

*Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Commissioner for Railways v. Toohey, from the Supreme Court of New South Wales, delivered 12th July 1884.*

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Present :

LORD WATSON.

SIR BARNES PEACOCK.

SIR ROBERT P. COLLIER.

SIR RICHARD COUCH.

This appeal is in a suit brought by the Respondent, as administratrix of Michael Toohey, in the Supreme Court of New South Wales against the Appellant for negligence in driving and managing what is called in the declaration a tram motor, and a train of tram carriages attached thereto, upon and along a public street in the city of Sydney, called Elizabeth Street, and thereby causing the death of Michael Toohey. The Defendant pleaded Not guilty, upon which the Plaintiff took issue. At the trial before Mr. Justice Faucett the jury found a verdict for the Defendant. A rule for a new trial was moved for on the grounds,—1, that the verdict was against evidence and the weight of evidence ; 2, that Mr. Justice Faucett should not have directed the jury that the Defendant had a legal right to run steam motors upon the tramway lines. There is no note in the Record of the summing up to the jury, but it seems to have been admitted that this direction was given. On the argument of the rule, a count was added to

the declaration by leave of the Court, which stated that the Defendant wrongfully drove and caused to be driven along a certain highway in the city of Sydney a certain dangerous machine, to wit, a certain steam motor or engine, and the said Michael Toohey, whilst lawfully using the said highway with his horse and cart, was struck and knocked down by the said steam engine of the Defendant being so driven as aforesaid, and his death was caused as stated in the first count. The Supreme Court, consisting of three Judges, after hearing Counsel, ordered a new trial on both grounds.

The Commissioner for Railways has appealed to Her Majesty in Council on the grounds that the employment of steam as a motive power was not unlawful, and that on the question of negligence the weight of evidence was in his favour. As the former question was the first argued before their Lordships, they will dispose of it first.

The tramroad upon which the steam motor was being driven at the time of the accident was authorized to be constructed by an Act of the Legislature of New South Wales (42 Vict., No. 18), passed in 1879.

By the 3rd section of that Act, the Commissioner of Railways was charged with the construction and completion of this tramroad, and was to have all such powers and authorities created by the Act, 22 Vict., No. 19, as were necessary for fully carrying into effect the purposes of the Act, and then followed a provision similar to that in the 5th section of the Act which follows.

By another Act passed in 1880 (43 Vict., No. 25), and called the "Tramways Extension Act, 1880," the Act of 1879 was repealed. And by the 2nd section it was enacted that tramways for conveying passengers and their luggage and other

goods and merchandise should be constructed as soon as conveniently might be along the several routes set forth in the first and third schedules thereto, as well as along any other route or routes within the city of Sydney and the suburbs thereof which might be approved by the Governor with the advice of the Executive Council. The 5th section is as follows:—

“The Commissioner for Railways shall be charged with the construction, completion, and maintenance of all tramways constructed or maintained under this Act, and shall have power to enforce tolls or charges for the carriage of passengers, luggage, and goods by and along any such tramway, and shall have and may exercise all such powers and authorities created by the Act 22 Vict., No. 19, as are necessary for fully carrying into effect the purposes of this Act, and shall be subject to all the like rules, regulations, liabilities, and obligations in relation thereto as he is subject to in respect of railways by the said Act, so far as the same are applicable to such purposes; and except as herein expressly enacted all other the provisions of the said Act applicable to the construction, completion, maintenance, conduct, and *working* of and to the imposing of tolls or charges for the conveyance of passengers, goods, or chattels, and generally to the regulation of the lines of railway to be constructed thereunder, shall so far as applicable as aforesaid apply to the construction, completion, management, maintenance, conduct, *working*, imposition of charges for and regulation of the tramways to be constructed under this Act.”

Although the words “maintained under this “Act” occur in the early part of this section, the concluding words show that it was intended to apply to the tramways described in the first and third schedules which were to be constructed under that Act. The construction of this 5th

section is not free from difficulty. The words in the latter part, "so far as applicable as afore-said," seem to refer to the previous words "necessary for fully carrying into effect the purposes of this Act." And if it is considered, looking at the second section, that the purposes of the Act were not merely the construction and maintenance of the tramway, but the conveying passengers and their luggage and other goods and merchandise, the latter part of the section may reasonably be construed as applying to the means of traction.

But the section which is applicable to the tramway in Elizabeth Street is the third. That tramway is described in the 2nd schedule, and the 3rd section enacts that the tramway described in the 2nd schedule, and all buildings, offices, and works connected therewith constructed under the authority of the repealed Act, shall be maintained and *worked* by the Commissioner under the authority of that Act, who for that purpose shall and may exercise all the powers and authorities and incur all the obligations respectively conferred and imposed upon him by that Act and the Act incorporated therewith with reference to tramways to be constructed thereunder. The Act incorporated by the 14th section is the 22 Vict., No. 19. Section 100 of that Act makes it lawful for the Commissioner, under and subject to such orders, restrictions, and regulations as shall from time to time be made by the Governor, with the advice of the Executive Council, to use and employ locomotive engines or other moving power, and carriages and waggon to be drawn or propelled thereby, and to carry and convey upon the railways all such passengers and goods as shall be offered for that purpose, and to make such charges in respect thereof as may from time to time be determined upon by the Governor, with the

advice of the Executive Council. And by Section 141 the word "railway" shall be construed to extend to any tramway constructed or worked under the provisions of the Act. Their Lordships think there can be no doubt that by locomotive engines in this Act engines worked by steam were intended; and with reference to their use on tramways, it is not unimportant that Section 115 gives to the Commissioner, subject to the approval of the Governor and Executive Council, power to make regulations for, among other purposes, regulating the mode by which and the speed at which carriages using the railways are to be moved or propelled. In their Lordships' opinion, the provision in the 3rd section of the Tramways Extension Act, 1880, that for the purpose of working the tramway described in the 2nd schedule the Commissioner should and might exercise all the powers and authorities conferred upon him by the 22 Vict., No. 19, with reference to tramways to be constructed under it, made it lawful for him to use the steam motor upon the tramway in Elizabeth Street. In the order of the Supreme Court for the new trial, the direction is stated generally "that the Defendant had a legal right to run "steam motors upon the tramway lines," and it would seem from the reasons of the Judges that it was thought necessary to decide the question as to the tramways in the 1st and 3rd schedules as well as the 2nd. If, however, the direction is right as to the tramway in question in this action, the verdict cannot be set aside for misdirection. It is not necessary for their Lordships to come to any decision as to the use of steam motors upon the other tramways, but they may say they think the 5th section, though the construction of it may not be free from doubt, is sufficient to make the use of them legal.

Although the use of the steam motor upon the

tramway was lawful, the Commissioner would be liable for an injury caused by the negligent use of it, and their Lordships agree with the Supreme Court in thinking that the verdict as to this was against the weight of the evidence.

There were for the Plaintiff three witnesses who saw the accident, and had a full opportunity of observing what happened.

The deceased was in a cart laden with sewerage, sitting on the right-hand side of it. He had to cross Elizabeth Street, and, in consequence of the tramway being under repair, and the street blocked, he had to go some 20 or 30 yards along the line. The motor was coming in the opposite direction, and the cart could have been seen by the man in it from some distance, and in time to have stopped before reaching the cart. He did not do so, but went on, and struck the cart, the deceased being thrown out. One of the witnesses, a policeman, who was walking in Elizabeth Street towards the cart, the motor being then behind him, said he heard Toohey and other men shouting to warn the motor, but it did not appear to pull up.

For the Defendant were called the driver, conductor, and fireman of the motor. The first said Toohey's cart had got perfectly clear of the tramway, and was about two feet clear when they were within 12 or 13 yards of him, and the cause of their striking him would be his pulling the off rein or the horse shying, which is only conjecture. The cart being two feet clear of the tramway is not consistent with Toohey and the men shouting to give warning, and is opposed to the evidence of the Plaintiff's witnesses, who were better able to observe where it was. The conductor said he observed a slackening of speed, whilst the fireman said he did not observe any,-- he was too busily engaged. It is possible there was some slackening of speed just at the time of

the accident, as they were only a few yards from the stopping place, but it was not in time or sufficient to prevent the striking the cart. It was argued that the jury were warranted in believing the driver, but the weight of evidence was greatly in the Plaintiff's favour, and there was no apparent reason for discrediting her witnesses.

The Appellant has failed to show that the order for a new trial ought to be reversed, and their Lordships will humbly advise Her Majesty that it should be amended by omitting the second ground. The costs of the appeal will be paid by the Appellant, as the order is fully supported by the first ground on which it was granted.

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