[HIGH COURT OF AUSTRALIA.]

COMMISSIONER FOR RAILWAYS (N.S.W.) . APPELLANT;
DEFENDANT,

AND

HOOPER . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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1953, SYDNEY, *Nov.* 10, 11;

1954, MELBOURNE, *March* 5.

Dixon C.J., Webb, Kitto and Taylor JJ.

*Negligence—Personal injuries—Invitor and invitee—Railway goods yard—Sheep—Unloading from trucks—Removal of trucks by consignee—Stationary trucks struck by moving trucks—Consignee caught between buffers and killed—Commissioner for Railways—Duty of care—Liability.*

A sheepdealer, on whose behalf several trucks containing sheep had arrived at a certain railway station, sought to move the trucks to the dump or race in order to unload them. While the porter was away tending to other trucks the sheepdealer, assisted by three other men, barred and uncoupled two of the trucks and allowed them to run slowly down the slight gradient to the dump where they were brought to a standstill by means of brakes. Returning to the train they released four more trucks which ran slowly down towards the other two trucks but came to a standstill with a foot or eighteen inches between the buffers of the upper of the two trucks and the lowest of the four trucks. The party uncoupled another two trucks which moved slowly down the line and the party walked ahead of them on the side furthest from the sheep yards. On reaching the interval the four men proceeded to pass through it. The first two men did so successfully but just as the sheepdealer was about to mount the ramp the second two trucks struck the set of four trucks and drove them forward and being caught between the forward buffer of the oncoming truck and the rear buffer of the stationary truck, he, the sheepdealer, was killed. In an action for negligence against the Commissioner for Railways,

*Held*, by *Dixon* C.J., *Kitto* and *Taylor* JJ. (*Webb* J. dissenting), that there was no evidence of the neglect of any duty on the part of the defendant commissioner: although the deceased was an invitee his injury was not suffered because of dangers due to the nature or condition of the defendant's premises, but was a result of the manner in which he acted in the course of operation with the defendant's trucks undertaken by himself his servants and agents.

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

APPEAL from the Supreme Court of New South Wales.

In an action brought by her under the *Compensation to Relatives Act* 1897-1946 (N.S.W.) in the Supreme Court of New South Wales, on behalf of herself and five sons and four daughters, all infants, Gloria Iris McLeod Hooper sought to recover damages from the Commissioner for Railways (N.S.W.) for the death of her husband, Lionel Athol Hooper, a sheepdealer, who on 27th February 1951 "while lawfully present at the railway yard, Condobolin, was crushed between the buffers of two railway trucks while attending to the unloading from trucks of some sheep consigned to Condobolin on his account, and who died as a result of the injuries thereby sustained by him".

The defendant denied the allegations, *inter alia*, that the deceased, with the invitation of the defendant was lawfully in and upon the said railway yard and premises for the purpose of unloading and receiving and removing the said sheep.

The deceased had purchased some sheep for delivery at Condobolin, and on 27th February 1951, a train carrying that consignment of sheep reached Condobolin. There were two lots of sheep in the train, several truck loads being consigned to a man named Casky, and the remaining trucks—some fourteen or fifteen in number—contained the sheep consigned to the deceased. The trucks were detached from the train and placed in a position near the loading ramp, and when the deceased arrived, with assistance, to take delivery of the sheep, it became necessary to remove trucks down into position so that the sheep could disembark at the ramp. The trucks containing Casky's sheep were taken away under the supervision of a porter, an employee of the defendant commissioner, and they were removed to another part of the yard and placed in what was known as the loop. The deceased, with his fellow workers, then commenced to bring the trucks down to the loading ramp from the position in which they were standing further up the line, there being a very slight grade from that position down to the ramp. Two trucks were brought down and placed in position, the porter not being present and no other servant of the commissioner being there, and then a further four trucks were also brought down and brought to a stop, leaving a gap of some twelve to eighteen inches between the buffers of the leading truck in the second set and the buffers of the rear truck of the first two. After that the deceased returned again, with his assistants, to bring down some more trucks, and another four were released and started on their way down towards the loading ramp. They were moving at a very slow pace, for the deceased and those who were with him walked ahead of

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the third set of trucks which were moving down, and when they came to the gap mentioned above they proceeded to pass through it, they being at that time on the opposite side to the loading ramp, in order to get up on to the ramp itself. Two men passed through safely and got up on to the ramp. The deceased was passing through, followed by the fourth man, and as he came between the two sets of buffers nearest to the ramp the slowly moving trucks in the third set bumped into the stationary set of four trucks, forced them forward slightly, and the deceased was crushed between the buffers and died. The fourth member of the party was just behind, but not being between the buffers, did not suffer any injury.

The trial judge (*Richardson* J.) held that the evidence pointed irresistibly to the fact that the deceased was wholly responsible for the injuries sustained by himself, and, by direction, the jury returned a verdict for the defendant.

The Full Court of the Supreme Court of New South Wales (*Street* C.J., *Owen* and *Herron* JJ.) allowed an appeal, set aside the verdict, and ordered a new trial.

From that decision the defendant Commissioner for Railways appealed, by special leave, to the High Court.

Relevant by-laws are sufficiently stated in the judgments of *Dixon* C.J., *Webb* and *Taylor* JJ. hereunder.

*N. A. Jenkyn* Q.C. (with him *H. Jenkins*), for the appellant. On the facts the only duty which the appellant commissioner owed to the deceased arose out of a relationship of invitor and invitee. There was not any evidence of a breach by the commissioner of that duty, nor of a concealed danger (*Indermaur* v. *Dames* (1) ). Whatever danger existed was fully known to the deceased and was of his own creation. A causal connection involving the commissioner was not proved. Contributory negligence on the part of the deceased was conclusively established, or could be inferred, in the respondent's own case. The trial judge was correct in entering a verdict for the commissioner. The commissioner is entitled to rely upon the point taken on his behalf before the trial judge. The respondent's case was that the deceased had gone to the railway yard with his own three selected men to unload the sheep, that is to perform the ordinary duty of a consignee. On the evidence the accident resulted from an operation which the invitee himself was carrying on on the premises (*Norman* v. *Great Western Railway Co.* (2) ; *Brackley* v. *Midland Railway* (3) ). The declaration sets out duties which are

(1) (1866) L.R. 1 C.P. 274.
(2) (1915) 1 K.B. 584.
(3) (1916) 85 L.J. K.B. 1596.

not duties known to the law. On the facts of this case the respondent has to succeed on the principles expounded by *Willes* J. in *Indermaur* v. *Dames* (1): see *London Graving Dock Co. Ltd.* v. *Horton* (2). An alternative line of liability is dealt with in *Clerk and Lindsell* on *Torts*, 10th ed. (1947), p. 660. It is not correct to say that the allowing or lending by an owner of a truck to an adult to use the truck puts it into the class of dangerous things. A perusal of the cases shows that each is an act of misfeasance. There is a distinction between an omission and a negligent performance of a duty: *Charlesworth* on *Negligence*, 1st ed. (1938), p. 188. When the authors of *Clerk and Lindsell* on *Torts*, 10th ed. (1947) and *Charlesworth* on *Negligence*, 1st ed. (1938) dealt with the matter they very carefully selected the word "act" and not "omission". They avoided the use of the word "omission". There is a distinction between misfeasance and non-feasance: *Salmond* on *Torts*, 10th ed. (1945), p. 503.

[DIXON C.J. referrred to *Charlesworth* on *Negligence*, 2nd ed. (1947-1950), p. 166 and *Cox* v. *Coulson* (3).]

The distinction between wrongs of commission and wrongs of omission is shown in *Law Quarterly Review*, vol. 69 (1953), Part 1, pp. 182, 196.

[KITTO J. referred to *Membery* v. *Great Western Railway Co.* (4).]

That case clearly shows that there must be a positive act.

[KITTO J. referred to *Bellambi Coal Co. Ltd.* v. *Murray* (5).]

A positive act of misfeasance as against an omission is stressed by all textbook writers, see *Salmond* on *Torts*, 10th ed. (1945), p. 503. It cannot be said that, assuming some duty on the part of the respondent, the acts of the invitee should be superintended. Assuming a duty to supervise, what form is it suggested that the supervision should take? In this case the accident did not take place because of the absence of the porter. There is not any evidence that each truck should be "braked", or that it was wrong that there was a gap between the trucks. The accident occurred because the deceased himself started the trucks in motion and then walked between two of those trucks. Those trucks were travelling at less than an ordinary walking rate. There is not any evidence of any breach of duty to an invitee (*London Graving Dock Co. Ltd.* v. *Horton* (6)).

[TAYLOR J. referred to *Glasgow Corporation* v. *Muir* (7).

(1) (1866) L.R. 1 C.P., at p. 288.
(2) (1951) A.C. 737.
(3) (1916) 2 K.B. 177.
(4) (1889) 14 App. Cas. 179.
(5) (1909) 9 C.L.R. 568.
(6) (1951) A.C. 737, at pp. 764-766, 774.
(7) (1943) A.C. 448, at pp. 455, 457, 458, 466.

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KITTO J. referred to *Thompson* v. *Bankstown Corporation* (1).] There was not any extraordinary danger attached to the truck. Even if an invitee is invited to come on to the premises the invitor is not required to protect the invitee from that kind of danger. There was not any greater risk than is ordinarily found in a railway goods yard. On the assumption that the general law of negligence is applicable, the law laid down in *Donoghue* v. *Stevenson* (2) would apply. The invitor would not, in the circumstances, apprehend any danger. No attempt was made to show what was the alleged default on the part of the commissioner. Whether it be "agony of the moment" or carelessness on the part of the deceased, the act of passing between the trucks was deliberate and brought about his death (*S.S. Singleton Abbey* v. *S.S. Paludina* (3); *Municipal Tramways Trust* v. *Ashby* (4)). The deceased took the decision of going between the trucks; that broke the chain of causation. If a duty and a breach, it created the occasion on which the deceased deliberately and with full knowledge took a risk which was unreasonable and could not be said to be attributable to any breach of duty on the part of the commissioner. In addition to the cases referred to in the judgment of the court below on the topic of contributory negligence are the following cases: *Packham* v. *Commissioner for Railways* (5); *Commissioner of Railways* v. *Leahy* (6); *Fraser* v. *Victorian Railways Commissioners* (7) and *Davey* v. *London & South Western Railway Co.* (8). Those cases lay down the principle that the court has the power to enter a verdict in those circumstances: *Law Quarterly Review*, vol. 51, p. 500. If the evidence is open to one conclusion then the court will not permit a jury to find another conclusion (*Sharpe* v. *Southern Railway* (9)). The abovementioned decisions have been consistently followed over a long period of time. The only interpretation of the deceased's conduct is that having regard to the circumstances he was careless (*Wakelin* v. *London & South Western Railway Co.* (10)). It is not the railway employees' practice or responsibility to take any part in the loading or unloading operations. If the deceased chose to take part in such operations it cannot be said to be an "unusual" danger. Such dangers were, in the circumstances, usual dangers: see *Government Railways Act* 1912-1952 (N.S.W.), ss. 65 (2) (a), 67 (3), and by-laws made thereunder.

(1) (1953) 87 C.L.R. 619.
(2) (1932) A.C. 562.
(3) (1927) A.C. 16, at pp. 28, 31, 32.
(4) (1951) S.A.S.R. 61.
(5) (1941) 41 S.R. (N.S.W.) 146.
(6) (1905) 2 C.L.R. 54.
(7) (1909) 8 C.L.R. 54.
(8) (1883) 12 Q.B.D. 70.
(9) (1925) 2 K.B. 311.
(10) (1886) 12 App. Cas. 41.

[DIXON C.J. referred to *Chief Commissioner for Railways* v. *Great Cobar Ltd.* (1).]

*N. D. McIntosh* Q.C. (with him *C. Shannon*), for the respondent. The question of invitor and invitee does not arise in this case. The principle enunciated in *Membery* v. *Great Western Railway Co.* (2) that upon a charge of negligence it is important to inquire as to the existence of a duty to take care, and, if there be such a duty, the extent of it at the time and the circumstances existing on the occasion when the negligence is alleged to have been committed, was noted with approval in *Buckingham* v. *Luna Park (N.S.W.) Ltd.* (3) and *Bond* v. *South Australian Railways Commissioner* (4). The various aspects of this matter are covered by the departmental rules and regulations which the deceased knew or should be deemed to have known. Those rules show, *inter alia*, a warning to railway employees and other persons engaged to be careful, the standard required by the commissioner from his employees in relation to a particular truck; the procedure to be followed in connection with the coupling and uncoupling of trucks; that employees must exercise proper care and should not pass between buffers. Those rules and regulations should have been admitted in evidence. They are admissible as directions by the commissioner to his servants as to the standard of care they should take, and, as to railway personnel, it would be an element which could assist the jury in deciding whether there was a duty to the deceased and as to whether there was a breach of such duty: see *Donoghue* v. *Stevenson* (5). Under the regulations and upon the facts the deceased was informed that the sheep had to be unloaded by the consignee. But they could not be unloaded unless they were brought to the unloading ramp. *Membery* v. *Great Western Railway Co.* (6) is distinguishable on the facts. The proposition stated in *Bourhill* v. *Young* (7) is the test in this case. The matter must be regarded as it arose at the particular time. The mere fact that the deceased had no knowledge of the dangers involved shows only that he could not be guilty of contributory negligence. The inferences which might be drawn were discussed by *Isaacs* J. in *South Australian Co.* v. *Richardson* (8). If an inference can be drawn in two ways the matter is one for the jury. The inference can be drawn that in all the circumstances, with the knowledge he had, the deceased was under the impression

(1) (1911) 11 S.R. (N.S.W.) 65.
(2) (1889) 14 App. Cas. 179, at p. 190.
(3) (1943) 43 S.R. (N.S.W.) 245, at p. 249.
(4) (1923) 33 C.L.R. 273, at p. 282.
(5) (1932) A.C. 562.
(6) (1889) 14 App. Cas. 179.
(7) (1943) A.C. 92, at p. 104.
(8) (1915) 20 C.L.R. 181, at p. 196.

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that there was not any danger. It was for the defendant commissioner to prove that a warning was given, and not for the plaintiff to prove that a warning was not given. The real inquiry is that the commissioner did not provide anyone to move the trucks. There was not anybody present on behalf of the commissioner to control the unloading of the sheep, and the task of moving the trucks for the purpose of unloading devolved upon the deceased. The regulations are silent on the matter of moving trucks for the purpose of unloading sheep. If it is the duty of the commissioner to move railway trucks for that purpose it is implied in that that there is something inherently difficult and dangerous in moving railway trucks. The deceased was inexperienced in the matter of moving trucks but the rules and regulations show that that matter is regarded by the commissioner as being important and dangerous. It was the custom to walk between trucks. On the question of knowledge in cases of invitor and invitee see *Bond* v. *South Australian Railway Commissioner* (1), see also *London, Tilbury and Southend Railway* v. *Paterson* (2). When two or more inferences can be drawn the matter is one for the jury. "Knowledge" was dealt with in *London Graving Dock Co. Ltd.* v. *Horton* (3), and the functions of a jury in *Commissioner for Railways* v. *Corben* (4). In this case the facts were peculiarly within the ambit of the jury—a country jury.

*N. A. Jenkyn* Q.C., in reply.

*Cur. adv. vult.*

March 5. 1954.

The following written judgments were delivered :—

DIXON C.J. This is a defendant's appeal brought by leave from an order for a new trial. The defendant obtained a verdict by direction, which the Full Court of the Supreme Court has set aside. The action was brought by a widow on behalf of herself and her six children under the *Compensation to Relatives Act* 1897-1946 (N.S.W.) in respect of the death of her husband. It is an action of negligence. The deceased man, whose name was Lionel Athol Hooper, was a sheepdealer and he was killed on 27th February 1951 at Condobolin. He was crushed between the buffers of two trucks while attending to the untrucking of some sheep consigned to Condobolin on his account. The sheep and cattle yards at that railway station are upon a loop line or siding with a slight gradient down which trucks may gravitate to the dump or race for unloading or loading

(1) (1923) 33 C.L.R., at p. 289.
(2) (1913) 29 T.L.R. 413.
(3) (1951) A.C., at pp. 746, 747.
(4) (1938) 39 S.R. (N.S.W.) 55, at p. 58.

as the case may be. On the day in question a train arrived consisting of twenty-nine trucks or thereabouts loaded with sheep. Thirteen truck loads were consigned to Hooper, in his wife's name, and sixteen to another consignee, named Casky. The trucks were shunted into the siding. The thirteen trucks containing Hooper's sheep were at the end of the train further from the dump. The sixteen trucks containing Casky's sheep were at the lower end, the last four of them being opposite the dump. It appears that when sheep are to be untrucked at Condobolin the consignee, or the stock agent acting for him, enlists the services of three or four casual hands for the purposes of the operation. It was not actually proved to be a usage or regular practice but the evidence indicated at least that it was very often done. On former occasions Hooper had done it and had supervised the operations. But, so far as appeared, he had not himself previously joined the men in actually moving the trucks. On the day when he was killed he brought with him to the railway yards three other men for the purpose of untrucking his sheep. They were Newman, who described himself as a share farmer but said he was actually working for the deceased as well, Jacobsen, who was a stock salesman, and a man named Ison. When Hooper saw how the train was made up and found that the trucks for Casky must be detached and allowed to run down the siding or loop before his could be gravitated to the dump, he left the yards and went to the station, whence he returned with a railway porter. The latter, with the help of others of the party, uncoupled Casky's trucks in sections. It had to be done in sections because it was necessary to move the lower of the trucks to be uncoupled closer to the upper in order to unhook the coupling, a thing that was done by levering the wheels with a crowbar. The porter followed Casky's trucks down to the lower end of the siding or loop in order to bring them to a standstill by means of the brakes and see that they were secure. The gradient was small and the pace slow. While the porter was doing this, Hooper and his party proceeded to move the trucks containing his sheep. They "barred" and uncoupled from the train the two nearest trucks and allowed them to run slowly down to the now vacant position opposite to the dump where they brought them to a standstill by means of the brakes. They returned to the train and this time released a section of four more trucks which ran down to the two already standing opposite the dump. When they came to a standstill there was an interval of a foot or eighteen inches between the buffers of the upper of the two stationary trucks opposite the dump and the lowest of the next four trucks. It was while passing through

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this interval a little later that Hooper was killed. It does not appear whether the interval was the result of the four trucks being stopped by the use of the brakes before actually reaching the two trucks already standing or whether they struck the latter and, recoiling a foot or eighteen inches, stood still. Nor does it appear that the brakes were actually applied to the four trucks.

This done the party uncoupled another section; it consisted of two trucks. They slowly moved down the line and the party walked ahead of them on the side further from the sheep yards. On reaching the gap between the two earlier sets of trucks the four men proceeded to pass through it, first Ison, next Jacobsen, and then the deceased and last Newman. Ison got up on the ramp, so did Jacobsen. Just as the deceased was about to mount the ramp the two moving trucks struck the four stationary trucks and drove them forward. Hooper was caught between the forward buffer of the oncoming truck and the rear buffer of the standing truck and killed. Newman escaped only because his position, behind Hooper, was in the space between the two sets of buffers. They had to separate the trucks to extricate the deceased, an operation in which a part was taken by the porter who by this time had returned.

On the foregoing facts I am unable to see how the Commissioner for Railways can be held liable in damages for the death of the plaintiff's husband. No servant or agent of the defendant commissioner set the trucks in motion. None of his servants or agents by any act or omission caused the deceased to attempt to pass through the space between the two sets of trucks or contributed to his doing so. None of them was concerned in the braking of the four stationary trucks or was in any way responsible for the failure of the four stationary trucks to withstand the impact of the two moving trucks, if that could be considered a cause of the accident in itself importing negligence. All the immediate causes leading up to the fatality formed steps in the course of the operations which were in fact conducted by the deceased and the three men he had brought with him.

It is of course true that the deceased came into the yards as an invitee and it is true that as the invitor occupying the railway yards the commissioner bore a duty to him in respect of the premises to exercise reasonable care to prevent injury to him from unusual danger of which the commissioner knew or ought to have known. But the case is outside the scope of this duty of care. It was not a defect in the premises that caused the accident. The cause was not an unusual danger which belonged to or was characteristic of the premises. The injury was not suffered because of dangers

due to the nature or condition of the premises. The accident arose from the deceased's passing between the first two sets of trucks after he and his agents had set the third set in motion so that it was certain to impart an impetus to the standing trucks forming the second set. This appears to me entirely a question of the manner in which the deceased and his companions conducted themselves in operating the mechanical agencies belonging to the defendant. It would I think be stretching the particular category of the law of negligence which relates to the duty of occupiers to invitees to treat it as extending to an injury received by the person coming upon the premises as invitee as a result of the manner in which he acted in the course of operations with the defendant's trucks undertaken by himself, his servants or agents.

But to place the case outside the application of the law relating to an occupier's duty of exercising due care with respect to premises in order to safeguard invitees is not to place it outside the general law of negligence. The difficulty is to find the basis of a duty of care which would make it incumbent upon the defendant commissioner to take any particular measures the omission of which occasioned the accident. Was it the commissioner's duty to take care to see that the trucks were moved by his own servants and agents to the exclusion of any participation of the deceased in that operation? Alternatively, if he suffered or encouraged or required the deceased to undertake or take part in the movement of the trucks, should the commissioner have instructed him or warned him about the particular risks and specific dangers which he should be careful to avoid?

In considering these possibilities we sought information as to the respective duties under the contract of carriage of the commissioner and the consignee in discharging the trucks. The materials in evidence are perhaps not enough to allow of a full elucidation of these duties. But it appears that there is a by-law providing that all livestock must be loaded and unloaded by the consignors and consignees respectively by whom also the wagon doors must be secured and opened, fastenings attended to &c. Another by-law provides that live stock must be unloaded within three hours after arrival, otherwise it may be done by the commissioner at owner's risk and a specified charge may be made. These by-laws, however, are not inconsistent with the theoretical possibility that it remains the contractual duty of the commissioner to move trucks to the race or ramp. But the fact is that, whether he was contractually obliged to do so or not, the deceased undertook the work of moving the trucks down to the dump and he did so in accordance with a

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course commonly pursued. The men with him had repeatedly performed the operation and he had repeatedly supervised it. The dangers which attend it arise from the weight and consequent momentum of trucks and their movement upon fixed rails. But these are obvious matters. The operation was not that of shunting where there are points and crossing and trucks are impelled by engines. It was one where there was a single fixed track and where the movement of the trucks must be the result only of the slight gradient and very slow. The party apparently knew how to apply the brakes and to do so effectively. Rules or regulations applicable to railway employees were put in evidence from which it appears that directions are given to them requiring the exercise of care in getting between vehicles to couple or uncouple them. They are to go under and not between buffers and experienced shunters are directed to impress this on beginners. Can it be said that the defendant commissioner was under a duty of care making it necessary to give a similar warning to the deceased ? It must be remembered that the only uncoupling to be done by the deceased and his party or by others doing a like service for themselves was on a gravitational single loop for the purpose of allowing trucks to move away from stationary trucks to which no engine was attached and that they would therefore do no coupling. The actual warning contained in the regulations cited consequently has no point, although, no doubt, it implies the unwisdom of passing between buffers in any circumstances. But it would go beyond what was reasonable to impose upon the commissioner an obligation to attempt to instruct persons untrucking sheep or cattle as to the obvious risk of passing between stationary trucks when other trucks or vehicles are actually moving or likely to be moved towards one or other set of them so as to make a contact of any violence.

In my opinion there was no duty of care upon the commissioner by the breach of which the accident was caused and on this ground the plaintiff's action must fail.

Unfortunately in the Full Court of the Supreme Court the defendant's case seems to have been put only on the ground that the deceased was conclusively shown to have been guilty of contributory negligence. Their Honours were of opinion that it was open to a jury to find otherwise. Although the argument was limited in this way in the Supreme Court, it would not be right for us to allow the order for a new trial to stand, when we think that the plaintiff's case must fail. As I am of opinion that no initial case has been made out of breach of a duty of care causing the

accident, it would be profitless to attempt the illogical course of considering contributory negligence as a possible answer to a hypothetical breach of duty. But I do not think that in the circumstances the respondent should pay the appellant's costs of this appeal. I think that the appeal should be allowed, the order of the Supreme Court should be discharged and in lieu thereof it should be ordered that the appeal to the Full Court of the Supreme Court should be dismissed with costs.

WEBB J. I would dismiss this appeal.

In my opinion it was open to the jury to find on the evidence that the appellant Commissioner for Railways was guilty of negligence and that the deceased was not guilty of contributory negligence. I think then that the case should have been left to the jury.

The learned trial judge appears to have taken the view that, as was indeed assumed by the parties before the Full Court, there was evidence of negligence on the part of the commissioner, but that the deceased was so clearly guilty of negligence contributing to the accident that no jury of reasonable men could have found otherwise. I think, however, that it was open to the jury to find either that the deceased was guilty of negligence or that he was guilty of nothing more than an error of judgment in trying to pass between the then stationary trucks. What would be negligence in one case could be mere error of judgment in another. The difference between the two kinds of conduct would depend on what the particular individual knew or should have known of the danger to which he was exposing himself in doing what he did. If the necessary knowledge to avoid the dangers involved in moving railway trucks in railway yards of the kind in question here could not ordinarily be acquired without experience, among other things in operating brakes and noting the effect of the application of brakes, and the deceased did not have that experience, his action in trying to pass between the trucks could reasonably have been found by the jury to have amounted to mere error of judgment. It was for them to decide whether and to what extent experience was required and whether the deceased had the requisite experience. If they found that he did not have it then the question would have arisen whether the commissioner was guilty of negligence in requiring, or inviting, or permitting the deceased to handle the trucks to unload the sheep. Passing between trucks would be necessary in such operations and not obviously dangerous in all circumstances.

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It is true that the deceased began the unloading only as from the time when shunting operations were no longer necessary. However, the trucks were on an incline running towards and beyond the unloading ramp, and so it was open to the jury to find that in such a situation they were dangerous things to handle, even without an engine, having regard to their structure, weight, number and braking apparatus; and to find further that if danger was to be avoided it was necessary that those moving the trucks and applying the brakes should have a skill and experience and an awareness of the dangers involved not in fact possessed by the deceased. But if the jury had made those findings it would then I think have been open to them to find under the circumstances that existed, including the absence of any provision for the supervision or control of the unloading operations by a railway employee, that the commissioner owed a duty to the deceased not to require, or to invite, or to permit him to move the trucks and, having failed in that duty, was responsible for the accident to the deceased and his death.

At the trial certain instructions to railway employees were tendered by the respondent and were rejected. So far as those instructions referred to shunting operations they were, I think, rightly rejected. But so far as they counselled care in moving trucks in railway yards, apart from shunting operations, I think they should have been received as evidence of admissions by the commissioner that danger was involved in the operation, even to employees.

KITTO J. In my opinion the appeal to this Court should be allowed and the appeal to the Full Court of the Supreme Court dismissed. I have nothing to add to the reasons stated by the Chief Justice.

TAYLOR J. This is an appeal by leave from an order of the Full Court of New South Wales setting aside a verdict for the defendant which was entered by the direction of the learned trial judge and ordering a new trial in an action in which the respondent on this appeal sued, pursuant to the provisions of the *Compensation to Relatives Act* 1897-1946, to recover damages occasioned to her by the death of her husband, Lionel Athol Hooper.

The deceased met his death at the Condobolin railway yard when he was engaged with certain other persons in the task of unloading sheep which had been consigned by the appellant's railway to the plaintiff. The sheep were contained in a number of trucks and upon their arrival at Condobolin the railway authorities there telephoned either the deceased or the plaintiff and communicated

the fact of their arrival. Thereupon the deceased with three other persons attended the railway yards for the purpose of taking delivery of the sheep. The railway yard at Condobolin is situated on a more or less level piece of ground but from one end to the other there is a very gradual incline and the trucks which contained the sheep to be unloaded had been shunted to the higher end of the yard. It was impossible to unload the sheep from the trucks in the position which the trucks then occupied and it was necessary that they should be moved some distance down the yard to a ramp constructed for the purpose, *inter alia*, of unloading live stock from trucks of this kind, but before this could be done it was necessary that other trucks containing sheep consigned to another person, one Casky, should be moved for these trucks were then occupying positions in the vicinity of the ramp. There was tendered in evidence an extract from the by-law relating to Merchandise and Live Stock Rates which is in the following terms :

" 7. All live stock must be loaded and unloaded by the consignors and consignees respectively, by whom also the wagon doors must be secured and opened, fastenings attended to &c.

8. All live stock must be unloaded within three hours after arrival ; otherwise such live stock may be unloaded by the Commissioner at the owner's risk, and a charge of 4s. 3d. per waggon made for the service.

9. All live stock must be removed from the Railway premises immediately after it is unloaded or, if left, will remain at the owner's risk and expense, and may be sent to agistment or livery, the cost of such sending and of such agistment and livery shall be paid by the owner, and such cost must be paid on demand as part of the authorised charges ; and such stock, if not removed within seven days, may be sold by auction, by order of the Commissioner, and the proceeds applied in payment of all expenses incurred, and the balance thereof handed over to the owner on demand ".

Counsel for the appellant contended that these provisions formed part of the contract for the carriage of the plaintiff's sheep and further, that the effect of the first paragraph was to impose upon the consignee the obligation of accepting delivery of the sheep at the point of time when the trucks containing them had been shunted to some place in the yard from where they might, by gravitation, be moved to the vicinity of the ramp. But since he admitted that it was not practicable for the sheep to be removed from the trucks at any other point than at the ramp he submitted that the terms of the contract not only entitled but also required

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the consignee to attend to and control the necessary movements of the trucks from the position in which he found them to the vicinity of the ramp. There is, however, no evidence, or at the most very little evidence as to the contract of carriage but, nevertheless, I have no doubt that the terms of the by-law referred to did not have the effect for which the appellant contended. There is nothing in the terms of the by-law to require such a conclusion; the provision that "All live stock must be . . . unloaded by the consignors and consignees respectively, by whom also the wagon doors must be secured and opened, fastenings attended to &c." is most inappropriate to relieve the appellant from an obligation to bring the trucks to the only point at Condobolin where the consignee might have taken possession of the sheep or to impose upon the latter the obligation by herself or her agents to move the trucks containing them from a more or less remote position in the yard to that point. Some attempt, however, was made by the plaintiff to show that the practice obtained at Condobolin for consignees of live stock to take the necessary steps on their own account to move trucks containing live stock consigned to them to the vicinity of the ramp. Whether or not such a practice existed the fact is that on this occasion the brakes of the trucks containing Casky's sheep were released and the trucks allowed to run down the incline to a point where they no longer obstructed the handling of the trucks containing the sheep consigned to the plaintiff. This manoeuvre was carried out partly by a railway porter and partly by the deceased and those persons who had attended the yard to assist him in taking delivery. But after these other trucks had been moved the porter went off to perform other duties and he played no further part in the operations necessary to enable the plaintiff's sheep to be unloaded. The way having been made clear for the movement of the trucks containing these sheep the deceased and his three assistants set about bringing those trucks down to the vicinity of the unloading ramp. First of all, the brakes were released on two trucks which were then set in motion by pushing them a short distance whereupon they proceeded to travel slowly towards the unloading ramp. When they reached the point where it was desired that they should be stopped the brakes of the trucks were applied by either the deceased or some one or more of those assisting him. The next manoeuvre was to bring down another set of four trucks. These were set in motion in the same manner and they proceeded down towards the place where the first set of two trucks was then standing. There is some evidence that the brakes on some or all of these trucks were applied when they came to a

standstill, and it is clear that when they finally came to rest the front buffers of the first of this set of four trucks were some eighteen inches away from the rear buffers of the first set of two trucks. There is, however, no evidence and it is, therefore, completely uncertain whether the second set of four trucks had simply stopped at this point or whether they had struck the first set of two trucks and rebounded, or whether, having struck the first set of two trucks, the latter had moved on some short distance. With the first two sets of trucks in this position the deceased and those assisting him then set about removing from the top end of the yard the remaining trucks—two in number—which contained sheep consigned to the plaintiff. They were set in motion in the same fashion as the earlier trucks and thereupon the deceased and his three assistants walked in the direction of the ramp and arrived in the vicinity of the rear of the first set of two trucks before the final set of two trucks had reached its destination. Being then on the opposite side of the line from the ramp they proceeded to cross through the opening, previously referred to, between the first and second sets of trucks. Two persons crossed through safely, but the deceased, who was the third one in the line of those crossing, had only reached a position between the off-side buffer at the rear of the first set of trucks and that at the front of the second set when the third and last set of two trucks struck the rear of the second set. The impact caused the latter to move forward and the deceased was caught between the buffers as a result of which he sustained injuries which caused his death very shortly afterwards.

The learned trial judge having heard the plaintiff's case, directed a verdict for the defendant on the ground that, whilst in his opinion there was some evidence of negligence on the part of the commissioner's servants, the evidence clearly showed contributory negligence on the part of the deceased. As the learned judge saw it the evidence pointed irresistibly to the fact that the deceased was wholly responsible for the injuries which caused his death.

From this decision the present respondent appealed to the Full Court and the only issue which was there debated was whether the case should have been taken from the jury on this ground. The members of the Full Court were unanimously of the opinion that, although it was a border line case, there was sufficient in the evidence to require that the issue should have been submitted for the jury's determination. No argument was addressed to the Full Court in an endeavour to establish that there was no evidence of negligence on the part of the commissioner, it, apparently, being impliedly conceded that there was some evidence capable of sustaining an

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affirmative finding on this issue. Accordingly their Honours directed that there should be a new trial.

It was in these circumstances that an application was made to this Court by the present appellant for leave to appeal from the order of the Supreme Court and on this application leave was granted. It is most unfortunate that the latter question was not litigated before the Full Court and had the order of that court finally disposed of the matter I would have been firmly of the opinion that leave should not have been granted. But since the order for a new trial necessarily left the appellant in a position in which he was free to raise this additional point on the new trial and, if necessary, on any subsequent appeal, it was proper in the interests of the parties that leave to appeal to this Court should be granted.

Counsel for the appellant has now argued before us that the evidence does not disclose a breach of any duty on the part of the appellant and that, even if it does, there is no evidence of any causal connection between any breach disclosed by the evidence and the injuries which resulted in the deceased's death. Finally he contends that, upon the evidence, the irresistible conclusion is that those injuries were caused by the deceased's own negligence.

The declaration in the action avers that at the time of the accident the deceased was in the railway yard of the appellant at the invitation of the latter and thereafter follow a number of general allegations of negligence. It is alleged that the defendant by his servants and agents " so negligently carelessly and improperly conducted himself in and about the care control management maintenance and supervision of the said yards and premises and of the railway tracks and trucks in and upon the said yards and premises And in and about the coupling and uncoupling and movement and gravitation of the said railway trucks And in failing to provide and direct a competent or any officer or employee of the defendant to supervise and control and undertake the coupling uncoupling movement and gravitation of such railway trucks And in failing to take proper and reasonable precautions for the safety of the said Lionel Athol Hooper in respect of his lawful presence in and upon the said yards and premises as aforesaid And in failing adequately or at all to warn the said Lionel Athol Hooper of or to protect him against the dangers arising out of and incidental to the coupling uncoupling movement and gravitation of such railway trucks And in failing so to carry out the operations of coupling uncoupling moving and gravitating such railway trucks and his other operations in and upon the said yards

and premises as not to subject the said Lionel Athol Hooper present as aforesaid to unnecessary risk That the said Lionel Athol Hooper was crushed between two such railway trucks and by reason of the injuries thereby occasioned to him the said Lionel Athol Hooper afterwards and within twelve calendar months next before the institution of this suit died". These allegations are in extremely general terms and I have some difficulty in understanding the nature of any particular duty a breach of which, it is alleged, led to the deceased's death. In the absence of particulars of these general allegations counsel for the appellant apparently experienced much the same difficulty and in anticipation of the respondent's argument he treated the declaration as alleging a breach or breaches of the duty which is owed by an occupier to an invitee and sought to establish that, on this basis, the respondent was not entitled to succeed in the action. Indeed, counsel went as far as to suggest that unless the case fell within the principle enunciated in *Indermaur* v. *Dames* (1) the appeal must succeed for, it was contended, that principle *exhaustively* defines the liability of an occupier for injuries to an invitee caused on the occupied premises by negligent acts of omission. Counsel did purport to concede that an occupier would be liable if, as the result of any *positive* act of negligence, he created some new danger of an unusual kind whilst the invitee was present on the premises and which resulted in injury to the latter. But this is merely another way of saying that liability will attach to the occupier whether the unusual danger exists at the time the invitee comes to the premises or whether it is subsequently created by some act of the former. In either case the liability attaches for injuries caused by a failure on the part of the occupier to take reasonable precautions to prevent injury to the invitee. The liability of the occupier for injuries resulting from unusual dangers is not absolute but arises only where, no other sufficient precaution having been taken by the occupier, the invitee has no notice of the danger or, having notice, fails, by reason of a warning being insufficient or inadequate in the circumstances, to appreciate fully the significance of the danger (*London Graving Dock Co. Ltd.* v. *Horton* (2) ). This being so it may be said that, although liability attaches for injuries resulting from the existence of unusual dangers, the cause of action itself is really founded, not on the existence of the danger, but on the failure of the occupier to take reasonable steps to safeguard the invitee. That the cause of action is not founded on any positive act creating the unusual danger is clear for an occupier who has

(1) (1866) L.R. 1 C.P. 274. (2) (1951) A.C. 737.

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failed to take reasonable steps to warn or otherwise safeguard an invitee will be liable for injuries caused by an unusual danger whether the danger was created by the act of the occupier or by some other person for whose acts he cannot be said to be vicariously liable. This being so it is misleading to say that the only basis, *apart* from the principle enunciated in *Indermaur* v. *Dames* (1) upon which an occupier may become liable for injuries caused to an invitee is where he creates some new danger on the premises by some positive act. The truth is that the rule in *Indermaur* v. *Dames* (1) relates to liability for injuries resulting from unusual dangers on premises to which an invitee has come. And it is clear that such dangers may exist by reason of the condition of the premises or by reason of some activity there carried on. But it is beyond question that not every careless act of an occupier which creates a dangerous situation and causes injury to an invitee can be said to create a situation of danger, or an unusual danger in relation to the premises. Can it, for instance, be said that the liability of an occupier of a country property, upon which no unusual dangers can be said to exist, falls to be determined in accordance with the *Indermauer* v. *Dames* (1) principle when, in company with an invitee on a shooting expedition thereon, he negligently shoots his companion? Such a situation has nothing to do with what may perhaps be described as a principle intended to define the obligations of occupiers of premises, as such, with respect to invitees and it is clear that circumstances may arise, unrelated to questions of the safety of the occupied premises, in which the obligations of the occupier for both negligent acts of commission and omission fall to be determined in accordance with the general principles of liability for negligence.

In the present case there is, however, some difficulty in determining whether the declaration intends, substantially, to allege that the deceased's death resulted from failure to safeguard him from an unusual danger or unusual dangers on the premises of the appellant and, indeed, counsel for the respondent expressly repudiated any suggestion that the declaration should be so understood. But even if the declaration should be regarded as alleging that the deceased's death was caused by some unusual danger on the premises that claim was not supported by the facts. It may be thought that the presence of the deceased in the railway yard exposed him to some risk and, possibly, it may be argued that some of the dangers creating such risk were unusual in the sense in which that term has been explained in *Horton's Case* (2). That

(1) (1866) L.R. 1 C.P. 274.

(2) (1951) A.C. 737.

this may have been so, however, is of no consequence unless his death resulted from some such danger whilst he was ignorant of the risk created by it, or if not ignorant, at a time when by reason of the insufficiency of any warning given to him, he did not fully appreciate the significance of the risk involved. But on the evidence the deceased's death did not result from any such unusual danger. The risk involved in attempting to pass through the narrow opening between the two sets of stationary trucks at the very moment when another set, which he himself had set in motion, was bearing down upon the rear of the stationary trucks was so obvious that it could not be regarded as unusual, nor could any reasonable person have failed to appreciate it.

But as I have already stated the respondent did not seek to put her case on this ground and contended that her claim fell to be determined according to the general principles relating to liability for negligent acts. Little help in recognizing and appreciating the negligent acts complained of is obtained from the terms of the declaration, but counsel for the respondent endeavoured to particularize these under a number of headings. In the first place he contended that the deceased and his assistants should not have been permitted to take any part in moving the trucks containing the plaintiff's sheep. He urged that the risks involved in releasing the brakes on a number of trucks by turning a handle on the sides thereof and allowing them to run slowly towards the unloading ramp were such that the deceased and his assistants should not have been allowed to undertake that operation on their own initiative. I am not prepared to hold that the operation was such that it was unreasonable to expect that it could and would be performed safely by persons of ordinary intelligence or performed without any real risk of injury to them. But even if the contrary view were acceptable it is clear that the injuries which caused the deceased's death did not result from any lack of ability to perform the operation or from inexperience of any concealed dangers in performing it, but from his own actions in pursuing a course which was obviously dangerous. These observations apply with equal force to the claim, secondly made, that the deceased should not have been permitted to carry out the operation in the absence of some competent and trained person to supervise it.

It was further suggested that before the deceased was permitted to carry out the operation he should have received at the hands of the appellant's servants adequate warning about the dangers involved and it was contended that it was reasonable to infer that if such a warning had been given the deceased would not have pursued the course which led to his death. The gist of this complaint

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appears to me to be that a warning would have enabled the deceased to appreciate the risk involved in attempting to cross between the stationary trucks. But the risk involved in doing so was obvious and undoubtedly should have been appreciated by the deceased. In any event no evidence was given on circumstances vital to this aspect of the case. It was the deceased who in the first instance saw a railway official and, presumably, received permission to move the trucks containing the plaintiff's sheep and there is no evidence whatever as to what took place during their preliminary discussion. We were asked to assume from some evidence of what had happened on previous occasions that this official did not proffer any warning to the deceased concerning dangers which might be encountered in moving these trucks, but such a conclusion would, I think, be unwarranted on the evidence. I would, however, be loath to base my decision on this branch of the case merely upon that ground and I should reiterate that it would be quite erroneous to infer from the evidence that the deceased's death resulted from the absence of any such warning, for it is impossible to conclude that any warning would have rendered more obvious to the deceased the all too clear risk involved in the course which he pursued.

I should add that whilst counsel for the respondent disaffirmed any intention of relying on the principle enunciated in *Indermaur* v. *Dames* (1) the particular grounds upon which he relied savoured more of allegations of the existence of unusual dangers on the appellant's premises than of allegations pertaining to the general principles of liability for negligence. But even if they are identified as such the result could not, for the reasons already given, be different. Accordingly I am of opinion that the appeal should be allowed, the order of the Full Court set aside and judgment entered for the defendant.

*Appeal allowed. Order of the Supreme Court discharged. In lieu thereof order that the appeal to the Full Court of the Supreme Court be discharged. Pursuant to the order of this Court dated 20th August* 1953 *granting leave to appeal respondent's costs of the appeal to this Court to be paid by the appellant.*

Solicitor for the appellant, *S. Burke*, Solicitor for Railways (N.S.W.).

Solicitors for the respondent, *Herbert Smith & W. B. Phillips.*

J. B.

(1) (1866) L.R. 1 C.P. 274.