cess or " six foot " between each of them, No. 1 being the nearest to the loco depot which lies to the west. The yards run roughly from south to north. The shunting yards are not gravitation yards but are flat. There is, however, a slight fall to the north, enough to make it desirable to brake standing trucks in order to be sure of holding them. The down siding upon which the train pulled up was No. 6.

The engine-driver Cole and his fireman, the deceased, alighted from the brake-van and proceeded to cross the intervening metals at right angles, going west towards the depot. On No. 3 down siding a string of vehicles was standing stationary. There may have been a dozen vehicles; two or three were a class of brake-van called " H.D." and the rest open " S " trucks. They were standing slightly up the track from the intended line of passage of Cole and the deceased who would pass behind the trucks on their left as they went to the loco depot. In fact they proceeded to cross the rails of No. 3 track about three yards behind the stationary vehicles. The rearmost vehicle was a brake-van. Cole was in front and the deceased a couple of paces behind him. Just as Cole completed his crossing of No. 3 track—he had cleared the line, so to speak, of the overhang of the brake-van—there was a crash and the string of vehicles was violently propelled along the track northwards. The deceased had just about reached the further or more westerly rail of No. 3 track. The brake-van struck him and knocked him down. Eight of the vehicles passed over him. They were propelled a distance of about one hundred yards before they came again to a standstill. The stationary vehicles had been shot forward by the impact of a number of ballast trucks, which had been kicked off an engine on No. 3 down siding for the purpose of sending the stationary vehicles down the yard and, presumably, the ballast trucks also.

A shunting crew consisting of a senior shunter and four other men were at work and it is to be assumed that the bringing in of the train upon No. 6 siding and the kicking-off of the ballast trucks on No. 3 siding were done under the directions of the senior shunter. The distance between No. 6 siding and No. 3 siding may be taken to be about a dozen yards. The deceased and Cole had got down from the brake-van to the westerly " six foot " and probably the

deceased had walked about thirty feet when he was struck by the vehicle.

It is suggested that the senior shunter showed a failure in due care in sending the ballast trucks down No. 3 siding without warning, after putting the arriving goods train which carried Cole and the deceased upon No. 6 siding where he would know it had drawn up near the stationary trucks and vans which the impact of the ballast trucks was intended to propel forward. For this reason and also because the failure of the Commissioner to institute a system of warning or some other safeguard for the protection of the members of the running staff who might have occasion to cross the yards was relied upon as evidence of negligence, it is necessary to state what are the duties of the five members of a shunting crew and how, in the present instance, they were disposed and how they were respectively occupied at the time of the accident. It is also necessary to say something about the arrangement of the shunting yard.

Such a shunting crew consists, first, of a senior shunter who directs operations, broadly speaking, from the end where the engine is pushing or drawing the vehicles; second, of a No. 1 man who works chiefly where the trucks leave the engine, that is, who "cuts off"; third, of a points man who receives the signals of the senior shunter or the No. 1 man at the points and changes the points accordingly; fourth, of a middleman who follows the trucks, though not always right through, and applies the brakes when necessary; and fifth, of a bottom man who is stationed at the far end of the yard and makes good the train by coupling the vehicles that are sent down and who couples up the engine which comes from the loco sheds or yard. In this work the middleman may help. The bottom man, it is said, is not "working with the team." He may cross from one set of rails to another to cut off an incoming engine or to couple up an outgoing engine.

On the occasion of the accident the senior shunter, whose name is Roach, was stationed up the yard a considerable distance south of the place where the accident occurred. What the distance was it would be hard to say. The plan of the yards put in bears no scale and it is hardly possible to supply the deficiency from the oral estimates of various distances and from the information contained upon a plan, put in, of a small portion of the *locus in quo*. But Roach was standing at the shunting-neck. The down main that enters the yard from the south fans out into a down relief siding, a down through road and a down shunting-neck. The down shunting-neck, in turn, fans out into five marshalling grids or sidings and into the eight down sidings which open out further

H. C. OF A. 1947.

BRESSINGTON v. COMMISSIONER FOR RAILWAYS (N.S.W.).

Dixon J.

north than the marshalling sidings. Roach was on the main shunting-neck. The pointsman Hicks was stationed at the points where the eight down sidings, as distinguished from the down marshalling grids or sidings, branch off. Their fanning out means that going north they curve before they straighten out into eight parallel lines. The No. 1 man, Coleman, was assisting the senior shunter. He was further north and had crossed westerly to inquire about a delayed train which had pulled up on a down line, perhaps the down through. The train moved off and he turned to come back just as the accident happened. He says that he was one hundred and fifty yards away. The middleman, Starr, was down at the bottom end, uncoupling the engine of the goods train which had just come in, that upon which the deceased and Cole had travelled from Teralba. There is no evidence what the bottom man, Stone, was doing. Indeed in the evidence there is some confusion between him and Starr and it would perhaps be open to the jury to conclude that Starr was the bottom man and Stone, as middleman, was unaccounted for. Of these men only Coleman was called as a witness.

The ballast trucks which struck the stationary string of trucks and brake-vans must have been pushed by an engine which travelled through or from the shunting-neck and they must have been pushed or kicked through the points controlled by Hicks on to No. 3 down siding. Just before that the goods train carrying the deceased and Cole must have passed through the same neck and have been switched by the points worked by Hicks to No. 6 down siding. The moving ballast trucks would be hidden from the deceased and Cole by the stationary vehicles on No. 3, unless they were seen as they moved from the points on the curve of No. 3 before that line straightened out. The speed at which they moved is described as the ordinary shunting rate and the operation of kicking them off to bump along the stationary vehicles is described as an ordinary shunting operation.

There is no evidence that Roach or any of the shunting crew had reason to know that the incoming train from which Cole and the deceased alighted carried passengers, but they would know that the guard might leave it and they would know of the possibility of its carrying some other members of the running staff. The yards were necessarily traversed at times by guards, shunters, fettlers, yardmasters, night officers, train examiners, engine-drivers and firemen. There was evidence that representations had been made to the Commissioner concerning the increasing danger to which such members of the running staff were exposed because of the

growth in the amount of shunting operations and in the noise which made whistling no warning.

It is on this state of facts that we must decide whether the plaintiff made a case of negligence (other than the failure to provide a bridge) on the part of the Commissioner or his servants fit to be submitted to a jury.

Counsel for the Commissioner candidly said that no special precautions were adopted to guard the men against the dangers attendant upon crossing a shunting yard. His contention was that there were none that could be taken by the Commissioner and that the risks were an unavoidable incident of the operations, arising from the same causes as the risks to a pedestrian of crossing a city street. Vehicles moved and might move suddenly on shunting or running lines. They were visible; they moved on fixed rails, and the risks arose from crossing with insufficient margin through carelessness or inattention. The only vehicles not likely to move were those specially marked with a red disc or light, because men were at work on or under them.

It is, I think, incumbent upon the plaintiff-appellant to point to some specific precaution which the Commissioner might reasonably have taken but omitted. It is not enough, in my opinion, for her to say that the Commissioner chose to put down in the shunting yard the engine crew relieved at Teralba, as he did many other engine crews, and that he was bound either to set them down in a safe place outside the yards or to provide some special protection for them against the dangers attendant upon a shunting yard.

It is part of the ordinary work of the running staff of a railroad to move about amongst trains and railway vehicles and it is the common and necessary practice for the crew of a train to cross the rails when they are relieved. Where running staff are carried as passengers the necessity is not the same; it is not inescapable, but it is the usual and common practice and I do not think it would be reasonable for a jury to find that it was negligence to set down in the yards a relieved engine crew carried as passengers in a goods train.

But one of the witnesses, during his cross-examination, said that he would agree to the proposition put to him that had a shunter been placed at the stationary vehicles to warn people that they might suddenly move, it would have been a safe precaution to take. Some attempted explanation of this answer was made by the witness in his re-examination, but it would be for the jury to say whether the effect of the answer was removed, whatever that effect may be. *Davidson* J., who dissented from the majority of the

H. C. OF A. 1947.

BRESSINGTON v. COMMISSIONER FOR RAILWAYS (N.S.W.).

Dixon J.

Full Court and would have granted a new trial, was impressed with the answer as affording a basis for a finding against the defendant. Literally the evidence only means that, if it were done, it would have been a precaution ensuring or increasing the safety of the operation. To place a man at the rear of all strings of stationary vehicles about to be shunted is, I think, a thing which consideration will show to be impracticable. It is not a precaution which could be reasonably required of the Commissioner. To say that it should have been done in the particular circumstances surrounding the accident is another thing. That is a contention which forms part of what I regard as the real question in the case. It is the question whether, because a train had just come to a standstill on a neighbouring line, the chief shunter ought to have taken some specific precaution, either by delaying the shunting on No. 6 till anybody who might cross from the goods train was clear, or by sending somebody down to warn people or to signal back to him that all was clear or by some other means.

After giving full consideration to this question, I am unable to regard it as reasonably open to a jury to find that the senior shunter, or any other member of the shunting crew, was negligent in sending through the engine and ballast trucks when and as they did and without taking any additional or special precautions such as I have mentioned.

In shunting yards the movement of vehicles is constant. Unless there is some ground for supposing that vehicles stationary at the moment they are seen are not the subject of immediate operations their sudden movement is to be foreseen. There was no reason for the senior shunter to expect a number of people to alight from the brake-van of the goods train. The guard and two or three others at most might do so. The operation of shunting was normal and was carried out in a usual manner, though no doubt it included what strangers to such yards might consider a violent impact. The shunting crew were at normal work in various parts of the yards. What Stone was doing does not appear, but, even if he or Starr had accompanied the ballast trucks as they moved down, he could not have seen the deceased or have influenced the course events took.

The cause of the accident was really the short distance between the rearmost brake-van and the deceased and Cole as they crossed. For three yards is a short distance where trucks may be suddenly " kicked " forward.

It is an unfortunate case but the cause of action depends on negligence and for the plaintiff to succeed she must be able to

indicate some negligent act or omission on the part of the Commissioner or his servants. That I think, on the evidence, she cannot do.

I am, therefore, of opinion that the appeal should be dismissed.

McTiernan J. The question whether negligence can be inferred from the facts proved in this case is not itself a question of fact for the jury. It is a question of law for the court (*Metropolitan Railway Co.* v. *Jackson* (1)). I am of opinion that *Herron* J. was right in deciding that the jury could not legitimately infer from the facts that the shunting operation which resulted in the death of the appellant's husband was done negligently. In this Court the appellant alleged that the respondent was guilty of negligence in connection with this shunting operation in that the respondent had no one to warn the deceased that the vehicles which ran over him would be started into motion. If the respondent had taken this precaution the jury could find that it would have prevented the fatality. But that is not the test of whether there was negligence. The question is whether, the facts being as they were, the respondent failed to observe its duty to take due and reasonable care for the safety of the deceased and not to subject him to unnecessary risk. The deceased did not meet his death from any danger which he had no reason to apprehend. He was bound to use ordinary care in crossing in front of the vehicles which hit him. This ordinary care would have prevented the accident. It was an ordinary shunting operation and was done in the usual manner. The deceased was experienced in crossing railway premises where such shunting operations are common. He knew that any stationary vehicle in this yard was likely to be started into motion without warning. The only exceptions were vehicles on which there were red discs. None of the vehicles which hit the deceased bore a red disc. There was ample room for the deceased to walk at a safe distance from the front of the leading vehicle. He could get clear of the rails in a few seconds. There is nothing in the facts making it reasonable that the respondent should have had someone to give warning that motion was about to be imparted to the stationary vehicles : cf. *Stubley* v. *London & North Western Railway Co.* (2).

I agree that the appeal should be dismissed.

Williams J. The deceased was a member of the running staff of the railways. The accident occurred whilst he was crossing a set of railway lines in a shunting yard. It was caused by some

(1) (1877) 3 App. Cas. 193, at p. 200. (2) (1865) 1 L.R. Ex. 13.

H. C. OF A. 1947.

BRESSINGTON v. COMMISSIONER FOR RAILWAYS (N.S.W.).

Williams J.

stationary vehicles being bumped and set in motion by other vehicles in the ordinary course of shunting operations, and the former vehicles colliding with and over-running the deceased.

The risk incurred in crossing railway lines in a shunting yard in broad daylight is an ordinary incident of the employment of the running staff of a railway. It is a risk similar to that discussed in *Jury* v. *Commissioner for Railways* (*N.S.W.*) (1) and *Key* v. *Commissioner for Railways* (*N.S.W.*) (2) against which ordinary care and caution on the part of a member of such staff should be a sufficient safeguard. There was no evidence on which the jury could have reasonably found that there was a duty on the respondent to warn such employees before stationary vehicles were set in motion.

In my opinion the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Mervyn Finlay & Co.*

Solicitor for the respondent, *Fred. W. Bretnall*, Solicitor for Railways (N.S.W.)

J. B.

(1) (1935) 53 C.L.R. 273.

(2) (1941) 64 C.L.R. 619.