

PC
GDT-6-6

5, 1966

IN THE PRIVY COUNCIL

No. 24 of 1965

O N A P P E A L
FROM THE SUPREME COURT OF NEW SOUTH WALES

BETWEEN

THE COMMISSIONER FOR RAILWAYS

Appellant

- and -

PATRICIA VERA McDERMOTT

Respondent

CASE FOR THE APPELLANT

- 10 (1) This is an appeal pursuant to leave granted by the Supreme Court of New South Wales from a Rule of that Court (Macfarlan, Moffitt and Taylor JJ.) made on 1st December, 1964. That Rule dismissed the Appeal of the Appellant from the Judgment of the Supreme Court (Clancy J.) which had been entered in accordance with the verdict of a jury in a case in which the Respondent was Plaintiff and the Appellant Defendant. That case was tried twice. The first trial before Wallace J. and a jury also resulted in a verdict for the Respondent. The Appellant appealed from the judgment entered against it. On the Appeal the Court (Herron C.J., Richardson and Brereton JJ.) ordered a new trial limited, as later appears, to the first count of the Respondent's declaration. (1963 S.R. 877). The new trial was that, above referred to, before Clancy J.
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- 30 (2) The Appellant is a body corporate charged with the duty of administering the Railway system of the State of New South Wales including the running of railway traffic carrying passengers and goods thereon and in it are vested the lands upon which its railway lines are situated.
- RECORD
p. 149
p. 126

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pp.29-33
 pp.129-130
 p.113 LL.12-14

p.27 LL.36 & 40
 p.28 L. 17
 p.70 LL.12-18

p.67 LL.13-18

p.1

- (3) At all material times there was vested in the Appellant the Sydney-Newcastle railway line and at Koolewong between Woy Woy and Gosford on that line there was a small unattended railway station. A little to the north of the station there were gates in the fences that run along the side of the railway. Those fences mark the eastern and western boundaries of the Appellant's lands at Koolewong. The gates on each side consisted of a wicket gate for pedestrians and immediately to the north of that a larger gate for vehicles. The gates have always been unattended. The persons who opened the vehicle gates were obliged to close them after use under penalty if they did not do so. At Koolewong the railway runs more or less north and south. On the eastern side of the line lies the Woy Woy-Gosford Road and to the east of that Brisbane Water. On the western side of the line there is a small pocket of houses and beyond them wilderness. Years ago such houses consisted of just an odd weekender or two and then gradually more small cottages began to appear. The inhabitants of these houses were permitted by the Appellant to reach the Gosford-Woy Woy Road by crossing the railway lines through the said gates. Between the vehicle gates on each side of the line the corssing consisted of railway sleepers lying side by side and parallel to the railway lines.
- (4) On 10th June, 1959 at approximately 6.20 p.m. the Respondent was run over by the Sydney bound North Coast Daylight express whilst it was travelling south at a point variously fixed at 8 or 12 feet north of the sleeper crossing.
- (5) The Respondent had been living in a house on the west side of the railway line at Koolewong for 9 or 10 years prior to 10th June, 1959. The house was 150 yards from the corssing, towards the north.
- (6) The Respondent sued the Appellant for damages for negligence in a declaration containing two counts. The second count alleging an invitor-invitee relationship was abandoned at

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the first trial. On the second appeal both parties proceeded on the basis that judgment had been entered for the Appellant on the invitor-invitee count.

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p. 133 LL.21-25

(7) The first count made the prefatory averment that the Respondent was lawfully crossing certain railway lines owned and occupied by the Appellant and alleged negligence:- p.1

10 (i) in and about the construction, maintenance and lighting of the said railway lines, the permanent way, the entrance thereto and the crossing thereof;

(ii) in and about the care, management, control, maintenance, equipment, driving and operation of a certain train, and

20 (iii) in the failure properly to warn the Respondent that the permanent way and the crossing had become and were in a dangerous condition.

(8) The Appellant pleaded the "general issue by Statute" thus putting in issue the whole of the Respondent's case. In a second plea the Appellant specifically traversed the prefatory averment. p.2

30 (9) Although the Respondent called no evidence of express permission to use the crossing it was not disputed by the Appellant or the Respondent that if she was on the sleeper crossing, using it as a way to or from her house, she was a licensee of the Appellant. However, the Appellant also contended that in the position in which the Respondent lay, prone in the path of the train, off the crossing, she was outside the area of any licence and she was a trespasser.

40 (10) The evidence at the second trial was substantially similar to that at the first. The chief differences were -

(i) No evidence was given at the first trial as to how it was claimed the Appellant could have

RECORD
pp. 33-40
pp. 48-50

improved the crossing, whereas at the second trial there was some such evidence.

pp. 97-100

(ii) At the first trial evidence that the Respondent shortly before the accident was under the influence of liquor was given solely in the Appellant's case, whereas at the second trial some of that evidence appears in the Respondent's case.

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p.85 LL. 2-4

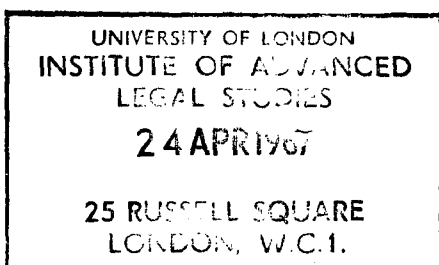
(11) At the first trial Wallace J. in his directions to the jury as to the Appellant's duty to the Respondent followed Fullagar J. in Rich -v- Commissioner for Railways 101 C.L.R. 135. Fullagar J. there said at page 144 that there may co-exist with the special duty owed by an occupier of premises to a licensee a general duty of care which is not related to the condition of the premises and which arises not from the fact of occupation but from the general circumstances of the case. Fullagar J. went on to formulate the proposition at page 145 that the Appellant's duty in Rich's case was to do everything which in the circumstances was reasonably necessary to secure the safety of persons using the crossing.

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(12) In the first appeal to it the Full Court held that the trial judge "was in no error in his statement of principle" (1963 S.R. at p. 884). In his judgment Herron C.J. at page 882 said:-
"The mistake evident in the Appellant's submission is that no greater or other duty can be owed to a licensee than the conventional rule as to occupiers allows one governed by the category in which the plaintiff enters the premises. The true rule is that, whereas a well defined duty (as to the safety of premises) flows from the relationship of occupier to licensee, nonetheless the latter may, if circumstances are proved which give rise to it, rely upon a higher or broader duty".

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(13) At the first trial Wallace J. left to the jury as heads of negligence these matters:-

- (i) the roughness of the sleeper crossing;
- (ii) the lack of a warning system at the crossing;
- (iii) the excessive speed of the train;
- (iv) the lack of a gatekeeper.

10 (14) On the first appeal the Full Court held that Wallace J. had erroneously left to the jury the matters complained of in (ii) (iii) and (iv) above as heads of negligence. However, the Full Court held that the Respondent was entitled to have left to the jury, apparently as part of "the circumstances" or "total situation", that the Respondent was a person likely to be affected by the Appellant's "acts or omissions in relation to the surface and the lighting of the crossing".

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(15) The Respondent gave evidence at the second trial, inter alia, as to the following matters:-

(i) That, except for some vague and confused recollections of seeing lights and hearing a noise possibly of a trailer she had no recollection of events on the date of her accident or for some seven weeks before it

p.9 LL.
33-41
p.13 LL.
21-23

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(ii) That she had been over the crossing by day and by night time hundreds of times, before the accident, in a car and walking and that she had stumbled only once whilst on the crossing which to her knowledge or recollection was the only time she had stumbled in her life, and, in re-examination, that she had never from her memory walked across the crossing at night.

p.9 L.3

p.15 LL.5-8
p.15 LL.36-37
p.17 LL.15-40
p.18 LL.1-2

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p.18 LL.32-33
p.23 LL.34-40

(16) Other evidence called for the Respondent as to happenings on the day of her accident

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was as follows :-

(i) After the accident apart from the loss of her feet she had an injury to the right forehead, a fractured collarbone, a gravel rash on hands and knees and forehead. An opinion was expressed by a medical practitioner (over objection by the Appellant) that the fractured collarbone and injury to the right forehead would be more likely to be due to a direct fall than by the train passing over the Respondent's legs and moving and buffeting the Respondent's body or by a vigorous pushing movement of the body. No evidence was given that the medical practitioner had any skill, knowledge or experience or had made any study as to the effect upon the movement of a human body of a train running across the legs thereof: (the evidence of the medical practitioner in your Appellant's submission was inadmissible and of no probative value - Bugg -v- Day 79 C.L.R. 442). 10 20

p.56 LL.1-2
p.56 LL.17-19

(ii) On the day of the accident the Respondent left her home at about 4 p.m.; at about 5 p.m. she arrived in a taxi on the east side of the crossing and alighting from it she handed a brown paper parcel containing a small flask of whisky to a Mr. Thompson; she got back into the taxi and went off towards Woy Woy; between 5.30 and 5.45 p.m. or possibly shortly before 5 p.m. the Respondent was in a chemist's shop at Woy Woy; at around about 6 pm. Mr. Thompson heard the Respondent's voice in her house; at about 6.10 p.m. the Respondent got into Mr. Hannon's taxi at Woy Woy; he "could see she had been drinking and she had a dishevelled appearance about her"; her speech was slurred; "her eyes were watery as though she had been drinking"; "her voice was thick"; in his opinion the Respondent was "under the influence of alcohol". 30 40 50

~~Respondent was~~
RESPONDENT WAS.

pp. 5-8
p.57 LL.1-9
p.58 LL.19-28

of liquor"; at about 6.15 p.m. Mr. Hannon arrived at the eastern side of the crossing and the Respondent alighted from the taxi; approximately at 6.20 p.m. the fireman of the North Coast Daylight Express, who was on the right hand side of the engine as it approached the crossing, thought he saw an object lying on the line in between the rails when he was 150 feet from the crossing and when he was about 60 feet from the object it looked to be a body the head of which was clear of the outside rail the feet and portion of the legs being over the right hand rail (i.e. the rail on the fireman's side of the engine); the body was face down lying at an angle but the fireman could not tell whether the head was towards him or away from him; the fireman kept the object under observation until it passed out of his view underneath the engine and it did not move at any time from the time he first saw it; the body was approximately 12 feet clear (i.e.) to the north of the sleepers; at some time after the train passed the crossing and before a Sergeant Cunningham arrived at the scene at about 6.25 p.m. a Mrs. Hayes, who was in the waiting shed on the railway station heard screaming along the line; she went to the Respondent who was off the crossing on the railway lines with her feet severed; she lifted the Respondent up by the shoulders, put her down quickly and then rolled her over the line; when Sergeant Cunningham arrived the Respondent was lying to the north of the crossing between the two sets of tracks on her left side with the nearest part of her body approximately 8 feet from the northern edge of the sleepers and her head pointing towards the north.

p.69 LL.
p.7 & 17
pp.59-63

p.70 LL.
1-36

(17) Evidence was given for the Respondent that the sleepers were old, worn and in bad condition, that they were rough and of slightly different levels compared one with

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the other, that some of the sleepers did not lie firmly but moved under weight, and that the crossing was unlit. On the evidence the crossing had been in this state for some years.

- (18) Witnesses for the Respondent gave evidence that on occasions, in some instances once only over a period of years, they had stumbled or fallen on the sleeper crossing, but there was no evidence that any of those incidents were observed by or reported to any of the Appellant's employees or that the Appellant knew of them. 10
- pp.33-40
pp.48-50 (19) Evidence was given for the Respondent as to how the crossing could have been improved to ensure greater safety for persons using it.
- pp.100-111 (20) The Appellant called evidence that the Respondent was in the Bayview Hotel Woy Woy before 5 p.m. on the day of the accident and that she "had had a quantity of beer"; that she got into a taxicab at a time between 4.15 p.m. and 4.30 p.m. opposite the Bayview Hotel when the driver noticed her speech was slurred; that she was taken by the taxicab to the crossing where she met a man and where certain incidents occurred and that she was taken back to the taxi rank at Woy Woy in the vicinity of 5 p.m. 20 30
- p.74
p.112 (21) Before the trial Judge application was made by the Appellant on two occasions for a verdict by direction. Upon the first application His Honour Allowed the Respondent to re-open her case and further evidence was called, namely the evidence of Mr. Hannon the driver of the taxicab, who said he brought her to the crossing shortly after 6 p.m. The second application was made by the Appellant at the conclusion of all the evidence and it was made upon similar grounds to those of the first application. 40
- (22) The Appellant contended before the trial Judge -

- (i) that there was no evidence of any duty on the part of the Appellant to the Respondent other than the duty to a trespasser;
- (ii) that if the Respondent was not a trespasser but was a licensee there was no evidence of any breach of the duty owed to her as a licensee, and
- 10 (iii) that there was no evidence of negligence on the part of the Appellant.
- (23) The application for a verdict by direction was refused, His Honour ruling that the matter was one for the jury. p.112
- (24) His Honour left to the jury the question whether the Respondent was a trespasser or a licensee, but directed the jury that if she was a trespasser or if she did not stumble on the crossing there should be a verdict for the Appellant. p.116 LL. 43-45
p.117 LL. 1-8
- 20 (25) As to the Appellant's duty to the Respondent if she was a licensee, His Honour directed the jury that it was the duty of the Appellant, in respect of the static condition of the crossing to do everything reasonably necessary to ensure the safety of the licensees using the crossing and to do everything reasonably necessary to protect them against foreseeable damage. Clancy J. directed the jury in these terms:- p.113 LL.23-45
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40 "It is claimed that the nature of the crossing, the manner in which it was constructed, the manner in which it was maintained and the failure to light it at night, are all indices of a breach of a duty on the part of the defendant to take reasonable care for persons using the crossing. It is a matter for you, gentlemen. All I can tell you is that the present state of the law is that if the plaintiff was injured while using that crossing in an exercise of her licence, and through breaches in the sense that I have indicated as to the method of construction, the maintenance and the

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lighting, she will succeed if they fall short of the standard you consider a reasonable person would provide."

- p.126 LL.21-29 (26) His Honour did not direct the jury that as the Respondent was well acquainted with the state of the crossing there was no duty on the Appellant as set forth in the preceding paragraph. His Honour declined to direct the jury that the duty of care due by the Appellant to the Respondent extended only to concealed traps actually known to the occupier but not known to the licensee and that the duty was confined to giving warning of the existence of dangers of this limited class. 10
- p.126 LL.31-32 (27) The jury returned a verdict for the Respondent in the sum of £10,000.
- pp.127-128 (28) The Appellant appealed to the Full Court of the Supreme Court of New South Wales by Notice of Motion. By Rule the Full Court dismissed the Appellant's appeal and its reasons for judgment were delivered on 1st December, 1964, those being the Rule and Reasons for Judgment which are the subject matter of this Appeal to Her Majesty in Council. 20
- pp.129-149 (29) It is submitted that the Full Court dismissed your Appellant's appeal for the following main reasons:-
- (i) It was open to the jury to draw an inference that the Respondent's presence on the line was due to a fall on the uneven crossing and accordingly the case was not an unexplained presence on the line and was not governed by *Wakelin -v- The London & South Western Railway Company* 12 App. Cas. 41. The decision in the previous appeal (*McDermott -v- Commissioner for Railways* (1963) S.R. 877) precluded the Appellant from relying upon the contention that the Respondent was a trespasser. 30
- (ii) The duty of the Appellant to the Respondent as to the static 40

condition of its premises was that stated by the Full Court on the first appeal (1963) S.R. 877 and was not the restricted duty of an occupier to a licensee, although there was no positive act of negligence on the part of the train crew.

(30) Questions arising for determination on this appeal are:-

- 10 (i) What duty did the Appellant owe to the Respondent?
- (ii) Was there evidence of breach of such duty causing injury to the Respondent?
- (iii) Did the Appellant owe to the Respondent any duty to improve the crossing, and may it properly be left to a jury to decide whether the Appellant had failed in any duty of care to the Respondent because of the state of the crossing i.e. by reason of not having constructed it in some other way, maintained it in better condition or lit it?
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(31) The problems stemming out of the statement of duty owed by the Appellant as a licensor at many crossings are very great. If the Appellant is to be subjected to the duty as formulated by the Full Court in this case the result follows that whenever the Appellant's trains, passing along rails on the Appellant's own property, collide with persons or property permitted to be upon a crossing, the Appellant could be held liable in damages if the jury took the view that the Appellant should have improved the method or means of crossing the railway line. It would be open to the jury to take the view that the Appellant should have provided an overhead bridge or underground tunnel in lieu of a crossing on the level.

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CONTENTIONS

(32) The Full Court was under a misconception as to the nature and scope of the duty owed to the Respondent.

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- (33) The Full Court erred in accepting Fullagar J.'s erroneous formulation of the relevant duty of licensor to licensee in Rich -v- Commissioner for Railways 101 C.L.R. 135 and the Full Court also misconceived the effect of the decisions of the High Court in Thompson -v- The Council of the Municipality of Bankstown 87 C.L.R. 619, and Cardy -v- Commissioner for Railways 104 C.L.R. 274, both explained in Commissioner for Railways -v- Quinlan 1964 A.C. 1054. 10
- (34) The Appellant respectfully submits that the Judgment of the Full Court dismissing the Appellant's appeal in the action was erroneous and ought to be reversed and that the judgment in the action should be set aside and judgment entered for the Appellant for the following amongst other 20

R E A S O N S

- (1) The principles determining an occupier's liability to persons injured on his premises were firmly settled before and not altered by the decision in Donoghue -v- Stevenson 1932 A.C. 562. The imposition on an occupier of premises of a duty to his licensee to construct and maintain those premises "without imperfections" or "to secure the safety of licensees" is novel, contrary both to principle and authority binding on the Full Court and unauthorised by statute. 30
- (2) The Respondent was a trespasser at the spot where she met with her injuries and there was no evidence of breach by the Appellant of any duty owed to her as such. 40
- (3) The Respondent's presence on the railway line was unexplained;

her fall there, if she fell, was unexplained. There was no evidence that her injuries more probably than not were caused by a breach of any duty the Appellant owed to her. Wakelin -v- The London and South Western Railway Company 12 App. Cas. 41.

- 10 (4) There was no evidence of data from which it could be inferred rather than guessed that the Respondent got to the spot where she lay prone in the path of the train because of a stumble caused by the state of the sleeper crossing. Putting the Respondent's case at its highest on this aspect there were competing inferences of at least equal degrees of probability accounting for her presence on the line.
- 20 (5) If the Respondent did so stumble and fall, as a licensee she took the crossing, with its dangers, as she found it. Gallagher -v- Humphrey (1862 L.T. (N.S.) 684; Coleshill -v- Manchester Corporation (1928) 1 K.B. 776.
- (6) The Appellant owed no duty to the Respondent to light or otherwise improve the crossing.
- (7) There being no evidence of negligence on the part of the train crew the Respondent's claim necessarily failed.

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IN THE PRIVY COUNCIL

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