[HIGH COURT OF AUSTRALIA.]

COMMISSIONER FOR RAILWAYS . . APPELLANT;
DEFENDANT,

AND

DOWLE . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1958.

SYDNEY, *April* 18.

Dixon C.J., McTiernan, Fullagar and Taylor JJ.

Negligence—Railway level crossing—Open crossing with halt signs—Collision between train and motor vehicle on crossing—Death of driver of motor vehicle—Adequacy of precaution taken at crossing—Contributory negligence—Motor vehicle stopped at halt sign before proceeding to cross railway line—Inference whether deceased had taken reasonable precautions—Question for jury—Open to jury to negative contributory negligence.

D. was killed when a four ton truck which he was driving in a southerly direction came into collision in daylight with a train travelling in a south-westerly direction at a level crossing. Between the roadway and the railway there was no obstruction to vision, and both the roadway and railway in the vicinity of the level crossing ran in a straight line. The deceased's truck was fitted with a hopper which constituted an obstruction to his seeing behind him by means of a rear-vision mirror in the cabin and at the time of the collision the truck was heavily laden with blue metal. The deceased, according to the evidence of the sole witness to the accident who was some seventy yards away to the west, stopped his vehicle at a halt sign situated on the eastern side of the road on which he was travelling and then proceeded into the crossing. When the rear of his truck was nearly across the eastern line it was struck by a train coming from the north, and as a consequence the truck was overturned and the deceased died from injuries thus sustained. The witness also testified that the train had whistled, and that at the time of the accident a westerly wind was blowing. The crossing was close by a race-course and on race days was much used by traffic and was controlled by a flag-man employed by the commissioner to direct the traffic. The day on which the accident occurred was not a race day. In an action brought by D.'s widow under the *Compensation to Relatives Act* 1897-1946 against the Commissioner for Railways the defendant denied negligence and alleged that the deceased had been guilty of

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contributory negligence, in that he either failed to look or that having looked and seen he took the risk. At the trial there was some evidence from a number of previous accidents that the crossing had proved a source of danger but in summing-up the trial judge reduced the question of negligence to the availability of a flag-man and the possibility of his use at the crossing. The jury found a general verdict for the plaintiff, from which the defendant appealed seeking the entry of a verdict in his favour.

Held, that upon the evidence it was open to the jury to find negligence on the part of the commissioner and negative contributory negligence on the part of the deceased, and accordingly the verdict of the jury ought not to be disturbed.

The duty of railways commissioners in respect of level crossings discussed.

The South Australian Railways Commissioner v. *Thomas* (1951) 84 C.L.R. 84, at p. 89 referred to.

Williams v. *Commissioner for Road Transport and Tramways (N.S.W.)* (1933) 50 C.L.R. 258, at pp. 265, 266 per *Dixon* J. referred to.

Decision of the Supreme Court of N.S.W. (Full Court) : *Dowle* v. *Commissioner for Railways* (1957) 75 W.N. (N.S.W.) 377, affirmed.

APPEAL from the Supreme Court of N.S.W.

On 5th May 1954 Rita May Dowle commenced proceedings in the Supreme Court of N.S.W. under the *Compensation to Relatives Act* 1897-1946 against the Commissioner for Railways on behalf of herself as the widow of and on behalf of Graham Maxwell Dowle and Christine Rita Dowle as infant children of Henry Maxwell Dowle to recover damages in respect of the death of the said Henry Maxwell Dowle which was alleged to have been caused by the negligent control by the defendant of a certain level crossing at Rosehill near Sydney, New South Wales, across which the said Henry Maxwell Dowle was lawfully driving a four-ton truck when it was struck by a train.

The action was heard before *Maguire* J. and a jury of four. At the conclusion of the case for the plaintiff the defendant moved for a verdict by direction, which was refused, and the jury brought in a verdict for the plaintiff in the sum of £7,700. Judgment was entered accordingly.

The defendant appealed by motion to the Full Court of the Supreme Court (*Street* C.J., *Owen* and *Herron* JJ.) for an order setting aside the jury's verdict and entering a verdict for the defendant or alternatively granting a new trial in the action, but the appeal (*Street* C.J. dissenting) was dismissed : *Dowle* v. *Commissioner for Railways* (1).

(1) (1957) 75 W.N. (N.S.W.) 377.

From this decision the defendant appealed to the High Court seeking an order setting aside the judgment of the Full Court and entering a verdict for the defendant with costs.

Further relevant facts appear in the judgment of the Court hereunder.

N. A. Jenkyn Q.C. and *H. Jenkins*, for the appellant.

A. Larkins Q.C. and *E. M. Martin*, for the respondent, were not called upon.

The oral judgment of the COURT was delivered by DIXON C.J.

We have had an opportunity of considering this case and we think that it is unnecessary to hear the respondent to the appeal, being satisfied that the appeal should be dismissed.

The appeal arises out of an accident which occurred as long ago as 20th July 1953. The site of the accident was a level crossing. A railway line runs from Clyde Junction to its terminus at Carlingford, passing through some four stations on the way; the line referred to is where the line crosses a street called Aston Street. The railway is a double line and along this stretch it runs north-east to south-west, not a very accurate statement perhaps in terms of the points of the compass, but sufficient for these purposes. The road runs north and south.

On the date that I have mentioned the plaintiff's husband was proceeding in a four-ton truck south along Aston Street in daylight. He met his death by being run down at the crossing by a train which was on the up-line travelling south-westerly. The circumstances of the accident will best appear from a description of the place. Aston Street meets the railway at an angle which we have not measured but which looks on the plan to be about 35 degrees. At a position where it approaches the down side of the railway there were halt signs. The halt sign on the left-hand side of the road—that is to say on the easterly side—shows conspicuously enough that there is a railway crossing and that vehicles should halt. Measurements are given in the plan before us and the measurement from the halt sign to the up rails of the crossing is about 60 feet, to be accurate, 57 feet, 6 inches. The roadway is a tarred surface and between the roadway, which is, substantially, a straight stretch, and the railway, there appears to have been no obstruction to the vision. The railway also runs substantially in a straight line, and down the line, i.e. north of the level crossing in question, at a distance from the crossing of approximately 260 yards there is a small crossing called Unwin Street.

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The deceased man was driving a four-ton truck which carried a very heavy load of metal. It was fitted with a hopper, as far as one can judge from the photograph, which constituted, at the back of this truck, an obstruction to his seeing behind him by means of a rear-vision mirror in the cabin.

There was only one witness of the accident called: he was a man who, apparently, was the manager for his father of some racing stables which appear to have been to the west of the line. Some seventy yards away he was exercising some horses and he saw portion of what occurred. With the aid of his evidence as to what occurred, it appears that the deceased came down the roadway, pulled up at the halt sign, and then proceeded. When he was nearly over the up-line the rear of his truck was struck by a train coming, of course, from the north; the truck was overturned and he died from the injuries he received in the accident.

It will be apparent from what I have stated that for seeing the train the deceased must have been at some disadvantage. He would be on the driver's side; he could not depend on a rear-vision mirror in his cabin, assuming, that is, that a rear-vision mirror would have taken in a sufficient range to see the train advancing; he would have to lean over to the side of his truck—the left-hand side of his truck—and look out, and look to his rear really, to see the advancing train.

But the witness whom I have mentioned says that the train whistled. When it whistled is not quite clear, but there was a westerly wind blowing and it is quite likely that the westerly wind would affect to a considerable degree the volume and character of the sound emitted by the whistle. No doubt it is true that when the truck-driver stopped at the crossing that position would be a little more east than where the witness stood but he was driving a truck, which both as he approached the crossing and when he put it in gear again would naturally have been noisy even if the noise was reduced while he was stopped. It was, of course, open to a jury to infer that he did look, or that he attempted to look.

On those facts the jury found a verdict for the plaintiff. There was an appeal to the Full Court of the Supreme Court, which was dismissed, the Chief Justice dissenting. And from the dismissal of that appeal there is now an appeal as of right to this Court.

The two lines of defence taken at the trial by the defendant were, naturally enough, that there had been no negligence on its part and that there had been contributory negligence on the part of the plaintiff. The plaintiff's case included the evidence which I have stated and very little more. The defendant commissioner called no

evidence. There was very little evidence of the amount of traffic on the roadway, and almost none as to the amount of traffic on the railway. But it did appear that a racecourse—Rosehill racecourse—was close at hand, and that on race days, of which this was not one, Aston Street was a thoroughfare much used by race traffic. It appeared that on race days, the railway commissioner found it necessary to have a flag-man to control the traffic crossing the railway and to ensure that there was no accident from passing trains. The railway was not, at the time of the accident, electrified, although the photographs taken some two or three years later show an electric overhead wire and also the connexions at the fish-plates formed by the welding of the copper wires. At the trial the jury may, as one would guess, have found some hint in the use of the flag on race days in arriving at their verdict. At all events as the trial proceeded there was a certain amount of concentration on the possibility of using a flag-man. The defence of contributory negligence was raised, and the dilemma, to which courts long ago grew accustomed, was put: the man either did not look, in which case he was negligent; or having looked and seen, he took the risk.

The learned Judge put before the jury the evidence which described the locality; but in the end he reduced the question of negligence to the availability of a flag-man and the possibility of his use. The jury brought in a general verdict for the plaintiff.

The appeal to this Court is based solely upon the view that there should be a verdict for the defendant. A new trial is not sought from us.

Evidence was submitted that over a period of years there had been a number of accidents (ten in fact) at this level crossing, but no particulars were given of the precise nature of the accidents or of the cause of them and it was just left to the jury that there was some evidence that the crossing had proved a source of danger.

In our view the character of the crossing is the all-important thing.

From the north, i.e. as the truck-driver was going, the road approaches the railway line at a fairly acute angle and at the level crossing it crosses it at an equally acute angle. Any motor traffic which comes down the road towards this crossing from the north must be at a disadvantage in seeing any train. The halt signs are the warning of the existence of the crossing; there is no means of giving warning of the approach of a train. We may take judicial notice of the fact that it is an outer suburb of Sydney which is growing and has grown in population and that the general character and appearance of the street from the railway shows that it is not

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a neglected area by any means, nor an area in which it would be right to regard a train as a rarity or to conclude that few vehicles crossed the line.

From a general view of the scene to be gathered from the plan and the photographs displayed to them the jury would be well entitled to draw the inference that some special care was necessary. By special care I mean not that any degree of care is necessary which goes beyond what is incumbent upon a railway authority in the case of all level crossings, but that the dangers which an open level crossing with a diagonal road necessarily involves where there is population and traffic call for particular consideration.

In the recent case of *The South Australian Railways Commissioner* v. *Thomas* (1), this Court gave some attention to the formulation of the law which governs the duty of railway commissioners in respect of level crossings. What was said was this: "In considering whether adequate warning was provided at a level crossing over a public road all the circumstances of the locality and of the traffic passing over it and the conditions prevailing at the relevant time must be taken into consideration: *Alchin* v. *Commissioner for Railways* (2). The duty of the commissioner is to do everything which in the circumstances is reasonably necessary to secure the safety of persons using the crossing: *Cliff* v. *Midland Railway Co.* (3) *Ellis* v. *Great Western Railway Co.* (4); *Liddiatt* v. *Great Western Railway Co.* (5). This must include a duty to give reasonable warning of the approach of a train where the commissioner does not provide gates which are closed when a train is approaching. That duty is not fulfilled by providing means which would enable persons of acute vision and hearing exercising the most anxious care to avoid injury. The fact that all sorts and conditions of people use the highway must be taken into account, and, whilst the commissioner is not required to protect against their own carelessness people who proceed without any regard to their own safety, it is his duty to take every reasonable precaution to ensure that the level crossing will be safe for the members of the public generally who act with due care while exercising their rights of passing over it" (6).

In the present case the question whether due care was exercised appears to us to be essentially one for the jury. All sorts of expedients may suggest themselves, drawn from common knowledge of what is done on railways, as a means of adding additional precautions to those which were in fact taken. Here we have simply

(1) (1951) 84 C.L.R. 84.
(2) (1935) 35 S.R. (N.S.W.) 498, at p. 502; 52 W.N. 156.
(3) (1870) L.R. 5 Q.B. 258, at p. 261.
(4) (1874) L.R. 9 C.P. 551, at p. 555.
(5) (1946) K.B. 545, at p. 550.
(6) (1951) 84 C.L.R., at p. 89.

an open crossing with halt signs, a crossing too where the visibility to the left was very much restricted for traffic approaching the crossing from the northern side.

Audibility is another question ; it has to be remembered that in modern conditions there are many occasions of which it may be said either that the vehicles make so much noise themselves or that there is so much noise surrounding them that it is not by any means certain that a person inside one of them will be able to hear the whistle of an engine.

The question of what ought to be done was, we think, somewhat unduly narrowed in the course of the trial ; further, the learned judge eventually left to the jury the limited question whether in addition to what was done there should have been a flag-man. That is the aspect of the case which has given us most serious consideration ; but looking at the question in a logical way we think that to reduce it to a question whether a flag-man should have been employed meant that other precautions that might have been taken were put on one side, and that this reduction of the question of negligence would operate in favour of the railway commissioner. We would have thought for ourselves that the more general way of looking at it would have been to ask, " Were the precautions adequate, having regard to the character of the site, the open level crossing, the growth of population, the amount of traffic upon the railways ? "; so that what sort of additional precaution should be taken should not, perhaps, have been reduced to the precise notion of having flag-men. But at all events, it means that the elimination one by one of all the other notions of taking precautions was in favour of the railway commissioner. For, the real basis of the verdict is undoubtedly that the precautions were insufficient and that the precaution at least was open to the railway commissioner.

In those circumstances we do not feel that it is a case in which we should disturb the finding that there was negligence on the part of the railway commissioner in and about the level crossing.

It is plain that in appealing the railway commissioner is actuated by the feeling that a definite finding of the jury that he should have a flag-man contains implications which affect him in his general conduct of the railways. We say no more on that subject than that this is a very special case, and that the verdict does not appear to us to carry those particular implications, but rather, in this case, the general implication that there were not enough proper precautions taken and that that particular precaution at least was one that was open to him.

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Turning to the question of contributory negligence the dilemma was, as I have said, put as follows: There was the deceased; evidence was given that he stopped; one inference to be drawn from his stopping is that he looked; if he had looked, he would have seen. The alternative is open that he stopped but did not look. If, however, he did not look, that was contributory negligence. Therefore, there was conclusive evidence of contributory negligence. Reliance was once more placed upon the passages on this subject in the judgments of *Griffith*, C.J. in *Commissioner of Railways* v. *Leahy* (1), and *Fraser* v. *Victorian Railways Commissioners* (2). I take leave to read what I said—it is a good many years ago I am afraid—on the subject of those passages. In *Williams* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (3), a case otherwise a little remote from this—it was a street accident between a tram and a pedestrian—the same dilemma was put forward, and this is what I said: "The judgment of the Full Court proceeds upon reasoning, with which we are all familiar, which places the plaintiff's husband in this dilemma: either he did look and saw the tram, in which case to proceed would be negligent; or he did not look, in which case his failure to look was negligence. Passages were cited from *Fraser* v. *The Victorian Railways Commissioners* (4), and *The Commissioner of Railways* v. *Leahy* (5). It must be remembered, in dealing with the observations of Sir *Samuel Griffith* C.J. in those cases, that they were observations on facts and do not profess to be laying down principles of law. He was dealing with what were the necessary deductions of fact to be made in those cases from the circumstances disclosed by the evidence. It will often be found that the mode of reasoning employed is applicable in dealing with questions of fact which must be submitted for decision by the jury. Less often will it be found applicable when the jury's verdict has passed against the defendant and the question is whether the verdict was open to the jury. An apparent dilemma is often found imperfect, and it is so in this case, because it omits more than one possible explanation" (6).

The concluding statement in that passage is quite applicable to this case. It is not a perfect dilemma to say that either the deceased did not look or he looked and saw and took the risk.

Observations were made during the argument about the distance the train may have been, the distance of the halt sign, and the difficulty of being satisfied that the deceased saw or could see from that position the train, which may have been some distance to the

(1) (1904) 2 C.L.R. 54, at p. 60.
(2) (1909) 8 C.L.R. 54, at pp. 60, 61.
(3) (1933) 50 C.L.R. 258.
(4) (1909) 8 C.L.R. 54.
(5) (1904) 2 C.L.R. 54.
(6) (1933) 50 C.L.R., at pp. 265, 266.

north. It is unnecessary to go over these matters but it is quite plain that it was open to the jury to take the view that he did all that was reasonable to see that there was no approaching train and that by some unfortunate chance he did not see until it was too late the advancing train which killed him. It is plain that he stopped at the halt sign and that is all that is positively known. The rest is inference. It was for the jury to say whether they were satisfied that he had not taken reasonable precautions for his own safety and that conclusion they negatived when they found in favour of his widow.

We think it is quite impossible to treat the case as one where there is conclusive evidence of contributory negligence, and indeed I may add that cases where the evidence is so conclusive that as a matter of law the jury must be directed to find contributory negligence are indeed rare.

For those reasons we think that the finding in favour of the plaintiff that her husband's death arose from the defendant's negligence and that there was no contributory negligence on his part ought to be sustained too.

The appeal should be dismissed. The order will be appeal dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Sydney Burke*, Solicitor for Railways.
Solicitor for the respondent, *Raymond Buggy*.

R. A. H.