[HIGH COURT OF AUSTRALIA.]

JURY . . . . . APPELLANT;
PLAINTIFF,

AND

THE COMMISSIONER FOR RAILWAYS (NEW SOUTH WALES) . . . } RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 3, 4.

MELBOURNE, *May* 13.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Negligence—Master and servant—Fettlers' camp at side of permanent way—Access—Use of permanent way—Fettler, whilst off duty, killed by train at night—No direct evidence of accident—Provision of access—Duty of Commissioner—Compensation to Relatives Act 1897 (*N.S.W.*) (*No.* 31 *of* 1897).

The deceased, a fettler employed by the respondent, was, with other fettlers, encamped in one of two camps established by the respondent on opposite sides of the railway lines, on railway land near to Leura railway station. A charge made by the respondent for the use of these camps was deducted from an allowance which the fettlers were entitled to receive in addition to wages. There was no direct exit from or entrance to the deceased's camp by any public road. The nearest road was not very readily accessible. There was no water supply in this camp, and supplies had to be procured from across the railway lines or at the railway station. The fettlers also went to the township, or the station or the camp opposite upon their own business or pleasure. A ready means of ingress to and egress from the camp was by the permanent way. It was habitually used by the fettlers. One night after working hours the deceased was seen on the railway station some time before an express train passed through. After the train had passed his dead body was found on the permanent way near the station, and it was evident that he had been killed by the train. There was no direct evidence explaining how the deceased got upon the permanent way, or for what purpose he was there. The night was foggy with drizzling rain. His widow brought an action

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against the respondent, alleging negligence on the ground, *inter alia*, that the respondent had omitted to provide for the safe passing of the deceased to and from the camp. The jury were directed, in effect, that the deceased was entitled to access to his camp by all reasonable routes, and the respondent owed a duty to him to see that any such way was as safe as it could be made by the exercise of reasonable care. The jury gave a verdict for the respondent.

Held that the verdict should be upheld on the ground that the jury had been sufficiently directed, and (by *Rich* and *Dixon* JJ.) that a finding would have been unreasonable that the respondent had been guilty of negligence by failing to guard employees from the risk of walking on the line by providing better and more convenient access to the camps.

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

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 (N.S.W.), by Eileen Beatrice Jury, on behalf of herself and her two children, against the Commissioner for Railways, New South Wales, in which she claimed the sum of £2,000 as compensation for the death of her husband. The husband, Roy Carlton Jury, was employed by the Commissioner to work as a fettler upon the railway lines at a weekly wage with a living allowance of 7s. 6d. a night where no camp was provided, and 2s. 6d. a night where a camp was provided. For some eight days prior to the date of his death, 26th September 1934, Jury had been at work on the railway lines between Wentworth Falls and Leura, and, with other men similarly employed, had been encamped, within the railway fences, at the side of the railway lines about 110 yards from the down end of the railway station at Leura. His hours of work were from 7.30 a.m. to 5 p.m. From the camp the town of Leura lay in the direction of the station. A road to the town skirted the railway lines on the down side and passed close to the place where Jury was encamped. To reach it, however, it was necessary to get through a fence, scramble down a bank and over a ditch. The men occupying the camp, including the ganger, were accustomed to use the railway lines to go to and from the town as well as to go to and from the station where they obtained water. To go to town they left the railway lines shortly before reaching the platform and got through a fence on to the road. When they used

the railway lines the men sometimes walked along a track called a "cess," just outside the outer rail, but more often they walked for the greater part of the distance between the rails of the down line. At about 9.30 p.m. on 26th September 1934 Jury was on Leura railway station. It was a foggy night with drizzling rain. At about 10.30 p.m. on the same night the mail train from Sydney to Forbes passed through the station at about thirty miles per hour. At some time near midnight Jury's dead body was found upon the railway lines. He had been decapitated, and his head and body were within a short distance from the platform near some signal wires which crossed under the rails and then ran on to the signal posts. The reason for his being upon the railway lines and the exact cause of the accident could not be proved by direct evidence. The place where, apparently, he was struck was out of the range of the lamps on the station, even if they were still alight, which was doubtful.

The declaration contained three counts. The first count charged negligence in the care, control and management of the track in omitting to keep it in a safe condition and unobstructed by wires and to cover and guard the wires and light the track and wires. The second count charged negligence in the driving and management of the train by which Jury was killed. The third count, upon which this appeal turned, alleged that the defendant was possessed of, and had the care, control and management of a certain camp for the accommodation of certain employees of the defendant and the land adjoining that camp over which those employees were obliged to pass, yet the defendant negligently omitted to provide for the safe passing of those employees over the land and to light the land in proper places and in sufficient manner for the use of those employees during the hours of darkness, whereby the deceased whilst lawfully passing along the land was struck by an engine and killed.

The jury found a verdict for the defendant.

The trial Judge directed the jury, in effect, that the deceased had an implied contractual right of access to and from the camp over the defendant's land, through which the permanent way ran, for all reasonable purposes and by any reasonable way, and the defendant owed a duty to him to see that any such way across that

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land was as safe as it could be made by the exercise of reasonable care. On an appeal to the Full Court of the Supreme Court, an objection was made on behalf of the plaintiff that this direction was inadequate, as the case demanded that the jury should have been directed that it was negligence on the part of the defendant not to provide a safe way to and from the camp across the railway land, suggesting that the defendant was under a duty to provide a way which was safe from the usual dangers incident to walking on the permanent way.

The Full Court dismissed the appeal.

From that decision the plaintiff now appealed to the High Court.

Further material facts appear in the judgments hereunder.

Evatt and *Dwyer*, for the appellant. The right of the deceased to be on the permanent way, and at the spot where his body was found, is not disputed. He was an invitee, not a trespasser. Alternatively, the question should be determined in the light of the contractual relationship existing between the deceased and the respondent. The Commissioner failed in his duty to provide a reasonably safe route to and from the camp. Owing to its frequent use by trains the permanent way was a place of unusual danger which the respondent did not take reasonable care to guard against, e.g., the lighting arrangements were not reasonably adequate, nor were the signal rails sufficiently guarded (*Lipman* v. *Clendinnen* (1); *Indermaur* v. *Dames* (2)). The fact that the deceased might or should have been aware of the danger does not relieve the respondent of responsibility (*Smith* v. *Baker & Sons* (3); *Williams* v. *Birmingham Battery and Metal Co.* (4)). Having regard to the absence of means of reasonably safe access, the respondent was negligent in utilizing the site as a camping area. By reason of the contractual relationship between the deceased and the respondent it was the duty of the latter to provide a means of access to the camp as safe as reasonable skill and care could make it (*Francis* v. *Cockrell* (5); *Maclenan* v. *Segar* (6)). The question of contributory negligence on the part

(1) (1932) 46 C.L.R. 550, at p. 556.
(2) (1866) L.R. 1 C.P. 274; (1867) L.R. 2 C.P. 311.
(3) (1891) A.C. 325.
(4) (1899) 2 Q.B. 338.
(5) (1870) L.R. 5 Q.B. 184, 501.
(6) (1917) 2 K.B. 325.

of the deceased does not arise. The jury was not directed on the third count.

Monahan K.C. (with him *Kinsella*), for the respondent. The evidence shows that there were at least two means of access to the camp, one of which, the main road, could have been reached by walking at the side of the permanent way to a point opposite the main camp and then proceeding straight across the permanent way. Practically no risk or danger would have been involved in the use of this route. In the absence of direct evidence as to the circumstances surrounding the death of the deceased, the matter is one of conjecture only (*Wakelin* v. *London and South Western Railway Co.* (1)). The deceased was not bound to encamp on this particular site, or any site. He was free, if he so desired, to obtain other accommodation. The evidence shows that some of the employees in the same camp entered and left the camp by a route which did not involve a crossing of the permanent way. The evidence does not show that the accident arose as a consequence of any neglect on the part of the respondent; it is just as consistent with negligence on the part of the deceased (*Fraser* v. *Victorian Railways Commissioners* (2)). The accident occurred outside of working hours; the deceased was not at that time, in any real sense, an employee of the respondent. He was engaged upon his own affairs. If the right to a reasonably safe route to and from the camp depended upon the contractual relationship between the deceased and the respondent, then that right enures only for the benefit of the deceased or his executor. The appellant is not the deceased's executrix. The *Compensation to Relatives Act* 1897, does not give her any right to recover. An invitee possessing knowledge of the dangers involved, as the deceased did, cannot recover damages for injuries sustained by him (*Cavalier* v. *Pope* (3)).

[STARKE J. referred to *Smith* v. *Baker & Sons* (4).]

That case depends upon the obligation to provide safe ways for servants. The only obligation here was to take reasonable care to provide reasonably safe access to the site selected for the camp.

(1) (1886) 12 App. Cas. 41.
(2) (1909) 8 C.L.R. 54.
(3) (1906) A.C. 428, at p. 432.
(4) (1891) A.C., at pp. 354 et seq.

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[McTIERNAN J. referred to *Fanton* v. *Denville* (1).]

Even assuming negligence on the part of the respondent, the evidence does not prove that that negligence was the cause of the death of the deceased (*Mersey Docks and Harbour Board* v. *Procter* (2)). It is not incumbent upon a trial Judge separately to direct the jury on the various counts in the declaration. The matters raised in the third count were adequately dealt with by the trial Judge in the course of his summing-up, which was equally applicable to all the counts.

Dwyer, in reply. The question which should have been left with the jury was not whether the deceased was entitled to go on to the permanent way, but: What was the duty of the Commissioner and did he provide reasonable means of access to the camp ?

Cur. adv. vult.

May 13. The following written judgments were delivered :—

RICH AND DIXON JJ. The appellant is the widow of a fettler who met his death whilst in the employment of the respondent, the Commissioner for Railways. He was killed at about 10.27 p.m. on 26th September 1934 on the down line just a little beyond the Leura railway station by the Forbes mail which ran express through the station at about thirty miles per hour.

The reason for his being upon the line and the exact cause of the accident are matters of inference. They could not be proved by direct evidence.

The deceased was one of some twenty-five or thirty men who were encamped near the Leura railway station. They were employed by day at work about three-quarters of a mile down the line. About sixteen of them were accommodated at a camp pitched in or near the station yard on the up side of the railway a little down the line from the station. The remainder were provided with a camp which was pitched on the opposite side of the line, that is, on the down side, and at a distance of about 110 yards from the down end of the station platform. The deceased's tent was in this camp. He had come there about eight days before he met his death.

(1) (1932) 2 K.B. 309. (2) (1923) A.C. 253.

From the camp the town of Leura lay in the direction of the station. The main road ran behind the station yard on the up side, but another road to the town skirted the line on the down side and went close to the deceased's camp. To reach it, however, it was necessary to get through a fence and scramble down a bank and over a ditch or the like. The men occupying the camp, including the ganger, were accustomed to use the railway line to go to and from the town as well as to go to and from the station where they obtained water. To go to the town, they left the railway shortly before reaching the platform and got through a fence on to the road. The permanent way ran upon an embankment and the cess between the edge of the embankment and the sleepers is said not to have been very wide. Whether for this reason or because they preferred walking upon the sleepers the men, it was said, more often walked for the greater part of the distance between the rails of the down line. Near the end of the platform the signal wires cross under the rails and then run on to the signal posts, one of which, the starting signal, stood near the deceased's camp.

One witness said that the practice of the men in returning from the town was, after getting through the fence, to walk in the cess to the point where the signal wires emerged and ran alongside the track and then to walk between the rails until some points were reached and there to cross back into the cess.

After the accident it was found that traces of blood commenced about five yards down from the place where the signal wires cross under the rails and turn to run parallel with them. It seems a safe inference that it was there or thereabouts that the deceased was struck by the train. The night was described as murky and drizzling. The lamps on the station would cast no light on that place if they were still on. The probability is that they had been already turned off on the departure of the last train to stop at Leura. No one saw the deceased after that time. During the evening he had been seen in Leura, and he had paid three visits to the station where, it seems, he asked the officer in charge about the trains going to Katoomba. He remained on the station after the last of these left and was seen at about 9.35 by the same officer who says he must

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have left by the stairs at the other end which lead to the town. No one saw him later than that time.

His widow sued the Commissioner under Lord Campbell's Act. Her declaration contained three counts. The first charged negligence in the care, control and management of the track in omitting to keep it in a safe condition and unobstructed by wires and to cover and guard the wires and light the track and wires. The second charged negligence in the driving and management of the train by which the deceased was killed. The third count, upon which the appeal turns, alleged that the defendant was possessed and had the care control and management of a certain camp for the accommodation of certain employees of the defendant and the land adjoining the said camp over which the said employees were obliged to pass, yet the defendant negligently omitted to provide for the safe passing of the said employees over the said land and to light the said land in proper places and in sufficient manner for the use of the said employees during the hours of darkness, whereby the deceased whilst lawfully passing along the said land was struck by an engine and killed.

The jury found a verdict for the defendant and the Full Court dismissed an application for a new trial. From the order of the Full Court the plaintiff now appeals to this Court.

The first step in dealing with the appeal is to determine the measure of the defendant's duty towards the deceased. He was employed by the defendant to work as a fettler upon the railway line at a weekly wage with a living allowance of 7s. 6d. a night where no camp is provided and 2s. 6d. a night where a camp is provided. It thus appears that the Commissioner accommodated the men with a camp as a condition of the employment. No doubt the men were not obliged to live in it and when living in it had complete liberty of action outside hours of labour. But it remains true that in camping the men on railway premises the Commissioner was acting under the contract of service, and in dwelling there the deceased was responding to the demands of the employment.

"It is clear on the authorities with regard to those who come upon the premises of another, not as trespassers, but as licensees, by the leave of the owner, that the claim of such persons to protection and reasonable care on the part of the owner of the premises depends

upon the character in which they are allowed to exercise the privilege or use the opportunity of being upon the premises" (per *Kennedy* L.J., *Coldrick* v. *Partridge, Jones & Co.* (1)).

Those who come in the character of servants obtain from the common law no right to protection from risks of injury which arise out of or are fairly incident to the nature of their employment, and among those risks is that of want of care on the part of their fellow servants. But the common law does impose upon the employer a duty to take reasonable precautions against injury to his employees through an unnecessarily dangerous condition or character of his premises or plant.

In his judgment in *Fanton* v. *Denville* (2) *Scrutton* L.J. said:—"It will be seen that so far the 'doctrine of common employment' protects the master from liability to one servant for loss caused by the negligence of a fellow-servant, but leaves vague what duties, if any, lie on the master himself as to the provision of suitable plant and competent fellow-servants. Is the master's duty to make good an absolute warranty of the fitness of buildings and plant employed in his business for their purpose, or is it an obligation merely personally to use reasonable care to see that they are fit, and does the master fulfil this duty by using reasonable care to appoint competent servants, in which case he is not liable if they act negligently?"

To this question inconsistent answers have been given on the one hand by the Court of Appeal in that case and on the other by the Privy Council, the Supreme Court of Canada and the Supreme Court of Victoria (*Toronto Power Co.* v. *Paskwan* (3); *Canada Woollen Mills* v. *Traplin* (4); *Ainslie Mining and Railway Co.* v. *McDougall* (5); *Brooks, Scanlon, O'Brien Co.* v. *Fakkema* (6); *Ogden* v. *Melbourne Electric Supply Co.* (7)).

In New South Wales, however, the doctrine of common employment is abrogated. Sec. 65 (1) of the *Workers' Compensation Act* 1926-1929 provides that where any injury or damage is suffered by a worker by reason of the negligence of a fellow worker, the employer of those workers shall be liable in damages in respect to that injury

(1) (1909) 1 K.B. 530, at pp. 548, 549; (1910) A.C. 77.
(2) (1932) 2 K.B., at p. 319.
(3) (1915) A.C. 734.
(4) (1904) 35 Can. S.C.R. 424.
(5) (1909) 42 Can. S.C.R. 420.
(6) (1911) 44 Can. S.C.R. 412.
(7) (1918) V.L.R. 77; 39 A.L.T. 111.

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or damage in the same manner and in the same cases as if those workers had not been engaged in a common employment. The result of this provision when applied to the employer's obligation in reference to the safety of premises and plant appears to be to enable the employee to complain of harm caused by any failure on the part of the employer his servants or agents to exercise due care to avert unnecessary dangers from the character or condition of the employer's premises and plant.

The theory that, independently of risks from the neglect of fellow servants, an employee has no action for injuries sustained from defects in the premises or plant of which he knew or of which his employer did not know is now exploded. *Griffiths* v. *London and St. Katharine Docks Co.* (1) need no longer be distinguished. Its sapped vitality could not withstand the direct assault of Mr. Justice *McCardie* (*Baker* v. *James Brothers and Sons Ltd.* (2)).

There is no longer an independent rule demanding ignorance in the servant and knowledge in the master. But negligence in the master, or those for whom he is responsible, if any there be, must be proved, and knowledge is one way but not the only way of proving it. The servant must not have consented to the consequences of the master's negligence, but his mere knowledge does not prove consent. He must not have been guilty of contributory negligence, but still less does his mere knowledge prove that he was.

A wide view has always been taken of the activities or matters to which the character of employee extends. Whenever the employee is upon the employer's premises in connection with or in furtherance of his employment he goes there in that character. The result has often been that liabilities which his employer would otherwise incur to him have been destroyed by the doctrine of common employment. (See *Tunney* v. *Midland Railway Co.* (3); *Coldrick* v. *Partridge, Jones & Co.* (4).)

If he used a facility provided by his master to bring him to work should he choose to avail himself of it, the fellow servant doctrine applied. When that doctrine is abolished, the increase in the

(1) (1884) 13 Q.B.D. 259.
(2) (1921) 2 K.B. 674, at pp. 678 et seq.
(3) (1866) L.R. 1 C.P. 291.
(4) (1909) 1 K.B. 530.

responsibility of the employer to his servant converts the wide application of that character into a benefit to the servant.

The consequence in the present case is that in providing a camp on his premises for the deceased to inhabit in his character of employee the Commissioner incurred to the deceased a duty of reasonable care for his safety. It was incumbent upon him to take all reasonable precautions in providing a place for a camp including approaches and means of access.

The questions which arise are whether the declaration alleged a breach of this duty, whether the evidence of such a breach is sufficient to submit to a jury and whether from the circumstances an inference may reasonably be drawn that the death of the deceased was caused thereby. If these questions are answered in favour of the plaintiff appellant the question will then be whether these issues were submitted to the jury with a sufficient direction. For it is undeniable that it was within the province of the jury under a proper direction to absolve the Commissioner of liability.

The count based upon negligence in the management of the train may be disposed of at once. The circumstances proved do not support an inference that the train ran over the deceased because of any want of due care on the part of the crew in looking ahead or because the leading engine did not carry a headlight which illuminated the track or because of any negligent act or omission in the running of the train.

The case for the plaintiff appellant must depend upon the danger inherent in the use by foot passengers of a railway track by night as a path or way and upon the supposed failure of the Commissioner adequately to provide against those dangers by pitching the camp where a safer and more ready means of access existed or providing or improving other approaches to the place where it was in fact pitched or by lighting the railway track between the camp and the station or possibly by taking some other measures to lessen the risk of pedestrians falling.

In the declarations the allegations of failure to take these precautions are distributed between two counts. The second count relates to the condition of "a certain track leading" to the camp, the omission to keep it in a safe condition, the keeping

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it obstructed by wires and the omission to light the track and wires in a sufficient manner during hours of darkness. The third count, the material portions of which have already been stated, alleges that the employees were obliged to pass over land adjoining the camp under the care and management of the Commissioner and that he omitted to provide for their safe passing. This count does not appear to us to be directed either to negligence in selecting as a site for the camp a place having no reasonable or proper access except by such an approach or to negligence in failing to provide another safe and sufficient route.

It assumes the location and the access and in effect alleges neglect to avert the consequent danger to the employees using it. But the form of the count would probably have been treated as a matter of small importance if at the trial it appeared that the evidence supported a cause of action consisting in neglect to provide an alternative means of access or a camp site with a better or safer approach.

In considering the sufficiency of the evidence to sustain such a cause of action as that actually stated in the count, it must not be forgotten that it cannot be known whether the deceased was struck by the engine while moving along or across or by the side of the down line or whether he tripped and fell upon the line in attempting to get out of the way of the train on hearing its approach or whether he had at an earlier time fallen over the wires or some other obstruction and was lying stunned when the train came. Further, it cannot be known whether when he went on to the railway track he was on his way back to his camp or to visit the camp on the other side of the line. In favour of the theory that at some stage he must have fallen and so been unable to escape from the advancing train is the fact that otherwise he could scarcely have failed to hear the train in time to escape it, for it was drawn by two engines which hauled it up a steep bank to the level of the Leura station track. In favour of the theory that he was on his way to his own camp rather than to the other camp there is nothing except the facts that for men who would rise early next morning for work the hour was a little late, and that there was a better if longer route to that other camp.

In these circumstances it cannot be fairly said that more has been proved in relation to the causation of the accident than that

it may properly be attributed to exposure to the risks which attend walking upon a railway.

To fix the responsibility on the Commissioner for the deceased's being so exposed to those risks, it must be found that, whether the deceased was on his way to his own or to his comrades' camp, his use of the railway for the purpose was the result of an unreasonable neglect on the part of the Commissioner to see that another convenient access existed which was safe. Such a finding is in the circumstances indispensable to the plaintiff unless it were considered that for both purposes the use of the railway had been required or authorized by the Commissioner and that he, although in other respects observing due care for the safety of the men, had been negligent in failing to light or otherwise safeguard the place. But that head of negligence was definitely negatived by the verdict of the jury who received a clear and full direction upon it from *Jordan* C.J. who presided at the trial.

Thus the questions which remain are whether there was evidence upon which the jury might find that to whichever camp he was going, the use of the railway by the deceased was due to negligence on the part of the Commissioner in failing to provide another and safer route, and if so whether the plaintiff appellant was entitled upon that issue to any other direction to the jury than that which she obtained.

We think that each of these questions must be decided against the plaintiff appellant.

The evidence shows that neither of the camps was cut off from the town unless the railway was used. Railway employees are, or may be expected to be, familiar with the permanent way, and for many purposes their being and walking upon it are incidents of their employment. The measure of care for their safety incumbent on the Commissioner is to be determined by reference to the standards of reasonable conduct in railway management. The camp near the railway yard might be reached without any inconvenience so great as to justify a preference for the risks which are said to surround a pedestrian who uses the railway by night. No doubt the camp at which the deceased was accommodated was so situated that it would be natural for the men to use the railway in going to and coming from

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Leura. It may or may not be true that without much inconvenience men might go by either of the two roads, one of which involved scrambling down a declivity and the other crossing the metals and taking a longer journey. But it was a fettlers' camp and it was near a town. It would be apparent that men in such a camp would go to and from the town after dark and that they would use the railway line without much hesitation if that were the most convenient way.

Its use might be safe enough if men walked not between the rails but along the cess at the side of the ballast. The danger of walking in darkness between the metals is not hidden or a matter of acquired knowledge. Such as it is, it is obvious. Thus the degree of risk likely to arise from the situation of the camp and the circumstances, depended upon matters of common knowledge and an appreciation of the features of the locality.

Would a finding be reasonable that by failing to guard against it by providing better and more convenient access to each camp the Commissioner negligently caused the deceased to expose himself to the danger which proved fatal? The finding must extend to each camp because of the uncertainty as to the deceased's goal.

In our opinion such a finding would involve a degree of precaution which reasonable care for the safety of the men did not demand. The finding, if made, could not be sustained.

But we think that as the third count was framed the plaintiff appellant was not entitled to any direction to the jury which she failed to obtain and that for this reason their verdict is final.

At the beginning of his summing-up in reference to the third count the learned Chief Justice said that the plaintiff's case was put that the defendant negligently omitted to provide for the safe passing of the employees including the deceased over the land adjoining the camp and to light it sufficiently, as a result of which the accident happened. Later he said there were two broad questions:—"First of all, was the defendant guilty of any negligence in connection with the wires, or the wheels or the chains or the lighting or otherwise in connection with the track? The second question is, was the defendant guilty of any negligence in connection with the running of the train?" He then directed the jury that the deceased was entitled to access to the camp by all reasonable routes and the question

therefore arose whether the deceased was either using the only reasonable available means of access which it was reasonable for him to use in the circumstances. If so, it was the duty of the Commissioner to see that the track was as safe as the exercise of reasonable care on his part could make it. Again, at a later stage in his charge his Honor said :—" Well, gentlemen, it is for you to determine whether you think that the deceased, at the time of the accident, was or was not using a track which it was reasonable and proper for him to use in the circumstances. It was the Commissioner's duty to see that proper means of access, if this was a proper means of access, was safe for the plaintiff " (meaning the deceased) " so far as such safety could be secured by the exercise of reasonable care." He next referred to precautions suggested for making the railway track safer. He then gave a general direction that the jury should consider whether the Commissioner was in any way negligent in not providing a reasonably safe means of approach to and from the camp. He proceeded to deal with the question whether, if negligence was made out, it caused the accident. At the conclusion of the charge the plaintiff's counsel requested a further direction, and the following discussion took place in the presence of the jury :—

Mr. *Evatt* : I submit that in the light of the relationship between the deceased and the Railway Commissioner, it was the duty of the Railway Commissioner to provide a safe route to and from the camp.

His Honor : I think I have already dealt with that.

Mr. *Evatt* : That is under the third count. Your Honor did not deal with the third count. I submit that there was a duty cast upon the defendant to provide a safe route to and from this camp, and that if such a route was not provided, the plaintiff is entitled to succeed.

His Honor : That is merely putting it in a different way, that there was a duty to provide a reasonable means of access, and that such means of access should be reasonably safe. That is undoubtedly so, and if the Commissioner negligently failed to provide a reasonably safe means of access, that is negligence. I think that I have already directed the jury substantially to that effect.

These directions appear to be sufficient. The question whether the Commissioner took proper precautions for the safety of the men

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in camping them where he did without making further provision for access was in the beginning divided into two steps. First, whether the deceased reasonably used the line as a mode of access; and second, whether it ought to have been made safer. This is the one way of approaching the issue. But that the final question was whether in the matter of access reasonable precautions for the men's safety were taken was explained by the other observations we have quoted, and put beyond doubt, if any remained, by the Judge's explicit replies to counsel's objection or request for a further direction. Those replies were intended for the jury's hearing and cannot be disregarded. The third count did not allege failure to provide other routes as the negligence constituting a breach of duty. To entitle the plaintiff appellant to complain that such a failure was not more clearly and fully put to the jury by the learned Judge, it would be necessary for her counsel to put such a case in much more distinct terms, and indeed, in strictness, to seek an amendment.

The case is one in which compassion must be felt for the appellant. But the decision of the jury against her is final. It does not seem possible to say that the charge did not adequately submit to jury the case actually made on her behalf. It is satisfactory, however, to feel that upon the evidence no other case than that made was fairly open.

The appeal must be dismissed.

STARKE J. Roy Carlton Jury was a fettler in the employ of the Commissioner of Railways of New South Wales. In September 1934, he camped, with others of a gang of workmen for the performance of their duties, near the Leura railway station, and within the railway fences. They so camped with the sanction of the Commissioner. Their hours of duty were from 7.30 a.m. to 5 p.m. There was no water supply in the camp, and the workmen had to cross the railway lines or go to the railway station for it. Food was delivered to the camp by tradesmen, or else was obtained by the workmen going into the Leura township for it and bringing it back to the camp. The workmen also went to the township or the station or an adjoining camp upon their own business or pleasure. A ready means of access to and from the camp was by the railway line, and it was

habitually used by all the workmen, foremen as well as ordinary workmen. They walked either along a track called a "cess," just outside the outer rail, or between the running rails of the railway line called the four-foot way, or else in the space between two pairs of lines of railway called the six-foot way. About 9 p.m. on 26th September 1934 Jury was noticed in the Leura township, and at about 9.30 p.m. was standing upon the platform of the Leura railway station. It was a foggy night with drizzling rain. About 10.30 p.m. on the same night, the mail train to Forbes went through the Leura station at about thirty miles per hour. At some time near midnight, Jury's dead body was found upon the railway line. He had been decapitated, and his head and body were within a short distance from the railway platform. There is no direct evidence explaining how Jury got upon the railway line or for what purpose he was upon it. The plaintiff, who is his widow, brought an action for damages against the Commissioner of Railways for the benefit of herself and his children. It is founded upon the *Compensation to Relatives Act* 1897 (N.S.W.). By her declaration the plaintiff charged the Commissioner with negligence in not keeping the railway track in a safe condition for the use of his workmen at the camp, in the management and driving of his train, and in omitting to provide for the safe passing of his workmen to and from the camp already mentioned. The action was tried by *Jordan* C.J. with a jury. He directed them that it was for them to determine whether the deceased was at the time of the accident using a track which was reasonable and proper for him to use in the circumstances, and that it was the Commissioner's duty to see that the proper means of access (if the track used by the deceased was reasonable and proper for him to use) was safe for the deceased so far as such safety could be secured by the exercise of reasonable care by the Commissioner. The jury found a verdict for the Commissioner, and the Full Court on appeal refused to disturb it. An appeal has been brought to this Court.

It is contended that the learned Chief Justice should have directed the jury that a duty was cast upon the Commissioner to provide a safe route to and from the camp, and that if such a route was not provided the plaintiff should succeed. The contention was put to the Chief Justice before the jury and he thus dealt with it :—"That

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is merely putting it in a different way, that there was a duty to provide a reasonable means of access and that such means of access should be reasonably safe. That is undoubtedly so, and if the Commissioner negligently failed to provide a reasonably safe means of access that is negligence." In my opinion, the direction of the Chief Justice, whether the last observation be taken as part of the direction or not, was substantially correct. The employment of Jury by the Commissioner constituted a relationship of duty between them extending not only to his hours of duty but to his comings and goings from the camp as well on his own business as on that of his employer. The duty arises out of the relationship of the parties. The contract of employment involves the duty, but it is not founded upon any term express or implied in the contract. According to the common law, however, the workman takes upon himself the ordinary risks of his employment. Thus a person engaged to perform a dangerous operation takes upon himself the risks incident thereto. The work for which Jury was engaged was not intrinsically dangerous, though it had some risks peculiarly its own. But it is clear also at common law that the contract of employment involves a duty on the part of the employer to take reasonable care to provide proper appliances, to maintain them in a proper condition, and to see that the condition of the premises and ways where his workmen are engaged is reasonably suitable and safe for the purposes for which they are used, and so to carry on his operations as not to subject those employed by him to unnecessary risk (*Smith* v. *Baker & Sons* (1); *Williams* v. *Birmingham Battery and Metal Co.* (2)). In the present case the Commissioner knows of and sanctions a camp of workmen alongside the railway. It is there that they live and have a temporary abode; they are on the railway premises with his leave and licence. They must go to and from the camp for the purposes of their work, and also for supplies of food and water and other purposes. In my opinion such a state of circumstances makes it incumbent upon the Commissioner and creates a duty in him towards the workmen to provide a reasonably safe approach or means of access to and from the camp. But it creates no higher or other duty in respect of that approach or means of access. It is in

(1) (1891) A.C., at pp. 353, 356, 357, 360, 362. (2) (1899) 2 Q.B. 338.

this sense that the learned Chief Justice directed the jury, and it was for the jury to say whether the railway track used by the men was, having regard to the nature and character of the camp, and of the employment, a reasonably safe approach or means of access thereto. The suggestion that the Chief Justice directed the jury only in relation to the arrangement and condition of the railway track and not to its safety as a means of approach to the camp, is quite untenable if the charge be read fairly and as a whole. It is not necessary to refer to the charge in relation to the condition of the track and the driving of the train, for it was not challenged in either aspect. Nor is it necessary to determine whether there was any evidence connecting the death of the deceased with negligence on the part of the Commissioner. As at present advised, I think the question was rightly left to the jury. The jury found a general verdict for the defendant, and that verdict should, in my opinion, be sustained and this appeal dismissed.

EVATT J. The only ground of appeal in this case is that the learned trial Judge failed to leave to the jury the issue of negligence raised by the third count of the declaration; that is, negligent omission to provide for the safe passing of the employees (including the deceased) over the land adjoining the camp to which they had been assigned. In particular the count alleged a failure to provide for the safe passing of the employees during the hours of darkness.

As it is admitted by counsel for the respondent that, in relation to the means of access to and from the camp during the hours of darkness as well as during the day, the defendant was under a duty to take reasonable care for the safety of the employees, it is unnecessary to consider further the precise nature of the legal relationship which gave rise to such duty.

The appellant argues that although the trial Judge stressed two heads of negligence, one relating to the running of the train, and the other to the provision of reasonable safeguards on the permanent way itself, he did not make it sufficiently clear to the jury that, under the third count, the primary question was, not whether there was carelessness in failing to mitigate the inevitable hazards of the permanent way actual, but whether reasonable care was shown in

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compelling the deceased employee to camp in such a position that, for all practical purposes, he was compelled to cross the frequently used permanent way at all.

I agree that the issue of negligence raised by the third count was quite distinct from those raised by the first and second count. Further, I am of opinion that there was evidence which might have supported a finding by the jury that the selection of the site for the south side camp used by the employees amounted to negligence in the defendant. Further, the evidence of the witness Jones that, out of 200 similar camps in the State inspected by him, the particular south side camp at Leura was the worst he had ever seen for approach or egress, might well have been accepted by the jury. It is to be remembered that the doctrine of common employment cannot be availed of in the State of New South Wales. And though I think it was the pinch of the case against her, I also assume in favour of the appellant that there was evidence before the jury which would have entitled them to find that the death was caused through the negligent failure of the defendant's servants to provide a reasonably safe site for the camp, having regard to the fact that the employees would have to use the permanent way as a means of egress and ingress by night as well as by day.

But the appeal should fail because it is not sufficiently established that the trial Judge failed to direct the jury as to the defendant's liability under the third count. The fact that he stressed other aspects of the case is probably due to the fact that such aspects were emphasized at the trial to a far greater extent than they have been upon the appeals. In one part of his summing-up the Chief Justice gave a general direction which was sufficient to cover the issue of negligence under the third count. Further, at the close of the summing-up, he stated that he had already directed the jury substantially to the effect that, if the Commissioner negligently failed to provide reasonably safe means of egress to and from the camp, the plaintiff might be entitled to succeed under the third count. At that stage, counsel for the appellant overstated the legal liability of the defendant, for he asked for a direction in point of law that the plaintiff was entitled to succeed under the third count.

This request was rightly refused by his Honor, for it was clearly a question for the jury to determine whether any acts or omissions of the defendant were unreasonable and negligent.

I am inclined to think that, to some extent at least, the jury's attention was diverted from the outstanding issue which arose under the third count. But it is impossible to order a new trial unless a miscarriage is proved more satisfactorily.

The appeal should be dismissed.

McTIERNAN J. The tragic discovery that the deceased was run down by a train does not, of itself, afford sufficient proof of any negligence on the part of the respondent. The allegation of negligence, which it is material to consider on this appeal, was the alleged omission to make any provision for the deceased safely to go from and return to the camp which was set up by the respondent within the same enclosure as the railway line, for the use of the deceased and a number of his fellow employees who were working for the respondent as fettlers on the railway line in that vicinity. It is submitted on behalf of the appellant that the jury should have been directed that it was the respondent's duty to the deceased to give him safe access to and egress from this camp, and that the breach of this duty was the cause of the accident. There was no direct exit from the camp where deceased was stationed to any public road. The nearest road was some distance away, but it was not very readily accessible, and it was separated from the camp by the fence enclosing the railway premises on that side of the line. Hence, when the men left the camp to get water at the Leura station, or to go to the town of Leura after working hours, which were from 7.30 a.m. to 5 p.m., they were in the habit of walking along that part of the railway line where the deceased was run down. The accident happened at about 10.30 p.m. In making these journeys the men followed the path on the outside of the railway line adjacent to it, as far as it was convenient to walk on that path, and then stepped off it on to the sleepers set across the intervening space of four feet between the rails. They also used to walk along the space, which was six feet wide, between the two sets of rails. The deceased lived in one of two camps

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which were on opposite sides of the line. Both were established by the respondent for the accommodation of the itinerant gang of fettlers, to which the deceased belonged, who were working on the line between Wentworth Falls and Leura. The deceased was killed on that section of the line. The men encamped on the side of the line, opposite to where deceased's camp was, could go from their camp to a public road, which led to Leura, without crossing the railway lines. A charge was made by the respondent for the use of these camps, the amount being deducted from the daily allowance which the men were entitled to receive in addition to wages.

The jury were directed, in effect, that the deceased had an implied contractual right of access to and from the camp over the respondent's land, through which the permanent way ran, for all reasonable purposes and by any reasonable way, and the respondent owed a duty to him to see that any such way across this land was as safe as it could be made by the exercise of reasonable care. It was contended that the jury should have been directed that it was negligence on the part of the respondent not to provide a safe way to and from the camp across the railway land, as the respondent was under a duty to provide a way which was safe from the usual dangers incident to walking on the permanent way.

Apart from any special relationship created by contract, the law places every person who enters premises in another's occupation in one of three categories, namely, invitee, licensee, trespasser, for the purpose of determining the measure of diligence which it is the duty of the occupier to exercise for his personal safety (*Thomas* v. *Quartermaine* (1); *Latham* v. *R. Johnson & Nephew Ltd.* (2); *Lipman* v. *Clendinnen* (3)). The highest standard of care is due to persons whom the law classifies as invitees. The measure of that duty is described by *Willes* J. in a well-known passage in his judgment in *Indermaur* v. *Dames* (4)).

The contract of employment gave the deceased a right of access to and from the camp, but it did not provide that the means of access should be safe from the danger of passing trains. "The master

(1) (1887) 18 Q.B.D. 685, at p. 695.
(2) (1913) 1 K.B., at p. 410.
(3) (1932) 46 C.L.R. at p. 555.
(4) (1866) L.R. 1 C.P. 274.

is liable to the servant in the terms of the contract; and further, he is liable in respect of those occurrences which take their rise from the existence of the contract just as if no contract existed and the rights of the parties were regulated by the general rules of the common law" (*Beven* on *Negligence*, 4th ed. (1928), vol. 1, pp. 760, 761; cf. *Baker* v. *James Brothers and Sons Ltd.* (1)). The application of this principle in the present case is not conditioned by the doctrine of common employment which is no longer part of the law of New South Wales. The relevant occurrences which took their rise from the subsisting contract of employment were the reasonable journeys of the deceased to and from his camp, over the railway premises. The respondent's duty to provide for the safety of the deceased on these occasions depended upon whether the law placed him in the category of invitee or licensee or trespasser. The contract is silent as to the measure of diligence which the respondent owed to the deceased, but the relationship of employer and employee is material in deciding to which of these categories he belonged when he was at the place where he met his death.

The danger which overtook the deceased was one of the usual dangers incident to walking along the way by which he was returning to the camp. For the deceased it was an obvious and palpable danger. If the deceased were an invitee, the respondent's duty did not extend to providing him with a safe way to and from the camp, by eliminating from any road he might have chosen to take the dangers which were usual and well known to him as a fettler. If the part of the permanent way, where he was run over, were within the area of respondent's invitation, assuming deceased to have been an invitee on the premises, he used that road subject to its usual dangers which included those usually caused by the trains (*South Australian Co.* v. *Richardson* (2); cf. *Mersey Docks and Harbour Board* v. *Procter* (3)). If he were but a licensee or trespasser in relation to the scene of the accident, much less was it respondent's duty to provide him with a road which was made safe by excluding dangers to which it was usually and obviously subject. As already stated, no such duty was imposed by the terms of the contract, and

(1) (1921) 2 K.B., at p. 681. (2) (1915) 20 C.L.R. 181, at p. 186.
(3) (1923) A.C., at p. 274.

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since it was not imposed by law, if deceased were an invitee, licensee or trespasser, it follows that the attack on the summing-up in the action fails, and that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *C. Jollie Smith & Co.*

Solicitor for the respondent, *F. W. Bretnall*, Solicitor for Transport.

J. B.

[HIGH COURT OF AUSTRALIA.]

THE COUNCIL OF THE TOWN OF SOUTHPORT APPELLANT;

AND

THE CORPORATION OF THE TRUSTEES OF THE ORDER OF THE SISTERS OF MERCY IN QUEENSLAND . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1935. BRISBANE, *July* 5, 8, 9, 11. Rich, Dixon and McTiernan JJ.

Local Government—Rates—Exemption—Exclusive user for a public school—Convent and school—Land vested in corporation under or in pursuance of any statute for the purpose of public charities—Local Authorities Act 1902-1932 (*Q.*) (2 *Edw. VII. No.* 19—23 *Geo. V. No.* 27), *sec.* 216 (*iii.*), (*vi.*)—*Religious Educational and Charitable Institutions Act* 1861 (*Q.*) (25 *Vict. No.* 19), *sec.* 1.

The Corporation of the Order of the Sisters of Mercy was the registered proprietor under the *Real Property Act* 1861 (Q.) of certain land held in trust for the purposes of the Order. On the land there were two buildings connected by a covered way, one building being fitted as a schoolroom, the other containing classrooms, dining room, dormitory, chapel and cells or bedrooms for the nuns of the Order. On these premises a day and boarding school was conducted by the nuns. Twelve Sisters of the Order resided on the premises, and were