[HIGH COURT OF AUSTRALIA.]

TRANSPORT COMMISSION (TAS.) . . APPELLANT;
DEFENDANT,

AND

NEALE EDWARDS PROPRIETARY LIMITED . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

H. C. OF A. 1954.

HOBART, *March* 18, 19;

SYDNEY, *May* 4.

Webb, Fullagar and Kitto JJ.

Carriers—Carriage of goods by rail—Exclusion of liability of carrier except in respect of loss or damage etc. arising from "wilful misconduct" of carrier's servants—Evidence—Inference.

The meaning of "wilful misconduct" as used in the exceptions to liability-exclusion clauses in contracts of carriage is now settled, and is made out where a person knows that it is wrong conduct on his part in the existing circumstances to do, or fail to do (as the case may be), a particular thing, and yet intentionally does, or fails or omits to do it, or persists in the act, failure or omission regardless of consequences, or acts with reckless indifference, not caring what the results of his indifference may be. The *mis*conduct, not the conduct, must be wilful.

The transport commission agreed to carry by rail certain goods of N. on the terms of a consignment note which provided that in consideration of the payment of a lower freight rate N. would release the commission from all liability for loss or damage, etc., to the goods, except upon proof that such loss or damage arose from the wilful misconduct of the commission's servants. The train on which N.'s goods were carried capsized, resulting in loss or damage to N.'s goods. In an action by N. to recover damages for the loss, the evidence showed that the train, which comprised two diesel electric locomotives, about twenty trucks and a guard's van, with a crew of three, capsized on a dark night as the train was taking a five-chain curve on a steep downgrade. The evidence also showed that for about fifty chains before the point of capsize the train was travelling downhill on a grade which varied, but which was steep throughout, and within 200 yards of the point of capsize increased from one foot in sixty-eight feet to one foot in forty-one feet. Over that short distance the grade was so steep that an engine running freely would increase

its speed by eight to ten m.p.h. A speed limit was fixed by the regulations at which each curve should be negotiated, and at intervals along the line there were pegs indicating the maximum speed limit. The need for observing these limits was stressed in departmental notices to the train crews, including a weekly notice less than two months before the capsize. The driver of this train had over three years' experience both in steam and diesel engines and had driven over this line on previous occasions. According to the evidence, the train had efficient headlights, and there appears to have been nothing wrong with the construction or maintenance of the track, or with the carriage or engines; or with the composition of the train. Expert evidence was given that diesel electric locomotives gather speed more quickly than steam locomotives when running free; that from a diesel it was harder to judge speed than from a steam locomotive, the diesel being more silent; and that the downgrade in question was a very deceiving one. There was no eye-witness of the accident, and both the driver and his assistant were killed. The guard survived, but he was too far back on the train to be able to give an account of what happened in the engine cabin. The trial judge found that the sole cause of the accident was the excessive speed at which the train entered the curve, viz. 45 m.p.h. His Honour was satisfied that the brakes did not fail, but that at the time of the capsize, and since the passing of a point some 170 yards before the curve at which the train capsized, the train had been running without any application of the brakes. His Honour found that the driver ought to have known the proximity of the curve; that he should have been aware of the speed at the point of capsize; that he could not have reached such a speed without becoming aware of it; and that he was aware that there was an imminent risk of the train becoming derailed if he entered the curve at a speed of 40 m.p.h. or more. His Honour also found that the driver, while not deliberately speeding into the curve, intentionally ceased to keep watch on the position and speed of the train from moment to moment. His Honour held that this failure to look constituted wilful misconduct.

Held, that the circumstances of the case gave rise to nothing but conjecture, and no affirmative inference could be drawn from the evidence that the driver of the train made a positive choice to subject his train to the risk of being forced off the rails by excessive speed, he realizing at the time that there was a real danger of such a happening and recklessly choosing to ignore it.

Graham v. *Belfast & Northern Counties Railway Co.* (1901) 2 I.R. 13, at p. 19; *Forder* v. *Great Western Railway Co.* (1905) 2 K.B. 532, at p. 535; *Lewis* v. *Great Western Railway Co.* (1877) 3 Q.B.D. 195, at p. 206, applied.

Decision of the Supreme Court of Tasmania (*Green* A.C.J.), reversed.

APPEAL from the Supreme Court of Tasmania.

On 26th October 1951 the Transport Commission of Tasmania, which is a body corporate pursuant to the *Transport Act* 1938 (Tas.), received from the respondent company a consignment of rabbit-skins for carriage by rail from Glenorchy to Burnie upon the terms,

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inter alia, of a consignment note, which was described as a special contract. The consignment note provided that the goods were to be carried at "owner's risk rate" and concluded as follows:— "and I relieve the commission from all liability in the case of loss, detention, injury, delay, non-delivery, mis-delivery, or damage except upon proof that such loss, detention, injury, delay, non-delivery, mis-delivery, or damage arose from the wilful misconduct of the commission's servants". Shortly before midnight on 26th October 1951, the train carrying the goods capsized, resulting in the total destruction of some of the skins and damage to others. The loss claimed by the respondent company was £3,622 5s. 0d., and this amount was not challenged at the trial.

In an action by the respondent company to recover this loss from the appellant, the only question at the close of the evidence was whether the loss incurred by the respondent company arose from the wilful misconduct of the driver of the train. The trial judge (*Green* A.C.J.) invited counsel to submit questions as to the relevant facts and his Honour gave his findings on these questions. The questions and the findings of his Honour were:

1. At what speed did the train capsize?

Answer. At 45 m.p.h. In making this answer I accept the evidence of Mr. Pennyfather (an expert witness who gave evidence for the respondent company). I do not think there were any defects in the track or the locomotives which would allow the capsize to take place at a lower speed.

2. At what speed did the train enter the curve?

Answer. At 45 m.p.h. Here I accept the evidence of Mr. Townsend (an engineer of the commission) that the two locomotives had apparently left the line at the point of entry into the curve.

3. At what speed did the train pass "the Wattles"? (a landmark near the point of capsize.)

Answer. At 35-37 m.p.h. Here I accept the evidence of Mr. Meikle (an employee of the commission) that the train if running free from "the Wattles" to "the curve" would accelerate from 8-10 m.p.h. I find that the train was running free over that distance.

4. What was the maximum permissible speed at each of the three above-mentioned points?

Answer. At the point of capsize, 20 m.p.h.; at the point of entry to curve, 20 m.p.h.; At "the Wattles", 30 m.p.h.

5. What caused the train to capsize?

Answer. Excessive speed.

6. If excessive speed was the cause, were there any other contributing factors ?

Answer. No.

7. Were the following either a cause or a contributing factor to the capsize ? (a) Failure of brakes ? (b) Failure of or defect in speedometer ? (c) Sudden application of Westinghouse brakes ?

Answer. No. In making this answer I am quite satisfied with Mr. Meikle's evidence that the brakes did not fail. I am equally satisfied by Mr. Townsend's evidence that there was no application of the Westinghouse brakes. If there had been the wheels would not have been spinning freely when the locomotive left the line. I see no reason to think the speedometer was defective. So far as the evidence goes it was working in the second locomotive X2 that afternoon and although the tape recorder on the speedometer in X1 was not working at the time of the accident this was because the spool had not been changed.

8. Was the train retarded by the application of the brakes between " the Blood Hut " (a landmark referred to in evidence) and the point of capsize ?

Answer : I am unable to say. I can only repeat my finding that the train passed " the Wattles " at 35-37 m.p.h. and I now add that no subsequent application of the brakes retarded the train.

9. Was any power applied to the locomotives between " the Blood Hut " and the point of capsize and, if so, did it affect the speed of the locomotive ?

Answer : I am unable to say. I think that it is improbable that it was deliberately applied after passing " the Wattles " and in any case if after passing " the Wattles " the power controller was at notch one this did not affect the speed of the train.

10. (a) Was the power controller in notch one immediately the locomotive came to rest ? (b) If so, was it in such position as a result of the intentional action of the driver before the point of capsize ?

Answer : (a) After all movement—either of the train or its broken parts—had ceased the power controller on the balance of probabilities was in notch one. (b) I am unable to say. As I have said in my answer to question 9, I think it improbable. The driver had passed " the Wattles " at 35-37 m.p.h. He must have known the length and weight of his train. He knew or ought to have known that he was accelerating because his train was running free. He knew or ought to have known that he was approaching " the curve ". That he should apply power in those circumstances I think improbable, to say the least of it. I think it much more

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likely that it was in notch one as the result of the involuntary act of the driver or as the result of the impact or as the result of the direct blow the power wheel received.

11. Did the driver have an unobstructed view of the curve after rounding the ten-chain curve at " the Wattles " ?

Answer: Yes.

12. Was the driver aware or should he have been aware of the proximity of the five-chain curve at the time he passed " the Wattles " ?

Answer: If he knew his position at " the Wattles " (and he ought to have done so) he must have known the proximity of " the curve ".

13. Did the driver mistake his position and find himself closer to the five-chain curve than he thought he was ?

Answer: I cannot say that he did not do so, but he was an experienced railwayman and if he was attending to his duty should not have done so.

14. Was the driver aware that there was an imminent risk of the train becoming derailed if he entered the curve at a speed of not less than 40 m.p.h. ?

Answer: Yes.

15. What experience did the driver have with respect to that portion of the track where the capsize occurred ?

Answer: As driver and fireman he had been over the track many times. He was experienced.

16. Had the driver on any previous occasion or occasions exceeded the maximum permissible speed and had the driver on a previous occasion been the driver of a goods train which had been derailed on a curve ?

Answer: On the evidence he had twice exceeded the maximum permissible speed and once had been the driver of a goods train derailed on a curve. I answer this question merely because it is asked. It must not be assumed I think it relevant.

17. (a) On the probabilities did the driver reach a speed of not less than 40 m.p.h. without being aware thereof in sufficient time to prevent the train capsizing ? (b) Could the driver have reached a speed of not less than 40 m.p.h. without being aware thereof in sufficient time to prevent the train capsizing ?

Answer: It will be seen that I have changed the opening words of 17 (a) as submitted by counsel. So altered I think 17 (a) and its alternative 17 (b) are answered by saying that the answer to 17 (a) is " yes, but he should not have reached that speed without

being aware of it " and to 17 (b) is " yes but he should have been aware of it ".

17A. Should the driver have been aware of the speed—(a) at which he passed " the Wattles "; (b) at the point of entering the curve ?

Answer: Yes—see answer to question 17.

18. Did the driver know he was reaching a critical speed and yet take no action to avoid the consequences ?

Answer: This I think is already answered by the answers to questions 8 and 17A. He knew or ought to have known his speed at " the Wattles " and did not afterwards apply his brakes, so as to retard the train.

18A. If the train was running free, what acceleration would it receive from " the Wattles " to the curve ?

Answer: This is answered in question 3, viz., 8-10 m.p.h.

19. Did the driver know that the train, if running free on this downgrade, would gather speed quickly if the brakes were not applied ?

Answer: I have added this question myself. And I answer it—" as an experienced railwayman, yes ".

20. Was the driver—(a) deliberately speeding into " the curve " ? (b) knowing he was approaching " the curve " deliberately failing to attend to his duty—i.e., by slowing the train ? (c) indifferent to the point his train had reached in the sense that although he ought to have known where he was he did not because he was not attending to his duty ? (d) indifferent to slowing his train in the sense that if he had been attending to his duty he would have done so ?

Answer: (a) No. (b) No. (c) Yes. (d) Yes.

These questions I have added myself. I think they add little to the previous answers but they may serve as a summary.

After giving these findings his Honour gave a verdict for the plaintiff for the amount claimed, on the ground that the driver of the train had been guilty of wilful misconduct.

From this decision the commission appealed to the High Court.

S. C. Burbury Q.C., Solicitor-General of Tasmania (with him *D. M. Chambers* and *J. H. Dobson*), for the appellant. The concept of " wilful misconduct " involves conscious wrong-doing. The trial judge was wrong in holding that the proper inference to be drawn from the evidence was wilful misconduct. The evidence did not establish that there was any wrongful act done on purpose. A wrongful act may be an act of commission or omission but the

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driver of the train must have realised that he was doing what was wrong and intended to do that wrong before he can be said to have been guilty of wilful misconduct. Intention to do a wrongful act is the antithesis of negligence and is different in kind from negligence; *Lewis* v. *Great Western Railway Co.* (1); *Graham* v. *Belfast & Northern Counties Railway Co.* (2); *Forder* v. *Great Western Railway Co.* (3); *Sheppard & Son* v. *Midland Railway Co.* (4); *Re City Equitable Fire Insurance Co.* (5); *Horabin* v. *British Overseas Airways Corporation* (6); *Webb* v. *Great Western Railway Co.* (7); *White* v. *South Australian Railways Commissioner* (8); *Johnson* v. *Marshall* (9); *Bist* v. *London & South Western Railway Co.* (10); *R.* v. *Senior* (11). The onus was on the respondent to establish affirmatively wilful misconduct. The evidence was consistent with either negligence or wilful misconduct and the respondent should have failed: *Haynes* v. *Great Western Railway Co.* (12); *Luxton* v. *Vines* (13). All that the evidence establishes is that the excessive speed of the train might have been caused by wilful misconduct. It is at least equally consistent with negligence. The findings of fact are more consistent with negligence than wilful misconduct. The trial judge used the language of negligence in making his findings. The respondent could only succeed by establishing either (1) an intentional wrongful act of commission, viz. driving the train deliberately at 45 m.p.h. knowing that it was wrong to do so. This is negatived by the answer to question 20 (a); or (2) an intentional wrongful act of omission, viz. knowing the train was approaching a bend where the speed should have been not in excess of 20 m.p.h., and knowing it was travelling at 40 m.p.h., the driver deliberately refrained from applying the brakes. This is negatived by the answers to questions 17 (a), 17 (b) and 20 (b). The evidence does not establish a deliberate act of commission or omission on the part of the driver causing excessive speed. The evidence is equally consistent with the driver mistaking his position through failure to keep a good look-out (not a deliberate failure) or mistaking his speed through lack of attention. This is more likely than conscious wrong-doing involving actual knowledge of his position and speed and deliberately accelerating or permitting the train to accelerate to the point of capsize.

(1) (1877) 3 Q.B.D. 195.
(2) (1901) 2 I.R. 13.
(3) (1905) 2 K.B. 532.
(4) (1916) 85 L.J.K.B. 283.
(5) (1925) Ch. 407, at pp. 434-437, 516-517.
(6) (1952) 2 All E.R. 1016.
(7) (1877) 26 W.R. 111.
(8) (1919) S.A.S.R. 44.
(9) (1906) A.C. 409.
(10) (1907) A.C. 209.
(11) (1899) 1 Q.B. 283.
(12) (1879) 41 L.T. (N.S.) 436.
(13) (1952) 85 C.L.R. 352.

To say that the driver was guilty of conscious wrong-doing causing the train to capsize in these circumstances would be to say that he was courting death : *Light* v. *Mouchemore* (1).

R. M. Eggleston Q.C. (with him *M. G. Everett*), for the respondent. The driver of the train had consciously abandoned his task. If he was conscious of all the elements in the situation and nevertheless allowed the train to accelerate down the slope without taking action to brake it he displayed indifference in the positive sense. If he knew he should have been applying the brakes and did not do so, he was guilty of wilful misconduct. There are two possibilities : either the driver deliberately took the risk or he deserted his post. There is nothing improbable in the theory that the driver was a person of the cast of temperament who took risks. An experienced driver must know when he is driving at a speed more than double the maximum permissible speed and on the evidence he must know his position on the track. [He referred to *Lewis* v. *Great Western Railway Co.* (2).] The test of negligence is an objective one. The concept of wilful misconduct involves the conscious failure to do something which a person knows should be done. There is no room in this case for an honest error of judgment, because the driver must have known his position and the speed of the train. At no point on the track is he permitted to exceed 35 m.p.h. The question is : was there evidence on which a judge who had heard the evidence and at its conclusion was driven in the cabin of a similar locomotive over the track where the capsize occurred could find that the driver was guilty of wilful misconduct. An omission to perform a duty may be wilful misconduct : *Glenister* v. *Great Western Railway Co.* (3) ; *Hoare* v. *Great Western Railway Co.* (4) ; *Bastable* v. *North British Railway Co.* (5). The word " indifferent " in question 20 means that the driver knew what his duty was but did not perform it because he did not care. The period of time over which the driver took no action at all is such as to render it improbable that the capsize was due to inadvertence or honest error.

S. C. Burbury Q.C., in reply. The evidence does not establish that the driver was aware of the position he had reached on the track and his speed. Before a finding of wilful misconduct could be justified it must be clear that the driver was aware of the position and speed of the train and had a choice between action and inaction.

(1) (1915) 20 C.L.R. 647, at pp. 651-652.
(2) (1877) 3 Q.B.D. 195.
(3) (1873) 29 L.T. (N.S.) 423.
(4) (1877) 37 L.T. (N.S.) 186.
(5) (1912) S.C. 555.

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It is not sufficient that the evidence justifies an inference that the driver had ceased to look. It must also justify the inference that he deliberately ceased to look, knowing that he was exposing the train to risk. The act of the driver in ceasing to look is not more consistent with wilful misconduct than negligence.

Cur. adv. vult.

May 4.

The following written judgments were delivered :—

WEBB J. This is an appeal from a judgment of the Supreme Court of Tasmania (*Green* A.C.J.) awarding the respondent company £3,622 5s. 0d. in an action tried without a jury and brought by the respondent against the appellant commission to recover damages for breach of contract arising from the alleged wilful misconduct, negligence or breach of duty of the appellant's servants in the carriage of goods, i.e. 164 bales of rabbit-skins by railway, or in the maintenance or supervision of the railway system. The appellant agreed to carry the skins from Glenorchy to Burnie on the terms of a consignment note which provided that in consideration of the payment of a lower freight rate the respondent would release the appellant from all liability, among other things, for loss or damage to the skins, except upon proof that such loss or damage arose from the wilful misconduct of the appellant's servants. The train carrying the skins capsized, resulting in loss or damage amounting to £3,622 5s. 0d. There is no question as to this being the amount of the damage done, if it is recoverable. The learned trial judge found that the capsize was caused solely by the excessive speed of the train, i.e. 45 m.p.h. on a curve of five chains radius, which the railway regulations required to be negotiated at a speed of not more than 20 m.p.h. His Honour found that the engine-driver was indifferent to the speed attained because he was not attending to his duty, and so was guilty of wilful misconduct.

The driver and the fireman were killed. The guard survived ; but he was too far back on the train to be able to account for what happened in the engine-cabin. There were two engines both of the diesel type and contiguous. There was no eye-witness. The accident took place about midnight on 26th October 1951.

There was expert evidence upon which it could properly be found, as his Honour did find, that the speed was 45 m.p.h. on the five-chain curve, and that this speed was necessary for and did in fact cause the capsize. The question that remains for decision is : what act or omission of the driver brought about this excessive speed ? For the evidence indicates that it was more likely than

not that it was due to his act or omission. But unless the evidence also indicates that it was more likely than not that the driver was guilty of wilful misconduct causing the capsize the respondent should have failed in the action, as the onus of proof rested on the respondent as plaintiff.

To establish wilful misconduct it was necessary for the respondent to point to evidence that the driver knew and appreciated that it was wrong conduct on his part to do or to fail or omit to do a particular thing, and yet intentionally did or failed to do or omitted to do it, or persisted in the act, failure or omission regardless of consequences: *Graham* v. *Belfast & Northern Counties Railway Co.* (1). Or that the driver acted with reckless carelessness, not caring what the results of his carelessness might be: *Forder* v. *Great Western Railway Co.* (2). The *mis*conduct, not the conduct, must have been wilful. If the driver acted under a supposition that his action might be mischievous and with an indifference to his duty to ascertain whether it was mischievous or not that would have been wilful misconduct: *Lewis* v. *Great Western Railway Co.* per *Bramwell* L.J. (3). It appears that *Green* A.C.J. applied the view of the law stated by *Bramwell* L.J.

Such being the law I proceed to state the facts, which so far as material appear to me to be in a very short compass.

For about fifty chains before the point of capsize the train was travelling downhill on a grade which varied, but which was steep throughout, and within 200 yards of the point of the capsize increased from one foot in sixty-eight feet to one foot in forty-one feet. Over that short distance the grade was so steep that an engine running freely would increase its speed by 8 to 10 m.p.h. There were several curves of varying radii in this section of the line and a speed limit was fixed by the regulations at which each curve should be negotiated, varying with the radius of the curve, and perhaps the grade at that point, with a view to insure that the curve would be negotiated at a safe speed. The need for observing these limits was stressed in departmental notices to the train crews, including a weekly notice less than two months before the capsize. The driver of this train had over three years' experience and had driven over this line on previous occasions. The engine was, as already stated, a diesel type, and he had driven that type from the time it was introduced into that railway system. There appears to have been nothing wrong with the construction or maintenance of the track, or with the carriages or engines; or with the

(1) (1901) 2 I.R. 13.
(2) (1905) 2 K.B. 532.
(3) (1877) 3 Q.B.D. 195, at p. 206.

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composition of the train. Then it was well open to his Honour to find as he did that excessive speed was alone responsible for the capsize.

Now this excessive speed could have been due only to one of the following acts or omissions of the driver :—(1) a deliberate act ; (2) indifference, which implied appreciation of the speed and location of the train from time to time, and of the risk attending a speed in excess of that fixed by the regulations ; (3) inadvertence ; or (4) failure to control the speed owing to physical or mental incapacity created with or without the driver's fault.

Which of these four alternatives was the explanation is, in my opinion, entirely within the region of speculation, as I can find nothing in the evidence which points more to one being the explanation than to the others, that is to say, which makes that one more likely than any of the others. Evidence to support an inference of wilful misconduct must not only be consistent with wilful misconduct but reasonably inconsistent with its absence : *Haynes* v. *Great Western Railway Co.* (1).

It would be remarkable if the state of mind of the driver could be determined by evidence in the circumstances of this case. If there had been an automatic device in the engine-cabin to control the speed on curves, and after the capsize this device had been found in order but to have been put out of action by human agency, that might point to deliberate interference by a member of the train crew. But a doubt whether conduct was indifferent or inadvertent could not be so resolved. The particular negative state of mind, the cause of the failure to act, whether this was due to indifference or inadvertence, would not be reflected in the physical condition of any article, or in any other effect resulting from such failure. It is no answer to say that the driver must, in the absence of evidence to the contrary, be assumed to have known from time to time, at night as well as during the day, where the train was, and more particularly in relation to the curves ; what the speed was ; and what the speed limit was. Let it be so assumed, still that does not negative any of the four possible explanations, or make one more likely than any of the others. But the learned trial judge assumed that the driver was not ill, apparently because of the presumption of continuance of the state of sound health which he must be taken to have enjoyed when he began the journey. But if that presumption is to be made, so too is the presumption against the commission of a crime by the driver ; for if a deliberate act or indifferent driving was the explanation then he was guilty of

(1) (1879) 41 L.T. (N.S.) 436.

manslaughter at least, seeing that the fireman was killed. The indifference that would have amounted to wilful misconduct would have amounted to recklessness warranting a conviction for manslaughter.

Then if possible explanations (1), (2) and (4) are eliminated only (3)—inadvertence—is left; but inadvertence does not amount to wilful misconduct.

Nothing but the assumed knowledge of the driver was relied upon as pointing more to one explanation than to any of the other three.

In my opinion wilful misconduct of the appellant's servants was not established.

The respondent's contract with the appellant excluded claims for negligence and breach of duty short of misconduct; so those additional claims were not pressed and need not be dealt with.

I would allow the appeal, set aside the judgment of the Supreme Court, and enter judgment for the appellant.

FULLAGAR J. I agree that this appeal should be allowed. I do not think that I can usefully add anything to the reasons given by my brothers *Webb* and *Kitto*.

KITTO J. On 26th October 1951 the appellant commission received from the respondent 164 bales of rabbit-skins, for conveyance by rail from Glenorchy to Burnie, in the State of Tasmania, upon the terms of a special contract contained in a consignment note. The document had at the head of it a notice that the commission had two rates for the carriage of certain classes and descriptions of goods, one termed the "commission's risk rate", in consideration of which the appellant took the liability of a common carrier subject to certain statutes, and the other a lower rate, termed the "owner's risk rate", which was charged on condition that the goods should be carried at the owner's risk only and that the consignor should relieve the commission of all liability for loss, detention, injury, delay, non-delivery, mis-delivery, or damage except upon proof that such loss etc., arose from the wilful misconduct of the commission's servants. The body of the consignment note contained the following:—

"To the Transport Commission. October 26th 1951.

Please receive from Neale Edwards Pty. Ltd. at Glenorchy Railway Station and forward the undermentioned Goods to River Don Trading Co. at Burnie Railway Station subject to the Railway

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Management Act, 1935, and to the Transport Act, 1938, and in particular to the stipulations, terms, and conditions of this Consignment Note, which is, and is of the nature of, a special contract. So far as regards those opposite which in the column headed 'At Whole Risk' I have so indicated, I require the goods to be carried at the Commission's risk, subject to the Railway Management Act, 1935, and to the Transport Act, 1938. In respect of the goods to which the two rates above referred to apply, and as to which I have not directed that they be carried at the Commission's Risk Rate, I require them to be carried at the Owner's Risk Rate, in consideration whereof I undertake all risk of loading and unloading and of the carriage of the same by railway; and I relieve the Commission from all liability in the case of loss, detention, injury, delay, non-delivery, mis-delivery, or damage except upon proof that such loss, detention, injury, delay, non-delivery, mis-delivery, or damage arose from the wilful misconduct of the Commission's servants."

The consignment note was signed by an agent on behalf of the respondent as consignor, and receipt of the goods subject to its terms was acknowledged by the signature of a railway employee on behalf of the commission. The respondent's rabbit-skins were goods to which the two rates applied, and the respondent did not direct in the appropriate column or otherwise that they be carried at the commission's risk rate. The respondent accordingly obtained the benefit of the lower owner's risk rate. The skins were duly loaded and despatched, but as a result of an accident which occurred to the train conveying them many were either damaged or destroyed, and the respondent suffered loss to the extent of £3,622 5s. 0d.

The respondent sued the appellant in the Supreme Court of Tasmania to recover this amount. The action was tried by *Green* A.C.J. without a jury, and at the close of the evidence the only question for determination was whether the respondent had proved that the damage of which it complained arose from the wilful misconduct of one of the commission's servants, namely the driver of the train. The learned judge answered this question in the affirmative. He made findings of fact in the form of carefully-framed answers to a large number of questions; and to these answers he added a statement of his reasons for holding that the respondent was entitled to succeed. He gave a verdict for the respondent for the amount claimed, and against the judgment entered pursuant to this verdict the commission now appeals to this Court.

The train conveying the respondent's rabbit-skins was a goods train consisting of two diesel electric locomotives, about twenty trucks and a guard's van. It was over 500 feet in length and weighed some 265 tons. The crew consisted of a driver an assistant with the title of fireman and a guard. The first two were in the driving compartment of the leading engine, and the guard was in the van at the rear of the train. The train left the Danby siding at 10.53 p.m. travelling north. The line rises for a short distance after leaving Danby, and then declines somewhat steeply for about 920 yards to a culvert which crosses a creek known as Brummagen Creek. The culvert is approximately in the middle of a sharp curve in the line, the radius of the curve being only five chains. The gauge of the track is only three feet six inches. As the train entered the curve it commenced to capsize. The engines left the rails, hurtled into the far bank of the creek and partially buried themselves in the earth. The trucks followed them and ended in a closely compacted mass of wreckage. The van alone remained upright on the rails. The driver and the fireman were both killed.

The learned judge found that the cause of the disaster was the excessive speed at which the train entered the curve, and that there was no other contributing factor. This finding both parties accept. If the cause of action sued upon had been for negligence, the evidence would have amply justified a verdict for the plaintiff. It is obvious, and the commission does not attempt to deny it, that if a train enters a curve so fast that without the intervention of any other factor it capsizes and becomes the complete wreck which the evidence in this case depicts, there is an exceedingly strong prima facie case of negligence on the part of the driver. But the respondent, having chosen to accept the benefit of the lower rate for the carriage of its goods, had exonerated the commission from liability on the ground of negligence. The wilful misconduct for which alone the commission remains liable is " something entirely different from negligence, and far beyond it, whether the negligence be culpable, or gross, or howsoever denominated ": *Lewis v. Great Western Railway Co.* (1); *Graham* v. *Belfast & Northern Counties Railway Co.* (2); *Norris* v. *Great Central Railway Co.* (3).

Contracts of carriage in the terms of the consignment note in the present case have been construed by the courts over a long period of years, and the meaning of " wilful misconduct " in such a context is now settled. The essential point about it was brought

(1) (1877) 3 Q.B.D., at pp. 195, 206, 213.
(2) (1901) 2 I.R. 13, at p. 19.
(3) (1916) 85 L.J.K.B. 283, at p. 285.

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out by *Bramwell* L.J. in the first of the cases above cited (1), when he said: "the *mis*conduct, not the conduct, must be wilful". A definition of the expression was offered by *Johnson* J. in *Graham's Case* (2) in this form: "a person wilfully misconducts himself who knows and appreciates that it is wrong conduct on his part in the existing circumstances to do, or to fail or omit to do (as the case may be) a particular thing, and yet intentionally does, or fails or omits to do it or persists in the act failure or omission regardless of consequences" (2). This definition was adopted by Lord *Alverstone* C.J. in *Forder* v. *Great Western Railway Co.* (3), subject to the addition of the words, "or acts with reckless carelessness, not caring what the results of his carelessness may be". Interpreting carelessness here to mean indifference, *Johnson* J.'s definition with Lord *Alverstone's* addition to it was approved by *Avory* and *Lush* JJ. in *Sheppard & Son* v. *Midland Railway Co.* (4); by *Astbury* J. in *Joshua Buckton & Co.* v. *London & North Western Railway Co.* (5); and by *Pollock* M.R. in *In re City Equitable Fire Insurance Co.* (6). The definition in its original form satisfactorily expanded the statement of *Bramwell* L.J. in *Lewis* v. *Great Western Railway Co.* (1), that one condition of wilful misconduct must be that the person guilty of it should know that mischief will result from it. The addition, understood as *Avory* and *Lush* JJ. understood it, covers what *Bramwell* L.J. went on to say: "But to my mind there might be other 'wilful misconduct'. I think it would be wilful misconduct if a man did an act not knowing whether mischief would or would not result from it. I do not mean when in a state of ignorance, but after being told, 'Now this may or may not be a right thing to do'. He might say, 'Well, I do not know which is right, and I do not care; I will do this'. I am much inclined to think that that would be 'wilful misconduct', because he acted under the supposition that it might be mischievous, and with an indifference to his duty to ascertain whether it was mischievous or not. I think that would be wilful misconduct" (7).

The application of these tests in the present case is that in order to prove that the loss arose from wilful misconduct on the part of the driver the respondent had to satisfy the court that the root cause of the accident lay in a positive choice made by the driver to subject his train to the risk of being forced off the rails by excessive speed, he realizing at the time that there was a real danger of such a happening and recklessly choosing to incur it.

(1) (1877) 3 Q.B.D. 195, at p. 206.
(2) (1901) 2 I.R. 13, at p. 19.
(3) (1905) 2 K.B. 532, at p. 535.
(4) (1915) 85 L.J.K.B. 283, at p. 286.
(5) (1916) 87 L.J.K.B. 234, at p. 242.
(6) (1925) Ch. 407, at p. 517.
(7) (1877) 3 Q.B.D. 195, at p. 203.

It is possible to imagine two ways in which this might have come about. One is that as the train was descending the slope towards Brummagen Creek, and while there was still time to regulate the speed of the train as to enable it to pass safely round the curve, the driver, with the fact present to his mind that there was a real danger of the train leaving the rails if the speed went unchecked, nevertheless determined not to keep the speed in check, or not to keep it in check to the extent which he believed to be sufficient, and that he carried this decision into effect. The other possibility is that at some point during the descent of the slope or even before it commenced, but while there was time to reduce the speed of the train sufficiently to enable it to take the curve safely, the driver, while appreciating that there would come a stage at which the speed would need to be checked if the train were not to be in peril of leaving the rails, determined not to attend to the progress of the train, and kept his attention diverted to some other matter, recklessly incurring the risk which he realised was involved in so doing, until the accident happened or became inevitable.

The respondent does not suggest, and the trial judge did not find, that the accident is to be explained in the first of these ways. Indeed it attributes to the driver an attitude of foolhardiness which is quite incredible. The respondent, however, contends that the learned judge accepted the second explanation, and that it should also be accepted in this Court. Some facts which were not in dispute may first be mentioned. From the top of the hill which the line mounts after passing the Danby siding, the distance to the point of capsize is about 920 yards. At the beginning of the descent, near a spot known as the Blood Hut, the line is straight for about 350 yards, the down gradient being one in fifty-five. Then there is a slight curve to the left of fifteen chains radius, and in this vicinity the gradient becomes one in forty-seven. The line veers further to the left in slight curves of eighteen, twenty-two and ten chains radius with a gradient of one in sixty-eight; and finally, having straightened out again, it proceeds with a gradient of one in forty-one towards and into the fatal sharp curve to the right which crosses the Brummagen Creek viaduct. About 170 yards before the point of the capsize the line passes a clump of trees referred to in the case as the Wattles. From there the driver has an unobstructed view to the five-chain curve over Brummagen Creek.

At intervals along the line there are pegs indicating maximum permitted speeds. At the date of the accident these speeds were: 35 m.p.h. on the crest of the hill, 30 m.p.h. about 400 yards down the incline, 35 m.p.h. another 700 yards on, 30 m.p.h. on the gentle

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curve to the left of varying radii just before the Wattles, and 20 m.p.h. about fifty yards before the point of the capsize. The accident occurred just before 11 o'clock on a dark night, but the train had efficient headlights, and while there is no evidence that the figures on the speed pegs could be read by the driver it is to be observed that he knew the route quite well, and may be taken to have known what the pegs indicated. Just above his head was an illuminated speedometer which (unless it was out of order, and the evidence does not suggest that it was) would have enabled him to see, even if he did not know by reason of the sense of speed which his experience might be expected to have developed in him, how the pace of the train compared with the permitted speeds. These facts are mentioned because much reliance was placed upon them by counsel for the respondent, who pointed to evidence showing that the permitted speeds had been fixed for safety reasons, and that the importance of not exceeding them had been impressed by the commission upon its drivers. These matters, however, have importance in the case only as part of the material upon which the trial judge had to decide whether the driver was in fact aware of actual danger and consciously accepted it. It is nothing to the point that he may have been aware that he was infringing restrictions as to speed which were binding upon him, for the accident was not caused by infringing these restrictions; it was caused by allowing the train to enter the curve at a greater speed than that at which it was in fact possible for that train to take that curve. What is to the point is the question whether he was aware that he was subjecting the train to an actual danger of entering the curve at such a greater speed: cf. *Horabin* v. *British Overseas Airways Corporation* (1). In so far as the case of *Bastable* v. *North British Railway Co.* (2) supports a different view it must be regarded as out of line with the current of English authority.

His Honour found that the train was travelling at 45 m.p.h. when it capsized; that it had been running free, i.e. without any application of the brakes; that so running it would have accelerated by 8 to 10 m.p.h. over the distance between the Wattles and the point of capsize; and that therefore the speed at the Wattles (where the maximum permitted speed was 30 m.p.h. and there remained only about 150 yards to be traversed before reaching the 20 m.p.h. peg near the commencement of the five-chain curve) was between 35 and 37 m.p.h. His Honour was satisfied that the brakes did not fail, but that the train was not retarded by any

(1) (1952) 2 All E.R. 1016.

(2) (1912) S.C. 555.

application of the brakes after passing the Wattles. He thought it improbable that any power was applied to the locomotive after passing the Wattles, but was unable to say whether any power was applied between the Blood Hut and the point of capsize. In his Honour's view, the driver ought to have known the proximity of the five-chain curve. To the question whether the driver mistook his position and found himself closer to the five-chain curve than he thought he was, the learned judge gave the answer, " I cannot say that he did not do so, but he was an experienced railwayman and if he was attending to his duty he should not have done so ". Then his Honour made an important series of findings which may be re-stated thus. As an experienced railwayman, the driver knew that the train, running free on the downgrade from the Wattles, would gather speed quickly if the brakes were not applied. He should have been aware of the speed at which he passed the Wattles and of the speed at which he entered the five-chain curve. He was aware that there was an imminent risk of the train becoming derailed if he entered that curve at a speed of 40 m.p.h. or more. He should not have reached such a speed without being aware of it; but on the probabilities he could and did reach such a speed without being aware of it in sufficient time to prevent the train capsizing. He was not deliberately speeding into the curve. He did not deliberately fail, knowing that he was approaching the curve, to attend to his duty by slowing the train. But it was because he was not attending to his duty that he did not know where he was and did not slow the train.

Having made these findings, the learned judge stated the grounds for his decision in a passage which should be quoted in full. " This accident took place because the deceased driver was not attending to his duty. That in my view amounts to misconduct in law. The question is, was that misconduct wilful ? Was the driver wilfully not attending, or was there some other reason for his failure to do so ? I think that it was wilful. I think that he wilfully, that is, as a conscious act of his will, ceased to watch where his train was and what its speed was. I reach that conclusion because the driver was an experienced man. He knew that stretch of line and, of course, the whole line. He knew the length and weight of his train. He knew that he was on a down grade and that his train would gather speed quickly if he did not brake. He passed the Wattles at 35 or 37 m.p.h. so that he was not, I think, keeping a proper watch before then. From the Wattles the point of derailment was a distance shown on the plan of approximately 170 yards and in that distance again he did not brake. His failure to do so was in

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my view, misconduct, and in my view, wilful misconduct. He was not looking. If he had been looking and had let the train run on, he was and must have known that he was simply committing suicide. It is his failure to look which in my view was the wilful misconduct. There is nothing to suggest that that failure to look was due to illness or to any other cause than a deliberate act of the will and on the balance of the probabilities I think it was a deliberate act ".

In considering this reasoning it must be borne constantly in mind that the notion of wilful misconduct as expounded in the authorities which have been cited is not satisfied in the present case by a finding that the driver intentionally ceased to keep watch on the position and speed of the train from moment to moment. It requires the additional element that the driver did this, knowing but not caring that he was thereby taking a real risk of capsize or derailment. This being remembered, two comments upon the learned judge's reasoning must be made. The first is that the assumption is tacitly made that so experienced a driver could not have deliberately averted his attention from the situation and speed of his train to the extent which is suggested, without being aware of, and consciously accepting, the risk involved in so doing. There is, however, no reason to ignore the possibility that the driver, having shut off the power, believed that the train could not attain such a speed as to be in danger of failing to take the curve, and decided, through over-confidence in his own judgment, that he could safely attend to something else until there should again be need for an application of the power. In this connection it is relevant to mention that, according to the evidence given by Mr. Pennefather, the retired chief civil engineer of the New South Wales Railways, by Mr. Townsend the assistant chief mechanical engineer of the Tasmanian Government Railways, and by Mr. Mitchell, a retired engine-driver, diesel electric locomotives gather speed more quickly than steam locomotives when running free. Mr. Meikle, the superintendent of locomotive running of the Tasmanian Government Railways, said also that from a diesel it is harder to judge speed than from a steam locomotive, the diesel being more silent than the steam. (Mr. Pennefather, Mr. Townsend and Mr. Meikle were all relied upon by the learned judge for some of his findings). To this should be added some evidence given by Mr. Mitchell : " The grade from there (the Danby siding) to Brummagen Creek is a very deceiving one and to view it from the cab you would think it was more level than it is and the train gets away very quickly on it. I cannot think of any more deceiving piece of track

in Tasmania. It would be deceiving to an experienced driver too . . . In my experience it is very easy at night to misjudge your position and find you were very much closer to Brummagen Creek than you thought you were ".

The second comment to be made is that the evidence does not warrant the conclusion that the driver acted deliberately in refraining from watching where his train was and what its speed was. There was, of course, no direct evidence on the point, for the only two persons who could have given such evidence, the driver and the fireman, unfortunately perished in the disaster. The guard was unable to throw any light on the cause of the accident. The case was therefore one of circumstantial evidence. The burden of proof lay upon the respondent: *H. C. Smith Ltd.* v. *Great Western Railway Co.* (1), and the standard of proof which he had to satisfy was that which was explained in *Luxton* v. *Vines* (2). It will be sufficient to quote two sentences from the latter case: " In questions of this sort, where direct proof is not available, it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture: see per Lord *Robson*, *Richard Evans & Co. Ltd.* v. *Astley* (3). But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought, then, though the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture or surmise: cf. per Lord *Loreburn* (4) " (2).

Now, the considerations which weighed with the learned trial judge were undeniably substantial. The driver was an experienced driver of both steam and diesel electric engines. He should have known the capacity of so heavy a train to gain momentum if allowed to coast downhill without any application of the brakes. He knew the line well. He knew there was a steep slope to the curve at Brummagen Creek, and had often taken trains down it. Having regard to his knowledge and experience, there is obviously much to be said for the view which the trial judge expressed, that if the driver had been keeping a proper watch he would have known, as he passed the Wattles and indeed over a period of some seconds before he reached the Wattles, that unless he applied the brakes he was committing suicide. And if that view be accepted, the inference is strong, as his Honour thought, that the driver could

(1) (1922) 1 A.C. 178, at p. 183.
(2) (1952) 85 C.L.R. 352, at p. 358.
(3) (1911) A.C. 674, at p. 687.
(4) (1911) A.C., at p. 678.

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not in fact have been keeping a proper watch. But the very knowledge and experience upon which this inference is based must have told the driver, if he gave any consideration to the question of keeping or not keeping a watch on the location and speed of the train, that to let the train run free on that stretch of line without keeping such a watch was just as surely suicidal as to keep a watch but to refrain from applying the brakes when the need to do so should become apparent. The circumstances which support the inference that no proper watch was kept support equally the inference that the omission to keep a proper watch was not due to a deliberate choice made with a realization of the danger involved.

The theory that the driver deliberately elected to take the risk of paying no attention for an appreciable period to the identity of the slope he was descending and the speed the train was developing as it descended that slope is thus open to the very objection which led his Honour to reject the competing theory that the driver elected to take the risk of not braking the train, although he perceived that the speed and the proximity of the five-chain curve demanded that course. If there is any reasonable alternative hypothesis, both those theories ought to be rejected as attributing to the driver a degree of unconcern for his own life and the life of his fireman, to say nothing of the safety of his train, which could hardly be reconciled with sanity.

Other possibilities suggest themselves at once. It is true, as the learned judge said, that there is nothing in the evidence to suggest that the driver's failure to watch was due to illness, but neither is there anything to exclude the possibility. Again, it may be that the fireman became ill and claimed the driver's attention for a few seconds. Or some altercation may have broken out between the two men and absorbed the attention of both. Or it may be that the driver's familiarity with the line he was traversing had bred a contempt for its dangers, and he turned his mind to some engrossing occupation such as a study of sporting information, or the reading of an absorbing story, taking it for granted, without thinking about the matter, that as long as the power was shut off there was no need to worry. It cannot be said that there is any special likelihood about any of these possibilities, but the evidence is consistent with them all, and at least none of them requires the supposition that the driver deliberately embraced the danger of a violent death. If there is one thing less probable than any other in this case, it is that the driver risked plunging off the line with 265 tons of rolling stock behind him, appreciating that the risk was real, and actually choosing to take it in preference either to

keeping his attention on his work or to using the brakes when he saw the need to do so.

The conclusion which the respondent sought is therefore one which cannot be reached save by conjecture, and by conjecture characterized by improbability. The respondent's claim should fail, and accordingly the appeal should be allowed.

Appeal allowed with costs; judgment of the Supreme Court of Tasmania set aside. In lieu thereof judgment for the defendant with costs.

Solicitor for the appellant, *J. H. Dobson*, Solicitor for the Transport Commission.

Solicitors for the respondent, *Simmons, Wolfhagen, Simmons & Walsh.*

M. G. E.