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IN THE HIGH COURT OF AUSTRALIA.

MATTERSON

V.

THE COMMISSIONER FOR RAILWAYS

REASONS FOR JUDGMENT.

Delivered at Sydney

on Thursday, 27th July, 1944.

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IN THE HIGH COURT OF AUSTRALIA)
NEW SOUTH WALES REGISTRY) No. 98 of 1943

MATTERSON v. COMMISSIONER FOR RAILWAYS

THURSDAY, 27TH JULY, 1944.

JUDGMENT.

LATHAM C.J.: The plaintiff in these proceedings was the widow of one Matterson, who met his death in an accident in yards controlled by the Metropolitan Meat Industry Board at Homebush Bay. She sued under the Compensation to Relatives Act 1897.

The deceased had been employed there for a substantial period, since the year 1927, and it may be assumed that he was familiar with the yards, and accustomed to moving about in them. He was working at a place known as the rennet room and had occasion to cross four railway lines, between that and the platform, across which a diagonal path lead, that path being flush with the surface of the rails, apparently for the purpose of going to a lavatory. Upon returning he met with an accident, as a result of which he died. The accident was not observed by anyone; there was an engine driver and a shunter on a train which passed above his body. The body of the deceased was found between the rails, having been dragged apparently across this crossing to which I have referred. At this point the deceased would have a clear view in the direction from which the train was coming; it was clear daylight. When his body was observed lying there he was pciked up by some of his fellow-employees and he then said this - I read from p. 25 of the transcript. The witness Barker asked him what had happened "and he told me that he had walked into the front of the train, and it was like on to him before he could get out of its way, and he threw himself in the 4 foot. That was the gist of his statement. He said that he had the presence of mind to throw himself into the 4 foot." Shortly afterwards Matterson died.

There is a regulation for the conduct of train movements in this yard, which reads as follows:-

> "Abattoirs - level crossings - there are several level crossings at the Abattoirs and prior to any vehicle being allowed to foul any of the crossings the guard or shunter must ensure that each is safeguarded to prevent workmen, horses or [illegible]

vehicles crossing whilst the movement is taking place. The driver and firemen must keep a sharp look-out and be prepared to obey any signal given."

The plaintiff contended that, first, this crossing was not safeguarded. There certainly is no evidence that it was safeguarded and having regard to all the evidence I agree that it was open to the jury to find that it was not safeguarded. Further, this regulation provides that the driver and fireman must keep a sharp look-out and be prepared to obey any signal given. That regulation is expressed in such a form that it may be suggested that the sharp look-out is required only for the purpose of obeying signals given, but the regulation does not create or limit the liability of the Commissioner. Obviously the driver and fireman should keep a sharp look-out in any event independently of any regulation, and it is obvious that the jury might have concluded that no look-out was kept. The evidence was to the effect that the driver and the shunter in this case did not see the accident and were unaware that the man had been injured. It was open to the jury to find that no look-out at all was being kept, that the crossing was not safeguarded and there was evidence that there was no warning whistle. There is no evidence that such a whistle was necessary, but that is an element which the jury might take into account.

Accordingly, I agree that there was evidence, although it is not very strong, from which the jury could properly infer that there was negligence on the part of the defendant.

The plaintiff in such an action as this must prove that there was a duty to take care, a breach of the duty and damage resulting to the relevant person, in this case the deceased person, from the breach of duty. Here I think the duty to take care is obvious from the circumstances of the case. There is obviously a duty to exercise in the case of railway vehicles and, as I have said, in my opinion there is enough evidence to go to the jury of a breach of that duty.

The next question is whether there was evidence to go to the jury that the injury to the deceased and his death was caused by that breach of duty. It is at this point, upon the view which I have taken that the statement of the deceased becomes very important. It is established that if on the evidence adduced for the plaintiff the only rational evidence is that the plaintiff - or, as here, the deceased - was guilty of contributory negligence so that a verdict, in his favour,

would be set aside as being against the weight of evidence, then the Judge ought to withdraw the case from the jury and give judgment for the defendant.

The Full Court referred to what was said in Wakelin's case (12 A.C. 41) where, although the onus in relationt to contributory negligence rests upon the defendant, it was said: "If such contributory negligence be admitted by the plaintiff, or be proved by the plaintiff's witnesses while establishing negligence against the defendants, I do not think there is anything left for the jury to decide, there being no contest of fact."

Here the evidence is that in daylight Matterson, walking in a place with which he was familiar and about to cross the railway line where there was a slow-moving train in full sight and vision if he had looked, so conducted himself that he was knocked down by the train, or fell in front of the train, or threw himself in between the rails, and he was killed.

In my opinion that is plain overwhelming evidence of contributory negligence and the learned Judge acted rightly, therefore, in withdrawing the case from the jury upon that ground.

It has been urged that this is a case in which British Columbia Electric Railway Co.Ltd. v. Loach (1916(1) A.C. 719) might be applied. In my opinion, Loach's case is irrelevant here; there is nothing to support the view that the Commissioner's servants were disabled by some negligence on the part of the Commissioner from doing something after the negligence of the plaintiff which would have prevented the accident, and, that being so, Loach's case is irrelevant.

In my opinion the appeal should be dismssed with costs.

ORDER: Appeal dismissed with costs.