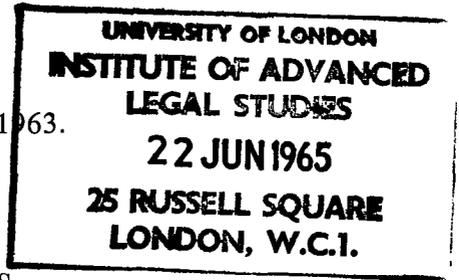


9,1964



No. 41 of 1963.

In The Privy Council

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES

78543

BETWEEN

THE COMMISSIONER FOR RAILWAYS -

Appellant

AND

FRANCIS JOHN QUINLAN -

Respondent

CASE FOR THE RESPONDENT

10

RECORD:

1. This is an appeal by leave of the Supreme Court of New South Wales from an order of that Court (Herron, C.J., McClemens and Wallace, J.J.) made the 23rd day of November, 1962. p. 164.

That the order dismissed the appeal of the Appellant against a verdict and judgement in the sum of £3,250 obtained by the Respondent on the 27th day of November, 1961. p. 162.

2. The Respondent (the Plaintiff in the action) claimed damages in respect of injury sustained by him on the 5th November, 1956, when a truck driven by him came into collision with a railway engine at a level crossing near Carlingford, New South Wales, known as Walters' Crossing. The Plaintiff alleged that the Appellant (Defendant) was negligent in and about the care, control and management of the train and in and about the care, control and management of Walters' Crossing and in and about failing to take reasonable and proper steps to secure the safety of persons using the said crossing. p. 1.

3. The Defendant denied negligence and pleaded a number of statutory defences, none of which are relevant to the question for determination of this Appeal. p. 2.

4. Walters' Crossing was at all material times an accommodation crossing, originally provided for by Section 7 of Simpson's Railway Act of 1883. In about 1900, the line running from Carlingford to Clyde, including Walters' Crossing, became part of the New South Wales State Railway system. p. 2.

RECORD: 5. The Commissioner for Railways, as at 5th January 1956 and for many years prior thereto, was charged with the duty of administering and maintaining the railway system of the State of New South Wales.

p. 25,
ll. 19-20.
p. 78, l. 25.
p. 105, l. 8.
p. 26,

6. About 30 yards from Walters' Crossing on the eastern side was a new housing estate in the course of construction for the Housing Commission of New South Wales. As at the 1st December 1955 the Housing Commission had let contracts for the erection of 212 cottages on the eastern side of the railway between Carlingford Station and Telopea Station. The distance between Carlingford Station and Telopea Station was 6 chains and the distance between Walters' Crossing and Telopea Station a quarter of a mile. 10

At the time of the accident there were 17 cottages under construction in the immediate vicinity of Walters' Crossing on the eastern side.

ll. 1-4.
p. 6,
ll. 18-22.
p. 104,
l. 30.
p. 16,
ll. 40-44.

7. About 50 yards from Walters' Crossing on the Carlingford side (that is the plaintiff's left hand side as he faces east entering Walters' Crossing) there was a curve in the railway line to the left described as a 12 chain curve and the vision both for the driver of the locomotive and the Plaintiff was very restricted and quite apart from the curve itself there were a number of trees between the crossing and the curve which made it impossible for the Plaintiff to see the train before it rounded the curve, as well as for the train crew to see the Plaintiff in his lorry. 20

The Plaintiff's Case was that no whistle was sounded.

p. 93, l. 17.
p. 89,
ll. 35-36,
l. 13, l. 18.
p. 90, l. 30.
p. 94,
ll. 16-18.

8. The Defendant's Witnesses gave inconsistent evidence in respect of the sounding of the locomotive's whistle, viz. that the locomotive's whistle was sounded as it left Carlingford Station and again when it was about half a mile from Telopea Station. The driver of the locomotive, Mr. Gardiner, gave evidence that on both occasions the whistle was a short blast whereas Mr. Chowstow the fireman gave evidence that on each occasion it was a long blast and that the second one was something in the order of four seconds. The driver Gardiner admitted in cross examination that the whistle blown half a mile from Telopea Station was intended to warn people in the vicinity 30 of Telopea Station where a pedestrian crossing existed. Mr. Gardiner further agreed that this whistle would not have helped avert a collision at Walters' Crossing.

p. 97, l. 37.
p. 98,
ll. 8-9.

9. The locomotive was travelling on a down grade from Carlingford to Walters' Crossing and the steam was shut off and the train was travelling silently on the line.

p. 87,
ll. 19-20.
p. 97,
l. 26-30.
p. 74,

10. Mr. Gardiner's evidence was that as soon as he saw the truck on the crossing he took every measure to bring the train to a halt but was unable to stop it before the collision occurred. He said that he saw the truck on the crossing as soon as the locomotive got into the curve. Train was 40 brought to a stop 190 yards from the crossing with the leading wheels off the line.

11. The surface at Walters' Crossing between the railway lines consisted of loose sleepers. On either side of the crossing there was a gate and on each side of the crossing there was a notice "Beware of Trains". There was no notice prohibiting the use of the crossing or informing the public that it was a private or accommodation crossing.

RECORD:
 ll. 7, 8.
 p. 77,
 ll. 19-25.
 p. 17, l. 13.
 p. 5, l. 18.

12. The Plaintiff's evidence was that he had been across the crossing on one previous occasion and that on the occasion the gates on both sides were open and that on the morning of the 5th January, 1956 he was approaching Walters' Crossing from the western side along Adderton Road at about 5.20 a.m. Adderton Road runs adjacent to the railway line for some distance on the western side. The Plaintiff said that he travelled in a northerly direction in Adderton Road and very slowly approached the crossing. When the bonnet of the truck was level with the gates he put the truck in low gear, hesitated and looked to the left and to the right. There is some evidence that he actually stopped. He said "I looked to the left and to the right and I paused and listened as you have a very dim view on the left hand side". The Plaintiff swears that he did not hear any whistle blow or any noise associated with the running of the train and that there was no train in sight. The Plaintiff having looked and listened and seen no train approaching proceeded to cross the railway line at Walters' Crossing and when he was about half way across the train struck the truck and the Plaintiff was thrown to the ground and sustained injuries. The Plaintiff's evidence was that once he entered on to the crossing that it was impossible to get clear of the line in the event of a train coming around the curve whilst he was within the crossing.

p. 4, l. 1.

p. 12, l. 34.

p. 5,
 ll. 6-10.

p. 17, l. 11.

p. 6, l. 24.

13. The evidence disclosed that the crossing was being used at material times by trucks delivering materials to cottages in the course of construction in the immediate vicinity of Walters' Crossing on the eastern side and that it was being used by workmen engaged on the said cottages.

p. 27,
 ll. 37-40.
 p. 36,
 l. 112.
 p. 45,
 ll. 1-19.

14. On the 1st December 1955, the Housing Commission of New South Wales had written a letter to the Commissioner of Railways, the first two paragraphs of which being the only parts admitted, are in the following terms:—

p. 59,
 l. 29-39-40.

"The Commission has let contracts for the erection of 212 cottages on the eastern side of the railway between Telopea and Carlingford Stations as part of this project. These cottages will be completed progressively between February and June next.

p. 78,
 l. 25.

There are two level crossings in the vicinity of Telopea Station and these are at present being used by builders, contractors and suppliers."

No reply to this was received until after the Plaintiff's accident.

RECORD: In addition on a pole just outside the railway property on the eastern side was a fibro sign pointing across to the eastern side with the words "Stewart's Job" written thereon. Trains used the line between 5-17 a.m. and midnight each day, employees of the Defendant made regular inspections of the ^{main} way.

p. 149. 15. On the 6th January, 1956, the gates of Walters' Crossing were padlocked, so as to prevent further use of crossing by the public.

11. 9-11. 16. At the hearing before Mr. Justice Richardson and a Jury of four the Appellant contended to Jury that there was no negligence but did not ask Jury to direct a verdict in its favour. 10

p. 135-6. 17. The judge directed the Jury that the Plaintiff was as a matter of Law to be treated as a trespasser and duty owing to him was that of reasonable care bearing in mind the proved circumstances of the accident, the proved user of the crossing and fact that the Plaintiff was a trespasser.

18. In the Full Court of the Supreme Court of New South Wales the appellant made three (3) broad submissions. Firstly that as a matter of Law the appellant was entitled to a verdict as there was no evidence of negligence and no breach. Secondly in the alternative that his Honour, the Trial Judge, made errors in admitting certain evidence and in directing the Jury and that a new trial should be ordered. Thirdly Evidence for contributory Negligence 20 was such as to entitle Appellant to verdict by direction of Jury. Appellant contended to (1) That crossing was accommodation crossing. Respondent was a trespasser thereon that only duty owed by ^{it} depended upon the existence of relationship arising from occupation of premises by the Appellant that Respondent could not complain of condition of premises as he was a trespasser. *Edwards v. R., Exec.*, 1952 A.C. 737.

19. These were rejected and the Respondent maintains that the judgement of the Full Court of the Supreme Court of New South Wales was correct.

20. The Respondent contended that on the evidence having particular 30 regard to (a) the physical features of Walters' Crossing (b) the curve to the left in the railway line 50 yards from the crossing, (c) the notices at the crossing and (d) the evidence of user of the crossing. The appellant owed to ~~Respondent~~ a duty to the Respondent not withstanding that he entered the crossing as a trespasser not depending on relationship arising from the occupancy but a general duty to take reasonable care for the respondent's safety in the circumstances and that that duty had been breached by the appellant's failure to warn the respondent by whistling or by other means of the presence of the train.

Thompson v. Bankstown Council 87 C.L.R. 619; *Rich v. The Commissioner for Railways* 101 C.L.R. 135; *Cardy v. The Commissioner for Railways* 104 C.L.R. 274; *Lloyds Bank v. The Railway Executive* 1952 A.E.R. 1.; *Smith v. London Midland and Scottish Railway Co., Ltd.*, 1948 Sessions Cases 125; *Knight v. The Great Western Railway Co.*, 1943 1 K.B. 105.

SUBMISSIONS

The Respondent humbly submits that the decision of the Full Court of the Supreme Court of New South Wales was correct and should be approved and that this appeal should be dismissed for the following, (amongst others)

REASONS

For the following reasons: —

- (1) Because there was sufficient evidence to support a finding by the Jury that the Defendant was guilty of breach of the legal duty to the Plaintiff.
- (2) That the test of liability was correctly stated by the Full Court in *Commissioner for Railways v. Quinlan*, 1963, N.S.W. R. 1.
- (3) It was open to the Jury to find for the Respondent on the issue of contributory negligence.
- (4) There was no error in the part of the Trial Judge in admitting or rejecting evidence or in his directions to the Jury.
- (5) The Full Court was right.

MARCEL E. PILE.

Counsel for Respondent.

In The Privy Council

On Appeal from the Supreme Court of New South Wales

BETWEEN

FRANCIS JOHN QUINLAN

(Plaintiff) Respondent

AND

THE COMMISSIONER FOR RAILWAYS

(Defendant) Appellant

Case for the Respondent
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