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5, 1966

IN THE PRIVY COUNCIL

No. 24 of 1965

ON APPEAL  
FROM THE SUPREME COURT OF NEW SOUTH WALES

B E T W E E N :-

THE COMMISSIONER FOR RAILWAYS (Defendant)  
Appellant

- and -

PATRICIA VERA McDERMOTT (Plaintiff)  
Respondent

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C A S E FOR THE RESPONDENT

CIRCUMSTANCES OF APPEAL

Record

1. This is an appeal pursuant to leave granted by the Supreme Court of New South Wales from a rule of the Full Court of the said Supreme Court (Macfarlan, Moffitt and Taylor JJ.) delivered the First day of December 1964 whereby the appeal of the Defendant (appellant) to that Court was dismissed. p. 150  
p. 129

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2. The Respondent (Plaintiff) instituted proceedings in the said Supreme Court in its common law jurisdiction on the Twenty-sixth day of October 1959 and by her declaration claimed damages from the Respondent (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 whom is vested the track upon which his railway lines are situated) on two counts the substance of which is as follows :- p. 2  
p. 2 L.3

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(a) By her first count the Plaintiff sued the Defendant in negligence relying upon the relationship between the parties as declared in Donoghue v. Stevenson (1932) A.C. 580 and arising out of the facts and circumstances of the matter. p.2 L1.6-25

(b) By her second count the Plaintiff also sued the Defendant for his breach of duty to her in his capacity of occupier of the land she being thereon lawfully. p.1.L1.26-34

3. The Defendant by his pleas denied negligence, relied upon certain statutory defences available to p.2 L1.1-23

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him (which do not appear to be here relevant), and traversed the averments of fact made by the Plaintiff in the second count of her declaration.

4. The matter first came on for hearing before Wallace J. and a jury of four when a verdict was returned in favour of the Plaintiff in the sum of £14,000. 0. 0.

5. The Defendant appealed to the Full Court of the said Supreme Court on certain grounds and on the Eleventh day of April, 1963 the said Full Court (Herron C.J., Richardson and Brereton JJ.) allowed the appeal and returned the matter for retrial, McDermott v The Commissioner for Railways 80 W.N. (N.S.W.) 1036.

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24 APR 1967  
25 RUSSELL SQUARE  
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6. Pursuant to the rule of the Full Court the matter proceeded before Clancy J. and a jury of four on the Eleventh, Twelfth and Thirteenth days of March, 1964 when the jury returned a verdict for the Plaintiff in the sum of £10,000. 0. 0. It is from this verdict that the present appeal has by leave been brought.

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FACTS OF APPEAL

p.8.L1.13-18 7. The Plaintiff was at the time when she sustained the damage complained of, and had been for approximately ten years previously, a resident of a village known as Koolewong in the State of New South Wales.

p.23.L1.14-18  
p.28.L1.12-18.pp.153, 154. 8. Her residence was situated in an area to which the means of access was by a level crossing situated a short distance to the north of Koolewong railway station which is an unattended station on the main northern railway line between Woy Woy and Gosford.

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pp.154-155  
p.34.L1.34-36 9. The crossing was formed by sleepers laid side by side, parallel to the two sets of railway lines, approximately level with the height of the railway lines and placed so as to permit of the passage of trains along the lines.

p.30 L1.12-13.  
p.34 L1.30-40  
p.47 L.17  
p.48 10. At the time that the Plaintiff was injured the sleepers were old, worn, in bad condition, rough and uneven. There were gaps between the sleepers of such width that it was possible for the foot or shoe of a pedestrian to be caught in them. The sleepers also had bolt holes in them and were so inadequately founded that they moved and changed position under weight, even of a pedestrian.

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Record

11. At either end of the crossing there were closed but unlocked vehicular gates which led straight on to the sleepers. pp.156-157
12. Beside each such gate and on its southern side was a wicket gate for use by pedestrians. These gates did not open on to the sleepers, the width of the sleepers being no more than the width of the vehicular gates. Otherwise access to the lines was only through a wire fence and across difficult land. p.35 L.15-  
p.49 L1.2-4  
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pp.153-165
- 10 13. On the Tenth day of June 1959 at approximately 6.20 p.m. while the Plaintiff was lying prone across the eastern set of rails at a distance of some 8' to 12' north of the sleepers a train operated by the Defendant passed over her. p.49 L1.28-39  
p. 60  
p.70 L1.1-26
14. At this time it was dark. The area surrounding the crossing and the crossing itself were unlit. The crossing was in darkness. There was no system of warning at the crossing p.69 L1.22-34  
p.31 L.25-  
p.32 L1.3-5
- 20 15. The plaintiff was first seen in the headlight of the train by its fireman (Watson) working in the engine as the train approached the crossing at approximately 40 miles per hour, and accelerating. At this time the train was at a distance of approximately 150 feet from the Plaintiff in which distance it was not possible to stop the train. p.26 L1.1-26  
p.27 L1.28-30  
p.25 L1.20-23  
p.28 L1.1-5
16. Subsequently the plaintiff was found, by a certain Esther Louisa Hayes on the railway lines in an injured condition. There the Plaintiff later received first aid attention. p. 59.  
p.70 L1.2-26  
p.167.
- 30 17. The Plaintiff suffered grave physical injuries and retrograde amnesia as a result of which she has no recollection of any matters relevant to the occurrences on the day in question. p.3 L1.20-39
18. Shortly before the Plaintiff was observed by the fireman (Watson), lying on the railway lines and at approximately 6.15 p.m. to 6.20 p.m., she had alighted from a taxi-cab at the gates on the eastern side of the crossing after being conveyed there from Woy Woy, a nearby town. p.97.
- 40 19. It was normal for taxi-cabs to set down at the gates on the eastern side of the crossing persons proceeding to the western side of the railway lines. p.107 L1.2-22
20. Evidence, some of which was conflicting, was

Record

before the Court as to the whereabouts and the acts of the Plaintiff at different times on the Tenth day of June, 1959, prior to the time when she sustained injury.

There was evidence that :-

p.100.L1.32-38  
p.101 E.28  
pp.102-103  
p.56 L1.10-20  
p.103 L1.33-37  
p.104 L.4

(a) Prior to 5.00 p.m. she was at a hotel and that she consumed some intoxicating liquor.

(b) At approximately 4.30 p.m. or 5.00 p.m. she was conveyed by taxi-cab from Woy Woy to Koolewong and back to Woy Woy.

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p.6 L1.20-24  
p.6 L1.5-7

(c) At 5.30 p.m. (approximately) she was in the chemist store of a certain Ian David Thompson at Woy Woy where she purchased some Nembutal capsules on a doctor's prescription.

p.64 L.9  
p.57 L.31  
p.72 L1.30-31  
p.73 L1.9-11,14  
p.98 L1.30-40

(d) At the time of reaching the crossing at 6.20 p.m. she was affected by alcoholic liquor. There was considerable conflicting evidence before the jury for their consideration on this aspect of the matter

p.30 L1.30 et seq.  
p.41 L1.35 et seq.  
p.42 L1.1-9  
p.44 L1.20-24  
p.57 L1.22-28  
p.66 L1.18-40  
p.67 L.12  
p.72 L1.35-40  
p.73 L1.1-3  
p.34 L1.38-40  
p.42 L1.6-9

21. Because of the condition of the sleepers numerous pedestrians, including the Plaintiff, whilst lawfully using the crossing had tripped, fallen or stumbled, sometimes sustaining injury. Even in daylight it was necessary to exercise care in using the crossing.

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p.47 L1.20-29  
pp.170-174

22. At the time of the injury to the Plaintiff the crossing was in an unsatisfactory condition

23. Since the injury sustained by the Plaintiff the crossing has been re-surfaced to a proper standard and has been lit.

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p.115.L1.31-32  
p.116 L1.7-15

24. The learned trial judge (ClancyJ.) put the Plaintiff's contention to the jury in the following terms "Her case is that while crossing the sleepers she stumbled and her stumble carried her away from the crossing and she fell". "The Plaintiff's case is that having stumbled, that is where the movement of the stumble took her to. Well, you have got to consider that. Take it as 8 feet, if you like, but consider now the length of that stumble. I propose to say nothing about it. I have no views. It may

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24 APR 1967

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well be that a person could stumble 8 to 12 feet before coming to the ground, but consider it as a problem presented to you and one for determination by you and envisage the distance. You may think that from the edge of your jury box to the edge of the bar table could be about 14 feet. That is a matter for you. Then work out what you think would be 8 to 12 feet."

10 25. The learned trial judge put the Defendant's contention to the jury in the following terms:- p.115 Ll.35-43  
p.116 Ll.1-6

20 "The Defendant concedes in this case that she fell, but he puts to you that she has made it appear to you that it seems more probable than not that the manner of her fall was caused by something, which took place somewhere on or along the line. There is the evidence of the gravel rash on the hands and face and the broken collarbone. The Defendant puts to you that it is a proper statement of the problem that the mere fact that she fell  
30 does not carry the Plaintiff necessarily to success. Where was she when the fall took place or started? What was she doing? The significance of it being this: that according to the fireman she was seen by him as the train approached, and while it was only a fleeting observation his impression was that she was 12 feet north of the crossing. Later, when the police constable arrived, a measurement was made by him, not with a rule, of course, but by means of paces- and it was found that her feet were 8 feet  
from the crossing. So you may think that it was a pretty accurate estimate by that fireman."

26. On the hearing of the appeal to the Full Court the Defendant by his counsel argued that it was unexplained how the Plaintiff came to be on the railway line but conceded that if this argument failed the Plaintiff was lawfully on the level crossing with the knowledge and acquiescence of the Defendant and that whatever rights she had in law should be decided on that basis. p.132 Ll.9-30

40 27. The learned judge directed the jury on the question of the Defendant's duty of care in the following terms:- p.113 Ll.23-40

"Under those circumstances it is the duty of the railway authorities to do everything which is reasonably necessary to ensure the safety of those persons using the crossing, to do everything reasonably necessary to protect them against foreseeable damage and foreseeable injury. It is said here that it was the breach of that duty which

Record

led to the Plaintiff's injury. That is a matter you have to consider. It is the Plaintiff's case that, in all the circumstances of the location of the village and these other matters to which I have already referred, it was reasonably foreseeable that somebody would use this crossing at night time. 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 that 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 lighting, she will succeed if they fall short of the standard you consider a reasonable person would provide".

p.133 L.4

28. The Appellant (Defendant) contended before the Full Court that the only duty owed by the Defendant to the Plaintiff was to take reasonable care to prevent harm to the Plaintiff from a state or condition of the crossing known to the Defendant, but unknown to the Plaintiff which the use of reasonable care on the Plaintiff's part would not disclose and which, considering the nature of the crossing, the occasion of the leave and licence, and the circumstances generally, a reasonable man would be misled into failing to anticipate or suspect—(Lipman v Clendinnen (46 C.L.R. 550 at pp. 569-570)).

p. 139

29. The Respondent (Plaintiff) relied upon the general allegation contained in the first count of her declaration that the relationship was as declared in Donoghue v Stevenson (1932) A.C. 580

30. The Respondent (Plaintiff) now relies upon the decision of the Full Court dismissing the appeal of the Defendant (Appellant) and the reasons given by their Honours therein.

SUBMISSIONS

31. The Respondent (Plaintiff) respectfully submits that the Appeal should be dismissed with costs for the following, amongst other -

REASONS

- (1) The decision appealed from is correct.
- (2) The learned trial judge correctly stated the duty of care owed by the Defendant to the Plaintiff.
- (3) The Defendant was in breach of the duty of care that he owed to the Plaintiff.
- (4) The decision in Quinlan v Commissioner for Railways (1964) A.C. 1054 does not apply to the facts and circumstances of the present case.

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RAY WATSON

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Counsel for Respondent

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C A S E FOR THE RESPONDENT  
PATRICIA VERA McDERMOTT

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