H. C. OF A. 1937.

J. C. WILLIAMSON LTD. v. METRO-GOLDWYN-MAYER THEATRES LTD.

Sound pictures appear to us not only such a development but one necessarily within the proximate contemplation of the parties.

In our opinion the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Sir Robert Best & Hooper.*

Solicitors for the respondents, *Moule, Hamilton & Derham.*

H. D. W.

[HIGH COURT OF AUSTRALIA.]

MERCER . . . . . APPELLANT;
PLAINTIFF,

AND

THE COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (NEW SOUTH WALES) } RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1936.

SYDNEY, *Dec.* 3, 24.

Latham C.J., Rich, Dixon, Evatt and McTiernan JJ.

Negligence—Affirmed by jury—Rider—Verdict for defendant entered by trial judge—Electric trams—Equipment—Failure to provide safety device—General practice—Collapse of driver—Remoteness of risk.

The fact that the ordinary or general practice adopted by those in the same trade as a defendant does not include a precaution the absence of which is relied on by a plaintiff as establishing negligence does not of itself negative negligence.

The plaintiff claimed damages from the Commissioner for Road Transport and Tramways for negligence. The plaintiff was a passenger in the first car of a two-car tram of the defendant when the driver collapsed at the controls. The electric motor continued working and forced the tram to travel with great velocity

up a hill and down the other side, where, in spite of the efforts on the part of the two conductors of the tram to apply the hand-brakes, the tram collided with another tram on the same line, causing injury to the plaintiff. The issue was whether the defendant had acted reasonably or unreasonably in failing to guard against the danger of a driver's collapse by installing a device for automatically cutting off the motor or otherwise stopping the tram. Evidence given for the defendant by a number of expert witnesses was to the effect that such a device caused other dangers and that the device was not in use in any other tramway system. Two witnesses said they had driven trams equipped with a safety device and had not suffered any undue strain or impairment of efficiency. The jury found the defendant guilty of negligence, awarded damages, and added a rider that the defendant was not careless in the ordinary meaning of that word in not fitting the device, but, on the contrary, was justified in taking the remote risk of claims for damages. The trial judge entered judgment for the defendant.

Held, by *Rich*, *Evatt* and *McTiernan* JJ. (*Latham* C.J. and *Dixon* J. dissenting), that judgment should have been entered for the plaintiff. The rider to the jury's verdict was quite consistent with the finding of negligence in relation to the plaintiff, although it negatived carelessness on the part of the defendant in administration generally, and on the evidence the finding was not unreasonable.

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

APPEAL from the Supreme Court of New South Wales.

In an action commenced in the Supreme Court of New South Wales Thomas Henry Mercer claimed from the Commissioner for Road Transport and Tramways of New South Wales the sum of £1,000 as damages for injuries sustained by him as the result of the negligence of the defendant. The plaintiff alleged in his declaration that the defendant had " negligently omitted to provide for the due and proper provision of efficient and suitable braking apparatus " on a tram car upon which he, the plaintiff, was a passenger for hire, and which was managed and controlled by the defendant, with the result that it collided with another tram car, whereby the plaintiff suffered severe bodily injuries. The defendant pleaded not guilty, and issue was joined.

Upon an application under sec. 140 of the *District Courts Act* 1912 (N.S.W.), the action was remitted for trial to the District Court of the Metropolitan District, holden at Sydney.

The plaintiff, a blind man, sixty-eight years of age, was a passenger in a tram consisting of two cars attached to each other. When the

H. C. OF A. 1936.

MERCER v. COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.).

tram cars were proceeding on a down grade through Cleveland Street, Redfern, the driver collapsed and the speed of the tram cars increased to between fifteen and twenty miles per hour. As soon as they became aware of the driver's collapse the two conductors applied the handbrakes and, by this means, were able to reduce the speed to about nine miles per hour. While proceeding at that rate the tram cars overtook and collided with another tram car. The plaintiff was thrown to the floor of the car in which he was travelling and sustained injuries. From the point where the driver collapsed to the point of impact was about one hundred and sixty yards. Apart from the hand-brakes the tram cars were not fitted with any form of safety appliance. Evidence given by officers from the Department of Road Transport and Tramways and also from the transport departments of other States showed that over a long period of years there were only a very few cases where accidents had occurred through the failure, or collapse, or illness of the driver. The witnesses also agreed that the safety appliances known as "the dead man's handle," the "spring return controller," and the depressing handle, although well known for many years, were not in use on tramway systems in any part of the world. It was also stated that during the years 1908-1911 "the dead man's handle" was tried in Sydney on a number of electrically propelled tram cars, but owing to the fact that it imposed a strain upon the drivers and impaired their efficiency and was a contributory cause in a number of accidents, it was not persevered with. A witness for the plaintiff stated that for some years prior to 1919 when he left the employ of the commissioner, he had been a driver of tram cars, and that he had not found any difficulty in, or experienced any fatigue from, driving a tram car equipped with a safety appliance—a depressing handle, by which upon the removal of the driver's hand, the circuit was broken—nor had it impaired his efficiency or imposed undue strain upon him. He admitted that some drivers fastened down the handle by various means, and that an accident had occurred to a tram car of which he was the driver and which was equipped with this form of safety appliance.

At the close of the plaintiff's case in reply counsel for the defendant asked the trial judge to direct the jury to return a verdict for the

defendant on the ground that there was no evidence that it had failed to adopt any known safety apparatus in practical use, which was the only ground of negligence suggested by the plaintiff against the defendant. It, however, was agreed that questions of negligence and damages should be left to the jury and that the judge should hear argument after the jury's findings as to what the verdict should be. The following questions were left with the jury: (*a*) Was the Commissioner for Road Transport and Tramways guilty of negligence in not providing a safety device as the depressing handle? and (*b*) if the defendant was so guilty did the injury to the plaintiff result therefrom and what damages would reasonably compensate the plaintiff for such injury. The jury answered both questions in the affirmative, awarded the plaintiff damages in the sum of £200, including all medical expenses, and added a rider as follows:—"The jury is of opinion from the evidence that the accident could have been avoided had the device been fitted. They are further of the opinion that the Commissioner for Road Transport was not careless in the ordinary meaning of the word in not fitting the device, but, on the contrary, he was justified in taking the remote risk of claims for damages that might arise from accidents as a direct result." Counsel for the defendant submitted that a verdict should be entered for the defendant, and counsel for the plaintiff submitted that the jury's findings should stand. In a reserved judgment, the trial judge held that there was no sufficient evidence of negligence to go to the jury. He said that in his opinion the defendant had complied with every reasonable requirement and that, in the circumstances, there was no ground for the jury disregarding the evidence of the engineers and experts and for their finding on negligence. A verdict was entered for the defendant. An appeal by the plaintiff was dismissed by the Full Court of the Supreme Court.

From this decision the plaintiff, by leave, appealed to the High Court.

Further facts appear in the judgments hereunder.

Piddington K.C. (with him *R. M. Kidston*), for the appellant. The respondent was negligent in not including as part of the ordinary equipment of tram cars, irrespective of whether those cars were

H. C. OF A. 1936.

MERCER v. COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.).

controlled by one or more than one employee, a device whereby, in circumstances similar to those present in this case, the current, that is, the motive power, would be disconnected immediately and automatically. The Supreme Court was in error in affirming the setting aside of the jury's verdict. The jury took the view that the injury was not the result of inevitable accident. Unless scientific theories of experts are based on fact, their evidence is not of much assistance to the court. The various forms of safety device have not been adequately tested by the respondent. It cannot be concluded, or even inferred, from the evidence that the installation of safety devices would impose undue strain upon the drivers, or impair efficiency, or increase the risk of accidents. The inference must be to the contrary. The jury's rider shows that they fully considered and appreciated the evidence. The opinion of the jury as expressed in the rider was that the respondent was negligent in not installing a safety device, but, having regard to the great number and extent of its operations and the probability of mishaps, the respondent was justified in taking the financial risk involved in being found negligent in some cases, probably a few. A somewhat similar rider was considered by the court in *Ward* v. *Roy W. Sandford Ltd.* (1). On the evidence the jury was justified in arriving at its verdict, and the Supreme Court was in error in affirming the setting aside of that verdict (*Williams* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (2); *Fitzpatrick* v. *Walter E. Cooper Pty. Ltd.* (3)).

Weston K.C. (with him *Clancy*), for the respondent. If the verdict of the jury is equivalent to a verdict of negligence it is a decision that because the respondent did not adopt a device not in use in any part of the world it is guilty of negligence for which it is liable. In that case the verdict cannot stand. The question is not whether the use of the device would have prevented this particular accident, but is whether the failure to have that device in use on its tramway system is negligence. There was no failure on the part of the respondent to do what, in all the circumstances, an ordinary prudent person would have done. All reasonable precautions for

(1) (1919) 19 S.R. (N.S.W.) 172, at pp. 176, 177, 180, 181.

(2) (1933) 50 C.L.R. 258.

(3) (1935) 54 C.L.R. 200.

the prevention of accidents were taken by the respondent. An error of judgment is distinguishable from carelessness. An error of judgment is not a matter for the jury. The evidence shows clearly that there was no error of judgment on the part of the respondent (*Earl of Shaftesbury* v. *London and South Western Railway Co.* (1)). It is not negligence not to use a device which, although known, is not in practical use in any part of the world (*Ford* v. *London and South Western Railway Co.* (2) ; *Crafter* v. *Metropolitan Railway Co.* (3) ; *Bellambi Coal Co. Ltd.* v. *Murray* (4)). The respondent was not bound to do something in excess of the general practice (*Alchin* v. *Commissioner for Railways* (5)).

[LATHAM C.J. referred to *Pendlebury* v. *Colonial Mutual Life Assurance Society Ltd.* (6).]

The evidence given with respect to many tramway systems throughout the world over many years shows that the collapse of a driver in circumstances present in this case is a very remote possibility and also that current-interrupters are not in use in any of those tramway systems. That evidence discharged the onus on the respondent. In view of the different conditions which prevail, the fact that current-interrupters are in use on electrically driven trains has no significance and should be disregarded. The jury's finding of negligence is unreasonable, and cannot stand (*Earl of Shaftesbury* v. *London and South Western Railway Co.* (7)).

Piddington K.C., in reply. It was known to the respondent that drivers do collapse, and, therefore, it was negligent in not making provision against that contingency. It is pure conjecture to assert that the risk of danger would be increased by the addition of a safety device to the equipment of tram cars. That such a safety device would impair the efficiency of drivers is merely a matter of opinion ; there is no proof to that effect. The jury were not bound to accept in full the evidence of the respondent's expert witnesses (*Hammer* v. *Hoffnung & Co. Ltd.* (8)), and there was ample evidence to support the jury's finding.

Cur. adv. vult.

(1) (1895) 11 T.L.R. 269, at p. 270.
(2) (1862) 2 F. & F. 730, at p. 733 ; 175 E.R. 1260, at p. 1261.
(3) (1866) L.R. 1 C.P. 300, at p. 303.
(4) (1909) 9 C.L.R. 568, at p. 580.
(5) (1935) 35 S.R. (N.S.W.) 498.
(6) (1912) 13 C.L.R. 676, at p. 686.
(7) (1895) 11 T.L.R., at p. 270.
(8) (1928) 28 S.R. (N.S.W.) 280, at p. 282.

H. C. OF A. 1936. MERCER v. COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.). Dec. 24.

The following written judgments were delivered :—

LATHAM C.J. The plaintiff was injured in a tram collision and sued the defendant for damages for negligence. After evidence had been given an application was made to the learned District Court judge to direct a verdict for the defendant on the ground that there was no evidence of negligence to go to the jury. The learned judge postponed the consideration of the application and put two questions to the jury. These questions were :—

(1) Was the Commissioner for Road Transport and Tramways guilty of negligence in not providing a safety device as the depressing handle ? (2) If the defendant was so guilty did the injury to the plaintiff result therefrom and what damages would reasonably compensate the plaintiff for such injury ?

The jury answered both questions in the affirmative and assessed damages at £200. The jury added the following rider to their verdict : " The jury is of opinion from the evidence that the accident could have been avoided had the device been fitted. They are further of the opinion that the Commissioner for Road Transport was not careless in the ordinary meaning of the word in not fitting the device, but, on the contrary, he was justified in taking the remote risk of claims for damages that might arise from accidents as a direct result." The learned judge then decided that there was no evidence of negligence to go to the jury and entered judgment for the defendant. The plaintiff appealed to the Full Court, which dismissed his appeal. Special leave to appeal to this court was granted.

The action was for damages for negligence. The defendant manages and controls the tramway system in Sydney. The plaintiff, who is a blind man, was travelling in the leading tram of two electric trams coupled together. The coupled trams got out of control and crashed into the rear of another tram and the plaintiff received injuries, in respect of which he has taken these proceedings. The trams were under the management and control of the defendant and the plaintiff therefore proved a prima facie case of negligence. The defence to the claim was inevitable accident. It was proved by the defendant that the driver of the leading tram suddenly became unconscious without any default on his part or on the part of the defendant. The defendant proved that the trams were equipped

with brakes which were applied as promptly as possible by the conductors. It was not suggested that the brakes were inefficient. Inevitable accident as a defence in law means an accident which could not have been prevented by any precautions which the defendant could reasonably have been expected to take.

The plaintiff sought to prove that the accident would not have happened if the defendant had taken a certain precaution. The precaution suggested was the equipment of trams with what is known as " the dead man's handle " or some similar apparatus. The dead man's handle is a device which the driver of a tram has to hold in position in order to maintain the current to the motors which drive the tram. If the driver faints or dies, the handle springs to a position which cuts off the current and applies the brakes, thus bringing the tram to a stop.

The defendant's witnesses included the general manager of the Brisbane tramways, who had recently inspected eighteen systems in Great Britain, the chief designing engineer in the chief electrical branch of the Railways Department of New South Wales, the superintendent of running sheds of the Melbourne tramway system, the rolling-stock superintendent of tramways in the New South Wales Department of Road Transport and Tramways and a skilled electrical engineer. These witnesses gave evidence that the Sydney trams were up to date in their equipment and that the provision for stopping trams was in accordance with general and possibly universal practice in the case of trams carrying both a driver and a conductor. They all agreed in stating that they had no knowledge of any two-man trams which anywhere employed the device of the dead man's handle or anything like it, and they all agreed in giving reasons for their opinion that the use of such a device would increase and not diminish danger to passengers and to the public. They explained the differences between on the one hand, electric trains and one-man trams (where such a device is generally in use) and on the other hand, two-man trams. In the case of the electric railway the driver has nothing to do but to drive the train, generally upon a fenced track with no intersecting roads, with no other traffic to be avoided, and with no responsibility in relation to passengers getting on and off the train. One-man trams are used

H. C. OF A. 1936.

MERCER v. COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.).

Latham C.J.

only where traffic is light and not where trams follow one another at very short intervals. The evidence was to the effect that in the case of trams running in heavy traffic where the driver had to drive the tram in relation to other trams in front, where he had to look out for all the traffic of the street, and where he was also responsible to some extent for seeing that passengers got on and off the tram safely, the strain of continually holding a handle in position impaired efficiency in the case of drivers as a class and tended rather to provoke than to prevent accidents. A device of the kind mentioned was tried in New South Wales for about three years in 1908-1911 and it was rejected, not on the grounds of expense, but because it was not safe. It was also tried in Victoria where it was also rejected. It was found that it tended to bring about rear collisions. The trial was made about six years ago on five cars, and in three years there were four rear collisions with these five cars. The collisions were due to the driver inadvertently releasing the pressure on the handle so that the dead man's control was applied without any intention and not at a stopping place so that a following car collided with the suddenly stopped car preceding it. Witnesses for the defendant also said that the dead man's handle and similar devices were unsafe because some drivers objected to the strain which they imposed upon their attention, and accordingly prevented the safety operation of the device by strapping it down or adopting some other means to prevent it working.

Against this volume of evidence the plaintiff called one witness who had driven a car with a device of this character during the period of experimentation in New South Wales. He retired from the tramway service about seventeen years ago. This witness said that he had been able to drive the car without difficulty, that it was tiresome at first, but that it did not impair his efficiency or impose any strain on him. This witness, however, admitted that on one occasion his hand " came off " the button on the handle which he should have held down continuously, that the tram stopped and then ran backwards and got on to some points and got into trouble. He was on this occasion driving into the sheds. It may be observed that if the accident had happened on a road, there might have been serious injury to occupants of any closely following vehicle. Another

witness, who was called for the defendant, admitted that he personally was able to drive the car satisfactorily with the dead man's handle, although his opinion was that it was a dangerous device because it impaired efficiency without giving any appreciable security. In cross-examination of the defendant's witnesses, counsel for plaintiff made suggestions with respect to a driving handle with some form of spring return which, when released, would operate to cut off the current, without putting on the brakes, as in the case of the dead man's handle strictly so called, but no evidence was given by any witness to support the suggestions made in cross-examination.

Against this volume of evidence for the defendant the evidence for the plaintiff is very slight indeed. There is no evidence to contradict or even to qualify the considered opinions of responsible officers who have actually experimented with the only device suggested which has, according to the evidence, been used in practice. There is no evidence to support the conclusion that any of these devices are used anywhere in the world on "two-man" trams running in heavy traffic.

The mere fact that a defendant follows common practice does not necessarily show that he is not negligent, though the general practice of prudent men is an important evidentiary fact. A common practice may be shown by evidence to be itself negligent. A jury is entitled, for example, on sufficient evidence, to find that a proper regard for the safety of other people would require the adoption of some precaution which has only recently been discovered. But a jury is entitled so to find only if there is actual evidence to that effect. A jury cannot disregard the evidence and find, merely on its own motion, that some precaution which would have prevented injury in a particular case ought to have been adopted. See the cases cited in *Salmond* on *Torts*, 9th ed. (1936), pp. 462, 463. An extreme example will illustrate the proposition. If all trams travelled at only four miles an hour there would be few accidents, but a jury is not entitled to determine a case upon such an opinion, even though, in the particular circumstances of a given case, the adoption of such a speed limit would have prevented any accident occurring, and though, it may be added, in some circumstances it would be negligent to put a tram into motion at all. The jury in this case added a rider

H. C. OF A. 1936.

MERCER v. COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.).

Latham C.J.

stating that in their opinion "the accident could have been avoided had the device been fitted." The acceptance of this opinion does not involve any conclusion as to negligence. It leaves untouched the question whether, in all the circumstances, the defendant took the care which would be shown by a reasonably prudent man.

After careful consideration I have come to the conclusion that this is a case in which the verdict is against the overwhelmingly preponderant weight of evidence. I would not have reached this conclusion had it not been for the fact that the evidence for the plaintiff does not at all meet the evidence called on behalf of the defendant but only shows that two particular men found themselves able to drive a tram which was equipped with a device of the character suggested on behalf of the plaintiff. Such evidence is so slight that it cannot justify the jury in rejecting the reasoned evidence of responsible expert witnesses (some of them quite unconnected with the defendant commissioner) whose authority and veracity were not in any way impugned. In this case the evidence of the witnesses for the defendant is not merely evidence of opinion delivered as authoritative. It is evidence supported by intelligible reasons based upon actual experience. The evidence in support of the plaintiff, if accepted in full, shows no more than that two men used the proposed device without difficulty. One of these men, a tramway officer of great experience, was most definite in his view that it was a dangerous apparatus if used by drivers generally. The other witness actually had a mishap while using the device, and it was only by good fortune that no one was injured.

For these reasons the learned District Court judge was right in setting the verdict aside as against the evidence and in ordering judgment to be entered for the defendant. In my opinion, therefore, the appeal from the judgment of the Full Court should be dismissed.

RICH, EVATT AND MCTIERNAN JJ. This is an appeal from the Supreme Court, which refused to set aside an order made by District Court Judge *Sheridan*, entering a verdict for the defendant in an action for damages alleged to have been caused by negligence. The action was brought by the present appellant against the Commissioner for Road Transport and Tramways, the declaration making the

general allegation that the defendant commissioner had omitted to provide efficient and suitable braking apparatus for tram cars, two of which came into collision and injured the plaintiff, who was a passenger in one of the cars. The plaintiff had been blind from an early age. The tram in which he was being carried got out of control, but he remained in it. No question of contributory negligence arises.

Unfortunately, the procedure adopted by the learned District Court judge was a somewhat irregular one. The jury found for the plaintiff on the issues of negligence and damages. Subsequently, in the absence of the jury, the judge himself reviewed the facts of the case, and, holding that there was no negligence, purported to enter a verdict for the defendant. Previously, the learned judge had informed the jury that, if the specific questions were answered by the jury, " it is a question of law what these answers will mean " ; but, in entering a verdict in a sense directly contrary to the jury's findings, the learned judge went further than interpreting or giving legal effect to the findings already entered. The better course would have been to enter the jury's verdict for the plaintiff, as given, and then to have heard a substantive application for a new trial. If this course had been followed, an appeal to the Supreme Court from the decision on the new trial application could have been brought. As it was, the District Court judge put himself in the position of directing a verdict for the defendant without the parties' consent or the jury being present to accept such direction.

The result of the procedure adopted at the trial was this—the District Court judge never had to determine any application for a new trial, and he restricted his enquiry to the question whether there was any evidence of negligence fit to be left to a jury. Strictly, therefore, the only question before the Full Court, and, therefore, before us, is whether there was *any* evidence of negligence. In our opinion, there was such evidence, and the trial judge could not properly have refused to leave the case to the jury.

Further, even if the application were regarded as the equivalent of a new trial application, we think that the evidence is not such as requires the jury's verdict to be set aside. The question to be answered on a new trial application is best stated in a passage from

H. C. OF A. 1936.

MERCER v. COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.).

Rich J. Evatt J. McTiernan J.

the well-known case of *Metropolitan Railway Co.* v. *Wright* (1). It is whether reasonable men "*might* . . . find the verdict which has been found." If they "might" so find, then, as Lord *Halsbury* said, no court has a right to disturb the decision of fact "which the law has confided to juries, not to judges" (1).

The outstanding facts of the present case are in a small compass. The plaintiff was travelling in the first of a two-car tram of the defendant, when the driver collapsed at the controls. But the electric motor continued working, and forced the tram to travel with great velocity up a hill and down the other side, where, in spite of all the efforts on the part of the two conductors of the tram to apply the brakes, the tram collided with another tram on the same line, causing serious injury to the plaintiff.

At the close of the plaintiff's case sufficient evidence had been given to warrant an application of the principle *res ipsa loquitur*. On the fuller material available at the conclusion of the case, it was clear, and admitted, that the collapse of the driver was not due to any negligence. Accordingly, the real question for decision by the jury was whether the defendant had acted reasonably or unreasonably in failing to guard against the danger of a driver's collapse by installing a means for automatically cutting off the motor or otherwise pulling up the car.

Although much evidence was adduced on behalf of the defendant, a good deal of it was relied upon by the plaintiff as supporting his case, which was, in essence, extremely simple. It was that the defendant failed to provide a reasonable system for pulling up a tram in the event of the driver's collapsing at the controls—an event which, to the defendant's knowledge, was likely to occur at any time. The plaintiff said that, at the very least, a device for cutting off the motor, upon such collapses occurring, was a necessary safeguard in a reasonably efficient system. It was pointed out that, by the operation of one well-known device, so soon as the driver's hand was removed from the controls, the motor would cut out and brakes be applied so as to bring the vehicle to a stop. Such a device is in universal use throughout the electric railway system of Sydney, and is referred to as the "dead man's handle." By a second form

(1) (1886) 11 App. Cas. 152, at p. 156.

of device which could, without great expense, have been adopted on the trams, the collapse of the driver would result in the motor alone being cut out, the device operating so that pressure normally exercised by the driver's hand would be removed if his hand were withdrawn from the controls.

The evidence showed that the latter of the two devices had been in use in Sydney during a period of two or three years prior to the war of 1914. The only two witnesses who had ever driven trams while this device was used were the witnesses Wills and Fenton—the former (now chief inspector) being called by the defendant, and the latter by the plaintiff. The reason or excuse suggested on behalf of the defendant for not continuing to employ the device was that, by requiring the driver to exert slight pressure on the controls, extra strain and possible inefficiency resulted. But this reason or excuse the jury were not *bound* to accept for several reasons; first, both witnesses repudiated the suggestion that their own driving was affected adversely by the device; and, second, it was probable that considerable time might be required to become used to the device.

The main body of the defendant's evidence was directed to showing that, while such a device was operating, other dangers might arise after the collapse of a driver, and, further, that the device was not shown to have been in use in any other tramways system. The latter contention found some favour in the Supreme Court, where it was suggested that no jury should be permitted to say that the ordinary methods commonly adopted by those in the same business as the defendant can constitute negligence on the defendant's part. But, as has been clearly pointed out, "the general practice itself may not conform to the standard of care required of a reasonably prudent man. In such a case it is not a good defence that the defendant acted in accordance with the general practice" (*Salmond* (ed. *Stallybrass*) on *Torts*, 9th ed. (1936), at p. 462). Moreover, it must not be forgotten that the principle just stated is likely to be of particular application in relation to tramway systems in large cities, owing to their probable replacement by motor transport. Accordingly, reference to present practice in other tram systems

H. C. OF A. 1936.

MERCER v. COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.).

Rich J. Evatt J. McTiernan J.

is necessarily of less significance. Further, it is admitted that a similar device is in operation in relation to one-man tram cars.

The argument that the risk of danger might be increased by using the device raises a question which was pre-eminently one for the jury's consideration. There is great and obvious danger to passengers and pedestrians alike whenever a heavy tramcar, possibly full of passengers, is allowed to career through the streets without any reasonable possibility of successful braking. Of course, the extent of the danger has to be balanced against other dangers said to result if the motor automatically cut out. But what dangers are really involved in the latter event? It was said that the tram might stop suddenly and be run down by an overtaking tram or other vehicle. But the device previously in use on the trams did not automatically apply a brake in such a manner that the tram stopped suddenly and not gradually. Further, any real possibility of collision from an overtaking vehicle during peak hour traffic is made extremely remote by the very slow speed of any such vehicle. Indeed, the risks referred to by the defendant's witnesses seem to be somewhat shadowy, and the jury may well have been sceptical of their theories.

Further, no satisfactory explanation (so the jury might think) was given as to why the device actually in use to-day in the Sydney electric system is appropriate or necessary in the train system but not in the tram system. A common-sense approach to the question would be: What purpose does such a device serve in the electric train system? Electric trains follow each other in Sydney, e.g., between Sydney and Parramatta, with very great frequency, so that there is always some theoretical risk of rear collision in the event of a sudden pulling up of the train upon a driver's collapse. But the device has been adopted because it is plain that the danger of rear collision is much less than the overwhelming danger resulting if a very heavy vehicle conveying passengers continues to run ahead with its motors in operation, but, owing to the driver having collapsed, without any reasonable possibility of being brought to a halt except by a collision with a vehicle ahead. The jury might consider that the reason why such a device is in use in the electric train system is that such system (unlike that of the trams) is abreast of modern

safety methods, and because it is certain to remain a permanent feature of metropolitan transport.

In our view, the jury were not precluded from thinking that a reasonably efficient system of tram control would have included installation of a device which, on a driver's collapse, would automatically bring the tram to rest, or at least cut out the motor so as to make braking by the conductors reasonably easy. There is, therefore, no reason to suppose that the jury acted perversely or unreasonably in finding that there was negligence. Of course, it is a mistake to regard the findings of the jury as amounting to an order that the device must be installed, nor does the finding compel another jury to accept a similar view as to whether there was negligence.

One matter which should be mentioned is that to their verdict the jury added a rider that the defendant " was not careless in the ordinary meaning of the word in not fitting the device, but on the contrary, he was justified in taking the remote risk of claims for damages that might arise from accidents as a direct result." The District Court judge regarded this rider as negativing the direct finding of negligence.

But, after the announcement of the rider, the following interrogation took place :—

His Honour : You find there was negligence—you find the accident was the result of negligence, do you ?

Juror : Yes.

His Honour : What do you say as to damages ?

Juror : We find damages, £200, including all medical expenses.

The jury thus reiterated the finding that the accident was the result of negligence. Further, a jury's rider should if possible be interpreted in such a way that it will not contradict the verdict to which it is subordinate (*Ward* v. *Roy W. Sandford Ltd.* (1)). In the present case, we think that the jury's rider evidenced close attention on their part to the precise issues of the case. They clearly meant to negative any careless administration on the part of the defendant. The jury appreciated fully that the actual occurrence of damage from a failure to use a device automatically

(1) (1919) 19 S.R. (N.S.W.) 172.

H. C. OF A. 1936.

MERCER v. COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS. (N.S.W.).

Rich J. Evatt J. McTiernan J.

cutting out the motor would necessarily be infrequent, and the trams might gradually be replaced by another transport, so that it would not be improper for the commissioner to refrain from adopting the device, provided that he paid damages where damages resulted. The rider, so regarded, is quite consistent with the finding of negligence, and implies that, as *Rich* J. pointed out in argument, there was negligence *vis à vis* the plaintiff, but no carelessness in administration generally.

The respondent's counsel relied strongly upon the case of *Earl of Shaftesbury* v. *London and South Western Railway Co.* (1). But an examination of the case shows that it can have no application to the present case. It appeared that, in *Earl of Shaftesbury* v. *London and South Western Railway Co.* (1), there had been a jury action where negligence had been alleged in relation to the escape of sparks from an engine. The jury expressly refrained from finding negligence, and merely stated their opinion that, if a spark arrester had been in use, the danger would have been minimized. Thereupon, it was agreed by the parties to accept such opinion as established, but to leave the trial judge to draw such inferences from the facts as were not inconsistent with the jury's opinion. The trial judge himself considered the evidence, and entered a verdict for the defendant, relying a good deal upon certain expert opinions upon the subject before him. The Court of Appeal affirmed the verdict and judgment, negativing negligence, but also pointed out the absence of any jury's finding of negligence. The case has no bearing upon the present case, where there has been a specific finding by the jury of negligence.

On the other hand, the recent decision of the House of Lords in *Manchester Corporation* v. *Markland* (2) illustrates the principle that, in an action of negligence, it is not always required of a plaintiff to specify the precise form of precaution which a defendant should have taken in order to avoid the accident or injury. In that case, the bursting of a service pipe caused a pool of water to form. The pool remained on a road for three days, when a frost occurred causing the motor car to skid and kill a man. The plaintiff was not compelled to give a specification of the means which should have been

(1) (1895) 11 T.L.R. 269. (2) (1936) A.C. 360.

adopted to ensure the early repair of bursts in mains, for, so far as the defendant was concerned, the outstanding fact was, as Lord *Tomlin* said, that " the matter was left to chance " (1). The facts of the present case show that the great danger to passengers and members of the public generally of injury following on the collapse of a driver at the controls of a tram was perfectly well known to the defendant, but against its occurrence no precautions were taken, so that, in a sense, " the matter was left to chance." The present plaintiff has not left the matter so much at large as was done in *Markland's Case* (2), but suggested two possible means by which injury and accident could reasonably have been avoided.

In our opinion, it is not right to say that the jury acted unreasonably in finding for the plaintiff. Not only was there evidence of negligence causing injury to the plaintiff, but the respondent has not succeeded in showing that, following the principles in *Metropolitan Railway Co.* v. *Wright* (3), the verdict should be set aside as one which a jury acting reasonably might not find.

The result is that the appeal should be allowed and the jury's finding restored.

DIXON J. Like many cases of negligence this appeal depends much more upon a proper application of the standard of duty imposed by law than upon any question as to what the facts are. For when the circumstances are examined I think it appears that the liability of the respondent depends altogether upon the measure of precaution he is bound to exercise to secure the safety of passengers in his trams. There is no dispute as to the cause of the accident or as to the nature and efficient condition of the appliances actually provided for the control of trams in motion. On the other side, there can be no dispute as to the mechanical possibility of providing a further appliance and no dispute as to its nature and operation. For, having regard to the verdict, the evidence on this subject must be read most favourably to the appellant. Reasons were given by witnesses against adopting any of the suggested additional appliances or devices. It is almost unnecessary to say that the jury were not

(1) (1936) A.C., at p. 365. (2) (1936) A.C. 360.
(3) (1886) 11 App. Cas. 152.

H. C. OF A. 1936.

MERCER v. COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.).

Dixon J.

bound to accept such reasons except in so far as they were founded, as some were, upon common general knowledge and upon independent reasoning. But when we turn to the reasons advanced in support of the appellant's contention that one or other of the suggested measures ought to have been taken, if the commissioner had exercised the due care which is incumbent upon a tramway authority, we find that none of them depends on matters of proof at all. They rest wholly upon general reasoning. For no evidence was led on the part of the appellant to prove any particular fact or circumstance as a foundation for the conclusion that the omission of the measures in question amounted to a breach of the duty. Mere proof that the tram car upon which the appellant was riding collided violently with the tram car ahead of it, was, of course, enough to launch the plaintiff's case. For such an occurrence unexplained is of so unusual a nature as to raise a prima facie inference of fault. But when it appeared that the motorman at the controls had suddenly and unaccountably collapsed and that thereupon the conductors had admittedly done all in their power to avert the consequences, an adequate explanation was supplied and the prima facie inference was overcome. The appellant was then necessarily thrown back upon a case which he was bound to prove affirmatively. That case was that a duty lay on the respondent as tramway authority to provide against the possibility of a motorman at the controls suddenly collapsing while the vehicle was in motion. The burden of establishing this position the appellant undertook. First, it was suggested on his behalf that a well-known device employed upon electric railways ought to have been adopted in the Sydney tramway system. The device is commonly called "the dead man's handle." It is a complicated method of cutting off the electric current and at the same time applying the air brakes whenever the motorman's hand is removed from the control handle. Its adoption in tram cars would mean that, unless the motorman exerted a constant pressure to overcome the spring, the control would return to the neutral or off position from the running notch in parallel, through the running notch in series and the shunting notch. It appeared that the use of the dead man's handle upon trams was no new thing. It is an appliance that has been available to the tramway systems of the

world for close upon thirty years, if not more. It is now in use in Melbourne on a few trams where the traffic is so sparse that no conductor is employed and the driver performs the double function. But no evidence was given that it was employed on any " two-man " tram anywhere, and much evidence was given that at no place in the world of which information could be obtained was it in use on any " two-man " tram. Evidence was given that the dead man's handle was introduced as an experiment upon certain cars in Sydney between 1908 and 1911 and that after a trial it was removed at the request of the chief traffic manager. Evidence was also given that more recently it was tried in Melbourne and that, after two year's use upon a few two-men cars, it was rejected. The objections to it were formulated by the witnesses for the respondent, who said, in effect, that the constant strain it imposed upon the motorman caused fatigue, irritation and inefficiency on his part. Moreover, as a result of his relinquishing the pressure on the control, the tram became liable suddenly to diminish speed or stop, and in the denser parts of the traffic this made collisions from behind more probable. The witnesses said that the conditions affecting tramway traffic in the city and the driving of railway trains were altogether different. In tramway systems the dead man's handle had been found the source of difficulties and dangers. Its disadvantages were out of proportion to the risks for the reduction or avoidance of which it was designed.

On behalf of the appellant, it was next suggested that an appliance might be devised simply to cut off the current when the driver's hand left the control. The suggestion was that by means of a spring the control handle might be brought back to the neutral or off position unless sufficient pressure were exerted to keep it at the desired notch, as, for instance, at the running notch in parallel or in series as the case might be. In answer, the witnesses pointed out that many of the same objections would apply. In addition, as no brakes would operate, the tram would continue on its course. If it was going downhill when the motorman collapsed, it would gather speed. But it might run backwards if it was going uphill. It appeared from the evidence of one witness that such a device had been obtained in Melbourne for the purposes of experiment, but that

H. C. OF A. 1936.

MERCER v. COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.).

Dixon J.

after examination and consideration it had been rejected by the tramway board without actually fitting it to a car.

Next, it was suggested on behalf of the appellant that a third device might be employed. That device was to consist in a spring raising the control lever upwards and an arrangement of contacts so that it was necessary to keep the control lever or handle pressed vertically downwards in order to maintain the current which upon its release would be cut off. A former tramway motorman said that about 1911, or perhaps 1908, mechanism of some such kind was actually tried in the Sydney system. A button was fixed on the top of the control handle upon which it was necessary for the driver to press when operating his control. If he relinquished the pressure the power was cut off. Another variation of the same device was tried. Instead of a button, it consisted of a lever which the driver must depress in the same way. This device was also rejected on the ground of its inconvenience and disadvantage. According to the witness, drivers were found strapping it down and plugging it with matches. Witnesses were called who had investigated tramway systems in other parts of the world and who were acquainted with the literature of the subject. None of them regarded the spring for returning the controller or the spring for raising the controller from a contact as devices which it would be difficult to improvise; but with the exceptions mentioned none of them was aware that such devices were in fact employed in any part of the world.

An investigation of the records of accidents was said to show that during the last ten years only two accidents occurred upon the Sydney system as the result of drivers collapsing, although there were many cases of men collapsing at work. In Melbourne no case of a man collapsing was known to have occurred on the electric trams, but one occurred on the cable trams. In Brisbane no cases of collapse were known to have occurred during the period, although two cases of temporary loss of control took place.

In answer to the objections to the contact-breaking device, a witness was called on behalf of the appellant who said that he had used it in Sydney when it was upon its trial and found no inconvenience or fatigue from it.

In his summing up, the learned trial judge twice informed the jury that the appellant's counsel no longer relied upon the dead man's handle, and, at the conclusion of the summing up, the appellant's counsel said that he had nothing to ask of his Honour. We are told, however, that the learned judge's impression was mistaken.

The question put to the jury on the issue of negligence asked them whether the respondent was guilty of negligence in not providing a safety device such as the depressing handle. After a retirement the jury informed the court that they found the matter most difficult to decide on, but, if the judge was prepared to accept the verdict with a rider, they had come to a decision. They answered the question, yes, and added the following rider :—" The jury is of opinion from the evidence that the accident could have been avoided had the device been fitted. They are further of the opinion that the Commissioner for Road Transport was not careless in the ordinary meaning of the word in not fitting the device, but, on the contrary, he was justified in taking the remote risk of claims for damages that might arise from accidents as a direct result."

In my opinion this verdict cannot stand. The question at issue was whether the commissioner failed to exercise reasonable care and skill for the safety of his passengers, because he did not fit one of these appliances to the tram car. If one is at liberty to look at the rider for the purpose of discovering which appliance the jury considered ought to have been fitted, it would appear that they referred to the depressing handle mentioned in the judge's question to them. But, whichever it was, I think there was no foundation for the conclusion that the respondent fell short of his duty in omitting to provide such a device. In considering the extent and nature of the measures that due care demands, the first question must be the gravity, frequency and imminence of the danger to be provided against. On that subject common knowledge and the statistics stated in the evidence are the two sources of information available. Almost every vehicle upon the highways throughout the world is in charge of one man upon whose retention of consciousness its control and safety depends. Except that a tram car contains more people and is a heavier vehicle likely to inflict greater damage on what it strikes, the same considerations affect the innumerable

H. C OF A. 1936.

MERCER v. COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.).

Dixon J.

vehicles upon the public streets as affect the question whether the risk of the collapse of the tramway motorman calls for a special additional precaution. As against the two factors I have mentioned, a tram car carries a conductor. Although an interval of time must elapse before the steps he can take can prove effective, his presence reduces the risks resulting from the driver's possible loss of consciousness. Further, a tram car travels on fixed rails and, therefore, needs no guidance. The statistics, if accepted, show that the risk is very infrequent. As the burden of proof lay upon the appellant, it was for him to establish the practical utility and advantages of the device which he suggested. The evidence of the disadvantages and difficulties of the devices was exceedingly strong, but it may be conceded that a jury might be at liberty to discount the positive case made in this respect on behalf of the defendant. Yet the fact remains that nowhere in the world does it appear that upon two-men cars any of the suggested devices has been put into use, except by way of experiment.

On the other hand, the deliberate judgment of those responsible for the tramway system of Melbourne and Sydney led to the rejection of the devices many years ago. There is no foundation, it appears to me, for the suggestion that they were not adopted because tramways are an obsolescent form of public transportation. At the time when the devices were rejected no other form of street transport rivalled the tramways and since that date in neither of the two cities concerned has there been any outward display on the part of the tramway authorities of any lack of faith in the immediate future of their systems. In matters of special or technical knowledge the course which is commonly adopted forms prima facie the measure of care and skill required. The proper equipment and conduct of a tramway system is a matter of special knowledge. Into that knowledge countless considerations enter, but engineering practice and experience combined with experiment will, doubtless, be the determining factors when the question is whether a particular appliance or device should be adopted. A high degree of skill and care to ensure safety must be exercised by those who undertake the carrying of passengers. But to fulfil that obligation it is enough if they adopt " the best precautions in known practical use, for securing the

safety and convenience of their passengers . . . Both objects must be looked to. It is easy to conceive a precaution, for example, a slower rate of speed, which would add a very small degree of security, while it would entail a very great degree of inconvenience. And a company ought not to be found guilty" of negligence "merely because they possibly might have done something more for safety, at a far greater sacrifice of convenience" (per *Erle* C.J., *Ford* v. *London and South Western Railway Co.* (1)).

When the negligence charged consists in failing to provide appliances or other measures which are not in practical use, it cannot be enough to show that such measures are mechanically possible. Some definite case must be made out from which it appears that for reasons which do not negative negligence or for no reason at all the common practice does disregard a practicable means of securing safety. A higher degree of precaution cannot be imposed than that commonly accepted in the art or science by skilled and competent persons guided by proper consideration for the safety of those whose lives are entrusted to them or who are exposed to danger by their activities. It cannot be presumed or surmised that a uniformly accepted practice is based upon a disregard or an insufficient regard for human life and safety.

In the present case, what appears to be the uniform practice of tramway systems has been held insufficient and inadequate and an appliance which, so far as appears, has been rejected upon substantial grounds by the judgment of the tramway world has been held to be a necessary part of the proper equipment of a Sydney tram. It is no wonder that the jury hesitated to make an unqualified finding of negligence and treated the tramway authority as not careless in the ordinary meaning of the word, but as having justifiably taken the remote risk of claims for damages that might arise from accidents which the device would or might avert. It is, no doubt, true that if an infrequent risk may be avoided by a ready precaution, failure to take the precaution may be negligent, notwithstanding the infrequency of the danger. In such a case the question depends upon the course which a reasonable man, guided by proper consideration for the safety of others, would take. But, in the present case,

(1) (1862) 2 F. & F., at pp. 732, 733; 175 E.R., at p. 1261.

H. C. OF A. 1936.

MERCER v. COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS. (N.S.W.).

Dixon J.

the evidence discloses no basis upon which the jury could find that a reasonably prudent tramway authority would adopt a device the merits of which had failed throughout a long period of time to bring it into general use upon any tramway system anywhere.

Whatever liberty or licence may be conceded to the jury in refusing to accept the very strong proofs of the inconveniences, disadvantages and risks attending the use of the devices suggested, it was impossible for them by doing so to obtain positive proof of the contrary. Whatever affirmative evidence they may have declined to give effect to, they remained faced with the fact, confessed by their rider, that the risk to be guarded against was a remote one. They were faced with the further fact that the introduction of the device would be in opposition to all practice known to them as well as to the expert testimony laid before them. So far as the suggested appliances had any actual existence, all that appeared concerning them was that they had been long disused.

In these circumstances it appears to me that an erroneous standard of duty is imposed upon the respondent by the verdict.

In my opinion the appeal should be dismissed.

Appeal allowed. Order of Full Court set aside. Verdict restored. Judgment entered in District Court for plaintiff for £200. *Respondent to pay costs of appeal to this court and to Supreme Court.*

Solicitors for the appellant, *Abram Landa & Co.*

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

J. B.