11

IN THE HIGH COURT OF AUSTRALIA

MELBOURNE AND METROPOLITAN TRAMWAYS BOARD

V.

POSTNECK AND ANOTHER

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at MELBOURNE

on TUESDAY, 11TH MARCH, 1958.

W. M. HOUSTON, Govt. Print., Melb.

C.1978/55

MELBOURNE AND METROPOLITAN TRAMWAYS BOARD

v.

POSTNECK AND ANOTHER

ORDER

Appeal dismissed with costs.

MELBOURNE & METROPOLITAN TRAMWAYS BOARD

v.

POSTNECK AND ANOTHER

JUDGMENT

DIXON C.J.
WEBB J.
KITTO J.
TAYLOR J.

MELBOURNE & METROPOLITAN TRAMWAYS BOARD

v.

POSTNECK AND ANOTHER.

The first named respondent is the widow of Eugen Postneck, deceased, who died as the result of injuries received immediately after alighting from a tram-car in Burke Road near its intersection with Cotham Road at Kew near Melbourne. Briefly the facts are that during the afternoon of the 15th July 1955 Mrs. Postneck and her husband were passengers in a tram-car as it travelled in a northerly direction along Burke Road. At the same time there was proceeding in the same direction along Burke Road a motor truck to which was attached a low level loader. This vehicle was being driven by the respondent Westcott and the tram was under the management and control of servants of the appellant. It would seem that the vehicles were not far apart as they proceeded and they arrived in the vicinity of the intersection at more or less the same time. The intersection marks the terminus of the tramway at its northern end and at the spot where the tram-car came to a stop there is an ordinary stopping place for passengers who wish to alight. But when the tram stopped on this occasion the rear portion of the truck and the low level loader were stationary alongside the tram. There was some dispute concerning the precise positions of the two vehicles in relation to one another but there was abundant evidence that, as is probable, the rear wheels of the low level loader were in a little more southerly position than the doorways of the tram and that the cabin of the truck was somewhat in advance of the front of the tram. The tram doorways, three in number, were situated about the centre of the tram. The tram having stopped the plaintiff and her husband proceeded to alight. In so doing they could not have failed to observe the proximity of the other vehicles but there was said to be a space of about two feet between the running-board of the

tram and the off-side of the low level loader and into this space the deceased, encumbered as he was with a contrivance for carrying parcels, alighted. Within a few moments, and before Mrs. Postneck had got beyond the foot-board of the tram, the truck commenced to move and almost immediately the deceased was crushed between the tram and the rear off-side wheel of the loader.

In an action subsequently brought by Mrs. Postneck the jury answered a number of questions in a manner which involved affirmative findings that the death of the deceased resulted from negligence on the part of the appellant's servants and the driver of the truck and also from his own contributory negligence. In all they assessed the total damages suffered by the plaintiff and her two children at the sum of £7,500 which sum, it was found, should be reduced by the amount of thirty per cent because of the deceased's contributory negligence. Liability for the resulting sum, namely £5,250, was apportioned between the appellant and the second named respondent and their respective contributions were fixed at six-sevenths and one-seventh respectively. In an appeal subsequently taken by the present appellant to the Full Court of the Supreme Court it was contended that there was no evidence capable of supporting the finding that its servants had been negligent in any particular and, alternatively, that, upon the evidence, the learned trial judge should have directed the jury to find that the deceased's death was caused solely by his own negligence. Additionally it was argued that if risk of injury was involved in the circumstances as they existed when the deceased alighted it was a risk which was obvious and one which must be taken to have been accepted by him with full knowledge of its existence and character.

For the purpose of considering the first of these submissions it is desirable to make some addition to the brief statement of facts already set out. The aggregate length of the truck and the loader was a little over forty-four feet. The width of the truck was seven feet and that of the tray of the loader six feet. But the rear wheels of the loader were set on the outside of the tray and the overall width of this set of wheels was approximately nine feet. It will be seen therefore that the rear wheels constituted by far the widest part of the vehicle and they occupied practically the whole of the available roadway between the tram and the southern kerb-line. The distance from the kerb-line to the foot-board of the tram was twelve feet nine inches but two feet of this distance was taken up by a gutter and the near side of the vehicle itself was said to be about one foot from the edge of the gutter. There seems little doubt, therefore, that when the deceased alighted the off-side rear wheels of the loader were within a matter of inches of the side of the tram although forward of the rear wheels there was sufficient room in the roadway to permit the deceased to alight. Whether or not he was aware, as he alighted, of the projecting rear wheels was a question to which the evidence provides no answer. They were, of course, there to be seen and it may be that he did observe them. But there is nothing in the evidence to support the inference that he did so, or indeed to necessitate a finding that he was negligent in failing to do so; he was alighting at a regular stopping place, he was encumbered with awkward paraphernalia and he was probably more concerned with getting safely to the roadway than with looking towards the rear to see whether he was stepping into what would become a dangerous

trap if, as in fact occurred, the truck should commence to move.

In the action brought by Mrs. Postneck it was argued on her behalf that, in extending to the deceased an invitation to alight in the circumstances as they existed, the appellant's servants had acted negligently. As was said by the learned trial judge in his charge to the jury:

> "what the plaintiff alleges is that the Board through its servants, the tram crew, was guilty of a breach of this duty, the duty that it owed to the deceased, in that it failed to exercise that degree of care which was reasonably to be expected in the circumstances. And as the case has been put on behalf of the plaintiff against the Board this failure to exercise reasonable care it is alleged consisted in the motorman on this tram bringing the tram to a stop at the place where it was pulled up at this terminus when the defendant Westcott's vehicle was in such close proximity to the tram as to render it dangerous for the deceased to alight or, having brought his tram into that position, in failing to warn the deceased of the danger of alighting at a point ahead of the rear offside wheel of Westcott's vehicle. Whether that case has been made out will depend upon what view of the facts you take and whether you consider the conduct of the Board's servants, the motorman driving the tram into the position that he did, the conductor and possibly the motorman as well in failing to warn the deceased of the position that had been created, whether you consider their conduct or the conduct of either of them did fall short of the care which you think it was reasonable for them to exercise in the circumstances."

The only objection of substance which was taken to this branch of his Honour's charge appears to be that it assumed that the driver of the tram was aware of the situation which was created by bringing the tram into the position in which it finally came to rest. Such a view of the facts, it was contended, was not open upon the evidence. In particular it was asserted that there was nothing in the evidence to justify a finding that the driver of the tram became aware that the rear wheels of the loader projected for a considerable distance on either side of the tray; the evidence it was said was quite consistent with both vehicles having travelled along Burke Road more or less side by side and in such a position that the driver did not at any time have an opportunity of observing the rear wheels of the loader. The learned trial judge was not prepared to accept

this view of the evidence. Nevertheless, he considered it advisable to make some additional reference to the evidence concerning this feature of the case and he pointed out to the jury that upon the evidence of one witness both vehicles had, for a distance of a hundred yards or so before the stopping place, travelled more or less side by side. But, as his Honour said, this was not the whole of the evidence in the case. Indeed, it appeared that the witness who gave this evidence had given evidence at an earlier coronial inquiry that the truck had already pulled up at the traffic lights at the intersection when the tram drew up alongside and this previous inconsistent testimony was in line with the evidence given by the driver of the truck at the trial. This latter witness deposed that he reached the intersection just about the time the traffic lights turned red and that his vehicle was stationary for some interval of time before the tram drove up to the stopping place. He was, he said, ahead of the tram and he stopped his vehicle before the tram came along. It is true that the driver of the truck assented in cross-examination to the suggestion that his vehicle and the tram arrived at the intersection at approximately the same time but this was immediately after he had emphasized the fact that he was ahead of the tram and that he stopped before it came along. It may, perhaps, be mentioned that no evidence was given by either the driver of the tram or by the conductor. Upon the evidence which was given, however, it is beyond doubt that it was open to the jury to find that the truck had pulled up at the intersection before the tram arrived and that, in overtaking the loader, the driver of the tram must have been in a position to observe that the rear wheels of the loader could constitute a real source of danger to passengers alighting from the nearside of the tram.

Once it is seen that this question of fact

was capable of being resolved in favour of the widow of the deceased the appellant's submissions on this branch of the appeal must fail. As already appears no objection was taken at the trial that, if this view of the facts was open, the direction of the learned trial judge invited the jury to determine the relevant issue upon consideration of a standard of care which was too high. Nevertheless upon the appeal the appellant sought to argue that this was so and it may be proper to deal briefly with this argument.

Assuming the point to be open to the appellant it may be said at once that the problem which arises is of an unusual character. The dangerous situation, it may perhaps be said, was occasioned primarily by the presence in the roadway of an extremely large vehicle which, at its widest part, occupied practically the whole of the available roadway beside the tram. To any reasonably prudent person who had observed the projecting rear wheels it must have been obvious that alighting passengers would be in serious danger if whilst in the course of their alighting the truck should commence to move. Upon the whole of the evidence it was for the jury to say whether the driver of the tram had an opportunity of observing the situation which would inevitably be created by proceeding right to the usual stopping place and it was also for them to say whether, in extending an invitation to passengers to alight in the circumstances as they existed, the tram crew was negligent. It was also essentially a matter for the jury to say whether failure on the part of the appellant's servants to warn alighting passengers of the existing danger or to take precautions to ensure that the truck did not move until alighting passengers had reached a position of safety constituted negligence. Findings adverse to the appellant on any of these matters cannot be said to involve the acceptance of a standard of care which is unduly onerous. Indeed to

hold otherwise would be to entertain the notion that the servants of the appellant were free to contribute to the creation of a state of affairs which involved unusual danger to alighting passengers without taking any precaution whatever for their protection. This is a view which cannot be accepted and the jury was entitled to reject it.

Upon the view of the facts which appears to have been accepted by the jury - and which it was open for them to accept - the other submissions to which brief reference has been made do not admit of serious argument. In the circumstances of the case they were essentially questions of fact for the jury and there is not the slightest reason why we should interfere with the conclusions which it reached.

A final submission was made that we should review the jury's assessment of the respective contributions of the appellant and the driver of the truck and much may be said in support of the proposition that the latter escaped too lightly. But in the ultimate result the assessment must have depended upon a view of facts which was open to the jury and which, if accepted, may have been thought to indicate only a subordinate or comparatively insignificant degree of negligence on his part. This being so it would not be proper for us to interfere. Accordingly the appeal should be dismissed with costs.

MELBOURNE AND METROPOLITAN TRAMWAYS BOARD

v.

POSTNECK & AN'OR

JUDGMENT McTIERNAN J.

MELBOURNE AND METROPOLITAN TRANSWAYS BOARD

v.

POSTNECK & AN'OR.

JUDGMENT McTIERNAN J.

I agree that this appeal should be dismissed.

The learned Judges of the Full Court of Victoria have set out fully the evidence which it is reasonable to presume from the verdict that the Jury accepted. The main question is whether there was sufficient evidence for the Jury to find that the fatal accident was the result of negligence on the part of the Board's servants, the driver and conductor of the tram from which the Plaintiff's husband alighted immediately before he was killed. The finding of contributory negligence against him is not called into question.

The duty of carriers of persons has been described in these terms: "They are bound to use the greatest amount of care and forethought which is reasonably necessary to secure the safety of the persons whom they undertake to convey". The law of carriage by Inland Transport, Kahn-Freund 3rd Edition page 356.

According to the evidence, the tram on which the deceased was a passenger immediately before he met his death, had arrived at its terminus and this was a stopping place at which it was proper for the passengers to alight. In these circumstances they could reasonably suppose that on the occasion in question they were invited to get out of the tram when it stopped at the terminus. It appears that the deceased alighted from an exit on the side of the tram from which it is normal and proper for the passengers to leave it. The Jury could very correctly find that the only area in which the deceased could manoeuvre when he alighted was the space between the side of the tram and the combined truck and trailer standing alongside of it. The evidence shows that the rear axle of the trailer projected beyond the sides of the truck and, in fact, the back wheel of

the trailer on the side next to the tram line was at no considerable distance from it. The red lights had stopped the vehicle and the Jury could find that it was waiting for the green lights to flash and it would then go forward. It appears that as the tram itself had arrived at its terminus it would stay where it was irrespective of any change in the traffic lights. In these circumstances I do not think that any reasonable man or Jury would hesitate to hold that the place on which the deceased stepped upon alighting from the tram was dangerous; or that the likelihood of injury arising in the situation in which he was placed by alighting at this appointed place was so remote that an accident such as that which befell him could not reasonably be foreseen. Clearly a carrier of passengers has to take reasonable care that the place available for them to stand on when the vehicle stops for them to alight is reasonably safe. This duty obliged the Board's servants in charge of the tram to pay attention to the question whether it would be safe for the passengers to alight from the side of the tram next to the big vehicle and to take notice of the proximity of the rear wheel of its trailer to the tram line, and the danger arising from that situation to passengers alighting from the tram on that side. The Board's servants had the means of seeing that the trailer's rear wheel was dangerously close to the tram line. The Jury was entitled to consider the issue of negligence on the basis that one or the other of the Board's servants or both of them knew or ought to have known that there was a real possibility of danger arising ~~from it~~ to passengers alighting from the tram on that side. In my opinion the duty which arose in those circumstances from the relation of carrier and passenger was to warn the deceased when he was going to the exit of the tram of the danger of alighting on that side before the truck with its long trailer moved, or to take measures to prevent him incurring unnecessary danger. Cockburn C.J. said in Rose v. North Eastern Railway Co. 2 Ex. D at 251 regarding the duty of a carrier to passengers

"they are not to be exposed to unnecessary danger". The Board's servants were, on the evidence, completely heedless of the danger threatening any passenger who was proceeding to alight from an exit opposite the ~~tick~~ big vehicle. They omitted to take any precaution to protect the deceased from the danger which he incurred by using the exit from which he alighted.

The deceased, however, chose to get out of the tram although the truck and trailer were standing on that side. The Jury thought that he thereby neglected to take reasonable care for his own safety and found that he was guilty of some contributory negligence. They correspondingly reduced the damages.

Upon the whole of the evidence there was sufficient proof to go to the Jury that the Board's servants in charge of the tram were guilty of negligence consisting of a breach of the duty of care owing to the deceased and that such default materially contributed to the accident. The Board contested the point that even if their servants were in default the real cause of the accident was the failure of the deceased to take due care of himself. I do not agree that the verdict should be set aside on that ground. It was open to the Jury to find that the negligence of the Board's servants materially contributed to the fatality. Regarding such an issue, Brett J.A. said in Rose v. North Eastern Railway Co. 2 Ex D at 252 "whether what was reasonable was done either by the Company or by the passengers is mainly a question for the Jury and that matter being one in the common affairs of life the Judges are not the authorities to decide what is reasonable". This statement of principle is drawn from the decision in Bridges v. North London Railway Co. L.R. 7 H.L. 213.

In regard to the extent of the duty owed by the Board, as carrier, to the deceased, as passenger, and the sufficiency of the evidence to prove default on the part of its servants the Full Court of Victoria said "The carrier

must take reasonable care to see that the passengers are carried safely and this obligation attaches both while the passengers are entering the vehicle and while they are leaving the vehicle. (M.M.T.B. v. Dobaj, an unreported decision of the Full Court in 1956: Williams v. Toronto &c 48 D.L.R. 346). The obligation in other words is to take all reasonable care to carry such passengers safely and to deposit them safely at the termination of the journey. It was held by the Full Court in the above case that this duty attaches where in depositing passengers from a 'bus, the 'bus is so situated in regard to the kerb that a hole in the roadway provides a danger to the disembarking passengers. It seems obvious that if, for instance, a wash-away had created a hole in the roadway at the terminus where the passengers were ordinarily deposited, and that such hole provided a danger to the disembarking passengers, it would be the duty of the Board to take reasonable measures to prevent passengers sustaining injuries from such hole which a tribunal of fact might find called for at least a warning of the danger or the provision of an alternative exit if it were possible. Once this position is realised it seems plain that the jury might regard the juxtaposition of the truck and low-level loader with the tram as creating a likely condition of danger. No warning was given by the tram crew of the danger which existed, nor was any announcement made that under the circumstances passengers should disembark on the right hand side of the tram instead of the left hand side, but the passengers were left without any guidance to alight from the tram. The exit spaces provided an invitation to passengers to alight by those means, and it seems to us that it was open to the jury to take the view that in the circumstances it was the negligence of the Tramway Board which brought about or contributed to the Plaintiff's husband's death". I agree with all that this statement contains.

Other points arose on this appeal concerning the sufficiency of the evidence to raise an issue of "volens" against

the deceased and the correctness of the apportionment of the damages. As to the former point their Honours said "In our opinion although there may have been evidence that the deceased man knew of the danger there is a complete absence of evidence that he appreciated the danger and a complete absence of evidence that knowing and appreciating the danger he voluntarily assumed the risk. At best for the defendant, assuming there were facts from which the jury might infer knowledge, the rest of the evidence is equally consistent with the deceased not appreciating the risk and there is nothing to suggest that he voluntarily assumed it". I agree with that statement and I think it unnecessary to add anything to that point.

I also agree with the view of the Full Court that there is no proper ground upon which to challenge successfully the apportionment of damages. I would add that nothing I have said regarding the duty of the Board to a passenger is meant to convey that it extends to taking measures to prevent injury to him by vehicular traffic on the street while he is proceeding from a stopping place to the footpath after alighting from a tram. It appears to me that the special feature of this case is that having regard to the circumstances proved in evidence the place which was available to the deceased to stand on immediately after leaving the tram was in the nature of a trap.