[HIGH COURT OF AUSTRALIA.]

CALEDONIAN COLLIERIES LIMITED . . APPELLANT;
DEFENDANT,

AND

SPEIRS . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, 1956, *Nov.* 28-30; *Dec.* 3-5, 1957, *Mar.* 21.

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

Negligence—Personal injuries—Railway trucks—Level crossing—Accident—Liability—Duty of care—Consequences—Remedies—Reasonably foreseeable— Novus actus interveniens—Conduct of third party—Foreseeable—Probable consequences —Causation—Principles.

C. owned, operated and exclusively controlled a private railway line of some miles in length, running from its Waratah Colliery to the Port of Newcastle, constructed by its predecessor and maintained under a private statute. The railway passed through a densely populated area, and over five roads and a main railway line, by level crossings. One of the level crossings was at L. Road where there was practically continuous road traffic. In 1936, under provisions of the private statute, a siding was constructed to join C.'s railway line at a point about two miles from the crossing at L. Road. The siding served the Crofton Colliery operated by F. and had a slight but continuous down grade to its junction with C.'s line which from that point fell in a continuous and steeper grade down to L. Road. From the crossing at L. Road, C.'s line proceeded for about one mile to where it crossed the main railway line, and thence to the port. F. used to hire trucks from C. for use on the siding, C. delivering the trucks to the top of the siding by means of a locomotive, F.'s employees used to move the trucks along the siding by manpower and gravity, for loading and arranging trains, using manually operated brakes to halt the trucks when required. F.'s siding was not provided with catch-points, a device which allows a train to pass in one direction but not in the other, preventing passage by derailing the train. Catch-points were installed at the Waratah Colliery and on C.'s line a short distance prior to its junction with the main railway line. They were simple and inexpensive to instal. In 1951, S.'s husband drove his car along L. Road and at the level crossing

on C.'s line was struck by a string of loaded coal trucks running along the road uncontrolled, at about fifty miles per hour. F.'s employees had been loading and assembling the trucks but there was no evidence of what caused the trucks to move. After hitting the car, the trucks travelled a further mile to the main line where they were derailed by catch-points. S.'s husband died of injuries received in the collision. After the accident C. refused to deliver trucks to F. until catch-points were installed in the siding by F., which was done. C. also installed a similar device on its own line about one hundred yards below the junction with the siding.

S. sued C. and F. for damages under the *Compensation to Relatives Act* 1897-1946 and obtained a verdict for £16,660 apportioned between herself and her two children, and apportioned as to liability, seventy per cent as against C. and thirty per cent against F. C. and F. appealed to the Full Court of the Supreme Court on the grounds that there was no evidence of negligence and that the damages awarded were excessive, and S. appealed against the apportionment of liability between the two defendants. The appeals by C. and F. were dismissed and S.'s appeal was allowed. C. appealed to the High Court.

Held, by *Dixon* C.J., *McTiernan*, *Kitto* and *Taylor* JJ. (*Webb* J. dissenting), that on the evidence the jury properly found a verdict against the appellant, therefore the appeal should be dismissed.

Held, by *Dixon* C.J., *McTiernan*, *Kitto* and *Taylor* JJ.: (1) that on the assumption that the appellant succeeded to the statutory authorities and immunities conferred upon its predecessor, the well-settled principle applied that when statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely to be occasioned, by their exercise, damages for negligence may be recovered;

Great Central Railway v. *Hewlett* (1916) 2 A.C. 511, at p. 519; *East Suffolk Rivers Catchment Board* v. *Kent* (1941) A.C. 74, at p. 85; and *Cox Bros. (Australia) Ltd.* v. *Commissioner of Waterworks* (1933) 50 C.L.R. 108, at pp. 119, 121, referred to.

(2) that in the occupation and management of a railway which crossed a busy highway the appellant owed a duty to those using the highway to exercise reasonable care for their safety from the dangers which arise from the presence of the railway;

(3) that an escape of trucks from the loop was a contingency likely at some time to occur and the jury were entitled to treat it as a possible danger against which precautions should have been taken;

Thompson v. *Bankstown Corporation* (1953) 87 C.L.R. 619, at p. 630, referred to.

Decision of the Supreme Court of New South Wales: *Speirs* v. *Caledonian Collieries Ltd.* (1957) S.R. (N.S.W.) 483; 74 W.N. 23, affirmed.

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APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court of New South Wales under the *Compensation to Relatives Act* 1897-1946 (N.S.W.) by Joyce Clair Speirs, administratrix of the estate of her deceased husband, Keith Miller Speirs, on behalf of herself and the two children of the marriage, Joy Elizabeth Speirs born 13th March 1948, and James Keith Speirs born 12th November 1950, against Caledonian Collieries Ltd., as firstly-named defendant, and Edwin Fenwick, Sydney Fenwick, Albert Fenwick, Clarence Fenwick and Hughie Fenwick, as secondly-named defendants, to recover, *inter alia*, damages for the pecuniary loss suffered by herself and the two children by reason of the death of her husband and their father, his death having been caused, so it was alleged, by injuries received by him in consequence of the servants and agents of the defendants having so negligently controlled and managed a certain system of railway lines and a train of trucks laden with coal on that system of railway lines that that train collided with a motor car then being driven by her husband and as a result of such collision he received injuries which caused his death. The collision occurred at the level crossing at the intersection of the Lambton Road, near Newcastle, with such system of railway lines.

The railway line on which the trucks were at the time of the accident had been constructed by the Waratah Colliery, a predecessor in title of the Caledonian Collieries Ltd. under the authority of a private Act of Parliament, No. 27 Vict., passed on 8th October 1863 whereunder Caledonian Collieries Ltd. was entitled to maintain the railway and all proper works and conveniences connected with it, including that portion of the railway which crossed Lambton Road at the level crossing where the accident took place. Sections 92 and 93 of the Act provide as follows : " 92. The railway hereby authorized to be made and the locomotives shall be open to public use upon payment of a toll to the company . . . for such carriage the party seeking transit supplying and loading his own trucks or waggons and all trucks when emptied shall be conveyed on their return free of cost. 93. And be it enacted that it shall be lawful for the owners or occupiers of the land traversed by the said railway to lay down upon their own lands any collateral branches of railway to communicate with the said railway for the purpose of bringing carriages to or from or upon the said railway and the company shall if required at the expense of such owners or occupiers make openings in the rails and such additional lines of railway as may be necessary for effecting such communication in places where the communication can be made with safety to the public and without injury to the said

railway and without inconvenience to the traffic thereupon and the promoters shall not take any rate or toll or other moneys for the passing of any passengers goods or other things along any branch so to be made by any such owner or occupier or other person but this enactment shall be subject to the following restrictions and conditions . . . . The persons making or using such branch railways shall be subject to all by-laws and regulations of the promoters from time to time made with respect to passing upon or crossing the railway and otherwise and the persons making or using such branch railway shall be bound to construct and from time to time as need may require to renew the offset plates and switches according to the most approved plan adopted by the company under the direction of their engineer."

The predecessors in title of the Fenwicks, the second-named defendants, who owned Crofton Colliery, had pursuant to the authority conferred by s. 93, constructed, in 1936, the branch railway line or siding, referred to as the Crofton Siding, which led from their colliery so as to join the main Waratah Colliery line and make one continuous line. This line joined the main line at a point about one and a quarter miles from Lambton Road. Crofton Colliery's pit-head was operated about eight or nine chains from the intersection with the Waratah line and was situated in a north-easterly direction from the main line. The line from the point where the Crofton siding joined it was mostly downhill and traversed five level crossings where the line crossed over public roads in the suburbs of Newcastle. The train involved in the collision had come on to the line owned by Caledonian Collieries Ltd. from that owned by the Fenwicks.

At the trial before *Collins* J. and a jury of four a verdict was given in favour of the plaintiff for the sum of £16,660 which was apportioned between her and the two children of the marriage. In answer to a special question the jury apportioned the liability for the verdict as to seventy per cent against Caledonian Collieries Ltd. and as to thirty per cent against the Fenwicks, the second-named defendants.

Appeals by Caledonian Collieries Ltd. and the Fenwicks were dismissed by the Full Court of the Supreme Court but an appeal by the plaintiff was allowed, the Full Court (*Street* C.J., *Herron* and *Myers* JJ.) holding that the case was not one for an apportionment of damages, and that on the findings of the jury the plaintiff-respondent was entitled to a verdict against each of the defendants for the full amount of £16,660: *Speirs* v. *Caledonian Collieries Ltd.* (1).

(1) (1957) S.R. (N.S.W.) 483; 74 W.N. 23.

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From that decision Caledonian Collieries Ltd. appealed to the High Court.

Further relevant facts appear in the majority judgment hereunder.

Sir *Garfield Barwick* Q.C. and *M. F. Loxton* Q.C. (with them *G. P. Donovan*), for the appellant.

Sir *Garfield Barwick* Q.C. It was not any act of the appellant which was causally related to this result. There was no evidence of negligence on the part of the appellant. The rail itself is not inherently dangerous. There could not be any cavil at the proposition that negligence of Crofton in leaving these trucks unbraked was the cause of the injury and no act of the appellant intervened between that negligent act of Crofton and the result. The ideas of *Donoghue* v. *Stevenson* (1) are inapposite. It is not at all like *Lynch* v. *Nurdin* (2). There was no act of the appellant antecedent to Crofton's negligence. The appellant's possession did not bring the appellant under a duty to interpose itself in some way between the independent negligence of Crofton and the consequential damage that might come from that negligence. No duty can be placed on the owner of the property merely from his ownership because his property may become the medium by which the independent negligence of another may result in damage. There is no duty on the owner of the property so to condition his property that it will counteract the effect of some other person's independent negligence. Any such duty could arise only out of and because of the probability that damage would ensue if one's property was not modified in some way. There was no evidence whatever that would warrant the conclusion that the appellant ought to have anticipated the escape of trucks from this line as a probable, or the likely, result. During the immediately preceding fifty years there had been no accident at this crossing. The appellant bailed the trucks to Crofton. It was under no duty to foresee the possibility that trucks might get out of control, but it is not a question of whether the appellant could foresee it or not. Having put the trucks into the control of another organisation, the fact that they are defective in brakes is not a liability of the appellant (*Caledonian Railway Co.* v. *Mulholland* (3)). The appellant was not bound to anticipate such a departure from Crofton's usual and easily operable safety system as would allow the trucks to come out on the rail, or that it was probable that these simple and not

(1) (1932) A.C. 562.
(2) (1841) 1 Q.B. 29 [113 E.R. 1041].
(3) (1898) A.C. 216.

dangerous operations would be neglected to the point where these waggons would come out. This is not a case in which the trucks would necessarily escape from the Crofton line on to the appellant's line. Sprags were better than the catch-points as a precaution. The appellant would not be liable because it did not have catch-points at every place that the line crossed the road. The evidence shows that catch-points are not so put for that purpose. In this case no act of the appellant is involved. It does not follow that because the appellant has a railway line it ought to have foreseen that somebody's negligence of the use of something else could have turned the appellant's railway line into a medium for injury being derived or inflicted on somebody else. Because it owned the railway line, and because it ought to have foreseen that somebody's negligence might have carried through its railway line to injury, it does not follow that the appellant was bound to interpose itself between that negligence and the injury. That has not anything to do with *Donoghue* v. *Stevenson* (1) and there is not any authority in the law for that proposition. An authority against it is *Evans* v. *Edinburgh Corporation* (2). It is not a failure to exercise due care prior to an accident (*McDowall* v. *Great Western Railway Co.* (3)). The fact that there was a catch-point in the siding would not have made any difference to the question of liability. The appellant would not be responsible if the brakes were defective nor would it have been liable so far as the trucks were concerned. The brakes were in good order. Out of the property, be it truck or rail, arise in this case no duties whilst in a purely passive situation. No act of the appellant in the management or running of the rail is concerned (*Caledonian Railway Co.* v. *Mulholland* (4)). The facts in that case are very similar to the facts in this case. *Oliver* v. *Saddler & Co.* (5) was distinguished, not disagreed with, on the ground that the only person who was intended to deal with the hawser (rope or sling) was the defendant. There is no evidence that a truck not started up by something would have moved by simply standing unbraked on the gradient. A string of trucks would not have started without some impelling force. This is not a case where there is an antecedent or intervening act of the appellant which is negligent. There can be intervening negligence which does not excuse. *Lynch* v. *Nurdin* (6); *Haynes* v. *Harwood* (7) and *Englehart* v. *Farrant* (8) have nothing to do with this case. The non-provision of catch-points did not lead in any way to the

(1) (1932) A.C. 562.
(2) (1916) 2 A.C. 45.
(3) (1903) 2 K.B. 331.
(4) (1898) A.C., at pp. 227, 229, 232.
(5) (1929) A.C. 584.
(6) (1841) 1 Q.B. 29 [113 E.R. 1041].
(7) (1935) 1 K.B. 146.
(8) (1897) 1 Q.B. 240.

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failure to brake the trucks. It was for the bailee to maintain the trucks. The appellant does not contest the proposition that these statutes do no more than authorise, and they leave the appellant with a liability for a negligent operation. The judges below equated this case to *North-Western Utilities Ltd.* v. *London Guarantee & Accident Co.Ltd.* (1) and similar cases cited by them; see *Bolton* v. *Stone* (2) and *Paris* v. *Stepney Borough Council* (3). The accident was in fact caused by the negligent failure of Crofton to maintain the braking and spragging of the trucks. The injury was caused by the negligence of Crofton who clearly owed a duty to users of the highway to keep the trucks braked. No act of the appellant in relation to the trucks preceded the negligent act of Crofton so as itself to be a cause of the injury. *Commissioner for Railways (N.S.W.)* v. *Hooper* (4) was a gravitational shunting or handling case. Sprags and braking and catch-points in the Crofton siding are alternative provisions: it is not essential that all of them be installed (*McDowall* v. *Great Western Railway Co.* (5)). The evidence in *Evans* v. *Edinburgh Corporation* (6) was close to this one in point of principle. The whole point of *Donoghue* v. *Stevenson* (7) is that when a person is doing something, he ought at that moment to consider who, in relation to his doing, may be affected. So in this case there is no duty even if the escape of the trucks ought to have been foreseen as probable. There is no material on which a jury could be allowed to find that negligence in the handling of these trucks by the Crofton personnel was probable so as to result in an escape of the trucks. It is not a question of whether a duty was breached. It is a question as to whether there was a duty.

M. F. Loxton Q.C. The court below was in error in refusing to hold that there was no evidence as to the cause of the escape of the trucks. In the absence of evidence of the actual cause the ambit of the duty cannot be ascertained. The case made out for the respondent was of *res ipsa loquitur*, but that does not apply here. There is no *res ipsa loquitur* doctrine to prove a duty. All that the respondent has proved is facts more consistent with negligence being the cause of this accident than the absence of negligence. To make out a case against the appellant the respondent had to prove an initial act of negligence which, by virtue of foreseeable intervening acts, led in its causes to the injuries the deceased suffered. This is not like *In re Polemis and Furness,*

(1) (1936) A.C. 108.
(2) (1951) A.C. 850.
(3) (1951) A.C. 367.
(4) (1954) 89 C.L.R. 486, at p. 496.
(5) (1903) 2 K.B., at p. 336.
(6) (1916) 2 A.C. 45, at pp. 48, 51, 53.
(7) (1932) A.C. 562.

Withy & Co. Ltd. (1) where the negligent act charged was the immediate cause of the loss or injury. In this case there are intervening acts. In the absence of evidence as to the immediate cause of this accident the plaintiff's claim must fail. The injury must be the direct consequence of the negligent act. It can only be found that an act was negligent if it can also be found that a reasonable man would have foreseen intervening acts. Whether it was reasonably foreseeable that by reason of something or other the trucks might be set loose on the line is similar to the proposition considered and rejected in *Glasgow Corporation* v. *Muir* (2). The question is: What are the facts that are necessary before the question of foreseeable danger can be determined. On the evidence it was not open to the jury to find that these trucks moved other than by impetus. Whatever duty was owed by the appellant had nothing to do with this act. A reasonable person only guards against dangers which could reasonably be foreseen, therefore as the cause of this accident cannot be proved it cannot be proved that the accident was one that the appellant should have reasonably foreseen. The duty was not an absolute one; it is limited in its scope or ambit and limited by the ordinary test. The fact that the appellant may have broken a duty in respect of risk (a) cannot be called in aid to supply a duty in respect of risk (b), if risk (b) happens to be unforeseeable.

[DIXON C.J. referred to *Mercer* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (3).]

There was not any intervening act in that case, but there was a direct relationship between the commissioner and the passenger. The matter can be approached both ways (*Glasgow Corporation* v. *Muir* (2)). The whole of the basis of the question now raised is the principle that the law is only concerned with negligence causing damage. Unless there is a duty there cannot be any negligence. The duty is always a matter of law for the court: see generally *Glasgow Corporation* v. *Muir* (4). The proposition that one must take reasonable steps to guard against eventualities which a reasonable man would foresee, was rejected in *Weld-Blundell* v. *Stephens* (5). The duty does not arise out of reasonable foreseeability at all. The duty arises out of a relationship: *Donoghue* v. *Stevenson* (6). As soon as a man puts his foot in the street, or sees a ship come over the horizon, he comes under a duty: *Heaven* v. *Pender* (7). That relationship is created by the relationship of cause and

(1) (1921) 3 K.B. 560.
(2) (1943) A.C. 448.
(3) (1936) 56 C.L.R. 580, at p. 592.
(4) (1943) A.C., at pp. 454-459, 467.
(5) (1920) A.C. 956.
(6) (1932) A.C. 562.
(7) (1883) 11 Q.B.D. 503.

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effect of conduct. A mere act of omission cannot create a relationship. There was no conduct by the appellant which directly affected the deceased. The respondent claims not a duty that the man who has brought on to his land dangerous things, not natural, that he should prevent their escape from his land, but that a person who has not brought them on to his land should prevent them from escaping from the wrongdoer—the neighbour. This is *Rylands* v. *Fletcher* (1) in reverse. It is not the joint operation which gives rise to the liability, it is the ability to take precautions. In *Oliver* v. *Saddler & Co.* (2) the duty was held because only one party could take the precautions. *North-Western Utilities Ltd.* v. *London Guarantee & Accident Co. Ltd.* (3) is a case of statutory duty. The railway is not a thing dangerous in itself. The appellant's duty *qua* the railway line was limited to the main line. There is no principle of the common law which creates a duty in the appellant *qua* the operation of Crofton. No responsibility can accrue to the appellant from the escape. It is absent. This is where *Glasgow Corporation* v. *Muir* (4) is distinguished. *Glasgow Corporation* v. *Muir* (4) was relied upon in the court below to distinguish between the existence of a duty and the test for determining its ambit or scope. This case is quite well illustrated by *Woods* v. *Duncan* (5). The duty is to avoid acts or omissions which would be likely to injure. The cause has got to be ascertained in every case of negligence.

[McTIERNAN J. referred to *Ruoff* v. *Long & Co.* (6).]

The liability in this case depended upon the foreseeability of the intervening event.

[TAYLOR J. referred to *Green* v. *Perry* (7).]

The appellant would be liable, assuming a duty, in a chain of causation when the following act may reasonably be foreseen, but the appellant is not liable when the following act could not reasonably be foreseen. It follows that when the following act is not known, there cannot be a question, neither the duty nor the breach of the duty causing the damage can be established, and so the plaintiff must fail. The standard of care is also a question of law. It is part of the duty. Whether the appellant acted negligently or carefully in having the catch-points installed in the management of the railway, is not a question for the jury but for the court. There was no causal relation between any breach: *Stapley* v.

(1) (1868) L.R. 3 H.L. 330.
(2) (1929) A.C. 584.
(3) (1936) A.C. 108.
(4) (1943) A.C. 448.
(5) (1946) A.C. 401, at pp. 419, 426, 430, 436, 442.
(6) (1916) 1 K.B. 148.
(7) (1955) 94 C.L.R. 606.

Gypsum Mines Ltd. (1). In *McDowall* v. *Great Western Railway Co.* (2) there was never a suggestion that the railway was the cause—the rails themselves were the cause. There was no case to go to the jury (*Heaven* v. *Pender* (3)). Although the *Supreme Court Rules* require that objections should be taken this is a special case and the effect of it is that the real issues in this case, of fact, whatever they may be, have never been determined. The trial judge should draw the jury's attention to the legal issues involved and explain those issues in the light of the evidence, and should also instruct the jury fully as to how the facts bear upon those legal issues. The judge should have informed the jury that they were independent torts. This is not a case of counsel standing by, and then trying to have another chance. What issues in fact were for the jury in this case have not been put to them. The defendant's case was not properly put to the jury in a way the jury would understand; to illustrate in what way the individual facts bore upon the individual legal issues. The jury had no idea how to distinguish between *causa causans* and *causa sine qua non*. Questions of fact should have been explained to the jury. The Court should approach the question: (i) from the point of view whether there was relationship which gave rise to the duty and then, assuming that there was such a relationship, whether the duty which had arisen would be still measured by the test of reasonable foreseeability. All the questions objected to were admitted after objection. As to the basis of their admissions, see *Rowley* v. *London and North Western Railway Co.* (4), *Phillips* v. *London and South Western Railway Co.* (5) and *Roach* v. *Yates* (6). There is a close analogy between those cases and this case. The actuarial evidence left the jury without any real help. The jury were prevented from directing their minds to the relevant matter. Some of the questions should have been rejected. The damages awarded by the jury were in excess of the amount which could reasonably have been awarded. The onus of proving damage lies upon the plaintiff. The jury did not take into account the very considerable deduction that would have to to be made in order to provide for contingencies to which the future was subject, e.g. the widow's re-marriage. The Waratah siding and the Crofton siding are right outside the statute. The statute does not contemplate any general supervision of the whole railway system. For the question of interpretation that it would not be so reliance is placed on s. 93. The statute does not bring the whole

(1) (1953) A.C. 663, at p. 681.
(2) (1903) 2 K.B. 331.
(3) (1883) 11 Q.B.D. 503.
(4) (1873) L.R. 8 Ex. 221.
(5) (1879) 5 Q.B.D. 78.
(6) (1938) 1 K.B. 256.

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railway system under the control of the appellant. There is an absence from the statute of any express duty. The junction of the Crofton private line or siding was something to which the appellant had to submit. The cause of this action did not arise out of any exercise by the appellant of its statutory powers. When the likelihood of the danger depended upon the intervening acts, then the likelihood of danger could not be determined unless the foreseeability of the intervening acts could be determined (*Green* v. *Perry* (1)).

K. W. Asprey Q.C. and *C. Langsworth* (with them *L. V. Kemp*), for the respondent.

K. W. Asprey Q.C. It is conceded that it is a question of law whether in any particular circumstances a duty of care exists. That duty is shown in *Hay or Bourhill* v. *Young* (2) and when that duty arises appears in *Fardon* v. *Harcourt-Rivington* (3); *Bolton* v. *Stone* (4); *Woods* v. *Duncan* (5) and *Salmond* on *Torts*, 11th ed. (1953), p. 507, note (*t*). The duty arose in this case because the appellant or its predecessors in title entered upon the task of constructing a railway system under the statute, but the obligation to make the opening in the rails was only a qualified obligation. The appellant had the power to insist upon precautions being taken by Crofton and it did not exercise that power. In a place where the junction was to be made which had an incline down to the appellant's line the communication, i.e. branch railway, referred to in s. 93 of the private Act enacted in October 1863, was not bound to be made unless it was a communication which could be made with safety to the public, and it could have been made with safety to the public if the appellant's predecessors had insisted upon proper precautions being taken on the Crofton siding. The right to call upon the appellant to effect a junction is only a qualified right because it can only be done in places where the communication can be made with safety to the public. The duty arose directly under the statute. Apart from the statute itself, the appellant operated a private railway system which it had constructed. As the constructor and operator of such a railway system it was under the general duty to take care: *Ellis* v. *Great Western Railway Co.* (6); *South Australian Railways Commissioner* v. *Thomas* (7). Again apart from statute the appellant carried out a business operation in

(1) (1955) 94 C.L.R. 606.
(2) (1943) A.C. 92, at p. 104.
(3) (1932) 48 T.L.R. 215.
(4) (1951) A.C. 850.
(5) (1946) A.C., at p. 436.
(6) (1874) L.R. 9 C.P. 551, at p. 555.
(7) (1951) 84 C.L.R. 84, at p. 89.

conjunction with Crofton under contract. By reason of that working relationship with the Crofton people the appellant was under a general duty to take care. They were not working under the statute in its entirety, but were working under an arrangement apart from the statute. The parties voluntarily entered into that arrangement. Not only was the possibility of such a happening reasonably to have been foreseen by the appellant, but it was negligent in unlocking the points and omitting to lock them on the day in question. There is not any absolute standard of what is reasonable and probable. In ascertaining whether a duty attaches to any person in the particular circumstances of the case it must be remembered that a reasonable and prudent man would be influenced not only by the greater or less probability of an accident occurring but also by the gravity of the consequences if an accident does occur. The gravity of the consequences is not only relevant to the degree of care but also to the attaching of the duty (*Paris* v. *Stepney Borough Council* (1)). In addition to the likelihood of an accident occurring in the ordinary course of events when handling heavy railway trucks on a gravitational siding, such trucks being unattended by a locomotive and operated only with manual brakes which can easily be dislodged and thus released in the course of the work, the probability of the gravity of the consequences, if an accident does occur is overwhelming, having regard to : (a) the weight of an escaping truck ; (b) the speed it must gather owing to steepness of the incline ; and (c) the large number of persons whom it may kill or gravely injure. The duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed. The duty would be owed to all persons, either on foot or on a conveyance who had reason to utilise any of those public crossings. The degree of care involves consideration of : (i) the seriousness of the injury to persons and property ; (ii) the likelihood of the injury being in fact caused on the happening of the accident ; and (iii) the measures necessary to eliminate the risk of injury including costs involved. Neglect of duty does not by repetition cease to be neglect of duty. A person is not necessarily relieved of the duty to anticipate an accident merely because an accident has not happened before, and the precautions which were taken after the accident, whilst not furnishing evidence of negligence, were evidence of what precautions were practicable to have avoided the accident which in fact occurred (*Davis* v. *Langdon* (2)). Once negligence on the part of the appellant is established, which directly contributed

(1) (1951) A.C., at pp. 375, 381.

(2) (1911) 11 S.R. (N.S.W.) 149, at pp. 161, 162.

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to cause the injury to the respondent, it is no defence for the appellant to say that it did not do or omit to do any act which was the immediate physical cause of the trucks escaping (*Grant* v. *Sun Shipping Co. Ltd.* (1); *Haynes* v. *Harwood* (2); *Wells* v. *Metropolitan Water Board* (3); *Glasgow Corporation* v. *Muir* (4) and *North-Western Utilities Ltd.* v. *London Guarantee and Accident Co. Ltd.* (5)). No attempt was made to lead evidence as to any practical difficulty or hazard arising from the use of those safety devices on either the appellant's line or the Crofton line. The jury could, in the circumstances, find the appellant was negligent in constructing the junction between its main line and the Crofton siding without making provision to prevent the escape of any vehicle from that siding on to the appellant's line, or without insisting that Crofton itself took such a precaution. The appellant was negligent in placing the trucks on a gravitational siding in the course of its business knowing that there was not any protective device. It was negligent in failing to install, in those circumstances, catch-points on its own line to prevent "runaway" trucks getting down to the public crossings, and also in removing the key or L-shaped device from between the rails and failing to replace it. *McDowall* v. *Great Western Railway Co.* (6) is in sharp contradistinction from this case, as the event in that case was the result of a deliberate act on the part of malicious youths; the possibility of danger emerging was not reasonably apparent, it was only a mere possibility (*Fardon* v. *Harcourt-Rivington* (7)). In *McDowall's Case* (8) the danger was a mere possibility, but in this case it was an apparent danger. In *Caledonian Railway Co.* v. *Mulholland* (9) the defendant was held not to be liable because the relations between the defendant and the plaintiff were not proximate. That case is explained in *Donoghue* v. *Stevenson* (10) and *Farr* v. *Butters Bros. & Co.* (11); there was no allegation in that case that the defendant knew or had any reason to suspect that the trucks concerned were defective. *Evans* v. *Edinburgh Corporation* (12) was decided on the ground that the door opening on to a lane was in itself perfectly harmless despite the fact that it opened outwards. *Ruoff* v. *Long & Co.* (13) was a case of "mere possibility". In *Bolton* v. *Stone* (14) it was held that although it was a possibility that the cricket ball could be

(1) (1948) A.C. 549, at p. 563.
(2) (1935) 1 K.B., at p. 153.
(3) (1937) 4 All E.R. 639.
(4) (1943) A.C. 448.
(5) (1936) A.C., at p. 126.
(6) (1903) 2 K.B. 331.
(7) (1932) 48 T.L.R. 215.
(8) (1903) 2 K.B. 331.
(9) (1898) A.C. 216.
(10) (1932) A.C., at p. 597.
(11) (1932) 2 K.B. 606, at pp. 616, 617.
(12) (1916) 2 A.C. 45.
(13) (1916) 1 K.B. 148.
(14) (1951) A.C. 850.

hit out of the ground there was no real probability that injury would flow from that act. The only question really for the Court on the question of duty is therefore : might the appellant reasonably have foreseen the possibility of the happening of escape of trucks and injury being caused thereby. The foreseeability of the possibility of the happening of this event is very apparent. This Court will not interfere with the exercise of the Full Court's discretion in refusing to grant leave to the appellant to argue a point not taken at the hearing : see *Bugg* v. *Day* (1). The summing-up was sufficient and a proper summing-up in all the circumstances. The damages awarded could not be said to be so inordinately high as to be beyond the verdict of reasonable men.

[WEBB J. referred to *Williams* v. *Usher* (2).]

C. Langsworth. The evidence shows by application of mathematics drawn from data in evidence how the sum of £840 in evidence is arrived at as a matter of mathematics. The calculation shows the factors which the actuary took from the tables which are in evidence. The factors are drawn from the Australian mortality tables and they take these factors into account, e.g. the expectation of life (a) of the deceased as at the age of thirty years ; and (b) of an ordinary man. The trial judge correctly directed the jury by referring to discounts for contingencies, vicissitudes in life and the possibility of re-marriage. The plaintiff (respondent) virtually presented her case at the lowest, because the figure which the actuary presented is discounted not only in the light of the mortality tables in relation to the deceased, but also in the light of the possibility that his wife might predecease him and the matter is terminated in any event at the age of sixty-five years. On the question of admissibility : see *Rowley* v. *London & North Western Railway Co.* (3). It is on the basis of that reasoning that here when the actuarial evidence is called the actuary, rightly and properly, discounts the sum by reference to the fact that Mrs. Speirs can only make a claim on the basis that she will be supported while both she and her husband are alive, and that the fact that the joint continuance of the lives is necessary and the basis of the calculation. Other cases as to the admissibility of evidence and especially applicable to this case are *M'Donald* v. *M'Donald* (4) ; *Roach* v. *Yates* (5) ; *Kranz* v. *Riley Dodds Australia Ltd.* (6) and *Pamment* v. *Pawelski* (7). That

(1) (1949) 79 C.L.R. 442.
(2) (1955) 94 C.L.R. 450.
(3) (1873) L.R. 8 Ex. 221, at pp. 226-228.
(4) (1880) 5 App. Cas. 519, at pp. 532, 539.
(5) (1938) 1 K.B. 256.
(6) (1954) V.L.R. 296, at p. 298.
(7) (1949) 79 C.L.R. 406, at p. 410.

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statement does not say that actuarial evidence based on expectances is entirely inadmissible: it is only a warning that that evidence must be subject to the qualifications that it has to be discounted by the various matters mentioned in the judgment of the Court. The articles in the *Australian Law Journal*, vol. 29, pp. 553, 557, in no way affects or qualifies the authorities submitted. Those authorities establish that actuarial evidence, of the type sought to be admitted here, is admissible as a matter of law.

Sir *Garfield Barwick* Q.C., in reply.

Cur adv. vult.

Mar. 21, 1957.

The following written judgments were delivered:—

DIXON C.J., MCTIERNAN, KITTO, AND TAYLOR JJ. On 29th June 1951, the husband of the respondent was fatally injured in a collision at a level crossing between a motor car which he was driving and a string of ten railway trucks fully loaded with coal. The level crossing was at the intersection of the Lambton Road, near Newcastle, with a private railway line which was in the control and management of the appellant. Weighing some 1,500 tons, out of control and travelling at high speed, the trucks entered the level crossing in circumstances which deprived the respondent's husband of all opportunity of avoiding them. They collided with his car and continued their career along the appellant's line until, a mile or so further on, near the junction of that line with the main government line, they were derailed by catch-points which had been installed to prevent the main line from being fouled in such an eventuality. Even so, their momentum carried them far enough for the leading truck to become an obstruction to the main line.

The trucks had come on to the appellant's line from a loop serving a colliery, known as the Crofton colliery, which was owned by four persons named Fenwick. These persons had the control and management of the loop line, and the trucks had escaped from it while in the charge of some employees of theirs.

The respondent, who is the administratrix of her husband's estate, brought in the Supreme Court of New South Wales an action under the provisions of the *Compensation to Relatives Act* 1897-1946 (N.S.W.), claiming damages against both the appellant and the Fenwicks for the benefit of herself and her two children. The declaration alleged, *inter alia*, that there was no effective means for controlling or stopping trucks moving towards the level crossing on the system of railway lines comprising the appellant's line and the loop line, and that negligence by the defendants in controlling and

managing the lines and the trucks caused the collision with the car driven by the deceased. The respondent's case against the appellant at the trial was put in more ways than one, but the complaint which loomed largest as the evidence proceeded was that the appellant was guilty of negligence in not providing catch-points at some point on its line between the junction with the Crofton loop and the level crossing.

The action was tried by *Collins* A.J. and a jury, and it ended in a verdict for the respondent for £16,660. This sum the jury allocated as to £14,660 to the respondent, as to £800 to one child, and as to £1,200 to the other child. In answer to specific questions, the jury found negligence as against the appellant and also as against the Fenwicks; and, his Honour having directed them that if they so found the case was one for an apportionment of damages according to the respective degrees of blame, they awarded seventy per cent of the damages against the appellant and thirty per cent against the Fenwicks.

Cross-appeals to the Full Court of the Supreme Court followed. Appeals by the present appellant and by the Fenwicks were both dismissed. The appeal of the present respondent succeeded, the Full Court holding, correctly as is now conceded, that the case was not one for an apportionment of damages, and that on the jury's findings the respondent was entitled to a verdict against each of the defendants for the full amount of £16,660. So far as the Fenwicks are concerned, the litigation ended there. The appellant, however, comes to this Court contending that its appeal to the Full Court should have been upheld.

The evidence fell short of establishing with certainty how the escape of the trucks from the Crofton loop was caused, though there was undoubtedly enough to warrant a conclusion by the jury that the cause was to be found in some carelessness on the part of one or more of the employees of the Crofton Colliery. The trucks had been left standing on the loop line, not far from its junction with the appellant's line, and between the junction and a gantry which was used by the Crofton people for loading coal from screens into trucks. They had been assembled in accordance with a practice which took advantage of a slight downward gradient in the line from a point above the gantry to a point near the junction. The practice was to gravitate a truck down to the gantry, and after filling it with coal to let it gravitate again towards the junction. Immediately before the junction the line rose very slightly, thus forming what was described in the evidence as a very shallow "dish". In this "dish" it was the custom to assemble the filled trucks. As each

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came down from the gantry it was stopped by an application of its brakes or by means of a sprag. Each truck after the first was immediately coupled to the one ahead of it. The practice was to leave the two leading trucks and the rear truck fully braked. In the ordinary course, when enough trucks had been collected they would be moved by a locomotive belonging to the appellant over the slight rise of the "dish" to the junction, and thence down the appellant's line to Newcastle. It may be that what happened on the occasion in question was that the brakes were not fully applied on the trucks which should have been braked, and that a bump from a truck newly-arrived from the gantry gave the ten which were coupled together a sufficient impetus to carry them over the slight rise to the junction. The brakes were of a simple though efficient type, consisting of a shoe impinging on the rim of the truck wheel with a degree of pressure applied to it by means of a lever. The free end of the lever moved in a rack. At the top of the rack was a slot in which the lever rested when the brake was completely off. To apply the brake it was necessary to lift the lever out of the slot and carry it down the rack, the pressure of the brake-shoe on the wheel-rim increasing with the downward movement of the lever in the rack. If the lever were allowed to bear down in the rack by its own weight alone, a slight braking effect would be produced. For stronger braking it was necessary for a man to force the lever further down the rack and fix it in the desired position by inserting a pin above it through holes in the rack. On the occasion in question the pins may have been left out, or (as the evidence suggested was possible) they may have been insecurely inserted and dislodged by vibration. There was evidence from which the jury might conclude that when the trucks were examined after the fatality the brakes were found to be in good order, but the wheels showed no signs of the brakes having been on, and the brake levers, though out of their slots, were not pinned down in the racks. There was also evidence suggesting that a shunter belonging to the Crofton colliery removed a sprag from a wheel of the leading truck.

But however it came about that the trucks were set in motion and entered the appellant's line, the fact is beyond dispute that it was that line which carried them to the level crossing where the collision occurred. From the Crofton loop junction to the level crossing was a little more than two miles. In that distance there were two other level crossings, and beyond the Lambton Road there were two more. The line was on a down grade all the way. The fall was 1 in 117 for the first mile or more, then 1 in 115 for another 35 chains, and thereafter it flattened out to 1 in 375. Thus, unbraked trucks

leaving the junction might be expected to gather a good deal of speed as they went down the first portion of the line, and at least to maintain it for the rest of the distance. That the slope of the line was considerable from a railway point of view the evidence of practical men made clear at the trial. A witness named Creswell, who had worked as a locomotive driver on the line for forty years, told of a practice of keeping the brakes applied on six to eight trucks in every train of forty-four during the whole of the descent, lest the train should get out of hand. A fireman-shunter named Summers, of fourteen years' experience on the line, described how he used to pin the brakes, on leaving the Crofton loop, with enough pressure " to make it a safe journey down ". An engine-driver named Campbell, who had been employed on the line since 1949, was invited by a juryman to suppose that he was taking waggons back to the appellant's pit (i.e. up the incline) and that six of the waggons on the tail-end of the train came loose ; and, being asked where they would go, he replied : " They would run down the line, of course ". It is necessary to add only that according to the evidence of an eye-witness the trucks which collided with the respondent's husband entered the level crossing at a speed of fifty miles an hour.

For maintaining a line with the dangerous potentialities which these facts indicate the appellant relied upon statutory authority. Two private Acts of the Parliament of New South Wales were put in evidence. The earlier, 27 Vict., incorporated a company by the name of the Waratah Coal Co., and authorised it, by s. 81, " to make construct and maintain a railway with all proper works and conveniences connected therewith upon across and over " certain lands which it described. That the railway might cross a road was recognised by ss. 83, 86 and 87. The later Act, 38 Vict., authorised the company to extend its line by the construction of branches. The appellant made a formal admission that the railway line in question in this case, excluding the Crofton siding, was at all material times vested in the appellant and that the appellant had the care, control and management of it. It does not follow, though at the trial the parties seem to have accepted it as true, that the appellant has succeeded to the authorities and immunities which the Acts conferred upon the Waratah Coal Co. But let that be assumed. At least there is nothing in the Acts which can be interpreted as giving statutory authority for the precise state in which the appellant's line was at the material time. It is not and could not be suggested that the absence of all provision for the protection of the Lambton Road level crossing from the irruption of runaway trucks

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was sanctioned by Parliament. On the assumption stated, the well-settled principle applies that when statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely to be occasioned, by their exercise, damages for negligence may be recovered : *Great Central Railway Co.* v. *Hewlett* (1) ; *East Suffolk Rivers Catchment Board* v. *Kent* (2) ; *Cox Bros. (Australia) Ltd.* v. *Commissioner of Waterworks* (3).

If the appellant had the statutory authority it asserted, there were two main questions for the consideration of the jury : first, whether injury was likely to persons using the Lambton Road level crossing, in the absence of the protection which catch-points in the appellant's line would afford ; and secondly, if so, whether the provision of such a means of protection was no more than a reasonable precaution for the appellant to take in the circumstances. The learned trial judge, applying the general principles of the law of negligence, told the jury that a person was under a duty to take care to avoid acts or omissions which could reasonably be foreseen to be likely to injure others ; and he left them to say whether the appellant's omission to make such a provision as catch-points could reasonably be foreseen as likely to injure persons using the level crossing. In substance, this directed the jury's minds to the right questions of fact. Indeed, it put the legal position virtually as *Vaughan Williams* L.J. expressed it in another level crossing case, *McDowall* v. *Great Western Railway Co.* (4) : " it seems to me that in every case in which the circumstances are such that any one of common sense having the custody of or control over a particular thing would recognise the danger of that happening which would be likely to injure others, it is the duty of the person having such custody or control to take reasonable care to avoid such injury " (5). It has been contended before us that it was for the judge to decide as a matter of law whether the appellant was under any duty of care, and if so what that duty was. It was, of course, for the judge to tell the jury what conclusions of fact they must reach before they could be entitled to treat the appellant as under a duty of care to users of the level crossing, and to describe in abstract terms the standard of that duty if it existed. This his Honour did ; and in the circumstances of the case the rest was for the jury.

(1) (1916) 2 A.C. 511, at p. 519.
(2) (1941) A.C. 74, at p. 85.
(3) (1933) 50 C.L.R. 108, at pp. 119, 121.
(4) (1903) 2 K.B. 331.
(5) (1903) 2 K.B., at p. 337.

Jordan C.J. accurately stated the function of the judge in relation to the question of duty in a negligence case, when he said in *Alchin* v. *Commissioner for Railways* (1): "If the facts are such that it is clear that a duty to be careful did or did not exist, the judge should so rule; but there may be cases in which it is open to question whether in the particular circumstances a reasonable man would take care. If so, it is for the judge to determine whether the facts are such as to admit of a finding by the jury that care was called for, and, if he so determines, it is for the jury to decide whether it was in fact called for" (2). As a general proposition it would seem undeniable that in the occupation and management of a railway which crosses a busy highway the appellants owe a duty to those using the highway to exercise reasonable care for their safety from the dangers which arise from the presence of the railway. In applying that general proposition in the present case, unless only one conclusion was reasonably open, it became a question for the jury whether reasonable care demanded that the appellants should have taken any and what precautions which would have averted injury from uncontrolled vehicles leaving the Crofton loop through accident or neglect on the part of the Fenwicks' employees or other cause.

The situation which the jury had to consider was, of course, that which existed immediately before the fatality. It may be that, at a time when no rolling-stock could ever be on the line except such as were being managed in connexion with the appellant's own mine and under conditions established and controlled by its staff, the provision of catch-points would have exceeded the requirements of reasonable care. But in 1936 the Crofton loop was constructed. The Act 27 Vict. provided by s. 93 that it should be lawful for the owners or occupiers of the land traversed by the authorised railway to lay down on their own lands any collateral branches of railway to communicate with the said railway for the purpose of bringing carriages to or from or upon the said railway, and that the company should if required at the expense of such owners or occupiers make openings in the rails and such additional lines of railway as might be necessary for effecting such connexion. Apparently it was accepted by all concerned that this provision obliged the appellant to construct the junction of the Crofton loop with its own line. At any rate, it did so; and from that time onwards the situation was substantially different from that which had existed before. The points which were installed at the junction were switch-points, providing no obstacle to the free passage of rolling-stock from the loop to the

(1) (1935) 35 S.R. (N.S.W.) 498; 52 W.N. 156.

(2) (1935) 35 S.R. (N.S.W.), at pp. 501, 502; 52 W.N. 156.

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appellant's line and in the direction of the Lambton Road and Newcastle. Any trucks reaching the junction, if out of control, would necessarily go down the line, unless, indeed, some positive action such as the insertion of a piece of metal into the points should be a means of derailment at the junction. And it was obvious that the appellant's line, from the junction down, would constitute, unless a protective device were provided, an instrument by which any rolling-stock emerging out of control from the Crofton loop must be carried to the succession of level crossings. Yet no such device was in fact provided, although the persons in charge of the appellant's affairs well knew that workmen not under its own control or oversight would be constantly dealing with trucks on the loop, that the trucks would be equipped with manually-operated brakes only, that the general trend of the loop was downwards to the junction, that a practice of moving trucks by gravitation towards the junction would be followed, and that nothing but the slight upward trend of the "dish" provided any obstacle to the escape of trucks which human fallibility might set moving while there was no locomotive to hold them. In considering whether it was within the demands of reasonable care in these circumstances to instal such a device as catch-points, the jury was bound, as the learned judge told them, to bear in mind the gravity of the consequences which might follow from an escape of trucks on to the Lambton Road level crossing. The probability was high that the result would be a collision for some unsuspecting user of the road, for at this point it was a very busy highway indeed. Close to the level crossing, in fact separated from it only by the width of a stormwater channel, was an intersection of several much-used roads. According to the evidence of a police officer, there was almost continuous traffic there. The vicinity was described by one witness as the most densely populated part of suburban Newcastle. And it was self-evident that if a collision should occur it would be a most serious disaster.

It is important to observe, particularly as the argument presented for the appellant appeared to give insufficient weight to it, that the jury had not to consider whether it was reasonable to foresee an escape of trucks in the precise manner, whatever it was, in which the trucks escaped on the occasion in question. They had to consider only whether it was reasonable to foresee in a general way the kind of thing that occurred: see *Thompson* v. *Bankstown Corporation* (1). That trucks on private lines do get out of control at times was, if not sufficiently attested by common knowledge, the

(1) (1953) 87 C.L.R. 619, at p. 630.

clear inference to be drawn from such evidence that was given as to the provision of catch-points in many places in private lines in order to prevent runaway trucks from fouling main lines. As has already been mentioned, the appellant's own line was equipped with catch-points near its intersection with the government line. And there was evidence that before the occasion to which this litigation relates the possibility of an escape of trucks from the Crofton siding had been brought home to the appellant on two occasions, one runaway truck having gone down the line as far as Adamstown, much beyond the Lambton Road level crossing.

That an escape of trucks from the loop was, in the circumstances, a contingency reasonably likely at some time to occur, and reasonably to be foreseen by the appellant as likely to occur, was a view which the jury was certainly entitled to take and act upon.

Now, there was only one way, so far as the evidence suggested, in which it was possible to ensure that the danger to road traffic from runaway rolling-stock on the line might be effectually averted, and that was by installing a set of catch-points. These are points worked by a lever which is so weighted that it keeps the points open unless it is deliberately held down against the influence of the weight. When the points are open, although vehicles may pass without interference in one direction, any vehicle attempting to go beyond them in the other direction will be deflected off the line and, if not capsized, at least stopped by the ploughing of its wheels into the earth or by meeting some obstruction. In the circumstances which have been described, was it not a conclusion to which the jury might properly come that reasonable care on the part of the appellant required the provision of catch-points at some place between the Crofton junction and the Lambton Road ?

For the appellant it is said that, although catch-points would certainly be effectual to stop runaway rolling-stock, there were such practical objections to them that a reasonable man in the position of the appellant would not have installed them. Not that they would have been excessively costly. A sum of £200 would have covered the cost, according to the evidence ; and the interruption to the use of the line could hardly have been great, for it took only a day to put in the switch points at the Crofton junction in 1936. But it was said, particularly by a Mr. Proctor, at one time Traffic Inspector, and later Superintendent, of the South Maitland Railway Pty. Ltd., that to put catch-points in a single " main " line, as he called the appellant's line, would be contrary to railway practice, as it would create a hazard for traffic coming down the gradient. He thought it would be " quite impracticable ", meaning,

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so far as one can gather, that catch-points would be a source of danger to regular traffic on the line and would be open to the economic objection that they would cause every train coming down from the Crofton loop to lose a great deal of time—as much as twenty minutes he suggested—in slowing up and stopping, waiting for a man to close the points, proceeding slowly past the points, and stopping again to pick up the man. But he seems to have been much influenced in his view by the supposition that if catch-points were reasonably required to protect the Lambton Road level crossing they must reasonably be required to protect the "thousands of level crossings all over the country", or at least at many comparable places. He does not appear to have given weight to the facts that only two trains a day, one from the appellant's mine and one from the Crofton mine, came down the line each day, and that even while there were no catch-points the constant practice was to stop for water at a point shortly before the level crossing was reached, and to proceed across the Lambton Road at a walking pace. An important consideration, which by itself was sufficient to justify a rejection of Mr. Proctor's opinion as to practicability, was that within a fortnight after the fatality which gave rise to the ligitation the appellant actually installed catch-points in such a position on its line as to prevent the occurrence of another tragedy, and these catch-points had remained a feature of the line ever since. That, of course, could not be regarded as an admission by the appellant that reasonable care in the management of the line required such a provision, and the trial judge so instructed the jury. But it had significance nevertheless, for the trial took place four years and more after these points were let into the line, and although the appellant's regular engine-driver and fireman-shunter were called as witnesses nothing in the evidence suggested that the difficulties which Mr. Proctor raised had proved important in practice. Even apart from this, however, the jury was entitled to discount Mr. Proctor's evidence as giving insufficient attention to the special requirements of the particular locale, as exaggerating the loss of time involved in the negotiation of catch-points by trains in the ordinary use of the line, and as giving undue weight to the possibility of derailments being caused by trains accidentally over-shooting the catch-points in the normal operation of the line. It seems nothing to the point that according to Mr. Proctor railway practice is to have catch-points to protect main lines only, and not on main lines themselves. If their provision may be a reasonable precaution for the protection of a main line, it is difficult to see why the view should not be open to the jury that in the situation that existed on

the appellant's line a similar provision was a reasonable precaution for the protection of the Lambton Road level crossing. And the absence of catch-points on main lines to protect level crossings was explained by Mr. Bone, a retired Government railway rolling-stock inspector, as attributable to the fact that on such lines trucks are always coupled to an engine.

If the jury rejected the view Mr. Proctor put forward, there remained only the consideration that to cause a derailment of runaway trucks is a drastic measure to take in any circumstances. The trucks and the line, and perhaps other property as well, may be damaged, and there is a possibility, though perhaps hardly more, that someone may be injured. But when the danger to be guarded against is of the order of a level crossing collision, it may well be that drastic measures are within the limits of reasonable care. It was certainly a view upon which the jury might legitimately act that on a balance of considerations a reasonable man in the position of the appellant would not have allowed himself to be deterred by the dangers which a derailment might possibly involve from giving users of the level crossing the protection of catch-points.

It was contended that even if the jury took this view they could not properly find a verdict against the appellant, because the omission of a derailing provision in the appellant's line could not be considered, in a legal sense, a cause of the collision which occurred. The submission was, in effect, that although it might be true that but for the appellant's conduct in having its line without catch-points the collision would not have happened, that conduct was not a *causa causans* of the collision so as to entail liability in tort. The answer, however, is that while carelessness on the part of Crofton employees may have been the sole cause of the escape of the trucks from the Crofton loop it was not the sole cause of the collision. In order that the collision should occur there had to be a positive contribution to the course of events, taking effect at and from the time when the trucks emerged from the loop, by a line of rails in such a condition as to give the trucks the uninterrupted support and guidance which were necessary to carry them, by the force of gravity, to the Lambton Road. Such a line the appellant provided. It cannot be right to treat the existence of the appellant's line as part of a static condition of affairs, in which the letting loose of the trucks operated alone to bring about the collision. To take that view would be to overlook the undoubted fact that the appellant's line was the means by which the trucks were conducted on a particular course by the positive action of rails upon wheels. The appellant's conduct in having the line where it was, and unprovided

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with catch-points as it was, had the effect of converting what began as an escape of trucks from the Crofton loop into a collision at the Lambton Road level crossing. This distinguishes the case completely from *Evans* v. *Edinburgh Corporation* (1) and other cases as to causation, from which the appellant claimed support for its argument.

The contention that on the evidence the jury could not properly find a verdict against the appellant must be rejected. As to damages, two submissions were made. The first was that certain evidence given at the trial by an actuary should not have been admitted. The actuary produced a book of mortality tables compiled by the Commonwealth Actuary and said that for the purpose of his calculations he had taken an interest rate of four and one-half per cent per annum. Without any further foundation than this having been laid, he was asked to say what, according to calculations he had made, was the present value of a sum of £1 per week payable weekly over three separate periods. One was the period of the joint lives of a man and a woman both aged thirty years, the payments ceasing at latest when the man reached the age of sixty-five years. Another was the period of the joint lives of a man aged thirty years and a girl aged three years and three months, the payments ceasing in any event when the girl reached sixteen years. The third was the period of the joint lives of a man aged thirty years and a boy aged seven months, the payments ceasing in any event when the boy attained sixteen years. The ages mentioned were respectively the ages of the respondent's husband, the respondent herself and their two children. The questions were objected to, but the objection was overruled, and the figures given by the actuary in his answers were £840, £499 and £560 respectively. We have not here to consider any broad question as to the admissibility of actuarial evidence, such as was the subject of the well-known judgment of *Blackburn* J. in *Rowley* v. *London and North Western Railway Co.* (2). The contention that is put is a narrow one, depending upon the fact that the actuary did not say what were the respective periods which he was taking as the expectation of life of each of the persons in respect of whose joint lives his calculations were made. In the absence of this information, it is said, the jury were not in a position to make a proper adjustment to any sum they might reach by employing the actuary's figures in order to allow for the contingencies affecting the lives of the actual persons they were dealing with, and that for that reason the evidence was irrelevant.

(1) (1916) 2 A.C. 45.

(2) (1873) L.R. 8 Ex. 221.

It is true that as the evidence was left the actuary's figures could not be used for some calculations which, if it had been possible to make them, the jury might have found helpful. But that is not a sufficient reason for saying that the admission of the figures in evidence is a ground for a new trial. The fact that their usefulness in any event was limited was brought to the jury's attention both in the course of the cross-examination and in the summing-up. The evidence made it quite clear that they were based upon average expectations of life and had no direct application to the particular persons to whom the case related. The learned judge rightly described the actuarial figures as merely the result of " a sum in mathematics ", and pointed out that they " do not deal with these parties ". He added that even if they were accepted exactly they would be ceiling figures, and he told the jury that the actuary's evidence was, at the best, a guide. The figures simply provided the jury with factors to be used in any calculations for which, on the evidence as a whole, they might prove to be material. Even if it is agreed that in the event no useful calculation could be based upon them, the verdict cannot be regarded as vitiated by their having been admitted. There may no doubt be a case in which actuarial figures given in evidence prove not only to be ultimately insusceptible of any legitimate use but to have an appreciable tendency, in all the circumstances of the trial, to mislead or confuse the jury; and it is possible that in such a case the admission of the figures may make the verdict unsatisfactory. The present, however, is not a case of that kind.

The second submission as to damages was that the amount awarded was disproportionately high. This Court has dealt in a number of cases recently with the principles upon which an appeal upon such a ground must be considered, and they need not be re-stated here. The Full Court of the Supreme Court, applying those principles, thought that the case was not one in which the verdict should be interfered with. All that need now be said is that no sufficient reason appears for coming to a different conclusion.

The final submission to be considered was to the effect that the summing-up did not give the jury sufficient guidance as to the relevant principles of law and the manner in which they should approach the application of those principles to the evidence in the case. The learned judges who heard the appeal in the Supreme Court overruled this submission because it was not covered by any of the numerous objections taken at the trial, and because in the context of the trial as a whole the summing-up, whatever criticisms might be made of it in some respects, sufficed to put the jury in

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possession of the issues they were to consider and of the law they were to apply. This view appears to be fully justified. There is no reason to think that the trial in any way miscarried.

The result is that the appeal should be dismissed with costs.

WEBB J. This is an appeal from an order of the Full Court of New South Wales dismissing an appeal from a judgment for £16,660 against the appellant and persons herein referred to as Crofton Colliery entered on the findings of a jury in an action under *Lord Campbell's Act* brought by the respondent in respect of the death of her husband who was killed when his motor car collided with coal trucks at a public crossing on the appellant's railway line. These trucks had escaped from the Crofton Colliery's railway siding which the statute under which the appellant's line was constructed required the appellant to permit to be connected with its line. The trucks escaped because the Crofton Colliery employees neglected to take the very simple precaution of braking and spragging the wheels of the trucks as they stood on the siding, with the result that the trucks ran down the incline in the siding to appellant's line and then along that line to the public crossing at an increasing speed.

The appellant submits that it could not reasonably have foreseen that the Crofton Colliery employees would fail to take the very simple measure of braking and spragging the wheels of the trucks to prevent them from moving, more particularly as that very simple measure had always been taken theretofore and had proved effective. There is, I think, something to be said for that submission, although the trial was with a jury and it is within the jury's province to find whether the danger was foreseeable and what precautions were reasonably required to avoid it. But in any event I cannot see why the installation of catch-points, which counsel for the respondent say should have been inserted, should be regarded as a reasonable precaution which the appellant should have taken against the possible escape of the trucks. I assume, without deciding, that the appellant could have insisted on catch-points being installed on the siding as a condition of permitting either the connexion of the siding with the appellant's line or the continuance of that connexion. Catch-points were installed on the Government line with which the appellant's line was connected, and they were installed on the appellant's line after this accident. But catch-points might be installed merely in the hope that they would reduce the damage without entirely preventing it. To derail a truck is an extreme measure and the onus of showing it is a reasonable precaution against accident must rest heavily on the party asserting that it

is. Indeed, to prevent derailments railway lines are required to be so constructed throughout their entire length that derailments will not occur; for wherever a derailment occurs it might well injure or kill somebody authorised to be there, and in proceedings to recover damages in respect of his injuries or death it could not be justified, whether as a reasonable precaution or otherwise, unless it could be shown that such injuries or death could not reasonably have been foreseen as a result of the derailment. If that is the position even where catch-points are installed and bring about a derailment, then, where they are not installed I think the position must be that the party alleging the duty to instal catch-points can succeed in establishing negligence only if it is shown that catch-points could have been installed at a place on the line where the derailment would not be likely to cause injury to any person. There is no presumption that such a place existed. For the reasons already stated none arose from the existence of catch-points on the Government line or since the accident on the appellant's line. I do not see how the mere existence of such catch-points can shift the onus of proof, as would be the case if their effect was a matter peculiarly within the appellant's knowledge. The problem of deciding whether to derail escaping trucks or to let them run on is perhaps readily solved. Still the choice is always between two evils: wherever the derailment is effected injury to some person is reasonably foreseeable, unless the catch-points are installed at a point where there is no likelihood of injury resulting from the derailment. The burden of proving that such point exists rests, I think, on the party alleging the duty to instal catch-points as part of his obligation to establish negligence, and that burden has not been discharged here.

I understand this case to be fought on the assumption that the provision of catch-points was the only precaution that the appellant could reasonably have been expected to take against the escape of trucks from the Crofton Colliery siding, but the appellant could reasonably have been expected to take it only if it were proved to be likely to prevent damage resulting from their escape, and that proof was not forthcoming.

I would allow this appeal.

Appeal dismissed with costs.

Solicitors for the appellant, *Allen, Allen & Hemsley.*

Solicitors for the respondent, *Dawson, Waldron, Edwards & Nichols.*

J. B.