In The Privy Council

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES

BETWEEN

THE COMMISSIONER FOR RAILWAYS ... ... *Appellant*

AND

PATRICIA VERA McDERMOTT ... ... *Respondent*

RECORD OF PROCEEDINGS

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In The Priy Council 24 OF 1965

ON APPEAL from the Supreme Court of New South Wales in Action No. 13250 of 1959

BETWEEN

THE COMMISSIONER FOR RAILWAYS .. .. (*Defendant*) *Appellant*

AND

PATRICIA VERA McDERMOTT .. .. (*Plaintiff*) *Respondent*

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1	Writ of Summons	26th October, 1959.
2	Appearance	13th November, 1959.
3	Particulars of Order XIII Rule 15	4th November, 1963.
4	Notice of Change of Solicitor	4th May, 1964.
5	Order extending time for filing Appeal Books and for Plaintiff's Exhibits to be filed separately	25th May, 1964.
6	Notice of Motion by Defendant for Conditional Leave to Appeal to Her Majesty in Council	11th December, 1964.
7	Affidavit of Howard Kenneth Kershaw	11th December, 1964.
8	Rule of the Full Court of Supreme Court of N.S.W. Granting Conditional Leave to Appeal	16th December, 1964.
9	Certificate of Prothonotary of Supreme Court of N.S.W. of Settlement of Index and Fulfilment of Conditions	17th February, 1965.
10	Plaintiff's Exhibit A1-A5 (photographs of her stumps)	
11	Plaintiff's Exhibit D (shoes found at scene of accident)	
12	Plaintiff's Exhibit J1-J2. (Reproduction of Articles written by Plaintiff)	
13	Notice of Motion by Defendant for Final Leave to Appeal to Her Majesty in Council	

No. 1

ISSUES FOR TRIAL

Writ issued 26th October, 1959.

Appearance Entered 13th November, 1959.

Declaration dated 17th March, 1960.

In the Supreme Court of New South Wales.

No. 1

Issues for Trial.

SYDNEY TO WIT

PATRICIA VERA McDERMOTT by KENNETH RAYMOND JONES her Attorney sues the defendant for that at the time of the grievances hereinafter stated and at all material times the plaintiff was lawfully crossing certain railway lines owned and occupied by the defendant and the defendant by itself its servants and agents so carelessly negligently and wrongfully conducted itself in and about the construction maintenance and lighting of the said railway lines, the permanent way, the entrances thereto and the crossing thereof and in and about the care management control maintenance equipment driving and operation of a certain train and in the failure properly to warn the plaintiff that the permanent way and the crossing had become and were in a dangerous condition whereupon the plaintiff whilst crossing the lines as aforesaid tripped and fell and was struck by the train as aforesaid and suffered wounds and injuries and became sick and ill for a long time and both the plaintiff's feet were severed and the plaintiff was permanently disabled and she was put to the expense of obtaining ambulance hospital and medical attention and surgical and chemist's supplies and she was otherwise greatly damnified.

2. And for a second count the plaintiff sues the defendant as aforesaid for that the defendant maintained and controlled a certain railway crossing and the plaintiff entered upon the said crossing at the invitation of the defendant and the said crossing was in a dangerous condition which condition was known to the defendant or ought to have been known by him and the defendant failed to warn the plaintiff of the danger whereupon the plaintiff tripped and fell and suffered the damages set forth in the first count hereof.

In the Supreme Court of New South Wales.

No. 1

Issues for Trial.

Pleas dated 25th May, 1960.

McDERMOTT
v.
THE COMMISSIONER FOR RAILWAYS

The Defendant by Sydney Burke its Solicitor says that it is not guilty.

Government Railways Act, 1912 as amended : Public Act : the whole Act and particularly Sections 143 and 144.

Ministry of Transport Act, 1932, as amended : Public Act : the whole Act and particularly Sections 16 and 17.

Transport (Division of Functions) Act, 1932, as amended: Public Act : the whole Act and particularly Sections 27 and 28.

2. And for a second plea the defendant as to so much of the declarations alleges that at the time of the grievances thereinafter stated and at all material times the plaintiff was lawfully crossing certain railway lines owned and occupied by the defendant denies the said allegations and each of them.

3. And for a third plea the defendant as to so much of the second count of the plaintiff's declaration as alleges that the defendant maintained and controlled a certain railway crossing and the plaintiff entered upon the said crossing at the invitation of the defendant and the said crossing was in a dangerous condition which condition was known to the defendant or ought to have been known by him denies the said allegations and each of them.

Replication dated : 19th June, 1960.

McDERMOTT
v.
THE COMMISSIONER FOR RAILWAYS

The Plaintiff joins issue with the defendant on the Defendant's Pleas herein.

Dated this 19th day of July, 1960.

(Sgd.) K. R. Jones,
Attorney for Plaintiff.

No. 2

PROCEEDINGS BEFORE HIS HONOUR MR. JUSTICE CLANCY AND A JURY OF FOUR: TRANSCRIPT OF EVIDENCE OF WITNESS

Plaintiff's Evidence

Evidence of Olaf McClure Spence

In the Supreme Court of New South Wales.

Plaintiff's evidence.

O. M. Spence.

Examination.

TO Mr. WATSON: My full name is Olaf McClure Spence and I am a legally qualified medical practitioner residing and practising my profession at 1 Mann Street, Gosford.

Q. You hold the usual degrees at Sydney University and you are a Fellow of the Royal College of Surgeons and a Fellow of the Royal Australasian College of Surgeons? A. Yes.

Q. Are you an Honorary consultant to Gosford District Hospital? A. I am.

Q. Was the plaintiff, Mrs. McDermott, a patient of yours before her accident in 1959? A. No.

Q. When did you first see her? A. On the day of the accident.

Q. It was actually the night of the accident, was it not? A. Yes.

Q. That was in the Gosford Hospital? A. Yes, in Casualty.

Q. What state was she in when you first saw her? A. She was in a state of severe shock, she was semi-conscious and suffering from multiple injuries and traumatic amputation of both lower limbs.

Q. That means the amputation was caused by an accident? A. Yes.

Q. Was she able to talk to you? A. She was barely aware of her surroundings.

Q. But she was able to make one or two comments, was she? A. Yes.

Q. You no doubt looked at her amputations? A. Yes.

Q. We will be told there was very little bleeding at the site of the accident when people got there. Is that consistent from what you saw of her amputations? A. Yes.

Q. What would be the reason for that? A. A crush injury causing an amputation usually does not bleed very much.

Q. You examined the amputations. Where did you find the legs were actually amputated? A. They were amputated at about the junction of the middle and lower thirds of the legs, below the knees.

Q. Did you notice any cuts on her forehead? A. Yes, there was a cut on the right forehead. She also had a fractured collarbone.

Q. Did that cut on the forehead require stitching? A. Yes.

Q. Would you be able to say at this stage how many sutures were required? A. No, I could not remember.

Q. She had a fractured collarbone? A. Yes.

Q. Was the fracture of the collarbone consistent with a person suffering a fall? A. Yes.

Q. Was it more consistent with that than with being hit by a train at speed? (Objected to; question allowed, based on the examination of the wound by the witness.)

Q. Was the fracture of the collarbone more consistent with a fall than with the injury being caused by a train travelling at high speed? A. Yes.

Q. Could a person of Mrs. McDermott's age and weight break her collarbone by a fall? A. Yes.

Q. Did you notice anything later, during the treatment of her, about the skull or forehead? A. The laceration was a fairly severe one and she developed a lump at the site. I considered that there was a break in the outer surface of the skull in that area.

Q. There was some kind of superficial fracture of the outer surface of the skull? A. Yes.

Q. Could that be caused in the same kind of fall which achieved the break of the collarbone? A. Yes.

HIS HONOUR: Q. What do you describe it as? A. A fracture of the outer layer of the skull.

Q. Is that a bony substance? A. Yes.

Mr. WATSON: Q. That would require a fairly heavy impact, would it not? A. A moderately heavy impact.

CROSS-EXAMINED

Mr. JENKINS: Q: In reference to the fractured collarbone, assume for the purpose of this question that before the accident the plaintiff was lying on the railway line 12 feet north of a pedestrian crossing and that she was lying with her legs across one rail of the railway line and that the rest of her body was in between that rail and the other rail of that particular railway line, and that a train went across the top of her and severed her legs. That being so, you would agree, would you not, that the train striking her legs—it is quite conceivable, is it not, that from the passage of the train across the top of her, her body would be moved? A. Yes.

Q. And that the collarbone would thus easily be broken? A. Yes.

Q. And, also, one could have this superficial fracture which you spoke about? A. Yes.

RE-EXAMINED

Mr. WATSON: Q. Assuming a further ingredient that was put to you, that is at the time the train approached this woman lying on the line she was lying face downwards, would you expect the fracture of the collarbone and the superficial fracture of the skull to be caused in those circumstances, or would it be more likely to occur in the original fall? (Objected to; allowed). A. I would think it would be more likely in a direct fall.

FURTHER CROSS-EXAMINED

Mr. JENKINS: Q. If a person is run over, as I put to you, by a train and buffeted by the train and subsequently immediately after that buffeting is manhandled across the line, away from the line, in other words, rolled over away from the line, that could easily cause a fracture of the collarbone and that superficial fracture of the head, could it not? A. I think she would need to be dropped to do that.

Q. But if she were rolled over in a moment of panic by someone, away from the line, would you not agree with that? A. I think it would have to be a very vigorous pushing.

Q. This is the first occasion, is it not, in the trials of this action, you have suggested there was a fracture of the skull, you have said "a laceration" before?

HIS HONOUR: No, at p. 84 there appears "superficial skull fracture".

Q. Is it a fracture that does not go right through? A. Yes, it is, Your Honour.

(Witness retired and excused.)

Evidence of Ian David Thompson

EXAMINED

TO Mr. WATSON: My full name is Ian David Thompson, and I reside at Newtown Road, Strathfield.

Q. You are a registered pharmacist by occupation. A. Yes.

Q. Previously were you the proprietor of a pharmacy and shop at Woy Woy? A. Yes.

Q. And you were the proprietor of that shop on 10th June, 1959? A. Yes.

Q. Do you recall that now as the day on which Mrs. McDermott suffered an accident? A. Yes.

Q. Did you know Mrs. McDermott prior to this accident? A. Oh yes, she was a customer of mine.

In the Supreme Court of New South Wales.

Plaintiff's evidence.

I. D. Thompson.

Examination.

Cross-examination.

Q. Did you see her on the day of the accident, at any time at all? A. She was in my shop in the afternoon of that day.

Q. Can you tell us how late in the afternoon she was in your shop? A. It was approximately 5.30.

Q. Did she obtain a prescription from you? A. Yes.

Q. Can you tell us what that prescription was? A. Nembutal capsules.

Q. I show you a book. Would you mark with a green cross the prescription which you gave Mrs. McDermott? A. Yes (marking book).

Q. Whose prescription was that? A. It was Dr. Little's prescription.

Q. To your knowledge is Dr. Little now deceased? A. Yes.

(Photostatic copy of prescription marked in prescription book with a green cross, dated Wednesday, 10th June, 1959, tendered and marked Exh. G.)

Q. How long was Mrs. McDermott in your shop that afternoon? A. She was there for no more than five or ten minutes.

Q. Were you serving other customers at the time? A. At that time of the day, yes.

Q. What time did you close your shop? A. At six.

Q. You have already told us she called there about 5.30? A. Yes.

Q. At what time would she have left, then? A. At twenty to or a quarter to six.

Q. Your book discloses only one other prescription filled that day? A. That is right.

CROSS-EXAMINED

Mr. JENKIN: Q. You enter up that book, do you not, when you dispense a prescription? A. Yes.

Q. That book, of itself, gives you no idea when the prescription is picked up by a customer, does it? A. No.

Q. You confine yourself, do you not, as to the time when Mrs. McDermott was in the shop because of the time in that book, that it was the second-last entry in the book? A. No, I recollected the staff had left at this time when she was in.

Q. Well, you only have an idea about it, you are not sure that the staff had gone? A. I feel reasonably certain.

Q. You said on a previous occasion you "had an idea" you were there on your own. I put to you, you are not quite sure about it? A. No, that could be true.

Q. And she could have been in at five o'clock, could she not, you will not deny that, will you? A. No, it is not impossible.

Q. You were not asked to recall when she was in the shop, were you, until almost a year after the day of the accident; that is right, is it not? A. Yes, I think it was about that time.

Q. And in those circumstances, it is extremely difficult for you to have to throw your mind back a year and say exactly what time a person was in your shop, is it not, you would agree with that, would you not? A. Yes.

Q. That being so, she could have been there, you would agree would you not, shortly before five o'clock? A. It would be possible.

Q. The prescription was nembutal? A. Yes.

Q. It was not a bottle containing liquid? A. No, they are a capsule.

Q. How big? A. Only small, there were only 25 of them.

Q. Is there a signature obtained for nembutal? A. This was a National Health prescription and they must receipt the back of the prescription.

Q. When do they receipt it? A. When they take delivery of the prescription.

Q. Where is the receipt for it, then? A. The Health Department have that. They do not pay me unless it has a receipt on the prescription.

Q. She did not come back to your shop on two occasions; she did not come back again, having been in once, did she? A. Not to my memory.

Q. Just cast your mind back. Did she come back on a second occasion after 5 o'clock, to get a bottle with some liquid in it? A. I could not say.

Q. When she was in your shop, did she have two bottles with her? A. Did she get two?

Q. Did she have any bottles with her, or any parcels with her that looked like bottles? A. She may have, I would not know.

RE-EXAMINED

Mr. WATSON: Q. Did Mrs. McDermott sign a receipt on this occasion? A. Yes, I think so.

Q. You say she was there, to the best of your recollection, between 5.30 and 5.45. When were you first aware she had suffered this serious accident? A. Later that night.

Q. When you became aware she suffered this serious accident, did you at that stage in your mind recall that she had been in your shop that afternoon? A. Oh yes, I realised straight away.

Q. Does that assist you in associating the later events? A. Yes.

Q. You were asked by my friend about your saying on a previous occasion that the staff had gone. What time did the staff usually depart? A. At 5.20.

In the Supreme Court of New South Wales.

Plaintiff's evidence.

I. D. Thompson.

Re-examination.

P. V. McDermott.

Examination.

Q. What staff did you carry at that time? A. My wife and two assistants, I think.

Q. Do you now have any recollection of what was going on in that shop that night after the staff had gone, have you any recollection whether Mrs. McDermott or anybody else was there? A. Usually at that time people were rushing in from the train and rushing out to catch their bus so there is usually some sort of activity.

Q. And that was the activity that night and, to your recollection, you were there on your own at that time when she came in? A. Yes.

(Witness retired and excused.)

Evidence of Patricia Vera McDermott

EXAMINED

TO Mr. WATSON: My full name is Patricia Vera McDermott, I live at 29 Old Gosford Road, Koolewong.

Q. Is Old Gosford Road a short dirt road on the western side of the railway line just near Koolewong station? A. Yes.

Q. How long had you lived there before you had this accident in 1959, can you tell us? A. I don't know.

Q. Before the accident you lived there with your husband and a friend of both of you, a Mr. Thompson, is that right? A. Yes.

Q. Before the accident, who did the housework in the home? A. I did.

Q. Was it a small home or a large home? A. It was a large home.

Q. Were you interested in the garden? A. Yes, very much.

Q. What kind of gardening did you do? A. I was interested in shrubs and selling shrubs. I had to learn about them.

Q. Did you learn the Latin names, and things like that, about shrubs? A. Yes.

Q. Did you have a big garden or a small garden? A. Oh, a large garden.

Q. Did you do the gardening yourself? A. I did it all.

Q. Did you drive a car before the accident? A. I believe so.

Q. You have no memory now of driving the car? A. No, I only saw it in the yard.

Q. Did you play the piano? A. Yes, I have always played the piano.

Q. Did you have any interest in dramatics? A. Yes, at one stage I belonged to the New Theatre.

Q. So you were interested in amateur dramatics? A. I was.

Q. Before the accident, do you recall getting around in the car at all? A. No, not for a long time. I remember seven weeks before.

Q. What is the last memory you have before the accident? A. The Kempsey Show.

Q. And, from what you have been told, that was seven weeks before? A. Yes.

Q. Before the Kempsey Show, can you remember now from your own memory, not from what you have been told, whether you drove around in the car? A. Well, I believe I did because I used to go out selling, but I cannot bring it into myself; but I have books.

Q. Do you remember doing a little bit of writing, or journalism, before the accident? A. Yes.

Q. Did you write some articles? A. Yes.

Q. Can you remember those; or is that from what you have been told? A. No, I have seen them, that is all.

Q. You told us you remembered about the Kempsey Show. What was your interest in the show? A. I was very interested in riding.

Q. That is, riding horses? A. Yes, hacking.

Q. That is the ponies, and that type of thing? A. Yes.

Q. Do you remember going to the Show to look at the horses? A. Yes.

Q. You made quite a holiday trip of that occasion? A. But I don't remember going, I just remember being there.

Q. Between the time of being at the Kempsey Show and the accident, which we were told was on 10th June, 1959, do you remember anything at all? A. No.

Q. You cannot recall anything in that period? A. I have had to ask what I was doing.

Q. I do not want you to tell us anything that anybody else has told you, only what you yourself can remember from your own mind. A. No, I do not remember.

Q. Coming to the accident itself, can you remember anything at all that night? A. Nor that day.

Q. Have you any memory of any lights or noises? A. Only the rockets and bursting lights . . .

Q. Have you any memory of any noises? A. . . . and they were coloured. Yes, I do think I heard the noise of a trailer but it could have been a noise in my head.

Q. That is all you can tell us about that particular time? A. That is all I can tell you.

In the Supreme Court of New South Wales.

Plaintiff's evidence.

P. V. McDermott.

Examination.

Q. When is your first memory, next? A. In hospital.

Q. What do you remember about the hospital? A. I saw the parish Priest.

Q. Did you recognise him as being your Priest, or just a Priest? A. Oh no, later on.

Q. But, your first memory? A. No, I just saw a Priest.

Q. When did you get a full memory of what was going on around you, were you still in hospital when you recognised where you were? A. Things used to swell up and go back. I think I made a pretty good battle for three days there.

Q. Well, you remember being in hospital? A. Yes.

Q. Do you remember being treated in hospital for a month or so? A. Yes.

Q. Then you came home. I think you were discharged from hospital on 8th July, 1959 but do not worry about the date. You came home. Did you stay in bed or did you try to get round the house? A. Oh no, I would not stay in bed, I got a pair of cushions and crawled round, I tried to do the housework.

Q. And you crawled around on your stumps, on the cushions? A. Yes.

Q. Did you have a wheelchair? A. No.

Q. You had a wheelchair at the hospital, did you not? A. No, I did not use it.

Q. Well, you got round on the cushions? A. Yes.

Q. While you were getting round on the cushions, I think your mother was there, helping out? A. Yes.

Q. Were you able to do much yourself, while you were in that condition? A. I could not do the cooking but I could do the cupboards and low-down things, that I cannot do now.

Q. Then, about five or six weeks later, did you get a pair of artificial limbs? A. Yes.

Q. They were fitted to you and I think you were able to get round on them almost the same day, were you not? A. Yes.

Q. To put on those limbs, first and foremost you have to put a series of socks on? A. I have to.

Q. How many pairs of socks would you have to put on your stumps? A. Three pairs, that is six socks.

Q. Then you have to strap on the harness? A. There is a leather cuff on the thigh, and a belt around the waist.

Q. How long would it take to put on the limbs? A. It would take 20 minutes to get into those limbs.

Q. Did you notice any trouble, for example, in the summer of 1959-1960 during the heat? A. Yes, I am unable to stand them on because of the perspiration and swelling of the legs.

Q. Have you had difficulty with ulcers in the legs? A. Yes, and also a sinus which Dr. Spence let out.

Q. When you had ulceration of the stumps, how long did you keep the legs off? A. Seven days last Christmas.

Q. Was that the last long period you have had with the legs off? A. Yes.

Q. Did you have to have them off for previous periods? A. Yes, different periods; it all depends on the heat.

Q. During the wintertime the stumps remained reasonably clean, did they? A. Yes, I do not perspire so much.

Q. A little while ago you got yourself another pair of artificial limbs? A. Yes.

Q. Since you have been getting round with these limbs, what work can you do around the house? A. I can do the cooking and I can write down what is missing out of the cupboard and make a list.

Q. You can prepare the shopping list? Can you make the beds? A. No, I cannot make the beds, there are too many movements.

Q. Can you do any sweeping? A. No, Mr. Thompson does the sweeping. I am inclined to over-balance without the sticks. I must have something.

Q. How do you manage, bathing? A. Well, we have created a gradient sort of stool to go up, and another stool to fit into the bath. I get from one onto the other, and down into the bath.

Q. You pull yourself up the gradient stool and on to the stool in the bath? A. Yes.

Q. You cannot take a shower but you have to take a bath? A. Yes.

Q. What about dressing and undressing, how do you manage that? A. Well, I manage it quite well. I have to get down on my knees to put the nether garments on but the rest is all standing up.

Q. Have you been able to do any gardening since the accident? A. No, I cannot kneel, or if I kneel I have to have my boots off but then people come and I am embarrassed.

Q. Have you been able to drive a car at all since the accident? A. No.

Q. You still live at Koolewong. How do you get out? A. I get a taxi to go out or I go out per favor of people.

Q. Are you able to get out on your own at all? A. No, I would not attempt it.

In the Supreme Court of New South Wales.

Plaintiff's evidence.

P. V. McDermott.

Examination.

Q. You could not walk down to the station with those legs? A. Down to Koolewong station?

Q. Yes. A. Yes, I have walked down to there.

Q. Can you get on the train? A. Yes, now they have built the platform up.

Q. The platforms have been changed, with the electric trains running there? A. Yes.

Q. Can you do this without assistance? A. Yes, I do it but it is difficult.

Q. How many times over the last six months would you have caught a train at Koolewong station? A. Twice.

Q. On other occasions you go out by car, either by taxi or with the assistance of friends? A. Yes.

Q. How far can you walk without undue fatigue on these limbs? A. I cannot walk very far because my back gives out.

Q. Have you been able to get to the theatre or to do any of those other activities since the accident? A. No, I have never been out at night for five years.

Q. Have you been able to resume any of your writing? A. No, just small letters. I get so many letters that I have to reply to.

Q. Do you find you have any difficulty in writing now? A. It takes me a long time to compose or compile anything.

Q. How have you felt in yourself with regard to memory, concentration, and things like that? A. Well, it worries me, I am waiting for something, for it to come back.

Q. You are wating for your memory to come back? A. Yes.

Q. What about in your conversations with people, do you have difficulty with those? A. No, except they say I "hop about a bit".

Q. Do you mean by that, from one subject to another? A. Yes.

Q. You have told doctors, particularly Dr. Fischer and Dr. Basser, as best you could what your symptoms and feelings were? A. I have told them, whenever they have asked me.

Q. Did you suffer any headache after the accident? A. Yes, I get bad heads.

Q. Did you have headaches before, of any consequence? A. I do not think I ever had anything before, I have always been very well. My one month's stay in hospital proves my constitution.

Q. Since you left hospital, have you had headaches? A. Yes.

Q. Do you still get headaches? A. Yes, trying to write gives me headaches.

Q. How do you feel in yourself, do you feel happy or depressed; can you describe how you feel generally? A. I am a very optimistic person and I think——

Q. Do you get weepy or depressed? A. No, I cannot cry at all.

Q. Do you get any pain in your stumps, aside from the ulcers? A. Yes, I get cramps in the left leg, which they expected to break down.

Q. What about the parts of the lower limbs that are not there, do you get any pains in those? A. Yes, they are always there.

Q. What kind of pain do you get? A. Do you want me to describe phantom feet? First of all, your feet go very cold, that is the onset, and then your toes turn under and you want to scratch underneath your instep, that gets itchy, and your big toe throbs—you have your feet.

Q. You feel your feet? A. Yes, I always feel I have my feet.

Q. You feel the coldness and the throbbing, and all that, in your feet? A. Yes.

Q. Is that a regular thing? A. Yes, most regular.

CROSS-EXAMINED

Mr. JENKINS: Q. You claim that you remember nothing for seven weeks before this accident happened, do you not? A. Yes.

Q. I am suggesting to you that you do remember things happened during that seven weeks? A. Well, perhaps you would clarify that for me.

Q. I will clarify it, firstly in this way. You remember hearing the noise of a trailer or a train just before the accident happened, do you not? A. I said I thought I heard a noise, yes.

Q. Do you remember, you came to the level crossing in a taxi cab at about 5.00 p.m. that night? A. No, I do not remember, I just know that I did.

Q. Do you not remember you came in a taxi cab about 5.00 p.m. that night, and that you had two bottles with you? (Objected to as the witness said she did not remember coming in a taxi that night; question allowed.)

Q. Can you not recollect you met a Mr. Thompson at the crossing on that night, before the accident, at about 5.00 p.m.? A. I remember nothing of that day at all, nothing at all. I have had to ask Mr. Thompson what was I doing.

Q. Do you remember a bottle being smashed at the crossing? A. No.

Q. Do you remember being in the Bayview Hotel? A. No.

Q. Do you remember being in O'Donnell's Hotel? A. No.

In the Supreme Court of New South Wales.

Plaintiff's evidence.

P. V. McDermott.

Cross-examination.

Q. Let us go back prior to the seven weeks. Were you in the habit of resorting to the Bayview Hotel at Woy Woy pretty regularly, and drinking there? (Objected to.) A. No, I would be there on business only.

Q. You would go there on business and, while you were there on business, you would have a drink? A. Well if it was a customer, certainly.

Q. And on occasions, I put to you, you were not only at the Bayview Hotel but you have also gone across to O'Donnell's Hotel, that is the other hotel at Woy Woy? A. Yes.

Q. And on occasions you have been in a state of intoxication? A. I have never been intoxicated in my life.

Q. You have certainly been in the hotels and you have been drinking there? A. What do you call "drinking"; consuming one?

Q. How many drinks have you ever had at an hotel? A. Two, at the most.

Q. Never more than two? A. No, I would never permit myself to be intoxicated.

Q. Have you ever bought a flask of whisky at an hotel, and taken it home? A. No. I would not have to do that, because I do not drink spirits.

Q. To your recollection, you have never bought a bottle of whisky in your life, have you? A. No.

Q. Have you ever drunk to excess in your life? A. I have told you "No".

Q. Do you remember, in 1956 you had an accident on a train? A. Yes, I remember you asking me that the other day.

Q. You were coming home, that is on a Saturday night or early Sunday morning in a train? A. No, I was coming home. I don't know when it was.

Q. I put to you it was on a Saturday night or a Sunday morning? A. No. I had just resigned from the Railways so it would be on the payday of the Railways.

Q. Do you not remember being at the races on a Saturday afternoon? A. No.

Q. Then I put to you, you did fall off a train at Koolewong? A. Yes.

Q. And, I put to you, you were then in a state of intoxication? A. No, I would not admit that.

Q. You had been drinking on the train, had you not? A. I had one beer.

Q. You have brought whisky home, when your mother has been coming, have you not? A. I don't know. I possibly have.

Q. You have carried it yourself? A. If it would fit into my handbag, perhaps.

Q. Of course, you have never carried a bottle of liquor that you could not put in your handbag, is that it? A. No. That is correct.

Q. Of course, you have been over this crossing at night time and in day time hundreds of times before the accident? A. Certainly.

Q. Not only in a car but also walking, that is correct, is it not? A. That is correct.

Q. You knew the crossing to be as it is shown in these photographs which I show you?

(13 photographs tendered together and marked Exhs. B1 to B13)

Q. You knew the crossing was as it is shown in these photographs. Exhs. B, which I show you? A. Where is the crossing, you have given me a photograph of train lines?

Q. Just have a look through the photographs. A. With all due respect to you, I cannot recall how the crossing looked. I have only seen the new crossing.

Q. I am talking about the old one. A. I don't know how it looked.

Q. Do you tell his Honour and the gentlemen of the jury you cannot describe the old crossing at all? A. No, but I believe it was in a bad state.

Q. Although you had been over it hundreds of times, you cannot say what it was like on that day? A. No, I have not any mental picture of it.

Q. And as far as you know, it could have been bitumen or bricks, or anything, the pedestrian crossing; is that right? A. No, it used to rip the mufflers off, it was a rough crossing.

Q. Made out of sleepers? A. Possibly.

Q. Just "possibly", is that it? A. Well, you have sleepers here (referring to Exh. B.).

Q. But I am asking you for your recollection? A. I cannot tell.

Q. You had lived there for many years before the accident? A. Yes, well there was a lot of gravel.

Q. You had lived there for many years before this accident? A. Yes.

Q. And you had been across it, you told me, hundreds of times? A. Yes.

Q. And you cannot say how it was constructed or what it was made of; is that what you say? A. That is what I said. But then, again, with all due respect to you, you have to watch both ways when you are going over, how often would you be looking down to see how the crossing was made?

In the Supreme Court of New South Wales.

Plaintiff's evidence.

P. L. McDermott.

Cross-examination.

Q. I was not asking you that question? Do you tell His Honour and the gentlemen of the jury that, having lived there for many years, you cannot describe how the crossing was constructed, is that so? A. That is true.

Q. You would at least know there were two wicket gates there? A. Yes. I know the gates because I have to open them.

Q. They were pedestrian gates? A. No, they were car gates.

Q. But there were two gates for the pedestrians? A. To go across, yes.

Q. When you would walk across, you would go through the two wicket gates, and walk from one to the other? A. Yes.

Q. And it was your practice, was it not, to walk straight from one wicket gate to the other across the railway lines? A. It could have been. I don't know.

Q. I think you said on a previous occasion that was your practice, did you not? A. I don't know. How long ago did I say that?

Q. What was your practice? A. Probably I did the right thing and went from one wicket gate to the other wicket gate.

Q. Did you walk across the sleepers? A. Yes, you would have to make a turn to walk across the sleepers.

Q. I am putting to you, did you do that? A. I don't know.

Q. So you cannot tell his Honour and the gentlemen of the jury how you used to cross the crossing when you went across there on foot, is that it? A. I would cross it on these wooden things.

Q. So you knew there were wooden things there, did you? A. Well there must have been something there, Mr. Jenkins. All right, well, so there were sleepers there.

Q. And on no prior occasion had you ever stumbled on this crossing? A. Yes, I had fallen.

HIS HONOUR: The matter is a little uncertain to me. I got the impression, Mr. Jenkins, you were suggesting the plaintiff crossed from wicket gate to wicket gate.

Q. Do you remember crossing on the sleepers, or do you not? A. I do not remember but if you had to cross from wicket gate to wicket gate, you would not cross on the sleepers because they are diametrically opposed.

Q. What is your recollection of the method by which you crossed before the accident and up to the time of the Kempsey Show, from which date your memory fails? A. I would use the crossing proper.

Q. What does that mean? A. Whatever was there, sleepers, gravel or whatever it was.

Q. You did not go direct from wicket gate to wicket gate? A. Well you could not, because you would have to get up, then, on the crossing.

Mr. JENKINS: Q. Before this seven-weeks period when you cannot remember anything, could you tell his Honour and the gentlemen of the jury what was your practice when you were going as a pedestrian over the crossing; you would go through a wicket gate, what course would you take over to the other wicket gate? A. Well, I had a car and I would be driving.

Q. But if you went over as a pedestrian, on occasions? A. There would be only one way to go. You would go through the wicket gate, up on the sleepers, cross over, and go through the wicket gate to the shop.

Q. So you know now there were sleepers there? A. Yes, by the picture. (Exh. B.)

Q. Is that all that helps you to remember? A. Yes, because I have not talked about it with anybody.

Q. You gave evidence a few days ago and this question was put to you: "On all other occasions on which you went over, on no prior occasion had you stumbled, had you?" and you answered "Never." A. Oh, we have stumbled but I would not call it "a fall".

Q. But the other day you swore you had never stumbled on a prior occasion? A. I thought you meant a fall. A stumble means to just stumble.

Q. You thought I asked had you fallen to the ground? A. Yes.

Q. So it is true to say you have never fallen? A. No.

Q. But I suppose you must have stumbled many, many times? A. No.

Q. Just once? A. Just once to my knowledge.

Q. When was that? A. I cannot remember.

Q. You must remember if it were only once, I put to you? A. But you are asking me over periods of years.

Q. But did you not say you only stumbled once, I am asking you to tell his Honour and the gentlemen of the jury when it was. A. I could not give a specific date or time.

Q. Would it be a year before the accident? A. It could have, yes.

Q. Or would it be three years? A. It could have been any time, Mr. Jenkins.

Q. Did you not tell me during the other day, in answer to this question : "On all the other occasions on which you went over, on no prior occasion had you stumbled, had you?" did you not answer "Never"? A. Yes.

Q. You said you never stumbled at that crossing? A. Yes, I have stumbled, so have the whole of the residents of Koolewong.

In the Supreme Court of New South Wales.

Plaintiff's evidence.

P. L. McDermott.

Cross-examination.

Q. Just leave them out of it. You say it is true to say you stumbled only once? A. Yes.

Q. You lived on the western side of the line in Old Gosford Road, did you not? A. Yes.

Q. You live in a house which is about 150 yards from the crossing? A. Yes.

Q. And you approach that house from the crossing along a dirt road, that is right, is it not? A. There is a dirt road and a grass footpath.

Q. And you can either walk on the dirt road or the grass footpath? A. That is correct.

Q. I suppose you have walked on the dirt road, have you not? A. Possibly, yes.

Q. "Possibly" only? A. More often I walk up on the grass.

Q. But you have walked on the road, have you not? A. Yes.

Q. And it is full of potholes? A. Yes.

Q. And it has big boulders in it? A. No, there are no big boulders in it.

Q. There are no stones sticking up? A. None at all.

Q. It is absolutely smooth, is it, apart from the potholes? A. That is correct, it is just sand.

Q. Coming to the footpath, there are driveways, to let people take cars into houses? A. There are slopes of driveways.

Q. Sloping driveways, I put to you? A. Yes.

Q. And some of those are two or three feet below the level of the footpath? A. No. You do not understand.

Q. You say "No" to that? A. I do. The begining of the slope would be down on the roadway but it is so high up that where you walk is high.

Q. Have you ever stumbled on the footpath or the roadway? A. No.

Q. Have you ever stumbled before in your life, apart from this once on the crossing? A. Not to my knowledge or recollection.

Q. In the whole of your life, the only time you ever stumbled was once on this crossing, is that right? A. Yes, I think so.

Q. You claim before the accident you were doing some writing? A. That is correct.

Q. Could you inform me of any journal or publication in which any writings which you wrote appeared? A. Yes, a couple appeared in "Reader's Digest"; in the "Evening News."

Q. There were two in the "Reader's Digest". How many appeared in the "Evening News"? A. Oh, two I suppose.

HIS HONOUR: Q. Where is the "Evening News" published? A. In Sydney.

Mr. JENKINS: Q. When was that? A. Don't you know—it is the evening paper; it was.

Q. Was it just before the accident that these were published? A. No.

Q. How long before the accident was it? A. I don't know.

Q. I am putting to you that you could not possibly claim to have any prowess as an author? A. I have not claimed that.

Q. You have not? A. No.

Q. The type of thing you were writing is this. I show you a journal, is that the type of thing? A. No, I have written a couple of short stories in "People".

Q. You claim that is a pretty good effort on your part? A. No, that is a very poor effort.

Q. I thought you said in previous trials "It was a darned good effort."? A. As it is only later——

Q. Is not that the way you described it? A. Yes, I am afraid I was a bit disturbed the other day, for which I apologise.

Q. Let us stop worrying about that. To get a picture of your background, you were doing domestic duties mostly before the accident? A. Yes, and outside selling.

Q. I think at one stage you were working as a barmaid? A. Where at?

Q. I am asking you, were you not working as a barmaid in East Sydney at one stage? A. No, Eastwood Hotel, Mr. Brown.

Q. You were also working casually as a carriage cleaner? A. Yes, I told you that.

Q. And you were selling underwear, and that type of thing? A. Yes, I had always worked.

Q. And in connection with your jobs, you were going to the hotels from time to time, were you not? A. Well, that is where most of your clientele are to be found. Much business is done in hotels.

Q. And that is where you used to do a lot of your business, you used to sell shrubs and underwear? A. I did not sell shrubs in hotels, I did door-to-door knocking and sold them.

Q. But you took orders in hotels? A. No, I would go to collect the money.

Q. On the day of the accident did you see a woman from Hardy's Bay, in an hotel; did you collect any money off a woman from Hardy's Bay? A. I don't know anything about that, nothing at all.

In the Supreme Court of New South Wales.

Plaintiff's evidence.

P. L. McDermott.

Cross-examination.

Q. Did you say in 1962, at a previous trial, this:

"Q. You said you did have a drink at the Bayview Hotel that afternoon? A. I did. I collected some money off a woman at Hardy's Bay. I bought two drinks."

A. Yes, but I was told that.

Q. All right. Now, coming back to your practice, you would go, would you not, to the hotels most days of the week to transact business? A. No, not so.

Q. Well you would go on quite a number of days to the hotels to transact business? A. No, I would be out selling in the country areas. I would be nowhere near the Woy Woy hotels; once a month I would go, possibly.

Q. Only once a month? A. Possibly so, it all depends where my business took me.

Q. But just to get some idea, you would visit the Bayview Hotel no more than once a month? A. No, I cannot confine myself to that statement, it could be incorrect.

Q. Would it be a number of times a month? A. It could possibly be, it all depends how long I was in a district.

Q. You would also go to O'Donnell's Hotel a number of times a month, that is so, is it not? A. Not so much, no.

Q. On this crossing, you now admit there were sleepers across there? A. Yes, I have seen the photograph.

HIS HONOUR: Q. Madam, are you agreeing there were sleepers across this railway line before the accident, only because of the photographs which were put in your hand a little while ago; say if you have any independent memory of it, I want to get this clear. A. I will say there were sleepers there.

Q. From your memory, is that from recollection? A. There could only have been sleepers, so it has to be like that. I do not really recollect it.

Q. Well, has your memory faded beyond the date of the Kempsey Show which was seven weeks before the accident, in regard to certain matters? A. Yes, there are certain gaps.

Q. And do you say you do not remember what the surface was before the accident, now, apart from the photographs? A. Well, I will say there were sleepers there.

Mr. JENKINS: Q. From your recollection; do you recollect it? A. Well there must have been.

Q. At the moment you take this position, do you not, your memory is gone as to what the crossing was like. Is that it? A. Yes, I did forget. I have asked them what it was like.

Q. But, relying on your own memory, it has gone, you cannot say what it was like? A. No, I forget what it was like.

HIS HONOUR: Q. How long were you living there before the accident? A. For some years.

Q. You said you were over it hundreds of times, but you do not remember what the surface of the crossing was? A. I have forgotten to ask them how long, it was about 10 or 11 years.

Q. But, do you not remember what this crossing was; or do you remember what it was? A. No, I do not.

Mr. JENKINS: Q. You used to go into Woy Woy, by taxi? A. Yes, when I did not have a car.

Q. Now, did you not regard the journey to Woy Woy as being so short, the length of a mile, that you used always to go by taxi, and did not use your own car? A. Well, the bus was only sixpence; no, I would not ring for a taxi to come and take me into Woy Woy. I would use the bus if I was not using my beetle.

Q. And you would come back by taxi? A. Possibly, if I was late.

Q. Prior to this seven weeks, have you ever come out from Woy Woy in a taxi to the crossing, and then gone straight into Woy Woy again by taxi, and come out again? A. No.

Q. Have you ever done that before? A. No.

Q. You could not imagine any reason why you would do that, could you? A. No, I really could not.

Q. What were the nembutal tablets for? A. They were to help me sleep. Dr. Little told me. He gave me two prescriptions, one was free and I asked Mr. Thompson to get it and he said the Board of Health would have it.

Q. Can you recollect ever getting a prescription from a doctor in respect of a medicine in liquid form? A. No, when?

Q. Before the accident, just before the accident? A. Oh no.

Q. Can you ever remember dropping a bottle of medicine, or anybody dropping a bottle of medicine in your presence? A. No.

Q. Not at all? A. Not at all.

Q. May I take this to be the position, you have never walked upon the railway line itself prior to this accident, to your recollection, that is the line other than the pedestrian crossing? A. Yes, when the train used to pull up past the station we had to get out and climb down on the lines.

Q. In other words, if the train from Sydney, or Gosford pulled in and the carriage did not pull up at the platform? A. Yes, it would go past.

Q. Then you would get down on to the side of the railway line? A. That is true.

In the Supreme Court of New South Wales.

Plaintiff's evidence.

P. V. McDermott.

Cross-examination.

Q. And you would walk along the side of the railway line to the wicket gate? A. Yes.

Q. However, I put to you this, have you ever walked on the railway line between two rails, away from the pedestrian crossing? A. No, not at all.

Q. There has been no occasion for you ever to do that, has there? A. No.

Q. Did you do the household shopping in at Woy Woy, yourself, when you went in? A. Yes.

Q. That is, shopping for meat and vegetables and things like that? A. Yes.

Q. Was it your practice to do it every day? A. Oh no.

Q. Some number of times a week? A. You are confining me to the house. If you let me explain, if I was out selling, I would bring all that stuff home in the car for a week, like you would do, and put it in the 'frig. It is no different to anybody else.

Q. In your house at the time your mother had been there for about a week, had she not? A. I do not know how long she had been there. You are getting me on times again.

Q. She had been there a short time, anyhow. That is correct, is it not? A. Could be.

Q. And your sister was staying there? A. Yes.

Q. And that is when the accident happened? A. What?

Q. On the day the accident happened, there were these people in the house at the same time, during the day anyhow, your mother and your sister at least, that is correct? A. No, my mother had gone to Sydney.

Q. I am coming to that, but she was in the house, was she not? A. Yes.

Q. And your sister was there? A. Yes.

Q. And Mr. Thompson was there? A. Yes.

Q. Did you cook the dinner? A. When do you mean?

Q. Did you cook the dinner usually? A. Me, I assume it would be me.

Q. You have never been home to your house after dark, from Woy Woy or Gosford, that is so, is it not? A. That is so.

Q. So if you had gone out on one of your expeditions, selling or to do shopping, you had never before this accident returned to your home except in daylight. Is that correct? A. Yes, because I cannot drive at night.

Q. So it would be quite unusual, would it not, for you to be crossing over this line after 6.00 p.m. in June? A. Nothing would be unusual for me to do; if I had something to do, I would go and do it. I understand from my mother, why I was down there——

HIS HONOUR: You are not allowed to say that. You must be very careful not to tell this jury what your mother told you.

WITNESS: I am sorry, your Honour.

Mr. JENKINS: Q. You spoke about having a noise and rockets in your head? A. Yes.

Q. That is before the accident? A. No, that was in hospital. I still have them.

Q. Did you not say you had a noise in your head while you were on the railway line? A. Yes, I stated I thought I heard the noise of a trailer or it could have been like the sound of the sea. It was a big noise and I have still got it.

Q. And, bursting lights? A. Yes.

Q. Do you remember crawling on your hands and knees? A. No.

Q. Can you say whether these bursting lights and the rockets were there before the accident? A. No, I would not have lights in my head.

Q. You cannot say when it was? A. It is just in hospital. I still have them.

Q. You cannot remember whether it was on the line or not? A. Not now I cannot, no.

Q. Have you ever sworn in your life? A. Certainly, I come from a racing family.

Q. Have you ever used these words—evidence will be given about this and I apologise for showing you this paper? (The Court Officer showed the witness a piece of paper with the words "fuck you" written on it.) A. No, it is a word I detest; although I have read James Joyce.

Q. You had liquor in the house from time to time, did you not? A. No. My husband is a teetotaller, Mr. Thompson is a teetotaller; I like a glass of ale, as I have told you. If I had visitors coming and there was the occasion for a socal drink, there would be liquor in the house.

Q. Whisky? A. Oh no, not spirits.

Q. Whisky has never been in the house? A. Never.

RE-EXAMINED

Mr. WATSON: Q. Can you help the Court from your own memory, not from what you have been told but from your own memory, by telling us how many times you walked across that crossing at night, before the accident? A. Oh, never at night.

Q. Never at night? A. No.

Q. Mr. Jenkins put a question to you that you had crossed that crossing hundreds of times but you say you never used that crossing in darkness? A. No, there would never be any occasion, I would be cooking Pat's dinner.

In the Supreme Court of New South Wales.

Plaintiff's evidence.

P. V. McDermott.

Re-examination.

E. J. Woodbury.

Examination.

Q. You did say you sometimes walked across the crossing to go to the shop? A. Correct.

Q. What shop is that? A. The only one there. It is the paper shop, the post office, and cigarette and food shop.

Q. And that is not on your side of the crossing? A. No.

Q. It is on the Brisbane Water side of the crossing, just over the road, is it? A. That is right.

Q. You did some writing before the accident. Did you write under the pseudonym of Patty Pitt? A. Yes.

Q. I show you two documents. Are they photostatic copies of articles which you wrote for "People"? A. Yes.

(Photostatic copies of two articles tendered and marked Exhs. J1 and J2.)

Q. You were asked whether you said at a previous hearing in 1962 that you remembered being at the Bayview Hotel and met a lady from Hardy's Bay. Are you able to say now you gave this evidence in 1962: "Q. You said you remember seeing Dr. Little on that afternoon? A. No I do not remember seeing him." Then his Honour asked: "You said you did have a drink at the Bayview Hotel that afternoon?" and you answered: "I did. I collected some money off a woman at Hardy's Bay. I bought two drinks." Then Mr. Jenkins asked: "On that afternoon?" and you answered "So she tells me." You were asked "So anything that happened that afternoon, you told us, you only know of because someone has told you since?" and you answered "I am afraid that has to be it." Is that the truth about that matter? A. Yes, it is.

Q. What about those two articles, Exh. J, written before the accident? A. Yes, there is a lot written there in a box.

Mr. JENKINS: (By leave.) Q. You have never been to the shop at night time, have you? A. No, the shop closes at 5.00 p.m.

(Witness retired.)

Evidence of Evelyn Joan Woodbury

EXAMINED

TO Mr. WATSON: My full name is Evelyn Joan Woodbury and I reside at Beach Street, Erina. I am a married woman.

Q. On 10th June, 1959, were you a nurse attached to Gosford District Hospital? A. Yes.

Q. Do you recall the plaintiff, Mrs. McDermott, becoming a patient at the hospital that evening? A. Yes.

Q. What time had you come on duty? A. At 6.00 a.m. on 11th June, the day after she was admitted.

Q. When you came on duty at 6.00 a.m., did you perform any particular nursing duties for Mrs. McDermott, such as cleaning her up? A. Yes, when I came on she was in the corridor. We moved her into a ward and undressed her; she was still in her clothes. She had a gravel rash on her hands, knees and forehead. We cleaned them up and picked out small bits of dirt and stone from the gravel rash.

Q. Did you know at that stage she had a broken collarbone? A. No, we did not find that out until a couple of days later.

Q. Actually, there were bits of dirt and blood and gravel? A. Yes, she had a lot of blood in her head and I cut a lot of her hair off.

Q. Are you able to describe now, this number of years later, what type of gravel it was? A. No, I am afraid I cannot. It was just dirt and gravel.

Q. You do not remember the colour of it, or anything like that, now? A. No.

Q. How long had you been a nurse at the hospital at that time? A. I started at the hospital in November, 1958.

Q. Had you seen other people, including children, with injuries as a result of falls? Y. Yes, quite a few.

Q. Were the injuries to the head and the gravel rash, consistent with what you saw? (Objected to; question withdrawn).

Mr. JENKINS: No questions.

(Witness retired and excused.)

Evidence of Trevor John Watson

EXAMINED

TO Mr. WATSON: My full name is Trevor John Watson and I reside at 356 Macquarie Street, Dubbo. By occupation I am a fireman employed by the Commissioner for Railways.

Q. Were you so employed on the evening of 10th June, 1959? A. Yes.

Q. On that night were you the fireman on the North Coast Daylight Express travelling from Taree to Sydney? A. Yes.

Q. Was that train being drawn by a 44-class diesel locomotive? A. That is right.

Q. I think at that stage the line between Sydney and Gosford had not been electrified but was in the process of being electrified? A. That is right.

In the Supreme Court of New South Wales.

Plaintiff's evidence.

T. J. Watson.

Examination.

Q. As you were on the train, after leaving Gosford and travelling south towards Koolewong level crossing, what side of the footplate were you on? A. The right-hand side.

Q. That is, the inner track? A. The inner track.

Q. About what time did your train approach the level crossing at Koolewong? A. Approximately at 6.20.

Q. Was it daylight or dark? A. Dark.

Q. Did the train have headlight illumination? A. Yes.

Q. Where was that headlight? A. In the centre of the locomotive.

Q. It is quite a bright light? A. Yes.

Q. Was that light shining as you crossed the crossing? A. Yes.

Q. What speed were you doing as you came towards the crossing? A. Forty miles an hour and possibly accelerating—we would be.

Q. Is there a curve in the line just before the crossing? A. Yes, the line curves to the right, in the direction we were travelling.

Q. Is the headlight on the front of the train focused straight? A. Yes.

Q. You would not get the line into the centre of the light until the train swept right round the curve? A. No.

Q. Did you notice anything on your line as you approached the Koolewong crossing? A. There was nothing on the line until we were approximately 150 feet away from the crossing and I thought I saw an object lying on the line.

Q. Did you get that in any part of the beam of the light? A. It was in the indirect beam of the light.

Q. In the side beam of the light. Where did you notice that object when you first noticed it? Did you realise it was on your line? A. Well, I saw it on the line, it was lying in between the rails.

Q. At about 60 feet from the object, were you able to identify it more closely? A. Well I could not give positive identification. I did not know whether it was a man, a boy or a woman, lying on the road but it looked to be a body. I could not be sure.

Q. Where was it lying? A. In between the rails. The head was clear of the outside rail and the feet and portion of the legs were over the right-hand rail. That was on the inside rail, that would be on my side.

Q. On your side, the feet were draped over the line and the rest of the body was in between the line, with the head well clear of the right-hand rail? A. I would not say "well clear" but it was clear of the rail.

Q. And what position was the body lying in? A. Face down.

Q. From what you have told us, the head was pointing towards the left, to your left side? A. That is correct.

Q. Was the body lying straight across the tracks, or at an angle? A. No, it was not lying straight, it was at an angle but I could not tell you now whether the head was towards me or away from me.

Q. Did you continue to keep this body under observation up to the time the train passed over it? A. I kept the object under observation until it passed out of my view, underneath the engine.

Q. Did it move at any time, from the time you first saw it? A. No.

Q. Your train passed over it, what did you do then? A. As I came onto it closer and realised what it was—whether it was fright or shock, I suffered a bit of a shock and froze and could not say anything until we passed the crossing. Then I informed the driver we had run over a person and would have to stop at Woy Woy.

Q. Did you in fact stop the train at Woy Woy? A. Yes.

Q. That was not a regular stopping place? A. No.

Q. And you know contact was made with the Police? A. Yes.

Q. Was any examination made of the front of the train at Woy Woy? A. No.

Q. Having reported the matter, you took the train on to Sydney? A. Yes.

Q. You or the driver did not go back to the accident? A. No.

Q. Who was the driver? A. Driver John Burke from Taree.

Q. You know the crossing is formed of sleepers? A. That is right.

Q. I do not suppose you have ever inspected this crossing on foot or closely? A. No, I have never inspected it closely at all. The only time I have seen it is going to and from it on a train.

Q. You knew it was a sleeper crossing? A. It was a sleeper crossing.

Q. As you approached the crossing at a speed of 40 miles an hour, accelerating, were you looking through the front of the diesel engine? A. Yes.

Q. It has quite a good view? A. Yes.

Q. Was your footplate up the front of the engine or down the side? A. You are approximately five feet or six feet back from the front of the engine.

Q. What would the height of your eyes be, roughly, from the ground? A. I would estimate approximately 12 feet.

Q. That is fairly high? A. Yes.

Q. As you approached, looking down on this object, at 40 miles an hour and accelerating, with the sleeper crossing beyond, about how far on your side do you estimate the body was lying from the sleeper crossing? A. It would be an estimation, approximately 12 feet clear of the sleepers.

Q. That is clear of the sleeper crossing. Having regard to the number of carriages you had on the train and the speed you were travelling, what distance would it take to pull that train up on the straight, at 40 miles an hour accelerating? A. With the load, the number of carriages and the brakes in good order, it would take approximately 500 feet.

CROSS-EXAMINED

Mr. JENKINS: Q. When the train was 150 yards back from the crossing, the whistle on the engine was blown, was it not? A. That is right.

Q. And it was a loud long blast of the whistle? A. Yes.

Q. My friend drew your attention to the crossing and you said you have been over it in the train? A. Yes.

Q. So you know, do you not, it is an unattended crossing which vehicles pass over and the drivers have to close the gates on either side, subject to a penalty? A. Yes.

Q. And it has two wicket gates? A. I think there are two wicket gates on the southern side.

Q. When you referred to the body being 12 feet on your side, that is on the northern side? A. Yes.

Q. In the course of your duties as a fireman, do you also do some driving occasionally? A. Not then.

Q. Actually at this speed it would take about 500 feet to pull the train up? A. Approximately.

Q. With regard to this particular type of crossing with the sleeper cross-over and the gates which the drivers have to close, there are very many of those in the Railway system of N.S.W. that you have seen; you have seen very many similar types of crossings, have you not? A. Yes.

Q. With the sleepers across? A. Yes.

Q. On this sleeper-type of crossing, in order that the train can go over there has to be a gap between the rail and the sleeper next to it, so the flange of the wheel can go across the crossing? A. Yes.

Q. I put to you that is a gap of over two inches? A. It would be round about two inches.

RE-EXAMINED

Mr. WATSON: Q. Can you tell us what the width of the flange of the wheel is; if you cannot it does not matter. A. I should say where it branches off from the tyre, from the flat of wheel, to start down it would be approximately an inch. It could be a little more or less and it tapers down.

Q. It tapers down to a point? A. Not to a real point. It would come down to about this size, roughly three-eighths of an inch and then it curves up on the inside of the wheel.

(Witness retired and excused.)

Evidence of Nancy Theresa Grace Bell

EXAMINED

TO Mr. WATSON: My full name is Nancy Theresa Grace Bell and I reside at 76 Old Gosford Road, Koolewong. I am a widow.

Q. How long have you been living at Koolewong? A. 13 years.

Q. Is 76 Old Gosford Road over the western side? A. Yes.

Q. Do you know where Mrs. McDermott lives? A. Yes.

Q. Where is your house in relation to hers, further south or further north? A. It is further along the road going west.

Q. I understand Old Gosford Road runs from north to south. A. Well, further towards Gosford.

Q. That road just peters out? A. Yes.

Q. There used to be a bridge but that disappeared, so the road runs a little on from your place and then it peters out? A. Yes.

Q. Did you know the state of the level crossing there in June, 1959, at the time Mrs. McDermott had the accident? A. Yes.

Q. What was the footing like at the crossing at that time? A. Very rough and broken.

Mr. WATSON: Q. There are sleepers laid between the tracks? A. Yes.

Q. Dealing with those sleepers first, what condition were they in? A. They were rotted and the spikes had come out of them, and they were not holding down at all.

Q. Do you mean by that they moved underfoot? A. They move underfoot, yes.

Q. Appreciably? A. Yes.

Q. Were there gaps between the sleepers? A. Yes, where they had broken——(objected to as leading).

Q. How were the sleepers, one to the other? A. They ran that way (indicates) and they were just broken, just like worn away, I suppose with the weather and deterioration.

Q. Had you noticed what happened to the sleepers when a car went over them, for example? A. Yes, they jumped up and down.

In the Supreme Court of New South Wales.

Plaintiff's evidence.

N. T. G. Bell.

Examination.

Q. And you still got this movement simply by walking on them? A. Yes, my word.

Q. Was there any change in the sleepers from the time in June, 1959, when Mrs. McDermott had her accident to September, 1959? A. No.

Q. Did anything happen to you on that crossing in September, 1959? A. Yes, I had a heavy fall.

Q. Just before we come to the fall itself, what time of the day was this? A. It would be about 3 o'clock in the afternoon.

Q. What actually were you doing? A. I got out of the car on the water side, I opened one gate and I went to go across to open the other gate for the car to cross and I got about half way across when I tripped and fell.

HIS HONOUR: Q. When you say "tripped", could you describe it in more detail? A. My foot caught in a bit of sleeper or something and threw me very heavily.

Q. Your foot caught? A. Yes.

Mr. WATSON: Q. What type of shoes were you wearing? A. Flat heel shoes.

Q. (Showing pair of shoes to witness.) How did your heels compare with those? A. I had flat heels, half inch high.

Q. Much flatter than those? A. Yes.

Q. You caught your foot in the sleepers. How did you fall? A. It threw me flat forward, across the other line—like where the train comes up from Sydney, going to Gosford. I was lying there half stunned or stunned and my father got out of the car ahead and picked me up, I think.

Q. Your father picked you up off the line? A. Yes.

Q. So at the time you caught your foot you were actually thrown forward? A. Yes, down on my face and all——

Q. Did you suffer any injury to your face? A. I had like a slight black eye, and it was grazed down there where I had fallen on the shoulder.

Q. Did you have any dressing on your shoulder? A. Yes, but I did not worry about it.

Q. I am just getting you to describe your injuries. You say you were stunned. Can you tell us whether you actually lost consciousness or were just dazed? A. No. I did not lose consciousness but I knew I was in danger and you had to get up; do you know what I mean. (Objected to.)

HIS HONOUR: Q. Please answer the question. Did you actually lose consciousness? A. No, I did not lose consciousness but I was stunned.

Mr. WATSON: Q. I do not understand what you mean by stunned? A. I knew I was on the railway line but I did not quite—I knew I was in danger. That kept penetrating my sub-consciousness—that I was in danger—and I was struggling to get up with my father.

Q. Your father actually lifted you? A. Yes.

Q. About how many houses are there on the West Koolewong side? A. There is over 30.

Q. I suppose they are mixed, between permanent dwellings and week-enders? A. I would say they are mostly permanent now.

Q. Was that the situation in June, 1959? A. There has been a lot more gone up since then.

Q. We are talking about June, 1959? Thirty or forty then? A. Yes.

Q. Most of them were permanent, were they? A. The majority were permanent, yes.

Q. Apart from this incident when you fell in this way, have you had any other difficulties with the crossing? A. No. What I mean to say is that we knew it was always——

HIS HONOUR: Q. Have you had any difficulties with the crossing? A. Just what do you mean by difficulties?

Mr. WATSON: Q. Have you had any other falls? A. No.

Q. Have you had any difficulties less than falling on any other occasion? A. I beg your pardon?

Q. Have you had any other difficulties short of falling on other occasions? Has anything happened to you on this crossing short of falling? A. No.

Q. Have you ever used the crossing at night? Have you ever had to walk across it at night? A. Yes, to open the gates.

Q. As at June, 1959, was it lit or unlit? A. Unlit.

Q. If you are going out at night and you have to use that crossing, do you do anything about shoes at all; or did you back in 1959? A. You never wore high heels over that crossing. You wear flat-heeled shoes if you are going in the train or a car or wherever you are going to visit, and you carry your high-heeled shoes.

Q. You carry your high heels with you and wear the flat ones while crossing the crossing? A. Yes.

CROSS-EXAMINED

Mr. JENKINS: Q. You have been there since you were 18 years of age? A. I have not lived there all the time.

Q. But you have been going to this particular area since you were 18 years of age? A. Yes.

Q. And the crossing has always been like this, as it was in 1959; a sleeper crossing? A. Yes.

In the Supreme Court of New South Wales.

Plaintiff's evidence.

N. T. G. Bell.

Cross-examination.

Q. I won't ask how old you are, Mrs. Bell, but during the whole of that time you told my friend, there was only one occasion on which you had difficulty in going across the crossing. That is so, is it not? A. Yes.

Q. And you have been over it several times, many times, at night time? A. Yes.

Q. On this occasion when you tripped, you tripped in the vicinity of between the rails, did you not? That is the rail nearest to the—— A. No. I had crossed over one set of rails and there were sleepers all broken up. That is where I fell through, and it threw me over on to the other side.

Q. Near one of the rails, was it? A. Not too far away from the rails.

Q. You know there is a gap between the rails and the sleepers, don't you; to let the train go over the crossing? A. Yes.

Q. Being there for such a long time, you might tell us if you can, in relation to that area—it is an unattended platform, is it? A. Yes.

Q. And it has always been an unattended platform? A. Yes.

Q. In regard to the area on the western side of the line, that has consisted of just an odd weekender or two in the early days? A. Yes.

Q. And gradually more small cottages started to appear. That is so, is it not? A. Yes.

Q. Until there is about 30 or so there now, is that correct? A. Yes.

Q. Thirty or so in 1959? This is true, is it not; the gates have always been those penalty gates that the driver of the car has to close, subject to a penalty if he does not? A. My word.

Q. And there have been wicket gates on the southern side? A. Yes.

Q. Is it true to say that on the western side of the line that Old Gosford road on that side is in a shocking state? A. My word.

Q. It is full of potholes, is it not? A. Yes.

Q. And boulders in the road? A. Yes.

Q. And the footpaths on that side of the road are cut with drive-ins to garages, are they not? A. I would say there was really no footpath, no Council made footpath.

Q. Indeed, on the western side of the line—taking the roadway and the footpaths—it would be quite easy for anybody to stumble and fall over there, would it not? A. Yes.

Q. Especially at night time? A. Yes.

Q. You, of course, in the whole of your life have never had another stumble, have you? A. I may have around the house.

Q. Leaving the house out for the moment. In the whole of your life you have never stumbled in the streets or on the footpath, have you? A. No.

Q. And this is the only occasion in the whole of your life where, outside your home, you have stumbled? A. Yes.

Q. You have been in other parts of New South Wales and seen crossings like this particular crossing, have you? A. Yes.

Q. Quite a number of them? A. Yes.

Mr. WATSON: No re-examination.

(Witness Retired)

Evidence of Andrew Bruce Sinclair

EXAMINED

(Mr. Watson tenders scale plan marked Exhibit E.)

Q. Is your full name Andrew Bruce Sinclair? A. Yes.

Q. Do you live at 40 Bullecourt Avenue, Mosman? A. Yes.

Q. Are you a consulting engineer, carrying on the practice of your profession at 504 Pacific Highway, St. Leonards? A. Yes.

Q. You hold the degree of Bachelor of Engineering of the Sydney University, and also A.M.I.E.? A. Yes. That stands for Associate Member of the Institution of Engineers. I am in private practice in general and civil engineering work.

Q. Previously you were employed by a firm of consulting engineers, being in charge of their civil engineering section for four years? A. Yes.

Q. During that time did you make a number of traffic engineering studies? A. Yes.

Q. Did you work on highway design? A. Yes.

Q. And did you undertake major engineering studies in both Sydney and Canberra? A. Yes.

Q. Some days ago were you asked to make a study of the problem of railway level crossings in association with this case? A. Yes.

Q. In the course of so doing have you inspected a number of crossings? A. Yes.

Q. In what area have you made those inspections? A. In the Sydney and Gosford areas.

Q. You have also studied the readily available literature? A. Yes.

Q. Have you inspected the plan and the photographs of this railway level crossing at Koolewong as it was stated to be in 1959? A. I have inspected a plan and the photographs. I have here the photographs.

In the Supreme Court of New South Wales.

Plaintiff's evidence.

A. B. Sinclair.

Examination.

Q. That is another set of photographs? A. That is another set of photographs.

Q. Do not refer to any books, documents or photographs, Mr. Sinclair, unless we come to that. Turning to the crossing in 1959 and dealing first with the actual sleeper position of the crossing what, from your point of view as an engineer, was its then defects? (Objected to—question allowed).

HIS HONOUR: I think you had better elaborate what you mean by defects, Mr. Watson. Do you mean any imperfections presenting themselves to a person crossing on foot? Defects, of course, may be aesthetic or relating to the location or anything.

Mr. WATSON: Q. In asking these questions we have in mind the situation of pedestrians using that crossing to cross on foot, either in connection with their cars or for other reasons. First of all, dealing with the actual footing of the crossing itself between the lines; what defects, from the point of view of using that crossing, were there for the pedestrian? ("Defects" objected to. Mr. Jenkins objected on the further ground that the witness was giving evidence of the condition of the crossing in 1959 and stated that the photographs were not taken until some time later. Mr. Watson informed His Honour that the photographs were taken on 13th July, 1959. Question allowed.)

Q. You have been to the Koolewong crossing since? A. I have been to the Koolewong crossing since.

Q. Within the last few days? A. Yes.

Q. But, in order to understand the crossing as it was in June and July. 1959, you are relying on the photographs and the plans? A. That is so.

HIS HONOUR: There has been a change since, I gather?

Mr. JENKINS: The line has been electrified and the whole system has been changed now.

Mr. WATSON: Q. What, for the pedestrian crossing that crossing—a person walking across that crossing—from the point of view of a consulting engineer is wrong with the crossing so far as the footing is concerned? A. The crossing was constructed of sleepers, apparently old railway sleepers, and there were considerable gaps in level between adjacent sleepers, up to 2 inches from the levels and up to $2\frac{1}{2}$ inches between the head of the rail and the adjacent sleeper in one case. So that in stepping across the crossing and endeavouring to avoid placing one's foot between the flange and the sleepers one had a rough surface on which to land. Then, from the pedestrian's point of view, I felt that these photographs indicated quite an unsatisfactory crossing situation.

Q. We are also told that the crossing was unlit. From the photographs were you able to ascertain whether there was any kind of warning system at all? A. There is no warning system shown in the photographs. The photographs show street lighting of an incandescent type, which has since been replaced, about 100 feet distant from the crossing.

Q. You saw from the photographs and no doubt on your recent examination—this may be a feature which has not been changed—the wicket gates opposite each other, and apparently it was necessary for a pedestrian who wanted to cross from wicket gate to wicket gate to do a kind of shallow "U" turn? (Objected to as leading——disallowed).

Q. You saw the photographs? A. Yes.

Q. Were the sleepers wide enough, as they were laid, to permit the pedestrians to cross from one wicket gate to the other? (Objected to——allowed).

Q. Were the sleepers wide enough or did they extend long enough to permit direct access from wicket gate to wicket gate? A. The sleepers appeared to be about 8 feet wide, and also appeared from the photographs to be squarely opposite the vehicle gates so that a pedestrian, having entered the side gates, would proceed to a line between the vehicle gates to use the crossing.

HIS HONOUR: Q. Use the sleeper crossing? A. Yes.

Q. If he did not want to use the sleeper crossing? A. He would step over the tracks.

Mr. WATSON: Q. Can you see any reason from the photographs and the plans as to why the sleeping crossing could not have been extended to provide direct access between the two wicket gates? A. No. There was no reason why it could not have extended to the wicket gates.

Q. You have examined other level crossings in recent days? A. Yes.

Q. First of all, as to the roughness of the footing of this crossing, could that have been corrected in an easy or inexpensive way? A. It has since been corrected——(Evidence objected to——allowed).

Q. Forget the crossing as it is at the moment. We will come to that. A. It could have been corrected by removing the existing sleepers and replacing the crossing with a built-up surface of gravel and bitumen.

Q. So, if the sleepers had remained in position was there some way of surfacing them? A. If they were rigid they could have been decked with running tracks, parallel to the direction of walking.

Q. Would it have been possible to surface the sleepers with bitumen? A. It would not have been satisfactory, but it would be possible; but where that has been done—where the sleepers are very firmly fixed—unless the sleepers are very firmly fixed they tend to rock and break at the bitumen.

Q. Assuming some remedial action of that type was carried out on that crossing about 1959, from the engineering point of view did you estimate what the cost would be? A. I would estimate that cost to be about £150.

Q. From the photographs and the plan, there is no lighting across the crossing but there is a lighting on the station—half way down to the station from the crossing. Did you see any problem as to why the crossing itself could not have been electrically lit? A. No. The crossing could have been electrically lit.

Q. Even with the electrification that is there now, if that had not been brought in for the trains at that time there was apparently available other sources of power? A. If this is admissible as an answer, it has subsequently——

Q. Not yet. Did you see anything from the plan or the photographs to indicate why it was not possible to light this crossing at 1959? A. No. It would have been possible to light the crossing.

HIS HONOUR: Q. There were electric street lights available in the neighbourhood at that time? A. Yes.

Mr. WATSON: Q. Would it have been a very expensive operation to light that crossing? A. I would estimate approximately £100.

Q. Have you looked at various warning systems for both pedestrians and motor traffic, advising or warning of the coming of a train—the approach of a train? A. I have looked at the available literature on warning systems and there are a number of systems which are—— (Objected to).

HIS HONOUR: (to Mr. Jenkins) I note your objection that the evidence should be confined to licensee or licensor relationship, and this evidence goes beyond that in relation to the lights.

Mr. Watson, on the question of warning and its relevance in the case—apart from in law—how can the absence of warning have any relevance in this case?

Mr. JENKINS: I was going to take that objection. Thirdly I was going to submit that this witness is not qualified, having only looked at literature.

(Mr. Watson pressed the evidence in relation to the warning system. His Honour ruled that the witness is not qualified to give evidence on railway warning systems.)

Mr. WATSON: Q. Do not answer this immediately. What is the normal distance of warning given? In other words, how far away is the train when the warning by way of flashing lights and bells normally commences? (Disallowed).

HIS HONOUR: The time factor alone in this case at this stage would not permit the jury to say that on a balance of probabilities had a bell been rung the plaintiff would not have essayed across or even with a flashing light.

Mr. WATSON: Q. Have you looked at this Koolewong crossing in the last few days? A. Yes.

Q. Leave aside all questions of the electrification of the line, what is the present surface of the Koolewong crossing? (Objected to.)

HIS HONOUR: You say that electrification does involve some altering of the permanent way?

Mr. JENKINS: I do not know whether I am quite qualified to say whether it does or not, but what happened in fact was a complete remodelling of the line.

Mr. WATSON: The crossing is still there, as I understand the facts, and the gates are still there. The crossing between the gates is also still there. All I am seeking to do is lead evidence of the change in the surface and the change in the lighting above the crossing, nothing more or less.

HIS HONOUR: Frankly I do not know whether it could be said that such change would necessarily be involved because of electrification.

Mr. WATSON: That is the main point, and I think what is behind Mr. Jenkins' submissions—"because we are electrifying the line, and because we had workmen up there and did all these things; we did those things too." It is the same crossing, the gates are in the same position and the footing is roughly the same. The purpose of the question is to show it can be done. (Question allowed)

Mr. WATSON: Q. What is the present surface of the Koolewong crossing? A. The present surface is gravel, approximately, up to the level of the tracks, contained by new timber sleepers, and surfaced with bitumen.

HIS HONOUR: Q. When you say "crossing", does that extend as far as the south wicket gate? A. It extends both across the vehicle crossing and the line between the wicket gates.

Mr. WATSON: Q. Will you look at the four photographs I now show you?

HIS HONOUR: It has got a long way from the old concept of licensor and licensee.

Mr. WATSON: Q. Do these photographs accurately depict the surface of the crossing as you saw them in the last few days? A. Yes.

(Four photographs tendered. Mr. Jenkins stated that he wanted to protect himself on the licensee-licensor basis on which his Honour had ruled and objected to the tender, marked Exhibit K)

Q. That type of surfacing and that type of treatment was available in 1959 in ordinary engineering practice, was it? A. Yes.

Q. Additionally, is there any lighting provided at the crossing itself? A. A street light has been installed on the eastern side, approximately 15 feet from the eastern track.

Q. What type of lighting is that? A. It is fluorescent, 20 watt.

Q. That is a bright light? A. In a relative sense it is a conventional street light, brighter than the old-fashioned incandescent bulb.

In the Supreme Court of New South Wales.

Plaintiff's evidence.

A. B. Sinclair.

Examination.

Cross-examination.

Q. Would you look at the photograph I now show you? (Handed to the witness) Does that show the position of the light you have just described? A. Yes.

(Photograph showing position of light tendered, objected to, admitted and marked Exhibit L.)

Mr. JENKINS: It looks like a Council electric light pole, and it could be said that there is nothing that the Commissioner did not do, if it is the Council's road leading up there. That pole is on the Council road.

Mr. WATSON: Q. While you were inspecting the Koolewong crossing did you count the number of houses on the western side of the crossing? A. I did.

Q. Did you draw a distinction between houses which, by your observation, appeared to be older than five years and those erected since? A. I did.

Q. Approximately how many houses were there that came into the class of being more than five years old? (Objected to, rejected)

Q. How many houses were there altogher? A. Sixty-one.

Q. Do not answer this question immediately. Of those 61 houses, how many appeared to you to have been recently erected? (Objected to—disallowed)

CROSS-EXAMINED

Mr. JENKINS: Q. You would know, would you not, that in New South Wales there are more than 3,000 crossings like this one? You would know that? A. I would know that there are more than 3,000 crossings.

HIS HONOUR: Q. Like this one? A. Like this one? I could not answer that.

Mr. JENKINS: Q. There are many more than 3,000 crossings, but would not you agree with this: There are thousands, anyhow, of crossings like this one? Would you not agree with that? A. I don't know how many crossings there are like this one in New South Wales.

Q. There could be two or 200, so far as you are concerned; you would not know? A. From my own travelling around the State I would estimate there would be at least several hundreds.

Q. You have said that in respect of the surfacing and the lighting, £250 would cover it. You realise you have said that in your evidence? A. Yes.

Q. Of course, if there were 3,000 or more of these crossings it would cost nearly a million pounds to do all this work in every crossing—or three-quarters of a million pounds? A. Yes.

HIS HONOUR: In your estimate have you included the cost of lighting some of the crossings up near Moree?

Mr. JENKINS: I am quite sure that if there was an accident at Moree I would be faced in court with flashing signs and crossings and all those sort of things.

Q. Anyhow, you say the road on the western side of Old Gosford road you saw it? A. Yes.

Q. In a shocking condition, isn't it? Isn't it in a shocking condition? A. It is in a poor condition.

Q. You could fill up the potholes in that road, could you not, from an engineering point of view? A. Yes.

Q. And you could cover it with bitumen, could you not, from an engineering point of view? A. Yes.

Q. And put a nice flat concrete surface on it; is not that so? A. Yes.

Q. And you could kerb and gutter it could you not? A. Les.

Q. Not only that, but you could also build nice concrete driveways for the grass footpaths, and across the footpaths? There are not any concrete driveways—they are just cut regularly into the footpaths. Will you agree with that? A. Yes, they are worn crossings.

Q. From an engineering point of view that would make the road far more comfortable for pedestrian traffic, would it not? A. Yes.

Q. So from an engineering point of view it comes down to this, does it not: that on a flat surface—every surface upon which a person walks (apart from a floor surface like this one here), whether it be in the country or on a road in the city, it can always be improved? A. Yes.

Q. The roads in Sydney could be improved considerably, could they not? A. Yes.

Q. And from those photographs it would be plain to anybody who had been over that crossing hundreds of times—it would be plain for them to see exactly what the condition of the crossing was? A. At the time of crossing?

Q. Yes. A. If they could see it?

Q. If they had been over it hundred of times in daylight? A. Yes.

Q. Studying the photographs, it would be plain to them—perfectly plain to them—what the condition of the crossing was? A. They would know from crossing the crossing.

Q. Supposing there is a gap between the sleeper next to the rail and the railway line—there is, is there not? A. Yes.

Q. On both sides? A. Yes.

Q. And that is absolutely necessary for the train to go over the crossing? A. Yes.

Q. It is a gap which is plain to be seen, quite visible? A. Yes.

Q. And it is a gap into which a pedestrian could put the heel of a shoe? A. Yes.

Q. And trip? A. Yes.

Q. That is shown in photograph Exhibit K4 (handed to witness). Shown in that photograph is the fact that the bitumen is cracking there, is it not? A. That is a crack between the bitumen and the sleeper.

Q. The bitumen is cracking there. That is what you refer to, is it not, when you speak about the bitumen—that it would crack if it was put there? A. That was when I was asked about putting bitumen directly over old sleepers. The bitumen directly over the old sleepers would give rise to similar cracks to that shown, but only continuously right across the crossing.

Q. This photograph, K4, shows—does it not—that the bitumen placed on the crossing has cracked? A. Yes.

Q. And cracked in such a way that it could cause a foot to be caught in it? A. I do not know on stepping over the sleepers—and this is relevant to an answer I gave to an earlier question—if there is a gap between the rail and the sleeper, one knows that in crossing the sleeper one would be stepping over and landing, not scraping one's foot along away from the rail, but stepping over and landing on a flat surface. The fact that there is that gap is always with any crossing——

Q. I am dealing with the bitumen here. This bitumen crack is such here that a foot could be caught in it? A. I do not recollect a crack being as wide as that. That photograph is taken at a flat angle.

Q. How long ago were you there; three or four days? A. Three or four days ago.

Q. You do agree that there is a crack? A. I agree that there is a crack.

Q. And you will agree that there is a crack, is there not, that could cause a person to trip? A. I think it would be very unlikely, but it would not be impossible.

Mr. WATSON: No re-examination.

(Witness retired.)

Evidence of Sydney Martin

EXAMINED

Mr. WATSON: Q. What is your full name? A. Sydney Martin.

Q. Do you reside at the Ettalong Beach Ambulance Station? A. Yes.

Q. Are you the station officer attached to Woy Woy-Ettalong Branch of the New South Wales Ambulance Board? A. Yes.

Q. On 10th June, 1959, did you go to Koolewong level crossing as a result of a call by Constable Cunningham? A. Yes.

Q. When you arrived there I think you saw Mrs. McDermott, Constable Cunningham was already there, and were there some other people? A. Yes.

Q. Where was Mrs. McDermott in respect of the railway line? A. Lying alongside the railway line, near the gates on the Brisbane Waters side—near the gates.

Q. Did you attend to her? A. Yes.

Q. I think you noticed that both her feet were amputated? A. Yes.

Q. Did you notice anything about her head? A. Yes. She had slight abrasions to the head. They seemed to be only trivial or superficial.

Q. You did not know anything about that at the time? A. No. The other injuries were too immediate.

Q. You then arranged to put her on the stretcher? A. Yes.

Q. And you were handed the feet, and you wrapped them up and took them with you? A. Yes.

Q. Did you take the patient to Gosford? A. Yes, to Gosford Hospital.

Q. While you were attending did you look at her head and face? A. Yes.

Q. What distance would you have been from her face? A. I was quite close to the face. I thought she may have a neck injury, or something like that, when she was thrown to the side of the road, so I supported her head while the others lifted her on to the stretcher.

Q. So you actually were supporting her head in fact at the time she was lifted on to the stretcher? A. Yes.

Q. Did you notice any smell of alcohol about her when you supported her at any stage? A. No.

Q. You took her to the hospital and she passed into the care of Dr. Spence? A. Yes. I radioed the hospital to say I was coming with a patient and the doctor took over as soon as I arrived there.

Q. Before 10th June had you been to the crossing on any other occasions? A. Yes, quite frequently.

Q. Had you yourself had any personal experience of walking across the sleeper crossing there? A. Yes. One night I caught my heel in one of the gaps of the sleepers and was thrown rather heavily onto the rails when I was going over to open the gates, from the eastern to the western side.

Q. You were actually walking across the crossing and were thrown down? A. Yes.

Q. How far did you go down? A. On my hand and knees.

In the Supreme Court of New South Wales.

Plaintiff's evidence.

S. Martin.

Examination.

Cross-examination.

Q. You were wearing ordinary male footwear at that stage? A. Yes, shoes.

Q. Can you tell us how long that was before the time of Mrs. McDermott? A. I would not know exactly, but somewhere about twelve months. It might have been a little more or a little less.

Q. Have you had any other difficulties at any time at the crossing? We are really concerned with the night time? A. No. I was always very wary there. It is such a rough crossing, and the worst crossing I have, I think, been on in New South Wales. (Answer objected to—allowed.)

Q. That crossing was not lit at night, was it? A. I don't know.

Q. Was the crossing lit at night? A. No, no lighting. I only had the aid of my headlights.

Q. On the night you fell, did you have your headlights on? A. Yes. I had the aid of my headlights.

Q. You were pulled up, you got to the eastern gate and opened that gate and you left your car with the headlamps on and you were in the process of walking across the line through the headlights when you fell down? A. Yes. When you approach the gates, it is rather a steep rise and the lights show upwards.

Q. Were they illuminating the crossing when you fell? When you fell was there a light on the crossing from the headlights? A. Yes. The best light I could get was from the car lights.

Q. Nevertheless, on that crossing you fell down on your hands and knees—on the crossing? A. Yes.

CROSS-EXAMINED

Mr. JENKINS: Q. How old are you? A. Sixty-six.

Q. In the whole of your life you have never stumbled anywhere, have you, except on this one occasion on the railway crossing? A. I would not say that.

Q. What did you say? A. I would not say that. I suppose I have stumbled at different times. I cannot remember, but I can remember that I fell rather heavily this night.

Q. Leave this night out. Can you recall any other occasions on which you stumbled? A. I beg your pardon?

Q. In your 66 years can you recall any other occasion on which you stumbled? A. No, I cannot; really I cannot.

Q. You cannot! You, as an ambulance man, are not interested—you have sworn before—(you are hard of hearing and forgive me for shouting) —as an ambulance man you are not interested, are you, in whether a person is under the influence of liquor or not? A. Usually no.

Q. Unless they vomit—this is what you swore before—you were only interested if they vomited in your ambulance car? A. That is right.

Q. On this particular night you took no particular notice as to whether Mrs. McDermott was under the influence of liquor or not, did you? A. No, I did not.

RE-EXAMINED

Mr. WATSON: Q. She did not vomit in the car, did she? A. No.

Q. And you did not smell liquor on her? A. I could not smell liquor on her. (Objected to—allowed.)

(Witness retired.)

Evidence of Phillip William Mitchell

EXAMINED

Mr. WATSON: Q. What is your full name? A. Phillip William Mitchell.

Q. Are you a garage proprietor at Beacon Hill, the Beacon Hill Service Station, Warringah Road, Beacon Hill? A. Yes.

Q. Did you previously live near the Koolewong level crossing? A. That is correct.

Q. I think you lived on the eastern, the Brisbane Water side? A. That is correct.

Q. Prior to 10th June. I think you lived there since about May, 1957? A. That is very true.

Q. On the night of 10th June you received a telephone call? A. I did.

Q. Was that from Senior Constable Cunningham? A. Yes.

Q. He sought your assistance because you had some first-aid knowledge? A. Yes.

Q. Then did you go to the crossing and see there Mrs. McDermott, the plaintiff? A. I did.

Q. Had you known her previously? A. No. I had not known her prior to this date.

Q. Was she lying clear of the railway line, on the eastern side near the Brisbane Water side gates? A. Yes.

Q. While you were there did she speak to you at all? A. Yes.

Q. Did you hear what she said? A. Yes, she spoke to me.

Q. What was she complaining of? A. She was complaining of her shoulder hurting.

In the Supreme Court of New South Wales.

Plaintiff's evidence.

P. W. Mitchell.

Examination.

Q. At the time she was speaking did you get very close to her head? A. Yes. I suppose I got within 12 inches of her head.

Q. Were you using anything? A. I used a torch to check her over.

Q. And you examined her shoulder? A. Yes.

Q. When she was speaking to you, was she speaking loudly or softly? A. In just a normal voice.

Q. When you examined her shoulder did you examine her face or head? A. Yes, I did.

Q. Did you notice any smell of alcoholic liquor on her while you were there? A. No, I did not.

Q. Then she was subsequently taken away in the ambulance? A. Yes.

Q. Have you walked across this level crossing yourself at night? A. Yes, I have.

Q. What was the purpose that took you over there? A. At the time I was residing at Koolewong I was employed by the Maritime Services Board of New South Wales as District Officer and on occasions I had to travel to Sydney by train and return by train at night. Therefore it was necessary to cross the crossing at night to return to the residence.

Q. Did you yourself ever have any difficulty about crossing? A. Yes. At that time it was quite a difficult crossing to cross.

Q. Why was that? A. It was very rough.

Q. Did you ever fall or stumble yourself? A. In this particular crossing you had to pick your way across very carefully to avoid stumbling.

Q. At the time of the accident you were associated with the Woy Woy Lions Club? A. I was secretary of the Woy Woy Lions Club at the time.

Q. Did your Club take an interest in Mrs. McDermott? A. They did. They adopted her as a project.

Q. Did you see her over the next couple of years? A. Yes. Along with another Lion I was appointed to look after her and take her to Sydney for leg fittings.

Q. Did you notice any change in her condition? A. Yes. From that time until such time as I left there in 1961 she aged considerably.

Q. To your observation she aged considerably? A. Yes, in my observation, yes.

Q. Did you notice any change about the way she spoke and the way she acted, cheerfulness or otherwise? A Yes. Not having been associated with her prior to the accident I could not say what she was like before.

Q. I only want from when you first began to know her? A. A number of the club, three or four of us, used to go out and visit her in hospital three or four times a week to see if there was anything she needed, and mainly from the time she came out of hospital she seemed to become withdrawn and inside herself and lost her happy attitude that she had in hospital. The reason probably being that while she was in hospital the full realisation as to how the loss of her legs affected her did not come until she got home.

CROSS-EXAMINED

Mr. JENKINS: Q. On a previous occasion, a little while ago, you gave this evidence: This question was put to you—

> "You made no attempt, no effort, to smell Mrs. McDermott's breath and see whether she had any liquor on her?"

And your answer was "No, I had no reason to." Do you remember that? A. Yes, I remember.

Q. And that is truthful? A. Yes.

Q. The next question was:

> You made no effort at all to do it. You made no deliberate effort to see whether she had liquor on her breath?"

And you answered "No, I did not". That is truthful, too? A. Yes. I did not have any reason to.

Q. On this night you got there about a quarter to seven—approximately a quarter to seven? A. Yes, approximately.

Q. You were a Maritime Services Board officer at that stage were you not? A. Yes.

Q. They have got quite a few wharves down at Woy Woy? A. Yes.

Q. And they are made out of rough decking? A. No, I would not say they are made out of rough decking. There are certain requirements they have to comply with, and one is that they have to be safe to walk on—both by day and night.

Q. But some of the wharves the Maritime Services Board have got have got big gaps in them? A. Not during my term of office.

Q. Have you been down there recently? A. No. I have not been up there since 1961; as regards looking at wharves.

Q. You have not? A. No.

Q. You will agree, will you not, that the road on the western side of the crossing is in a shocking condition? A. No, I would not say it is in a shocking condition.

Q. It is pretty good? A. I would not say it is pretty good, but in a negotiable condition. I am talking about at the time.

In the Supreme Court of New South Wales.

Plaintiff's evidence.

P. W. Mitchell.

Cross-examination.

E. W. Stevens.

Examination.

Q. It is a great improvement on the level crossing, I suppose? A. No. I would not say it is an improvement on the level crossing.

Q. To be quite frank with you, the road is such that you can trip on it in a number of places? A. Not if you walk along the side of the road.

Q. Let us not walk along the side but let us walk on the different part of the road for pedestrians to walk on. You could trip, could you? A. No, I don't think you could. If I might explain——

Q. You said you could not. I will accept that. There was only one light at the time of the accident along that old Gosford Road, showing there on the western side of the line? A. There was no light at the crossing.

Q. And there was no light near Mrs. McDermott's house, was there—no street light? A. Yes. There was a light right outside Mrs. McDermott's house.

Q. At the time of the accident? A. To the best of my knowledge, it was there at the time of the accident.

Q. Was not there only a light at the corner of Waterview Street and Old Gosford Road? A. No.

RE-EXAMINED

Mr. WATSON: Q. You have not seen a train running along this Old Gosford Road, have you? A. No, that is very true. (Question objected to.)

(Witness retired.)

Evidence of Ernest William Stevens

EXAMINED

Mr. WATSON: Q. What is your full name? A. Ernest William Stevens.

Q. Do you live at 11 Old Gosford Road, Koolewong? A. Yes.

Q. You are a gatekeeper employed by the Department of Railways? A. Yes.

Q. You are not employed at the Koolewong gate but down at the Hawkesbury River gates? A. Yes.

Q. But your house is quite near the crossing? A. Yes, very close.

Q. In fact you are on the railway side of this Old Gosford Road and your house is on railway land? A. Yes.

Q. Do you recall the night of 10th June, 1959? A. Yes.

Q. What first drew your attention to anything wrong? A. When one of the regular passenger trains stopped out of course.

Q. You mean it stopped in a position where it did not normally stop? A. That is correct. It stopped short of the station.

Q. About what time was this? A. I would say between 6.10 and 6.45, but I would not know about the correct time.

Q. Did you go down and see what was going on? A. I went down to see what was wrong.

Q. Did you see the ambulance there and did you see the plaintiff lying on the stretcher near the ambulance? A. Yes.

Q. Had you known her previously? A. Yes, I do know the lady.

Q. What was the condition of the lighting at the time? A. The only lighting there at the time was the light from the ambulance.

Q. What was the actual decking of the crossing? A. It was made of old sleepers.

Q. Do you walk across the crossing from time to time? A. Yes. I use the crossing about twelve days a fortnight, twice a day.

Q. Did you experience any difficulty crossing it prior to this accident? A. You just had to watch and see where you put your feet. That was the main thing about it.

Q. Why was that? A. There were gaps in between the sleepers and old bolt holes.

Q. There was no lighting at the time of the accident? A. No.

Q. Since the accident have you noticed work done in respect of the crossing as to its surfacing and lighting? A. Yes. They have resurfaced the whole of the surface with bitumen and they have also installed fluorescent lighting.

Q. When was that done? A. I could not say generally, but since the accident.

Q. Relating it back to Mrs. McDermott's accident, can you tell us whether it was a matter of months or years, that it was done, after the accident? A. It was only a short time after but I could not specify any particular time.

CROSS-EXAMINED

Mr. JENKINS: Q. How long have you been at Koolewong? A. Six years.

Q. And you have not stumbled, have you, on the crossing? A. No. I would not say I have stumbled.

Q. And you go over it twelve times a week, did you say? A. Yes, approximately.

Mr. WATSON: No re-examination.

(Witness retired.)

In the Supreme Court of New South Wales.

Plaintiff's evidence.

E. W. Stevens.

Cross-examination.

H. L. Camkin.

Examination.

HIS HONOUR (To jury): Gentlemen, will you be very careful to refrain from discussing this case with anybody? Do not talk it over even between yourselves away from court, because if you do it will be a mistrial and the matter will have to start from the beginning again. So be very careful and refrain from mentioning the matter at all to any person.

(Further hearing adjourned until 10 a.m., Thursday, 12th March, 1964.)

SECOND DAY: THURSDAY, 12TH MARCH, 1964

Evidence of Harry Leonard Camkin

EXAMINED

TO Mr. WATSON: My full name is Harry Leonard Camkin and I reside at 35 Mulgi Street, Blacktown. By occupation I am a traffic engineer with the Department of Motor Transport.

Q. Have you been such traffic engineer for eight years? A. Yes.

Q. You are present here under subpoena, is that correct? A. Yes.

Q. You hold a degree, Bachelor of Engineering at Sydney. You also hold a certificate in Traffic Planning and Control and a Diploma in Town and Country Planning? A. That is correct.

Q. Have you made any study of railway level crossings? A. Yes.

Q. Was that recently or over a period of years? A. Over the last three years.

Q. Why have you been making such studies? A. At the direction of the Department.

Q. Have you also been concerned with the erection of road signs and other devices at railway level crossings? A. Yes.

Q. In the course of your Departmental duties and engineering interests generally, have you made a close study of these things? A. Yes.

Q. Did you look at the plan and photographs of the crossing at Koolewong, as it was in 1959? A. I did.

Q. We are only interested in this case in the position of pedestrians on that crossing, and not the traverse of motor vehicles; only in pedestrians using the gates, or otherwise crossing? A. Yes.

Q. What do you say about the crossing as to the surface of the crossing between the gates—its footing? A. I found it quite poor, really.

Q. And from the point of view of the user, of people walking across it, what difficulties could it present? A. It could be rather dangerous.

Q. What would create a danger? A. The nature of the surface, the unevenness of the surface, and the fact that a pedestrian going from the pedestrian gate has to go out of his way, in effect, to use the crossing itself.

Q. He has to make a kind of basin turn to get across? A. Yes.

HIS HONOUR: Q. Why has he to do that, why can he not go from gate to gate? A. Because the crossing did not extend the full width of the pedestrian gates.

Q. The sleepers did not? A. No.

Q. Would it not be possible or practicable for him to travel direct from gate to gate, without journeying north to get on the sleepers? A. It would but he would have to step up and down, over the lines.

Mr. WATSON: Q. I take it, between the two sets of lines there is a basin and he would have to go up over one line, up over the second line, down into the basin, up over the third line and up over the fourth line? A. Yes.

HIS HONOUR: Q. What is a "basin"? A. Well, the level of the top of the rail is higher than the ground level below the rail. So, he has to step over each rail.

Mr. WATSON: Q. There are gaps between the two sets of sleepers of the two lines, between the down and up tracks? A. Yes.

Q. Is that gap lower than the sleeper level, between the lines? (Objected to).

HIS HONOUR: Q. Everyone takes it that a person moving through the wicket gate must deviate from the straight course onto the sleepers but what is the reason for that? A. Well I myself would prefer to cross on the sleepers rather than hop across the rails, because I feel there is more danger in a completely uneven surface than in a slightly uneven one.

Mr. WATSON: Q. We know that laid between the tracks are lumps of blue metal? A. Yes, ballast.

Q. You have to get over the rails, over the ballast, across the basin in the centre and up and over the rails again? A. That is right.

Q. Even having regard to the state of the footing of the crossing, do you regard that as a more dangerous exercise, to go straight from gate to gate than to do a turn and go across the crossing? A. Oh yes.

Q. Were you also told the evidence was the sleepers in that crossing were movable and not spiked down properly? A. I was not told that.

Q. Then withdraw that. Were you aware from the photographs this crossing was unlit at night? A. I saw the photographs.

Q. In your view was that or was not that crossing, having regard to its surface and lack of lighting, a dangerous crossing at night? (Objected to as not being a question for this witness; question disallowed as being a question for the jury).

In the Supreme Court of New South Wales.

Plaintiff's evidence.

H. L. Camkin.

Examination.

Cross-examination.

Q. Have you seen recent photographs of the crossing as it is now? A. No.

Q. You have seen the crossing? A. Yes.

Q. The footing has now been surfaced? A. That is right.

Q. What type of surface is it? A. A bitumen type surface.

Q. Is that a better surface than the old one, from the point of view of a pedestrian crossing? A. Yes.

Q. Has the crossing now been lit? A. I have not seen it at night time but there is a street lamp which would throw some light on the crossing, the amount of which I do not know.

Q. In connection with your occupation in the Transport Department, have you also been concerned to examine warning devices, where vehicular and pedestrian traffic crosses railway lines? A. I have taken into account the possible use of those devices.

Q. This has been in the course of your ordinary duties? A. Yes.

Q. Is it possible to erect warning devices at crossings such as this one at Koolewong? (Objected to "on the same ground as yesterday when evidence by another expert was rejected"; question disallowed as irrelevant.)

Q. Reverting to this crossing back in 1959, are you able to give an estimate of the cost of the surfacing you now see on that crossing, and of the lighting you now see in relation to the crossing, having regard to the fact there was a power source for lighting there in 1959; are you able to estimate roughly what these two things would cost? A. Of the order of £50 each.

CROSS-EXAMINED

Mr. JENKINS: Q. Did you see the road when you went down to Koolewong, the Old Gosford Road? A. I don't know it by that name.

Q. Did you see the road on the western side of the line? A. Yes.

Q. A dirt road? A. Yes.

Q. In a pretty shocking condition? A. Yes.

Q. And it could be improved by having bitumen put on it? A. Oh, yes.

Q. And a nice concrete surface? A. Yes.

Q. As it is at the moment, you could trip on it quite easily, could you not? A. Yes.

(Witness retired and excused)

Evidence of Elsie Caroline Usher

EXAMINED

TO Mr. WATSON: My full name is Elsie Caroline Usher and I reside at 91 Cowper Street, Randwick.

Q. Are you a widow? A. Yes.

Q. You are the mother of the plaintiff, Mrs. McDermott? A. Yes.

Q. I think you yourself are approximately 82 years of age? A. That is correct.

Q. Was your daughter born on the 24th October, 1902? A. Yes.

Q. Do you remember some years ago, in 1959, your daughter had an accident at Koolewong level crossing? A. I think a mother never forgets that sort of thing.

Q. On the day of the accident you actually travelled to Sydney, did you not? A. Yes.

Q. You had been staying in your daughter's home for some time before this day? A. That is true.

Q. For how long, on that occasion? A. A few months, I could not say exactly.

Q. Living in the home were your daughter, her husband and Mr. Thompson? A. Yes.

Q. Is it quite a large home? A. It is a very big place.

Q. Who did the housework around the place at the time? A. I think I did most of it when I was there.

Q. But who did it before the accident? A. Before the accident, she did it herself.

Q. Did she do the cooking? A. Yes, she was a very good cook and liked to do it herself.

Q. At the time of the accident I think another daughter of yours was staying there? A. My younger sister.

Q. But Mrs. McDermott was carrying out all the duties around the house, was she? A. Yes.

Q. Did she do much in the garden? A. She was always in the garden from early in the morning and as long as it was daylight, she was working. There was a lot to do because she was a florist and had to look after the shrubs.

Q. Did she get round in the car before the accident? A. Yes, she used it quite a lot to deliver plants and to get orders for other plants.

Q. What was she like in her personality, generally? A. She was a very lovely person, always. We were more like pals than mother and daughter.

In the Supreme Court of New South Wales.

Plaintiff's evidence.

E. C. Usher

Examination.

Q. Was she interested in the theatre? Yes, both of us were in the theatrical line when I was young.

Q. Did you ever go out with her in town anywhere? A. Not so very often. She would ring me up and invite me to town and we would have dinner and that sort of thing, and go to a show.

Q. How frequently before the accident would you have this kind of outing? A. Maybe once or twice a week; if she was not very busy, that would be.

Q. Then you used to go to Sydney from time to time while you were staying at Koolewong? A. Yes, but I did not like the long trip and I did not go unless it was necessary.

Q. Did you have any custom that you and your daughter followed when you went to Sydney on such trips? (Objected to: question allowed.)

Q. Was there any custom that you and your daughter followed when you went to Sydney by train? A. You mean, to sort of meet me, and that kind of thing?

Q. Yes? A. Yes——(remainder of answer objected to as not being an answer to the question; and struck out by his Honour's direction).

Q. When you went to Sydney on the day of the accident, did you go to Sydney to pick up anything? A. Yes. She had been to a sale previously, at an auction room, to buy some underwear, and curtains, and things like that. As she was so busy in the garden and with the flowers, she asked me if I minded calling down——(objection to conversation).

Q. Do not go any further on that. Did you go to Sydney on that day for a specific purpose? A. Yes I did.

Q. What was that purpose? A. To pick up these things she had previously bought, but she had not sufficient money to pay and she asked me to pick them up.

Q. You went to Sydney to pick up these things which she had previously bought? A. Yes.

Q. Was this a very big package you had to bring home? A. Yes there was quite a lot.

Q. You went to Sydney, and you were coming home on the train which gets to Koolewong about twenty to seven, is that right? A. That is true.

Q. What was the size of the load you had with you? A. A hefty bag about this size (demonstrating) and it was very heavy.

Q. Do not answer this question immediately. Had your daughter met you at the Koolewong station when you returned from Sydney on previous occasions? (Objected to as leading; and on the ground the witness already, in answer to a question, quite clearly indicated there was no custom. His Honour disallowed the question.)

Q. You arrived by this train. When you arrived in Koolewong, did you notice there was some commotion there? A. Yes.

Q. I do not want to distress you unduly?——(witness sobs). A. Why have I to be tortured like this? I have been through all of these things before.

HIS HONOUR : Q. You did not go near the scene of the accident, did you, you were taken away? A. No, but I saw all the people about.

Q. You did not go over and see anybody lying there? A. I saw a bundle lying near the gate and it was so dreadful. I could not stand it. I think I fainted, or something.

Mr. WATSON : Q. I now want you to come to another matter entirely. You stayed on in the home until your daughter came home from hospital? A. Yes I did.

Q. You helped around the house? A. Yes.

Q. I am going to read to you the evidence you gave on this occasion :

"Q. What was she like in herself, particularly in her relations with you before the accident? A. She was a wonderful daughter, wonderfully kind and always very generous.

Q. Was she a depressed person at all before the accident? A. She was like a bird around the house, always singing and playing the piano, and things like that.

Q. Did you stay at the house after she had the accident? A. Yes I stayed on for about some months.

Q. Some months? A. Yes.

Q. I take it that when she came out of hospital you more or less nursed her at home? A. I did, until she became a bit too difficult for me to handle.

Q. In what way did she become too difficult to handle? A. She became sort of difficult and irritable and I could not do anything right; everything was wrong.

Q. When she came home from hospital, it was some months before she had her artificial legs? A. About 10 months, I think.

Q. How did she live from the time she came home from hospital until the time she got the legs, how did she get around? A. On occasions—mostly I made some cushions and she would sort of crawl around on them.

Q. This was in the house for some time? A. Yes.

Q. Were you still there when she got the legs, or had you left before she got them? A. No, I was there the day she tried the legs on."

(At this stage the witness lay on the witness box.)

In the Supreme Court of New South Wales.

Plaintiff's evidence.

E. C. Usher

Examination.

HIS HONOUR: Q. Do you feel able to go on, or would you like to go outside for a while? A. I will be all right, I am sorry, I am very disturbed.

Mr. WATSON: I will continue to read your evidence:

"Q. For how long did you continue to stay there after she got the legs? A. Not very long; about 3 months, perhaps.

Q. You say there was difficulty between the two of you, and she became irritable? A. Very irritable and cranky.

Q. You have seen quite a bit of her, of course, since 1959? A. Yes.

Q. Does she go out much now? A. I do not think she goes out much. I do not see very much of her, to that extent.

Q. Apart from the obvious features of the legs, have you noticed any other changes in her? A. She can be very cranky and nasty for nothing at all. She gets irritable and cries, and that sort of thing, and it upsets me, so I do not feel like going up so much to see her because she is always so distressed and always crying, upbraiding me for something, so I won't go. 'Perhaps if I leave you by yourself you will adjust yourself', I said.

Q. You were quite close to your daughter before the accident? A. Yes. She was the most lovely character and beautiful girl in every way.

Q. Did you notice anything about the way she speaks? A. She cannot be bothered at all. I said 'I brought a very good book for you to read' and she says 'I cannot be bothered. I read the papers, and that is all I read'."

(By consent Mr. Watson then read the first two questions and answers in cross-examination.)

"Mr. JENKINS: Q. This train that was bringing you back was scheduled to arrive at Koolewong at five to seven, was it? A. Yes.

Q. And it did get there about five to seven on this night of the accident? A. Yes."

Mr. WATSON: Q. I just want to ask one other question. When you got home on the night of the 10th June, was there a meal prepared? A. Yes, she had cooked a very nice hot dinner.

Q. Which, I assume, was left completely uneaten that night? A. Yes.

Mr. JENKINS: No questions.

(Witness retired.)

Mr. WATSON: I propose to tender to your Honour in writing a question which I would have asked the last witness and which I think your Honour would reject. I should like the question to be recorded in the transcript.

(Mr. Watson's written question was shown to Mr. Jenkins, who said he would object to it. The written question was then shown to his Honour. The document shown to his Honour read:

"To Mrs. Usher: That morning did your daughter say something to you about her intentions as to what she would do that evening?")

HIS HONOUR: I will have it noted I would have allowed this question but I am assured it is the next question which is made clear from the terms of this question, and I would reject the next question. I note the question pressed.

Evidence of William George Thompson

EXAMINED

TO Mr. WATSON: My full name is William George Thompson, I am an invalid pensioner living in the same house as Mr. and Mrs. McDermott at Old Gosford Road, Koolewong.

Q. You are a part-owner of the house with them? A. Yes.

Q. You have been living permanently in that house since March, 1957? A. Yes.

Q. It was bought in 1955? A. Yes.

Q. Prior to March 1957, were you a frequent visitor to the house? A. Well, on my weekends off, I used to come from Sydney there.

Q. Do you remember the 10th June, 1959, on which day Mrs. McDermott suffered an accident? A. I do.

Q. Was she doing anything at the home during part of that day? A. During the day, we pulled an old stove out of the kitchen and were cementing the floor. That took us the biggest part of the day.

Q. Was she helping you with that? A. All the day.

Q. Her husband at that stage was down in Sydney? A. Yes.

Q. He only came home at weekends during the winter months, did he not? A. That is right.

Q. And Mrs. Usher was staying in the house but she had gone to Sydney for the day? A. Yes.

Q. There was another lady in the house? A. Miss Irene Fraser?

Q. She was also a guest in the home? A. That is right.

In the Supreme Court of New South Wales.

Plaintiff's evidence.

W. G. Thompson.

Examination.

Q. Did Mrs. McDermott leave the house that day? A. Round about 4 o'clock in the evening.

Q. Prior to her leaving the house, did she have any alcohol to drink, to your observation? A. No, there was nothing in the house, to my knowledge anyway.

Q. Did you see her leave the house when she went? A. I saw her leave about 4 o'clock.

Q. Then, did you yourself leave the house sometime later? A. Round about nearly 5 o'clock I went down to the station.

Q. Did you meet anybody at the station or did you see anybody? A. I met Mrs. McDermott at the station.

Q. What side of the line did you meet her on? A. On the Sydney side.

Q. The Brisbane Water side? A. On the Sydney side, going from Gosford to Sydney on the left hand side.

Q. The opposite side from which you lived? A. Yes.

Q. Were you there when she arrived at the station? A. She arrived in a taxi.

Q. This was about 5 p.m.? A. Yes.

Q. Did she give you anything at that stage? A. She gave me a small parcel.

Q. Then what did she do? A. She got out of the car and she got back in again and said she was going to see the doctor.

Q. So she got back in the cab, and went off to Woy Woy? A. Yes.

Q. Did you make any comment to her at that time? A. I said for her not to go.

Q. What did you really say, can you recollect? A. I said: "Don't be foolish. Don't go."

Q. Why did you say that? (Objected to; disallowed)

Q. She went back in the cab, and you went back home? A. I went back home, yes.

Q. You say it was a brown paper parcel? A. It was a small flask.

Q. What of? A. I believe it was whisky.

Q. And you took that home? A. I took that home, yes.

Q. Did you see her again that night before the accident? A. No.

HIS HONOUR: Q. When she went off in the taxi, did she go off in the direction of Woy Woy? A. That is right.

Mr. WATSON: Q. Did you hear her again that night? A. I was at the toilet out the back and I heard somebody, it must have been round about 6 o'clock; and she sang out to her sister: "Turn the meat over."

Q. This was quite clearly Mrs. McDermott's voice? A. Yes.

Q. About what time was this? A. It was dark then, it must have been round about 6 o'clock.

Q. Did this Miss Fraser suffer from any defect as to hearing or speech? A. She was slightly deaf.

Q. You did not see her again? A. No.

Q. Then did you hear something about an accident, later on? A. Later on, from her mother.

Q. Who cooked the meal that night? A. Mrs. McDermott put it in the oven. She put the meat in the electric stove before she went. Then she went away.

Q. She put the meat in the oven before 4 o'clock? A. Yes.

Q. Can you tell us where her voice came from, when Mrs. McDermott called out to Miss Fraser? A. From the front of the house.

Q. In Koolewong, I suppose the toilet is out the back of the house? A. About 25 feet from the back of the house.

Q. You did not go down to the crossing that night? A. Not after the 5 o'clock time.

Q. Have you yourself walked across that crossing at night? A. Oh, several times.

Q. Before the accident? A. Oh, yes, before the accident.

Q. And for sometime before the crossing was remedied, after the accident? A. Yes.

Q. Have you experienced any difficulty at night prior to the accident, in walking across the crossing? A. I have had three or four stumbles.

Q. You, however, suffer with an arthritic condition in the knees? A. In my knees.

Q. When you saw Mrs. McDermott at about 5 o'clock, and she handed you this flask, was there any sign of liquor on her then, to your observation? A. No, nothing.

Q. Since the accident you have continued to live on in the McDermott home, have you? A. I have.

Q. She was in hospital about a month, and then came home? A. That is right.

Q. The mother was still there? A. Yes.

Q. How did she get around the house? A. She got a couple of small pillows and used to get round on her knees.

In the Supreme Court of New South Wales.

Plaintiff's evidence.

W. G. Thompson.

Examination.

Cross-examination.

E. L. Hayes.

Q. Taking the type of character she was before the accident, and what she is today, and leaving aside the very severe loss of the legs, have you noticed anything else? A. There is a big difference.

Q. What is the type of difference? A. Before the accident she was quite free and easy, she played the piano and was all for public enjoyment but since then she has lost everything.

CROSS-EXAMINED

Mr. JENKINS: Q. When you met her at 5 o'clock at the railway level crossing, she got out of the taxi, did she not? A. Yes.

Q. Do you remember, there was a bottle smashed there? A. There was no bottle smashed there.

Q. That is your recollection. Do you remember there were some angry words passed between you? A. There were no angry words passed.

Q. Did she swear at you? A. There was no abuse at all.

Q. Did not this happen, you smashed a bottle and she swore at you and said: "I am going back to Woy Woy"? A. No.

Q. You say there were no angry words, but you did say to her that she was foolish, did you not? A. I did say so.

Q. On the question of the time you heard her voice, you are pretty certain, are you not, that was 6 p.m.? A. Round about that time.

Q. On a prior occasion you gave this evidence:

> "Q. And you could tell by the state of the darkness that it was 6 o'clock when you heard a voice? A. Yes.
>
> Q. Could it have been half-past 6? A. No, not that late.
>
> Q. A quarter past? A. No."

A. I was never asked that question.

Q. I put to you, you were asked; and you said: "No, it was not five past, it was round about six"? A. It seemed about that time.

Q. Of course, you yourself have been in an hotel with Mrs. McDermott? A. Only in the beer garden on a Saturday afternoon and we have had a middy and fish and chips there. We have never exceeded that, though.

(Witness retired and excused.)

Evidence of Esther Louisa Hayes

EXAMINED

TO Mr. WATSON: My full name is Esther Louisa Hayes.

Q. You gave evidence here last week, did you not? A. Yes.

Q. I will read over to you the evidence you gave on that occasion: — "To Mr. WATSON: I reside at 9 Waterview Street, Koolewong.

Q. Is Waterview Street on the mountain or on the western side of Koolewong station? A. I have no interest whether it is on the left or right.

Q. I did not ask you that. You have got Waterview Road and the railway line, and you are over on the mountain side? A. Yes, I am over on the mountain side.

Q. On 10th June, 1959, did you go to the Koolewong Railway station with the intention of meeting the train from Sydney? A. Yes, I did, to meet my husband.

Q. You went there to meet your husband? A. Yes, I did every night.

Q. What time was the train due in? A. A quarter to seven. I would not know.

Q. A quarter to seven? A. I think it could have been.

Q. It could have been twenty to seven? A. Sometimes they were late.

Q. When you went to the railway station, where did you wait? A. In the room.

Q. In the waiting shed? A. Yes.

Q. When you were in the waiting shed, did you hear something? A. Yes, I did.

Q. What did you hear? A. Screaming.

Q. Screaming? A. Yes. I then came out.

Q. Where was the screaming coming from? A. On the line.

Q. Along the line? A. Yes.

Q. Down towards the gates, or up——? A. Up near the gates.

Q. Up near the gates? A. Yes. But I was terribly frightened because I thought it was a man at first, and I went down and she screamed: "I know you".

Q. She screamed? A. Yes.

Q. Did she say anything to you? A. She said, "For God's sake, save me." She said, "I will be killed".

Q. Where did you see her, was it on the railway lines? A She was on the railway lines, yes.

Q. The lady you saw was Mrs. McDermott, was it not? A. Yes.

In the Supreme Court of New South Wales.

Plaintiff's evidence.

E. L. Hayes.

Examination.

Q. Do you know those sleepers that go across there, or did go across there? A. Yes, I know them.

Q. Where was she in relation to the sleepers? A. She was not very far. I picked her up, and I had to put her down, and she said, "Roll me". It was a dreadful night, it was that dark. I was not thinking—I was only thinking that if I could save her, I would.

Q. You know that this was a bitter experience? A. A bitter experience for me.

Q. I wonder can you help us this way, do you know there are four railway lines, two going up and two coming down? A. Yes.

Q. Can you tell us, when you first saw Mrs. McDermott, where she was in relation to those railway lines? A. I forget, because I have my husband very ill and I am forgetting things.

Q. All you know is that you tried to move her? A. I tried to save her.

Q. Did you roll her at all? A. I beg your pardon.

Q. Did you roll her at all? A. Yes, I did. I lifted her up and my side went click, and pain came. I said: "I can't lift you any more," she said "Roll me," and I rolled her.

Q. When you rolled her, did you roll her over one of the steel lines at all? A. I rolled her—it was a dreadful night, I can't really think.

Q. Can you help us by telling us whether or not you rolled her over the line? A. I rolled her over the line and then I tried——

Q. Did you finish rolling her, and when you finished do you know where you left her? A. I can't tell you now. I am going on 81. I have a husband sick for two years so I can't remember everything. It was a dreadful night. I could not hardly see her face. I knew her voice.

Q. Will you look at exhibit B-11? A. Yes.

Q. Do you recognise that as the pathway down from the station where you were waiting, down to the level crossing, that is the path you walked? A. Yes, that is the path.

Q. When you heard Mrs. McDermott scream, no doubt you went down that path, is that right? A. I went over the line. I ran over the lines. It was a dark night. I can't remember. I can't remember it.

Q. All I am trying to do is seek your help? A. I know. I won't tell any stories.

Q. Are you in a position now to mark on that photograph where you saw Mrs. McDermott; can you mark the photograph; you think you can, do you? A. I will try.

HIS HONOUR : Q. Unless you can remember, do not mark it? A. I can't remember.

Q. Do you remember where you found her? A. I just remember that I ran to her that quick. It was done that quick.

Q. You would prefer not to mark the photograph? A. Yes, I would, because it is no good if I am going to . . It was dreadful; the worst night I have ever seen.

Mr. WATSON : Q. After you rolled her, did you run away to get some help? A. I went away to get a man, because she said : "If you don't get me off here . . " I said : "I will go and get help."

Q. You, I think, went to Mr. Kitchener? A. Yes.

Q. And very shortly after, Sgt. Cunningham was there—a policeman? A. Yes, he was there, putting on lights for the train.

Q. You actually got the plaintiff, Mrs. McDermott, around the shoulders and tried to lift her up, did you? A. Yes, I had to put her down quickly.

Q. When you did that, you told us it was very dark, but when you did lift her up did you smell anything at all? A. No, I certainly did not. I certainly didn't, no. I must tell the truth.

Q. Just one other thing. I am sorry to ask you this question but we have to get the evidence. Sometime after you tried to lift Mrs. McDermott, did you find one of her feet? A. Yes, I found it going through——

Q. It was a bit closer to the station, was it? A. Yes, and when the light went on I could see all the blood, and I threw it down and I panicked. As a rule I could have saved her, I think, if I had gone down—I generally go down earlier, but I did not this night because it was too dark."

(By consent, Mr. Watson then read the cross-examination.)

"Mr. JENKINS : Q. This is true, is it not, that you heard the scream and ran down to where she was? A. Yes. Quickly. I heard the scream.

Q. You ran down to where she was? A. Yes.

Q. You tried to roll her a little bit? A. Yes, I rolled her.

Q. And then panicked? A. I panicked when the policeman came and put the light on, and I picked her foot up.

Q. You tried to roll her, and you could not see. You ran away to get your husband? A. No, I did not go to my husband. I went to get a man to come and help.

Q. You went and got Mr. Kitchener? A. I cannot remember anything after that. When the police were there, I panicked.

In the Supreme Court of New South Wales.

Plaintiff's evidence.

E. L. Hayes.

Examination.

Q. You were only there for a moment or so? A. Yes, I was not there very long.

HIS HONOUR: Q. You said you were not there very long? A. No.

Q. What do you mean by "there"? At the railway station, or at the scene? A. I was there a good bit. Not such a good bit, but I was there waiting for my husband. I did not hear the scream straight away. I was sitting down inside and it was dark. There were no lights on.

Q. How long had you been waiting before you heard the scream? A. I would not know.

Q. While you were waiting there, did a train go past in either direction? A. No. Had I been down there—I used to go early, but this night was very dark. I did not go down. In fact, I was frightened.

Q. While you were there no train went either way, is that right? A. Train coming down, you mean?

Q. Any way? A. I never seen them. I never seen them. I saw the police putting the big lights on for the train that was coming up."

(Mr. Watson then read the re-examination.)

"Mr. WATSON: Q. Mr. Jenkins asked you did you try to roll Mrs. McDermott. As I understand your evidence in chief, you were unable to lift her but you did in fact roll her? A. Yes, I did roll her. That was exactly true.

Mr. WATSON: Q. When you were waiting in the waiting shed for your husband to come on the train, were the station lights on? A. No, it was a dreadful night.

Q. The whole station was in darkness, was it? A. Yes.

Q. And at the time you went down to get Mrs. McDermott, the whole place was still in darkness? A. Yes, till the policeman came and put the big light on.

Q. Can you now tell us how long you were waiting in the waiting shed, before you heard the scream? A. Not very long.

Q. Would it be five or ten minutes? A. I could not tell you, it was so dark.

Q. You cannot tell us how long you were in the waiting shed before you heard the scream? A. It was not that long but I cannot remember the time.

HIS HONOUR: Q. You cannot put a time to it, as to how long you were waiting there? A. No.

Q. You cannot say whether it was five minutes, ten minutes, or any number of minutes at all? A. No.

Mr. WATSON: Q. While you were sitting in the waiting shed waiting for the train to come, and before you heard the screams, did you hear any train going the other way? A. I never heard any train at all.

Q. Do you know the North Coast Daylight Express? A. Yes.

Q. Did you see that train that night? A. No, I did not see any train. I was scared stiff, it was so dark.

Q. Did the North Coast Mail come through while you were there? A. I never seen it."

Mr. JENKINS: No questions.

(Witness retired and excused.)

(Mr. Watson stated that a copy of the Privy Council judgment in Quinlan v. Railway Commissioner had been received this morning, and asked his Honour if the parties could be given an opportunity to examine this judgment before the plaintiff's case was closed. His Honour stated that he would give the parties whatever adjournment they required for this purpose.)

Evidence of Patrick Leo McDermott

EXAMINED

Mr. WATSON: Q. You gave evidence on Friday? A. Yes.

Q. I am going to read that evidence over to you now. Tell me whether this is correct:

"To Mr. BROUN: I am the husband of the plaintiff.

Q. You live at Old Gosford Road, Koolewong, and by occupation you are a fitter? A. Yes.

Q. Were you married to the plaintiff in about 1923? A. 1923, Yes.

Q. You and your wife have no children? A. No children.

Q. Well, now, I would like you to tell us, if you would, a little about your wife prior to the accident that she suffered. What sort of life did she lead? A. Well, my wife was very active before the accident. She was in business and that sort of thing—going around activising herself in all sorts of sidelines.

Q. She took an interest in writing? A. In writing.

In the Supreme Court of New South Wales.

Plaintiff's evidence.

P. L. McDermott.

Examination.

Q. What about the garden? Did she take a lot of interest in the garden? A. Yes, she took a lot of interest in the garden. She was very fond of floral work.

Q. Was it a big garden which you had? A. It was a fair size — nearly as big as this room. For her, anyway. A house garden.

Q. Who principally looked after the garden? Her or yourself? A. Well, at the time she used to look after it. That was before the accident.

Q. And the garden always looked in good order? A. Yes.

Q. She interested herself in a large number of outside activities, such as the theatre? A. She had organising ability, and she could not be still. She had to be doing something or other all the time and she used to like to play the piano and sing. She also played the piano accordion at one time.

Q. Did she use the car very much? A. She used to use it. Of a day time she would go out.

Q. Would you say she was an easy-going pleasant person? A. Yes, very much so. We got on well together.

Q. She also did all the housework before the accident? A. Yes.

Q. What size is your house? A. It is 16 squares. It has about 6 rooms, or 7 rooms.

Q. Did she keep that in order? A. Yes, always in good order.

Q. Prior to the accident did you and your wife entertain frequently? A. Casually (sic) Yes.

Q. Was she always pleased to have guests? A. Yes.

Q. And prepare meals and food for them? A. Yes, always did that.

Q. I think you were in Sydney at the time when the accident actually occurred. A. Yes. It was winter time and I was working a lot of overtime at night time and it was inconvenient to come home so I came home on weekends.

Q. The first you saw of your wife after the accident was when she was in hospital? A. Yes.

Q. Would you tell us a little about your wife since the accident and what you have noticed about her. First of all you might take the housework. What does she do there now? A. She can do very little housework due to her incapacity to do the work. I do the work myself—a lot of it.

Q. Does she do the washing up, for example? A. She may be able to do a little, but I generally do it at the weekends. I do most of the work—sweeping and making the beds, and that sort of thing, and big washing-up.

Q. Have you seen her try to make a bed? A. I have seen her try but it is too much for her.

Q. She feels off-balance? She falls and loses balance? A. Yes.

Q. Have you seen her try to do sweeping? A. I have, but it is awkward for her to. She cannot handle the broom. It is too risky.

Q. Has she tried playing the piano since the accident? A. We had a piano there. She used to try but just could not get going at all, and she used to be able to sing at one time and had quite a pleasant voice in a sort of way.

Q. What happened when she tried to play the piano? A. She used to become upset and just bang it with nerves and I said 'Don't worry about it', and I stopped her from playing.

Q. Have you still got the piano now? A. No, we sold the piano. It used to upset her so I sold it.

Q. It upset her, so you sold it? A. Yes.

Q. Does she have as many friends call as she used to? A. There are some people call around. Friends. Quite a few people come around occasionally.

Q. How do you find her in regard to her general disposition now? A. She is very irritable at times and impatient at time, and has moods. At other times she is all right.

Q. What appears to be causing these moods and distress? What does she complain about and get upset about? A. Just her nervous condition. I could not exactly put my finger on it.

Q. When she fails at trying to do some manual task, such as playing the piano or making beds; does that upset her? A. Yes. it does upset her.

Q. That upsets her? A. Yes.

Q. Does she have times when she gets very upset and bangs things? A. Does she have times—— (Objected to.)

Q. Are there times when she sort of becomes very upset—more upset than other times, or when there is some particular feature about her mood? A. Well, there are moods. There are moods I just can't put my finger on exactly as to what some of the moods are. At times she might be—I just can't put a finger on the mood she gets now. I cannot make out why she gets moods that way.

Q. How often would you see these moods, as you call them? A. Sometimes at the weekends. Sometimes at night. I try to put my arm around her——

Q. Once a week, or once a month? A. Well, it may be once a week.

Q. About once a week? A. When I see her, yes.

Q. I think you said that at the moment you sweep the floors do you? A. I beg your pardon?

Q. You sweep the floors and make the beds? A. Yes.

HIS HONOUR: Q. Didn't you say you are there only at weekends still? A. I am home every night now. I come home every night now. Since the accident, I started to come home every night then. I had to give away the overtime and come home at night time to be with her.

Mr. BROUN: Q. What about washing? Do you have to do the family washing? A. I do any heavy washing, yes, at the weekend.

Q. Well, now, I think while—about the time of the accident you used the crossing regularly did you? A. Yes.

Q. Where the accident occurred? A. Yes.

Q. Would you tell us what you noticed about the crossing at about the time of the accident? A. Well, it was a very rough crossing. I know that. I used to know that there used to be shoes on the station. Women put their shoes there. I saw them changing their shoes at the train to go across the crossing. They used to put on slippers and take their high heels off.

Q. To cross the crossing? A. Yes.

Q. Did you see them put the other shoes back on? A. Yes, I used to talk to some of them on the train—they were neighbours—and they used to sit in the train and they changed their shoes while I was with them. I did not take much notice at the time because it had no significance.

Q. Have you yourself ever experienced difficulty on this crossing arising out of the condition of the crossing? A. Yes, I had a fall one time myself.

Mr. JENKINS: I won't object again because your Honour has ruled on it.

HIS HONOUR: Yes.

Mr. BROUN: Q. When was the fall you had on the crossing in relation to your wife's accident? A. It was some months after. It may have been nine, ten or twelve months. It is five years ago.

Q. Was the condition of the crossing at the time you fell the same as at the time your wife had her accident? A. Yes, it was exactly the same.

Q. Will you tell us what happened to you? A. I was taking home two young ladies from my place—my niece and a friend. They used to be up on holidays. On my way home from taking them I stumbled on the crossing, because it was dark that night, and the shadows of cars coming on the highway—the bright lights sort of blinded me, and you can just pick your way over, and I stumbled and skinned my knee. When I got home——

Q. When you got home you tried to keep it from your wife? A. Yes.

CROSS-EXAMINATION

Mr. JENKINS: Q. How long had your wife been living at Koolewong before the accident? A. We have been up there nearly ten years, I think it is.

Q. Ten years before the accident? A. Nine or ten years. I am not sure.

Q. Your observation of her before the accident was confined to weekends, as you say? A. I beg your pardon.

Q. Your observation of her before the accident was confined to the weekends when you would come home? A. Yes. At that period anyway. Round about that period. In the winter time when overtime was on I decided to stay in the city.

Q. Did you know of an accident that she had in 1956? A. The accident she had then?

Q. Yes. Did you know of that? A. I believe she had—Railway, you mean?

Q. Yes? A. Stepping off the train?

Q. Yes? A. Yes, I think she did stumble, too. I think she did have a stumble.

Q. That was a Saturday night, wasn't it, or Sunday morning? A. It may have been. She was on shift work at the time. She was just on it for a time.

Q. Were you home? A. I beg your pardon?

Q. Were you home? A. Yes, I was home.

Q. Were you present when the accident happened at all? A. No I was not present. It was night time.

Q. The first you knew about it, I suppose, is when you went to Gosford Hospital? A. How many years ago is that? It must have been a long time.

In the Supreme Court of New South Wales.

Plaintiff's evidence.

P. L. McDermott.

Cross-examination.

R. A. F. Cunningham.

Examination.

Q. I would suggest to you 1956? A. It might have been.

Q. Did you go to see her in hospital? A. Yes, I went up there.

Q. Now, have you ever stumbled before in your life? A. Have I ever?

Q. Yes? A. Where? On the crossing?

Q. Anywhere? A. Yes. I have.

Q. You have stumbled on the roadway, I suppose? A. Yes.

Q. And fell? A. Yes.

Q. And there is a dirt track, isn't there, up to the house where you live? A. Yes.

Q. And there are potholes in that road aren't there? A. Well I suppose there are sometimes.

Q. And not only potholes, I put to you, but quite a number of rocks sticking out in the road? A. Yes.

Q. And there are lawns in front of the houses, aren't there? A. Yes.

Q. And there are driveways gouged or cut into the lawns, aren't there? A. Yes, that is right.

Q. And in these driveways there is a lot of rough stone and rock isn't there? A. On the roadway?

Q. In the driveways, across the lawns? A. Yes. I think some of them are.

Q. And places where you could quite easily stumble? A. Yes."

Q. Is that evidence true and correct? A. True.

Mr. WATSON: I have no further questions.

Mr. JENKINS: No questions.

(Witness retired.)

Evidence of Roy Adam Frederick Cunningham

EXAMINED

Mr. WATSON: Is your full name Roy Adam Frederick Cunningham? A. Yes.

Q. Are you a Sergeant of Police now stationed at Warialda? A. Yes

Q. On 10th June, 1959, were you stationed at Woy Woy? A. Yes.

Q. On that day did you receive a telephone call from the Woy Woy Railway Station? A. Yes.

Q. As a result of that telephone call did you go to Koolewong level crossing? A. Yes.

Q. Is that level crossing just north of the Koolewong Station? A. Yes.

Q. What time did you get there? A. About 6.25 p.m.

Q. There are some houses on the western side of the crossing. Is there a shop on the eastern side of the crossing, on the Brisbane Waters side? A. Yes.

Q. Is there a public telephone outside that shop? A. Yes.

Q. Was it at that time a mixed business? A. It was at that time. I do not know what it is now.

Q. We are only interested in it in relation to that time That was a mixed business that closed about 5 or 6 o'clock? A. Yes.

Q. There was a public telephone outside the shop? A. Yes.

Q. You used that phone? A. Yes.

Q. You got there about 6.25? A. That is right.

Q. Was it daylight or dark? A. It was darkness at that time.

Q. And on the crossing at that stage there were sleepers across the line? A. Yes.

Q. Was there an outside light on the crossing when you arrived there or any lighting from the street light or anything else that you saw? A. No. The crossing was in darkness.

Q. Evidence has been given by one witness, an elderly witness, that the whole station was in darkness. A. That would not be correct.

Q. So, to the best of your memory the station itself had a light but there was no light whatsoever at the crossing? A. That is right.

HIS HONOUR : Q. What do you mean by the station light? An electric light or kerosene lamp? A. I do not know the present position but at that time there were a few electric lights along the platforms.

Mr. WATSON : These gave you no assistance whatever at the crossing did they? A. None.

Q. You had your torch with you? A. Yes.

Q. When you got to the crossing I think there were some people there including Mrs. Hayes, the elderly lady we had here this morning? A. When I first arrived there Mrs. Hayes was the only person there.

Q. She was standing on the crossing, on the western side? A. Yes.

Q. She was pretty much in a panic was she? A. Yes, she would be.

In the Supreme Court of New South Wales.

Plaintiff's evidence.

R. A. F. Cunningham.

Examination.

Q. Then did you find Mrs. McDermott? A. Yes.

Q. I think you found her in a position on the north side of the crossing lying between the 2nd and 3rd rails; that is, lying in the basin between the two sets of tracks? A. That is correct.

Q. I think you found the stumps of her feet up against the rail and her head pointing towards the north, and she was in a kind of right angle position, lying on her left side? A. Yes. She was lying on her left side and the stumps of the legs were against the western rail, or what I term the eastern side of the tracks.

Q. That is the line going to Sydney? A. Yes.

Q. And her head up the line a little further? A. Yes. She was lying to the north of the crossing, approximately 8 feet, from the northern edge of the sleepers which form the crossing, on her left side and in a right angle position, with her head pointing towards the north.

HIS HONOUR: Q. That 8 feet is the nearest part of her body to the sleeper? A. The nearest part of her body to the sleeper would have been the stumps of the legs.

Q. Is that the part that you say was 8 feet? A. Yes.

Mr. WATSON: Q. Did you fix that 8 feet simply by your eyes or did you make any measurement? A. I did not measure it at the time. It is judgment.

Q. It is judgment? You did not pace it out but just based it on what you saw? A. That is right.

Q. (Exhibit B6 handed to witness). Is that an outline of the sketch you have drawn, very roughly, showing the position in which you found Mrs. McDermott's body when you got there? A. That is so.

(Exhibit B6 shown to jury by Mr. Watson.)

Q. You later, I think, found the feet? A. Yes.

Q. They were actually lying one on the other, were they? A. That is so.

Q. Were they on the wooden sleepers of the crossing between the tracks of the western line; that is the line to Newcastle? A. Yes.

Q. Will you look at Exhibits B5 and B7 (handed to witness). Do those two marks there depict also the position in which you found her feet? A. That is so.

Q. And to identify where the stumps were, you saw them—taking a diagonal line across—was that where the feet were? A. I would say about 15 feet.

Q. On later investigation did you find her shoes? A. I did.

Q. Were they south of the crossing, on the Sydney line, between the rails? A. Yes.

Q. About how far south of the crossing? A. About 30 yards.

Q. (Exhibit B10 handed to witness). Do those two crosses show where you found the shoes? A. That would be the approximate position.

(Exhibited B10 shown to jury by Mr. Watson.)

Q. Is this a rough sketch plan you drew on a previous occasion, showing the position of the body as you saw it, and that traverse line being the edge of the sleepers? A. That is correct.

Q. Are these the shoes (shown to witness) that you found on that night? A. Yes.

Q. And that scuff mark on the outside of the right shoe, was that there when you found them? A. Yes, they were badly knocked about, just like that.

Q. I think you kept them in possession for quite some time? A. I did.

Q. Did you produce them at the first hearing, or were they held by you right up to the first hearing? A. No.

Q. They are probably a bit cleaner, but that is roughly the condition they were in the first time you saw them? A. Yes.

Q. The scuff mark on the outside of the left shoe and the scuff mark at the back? A. Yes, to the best of my recollection they were there that night.

(Photograph of shoes tendered and marked Exhibit C.)

(Pair of shoes tendered and marked Exhibit D.)

Q. When you got to Mrs. McDermott, I think you noticed that her feet were missing; did you take any particular notice of any arterial bleeding, but it was not present? A. That is correct.

Q. Apparently the stumps had been crushed and there was no bleeding. The stumps were in a blackened condition? A. That is right.

Q. Were you aware at that stage that very shortly thereafter a local train was due to arrive from Sydney? A. Yes.

Q. So, having satisfied yourself that there was minimum bleeding you then took action to stop the north-bound train? A. That is right.

Q. You had a red reflector material attached to your torch, and you used that? A. Yes.

Q. When you stopped the train did you obtain the assistance of the fireman from that train? A. I did.

Q. And with the assistance of the fireman did you help to carry Mrs. McDermott from the line and place her over on the eastern side near the gate? A. That is correct.

Q. Was she in that position when Mr. Martin, the ambulance driver, Mr. Mitchell and Mr. Stevens came on the scene? A. That is correct.

Q. Assuming that immediately after Mrs. McDermott's legs were chopped off she was lying between the rails on the eastern side—that is the lines going to Sydney, and assume the position in which you found her, would this situation be consistent with a lady of Mrs. Hayes' age having lifted her by the shoulders and just rolled her over the line? (Objected to; disallowed).

Q. I think you also, having stopped the train and having moved her over to that position—dashed off and telephoned, and when you got her over to that position—— A. I am not quite sure whether I telephoned beforehand or afterwards. I know that I made several telephone calls, including the ambulance, the hospital at Gosford, the Railway Station, and to Mr. Mitchell, and I made those calls from the public telephone box outside the shop.

Q. Did you some time later more closely examine Mrs. McDermott? You looked at her for arterial bleeding when you first went there? A. Yes.

Q. Did you look at her later around the face and head, either at that time or at any time before she went into the ambulance? A. Not particularly that I can recall.

Q. When you lifted her to carry her with the fireman, were you carrying her near her head? A. The legs.

Q. What distance would that be from her face at any time before she went into the ambulance? A. I would not have been closer than three feet.

Q. Did she speak at any time at all? A. No, except to complain. She used the words "Oh, my shoulder. Oh, my shoulder".

Q. Was that a coherent complaint? Could you understand the words? A. Not very well.

Q. But you could understand what she was saying? A. Yes.

Q. Did you yourself detect or smell any smell of liquor on her at any time that you were there with her that night? A. No.

Q. You have on different occasions used this crossing, I think, several occasions before, on police business? A. Yes.

Q. Have you used the crossing yourself at night? A. Yes.

Q. Had you had any difficulty yourself crossing that crossing at night? A. I always took care in crossing it because of its uneven surface.

Q. Did you use a torch? A. I always did.

Q. And even with the torch and taking care, did you ever have any problems yourself? A. I cannot recall exactly when, but I have stumbled slightly on it.

Q. I take it that on most occasions you have crossed at night you have crossed at least in one direction with the assistance of the lights from your police car? A. Yes.

Q. How long had you been a member of the Police Force prior to 10th June? A. Thirteen years.

Q. During that period I take it you would have had considerable experience, both of persons who had suffered injury and persons who were under the influence of intoxicating liquor? A. Yes.

Q. Did you see anything at all that night which gave you an indication that Mrs. McDermott was in any way influenced by intoxicating liquor? A. No.

CROSS-EXAMINED

Mr. JENKINS: Q. You are now a Sergeant? You were a Senior Constable then; is that right? A. That is so.

Q. You prepared an Occurrence Pad entry about this incident, did you? A. Yes.

Q. In which you wrote down the result of your investigations and what you observed? A. Yes.

Q. And that report was signed by you? A. Yes.

Q. And the very last sentence of that report, just over your signature, contains this sentence: "Her breath smelt of intoxicating liquor", does it not? A. Yes.

RE-EXAMINED

Mr. WATSON: Q. From what source did you obtain that? Were you told something by somebody? A. That is correct.

Q. And that comment is not the result of your own observations or what you saw? A. That is correct.

Q. An Occurrence Pad does not contain a statement prepared by you to give evidence, but it is a summary of facts given to you by various sources? A. It is the first report, not necessarily complete, that we make in our official capacity.

HIS HONOUR: Q. It was put to you that you do include in your Occurrence Pad information from sources other than your own observations? A. That is correct.

Q. People ringing you up and telling you something—you would put that on the Occurrence Pad, I take it? A. That is correct.

Mr. WATSON: And this comment was the result of something you were told? A. That is so.

In the Supreme Court of New South Wales.

Plaintiff's evidence.

R. A. F. Cunningham.

Re-examination.

Application by Defendant for Verdict by Direction.

Q. Nothing from what you observed? A. No.

(Witness retired and excused from further attendance.)

(Notice of intended action tendered and marked Exhibit H.)

Mr. WATSON: My friend admits that that notice of intended action was received.

That concludes the plaintiff's case, subject to the qualification that I would now like the opportunity of considering the Privy Council's judgment.

(Luncheon Adjournment)

(Case for the plaintiff closed.)

APPLICATION BY DEFENDANT FOR VERDICT BY DIRECTION

Mr. JENKINS: In my submission the plaintiff should be non-suited.

Mr. WATSON: I am not prepared to argue a non-suit.

Mr. JENKINS: I then ask for a verdict by direction.

(In the absence of the Jury.)

(In view of the Privy Council's decision in Quinlan v. Commissioner for Railways his Honour directed that the following application and submissions be reported.)

Mr. JENKINS: I ask for a verdict by direction, and the application is based on these submissions:

(1) There is no evidence of any duty on the part of the Commissioner to the plaintiff other than the duty to a trespasser.

(2) If the plaintiff were not a trespasser and she was a licensee, there was no evidence of any breach of the duty causing injury of a licensor to a licensee.

(3) There is no evidence of any negligence.

I would like to develop the last submission first. Taking this contentious matter of the Privy Council's judgment, this is a case of a person being found by the Railway Commissioner in circumstances which are completely unexplained, and it is almost identical with Wakeling v. London South Western Railway Company (12 A.C. 41). (Reads head note.) That case went to the Court of Appeal and then to the House of Lords, and the House of Lords held—"Confirming the Court of Appeal . . . negligence on the part of the company". That is very much this case.

If I might go to the judgment of Lord Halsbury in this case, they deal with this matter, and in the judgment these extra matters are not concerned with this case here, but there is the question of contributory negligence, and as to whether the onus shifts back to the plaintiff, but that does not really concern us.

HIS HONOUR: On this first ground that there is no evidence of a duty on the part of the Commissioner to the plaintiff other than in the category of a trespasser, does not that depend upon the jury's rejection of the submission (which is being made to them) that the plaintiff found herself north of the crossing because she stumbled away from the sleeper crossing, where it is claimed that she was in fact a licensee?

If she was a licensee on the sleeper crossing and the jury drew the inference that because of her stumble she fell this 8 feet to the north, then the jury by that finding would have found her a licensee.

Mr. JENKINS: But there is no evidence that she was ever on the crossing at all. The only evidence in the case is that she was at her own house, at 6 o'clock, and the next piece of evidence is that she is 12 feet—I suggest that is the correct interpretation of that evidence—away from the crossing, north of the crossing, but the circumstances in which she came to get there are completely unexplained.

It cannot be said that any explanation of her presence could be given by some suggestion that she was going to the railway station, because she would go through the wicket gate and would not touch the crossing in going up to the platform, but her presence on the spot is utterly unexplained and is outside the area of licence. Looking at it prima facie, finding her there means that she was certainly a trespasser and has no right or authority to be there, or anywhere. It would be complete conjecture as to how she got there.

HIS HONOUR: Is not there a further matter in that you are addressing me on a point which has already been decided for me by the Full Court in this case? I am not speaking of any changes which have taken place in the light of matters in the last 48 hours by reason of a decision of the Privy Council, but speaking of the question as to whether there is any evidence here on a question of fact. In that regard the State Full Court has held that there was, in this very case. Have I any room in which to make an independent decision on that, in the face of the Full Court's decision.

Mr. JENKINS: Your Honour might remember at an earlier stage in this case your Honour had indicated a view that perhaps your Honour would have to adhere to what the Full Court said.

HIS HONOUR: On that point.

In the Supreme Court of New South Wales.

Application by Defendant for Verdict by Direction.

Mr. JENKINS: It becomes most significant now, if the facts in this present trial are the same or similar to the facts presented to the Full Court, but now they are quite dissimilar. The Full Court founded itself in coming to this conclusion that there was a stumble and going across, on the taxi driver's evidence which was given in that case but which has not been given here.

I will refer your Honour to the relevant passages in the Full Court judgment. At page 4 of the judgment of his Honour the Chief Justice: "Evidence was given that shortly before 6.20 p.m. the timetable . . . in a civil case".

What the Full Court has said is that because the taxi driver dropped her on the eastern side the probability is that she is on the crossing, going to her home, and then stumbles and falls over; but there is no such evidence in the case now before your Honour and therefore your Honour is not bound by the Full Court's judgment.

Mr. Justice Brereton at page 4 of his judgment said: "She was later picked up by a taxi . . . before the arrival at the crossing of the train which struck her".

Of course that is not now open to the jury, and their only evidence in the case at the moment is this: that the plaintiff is at home and the next thing is she is found 12 feet north of the crossing.

HIS HONOUR: Leaving out of consideration for the time being the evidence of her being at home, is there not some evidence that she did come back in a taxi later?

Mr. WATSON: This evidence came from the defendant's witnesses on the last occasion. Thompson today said that 5 o'clock he went down there, and she went back to Woy Woy.

HIS HONOUR: That is somewhat different. If there had been a taxi with her at half-past five it could have been said, as Mr. Justice Brereton said, that the jury could discard Thompson's voice.

Mr. JENKINS: What the jury has to conjure up here is the getting of her 8 or 12 feet on to the other side of the line. How did she get there?

HIS HONOUR: I am still faced with the position that there was evidence given to the jury in the plaintiff's case.

Mr. JENKINS: That is what they are confined to, and I submit there is no evidence here for the jury to come to a conclusion as to how she got there. She has said that she does not go out at night, the shops on the other side of the line are closed at 5 o'clock, and here she is found in this unexplained position. I suggest it would be just mere conjecture to suggest how she came there. No one in the world suggests that she stumbled on the crossing because there was no need for her to go near the crossing. On the plaintiff's case, coming down from the station, she would not have to go near the

crossing at all. She was between her house and the crossing, and it is just as likely that she could have got through the fence. It is just as likely that she could have fallen from a train—there are many reasons as to why she may have got there, but actually she is in a place where she can only be a trespasser.

HIS HONOUR: It is all very tantalising, because I know that outside the door you have got some evidence that she was in a taxi.

Mr. JENKINS: I am prepared to forfeit the evidence about the intoxicating liquor. I am doing this because of what I am now suggesting is the altered situation, and the law has been interpreted correctly—not because of Quinlan's case and the Privy Council decision. This does not depend on Quinlan's case; this is an unexplained matter. She would be a trespasser, and even if there was no evidence of that, there is no evidence called on the part of the Commissioner which would explain her being where she was. There is no evidence of any fault on the part of the Commissioner and there is certainly no negligence in the running of the train.

HIS HONOUR: If she can be got on to the wooden crossing, she is a licensee and it would be open to the jury to find that she may have stumbled north, to where she was, and I would think in this case the evidence would be adequate for the jury to consider whether on the minimum obligation on the occupier of the premises she was a licensee at night. If Mr. Watson can get her on to the crossing then I would say other matters are available for determination by the jury. Of course I realise you have not completed your argument, and I will not interrupt you again.

Mr. JENKINS: I was dealing with the matter of her unexplained presence on the line and how she came there. The onus is left fairly and squarely on the plaintiff, and that is left unexplained.

In Wakeling's case (12 A.C. at p. 41) Lord Halsbury said: "It is in point upon the plaintiff in this case to establish by proof that the husband's death has been caused by some . . . I understand the admission . .

HIS HONOUR: On the finding of the body in that case it could be put to the jury that he was on the level crossing.

Mr. JENKINS: Yes. He said, "Leave that alone for the moment and it is unexplained." (Continues reading). "I understand the admission in answer to the 6th interrogatory . . contact was accomplished."

HIS HONOUR: In that report does it make it clear where the body was found?

Mr. JENKINS: Yes, I think it does.

HIS HONOUR: He was found in a position to which he could have been carried from the level crossing?

In the Supreme Court of New South Wales.

Application by Defendant for Verdict by Direction.

Mr. JENKINS: The facts are set out—"The approaches are guarded by a handrail. There is a slight curve . . . train." It does not say whether it was on the actual crossing or not.

HIS HONOUR: He was found away from the crossing in the direction to which the train was travelling?

Mr. JENKINS: His body was found the same night near the crossing.

HIS HONOUR: In this case I think you could confidently say that the body here could not be carried by the train, because this body was up in the Newcastle direction, the direction from which the train had come, and impact does not carry a body backwards.

Mr. JENKINS: In this case there was evidence that the whistle was not blown, but the House of Lords says it does not matter—there is no explanation as to how the body came to be in a particular position. It comes down to a matter of causation. There was no evidence to connect the evidence of the lack of blowing the whistle and the evidence of the accident, and there was no case to go to the jury.

In this case there is nothing to connect the plaintiff's body 8 or 12 feet north of the crossing with any condition of the crossing at all. Indeed it is not an infeasible explanation that she saw fit to walk across the line 12 feet to the north of the crossing.

HIS HONOUR: All this was put to the Full Court.

Mr. JENKINS: Yes. The only basis upon which there was a failure to have a verdict entered for the defendant was the matter of the taxicab, but in view of the evidence there is no possible need to use that. She does not go out at night; if she did come down to the platform the position of the body on the northern side is quite unexplained. On the evidence it would be utter conjecture to say that the condition of the crossing had anything to do with the position of the body, and my friend is not in the same position and I suggest that Your Honour in this case is not bound at all by what the Full Court has said. They based their decision upon this taxicab's arrival a few minutes before her getting on to the crossing.

HIS HONOUR: In that case the time of the arrival of the taxi was when?

Mr. JENKINS: Quarter past, and the accident happened at twenty past. However, as I said previously, she is walking across the crossing at the time, the train is coming, and she knocks herself out and falls on the line; because on the present case she gets home and she has left home about 6 o'clock because the neighbours heard, "Turn the meat over", and the next thing is that she is found on the line 12 feet north of the crossing.

Those stark facts alone could not connect the plaintiff in getting into that position with the condition of the crossing in any way. It is twenty

minutes later, and she is 12 feet north of the crossing and indeed at a time long before any train is expected from Sydney. It is just conjecture as to how she got there.

I know it is difficult to divorce one's mind from what went on previously in other cases, but that is the evidence here at the moment. I submit it is a case in which there is just no evidence of negligence because her presence on the line cannot be connected with the crossing, and the only thing my friend has ever opened up is the condition of the crossing and has never made any suggestion about the running of the train. Therefore there is clearly no evidence of negligence. That is the third submission.

I would like now to come to the matter of duty, if she is a trespasser.

Mr. WATSON: I will concede that if she is a trespasser you have no duty.

Mr. JENKINS: Then on the matter of licensee, if I may read to your Honour a textbook statement on the duty of licensor to licensee as set out in Fleming on Tort at page 454 of the 57th edition: "Standard of care due to licensees. An occupier owes . . . reasonable inspection of the premises".

HIS HONOUR: I do not see why you propose to discuss this when the whole essence of your application is that she is not a licensee, and there is no evidence even to suggest that she ever was at the relevant time a licensee. Why worry about the duties of a licensor? If there was any evidence here indicating that she is a licensee, even shorn of all the formulae in Donoghue v. Stevenson there would definitely be a case go to the jury.

Mr. JENKINS: That is what I wanted to discuss with your Honour because in my submission there would not be.

HIS HONOUR: I am not suggesting there would be the need for the application of Donoghue v. Stevenson principles to make it a matter for the jury, but I am adverting to what I said earlier: if there is any evidence here supporting the plaintiff's suggestion that she was on these sleepers, then I think it is a matter for the jury to say whether she was on them, and it would be for them to consider whether it was a trap, whether or not it was concealed and whether the inference could be drawn that she was thrown 8 to 12 feet up the track.

That does not require Donoghue v. Stevenson at all.

Mr. JENKINS: I quite agree with what your Honour says, or your Honour's approach, but in my submission in this case the night time makes no difference.

HIS HONOUR: That is where I am inclined to disagree with you.

Mr. JENKINS: I would like to read to your Honour a passage from Lord Somner.

In the Supreme Court of New South Wales.

Application by Defendant for Verdict by Direction.

HIS HONOUR: What about the Glendinning case where a person could see a hole in the ground in the daytime but not in the night time, and that becomes a trap?

Mr. JENKINS: But here we have a case where the plaintiff herself says she has been over this crossing hundreds of times.

HIS HONOUR: It is not an obstacle, such as a fixture. If it were a rail or a post then I think you would be on an entirely different ground, if you were to say that this plaintiff has "passed this post or rail hundreds of times in the daytime, and this happened on her first passage at night"—in those circumstances it would not be unknown to her. The different factor in this case is that it does not apply to a rail across the roadway, as in Anderson's case. In this case the surface could be regarded as a sort of "moveable feast", it is undulating sleepers. It could be guarded against by knowledge in the daytime, and a person could negotiate it quite safely in the daytime but might be in a different position—so the claim is—when having to contend with moving sleepers, uneven sleepers and sleepers placed at different distances apart in the night time. That is why I think night is a factor.

That is, if you get her on to the crossing, but I do not know how Mr. Watson is going to do that at this stage.

Mr. JENKINS: If you blindfold yourself and walk across, you would be in the same situation if you walked across at night time. Lord Somner dealt with this very matter in Mersey Docks and Harbour Board against Proctor (1923 A.C. 253 at 274), where he said: "A licensee . . . guard himself from falling into it". The evidence as adduced by my learned friend shows that not only was this expected, but indeed everybody there apparently knew and accepted the situation in regard to the nature of the crossing, and therefore we have no duty as we would have as an invitee. They knew exactly the nature of the crossing, and even their expert witness said it was plain to his eyes.

HIS HONOUR: They knew the condition of the crossing each time they crossed it, but its condition was not static. It is not like a post or a rail, as we have heard described. This wobbled, rocked and jumped up and down, and the obstacles were not identical on every journey. The evidence is that they did rock and move about, and if you knew exactly every space it does not follow that you would get the same obstacle every time you went through, so at night time you would not know what to expect.

Mr. JENKINS: Supposing it was the position that every one of the sleepers would jump up and down and that was known and that, being known to the person crossing, does not involve any failure of a duty on our part, because if these jump up and down, then they knew they jumped up and down—this was a sleeper crossing.

HIS HONOUR: "Jump up and down" is simply describing a physical feature that presents itself. It seems to me, that to make it clear, such a proposition would involve consideration of the plaintiff's complaint that there was no light, because a light may have placed that crossing in the same condition in the night time as it would be in the daytime.

Mr. JENKINS: In my submission there is no special duty cast at night time if the condition is known.

HIS HONOUR: I will agree with you that that is the law but I think it is a question of fact, as to whether there is evidence here of something that would not be seen in the night time. It is for the jury to decide whether it is that type of case or a Glendinning's case.

Mr. JENKINS: Of course I agree with your Honour that the evidence in this case shows that at night it is dark, and unlit, and therefore the crossing could not be seen. I could not be heard to argue to the contrary. All I am saying is that the plaintiff has been over it hundreds of times and knew its condition so it does not matter if she goes over it at night at all, knowing its condition as she did. The photographs were taken about a month after, and witnesses have deposed that there was no change in the condition, and here we only have evidence of the sleepers being unspiked. There is no evidence that on this particular night another particular sleeper became unspiked, but the evidence is that it has always been in this condition. The only evidence your Honour has before you is that there are loose sleepers and the plaintiff has been over the crossing hundreds of times, and they are known to have been there for thirty years in this condition. The plaintiff's case does not allow the jury or anyone else to say that in the last two or three days there may have been some change. In fact all the evidence goes the other way. It has always been like this, with loose sleepers, and there is no suggestion in the plaintiff's case that a particular series of sleepers became loose a day or so before, so the plaintiff would not have had an opportunity to see it.

She may walk along it, there are loose boards upon it, and it is in the same position as if I have a wharf and I say to my friend "Walk along it. There are loose boards upon it but you can clearly see them. They are loose here and everywhere," and my friend goes over it hundreds of times. If he chooses to go over it at night time I have got no obligation to light the premises in any way. There is no obligation upon the licensor to light the premises or pathway at night.

HIS HONOUR: There is an obligation upon him to give warning of traps there, night and day—there is no distinction.

Mr. JENKINS: Only when they are not known and it is claimed that they are not known. But that is not the position here; everybody took their shoes off.

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HIS HONOUR: It becomes a choice of whether it is a rough and unsafe crossing, and that is an adequate warning as to the night, or whether specific difficulties should be discernible at each crossing.

Mr. JENKINS: At this point, if I might perhaps go to something which rather sums up what I am putting to your Honour: this is a case with which the Privy Council in Quinlan's case agreed,—Gallagher against Humphrey (Vol. 6, Law Times (n.s.) page 684). It is referred to in your Honour's copy of the Privy Council judgment at the bottom of page 11: ". . . something that goes substantially further . . . on the part of the Railway staff."

The Commissioner says in respect of this crossing "Here it is, in this condition—rough with loose sleepers. You can use it, but I am not going to light it at night time. If you like use it at night time; knowing what it is like you take the risk." That is what he says and he is bound to no further duty.

Cockburn, L.J. said in Gallagher v. Humphrey at page 685 "I doubt whether on the pleadings . . . exists." They are very important words.

HIS HONOUR: Perhaps that ought to be read in the light of Cardy's case.

Mr. JENKINS: Cardy is said to have no bearing as a child's case.

HIS HONOUR: I suppose I should say the adoption of it.

Mr. JENKINS: It goes on that "He is not bound, for instance . . . or precipice".

HIS HONOUR: There is nothing new about that. It still comes back to the question of what is a trap. In one case it is a fence, a ditch, a post or rail. This can be known and the state of knowledge would continue night and day. If it is moving planks, then they can vary from day to day or hour to hour.

Mr. JENKINS: There is no evidence of that.

HIS HONOUR: I did not say there was. Can those sleepers be likened to that other type of case where the obstacle at night could be different from the obstacle seen by day?

Mr. JENKINS: On the evidence in this case the obstacle at night could not be different to the obstacle at daytime because there are spikes holding the sleepers down and the witness deposed that in some instances the spikes were out and had always been like that. There is no question of an alteration or an addition which would not be known to the plaintiff.

HIS HONOUR: I mean an alteration in the movement of the sleepers.

Mr. JENKINS: She knows it will move when she walks upon those sleepers.

HIS HONOUR: Why are you retiring from your assertion that she was not trespassing?

Mr. JENKINS: I am not at all. I thought perhaps I would make all my submissions now. If your Honour thinks it would shorten it, I would like to make these submissions but if your Honour thinks the more important submission I made is that she is a trespasser, perhaps my friend could answer that. I would like to make this submission and deal with this Privy Council case. I am not resiling from that at all, I am on the alternative basis. Going on he says "I quite agree that a person who merely gives permission . . . subject to existing dangers." We have said to her "You can go across. Look at these sleepers. They jump up and down." Then it goes on " . . . subject to a certain amount of risk and danger . . . upon a public highway." These are the facts which are most significant. He was taking his father's dinner according to the ususal custom and he was passing under when the crane dropped on the defendant. "As he was passing the chain broke . . . was allowed to run." That kind of thing is the type of thing from which there could be a liability.

Mr. Justice Whiteman said "I think that there was evidence to show that the plaintiff had the permission of the defendant to use the way . . . defendant's servants." It cannot be said in this case the plaintiff did not know here was a crossing with loose boards that jumped up and down, had holes and gaps in it, was rotted, she could trip on it, and she said "Knowing it is like that, I will go over it at night time" and accepted those conditions and risks. That is how she has framed her case against the defendant and the defendant says "Accepting that case, I am under no obligation to do anything to that crossing at all."

HIS HONOUR: The Full Court said the absence of a light was a matter for consideration by the jury in this case, did they not, but I think they put that not on the ground that you and I are discussing now—the obligation to light at night in order to ensure that the thing cannot be described as a trap. I do not think they put it on that ground. They put it on the general ground of the duty owed: that is so, is it not?

Mr. JENKINS: Your Honour is correct there.

Mr. WATSON: The Full Court never faced up to the licensee-concealed trap.

HIS HONOUR: There is a clear distinction. The thing we are discussing is the possibility of this thing, which is clearly a trap by day, at night time not being clearly so and therefore there should be a light to remove it from the category of the trap and therefore a light was necessary on one submission. But the Full Court did leave it to the jury in this particular case to decide whether the absence of a light did not have certain consequences, but not on that basis at all. Is that so?

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Mr. JENKINS: That is quite correct, your Honour. Then they said in this passage by Mr. Justice Brereton at page 11 "None the less there are . . . static condition of the premises." That has gone now by Quinlan. Quinlan has displaced that. That being so, the defendant says in this case that firstly it is a trespass but secondly, if a licensee, then the defendant has done nothing that could be described as a breach of the duty. There is no duty to light, to repair, to do anything. She took it as she knew it hundreds of times to be in the exact condition it was and therefore, on that, there is no basis to allow the case to go to the jury. The way my friend originally put this, and he did not open the law, wisely I would suggest, in opening the case in this current trial—he put it fairly and squarely in your Honour's lap and told the jury your Honour would tell them what the law was. The first submission I make, though, is that it is a Wakeland case. There is an unexplained presence on the line which would dispose of the whole thing.

HIS HONOUR: I was hoping Mr. Watson would call some evidence to put his client on the crossing. If she is there, I am prepared to make a certain ruling on the licensee. I cannot see how you can get her on that crossing unless Mr. Watson makes an application to re-open his case and call your taxi driver who will prove she was intoxicated.

Mr. JENKINS: I am already committed myself in front of the jury, saying I am doing this, that, and the other. That put me in a most difficult situation. I do not want to say much more because your Honour has completely put back to me what my submissions are exactly. When my friend opened the case, I think in the second or third trial, he did say that it was the Commissioner's duty to take steps in respect of the crossing, such as lighting, putting a surface on it, etc., to make it safe for persons using the crossing. That is not his duty at all in any way whatsoever and the case could never in those circumstances be put to the jury in that way—that it was the Commissioner's duty to make it safe. Even in the case of an invitor-invitee, that is putting the duty too high. He has put an invitor-invitee duty on the Commissioner. The Commissioner has no duty at all in respect of this crossing except to not have a concealed trap. The whole condition is well known to the plaintiff and it is no concealed trap. I do not feel that it is necessary to go into the matter of this judgment except to say this—and I would like to read this because it does become important—that it put Cardy's case aside because they say that it is a child inducement case and you get nothing from that, and Rich's case is the only important one and they say this, dealing with Rich: "The trial judge rejected the evidence and directed the jury to find for the defendant."

HIS HONOUR: That is where they suggest a positive act of negligence?

Mr. JENKINS: Yes, but they have gone further in another part of the judgment and say you not only take the static condition of the premises but you take the activities thereon being conducted. They are the positive acts.

You accept not only the static condition but you accept the activity. It goes on "Their Lordships are bound . . . Full Court." Mr. Justice Wallace in the first trial in McDermott's case said that he was going to direct the jury in accordance with the direction of Fullager J. in Rich's case and on the appeal the Full Court adopted Mr. Justice Fullager and the Privy Council have now disagreed with that. They make it very clear in the last three sentences; "It would not be that the duties would co-exist and overlap each other . . . he would have to take the crossing with its risks as he found it—positive act of negligence on the part of the Railway staff." In my submission that is the only way in which this case could be put to the jury—that the plaintiff was bound to take the crossing with the risks as she knew them to exist. If one accepts that then one sees there is no evidence to go before the jury because all the things of which the plaintiff complains were known to her and there were no traps and the Commissioner is guilty of no breach of duty, even putting the plaintiff's case at the highest.

HIS HONOUR: Licensee?

Mr. JENKINS: Yes. I do not think I should deal with the rest of the judgment. Cardy's case is dealt with and it is said it is a child case. It does seem that the categories are back into the field of the overriding Donoghue v. Stevenson case.

HIS HONOUR: The Donoghue duty is not to be imported into a case unless it is something like dropping a sugar bag. What about in Quinlan's case—on that very extract you have just read you would have to take the crossing with the risks as you found them and you would be entitled to complain of any positive act of negligence on the part of the Railway staff. Complaining of negligence with the train creeping on him, as it were.

Mr. JENKINS: They say not only take the static condition but you take the activity being conducted and the activity was running a railway and he could not complain at that. If we started to discharge a rifle along the railway line, that may be something different.

HIS HONOUR: What about the case we spoke of yesterday. He must accept the premises as he found them. There he had to enter on them in the knowledge of and with the acquiescence that the operation would continue and yet he was held entitled there. That was Mummery's case. That was to account for some act of negligence in the very operations being carried on. How do you reconcile that? They would not throw out one of those cases, would they?

Mr. JENKINS: It may be a bit different because here there are lines down and it is a warning to people that we are going to run trains along here and we have no obligation even to whistle at this point, say, if a train sneaked down.

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HIS HONOUR: Can you remember whether it was the point in Mummery's case that that wood, with reasonable care, would be stopped from flying about? I think it must have been. It must be reconciled in this way—that the person entering must accept the premises as they were. He must reconcile himself to the dangerous operations that were on at the time, but that he would be entitled to accept that those operations would be carried on in the normal way, whether it was making gun powder or running trains or cutting wood, and if there was a deviation from the normal way of running trains or cutting wood or making some dangerous chemical then he could complain. I think that is the only way you could reconcile it.

Mr. JENKINS: They say what your Honour says here. Page 7 "Secondly the formula covers activities . . . authority". So in our submission firstly the plaintiff is a trespasser but in any event there is a completely unexplained presence upon the line of the plaintiff. There is no nexus between the plaintiff's presence on the line where she was and any alleged negligence on the part of the Commissioner even, if as they said in Wakeland's case, one can say the failure to blow the whistle was negligence. There is no nexus between the person on the line and that failure. Here there is no nexus between the state of the lighting of the crossing and her presence in the position where she was at all, and that is the difficulty my friend faces in this case, your Honour. I do not think there is anything else I can add.

Mr. WATSON: Dealing first with the question of whether there is any evidence to go to the jury that my client was other than a trespasser, I will admit that there must be evidence from which the jury can draw an inference that she was on the footing of the crossing. The evidence from which the jury can draw this inference, or the portions of evidence are these: First the general geographic evidence that this was the only way across the railway line. It was the only access to the outer world that these people had. Secondly there is the evidence that this crossing was near a Railway Station. There is evidence that a public phone was over the other side, a shop, apparently not open but, one gathers, a shop and residence. There is evidence that the Commissioner knew that various persons, including one here, Mrs. Hayes, might be meeting a Sydney train coming in slightly after half-past six.

HIS HONOUR: That would not put her on the crossing.

Mr. WATSON: I will come to that. I am just giving a general background.

HIS HONOUR: If you had evidence here that she had to go on that platform, that still does not put her on the line.

Mr. WATSON: There is evidence, however, from which the jury could infer that she went down the crossing at about this time to meet her mother, because it was dark, her mother was aged and her mother was bringing a lady with her. Once we can get her at the wicket gates it seems to me, with respect, that no jury is required critically, nor is this Court required critically,

to look at the situation at what particular side of the line she happens to be on, no more important than it would be that I was seen on one side of Phillip Street at a particular point of time and something happens to me on the other side of Phillip Street. Once she is there and she is entitled to use it as a licensee to use that crossing, she could have used it for any purpose at all. The only question really to leave to the jury is this: can a proper inference be drawn that either in lawfully using that crossing, moving from east to west or west to east, either way, crossing between the wicket gates, crossing the line, can the jury draw the inference that crossing for her own purposes, whatever they may have been, she tripped and stumbled and projected herself onto the line.

HIS HONOUR: I am entirely with you on the second point if you can get her on the crossing. It is open to the jury to decide the question whether a stumble did not throw her. That has been laid down by the Full Court in this case but that is overlooking the second submission of Mr. Jenkins—of taking the crossing as you find it. But how do you get her on the crossing? If you suggest there was evidence from which the jury could draw the inference that she had left her home to go to the platform to meet her mother, that does not take her anywhere near the sleepers.

Mr. WATSON: That takes her to the first wicket gate on her side. Having got that far it is open to the jury to draw the inference that for some purpose which need not be explained, she decided to cross the railway line.

HIS HONOUR: They have to find more probably than not that she did cross on the sleepers.

Mr. WATSON: They can find more probably than not in the surrounding circumstances. She could have decided to use the public phone. There could be somebody on the other side of the line. She may have thought, for example, she had dropped something in the earlier trip and had gone looking for it. Once you put her there as a licensee she is in the same position as the person crossing a public street. Once the jury get her at or near this rough crossing, which is the only way of crossing the line, it is not that you go into a critical examination of what exactly she did from then on, for what purpose she went from east to west or west to east, whatever way she was going, for what reason she felt a call to go to the other side. All the jury has to know is that it is more probable than not that she found herself in the position on the railway line because of tripping on the crossing, and the jury is assisted in those matters by the fact that the state of the evidence is that she was a sober person going about her normal activities, she had gone down to the train apparently to meet her mother, she was acting in a normal, reasonable way, and anything outside the normal user of the crossing to cross the railway line becomes conjecture, and I would submit I am entitled to put to the jury on the balance of probabilities, being placed in that area by some earlier evidence she was entitled to use that crossing

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as she was and the accident came about—as an inference for them to draw —by her going off that crossing, passing from east to west or west to east, because either inference is open. That is the way in which I put it but if necessary I grasp the nettle in this way—that the Full Court in dealing with this matter took the evidence of the taxi driver as a beginning point of inference. It, with respect, does not seem to me to be the vital point to commence. They could have commenced their inference by saying she was at or near the crossing for a reasonable purpose. She was like any other citizen in this situation.

HIS HONOUR: How do they get her there without the taxi driver, who we do not see now?

Mr. WATSON: You can go backwards and say she is found in a position lying off a crossing. How else does she get there, on the balance of probabilities, except on the reasonable inference that she tripped off the crossing? How else would she be there? My friend talks about getting through a fence. There is no evidence you can get through any of these fences and if you have a look at the photograph of this crossing it would be a most interesting task for a young boy to get across, let alone a woman of 56. Working backwards, once you put her 6 or 8 feet off the crossing, where did she come from? What is the most reasonable inference or more probable inference that the jury can draw? They are assisted by evidence like Mrs. Bell and other people stumbling on that crossing. Once the jury say it is reasonable that she stumbled off that crossing it matters not how she got there originally and for what purpose. Inferentially the jury can work backwards from the place where they found the woman. The difference between this and Wakeland's case is that there is evidence in this case that other people did almost exactly the same thing. Mrs. Bell in particular stumbled and was projected forward. Some other witness stumbled and fell. So there is evidence from which the jury can draw an inference on the balance of probabilities that was not available to them in Wakeland's case, where you had a body unexplained beside the line. If this were a Compensation to Relatives case I would have been able to rely on the inference that as an ordinary resident of Koolewong and having regard to the fact that a Sydney train was coming in she was entitled to be down on that crossing and entitled to walk backwards and forwards for her own purposes. Working backwards there is an inference available for the jury to draw that she reached that position through stumbling off the crossing.

If we work backwards the situation is perfectly clear but if your Honour feels that is not enough when I have to grasp the nettle and I must grasp it in this way: naturally, when I concluded my case there was no indication in this case that the evidence from the defence would be any different to what it was previously. Mr. Jenkins then said, "I seek a verdict for the defendant". If your Honour is not satisfied with the argument as I have put it, working in reverse which I submit is the logical way, if your Honour is not satisfied

that the question should go to the jury in its present condition, I would ask leave to re-open my case and I would say that any rights Mr. Jenkins has lost by arguing for a verdict by direction must be given back to him. Your Honour is sitting at nisi prius with the jury out. This is not a game of tactics. This is a terribly important matter to both sides, a matter of tremendous importance, particularly where this is the second trial and the defendant suddenly turns around and does not call the evidence which he has here and which is available—he has the subpoenaed evidence outside—but seeks a verdict by direction and relies on the fact that he has not called this evidence in the second trial. In my submission, justice and fairness is done to both parties. In my submission I should be allowed to grasp the nettle. Justice is done to my learned friend and his client by vacating any penalties he might adopt by asking for a verdict by direction and calling further evidence if he so desires. Your Honour would have that discretion at nisi prius.

HIS HONOUR: He may make the same application again.

Mr. WATSON: He could. But I would submit it is not necessary to go that far. I would submit that once the jury can draw, as they were held to be entitled to draw from the Full Court judgment, that Mrs. McDermott was in the position she was because she stumbled off the crossing and that there is no other logical inference available to them, having regard to the whole weight of the evidence, it matters not when she got there, how she got there or from what particular side she got there.

HIS HONOUR: You are conceding now that it cannot go to the jury on the question of an obligation to take reasonable care for people using it? It is licensee and licensor?

Mr. WATSON: No. I have not argued that. I have simply at this stage argued the other point.

HIS HONOUR: Will you be conceding that,

Mr. WATSON: No.

HIS HONOUR: What do you do then if the position is simply a danger? True it is not a trap, because she knows about it.

Mr. WATSON: I would submit that the duties owed to the plaintiff in this regard are not expressed simply in the terms of a hidden trap. Nothing in Quinlan's case has cut down the law as expressed frequently in our Courts as to the duty the Commissioner owed to lawful occupiers of his land, persons who are lawfully on his land. Even in Quinlan's case this is stated because at page 12 of the judgment it says, "The law does not admit, however . . . reasonable care." That is the general statement of duty. It does appear, and this seems to be the way the Court dealt with it in Cardy's case and in the very lengthy dissertation on the law by the learned Chief

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Justice in Cardy's case he attempted to show how the various categories of occupier, invitee, trespasser came within the general law of negligence. They are part of the general duty to take care. What has happened, I submit, is that once a person is lawfully on the land the general duties apply, particularly where there is an activity being carried on and it is not merely a static condition. What has been said in Quinlan's case is this—you have got to get the person lawfully there. There is no duty to a trespasser. What has happened in Quinlan is one of the chickens of the waggon mound has come home to roost and the trespasser and the foreseeability circle is going around. What it says is a trespasser is not a reasonably foreseeable person in all the circumstances and there is no liability. He is a trespasser, but if a person is lawfully on your land you are then under a duty to use reasonable care towards him.

The Privy Council in Quinlan's case made mention of the case of Vedean v. British Transport Commission: "Their Lordships have studied with care . . . duty of care exists to the trespasser also". But they have refrained from saying anything about the licensee, invitor categories and in that case of Vedean Lord Denning said at page 382 "In the ordinary way the duty to use reasonable care. . . to foresee the presence of a trespasser". That, so far, is a statement of the law with which the Privy Council will not quarrel. It is when they go on to say in the circumstances he did foresee that they go on to Rich's case which has been overruled by the Privy Council. Cardy's case has not. Thompson's case has not. It is only the extension of the duty of care to a trespasser, because in some vague way he can be foreseen. It is only at this point that the Privy Council has said that. In a further statement of Lord Denning at page 384 he said "The principle that I have stated. . . under that duty because he is an occupier". Leaving out the duties as to trespassers, this, in my submission, is the present state of the law and nothing in Quinlan's case takes us away from the statement of the law as it has been propounded in the Full Court judgment in this particular case, by which your Honour is bound. So the state of the law is this: you do not only look at this sleeper crossing as a static situation and apply the static licensee principles. You look at it as part of an operation, part of the running of trains. You look at it as being a section of line which severs these people at West Koolewong from the rest of the area. You look at it as an activity, and once a person is lawfully on that crossing it is the general standard of Allchin's case. In other words, the Commissioner is under a duty to take reasonable care to preserve the safety of all those persons, excluding now trespassers, whom he reasonably anticipates will be on the line. This is still the law and, with the utmost respect, it would be very dangerous on the obiter in Quinlan's case to depart from the statement of the law that the Full Court has laid down in this particular case. So I would submit that this matter ought not to be put to the jury on the hidden trap principle. It ought to be put to the jury on the simple principle that the Commissioner knew that this was a crossing which

was used for all purposes by this little settlement of people at West Koolewong. He knew that and also knew it was a crossing used by his invitees as passengers or people meeting the train.

HIS HONOUR: You cannot import invitees into any remarks to be made to the jury.

Mr. WATSON: No. That was only using an argument to your Honour. He knew this particular crossing was a crossing of general user, pedestrian and vehicular, by many people and therefore, running express trains along it and knowing the dangers of the activity that he was conducting on this crossing, he was under a duty to take reasonable care to ensure their safety, and it is on that general principle I would submit that the matter should be left to the jury.

If your Honour is against me on that, if your Honour departs from the Full Court ruling—and your Honour is entitled slightly to depart from that Full Court ruling in so far as Rich's case is buttressed by a trespasser rule but the general principle is still there and, a fortiari, still therefore and invitee—and if there is something in the Privy Council's decision which your Honour feels should entitle your Honour to depart from the Full Court ruling in this case——

HIS HONOUR: How does the Full Court require that reasonable care should be exercised if the Full Court is not availing itself of Donoghue's case. How can it be said?

Mr. WATSON: In my submission, Donoghue's case is available and Quinlan has not denied this, because the very problem of the trespasser is that he is no longer a neighbour. We are back to the situation that one used to get under the Dog and Goat Act. If he is a trespasser he is taken right outside the ambit even though the explanation is there. The trespasser is no longer in the neighbour principle, but if the licensee or the invitee, or whatever he may be is lawfully there, he is your neighbour and you owe him a duty of care and this has not been cut down in any way by Quinlan's case. It has only been removed in the case of a trespasser. In fact, if anything it has been emphasised in Quinlan's case because by their attempt to reconcile Cardy to that particular statement of the law and the attempt to bring child allurement cases into the general neighbour principle I would submit that we are entitled to go back to the way the duty was put by the Full Court, which appears in Mr. Justice Herron's judgment when he says "It may be broadly stated that the duty of the Railway . . . ought to have done more than he did for the protection of pedestrians".

HIS HONOUR: Is there any reference made there to the suggested breach of this duty in the way of not making the sleepers more secure?

Mr. WATSON: The breaches are referred to in the basis of the crossing itself, the roughness of the crossing itself and the lack of lighting. Although I relied very heavily on the lack of lighting before Mr. Justice Wallace, he

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hardly put that to the jury and imported something into the original summing up which I did not rely on, namely the noise of the whistle or lack of gatekeeper. That is why we are back here, because Mr. Justice Wallace put to the jury those two matters. The gatekeeper and warning system were referred to but there was no evidence of it.

HIS HONOUR: I can see it arguable at least that a light could enter into the consideration of the question even if the matter were confined to the hard and fast licensee and licensor rule. A light there as would be a light in a corridor, as in Glendinning's case, so it is interesting that that was excluded here.

Mr. WATSON: It was not excluded here.

HIS HONOUR: It was not referred to, you say, in the summing up?

Mr. WATSON: Not in the summing up. With regard to his Honour, I think it was an oversight. It was a very long trial and I think his Honour was trying to shorten it, but in Mr. Justice Herron's judgment he says "In my opinion the Commissioner was correct in his directions . . circumstances in some other relation to a trespasser"—a fortiori a licensee—"and expounded by Lord Aitken". Then his Honour went on to deal with the decisions in Thompson and Cardy and to some extent relied on Rich. This statement from Cardy's judgment by the Chief Justice, at page 286 of Cardy's judgment was dealt with in Quinlan's case which quoted a passage very close to this but in no way cut down this passage by the learned Chief Justice: "In principle a duty of care should rest . . bringing it to their knowledge". In my submission that is the clear law of this land except for the reference to a trespasser and nothing in Quinlan's case has cut down that statement by his Honour the Chief Justice (Dixon) in Cardy's case. Roughly the same kind of reasoning was used by Brereton J. in his decision in this matter and I would submit that that general standard is still open to your Honour and is the statement of law which should be put to the jury.

I want to go back to the question of inference and read something that his Honour the Chief Justice said "Evidence was given that shortly before 6.20 p.m. . . . sleepers and the darkness." That kind of argument is equally open to me whether we start off by putting her there at 20 past 6 or start at the other point lying on the railway line and go backwards to the sleepers. ". . sleepers to account for her prone condition on the line . . . is a mere matter of conjecture".

HIS HONOUR: I will look at that. At a cursory glance I gave it some days ago, it appears that a great reliance was placed there on Donoghue v. Stevenson—and I am speaking generally—in those judgments.

Mr. WATSON: I still rely on Donoghue v. Stevenson.

HIS HONOUR: The Privy Council does not want it at all in these cases. it seems quite clear.

Mr. WATSON: It does not go quite that far. It could have said so as a definitive judgment.

HIS HONOUR: That raises another matter here and it is this : no matter what I think personally about it, to the extent that the Privy Council decision revises the Full Court decision in this case, is it not proper that the Full Court here should do the revision and not me? What am I supposed to do? I am supposed to follow the Full Court. They might say "We have been corrected and we will correct this one down here".

Mr. WATSON: With respect, your Honour has no alternative because there is nothing in Quinlan's case on obiter of any definitive quality which binds your Honour.

Mr. JENKINS: It is only obiter in the Full Court because what they said was the defendant was entitled to a new trial because Mr. Justice Wallace left the gatekeeper and so on and whatever else they said is only just obiter.

Mr. WATSON: They went off the direct point on the question of the duty of care and the Full Court definitely dealt with that on the appellant's submission.

HIS HONOUR: And one other part about it is that we hear what a jury has to say about it when you do get there——

Mr. WATSON: On the inference question I cannot say any more than that working backwards my way, from where she was lying it is open to the jury to draw a certain inference.

HIS HONOUR: I realise that is your line of argument. . . I think to bring the matter out in its proper light it might be better to allow you to re-open the matter and put the evidence in the same way as it was before the Full Court. But you will carry a penalty for it. I do not now how far that witness goes, of course, but even assuming on the question of insobriety he is against you a lot, you will have to face that. However, I do not want to stop you. It just occurred to me that, whatever my personal views are on an examination of the Full Court judgment, if it can be shown to be authority for the proposition that, except where the Privy Council has disallowed Donoghue v. Stevenson as applicable to this case, then I should follow their direction and let the matter go to the jury.

Mr. WATSON: With respect, I submit there is no alternative open to your Honour in the sort of pyramid of authority we work under. If this taxi driver's evidence then became a relevant matter of inference, if your Honour thinks I do not have enough evidence without that, I am prepared to grasp the nettle and call him, but then his evidence from the last trial can be read . . .

HIS HONOUR: I would like you to give some notice of that. I think you ought to have him here available tomorrow morning. Have you anything more to add to this matter?

In the Supreme Court of New South Wales.

Application by Defendant for Verdict by Direction.

Mr. WATSON: I do not think so. I think I have dealt with most of my learned friend's points.

Mr. JENKINS: My learned friend mentioned a public telephone. There is evidence in the case that there is a telephone on at the home. There is no question there. Her mother says she would ring her up at home. The public telephone drops out of the case.

HIS HONOUR: That makes it appear that she was going from that taxi.

Mr. JENKINS: I cannot see what Thompson's evidence amounts to, except that she apparently got home. Even if she complains of the taxi cab driver, the only possible inference could be that she went home safely.

HIS HONOUR: There is no evidence as to what she was wearing? Wearing a hat or carrying a bag? Such matters as that might show whether she had been home and come back.

Mr. WATSON: Even the taxi driver who said she was dishevelled and, by appearance, in liquor could not describe her dress. I think it has to be admitted there is an inconsistency, certainly as to the time between what Thompson has to say as far as hearing the voice is concerned and what the taxi driver says.

Mr. JENKINS: On the question of the plaintiff's whereabouts on the lines, the evidence is that it is a rough road, boulders in the road, pot holes, which is as consistent with her presence in that spot as some point further up, she got off and was walking down along the line. She could have got off a train. She is certainly a trespasser at that point. I agree to a certain extent with this Donoghue v. Stevenson matter. As they said, and as the Privy Council pointed out when they approved Gallagher v. Humphrey, they said if the lad is coming along bringing his father's dinner you cannot drop a bag of sugar on his head, but if the lad is coming along to bring his father's dinner and he is walking along the wharf where his father is and there are boards in it there is no room for saying that Donoghue v. Stevenson would require the owner of the wharf to repair the loose boards.

HIS HONOUR: I think that is what they meant in this case, although I may rule against you. The Privy Council, I think, meant that in this case. Even if I rule to the contrary, that is my private suspicion that that is what they meant, but in this case here you cannot drop a bag of sugar on the lad. That still reserves the right to the occupier to say the planks are loose, if you want to take your father's dinner to him, you have the planks, so we have a notice "Beware of the loose planks". To what extent our present Full Court has made an order binding on me that this matter should go to a jury for determination . . .

Mr. WATSON: I would suggest you are not bound to do it at all. They have said, anyway, clearly "It can be said that the licensor . . . duty to repair its premises". The Privy Council, in my submission, have clearly said to the contrary. Here we have different facts in deed.

Mr. JENKINS: I would oppose my friend re-opening the case at this stage because I have committed myself in front of the jury now and I put myself in a difficult situation because I said I asked for a verdict in front of them.

HIS HONOUR: Were they here then?

Mr. WATSON: I do not think so.

Mr. JENKINS: Yes, they were here then. Your Honour sent them outside and said legal matters would be argued.

HIS HONOUR: It is a thing not to be done lightly to allow a case to be re-opened. There is authority for circumstances in which it should be done. I did it some years ago in a criminal trial—I cannot think of the name of the case now—in which a witness was allowed to go back to the box and admit that her evidence in chief that she could not recognise a person who was one of the men kicking a man to death was false, and it went on appeal . . .

I think I had better read our Full Court judgment.

(Further hearing adjourned until 10 a.m. on Friday, 13th March, 1964.)

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RULING BY HIS HONOUR MR. JUSTICE CLANCY

HIS HONOUR: This is an application by the plaintiff for leave to re-open his case. The plaintiff's case had closed and at that stage learned Queen's Counsel who appears for the defendant asked for a verdict by direction. At the same time, learned counsel for the plaintiff made the present application.

Ordinarily, of course, such an application should not be acceded to but this is not, in my view, an ordinary case. There is a general principle that it is undersirable that the trial of real issues between parties should be obstructed by any technicalities and there would be a real obstruction here if this matter were allowed to go to the jury for decision in the absence of this driver of the taxi cab. He is the only one of the witnesses who places the plaintiff on the eastern side of the railway line shortly before the accident. I quite agree that the failure to call that witness, by the plaintiff, is a matter which needs some explanation from that quarter. In this case, I think there is some.

I have indicated what the evidence is likely to be, of a witness who has not yet been called and that, of itself, is an unusual forecast to be made by a judge presiding at nisi prius. The thought might occur to anyone: "How does the judge know what the witness is likely to say?" and that would be a fairly good query too, in most cases. But, in this case, I am aware of what the witness is likely to prove, not only because of the nature of the cross-

In the Supreme Court of New South Wales.

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Ruling of Clancy, J.

examination pointing to a suggestion of lack of sobriety of the plaintiff at the time when she left this taxi cab, but more importantly still, in that in the judgment of the Full Court in which this second trial was ordered the nature of the evidence of that witness is discussed at length. So, I am very well aware, and on perfectly proper grounds, as to what he will say.

The third matter which occurs to me is this, as to whether there would be any prejudice to the defendant in allowing this case to be re-opened for the express purpose only of allowing this witness to give evidence. In my view, the answer to that is in the negative. This is not a witness on a new subject, the evidence of this witness has been discussed by and large in the judgment of their Honours in the Full Court and, for good measure, it may be added he was the defendant's witness in the first trial. I think the special feature of this case which justifies me in exercising my discretion in favour of the plaintiff on this application is this. As I have said, this was a defendant's witness in the first case, who gave evidence favourably to the defendant in the sense that it contained an impeachment of the plaintiff on the subject of sobriety. But, not only is this a second trial, it is also a trial in which it has been necessary to empanel three juries, for various reasons, in order to get the trial under way.

No doubt appreciative of that delay learned counsel in this trial brought quite a number of witnesses, perhaps five or six, who each agreed to his evidence being read over to him, at a rapid rate. That is, the evidence given on the earlier trial. In many cases the witness was allowed to leave the box without any further question. I think everybody here then assumed this matter would follow the lines which it followed at the first trial.

I quite agree the plaintiff should not allow himself to be lulled into such a dangerous position but that is what happened. There was not only this factor of the delay in obtaining a satisfactory jury, there was not only this special feature that in a Supreme Court action before a jury pages and pages of evidence given in previous trials were read over to the present jury, but also the plaintiff stopped his case where he stopped it at the first trial and then the statement was made by the defendant Commissioner for Railways that the defendant proposes to call no evidence, leaving in the air this question as to the direction whence the plaintiff came just prior to the accident. It is a most important matter and I think it would be most undesirable to allow the matter to go for determination by the jury when it is known to all of us that this witness is outside the Court and when it is appreciated by all of how significant will be his evidence.

In the light of the fact that the plaintiff here has retrograde amnesia extending back for a period of seven weeks before the date on which she was injured, I propose to allow the witness to be called.

PLAINTIFF'S CASE RE-OPENED

Evidence of Kenneth Arthur Hannan

EXAMINED

TO Mr. WATSON: My full name is Kenneth Arthur Hannan. I reside at 281 Blackwell Road, Woy Woy.

Q. You are a taxi driver by occupation? A. Yes, that is right.

Q. You gave evidence in 1962, in a previous hearing? A. Yes, I did.

Q. Were you subpoenaed to give evidence in this case? A. Yes, I was.

Q. By whom were you subpoenaed? (Objected to; disallowed as being irrelevant.)

Q. On the 10th June, 1959, did you see the plaintiff, Mrs. McDermott? A. I did, yes.

Q. About what time of the evening was that? A. Approximately ten past six in the evening.

Q. Where were you at that time? A. Sitting in my taxi, on the rank at the Woy Woy taxi rank.

Q. Quite close to Woy Woy station? A. Yes.

Q. In what manner did you first see her? A. I did not see her until she was standing beside the car.

Q. Did she say something to you? A. She asked would I take her to Koolewong Post Office.

Q. That is the store just near the Koolewong level crossing? A. Yes.

Q. Did she then enter your cab? A. Yes.

Q. In the front or the back? A. In the back seat.

Q. In which seat, the passenger side or the driver's side? A. That I would not know now off-hand. I just cannot remember which side it was.

Q. Then did you drive her to Koolewong? A. Yes.

Q. Where did you stop? A. On the way, she asked me to drop her at the crossing, not the Post Office, so I drove to the crossing.

Q. Did you go up into the alcove into the crossing? A. No, I stayed on the side of the road.

Q. On the water driveway? A. Yes.

Q. What time did you arrive at the crossing? A. About a quarter past six.

Q. Are you able to fix these times precisely? A. Well, it is about five minutes run from Woy Woy to Koolewong crossing.

In the Supreme Court of New South Wales.

K. A. Hannan.

Plaintiff's Case Re-opened.

Cross-examination.

Q. Are you able to fix the time precisely when you say she came to your cab? A. It was about ten past six. A train had just gone which gets into Woy Woy about six and I know it was just after that, about ten past six.

Q. When you reached the crossing at Koolewong, did you do anything in respect of the lights in your cab? A. I put the interior light on, yes.

Q. Did you then turn to Mrs. McDermott in the back seat? A. Yes, I turned to receive my fee.

Q. What is the fare? A. Three shillings.

Q. Was she doing anything when you turned? A. She was just opening her handbag and looking through it. She told me she only had 1/6d., could I cash a tenner? I said: "No, I could not." I said: "Leave it and fix me up next time." She said: "All right, I will fix you up next time I am in Woy Woy."

Q. Then did she get out of the cab? A. Yes.

Q. I take it this would be somewhere between quarter past and twenty past six? A. It would be.

Q. And this would be at a position near the level crossing, on the eastern side of the crossing? A. Yes.

Q. Not up towards the gates, but down on the road? A. On the side of the road, yes.

Q. After she got out of the cab, did you see anything further of her? A. No, I left her standing on the side of the road, and drove off.

Q. Did she get out of the passenger side or the driver's side? A. The passenger's side.

Q. That is the side nearer to the crossing? A. That is right.

Q. And you drove away then? A. Yes.

CROSS-EXAMINED

Mr. JENKINS: Q. From what you observed of Mrs. McDermott getting into the taxi, in the taxi, getting out and that type of thing, what was her condition? A. She got into the car and asked me to take her to Koolewong. I could see she had been drinking and she had a dishevelled appearance about her. That is not Mrs. McDermott as I know her.

Q. You knew her before? A. Oh yes.

Q. She had a dishevelled appearance and you could see she had been drinking? A. Yes.

Q. What about her speech? A. It was slurred, that is what made me notice her so much.

Q. What about her eyes? A. Yes, her eyes were watery as though she had been drinking.

Q. You had seen her, and driven her, on a number of occasions? A. Yes.

Q. What about her voice on other occasions? A. It was quite clear and well spoken.

Q. It was quite different on this occasion? A. Oh yes.

Q. And it was hard to understand when talking? A. I could understand her but her voice was thick, you know.

Q. Your taxi rank is right opposite the Bayview Hotel? A. It is on the opposite side of the street, yes.

Q. At the time you speak about, you said there was a train about six o'clock? A. Round about six, I am not quite sure of the time.

Q. It could have been shortly before six? A. It might have been shortly before six the train came in, yes.

Q. And you said to my friend about ten past six—it could have been five past or three minutes past? A. It would be a little later than that, it would be approximately ten past. It would be nearer ten past than six o'clock.

Q. It could be five past, you would not dispute that? A. That is right.

Q. And it is a mile run? A. A little over a mile and it takes approximately five minutes to run it.

Q. So the situation could have been, you dropped her about ten past six at the crossing? A. It would be a quarter past six, I would say.

Q. Having known Mrs. McDermott before, I want you to take that into consideration and her condition on this night; you have seen people, have you not, under the influence of liquor on a number of occasions? A. Oh yes, on a number of occasions.

Q. Especially as a taxi driver? A. Yes, that is right.

Q. In your opinion was she under the influence of liquor at the time? A. Well I said she was under the influence of liquor, yes.

RE-EXAMINED

Mr. WATSON: Q. You told us she had a dishevelled appearance. Can you tell us whether she had a hat on? A. That I could not say, I would not be sure.

Q. Can you tell us anything about the colour of her dress or the type of her dress? A. No, I did not take any notice of the type of her dress at all.

Q. I think you said you cannot remember now whether she got in the driver's side or the passenger's side of the cab? A. No, I would not remember that now.

In the Supreme Court of New South Wales.

Plantiff's Case Re-opened.

K. A. Hannan.

Re-examination.

Defendant's evidence.

W. L. Fuller.

Examination.

Q. When she was looking in her handbag for change and mentioned a tenner, did she, or did she not, to your observation appear to experience any difficulty in looking for change? A. No, she was going through her handbag like any normal woman would, and looking down the bottom of her bag for change.

Q. Have you ever driven your cab across this crossing? (Objected to as not arising out of cross-examination; question disallowed.)

Q. Do you know the nature of the crossing? (Objected to; disallowed.)

Q. You said Mrs. McDermott was under the influence of liquor? A. Yes.

Q. Do you know the nature of this crossing? (Objected to; disallowed.)

(Witness retired and excused.)

(Case for the Plaintiff closed.)

DEFENDANT'S EVIDENCE

(At 10.35 a.m. Mr. Jenkins opened to the Jury.)

Evidence of William Leslie Fuller

EXAMINED

TO Mr. JENKINS: My full name is William Leslie Fuller and I reside at 305 Ocean Beach Road, Umina.

Q. At present you are engaged in the building trade as a bricklayer? A. Yes.

Q. On the 10th June 1959 you were employed, were you not, at the Bayview Hotel, Woy Woy? A. Yes.

Q. Your duties were, amongst other things, to serve beer and drinks, were they not, at the hotel? A. Yes.

Q. You would serve them in the lounge, the parlour and different places? A. In the lounge and beer garden.

Q. On the afternoon of 10th June 1959, did you see Mrs. McDermott, the plaintiff in this matter, in the Bayview Hotel? A. I did.

Q. At approximately what time did you first see her that afternoon? A. It was in the afternoon some time, it is quite a long time back and I could not state the time it was.

Q. Was she present in the hotel on one occasion or two occasions? A. Two occasions.

Q. Could you fix the first occasion in relation to, say five o'clock in the afternoon; was it before or after five? A. It was before five.

Q. Before five, did you have occasion to serve Mrs. McDermott with any liquor? A. I did.

Q. What kind of liquor was it? A. Beer.

Q. Could you say how many drinks, before five? A. I should say four or five; something like that.

Q. What time was the second occasion she was there? A. I did not serve her the second time. She came in and Mr. Healey came up——

Q. You saw her on the second occasion? A. Yes.

Q. About what time did you see her? A. It would be about half past five.

Q. Mr. Healey is the hotel proprietor, is he not? A. That is right.

Q. Did you yourself serve her with any intoxicating liquor after five, on the second occasion? A. Not the second occasion.

Q. You say Mr. Healey, the hotel proprietor, came up. Was there a conversation between you and Mr. Healey? A. Yes.

Q. Did you then, as far as Mrs. McDermott was concerned and the serving of the beer, do anything? A. No, I just did not serve Mrs. McDermott.

Q. At that stage was she under the influence of liquor? A. Well, as far as being under the influence of liquor, I could not say anyone was under the influence or anything like that. I am only a barman but my boss gave me orders——(Objected to.)

HIS HONOUR: Do not say what your boss told you.

Mr. JENKINS: Q. Was this in the presence of Mrs. McDermott? A. No.

Q. What did you notice about her? A. I would say Mrs. McDermott looked as if she had had a quantity of beer.

Q. This was about half-past five? A. Half-past five.

Q. Did you see her leave the hotel? A. No, I was busy at the time and could not pinpoint anything like that .

Q. At Woy Woy, there is another hotel called O'Donnell's Hotel? A. That is right.

Q. There is also a wine bar there, is there not? A. That is right.

Q. This was 6.30 closing, in 1959? A. That is right.

Q. On previous occasions you have served Mrs. McDermott, have you not, at the hotel? A. Yes.

Q. Would it be in the afternoon, mostly? A. Afternoon, and sometimes some mornings.

Q. On previous occasions, have you seen her in a state of intoxication? (Objected to; question withdrawn.)

CROSS-EXAMINED

In the Supreme Court of New South Wales.

Defendant's evidence.

W. L. Fuller.

Cross-examination.

Mr. WATSON: Q. During the five years since this matter first started, you have been seen by quite a number of people about the case, have you not? A. Not really.

Q. You have been seen by investigators from the Railway? A. Yes.

Q. You have been seen by clerks from Mr. Jones's office, my instructing solicitor? A. Yes.

Q. And you were seen by me in my own Chambers, in 1962? A. That is right.

Q. And you recollect seeing me in Chambers, in the presence of other gentlemen, in 1962? A. That is right.

Q. Do you remember telling me in 1962 you had been a drink waiter at the Bayview Hotel for about four years? A. Yes.

Q. And, on the 10th June 1959 Mrs. McDermott arrived at the hotel at about 3.30? A. I said "In the vicinity of that time." I said I could not pinpoint the time, it could be about that time.

Q. That is what you thought in 1962, it was about 3.30 she arrived? A. Yes.

Q. And did you further tell me she left about ten past four? A. Something about that time, that was the first time.

Q. And did you further tell me during that period she was served with two middies of beer? A. No, I did not say "two middies". I said "several beers".

Q. You swear you did not say "two middies of beer"? A. That is right.

Q. I am right about the other topics of the conference so far? A. Yes.

Q. You swear you did not tell me she was served with two middies? A. I said I could not very well say how many I served her.

Q. Did you say you thought it could have been two? A. It could have been two or more. You said it could have been two.

Q. You say it could have been two? A. I said to you, it could have been two or more.

Q. Why did you tell me in Chambers it could have been two or more, if it was in fact more than two? A. Well I did not want to worry about the drink part of it. I did not want to be in it.

Q. What you say to me is, what you now said to me in Chambers was not true? (Objected to.) A. I did not say that.

Q. At any rate, you do admit now you told me in Chambers it could have been two middies or could have been more? A. Yes.

Q. Is not this the truth, it could have been only two middies? A. No. When I spoke to you in Chambers, I did not want to be implicated in any way whatsoever in the case.

Q. And what you told me in Chambers was not accurate? A. It was not that it was not accurate. I told you "two beers" but I did serve the lady with more, really.

Q. Now you are telling me you told me in Chambers you served the lady with two beers but "in fact I did serve her with more." Is that what you now tell me? A. No, I do not say that now.

Q. You did in fact tell me in Chambers you had only served her with two middies? A. Yes.

Q. So you now say you told me in Chambers not "I served her with two middies or more" but "I only served her with two middies." A. Not when you spoke to me. You said: "Could you pinpoint how many beers your served the lady?" I said "I could not tell you for sure."

Q. You then said: "As far as I can remember I only served her with two middies"? A. Yes.

Q. You said that to get out of the case? A. Yes.

Q. That is the only reason? A. Yes.

Q. And when you said that, you say it was untrue? A. Yes.

Q. You also said on that occasion, did you not, that after she left the hotel at ten past four you did not personally see her again? A. Yes, I told you that.

Q. You did tell me, that after she left the hotel at ten minutes past four you did not see her again that afternoon? A. That is right.

(Witness retired and excused.)

Evidence of Charles Curnoch

EXAMINED

TO Mr. JENKINS: My full name is Charles Curnoch and I live at 48 Murray Road, Booker Bay. I am a taxi driver by occupation.

Q. You have been for some length of time in Woy Woy? A. About eight or nine years.

Q. On the 10th June 1959, you drove Mrs. McDermott in your taxi cab, did you not? A. Yes.

Q. About what time was that? A. Round about half-past four.

Q. Where did you pick here up? A. I think she came to the rank opposite the hotel, outside a cafe in Woy Woy.

In the Supreme Court of New South Wales.

Defendant's evidence.

C. Curnoch.

Examination.

Q. Opposite the Bayview Hotel? A. That is right.

Q. Did you notice her as she entered your cab? A. Yes, I guess I did.

Q. She asked you to take her somewhere? A. To Koolewong.

Q. Did she have anything with her? A. She had two parcels.

Q. What kind of parcels were they? A. They were two bottles.

Q. They were wrapped in some kind of paper, were they not? A. Yes.

HIS HONOUR: Q. Were they wrapped together or separately? A. Separately.

Mr. JENKINS: Q. Did you notice anything about her speech when she spoke to you? A. Yes, her speech was a little slurred.

Q. You had known her on previous occasions, had you not; and driven her? A. Yes.

Q. Was her speech different from those previous occasions? A. Yes, she generally speaks very correctly.

Q. Did she say anything to you about a carpet snake? A. Not on that occasion; some time before.

Q. Where did you take her, at Koolewong? A. I just let her off at the Koolewong railway gates. It is an unattended crossing.

Q. Tell his Honour and the gentlemen of the jury what occurred when the taxi got to Koolewong railway gates? A. She met a man there whom I did not know. He took the two parcels away from Mrs. McDermott. He took the paper off them and one of them was medicine. He threw that away. The other one was a flask, or a half-bottle of whisky, and he put that in his pocket.

Q. What do you mean when you say "he threw it away"? A. He just purposely dropped it on the railway line. It was no accident.

HIS HONOUR: Q. You say he purposely dropped it? A. Well, he threw it on the line.

Mr. JENKINS: Q. And it smashed? A. Yes.

Q. You said it was medicine. Did someone tell you it was? A. I could see it was not liquor, anyhow. It had a sort of medicine-like label on it. I did not inspect it very much; and it was coloured.

Q. Did Mrs. McDermott say anything to this gentleman? A. Yes, she did. She swore at the man and said: "I am going back to Woy Woy."

Q. On this piece of paper would you mind writing down those two words which she used when she swore? A. Yes. (The witness wrote "fuck you" on the paper. The document was then shown to his Honour, Mr. Watson and the jury.)

Q. Having said that and "I am going back to Woy Woy", did she get in the cab? A. Yes.

Q. Did you take her back to Woy Woy? A. I took her back to the rank, as far as I can remember.

Q. That is the rank opposite the Bayview Hotel? A. That is right.

Q. What time did you get there? A. It would be in the vicinity of five, I think. It is only a little over a mile drive to Koolewong, and she wasn't out of the car more than two or three minutes.

CROSS-EXAMINED

Mr. WATSON: Q. I think you told us that you picked her up about 4.15 to 4.20? A. It would be round about that.

Q. You arrived at the crossing at about what time? A. It would be about two minutes' drive.

Q. About what time did you get to the crossing? A. I picked her up about 4.15 and it was two minutes after, what time is that? You are asking me something that happened in 1959—what time it happened.

Q. How did you fix 4.15 or 4.20? A. I did not "fix" it; I said "in the vicinity of".

Q. What time did you arrive at the crossing? A. In the vicinity of 4.15.

Q. So, there was no time elapsed from when you picked her up until you arrived at the crossing? A. I don't follow you.

Q. I will ask you again. Will you please indicate to the Court at what time you arrived back at the crossing? A. Well, say twenty past four, is that okay?

Q. I am not interested in whether it is okay or not. You are on oath and I am asking you to tell this Court. A. Well, I will repeat: "In the vicinity of a quarter past four". I did not have a look at a watch, I don't suppose.

Q. Is that the time you arrived at the crossing, at about a quarter past four? A. I would say twenty past four.

Q. I take it then, you did not pick her up after 4.15, it must have been before 4.15 or at 4.15? A. I will say I picked her up at 4.15 and I took her to the crossing and it was about 4.20.

Q. How long were you at the crossing? A. Just long enough for her to get out—she would not be there more than three minutes.

Q. The amount of time at the crossing was five minutes? A. I would say, yes.

Q. And you drove back. What time did you get back to Woy Woy? A. In the vicinity of twenty minutes to five.

In the Supreme Court of New South Wales.

Defendant's evidence.

C. Curnoch.

Cross-examination.

Q. So, although you left at about 4.15 and although it took you five minutes to get to Koolewong, which takes us to 4.20; and although she was at the crossing approximately five minutes which takes us to 4.25; it took you a quarter of an hour to drive back? A. I walked back—this is ridiculous, if you don't mind.

HIS HONOUR: I do mind. You must answer the questions. You are not doing yourself any good by not answering.

WITNESS: How could I fix a definite time within five or ten minutes—a taxi driver? Heavens above, Mrs. McDermott was just another fare.

HIS HONOUR: If you do not remember, say you do not remember. Mr. Jenkins will argue the case.

Mr. WATSON: Q. Give this Court the best estimate you can of the time you arrived back in Woy Woy with Mrs. McDermott? A. I don't remember.

Q. Was it after five o'clock? A. No.

Q. Was it after 4.30? A. I would think it would be but I don't remember.

Q. How long after 4.30? A. I don't remember.

Q. And I presume, while ever I continue to ask these questions you will say "I don't remember."? A. I will about the time because I could not fix the time within five or ten minutes. I know I delivered her back before five o'clock. I know that.

Q. We can take it, it was some time before five? A. Yes.

Q. You told my friend she was a little slurred in her speech? A. Quite correct.

Q. Do you remember telling the Court, in 1962 when you gave evidence ". . . but she was quite steady on her feet."? A. Did I say she was steady on her feet?

Q. That is the evidence. A. Actually she only got out of the car, and almost back in again, she did not walk anywhere.

Q. You volunteered this to counsel on the last occasion. Do you remember being asked by Mr. Jenkyn in 1962: "What did you notice about her speech on this occasion?" and you said, "She slurred in her speech but was quite steady on her feet."? A. Very well.

Q. That is true, is it? A. It would be true, yes.

Q. He also asked you: "You just tell us what you noticed about her. You told us her speech was slurred, what else did you notice?" and you answered, "Nothing, I don't think. What else would I notice?". Mr. Jenkyn said: "You tell us?" and you said, "She got in the cab and her speech was slurred. I did not notice anything else about her." A. Very well.

Q. That is true, is it? A. That is true.

Q. When you got to the corner, did you go up into the alcove of the crossing, towards the gates? A. I got as close to the gate as I could, on the little rise.

Q. Did you make a U-turn in there, or did you back out? A. I backed out again.

Q. You have never driven your cab across the line, have you? A. Yes.

Q. Had you driven your cab across the line before 1962, when you gave evidence? A. I would say I did. There is a crippled gentleman lives over the line and the cab drivers drive him across the line. It is a little trouble but they do it.

Q. Do you remember my asking you this question on the last occasion: "You left Mrs. McDermott at the crossing, or you let her out at the crossing. Is it your practice never to drive across the Koolewong crossing?" and you answered, "We are not allowed to drive across the crossing. The insurance company of the taxi cabs will not permit it." A. That is quite correct and it is still true but this gentleman is a cripple.

Q. Did you drive across that crossing before you gave evidence in 1962? A. No, I do not think so because there is only this one gentleman and numerous cabs could take him; but we do drive across the crossing for this one gentleman.

Q. You say when you got to this crossing Mrs. McDermott handed two bottles wrapped in paper to this gentleman? A. Quite correct.

Q. And he tore the wrapping off the bottles and threw one of them to the ground? A. He did.

Q. What kind of wrapping was on the bottles? A. Knowing the hotel, it was newspaper, of course.

Q. Are you sure? A. No, I am not sure.

Q. You were asked by Mr. Jenkyn on the last occasion what type of parcels they were and you said they were bottles wrapped in paper.

"Did you mean newspaper or brown paper; do you remember? A. I don't remember. I think it was newspaper."

A. That still goes, I don't remember, I think it was newspaper.

Q. Do you remember giving this evidence:

"Q. You got to Koolewong and what happened then? A. She got out with the two parcels and met a short gentleman. I do not know who he was; I don't think I ever saw him in my life.

Q. Where was he? A. On the crossing.

Q. That was your side, or the other side? A. He was on the other side when I pulled up.

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C. Curnoch.

Cross-examination.

Q. Did he remain there or did he come across? A. I could not be certain.

Q. What happened? A. Mrs. McDermott got out of the taxi with the two parcels and he took the two parcels from her.

Q. What happened then? A. He threw a bottle on the road and it smashed and I think Mrs. McDermott said to me afterwards it was medicine.

Q. He threw this on the road and it smashed? A. Yes.

Q. What did he do with the other parcel? A. He put the other one in his pocket."

That evidence you gave in 1962 was correct? A. Quite correct.

Q. Is it the situation, or don't you know, the smashed bottle was a bottle of medicine, until Mrs. McDermott told you it was? A. That could possibly be.

Q. So it is not true to say you recognized this as a bottle of medicine by its colour or by its look, is it? A. Actually I don't know if Mrs. McDermott told me before or after I dropped her off, but I know the bottle was not liquor.

Q. And this is because Mrs. McDermott told you? A. Well, it would help.

Q. You said today this other man unwrapped both of these bottles? A. Yes.

Q. And you say one was not liquor and that was the bottle he threw to the ground? A. That is quite right.

Q. On the last occasion, you said nothing about this man unwrapping the parcels, did you? A. I don't remember.

Q. You said he threw the bottle on the road and it smashed and you thought Mrs. McDermott said to you afterwards it was medicine. That is the reason you knew it was medicine? A. I thought it was medicine myself, before she told me. I knew it was not a bottle of beer or whisky.

Q. How did you know that? A. Because I could see it, it was some coloured liquid.

Q. How could you see it? A. Through the glass, it was in a glass bottle.

HIS HONOUR: The witness said it was unwrapped in his presence and he saw some label on it, today.

Mr. WATSON: Q. You said nothing about unwrapping or seeing the bottle, on the previous occasion when you gave evidence? A. I don't remember. I don't see that it was very important.

Q. With respect, the Court will be the judge of that. You say when your cab first arrived there this other man was on the western side, or the other side of the crossing? A. I think when I pulled up, he was on the other side of the line and he walked across to meet Mrs. McDermott.

Q. You think he walked across? A. Yes.

Q. You told Mr. Jenkyn on the last occasion: "He was on the other side when I pulled up." Mr. Jenkyn asked you: "Did he remain there or come across?" and you said, "I could not be certain." You are more certain now, are you? A. I don't remember now.

Q. Do you remember Mr. Jenkyn asking you: "On the way back, you say that she spoke to you about this bottle which the gentleman had thrown to the ground. What did she say about it?" and you answered, "I think she said it was medicine but I am not certain about that." Is that true? A. I don't remember now. If it is there, it is true.

Q. You cannot tell us now the type of dress Mrs. McDermott was wearing, whether or not she had on a hat, or anything like that, can you? A. I certainly cannot and I could not before, when I was in Court.

Q. You could not remember that in 1962 when you gave evidence? A. No, I certainly could not. If I have 200 or 300 customers a day, I do not notice what dresses they have on.

Q. Do you have 300 customers a day now? A. I would not think so.

Q. Do you still drive? A. Yes.

Q. Where did this conversation take place between Mrs. McDermott and the man? A. At the railway gate.

Q. At the gate on the eastern side? A. Yes, the gate closest to where the car was pulled up.

Q. The big gate or the pedestrian gate? A. The pedestrian gate. There was no idea of opening a big double gate, just to walk through.

Q. Did the man come through the wicket gate on your side? A. I think he did. He met Mrs. McDermott at the car. She was out on the roadway.

Q. Was this conversation you heard between Mrs. McDermott and the man close to your car? A. Right alongside of it.

Q. Do you remember my asking you this question: "Where did the conversation take place with Mrs. McDermott and this man?" and you answered: "About as far as you are away from the car—about halfway across the line," and I was about the same distance from the witness box then as I am in this Court; and you added those words "about halfway across the line"? A. I don't remember.

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C. Curnoch.

Cross-examination.

Q. In 1962, is not that the evidence you gave, that the conversation took place between Mrs. McDermott and this man about halfway across the line? A. If that is the evidence that is there, that is what happened.

Q. So it did not take place right outside the car? A. Very well, it did not take place right outside the car.

Q. When you said on oath a few moments ago, it took place outside the car—— A. I should have said: "I don't remember," because I don't.

Q. Well, what you said a few moments ago was not true? A. Well it is not true; you have made your point.

Q. You said a moment ago this conversation between Mrs. McDermott and this man took place close to your car, when he came through the wicket gate. Is that correct? A. What evidence you have there is quite correct.

Q. What you said in 1962 is far more likely to be the truth than what you said today? A. I would think so.

Q. When you came to Court this morning, the memory you had is this conversation in which she used the rude words was right beside the car? A. It was close enough that I could hear it.

Q. But now you are prepared to admit on a previous occasion you said it took place halfway across the line? A. The evidence you have there is quite correct.

Q. Do you remember my asking you this: "Where was this bottle dropped?" and you said, "I do not know whether it was smashed on the roadway or the line. I do not know now." Is that true? A. Well, as long as it was smashed, I suppose it would not matter whether it was on the railway line or on the road.

Q. Do you remember Mr. Ian Thompson who ran a pharmacy at Woy Woy? A. I know of him. I see his name outside the doorway.

Q. That is quite close to the cab rank? A. Yes.

Q. And that is quite close to where you put Mrs. McDermott down after you went to Koolewong? A. I would imagine I left her at the cab rank when I drove her back to Woy Woy; and Ian Thompson would be about 50 yards around the corner from the taxi rank.

Q. Do you remember telling me on a previous occasion that you fixed the time that you picked up Mrs. McDermott because of something the steward at the Bayview Hotel had told you? A. I do not remember now. I am trying but I really do not remember now.

Q. Do you remember my asking you then: "You cannot recall whether or not the sun was shining?" and you answered, "No, I cannot, but it must have been before five o'clock because Mrs. McDermott left the hotel, according to the steward, at a quarter past four." Who was the steward you were referring to? A. The steward at the Bayview Hotel at Woy Woy.

Q. I asked you: "When did you have a talk to him?" and you answered, "In the last three or four days we came down in the train together." I asked you: "He told you that Mrs. McDermott left the hotel at about a quarter past four?" and you answered, "I believe he did. He said that Mrs. McDermott wanted something and the hotel proprietor was on the phone, and Mrs. McDermott toddled off." I asked you: "Did he tell you that he had seen her in the hotel that afternoon?" and you answered, "Yes."—— (Objection to anything further about the conversation with the steward in respect of some other matters.)

HIS HONOUR: What is your question, Mr. Watson?

Mr. WATSON: I was about to ask: "Did you say on a previous occasion the steward had told you that he had seen her in the hotel?".

HIS HONOUR: That question is definitely intended to contradict the last witness who was here, and I will not allow it.

Mr. WATSON: Q. In this trip to Koolewong and back, she paid you the fare? A. I will say so.

Q. On the last occasion I asked you: "There was certainly no difficulty with the fare?" and you answered: "She certainly paid me." I asked you: "There was no incident over the fare?" and you answered, "Not a bit." A. Certainly not, there never has been.

(Witness retired and excused.)

(His Honour granted leave to Mr. Jenkins to make an application in the absence of the jury as to certain other evidence, with regard to the admission of which he would like his Honour to rule.)

(The jury left the Court at 11.40 a.m.)

(Mr. Jenkins said he had evidence of the intoxication of the plaintiff on other occasions. He submitted, as this was an amnesia case, this evidence went not only to damages but also to causation; and that the evidence was admissible on liability as well as damages.

His Honour ruled that on damages evidence of previous drinking by the plaintiff would be admissible only because there was evidence here indicative of the medical theory that prolonged and heavy drinking would lead to a deterioration of intellect and memory, which the plaintiff claimed as part of her physical damage.

On the question of causation his Honour ruled that if it were sought to lead the evidence with a view to showing the plaintiff was intoxicated on previous occasions and therefore it was more likely than not she was intoxicated on this occasion, he would reject the evidence.)

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HIS HONOUR: Mr. Jenkins, it will be noted you have the evidence here but rather than tender it and have it rejected in the presence of the jury, you have kindly assisted the Court by making an application in the absence of the jury. You are entitled to have it as though it were tendered and rejected, except that I would have admitted it on the question of damages.

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Mr. JENKINS: I do not propose to call any further evidence.

(Case for the defendant closed.)

Mr. WATSON: There is no evidence in reply.

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(Mr. Jenkins then made an application to his Honour for a verdict for the defendant, by direction, upon the same grounds as his application of yesterday.

His Honour ruled that the matter was one for the jury.)

No. 3

SUMMING-UP OF HIS HONOUR MR. JUSTICE CLANCY

HIS HONOUR: Gentlemen of the jury, it seems common ground that on this evening in June 1959 the plaintiff had both her feet amputated by being run over by a train owned and managed by the defendant, on the property of the defendant.

Because of that the plaintiff brings an action here claiming damages from the defendant, her claim being based on a charge of negligence. You will appreciate that the facts of the accident insofar as the injury, and the place of it are concerned, not having been substantially in dispute here, something more than having been run over on the railway line is needed to entitle a person to a verdict. You must approach this case firmly with the appreciation that merely being run over by a train, even on a level crossing—and this is not on a level crossing exactly—does not of itself give an automatic right to a verdict.

As I have told you, the plaintiff brings her action, basing it in the pleadings, on a charge of negligence against the defendant.

Referring then to some matters, which form the background of this case—before discussing with you what is implicit in the plaintiff's case, I remind you that the plaintiff was a resident in this village of Koolewong, a pocket of houses on the western side of the Newcastle-Sydney railway line. On that western side there was a road, described as the Old Gosford Road,

which ended to the north in the bush and to the west there was, if not impenetrable scrub, heavy bush, and an escarpment to the west. It was the practice, therefore, for residents there to use this level crossing, and there is evidence here in which the plaintiff claimed that in order to proceed from the village to the roadway—the Gosford-Woy Woy Road—it was the custom of the inhabitants, and those who had business with them, either going to or coming from the village, to use this level crossing. It is submitted here that in all the circumstances of this case, having regard to the fact that these gates, either the set of wicket gates or the double gate, were the only means of access to the plaintiff and for those who were choosing to use it, were the only means of approach and exit from this village, that there is evidence there for you to decide in favour of the plaintiff that as she crossed over this crossing from time to time, and if she was doing it on this particular night, then she was doing so with the permission of the defendant. I think that has not been seriously contested here, and let me make quite clear what I mean by that. It is certainly in contest as to whether she was in fact using the crossing, but that this crossing was used by the residents of Koolewong and those others who had business there, with the permission of the defendant—and I invite correction if I am wrong—does not seem to be contested in this case. In other words, it seems to me, on the manner in which the case has progressed, it has been fought on the basis of the plaintiff being a licensee of the defendant.

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 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. The facts are entirely matters for you, and when I list these matters of complaint please believe I am listing the plaintiff's complaints and I am now taking this opportunity to point out to you that, when I list them, it is not to be taken by you as an indication from me that those imperfections necessarily existed. I am pointing out what the plaintiff's claim is.

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——
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In view of the amount of evidence available to you by way of description of this crossing, it is probably unnecessary that I recite the complaints to you, but perhaps to make the record coherent I should do that to some extent. You have this lengthy evidence, you have photographs and you have evidence as to the experience of people who have used it; all tending (in the plaintiff's submission to you) to prove that this crossing was not maintained in the manner in which a person, mindful of his obligation to take reasonable care, would permit it to remain. So far as I can see, the plaintiff's complaints relate to the actual manner in which the crossing was laid, the irregularity in the surface and the sleepers, the allegation that some sleepers as against the adjoining sleepers were inches different in height, that passage across them at times and in various parts of the crossing led to movement of the sleepers themselves. She complains that there were gaps between the sleepers, and of lack of uniformity in the gaps, and of all those other matters which you will consider when you look at the photographs and recollect the evidence. I am not attempting to describe in detail what the complaint of the static condition of this crossing is. I am quite sure that the matters are quite fresh in your mind.

The plaintiff's complaint then is that the defendant, having imposed on him an obligation of the nature I have indicated to you, failed in that regard so that she, crossing this place at night, tripped because of the state of the crossing, stumbled away to the north from the crossing, fell to the ground, and while in that position was run over by an oncoming train at a time after her fall which the evidence leaves to some extent in a state of uncertainty. There is no evidence here nor, indeed, any claim made that the train was travelling too rapidly. While I think one question was asked about the provision of warning signals, there is nothing in the evidence in this case which would justify you in coming to the conclusion that had the warning signal been of a different type, perhaps bells or lights, or had it been given earlier than the whistle stated to have been given by this train as it came around the curve to the north, you would be able to say "Well, that would have caused her to hesitate and, indeed, to refrain from essaying the crossing". That is because you do not know how long she was there before the train came.

If it were a case where the evidence showed that she was there for 30 seconds before the train came you may say "30 seconds working out the speed that the train would have come around here, would have given her ample time if there had been lights flashing or bells ringing". But there is nothing here, and indeed there is nothing in the law—on the evidence in this case—to bring into consideration the speed of the train or the lack of any sort of warning signal that you might have seen on some vehicular crossing or a crossing of a different nature.

I mention that, because after a little thought it may be said that it is better to refrain from discussing matters which in my consideration really have nothing to do with the case; but on the other hand there was something

mentioned, either in address or in the form of one question, which had some relationship to these matters. Even if my recollection is wrong on that, I thought it better to mention it to you and bring it out clearly before you as being a matter with which you are not concerned. What you are concerned about is the state of this crossing and the failure to light it.

It may well be that in day time people could manage the alleged hazards of this crossing. There is evidence by one witness that she fell and became semi-conscious. She does not suggest that she became unconscious, but semi-conscious and that was as a result of a fall. There is evidence of other witnesses speaking of stumblings to the extent that it is claimed that this supports the plaintiff's case that the inference to be drawn from the facts before you is that she stumbled. She cannot succeed in her claim if it is merely guesswork that you act upon.

The defendant raises by way of defence certain facts—uncontradicted facts—as, for example, where she was lying when found. It is suggested to you that these facts leave the picture to you as a matter of conjecture.

Now it is a matter for you to determine. These cases are decided on the balance of probabilities, and if the evidence accepted by you is such that it leaves you in a state where you can feel that it may have happened this way or it may have happened in some different way; and you are left in the state where either theory in your view could have been the correct one, you would be left in a state in which you would not be asserting that one of these theories, on the evidence, is more probable than the other. In that case the plaintiff would fail, because the burden of proof is on the plaintiff. That is a principle of our law that you must observe.

The burden is on her shoulders to establish these matters essential to her claim to the extent that you regard her as having weighed down the scale in her favour; and that, in your view, she has made it appear more probable than not that this mishap happened in the way in which she says it did.

Let me repeat: her case is that while crossing the sleepers she stumbled and her stumble carried her away from the crossing and she fell. That she went to sleep voluntarily on the rails was suggested in one phrase which was used, but I do not think it is suggested to you seriously.

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 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

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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.

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 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 or 12 feet.

I propose to say no more about that aspect of the case. If the stumble commenced on the level crossing, the sleeper crossing, while the plaintiff was exercising her licence to cross, and it was caused by the condition of those sleepers—that condition being such as to expose people using it unnecessarily to foreseeable damage—then she claims that it was by a breach of duty she was injured. To say she made her journey in some other way, without a stumble, to that spot 8 feet or 12 feet north of the crossing and there fell, for some reason, and tripped over the railway line itself—if you like—(because the defendant draws attention to her position as deposed to by the gentlemen who saw her) would that be the fact? She was lying straight across the line, she was lying with her head pointing roughly, so it is claimed, to the north-east, with her feet being over the western rail as the fireman approached her. The defendant puts to you that that lends some support to the contention that she was not crossing that line from east to west, from where the taxi left her, but was engaged on some other journey. Now, it is a very delicate question and, as I have told you, the facts are a matter for you. You are not to be influenced by any view that you think I hold. I am permitted to indicate to you what my view is—provided I make it clear to you that I am doing so—but you will realise that you are the sole judges of the facts. It may be that in putting these repeated submissions you might suspect that I prefer one case against the other, but I assure you that that is not the position. This has nothing to do with me. Of course these matters can be tried by a Judge alone, but the parties here have chosen to have the issues tried by the jury, so I do not wish to join the debate. I have not been invited, and at the lack of such invitation I am not disappointed at all. I assure you, gentlemen, it is your privilege to attend to this matter.

If the plaintiff arrived at this position prone on the railway line north of the crossing, voluntarily and not as a result of the stumble, whether it be through leaving the platform and walking to that position, or by leaving the

crossing and walking up there, or by getting through the fence and reaching that situation, if she got there voluntarily or through her own carelessness, then she is beyond the area of licence, and a stumble up the line does not make this defendant liable. His liability is bound up in this stumble commencing on this crossing. That is the law. If she got on to that railway line north of the crossing because she wanted to walk there, or because she did not know what she was doing, without any stumble, then she is a trespasser and you are bound under our law to find a verdict for the defendant. Her case is sustained only if it can be linked with some imperfection in the construction, the management and/or the lighting of this crossing. I won't go into the details of that, as to the alleged imperfections. It is said that the lighting was bad, but the street lighting did not have any effect on this crossing and that there was no lighting at all in or about the place which would help anyone making the journey.

But to return to this problem of how she got there, which is the most difficult one, I think; one of the difficulties is this: that Mr. Thompson has sworn that at about 6 o'clock he heard her call out at her residence on the western side of the line something to the effect of "Turn the meat over". Whether it was 6 o'clock or quarter past or twenty past six, on that evidence Mr. Thompson, if I may use the phrase, the plaintiff had got safely across the crossing after her second journey to Woy Woy and that evidence would get her home. If the plaintiff, having reached home and having given orders about the turning of the meat, decided again—in the exercise of her licence —to go over the crossing for some reason with which you have not been acquainted, then she may have stumbled on that journey.

No doubt one of the things that may tend to confuse you is this: on what journey is it (if you accept Thompson's evidence) that she is alleged to have stumbled? The case is simple, anyway, if you were not troubled with this evidence that her voice was heard at home before the running down, and after Thompson had seen her on her way back to Woy Woy for her second journey that afternoon. You will remember that he met her earlier in the afternoon and she handed him a parcel and he returned to the house. He said he advised her not to go back to Woy Woy and it was after that, he put the time about 6 o'clock, that he heard her voice. I cannot say anything about it that will help you, you will have to face up to that.

Let us take, first, the first possible version that she had not been near the house at all, that Thompson is mistaken—because, after all, you have a right to reject such parts of the evidence as you think should be rejected. The fact that Thompson swears that he heard her is something that you have to consider, but whether you accept it or not yourself is a matter for you to decide. If you do accept it, the plaintiff has not given any facts which would lead you to draw an inference as opposed to a conjecture as to why she was re-crossing that line from west to east shortly before this train came; there is a shop over there, but we are told it closes at half-past five. It was said in the

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addresses that there was no need for her to use the telephone because there was a telephone at home, but I cannot recollect whether there was a phone in her home, beyond some matters relating to the occasions when somebody would ring from Sydney. It seems to me to be conceded by the parties that there was a telephone in their home, and unless I am asked to withdraw that I will leave it to you in that way.

Then, what is the inference you are asked to draw? If in fact she was injured, having successfully negotiated the passage after leaving the taxi driver, having reached home and then having moved back to the railway line, what is the inference to be drawn from that? We know that the wicket gates are directly opposite each other and that between them there is no surfacing other than the ballast between the rails. You might think that the description given by the witnesses as to how they individually made the crossing is quite acceptable, in that one crossing from west to east or in the opposite direction would, although the wicket gates were directly opposite, make the journey by way of a route with a curve in it, in that in whichever direction they were passing they would move to the north to use this sleeper covering (uncomfortable as it was), but when a person goes through the wicket gate to go on to the platform is a situation to which you will have to give some thought to because there both these gates and the crossing are to the north of the platform.

Now, you are not to guess. I put that aspect to you merely to emphasize to you the necessity for closely examining the evidence in order that you may be satisfied on the balance of probabilities in your mind as to what did happen and from that evidence draw your inferences, if you can. But look at it in detail. In some cases which come before juries it is unnecessary to trouble them with all the minute details of the evidence of witnesses as they relate, let us say, to a collision between motor cars or even the running down of pedestrians. Quite often evidence is given as to how many inches or feet a person was away from another person or vehicle, and those are matters which in some cases the jury might feel could not be relied upon because they result from observations made in a very short period of time in collisions between pedestrians and vehicles. But I suggest to you that it is not only desirable but necessary in this case that you consider the most minute factor in this evidence. It would not be proper to brush it aside by saying "Well, she must have been on the crossing and must have stumbled because people do use the crossing." First of all, I suppose you would need some clear idea—although it is a matter for you and I do not suggest you would necessarily want it—as to in which direction she was travelling, and why. The "why" being perhaps all-important, or of importance, only in regard to another matter. That is, not only does the defendant put to you the problem of whether the plaintiff has weighed down the scale in her favour on this primary charge of negligence (the onus of proof not being on him at all), but secondly the defendant puts to you that even if you find that there

is some negligence contributing to the plaintiff's injury on the part of the defendant, either by the construction, management or lighting of this crossing. The defendant claims that on the evidence you would come to the conclusion that the plaintiff was not taking adequate care for her own safety and therefore was guilty of contributory negligence.

If the defendant prove that, then the defendant would succeed and you would find a verdict for the defendant. But here the onus of proof changes. When this defence of contributory negligence is raised the burden of proof is upon the shoulders of the defendant, and the defendant would have to make it appear to you more probable than not that it was as a result of her intoxication rendering her unable reasonably to look after herself that the plaintiff either made that stumble in the first place or was unable to control it in the second place or, particularly—because of this state of intoxication suggested—indeed wandered without a stumble away from the crossing to the extent of eight feet.

Now, there is your problem. That is why I said to you earlier the problem was whether she was crossing from east to west and why. When I used the word "why" I wanted to suggest to you—and I want to remove any possibility that it may be thought that I was suggesting to you—that the purpose of her visit could detract from her rights. If the plaintiff, having got home, decided to cross from west to east and just take the air or gaze on the waterfront on the eastern side, that would not detract from her claim. The invitation to you to consider what she was doing, if it was on a return journey, was one to direct your attention substantially to this defence of contributory negligence.

I will not go into the details of it at all with you. You have heard her examination. You are hampered, of course, by the fact that there is retrograde amnesia present, and she cannot remember anything earlier than about seven weeks before the accident, with the minor exception that about the time she was run over there was some rather confused evidence about lights and something which sounds like a trailer but with that qualification she has no recollection of anything that happened earlier than the Kempsey Show, seven weeks before.

Then comes this evidence of a person who saw her on her return journey from the first visit to Gosford earlier in the afternoon. I will not go into the details of it. There was evidence from Mr. Thompson that she was not affected by drink, and evidence which you may think is to the contrary by William Fuller, who said that she looked as if she had consumed a quantity of liquor at 5.30. The taxi driver said she came to his cab about 4.30, and he said that he heard her swear at Thompson, and saw her get back into the cab, and he took her back to Woy Woy. He said she was slurred in her speech but she was steady on her feet.

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Then there is the other taxi driver who brought her later on. Hannan was the taxi driver who took her back to the last journey. He said she came to him on the rank about 6.10 p.m. at Woy Woy and he drove her to a point near the crossing, at about 6.15, and I think the train was due to pass at 6.20:

> "I could see that she had been drinking. Her speech was slurred, her eyes were watering, her appearance was disordered."

He said: "I would say she was under the influence."

I do not want to say any more about the facts, they are a matter for you, but I must say this to you: that the element of drink can enter into the matter only if it is present to the extent which renders her—the onus of proof being on the defendant here—unable to pay reasonable attention for her own safety. Because that is all that she, under our law, is required to observe. If you thought that whatever happened was not due to intoxication and did not affect the event at all, then they did not react to her disadvantage. If a person is injured, having had some drink, he is not to be deprived of his legal rights as a punishment for having had too much. He is to be deprived of what otherwise would be his legal rights if he is intoxicated to such an extent that he is negligent in being unable to look after himself.

I trust I make that clear. The element of drink is not one in any sense of such importance that if the jury were satisfied that, notwithstanding the drink, that without any refernce to the drink the accident took place, then it is not available to a jury to withhold a verdict by way of disapproval of having had too much to drink. You cannot do that. But if the defendant has lead you to believe that a certain state of intoxication was reached and, on the balance of probabilities, has led you to believe that as a result of that and without reference to the roadway the plaintiff fell, or as a result of it the plaintiff wandered off her course and fell across the rail, and not as a result of any physical condition of the sleepers, then there would be a verdict for the defendant. It is a matter for you.

A person using the sleepers, tripping over them—perhaps affected to some extent but falling because of the imperfections in the sleepers—could easily come within the range of those persons whom a defendant could reasonably foresee would use the crossing. A person with a few drinks—and I use that word for whatever is meant by it—if you would expect that they could control themselves is, you may think, on the list of persons whom the defendant Commissioner could contemplate as persons using that crossing from time to time. In regard to those persons reasonable care should be taken in the construction, maintenance and lighting of this crossing.

The defendant here, in his defence of contributory negligence, seeks to carry the matter beyond that. His suggestion to you is that because of the drink the plaintiff wandered beyond the area of licence. That is a matter

for you. It is complicated by this evidence that she was heard at home. You have got Thompson putting her at home before she was injured. You will have to work that out the best way you can, gentlemen.

If you find for the plaintiff, then the law provides certain clearly defined heads of damage. In this case you are relieved from one which in so many cases forms the greatest part of the plaintiff's claim before a jury. I refer to an infringement of a person's earning capacity. In this case it is not suggested that the plaintiff is in the same position as a man whose weekly earnings have been suspended, diminished—permanently or temporarily. You can see what a vast difference that would make, as contrasted with some cases.

If a man comes to a jury and says "My earnings have been reduced by one, two, five or ten pounds a week" and then claims that would be the position for the next 40 years, you could see that such a head of damage would cause the jury to undertake some calculations, and, to take it to the extreme, some juries sitting where you are now sitting have to deal with cases where a man has been completely paralyzed and will be for the rest of his life. The jury has to consider in such a case his loss of earnings plus his nursing costs for the rest of his life. This is not such a case.

The plaintiff is not a workman, and is not claiming loss of weekly earnings. There was some reference to her selling some things to customers in the hotel from time to time but that is not suggested as a regular means of livelihood. Nothing by way of a specific amount has been attached to that. So you will regard that head of damage as completely disappearing from this case, with this exception (for what it is worth). You may not think it is worth anything in this case but there is the claim to be considered: is it more probable than not that in the future she will have to earn her own living? If that is so she would be entitled to claim something which would compensate her for her decreased earning capacity.

That might be a very important matter if the plaintiff were 40 or 50 years younger, but you have heard her age, and you may think it would be going beyond all reason if you were to start contemplating the matter of whether it is more probable than not that she will become a widow and will be out of work. Theoretically such a head of damages exists, and it is a matter for the jury. But in this case I suggest to you—reminding you that you are the judges of the fact—that any addition for diminution of earning capacity in years to come is likely to be a matter than you might say would not be supported by this evidence.

A young married woman of 20 might easily say to a jury "My husband might die and therefore I may have to go to work later on". But this woman is in her 60's and you may think that even if she had not been injured it is more probable that she would not be a candidate on the labour market.

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There are other heads of damages, of course. There is this serious injury which she has sustained, and that is a head of damage. In putting to you that under the heading of financial loss, there is a very definite amount of which I will remind you. There is an amount of £820 covering hospital and medical expenses.

I am endeavouring to point out to you, gentlemen, that you will deal with this case on the evidence you have heard here, and nothing else. You will not be influenced by anything you may have read in regard to verdicts of other juries because they depend on the facts of difference cases, and in so many of those cases the facts carry with them a claim that the plaintiff has been deprived of weekly earnings—sometimes of £40 a week for 40 years. That is not this case.

In putting that to you, it is not meant to suggest that the other heads of damage are not very great, perhaps greater in the personal result than some cases which are based on a loss of earnings. You will quite appreciate that this plaintiff has had both legs amputated at the site where you have seen in the photograph. That is quite a serious matter, because the law provides that a person should receive compensation for the physical injury she has sustained, for the pain and suffering which has resulted from it and which will result in the future. Here you have heard the circumstances of the amputation described to you, you have seen photos of it. In addition she had an injury to the shoulder, and there are certain other suggested disabilities which follow from it, so the plaintiff claims.

Pain and suffering is a head of damage extending into the future. She claims that she experiences these phantom pains. I think her own words were that she feels as if her feet are still there. That is quite an ordinary thing in cases of this kind. The medical evidence and her own evidence is that her condition is substantially static, so that under that head, bear in mind that her right is to be compensated for pain and suffering which could, on the balance of probabilities, be experienced in the future. There is one head of damage to be considered by you.

In this case there is another head of damage, and that is one which entitles the plaintiff to compensation for any disfigurement, the cosmetic results of this accident. Here, as you are well aware, the plaintiff is obliged to walk now with artificial limbs. You have seen photographs of her wearing the limbs and you have heard of the discomfort and inconvenience caused by the dressing in them, which takes a long time.

Under the head of pain and suffering, and inconvenience in the future, there is this sidelight which might not occur to you at first glance. There is this inconvenience caused also that if during the night the patient is obliged to leave her bed she has to choose either to put her legs on or to resort to what she did in the earlier days, use the cushion to move about. Although nobody has referred to it, you may think that possibly a chair would help, but I cannot direct you to any evidence there.

In this case, amongst the results of this injury, there did follow on more than one occasion some ulceration and that has caused the plaintiff to leave her legs off for a couple of days on one occasion. We are told that she finds it is desirable, if not necessary, to do that in hot weather because of the woollen wrapping which must go around the stump. There is evidence here again, adverting to her age, that as one grows older the skin is more susceptible to injury and there is the suggestion, you may think, from the medical evidence that the periods of time when she will be obliged to leave off the artificial legs will increase.

Dr. Callow said that the backache of which she complains is quite consistent with this injury, that her condition will remain as at present except that as a person grows older the skin becomes more fragile and so the periods during which she must leave off the legs will become more frequent. It was he who referred to the possibility of disturbed sleep. He suggested it would appear more likely in an elderly person, accompanied then by the difficulty of her having to move about without the use of her artificial legs.

The plaintiff has told you that since the accident she has head pains, phantom pains in the feet, cramps on change of the weather, and it is claimed that her memory and concentration have deteriorated. She said she cannot use buses as part of public transport, but she said that in a train she can manage satisfactorily. She said she can make beds and cook to some extent but that sweeping causes her to over balance. There is this suggested change in her personality, to the extent that she is more irritable, it is said, than she was before. On that you have the evidence of her mother who said she was much more irritable now than she was before, and also the evidence of the plaintiff's husband.

These witnesses have told you that before the plaintiff was injured she was an easy going and pleasant person, but this change has taken place from the time of the accident.

The plaintiff is entitled, further, to compensation for any diminution in her capacity to enjoy life generally. You must be careful under this heading that you do not tend to award compensation twice. If you consider the matter as one involving pain and suffering, be alert not to cover the same ground twice under this heading. This has interfered with her in such matters as her capacity to indulge in gardening. Her being deprived of that is something which the law permits as a head of damage, apart from interference with earning capacity. Any interference with her sporting interests—a man can come to the jury and, if the evidence warrants it, complain that because of the accident he cannot play golf, bowls or cannot fish, for what they are worth, are matters for the jury to consider. The mere inability to get about freely is part of that heading. Even where a person does not claim any special interest in a particular form of activity but merely complains "I cannot walk about like a normal person, I cannot get

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on buses like a normal person"; that is being deprived of a share of the amenities of life. As to being unable to use a bus, you may have different views.

I think there is very little I can say that will assist you, gentlemen, but perhaps I ought to refer again to one heading. There again I must repeat that every case has to be judged on its own facts, and it may well be—having regard to the age, hobbies and marital status of the plaintiff—that these photographs before you of her in a swimming costume and wearing the legs would not be indicative of such grave damages as they would be if the plaintiff were many years younger. This is not just a whim of my own, it is simply a discharge of a duty to point out to a jury that you have to look at the facts, and on this question of disfigurement it is quite clear that it cannot be put into any schedule. A man of 50 or 60 who sustained a broken nose probably would not be taken so seriously by a jury if he complained that his looks had been interfered with as would a young man of 16 or, you might think, more particularly a girl of 16. That is the theory which the law permits you to apply to this case. Now, if that photograph of the plaintiff, wearing a swimming costume and these legs, related to a girl of 16 or 17 (or whatever age you fix for yourself) you might think that is quite a serious disfigurement. I do not intend to suggest to you that it is not a disfigurement here but I do intend to point out to you that this is a matter to be judged by you in the light of the evidence of the case. Part of that evidence is the plaintiff's age. There is no suggestion in her case that she was in the habit of going swimming frequently or at all.

In these matters, gentlemen, you have got to be fair. You have got to be reasonable, you are not to be niggardly. It is true that this plaintiff has had quite a serious injury, but you will determine damages, if you come to them, fairly between the parties.

Now, I used the phrase "If you come to them" because that is a matter entirely for you and in reverting to this aspect of liability I am not returning to it with the idea of suggesting to you that you never will come to damages. That is your responsibility. But I do want to remind you that that problem is still there, and the fact that I have discussed damages with you is not to mean that I have indicated to you that whatever was said earlier about liability is of no importance because you will inevitably come to damages. That is not so.

The position starts off with your consideration of this prime question: was there any negligence on the part of the defendant? Then did the plaintiff's injury result from that negligence? Has the defendant proved contributory negligence on the part of the plaintiff, and all that is bound up to some extent with this problem presented by the evidence that the plaintiff was found north of this crossing. I think in regard to that I have said enough. I would not attempt to summarise it again, gentlemen, because

I feel there would be a danger that might emphasize one aspect of it as against the other, and at this stage of the trial I want to guard against that.

Will you be kind enough, gentlemen, to please retire and consider your verdict, and might I extend to you the invitation that if there is any part of the evidence about which your recollection is not clear, then you could make your wishes known to the officer and you would be brought back into Court and such part of the evidence as you wanted read over to you would be read. But it may well be that you will not require that assistance.

If there is any direction of law which I have not made clear to you, again don't hesitate to convey that to me and I will endeavour to clear it up if I can, or any problem which will have occurred to you. In the meantime, gentlemen, will you please retire?

Mr. WATSON: Before the jury retire, there are two small factual directions which I might seek in front of the jury.

Your Honour did say that you understood that Sergeant Cunningham paced the distance.

HIS HONOUR: I said "measured".

Mr. WATSON: He said neither. The transcript shows:

"Did you fix that as eight feet? A. I did not measure it . . .

Q. It is based on what you saw? A. That is right."

HIS HONOUR: That is so. Thank you, Mr. Watson, for that. I said I did not know whether he measured it.

Mr. WATSON: Your Honour did say, or may not have said straight out but the impression was formed—that the fireman had said that the body was lying with the head pointing north-east. That did come into your Honour's summing up, that the body was seen lying north-east—at an angle—with the head and the feet to the track at that stage. The body was north-east after it was rolled off the line, but the fireman himself was unable to say whether the head was pointing towards the train or away from it.

HIS HONOUR: I think you are correct.

(To Jury) Gentlemen, those two factual corrections are quite proper, and I remind you of them, and I am very grateful for them.

I have told you that this distance of 8 feet between the crossing and the feet of the plaintiff when the constable came there was paced by the constable. It is clear now that it was simply a judgment.

I did then refer to some evidence that the body was lying with the head towards the north-east and its feet towards the south-west. That was not the evidence of the fireman, it was the evidence of the constable, and I am

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very grateful for the reminder. That was the position found by him after the collision, and after Mrs. Hayes had rolled the body off the line. So it may well be that you would not, and perhaps it would be undesirable if you were to, place much importance on the angle of the body after the collision. As you can see, the fireman does not help, and as I recollect now he said that he did not know whether it was a man, woman or boy on the line. So he does not assist with the angles, and you may think that the constable does not help with the angles because of the fact that Mrs. Hayes said she endeavoured to lift the plaintiff and finally rolled her off from between the tracks over to the six feet track between the two of them. So there you think that the rolling could cause any angle to be adopted by the plaintiff, as Mrs. Hayes rolled her.

I do not think there is anything further I need add. Please retire and consider your verdict.

(At 11.26 a.m. the jury retired.)

Mr. WATSON: My friend heard what the plaintiff said while your Honour was speaking, and the jury may have heard her say a moment ago "What about the fractured skull", however, I do not think there has been any breach by that.

Mr. JENKINS: No.

I suppose that having asked for a verdict by direction I will be directed, would I not? Your Honour said "I propose to leave it to the jury this way", and I submit it should not be left to the jury that way. I suppose that I should say formally to your Honour that I ask your Honour to withdraw those directions relating to a general duty of care and to leave to the jury only the licensor-licensee duty properly so called.

HIS HONOUR: In doing so, you adopt all the argument you advanced to the Court on your application for a verdict by direction?

Mr. JENKINS: Yes. I think that is all I need say.

HIS HONOUR: I will note that all those matters you have raised.

(At 12.37 p.m. the jury returned to the Court with a verdict for the plaintiff in the sum of £10,000.)

HIS HONOUR: Judgment will be entered accordingly.

Mr. PARKER: I ask Your Honour to grant a stay of proceedings for 21 days.

HIS HONOUR: Judgment will be entered accordingly. I grant a stay of proceedings for 21 days on the usual terms.

No. 4

NOTICE OF APPEAL TO FULL COURT BY DEFENDANT

TAKE NOTICE that the Full Court will be moved on the first day on which its business permits after the expiration of 16 days from the date hereof for a rule allowing an appeal by the abovenamed appellant against the verdict and judgment entered against it in action No. 13250 of 1959 and ordering that judgment therein be entered for the appellant or that a new trial be had of the said action.

Particulars of the judgment appealed from are as follows: —

The action was heard by his Honour Mr. Justice Clancy and a jury at Sydney in a trial commenced on 11th March, 1964, and ended on 16th March, 1964, when the jury returned a verdict for Respondent (Plaintiff) for £10,000 and his Honour entered judgment accordingly.

The grounds of appeal are as follows: —

1. His Honour ought to have directed the jury to return a verdict for the Appellant.
2. The jury's finding on liability was against the weight of the evidence and was a finding which no jury properly directed could reasonably have made.
3. There was no evidence of breach of any duty owed by the Appellant to the Respondent.
4. There was no evidence that breach of any such duty caused the damage complained of.
5. His Honour was in error in his direction to the jury as to the nature and scope of the duty owed by the Appellant to the Respondent in that his Honour stated that duty too broadly as the ordinary duty of care.
6. There was no evidence that the crossing where or near to where the Respondent met with her injuries was a crossing of the Appellant's land by a public highway or public footway.
7. There was no evidence from which the jury could infer that the Respondent at any time on the night she was injured was using the crossing formed by sleepers.

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8. There was no evidence from which the jury could infer rather than guess how the Respondent came to be lying prone or at all in the path of the Appellant's train and to the north of the crossing formed by sleepers.

9. There was no evidence on which a jury could reasonably find that the Respondent was at any relevant time within the area of licence to cross the Appellant's railway lines.

10. The Respondent was in the circumstances a trespasser on the line where she was injured and there was no evidence that she was wilfully or recklessly injured by the railway staff.

11. The circumstances, on any view of the evidence open to the jury, did not establish any duty of care other than, at its highest, that owed by an occupier to a licensee and on that basis the Plaintiff necessarily failed.

12. If it were open to the jury to find that the Respondent was a licensee then, in accordance with the principles laid down in Gallagher v. Humphrey 6 L.T. (N.S.) 684, she had to take the crossing with its risks as she found it and there was no evidence of any positive act of negligence on the part of the railway staff.

13. The Appellant owed no duty to the Respondent to alter repair or add to the physical state or features of the crossing, nor could failure of the Appellant to do any of those things constitute a breach of the Appellant's duty to the Respondent and his Honour should have directed the jury accordingly.

14. As it necessarily appeared in the Respondent's case that she herself was guilty of contributory negligence his Honour should have directed a verdict for the Appellant on that ground.

15. His Honour was in error in admitting the evidence of witnesses as to the state in which they claimed the sleeper crossing to be and as to difficulties they allegedly experienced in using it at times other than when the Respondent met with her injuries.

Dated this third day of April, 1964.

A. H. CONLON, Counsel for the Appellant.

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No. 5

Reasons for Judgment of the Full Court.

Macfarlan, J.

No. 5

REASONS FOR JUDGMENT OF THE FULL COURT OF THE SUPREME COURT OF NEW SOUTH WALES

MACFARLAN, J.
TAYLOR, J.
MOFFITT, J.

Motion to set aside a verdict of a jury and to enter judgment for the Defendant.

MACFARLAN, J.: This appeal is from the verdict of a jury awarding the respondent-plaintiff the sum of £10,000 for damages in respect of an accident that occurred on the evening of 10th June, 1959, near Koolewong. Koolewong is a village near an unattended railway station of the same name on the main northern railway line between Woy Woy and Gosford.

At a previous trial the jury had awarded the plaintiff £14,000, but a new trial was ordered by the Court because it was of the opinion that the learned trial Judge had left to the jury as heads of negligence matters which, on the evidence, were not available as such. These matters included the speed of the train which caused the plaintiff's injuries and the failure of the driver of the train to sound a warning of its approach.

The further trial of the action pursued a somewhat chequered course insofar as two juries were discharged for irregularities, the nature of which does not concern us here, before a third jury was empanelled, which returned the verdict I have stated.

At the first trial and at the second trial the evidence given was almost identical, although one witness called by the defendant whose evidence played a material part in the first trial was called by the plaintiff at the second trial.

The facts in the case are not now in dispute, although upon the hearing of this appeal there was some disagreement as to what inferences could or should be drawn from those facts. The facts show that the plaintiff was a resident of this village and had been so for some years. The part of the village in which she lived was in a pocket of houses on the western side of the railway line. On that western side there was a road known as the Old Gosford Road. This road, which ran parallel with the railway line, ended at the north in bushland and at the south came to a dead end. On the west of this road there was impenetrable scrub, heavy bush and a rock escarpment. From what I have said it appears that the Old Gosford Road did not provide in itself any means of direct communication with the outside world. It was the practice, therefore, for the people—including the plaintiff —who lived on this western side of the railway line to use a level crossing which was just to the north of the northern end of the Koolewong railway

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station. The nature of the level crossing was that a number of sleepers had been laid side by side across the two railway tracks so as to constitute a path going from east to west. These sleepers, which pointed north and south, were approximately level with the top of the rails, though there was a gap between the sleepers and each of the rails of a sufficient width to permit the flange of the railway wheels to pass along the rail in the normal manner.

The evidence shows that the sleepers were old, worn and in bad condition and that they were rough and of slightly different levels, compared one with another. The evidence also showed that either the method of laying or the nature of the sleepers themselves had the result that some of them did not lie firmly but moved under weight. At the western and eastern ends of this crossing there were vehicular gates which were ordinarily closed but not locked. Persons desiring to cross the crossing in a vehicle were obliged to alight and open the gates and then close them when they had completed the crossing. In addition to these vehicular gates there were wicket gates, one on each side of the railway lines. These, it appears, were regularly used by pedestrians. The wicket gates were set on an east-west line slightly to the south of the southern edge of the crossing and it was accordingly necessary for any person intending to use the crossing by foot to enter through the wicket gates and then turn slightly to the north so as to reach the line of the sleepers and, when the sleepers had been crossed, to turn slightly towards the south in order to go through the wicket gate at the other end. At the time of the accident there was not any artificial lighting illuminating the crossing or its approaches.

About 6.20 p.m. on 10th June, 1959, the respondent-plaintiff was run over by the Up Northern Tablelands Daylight Express whilst she was lying prone across the eastern set of rails on which this train was travelling. The following further facts are taken from the judgment of Herron, C. J., who was a member of the Court which heard the first appeal (see 80 W.N. 1036) and, subject to one qualification which I will mention later, it was agreed by learned counsel that this statement of facts represented a fair view of the evidence given at the second trial. At p. 1037 Herron, C. J., said:

> "She was seen some 8 to 12 feet north of the sleepers. The evidence showed that the train crew sounded a whistle shortly before the accident but at a time when it seems, the respondent-plaintiff was already prone upon the line and it was of no avail in avoiding the accident. How she came to be in that position was not apparent.
>
> Evidence was given that shortly before 6.20 p.m., the timetable estimate of the passing of the train, the respondent-plaintiff had alighted from a taxi cab at the gates on the eastern side of the crossing. The jury could have inferred that she intended to cross

from east to west to return to her home. Evidence was given that she was somewhat affected by liquor. This was disputed. Although it has been described by the appellant-defendant's counsel as mere conjecture, I am of opinion that the jury was entitled to have drawn the inference that, in the darkness, the respondent-plaintiff probably stumbled and fell prostrate on the city bound tracks, due to the rough and uneven surface of the sleepers. It could be inferred that on the times deposed to in evidence, she may have fallen thus only a brief time before the train came upon her. The probabilities favour the inference that the respondent-plaintiff fell due to the state of the sleepers and the darkness. The appellant-defendant seeks to account for her prone position on the line by suggesting that she lay down and went to sleep, being affected by liquor, or that she had entered the crossing by climbing through the fence north of the gateway. These hypotheses cannot, of course, be positively excluded by logical deduction, but in a civil case the Court is concerned not with possibilities but with probabilities. The respondent-plaintiff is entitled to have the matter considered by a jury if the circumstances raise a more probable inference in favour of what is alleged. Here direct proof is not available. It is, therefore, enough if the circumstances appearing in evidence give rise to a reasonable and definite inference. They must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture: Richard Evans & Co. Ltd. v. Astley (1911) A.C. 674 at p. 687. But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusions sought then, though the conclusion may fall short of certainty, it is not to be regarded as mere conjecture or surmise. The respondent-plaintiff's proofs are meagre but they do raise an inference that her presence on the line was due to a fall on the uneven crossing. A decision of the High Court in Bradshaw v. McEwans Pty. Limited (27th April 1951—unreported) favours the respondent-plaintiff's contentions. The appellant-defendant says that the matter is simply left unexplained. But the body of evidence from residents who speak of the dangers from falling on the crossing favours the respondent-plaintiff's case, whereas the competing hypotheses put forward by the appellant-defendant are mere possibilities and do not appeal as reasonable explanations. Particularly is this so, I think, when the time of the respondent-plaintiff's arrival at the crossing in a taxi cab is considered for it was close to the estimated time of arrival of the train, the two being close together.

All the fireman, Watson, saw in the headlight of the engine was an object on the line, after the train had emerged from a cutting and curve in the lines some 150 feet away. The train was travelling at least at 40 miles per hour and the witness could not say whether the object was a boy, man or woman."

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I will add to what has been stated by the learned Chief Justice that according to the evidence the respondent-plaintiff suffered a retrograde amnesia in respect of the events which occurred during the period of three weeks before the accident.

These facts, as it seems to us and seemed to counsel, are sufficient to enable the points which have been argued in this trial to be considered. It is, though, necessary to note that counsel for the appellant-defendant did contest the view of the Court that an inference was raised that the plaintiff's presence on the line was due to a fall on the uneven crossing. The appellant-defendant argued by reference to evidentiary considerations, which it is not necessary to state, that a different view was open to the jury, viz.: that she had entered this crossing from the western side and that the evidence did not disclose any explanation of how she came to be on the railway line where she was injured. Accordingly it was argued that the facts open to the jury to decide were not any different from those facts which the House of Lords in Jane Wakelin v. The London and South Western Railway Company (12 App. Cas. 41) held did not raise a prima facie case of negligence. I, however, do not propose to consider this argument further but because of the identity of the evidence I think it proper that I should follow the view of the Chief Justice, with which Richardson J. concurred, and hold that it was open to the jury to find that the plaintiff's presence on the line was due to a fall on the uneven crossing. I reject the argument submitted by counsel for the appellant-defendant that because at the second trial the evidence of the taxi driver was given in the plaintiff's case rather than, as at the first trial, in the defendant's case a different inference is open from that which the Full Court ruled to be open on the first appeal. Counsel for the appellant-defendant then said that if this argument failed, he accepted that the respondent-plaintiff was lawfully on the level crossing with the knowledge and acquiescence of the appellant-defendant, and that whatever rights she had in law should be decided on that basis.

The trial of the action from which this appeal is brought took place in March of this year, and it was only when the evidence had been almost completed that a copy of the Privy Council's judgment in Quinlan v. The Commissioner for Railways (64 S.R. 1) became available. It was argued by counsel for the defendant at the trial that this decision required a different direction in law by the learned trial Judge from that stated by the Court as being applicable on the hearing of the first appeal. However, the learned Judge took the view that while the judgments of the Full Court stood it was his duty to follow them and, accordingly, his summing-up was in accordance with the law as stated in those judgments. The law in accordance with which the learned trial Judge charged the jury was substantially in accordance with that stated and declared by the High Court in Commissioner for Railways (N.S.W.) v. Cardy (104 C.L.R. 274) and Rich v. Commissioner for Railways (N.S.W.) (101 C.L.R. 135).

The notice of appeal assigns a number of grounds upon any one of which, so it was submitted, the appellant-defendant was entitled to relief; but on the appeal being opened counsel for the appellant-defendant said that in view of the number of trials which had already taken place he did not propose to argue any points, the success of which would involve a new trial. These points included misdirection, wrongful admission of evidence, and that the verdict of the jury was against the evidence and the weight of the evidence. Counsel, however, said that the point he did propose to argue was that on the facts proved the appellant-defendant was entitled to a verdict by direction. It is clear from the record of proceedings at the trial that counsel for the defendant took this last point sufficiently and adequately in his submissions to the trial Judge.

It is also necessary to note that the declaration filed on behalf of the plaintiff contained only two counts. The first count alleged a general duty of care owed by the defendant to the plaintiff and a breach of that duty by the defendant. It was in accordance with this general duty that the learned Judge at the first trial, and also the learned Judge at the second trial, summed-up. The second count alleged that the relationship between the appellant-defendant and the respondent-plaintiff was that of invitor and invitee and a breach by the appellant-defendant of the duties imposed by law where that relationship was established. Before us both parties proceeded upon the basis, which I think is correct, that on the hearing of the first appeal the Court directed that judgment should be entered for the defendant on the second count and that there is not now any significance attaching to that count.

However, the main point in contest flowed from an acceptance by the appellant-defendant, in the circumstances I have stated, that the respondent-plaintiff was lawfully with its knowledge and acquiescence on the level crossing and that while on the crossing she stumbled and fell onto the line. It was argued that her presence on the crossing at the time she stumbled was solely as a licensee of the appellant-defendant and that the relationship between the appellant-defendant and the respondent-plaintiff was that of licensor and licensee, and that the only duty owed her was the common law duty of a licensor to a licensee. In support of this argument and as a statement of the legal relationships thereby involved, reference was made to two passages from the judgment of Dixon J. (as he then was) in Lipman v. Clendinnen (46 C.L.R. 550). These passages are often cited and always applied in cases to which they are applicable. At p. 555 his Honour said: —

> "But English law has adopted a fixed classification of the capacities or characters in which persons enter upon premises occupied by others, and a special standard of duty has been established in reference to each class. Many of the circumstances which might have been considered in reference to the precautions required go now only to the question in what character did the sufferer come upon the premises.

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Apart from contractual relations (Maclenan v. Segar, (1917) 2 K.B. 325) and the execution of an independent authority given by law (Great Central Railway Co. v. Bates, (1921) 3 K.B. 578, at pp. 581-582; Low v. Grand Trunk Railway Co. (1881) 72 Maine 313; 39 Am. Rep. 331), he who enters upon land occupied by another does so in one or other of three characters. The duty owing to him is measured or defined by reference to the category to which he belongs. He comes as a trespasser, as a licensee, or as an invitee. The separation is absolute between these three classes, which are mutually exclusive. A different duty is incurred by an occupier to each class, and these various duties are not to be confused or assimilated. In determining the liability of an occupier, it is imperative that a decision should first be reached fixing the class to which the person belongs who complains of injury. When that has been done, the case must be governed altogether by the standard of duty prescribed for that class (see per Viscount Dunedin in Robert Addie & Sons (Collieries) v. Dumbreck, (1929) A.C. 358, at pp. 371-372.)"

At pp. 569 and 570 his Honour also said:—

> "The result of the authorities appears to be that the obligation of an occupier towards a licensee is to take reasonable care to prevent harm to him from a state or condition of the premises known to the occupier, but unknown to the visitor, which the use of reasonable care on his part would not disclose and which, considering the nature of the premises, the occasion of the leave and licence, and the circumstances generally, a reasonable man would be misled into failing to anticipate or suspect."

It will be appreciated that such a view of the legal relationship between the parties in this case departs widely from that which was stated by the Court in the first appeal to be applicable and departs from the law as stated and declared by the High Court in Thompson v. The Council of the Municipality of Bankstown (87 C.L.R. 619); Rich v. The Commissioner for Railways (101 C.L.R. 135) and Cardy v. Commissioner for Railways (104 C.L.R. 274). Counsel for the appellant-defendant submitted that the argument was well founded because it was directly required by, or if not directly required by, it was nevertheless a logical and inescapable consequence of the decision of the Privy Council in Quinlan's case. The argument did not formally accept that the condition of the sleepers constituted a hidden danger or, if it did, that the appellant-defendant had knowledge of the hidden danger; but these points were but faintly argued and on the state of the evidence can hardly be contested. But it was strongly argued that if the condition of the crossing constituted a hidden danger it was one which was known to the plaintiff and that—being known to the plaintiff—she was obliged to take the crossing in the condition in which it was and that the appellant-defendant accordingly did not owe any duty to her.

But before considering this last point there is, of course, the antecedent question which is of fundamental importance, and that question concerns the proper understanding and effect of the Privy Council's decision in the Quinlan case. In Quinlan's case the Privy Council was dealing with an appeal direct from this Court. It was a level crossing case in which the facts showed that the injured plaintiff was a trespasser at the time he was injured. The Privy Council said that in their view "The character in which the injured person was upon the occupier's premises is an inescapable element in the determination of the extent or limit of the latter's duty towards that person; and mere knowledge of some unprevented trespassing would not convert the occupier's limited duty into a 'general duty of care' which is said to arise from 'the general circumstances of the case'—to quote from the judgment of Fullagar J. in Rich v. Commissioner for Railways (101 C.L.R. 135 at p. 144)."

As appears from the short passage I have cited, the Privy Council rejected the view that the duty of the Commissioner towards Quinlan depended upon any general duty of care and, in particular, as it seems to me they have rejected the applicability to a trespasser of the following statement of principle (based upon Thompson's case, Rich's case and Cardy's case) which appears in the judgment of this Court in Quinlan's case (80 W.N. 820 at p. 825):—

> "The principle, in our opinion, to be extracted from the decided cases is that, in the case of a level crossing adjacent to a public highway which is not secured by a locked gate, there is a duty owed by the raliway authorities to take reasonable care towards persons to whom injury may reasonably and probably be anticipated if the duty is not observed (cf. Bourhill v. Young; 1943 A.C. 92 at 104, per Lord McMillan)."

So much, in my opinion, is clearly decided by their Lordships, but in the present case the respondent-plaintiff was not a trespasser but a licensee.

I have, for a number of reasons, found great difficulty in deciding whether or not the argument of the appellant-defendant is soundly grounded. Not the least of my difficulties arises from what was said by their Lordships about the three High Court cases of Thompson, Rich and Cardy which, apart from higher authority, would settle the law in the instant case. I think it is clear that they said at least that some parts of the judgments delivered were not applicable to the case of a trespasser injured upon a railway crossing. But I doubt if their Lordships were intending to say that the principles stated in these decisions and applied throughout Australia were inapplicable to all injuries sustained upon a level crossing. If this were so, certainly Rich, as it seems to me, would have been wrongly decided and yet their Lordships refrained from overruling them. But I think I should turn to what the Privy Council actually said about the three cases:—

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Thompson's case was explained as being one where the injury to the plaintiff plainly did not arise from any aspect of the relationship of occupier and trespasser. Of Cardy's case their Lordships said, at p. 16: —

> "The circumstances seemed to place the case squarely among those 'children's cases', in which an occupier who has placed a dangerous 'allurement' on his land is liable for injury caused by it to a straying child. A considerable portion of the Court's full and learned judgments is devoted to the question whether it was necessary or possible to describe the boy, playing on the surface of the tip, as a licensee, and their Lordships are at one with Dixon, C. J., in his exposition of the unreality of this description as applied to children in several previous authorities. Nor, as he says, is it necessary to resort to this categorisation to give them the legal remedy that is felt to be their due. Children's cases in this context do unavoidably introduce considerations that do not apply where the sufferer or injury is an adult."

The parts of the Privy Council judgment in which their Lordships deal with the Rich case are more difficult. Their Lordships say of this case at p. 14: —

> "The effect of it was only to direct a new trial of an action in which the plaintiff, an adult, was suing the defendant for damages for personal injuries sustained when she was struck by a locomotive while she was crossing the railway line at a station. She claimed that she was 'lawfully passing across the level crossing' at the site of the accident, and at the trial she sought to tender evidence that it was customary for members of the public to walk across the line at that point and that that practice was known to and permitted by the railway staff. The trial Judge rejected the evidence and directed the jury to find for the defendant on the ground that the plaintiff could only succeed if she could show that she was an invitee of the defendant and that there was no evidence to support such a finding. The High Court held this to have been wrong, taking the view, as expressed in the headnote to the report of the case, that the plaintiff's right did not depend upon whether the defendant as occupier of the premises had fulfilled his duty towards her having regard to the character in which she entered the premises, but upon whether 'in all the circumstances' he had exercised the care required of him in the management of the railway. The evidence rejected was relevant and admissible on this question.
>
> Their Lordships are bound to say that they would find great difficulty in accepting a proposition couched quite in these terms. In their view the character in which the injured person was upon the occupier's premises is an inescapable element of the determination of the extent or limit of the latter's duty towards that person; and mere knowledge of some unprevented trespassing would not convert

the occupier's limited duty into a 'general duty of care' which is said to arise from the general circumstances of the case, to quote from the judgment of Fullagar, J. There are certainly passages in one or more of the judgments delivered which suggest that the opinion adopted was that, given a course of trespassing by members of the public and knowledge of it by the defendant's servants, his duty of care towards a trespasser became equivalent to the duty of care owed to members of the public properly using a public level crossing. Their Lordships would not, with respect, agree with this. On the other hand, the exact significance of the decision really depends on what the Court thought that the rejected evidence would be capable of proving. It suggested facts strong enough to support a finding of acquiescence or actual permission on the part of the defendant, acquiescence in habitual trespass sufficient, in Salmond's words, to 'transform' the trespasser into a licensee. Acquiescence or permission, something that goes substantially further than mere knowledge and inaction, does seem to have been the aspect of the evidence that weighed in the minds of several members of the Court, and, if the rejected evidence did prove a case of this sort, their Lordships would agree that it would impose upon the occupier a duty more onerous than that owed to a trespasser. It would not be that the duties would co-exist and overlap each other, but that the plaintiff's character as trespasser would have been displaced by the different and preferred character of a licensee. Whether, even so, such a character would have protected the respondent in this case it is not necessary to inquire. Presumably, in accordance with the principle laid down by the Court of Queen's Bench in Gallagher v. Humphrey (1862 6 L.T. (N.S.) 684) he would have had to take the crossing with the risks as he found it but would have been entitled to complain of any positive act of negligence on the part of the railway staff."

I find this passage in their Lordships' judgment of considerable difficulty. It seems to me that it clearly holds that the High Court was wrong in Rich's case in saying that a general duty of care can be applied to a trespasser, and also insofar as it suggests that knowledge on the part of the occupier of the trespasser's presence created a duty equivalent to the duty of care owed to members of the public lawfully using the level crossing, but the passage also says that the evidence which the High Court held to be admissible in relation to the ascertainment of what the circumstances were at the time of the accident would be relevant in order to "transform" a trespasser into a licensee.

The appellant-defendant relies strongly upon the last sentence of this passage because, so it was submitted, it says that if the trespasser is so transformed, then, having become a licensee, he would be obliged to take the crossing with its risks as he found it, although he would have been entitled

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to complain of any positive act of negligence on the part of the Railway staff. In this case it is not open to the respondent-plaintiff to complain of any positive act of negligence on the part of the Railway staff because the Court held this on the hearing of the previous appeal. I propose to follow what was then said, but the question remains whether upon such a transformation taking place the duty of the appellant-defendant to the respondent-plaintiff is simply measured by the common law duty of an occupier to a licensee. Their Lordships' judgment is not definite on this point. The sentence upon which the appellant so strongly founds is introduced by the adverb "presumably", and does not refer to the duty of the licensor to warn of hidden dangers, nor does it refer to the situation which arises if the plaintiff has knowledge of what is held to be a hidden danger.

The point is also referred to at p. 18 where, in discussing whether a new trial should be granted or judgment entered for the defendant, their Lordships say: —

> "If the evidence were capable of supporting a plea that the injured man was there with the permission or acquiescence of the appellant, he might have a case, for acquiescence amounting to permission creates a duty of care at any rate equivalent to that owed to a licensee. It is not necessary to consider here whether Courts in Australia would now draw any material distinction between the position of the licensee and that of the invitee, where negligence is in issue, for there is in truth no evidence upon which a finding of acquiescence could be based."

Counsel for the respondent-plaintiff has submitted that the only point decided by the Privy Council is that the general principle as stated by the High Court in Rich's case and in Cardy's case does not apply to a trespasser. All else, so it is submitted, is obiter, but in any event a proper reading of the Privy Council judgment emphasises that the distinction drawn is between persons unlawfully on the crossing—as Quinlan was—and persons who are lawfully there. In the case of persons who are lawfully there the same duty to take care is imposed upon the Commissioner, and that is the duty which is stated in the three High Court cases, and in the decision of this Court upon the hearing of the first appeal.

I myself agree that what the Privy Council has said with respect to the duty owed to persons who are not trespassers is indeed an obiter dictum, but nevertheless an obiter dictum by the Privy Council expressing a clear and definite opinion of the law may be one which we should follow. However, in my judgment the correct view of what the Privy Council case said so far as it deals with the two matters going beyond the position of a trespasser is that the opinion of their Lordships is either reserved or not intended to be fully stated. I find this reservation in passages from the judgment upon which counsel for the appellant-defendant has most strongly relied, and I also think that this conclusion is to be drawn from the manner in which the

Privy Council judgment dealt with the three High Court cases. Parts of the judgments in these cases were criticised, but they were criticised in so far as they made applicable to a trespasser a general duty of care as opposed to the more limited duty expounded in the Privy Council judgment. Notwithstanding those criticisms the Privy Council did not overrule those decisions, nor did it say that they were wrongly decided in respects going beyond the relationship of occupier and trespasser. In the result I find it impossible to hold that in relation to persons lawfully, as opposed to unlawfully, using a level crossing, the judgment of the Privy Council has changed the law as it has been applied throughout Australia.

The conclusion which I have reached means that I have rejected the arguments upon which this appellant-defendant claimed to be entitled to judgment. I have held the decision of the Court given in the previous appeal precludes the appellant-defendant from relying upon the contention that the respondent-plaintiff was a trespasser. I have also held that viewing the relationship between the parties as that of licensor and licensee, the respondent-plaintiff is to be regarded as a person who at the material times was lawfully on the crossing. The respondent-plaintiff has throughout relied upon the general allegation contained in the first count of the declaration and this is the count upon which the Court in the previous appeal held that she was entitled to rely. Upon the hearing of this appeal no criticism was submitted of the manner in which the learned Judge applied that decision, nor upon the hearing of this appeal was our leave sought to argue that the Court had previously mis-stated the law applicable to persons lawfully on the crossing. Accordingly I am of the opinion that we should follow that decision, with the result that the appeal will be dismissed with costs.

Before parting with this case I think it proper to refer to an aspect of the evidence which appears to have been accepted by both parties as one of the bases upon which this case has proceeded throughout. In the evidence of Andrew Bruce Sinclair, a consulting engineer in private practice, the following appears:

> "Q. You would know, would you not, that in New South Wales there are more than 3,000 crossings like this one? You would know that? A. I would know that there are more than 3,000 crossings?
>
> Q. Like this one? A. Like this one? I could not answer that.
>
> Q. There are many more than 3,000 crossings, but would not you agree with this; there are thousands anyhow, of crossings like this one. Would you not agree with that? A. I don't know how many crossings there are like this one in New South Wales.
>
> Q. There could be two or three hundred, so far as you are concerned; you would not know? A. From my own travelling around the State I would estimate there would be at least several hundreds."

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Despite the valiant attempt by learned counsel for the appellant-defendant to persuade the witness to agree that there were "many more than three thousand crossings" like this one, I think the fact is just not proved. I would have been greatly surprised if with this witness's qualifications he could have given any other answer to this question or the facts assumed in it than he did. It is true that the witness does ultimately say that he estimates from his own experience there would be at least several hundreds presumably like this one at Koolewong. But if it were material for me to act upon this evidence I would take grave leave to doubt its probative value. My reason for saying this is that I would be inclined to think that this crossing is somewhat unique if one considers the situation of the pocket of houses on the western side of the railway line and the only means of access to them and the Old Gosford Road that is available. It was also apparently assumed that the appellant-defendant was the owner of the land upon which the railway lines were laid. There is not any evidence of this and for aught that appears it may well be that the railway lines at the point of this crossing were laid across a public road.

I have made these brief observations because it appears to have been assumed by both parties and particularly by the appellant-defendant that, if in the view of the Court the appeal had succeeded, the decision would have had a general application to all other level crossings throughout the State. In my opinion the evidence in this case and indeed also the absence of evidence not only denies the validity of such an assumption but also limits the effect of this decision completely within the confines of the evidence which the parties chose to lead and the assumptions which they chose to make with respect to the facts of this particular case.

On the points to which I have shortly referred I would add that I have read the fuller and more detailed observations made by my brother Moffitt and am in general agreement with what he has said.

MOFFITT, J.: It is not necessary to state the facts as they have already been summarised in the judgment of Macfarlan J. I agree with the decision he has come to and the reasons he has expressed but desire to add some remarks upon the central issue in the appeal, namely the extent of the appellant's duty to users of the level crossing.

Counsel for the appellant argued the appeal on the approach that there could be no question that the plaintiff was an invitee. Counsel for the respondent has debated the duty of the appellant on the basis that the plaintiff was a licensee who stumbled while exercising her licence to use the level crossing, but sought, despite her status as licensee, to have defined the duty of the appellant to her in accordance with that explained in Donoghue v. Stevenson (1932 A.C., 580). Such duty, he argued, was attracted by the appellant's activity of running a train over the crossing, causing injury to the plaintiff.

If the duty be as so alleged, rather than the duty of a licensor to a licensee as defined in Indermaur v. Dames (1866, L.R., 1 C.P. 274), the condition of the surface and lay-out of the crossing and the complete absence of any illumination provided evidence of the breach of such duty and it was open to the jury to infer that, by reason of such breach of duty, the plaintiff stumbled and fell on to the line near the crossing and, as a result, had her feet amputated by the wheels of the train. It was argued that, even if the duty were the restricted duty of a licensor, there was evidence that the crossing constituted a concealed trap, of which the appellant could be taken to have known and that the plaintiff's knowledge of it by day time and her decision, nevertheless, to use it by night did not debar her from succeeding. (McDermott v. Commissioner for Railways 80 W.N. 1036 at 1045). In view of the decision I have come to regarding the duty of the appellant, it is not necessary to decide this matter.

But for the decision of the Privy Council in Commissioner for Railways v. Quinlan, (64 S.R., 1) authority would require that we should hold that the appropriate duty was that applied in Donoghue v. Stevenson (Rich v. Commissioner for Railways, 101 C.L.R. 135, Thompson v. Bankstown Corporation, 87 C.L.R., 619, Commissioner for Railways v. Cardy, 104 C.L.R., 274, Videan v. British Transport Commission, 1963, 3 W.L.R. 374, Slater v. Clay Cross Co. Ltd., 1956, 2 Q.B. 264, Commissioner for Railways v. McDermott (supra.)). It has been conceded that, in substance, the facts adduced in this and the first trial (which became the subject of the appeal in Commissioner for Railways v. McDermott (supra.)), were the same. On the facts of the former trial this Court has already decided that there was evidence of a breach of duty defined in accordance with the authorities just referred to. Therefore, unless there be authority that compels us to do otherwise, we should follow the line of authority of the High Court and the decision of this Court in this very case.

Quinlan's case dealt with an occupier's duty to a trespasser with special reference to a situation where the occupier conducted on his land the activity of running a train over a level crossing. In elaborating the reasons which led to their decision, their Lordships appear at some points of their judgment to resort to generalisations applicable alike to each of the categories of trespasser, licensee and invitee and, in offering criticisms of the three High Court decisions referred to, make comments apparently relevant to the licensor-licensee situation. However, such opinion is obiter and some hesitation is shown when the judgment comes to the point of defining the situation that exists in the licensor-licensee relationship. It by no means follows that the generalisation, which appears to have been expressed on the occasion of the very special situation of a trespasser being dealt with, will, on further consideration, be applied to a situation where entry on the premises is lawful. In this situation I would not be prepared to take what, with all respect, I would regard not only as a backward step but contrary to existing authority of the High Court. I therefore conclude that the duty

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is the general duty to take reasonable care not to injure persons such as the respondent in the running of the appellant's trains and that there is evidence of a breach of such duty.

This conclusion is sufficient to dispose of the appeal but I think it appropriate to add certain comments. The appellant abandoned all grounds of appeal which would merely result in a new trial and does not seek to disturb the verdict on the ground of any direction given and has said that, if the respondent can show any basis, which would enable her on the evidence adduced, to have the matter left to the jury, he does not seek to have the verdict set aside even although the form of pleading and directions given be inappropriate. Counsel for the appellant says this has been done to avoid any further trial and also because it is sought to make this case a type of test case for what he described as "licensee level crossings" of which he says there are some thousands in New South Wales, where the public have permission to cross a line and gates are provided, but, apparently, are not attended. For my part, for the reasons which will appear, I think that this case cannot be treated as other than a decision upon the limited facts adduced and on the legal propositions in fact debated before us.

At the trial, counsel for the appellant contended that in New South Wales there were more than 3,000 crossings "like this one". We were told by counsel that the area on the western side of the railway line in which there are some sixty houses served by a road or roads is in a pocket and that the only access is by way of the crossing. There is no evidence as to the origin of this crossing, as there was in Quinlan's case, where the crossing was described as a "private level crossing" which it was found the plaintiff had no authority to use. Perhaps it is understandable that the case before us was not framed, nor evidence presented in relation to the precise legal status of the crossing in view of the then state of authority concerning the Commissioner's duty. The report of the decision of the Privy Council in Quinlan's case was received only during the progress of the last trial. It can be inferred, from such evidence as there is, that this crossing was open to the public. In the pocket on the western side of the crossing, there are public roads, described by counsel for the appellant as "council roads", so that any member of the public was entitled to use such roads if he wished, for example merely to drive upon them whether he had any connection with the residents living in that area or not and it may be inferred that any member of the public had at least permission to use the crossing. Whether it could be described as a right, in excess of that which flows from mere permission, would need further examination. It may well be that such a right to cross would depend upon it being shown, that the road, in fact crossed the railway line. That in turn may affect the responsibility of the railway authority for the condition of the crossing. Although there is no evidence regarding the history of the road and the railway line, yet even in the case of a public authority, evidence of user may provide evidence of dedication even although some conditions may be imposed on the user (Vale v. Whiddon, 50 S.R. 90

at 101-103 and cases there cited). Those who lived across the line and their visitors had at least permission to cross. In addition, however, it could be observed that the crossing was a few yards from a small country-style unattended railway station which, no doubt, owed its existence, at least in part, to the presence of the residents on the western side of the line. Access to the station was by means of the gates to the crossing. The Sydney bound train was boarded from a platform on the eastern side, so that residents from the western side of the line, wishing to travel to Sydney, would have to use the crossing to get to the appropriate platform and the residents from the eastern side of the line returning home at the end of the day, or any other member of the public coming from Sydney or going to Newcastle, would have to use the crossing to get to or from the appropriate platform. The use of the platform and of the crossing would be as of right for those members of the public using the transport provided by the appellant, a Government instrumentality, which pursuant to a Statute, conducts a railway service as a common carrier (Government Railways Act 1912/57 s. 33).

The Commissioner as a Government instrumentality provides level crossings for the use of the travelling and other members of the public. In the case of a particular railway crossing examination of the history and its title may disclose that the road preceded the railway and was left unaltered as a road after the railway was built across the road (Ibid. S. 15A, A.G. v. Railway Commissioners, 21 S.R., 118; 23 S.R. 265), or it may appear that the Railway was there first and access between public roads on either side of the railway was provided later. Even where the crossing is not a public road the use of the crossing as a means of access for the public in any practical sense is as if it were pursuant to a public right to cross the railway line. The reality of the situation appears more to accord with the notion of a general public right to cross than with a miscellany of individual rights classifying the public users into categories according to the occasion of their crossing.

To apply to the situation just described the duty that a land-owner owes to a stranger, whom he permits to cross his fields at his own risk, I find a little difficult. The reality and justice of the situation, it would seem, calls for a higher duty than that enunciated in Indermaur v. Dames (supra) and may possibly be met by either of two principles which have found some favour, particularly in Australia. The first is that which has formed the basis of decision in this appeal. The second is, that it may be, that the duty of the appellant does not fall to be considered on the licensor-licensee relationship, but according to some other category as of a person using the crossing pursuant to a common public right, assuming that that category be recognised. Despite the tendency in England to restrict the categories to three, favour exists in Australia in cases where land is used pursuant to a common public right, to recognise a general duty of care which although

In the Supreme Court of New South Wales.

Reasons for Judgment of the Full Court.

Moffitt, J.

subject to some limitations is of a higher order than that in the licensor-licensee relationship. In Aiken v. Kingborough Corporation (62 C.L.R., 179 at 209), Dixon, J., as he then was, said: —

> "To my mind none of the considerations upon which this standard of care depends" (that owed to a licensee) "is found in the relation of an occupier of premises held for public purposes to members of the public who come there as of right. The visitor, as I may call him, who comes in exercise of a common right, does not fill the exceptional position of a person seeking the gratuitous use of another's property. He does not gain admission by grace. The occupier is not giving a voluntary permission for the use of what otherwise is his beneficially, throwing no higher duty upon him than to undeceive the visitor about hidden perils he would not expect, or if, and only if, he does not undeceive him, to take measures for his safety therefrom. The member of the public, entering as of common right is entitled to expect care for his safety measured according to the nature of the premises and of the right of access vested, not in one individual, but in the public at large."

(Shire of Burrum v. Richardson, 62 C.L.R., 214, Vale v. Whiddon, supra, per Herron, J. at 107-112. Fleming, the Law of Torts, 2nd Ed. pp. 409-415 and 24 A.L.J., 47 cf. Sutton v. Bootle Corporation, 1947, 1 K.B., 359 at 366; London Graving Dock Co. Ltd. v. Horton, 1951 A.C. 737 at 764. Winfield on Tort, 6th Ed., 692-6; 7th Ed. 285-6. Lipman v. Clendinnen, 46 C.L.R., 550 at 555.)

Where a Government instrumentality runs a railway service in the capacity of a common carrier and by its railway line confines the public to one side or another of such line, unless access be provided and accordingly, at various points, gives to the public access from one public road or public place to another by means of a level crossing and runs trains over the crossing, which are liable to cause injury to the public unless reasonable care is taken with regard to the crossing, the two principles which have found favour in Australia on the one hand in the cases of Rich, Thompson and Cardy and on the other hand in Aiken's case may, according to the facts of the case, come into operation. I would find difficulty in understanding how it could be found that neither principle existed. To do so it seems would involve first compressing the relationship of the public authority to members of the public into a category of licensor to licensee which is inadequate to meet the reality of the relationship, but is selected on a view that the categories must be confined to three and the nearest made to fit. Having done so it would involve defining the relationship of licensor to licensee so selected according to its narrow limits applicable in a static state despite the risk of injury arising from the activity already referred to. To discard both principles and, accordingly, to apply both the narrow limits

referred to, produces an unreal result and in my view too limited a view of the relevant duty.

The appellant has sought by this case to establish as a principle applicable to an apparently large number of public crossings in this State, that the only duty is to warn of concealed dangers known to the applicant which must mean that either of the two principles referred to are unsound in law or the facts do not support them.

As the case has not been discussed before us, either from a factual or legal point of view, in relation to user of the crossing pursuant to any public right, I express no view upon whether the respondent crossed as a member of the public pursuant to a public right, nor do I come to any decision as to what would then have been the legal duty of the appellant to the respondent. However, as this case may be dealt with elsewhere and as counsel appear to assume that this case will act as a test case for the other crossings referred to I think it is relevant for this Court to draw attention, at the outset, to the limited area within which the case has been contested.

I agree the appeal should be dismissed with costs.

TAYLOR, J.: This is an appeal from the verdict of a jury awarding to the plaintiff the sum of £10,000 damages in a trial which terminated on the 21st April, 1964. This was the second trial of the action. A verdict for the plaintiff in the first trial had been set aside by the Full Court (McDermott v. Commissioner for Railways, 80 W.N. 1036). On the 9th March, 1964, the Judicial Committee of the Privy Council delivered judgment in Commissioner for Railways v. Quinlan (1964 S.R. 1). Their Lordships' reasons were available at the last hearing of the action.

At the hearing of this appeal the appellant did not seek a new trial of the action but contended that on the evidence given at the second trial he was entitled as a matter of law to have a verdict directed in his favour.

The facts of the case are set out in the judgment of the Chief Justice and of Brereton, J. in the report of the appeal previously referred to and I do not find it necessary to repeat them. Counsel for the appellant informed this Court that the only additional evidence given in the second trial was that the plaintiff admitted that she had, prior to the accident, used the pedestrian crossing at night time, whereas in the first trial she had maintained that she had used it only in the day time. In addition there was evidence in the second trial that the plaintiff had some gravel rash on her hands and knees, which had not been given on the first occasion.

In support of his contention that he was entitled to have a verdict for the defendant entered, the appellant argued that there was no evidence that the plaintiff was on the level crossing at any time prior to being run over by the train. The case that she sought to make at the trial was that she had stumbled on the uneven surface of the sleepers which constituted the

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Taylor, J.

crossing, and had fallen in a position some eight to twelve feet north of the crossing as a result of this stumbling, and whilst there unconscious she was run over by the train.

This case, contended the appellant, was not supported by any evidence and should not have been left to the jury. The plaintiff's presence on the railway line in an unconscious state some eight to ten feet north of the crossing was completely unexplained by any evidence, and no more was established by the evidence than that she was a trespasser on this portion of the Commissioner's property which was outside the limits of the level crossing.

This precise point was argued before the Full Court in the previous appeal. The Court in that appeal held that it was open to the jury to draw the inference that the plaintiff had arrived at the place where the fireman saw her lying before she was run over by stumbling on the uneven surface of the level crossing and falling. Since there is no material difference in the evidence upon which the Full Court decided this point adversely to the present appellant and material before us, we should, in my opinion, arrive at the same decision as the members of the previous Full Court did. Accordingly, I would reject this ground of appeal.

The appellant, in support of his remaining and principal ground of appeal, contended that the evidence, assuming it existed, that the plaintiff did fall when she stumbled or tripped on the crossing, established that she was a licensee and as such she must take the crossing as she found it. The duty owed to her by the defendant as the occupier of the property which she was licensed to use was not to expose her to risk of injury from a conceealed danger in the nature of a trap and since the danger was known to her and was obvious, she could not recover. There was no evidence that the defendant had been guilty of any breach of the only duty that he owed to the plaintiff; that is the duty of an occupier of property to a licensee.

The duty of the Commissioner for Railways generally to those who cross his premises by means of level crossings and to this plaintiff in particular was considered by the Full Court at the hearing of the previous appeal in this action. In the headnote of the report (80 W.N. 1036) it is stated that the duty of the Railway authority is to do everything which in the circumstances is reasonably necessary to secure the safety of the crossing. In determining the scope of this duty, although a well-defined duty (as to the safety of premises) flows from the relationship of occupier and licensee, nonetheless the latter may, if circumstances are found which give rise to it, rely upon a higher or broader duty. In stating the duty in these terms the Court followed the principle laid down by Jordan, C.J. in Alchin v. Commissioner for Railways (35 S.R. 498 at 502 and 503). The principle is also to be found in decisions of the High Court: South Australian Railways Commissioner v. Thomas, 84 C.L.R.; Commissioner for Railways v. Dowle, 99 C.L.R. 353.

The learned trial Judge on the hearing of the action from which this appeal is brought directed the jury on the basis that the plaintiff was a licensee and that the duty of the Commissioner for Railways was as stated by the Full Court in the terms I have set out above. There was undoubtedly evidence upon which a jury could find for the plaintiff if this statement of the Commissioner's duty was correct.

The appellant's contention, however, is that since the decision of the Privy Council in Quinlan's case, the above exposition of the law is not correct. The duty of the Commissioner, he contends, to a person using his level crossing who is a licensee is that imposed upon him as the occupier of property to a licensee. There is no room for any higher or broader duty. Quinlan's case, he claimed, decided as a matter of principle that the plaintiff in a case such as the present must establish a breach of the duty owed to her as a licensee. As she cannot do this, she fails.

He contended there was no evidence upon which a jury could find the Commissioner guilty of a breach of duty owed to the plaintiff on the basis that this duty is determined as arising solely from the relationship of a licensor and licensee. There is much to be said for the argument that if the duty of the Commissioner to this plaintiff be that owed by a licensor to a licensee without any wider or broader duty, there is no evidence of any breach of it fit to go to the jury. I do not find it necessary, however, to decide this point for the reasons which later appear.

The question to be determined then is what is the effect of the judgment of the Privy Council in Quinlan's case on the law as to the duty of the Commissioner as laid down by the Full Court on the hearing of the first appeal. The Privy Council in Quinlan's case was considering an appeal from a decision of the Full Court in this State (Quinlan v. Commissioner for Railways No. 2.80 W.N. 820) in which it was conceded that the plaintiff was a trespasser. As I read the judgment of their Lordships, they have rejected a doctrine that the general duty not to harm one's neighbour is owed by the occupier of property to a trespasser. Their Lordships said this:

> "It will be necessary to return to this proposition later, but for the moment it is sufficient to say that their Lordships cannot find any line of reasoning by which the limited duty that an occupier owes to a trespasser can co-exist with the wider general Stevenson formula:"

Their Lordships did make some reference to the position of a licensee at p. 15 of the report when they said this:

> "Whether, even so, such a character" (i.e. licensee) "would have protected the respondent in this case it is not necessary to inquire. Presumably, in accordance with the principle laid down by the Court

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of Queen's Bench in Gallagher v. Humphrey, he would have had to take the crossing with its risks as he found it but would have been entitled to complain of any positive act of negligence on the part of the Railway staff."

The appellant relied upon this passage from the judgment as establishing that the only duty owed by the Commissioner for Railways to the plaintiff in this case is that of an occupier of premises to a licensee, and since there is no evidence here or complaint of any positive act of negligence, i.e. the running of the train, the plaintiff must fail. This statement, he contended, is one of principle and to the extent that it is inconsistent with the statement of the duty of the Commissioner in relation to level crossings enunciated by Jordan C. J. in Alchin's case and the other cases referred to in the previous judgment of the Full Court in this case, these cases should no longer be followed.

I am not persuaded that Their Lordships of the Privy Council intended by this statement of the duty of the Commissioner to a licensee on a level crossing which was not strictly necessary to their decision, to make such far sweeping changes in the law on this subject in this State. These principles of law have been followed by the Courts of this State and approved by the High Court for many years. They may be said to govern the rights of the many thousands of members of the public who lawfully use the large number of level crossings that exist in this country. Until there is a decision of higher authority directly deciding the rights and liabilities of the Commissioner for Railways and those who are lawfully on a level crossing over the Commissioner's railway lines, we should, in my opinion, follow the decision of the Full Court in the hearing of the previous appeal.

Since there was evidence to go to the jury of a breach of the duty stated in these terms which caused the plaintiff's injury, the verdict should not be disturbed. Accordingly this ground of appeal fails.

In the result the appeal should be dismissed with costs.

No. 6

In the Supreme Court of New South Wales.

Rule dismissing Appeal.

RULE OF THE SUPREME COURT DISMISSING APPEAL

The First day of December, 1964.

UPON MOTION made on the Twenty-eighth and Twenty-ninth day of September, 1964, WHEREUPON AND UPON READING the Notice of Motion herein dated the Third day of April One thousand nine hundred and sixty-four and the Appeal Book filed herein and upon hearing what was alleged by Mr. H. Jenkins of Queen's Counsel with whom was Mr. A. H. S. Conlon of Counsel on behalf of the abovenamed Appellant Defendant and by Mr. R. Watson of Counsel with whom was Mr. M. Broun of Counsel on behalf of the abovenamed Respondent Plaintiff it was ordered that the matter stand over for Judgment and the matter standing in the list this day for judgment accordingly it is ordered that the Appeal herein be and the same is hereby dismissed and it is further ordered that the Appellant Defendant pay the costs of and incidental to this Appeal to the Respondent or her Solicitor, Kenneth Raymond Jones.

BY THE COURT,
For the Prothonotary,
E. F. LENNON (L.S.)
Chief Clerk.

No. 7

RULE OF THE SUPREME COURT GRANTING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

The Fifteenth day of March, 1965.

UPON MOTION made this day pursuant to the Notice of Motion filed herein on the Fifth day of March, 1965, WHEREUPON AND UPON READING the said Notice of Motion the affidavit of Howard Kenneth Kershaw sworn on the Fifth day of March, 1965, and the Prothonotary's Certificate of Compliance, AND UPON HEARING what is alleged by Mr. A. H. Conlon of Counsel for the Appellant and Mr. R. Watson of Counsel for the Respondent IT IS ORDERED that final leave to appeal to Her Majesty in Council from the judgment of this Court given and made herein on the First day of December, 1964, be and the same is hereby granted to the Appellant AND IT IS FURTHER ORDERED that upon payment by the Appellant of the costs of preparation of the Transcript Record and despatch thereof to England the sum of Twenty-five pounds (£25 0s. 0d.) deposited in Court by the Appellant as security for and towards the costs thereof be paid out of Court to the Appellant.

BY THE COURT,
For the Prothonotary,
J. LIEPINS (L.S.)
Chief Clerk.

No. 8

CERTIFICATE OF PROTHONOTARY VERIFYING TRANSCRIPT RECORD

I RONALD EARLE WALKER of Sydney in the State of New South Wales, Prothonotary of the Supreme Court of the Said State DO HEREBY CERTIFY that the sheets hereunto annexed and contained in pages numbered one to 191 inclusive contain a true copy of all the documents relevant to the appeal by the Appellant The Commissioner for Railways to Her Majesty in Council from the judgment of the Supreme Court given and made herein on the First day of December one thousand nine hundred and sixty four so far as the same have relation to the matters of the said appeal together with the reasons for the said judgment given by the said Court and an index of all the papers, documents and exhibits "B1 to B13" and "C", "E", "F", "G", "H", "K1 to K4", and "L" in the said action included in the annexed transcript record which true copy is remitted to the Privy Council pursuant to the Order of Her Majesty in Council of the Twentieth day of December in the year of Our Lord one thousand nine hundred and fifty seven.

IN FAITH AND TESTIMONY whereof I have hereunto set my hand and caused the seal of the said Supreme Court to be fixed this twenty-fourth day of May in the year of Our Lord one thousand nine hundred and sixty five.

R. E. WALKER (L.S.)
Prothonotary of the Supreme
Court of New South Wales.

No. 9

CERTIFICATE OF CHIEF JUSTICE

I the HONOURABLE LESLIE JAMES HERRON Chief Justice of the Supreme Court of New South Wales DO HEREBY CERTIFY that Ronald Earle Walker who has signed the Certificate above written is the Prothonotary of the said Supreme Court and that he has the custody of the records of the said Supreme Court.

IN FAITH AND TESTIMONY whereof I have hereunto set my hand and caused the seal of the said Supreme Court to be affixed this day of , in the year of Our Lord one thousand nine hundred and sixty five. 10

L. J. HERRON (L.S.)
Chief Justice of the Supreme
Court of New South Wales.

Exhibit B1

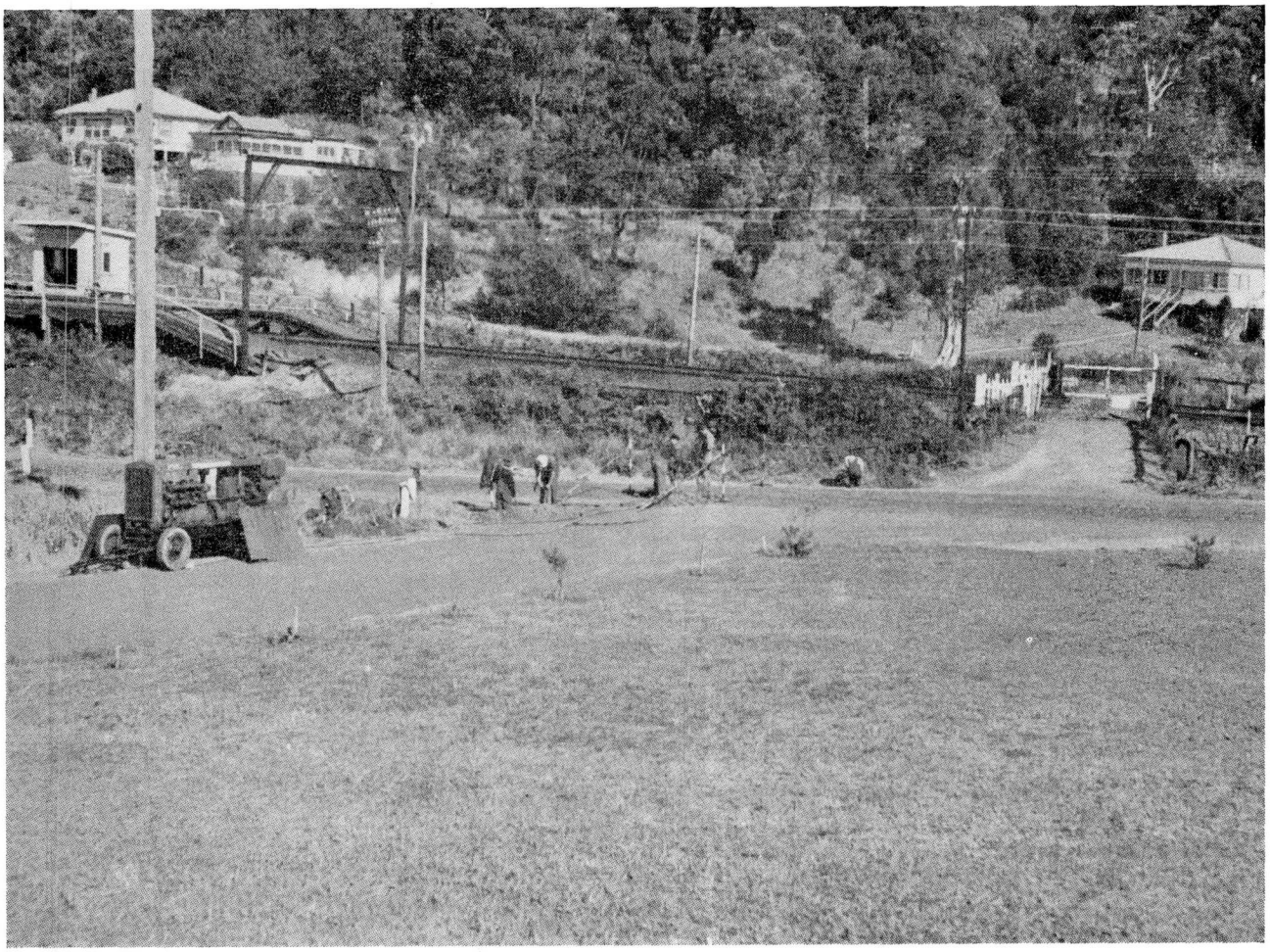
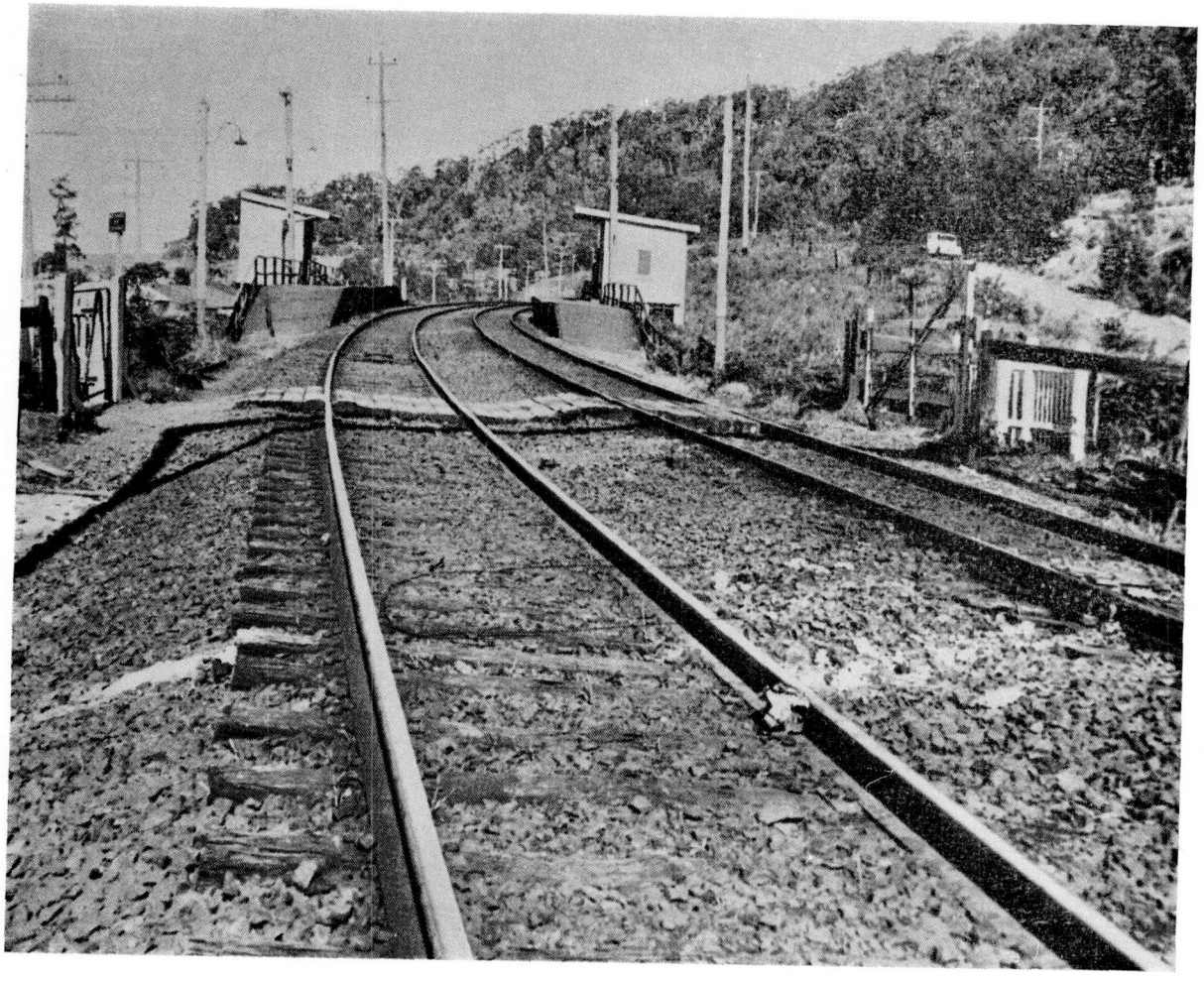


Exhibit B2



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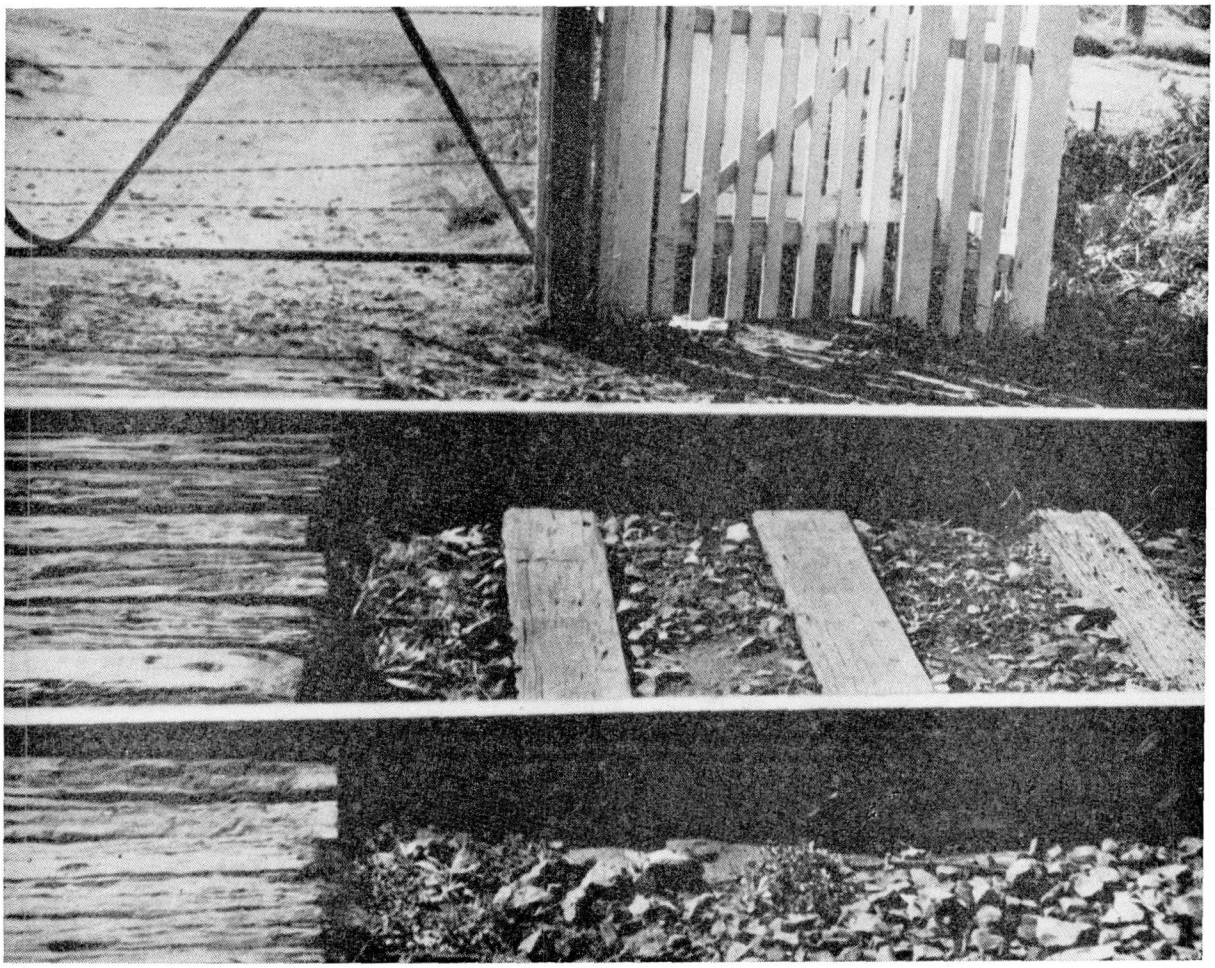

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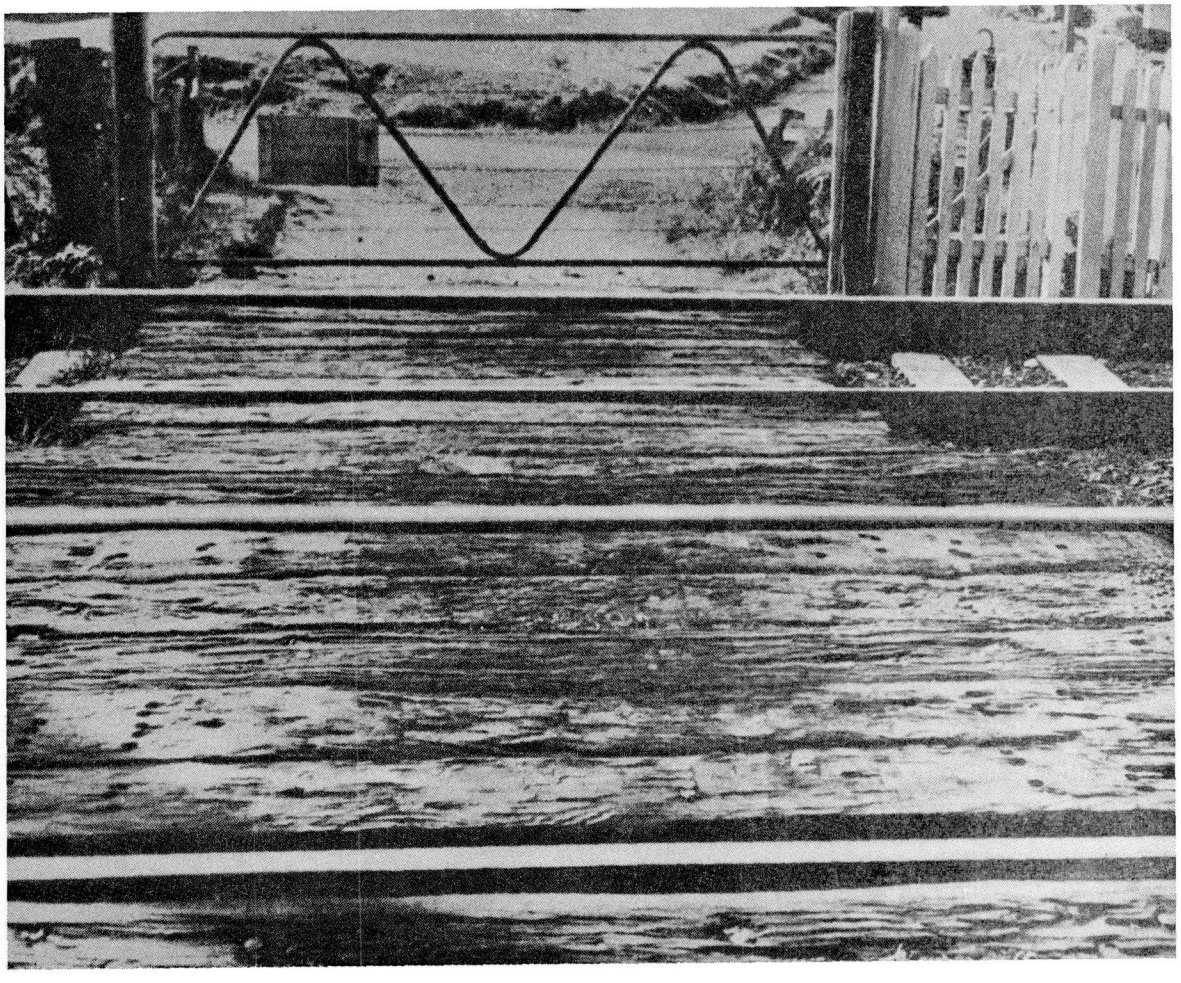

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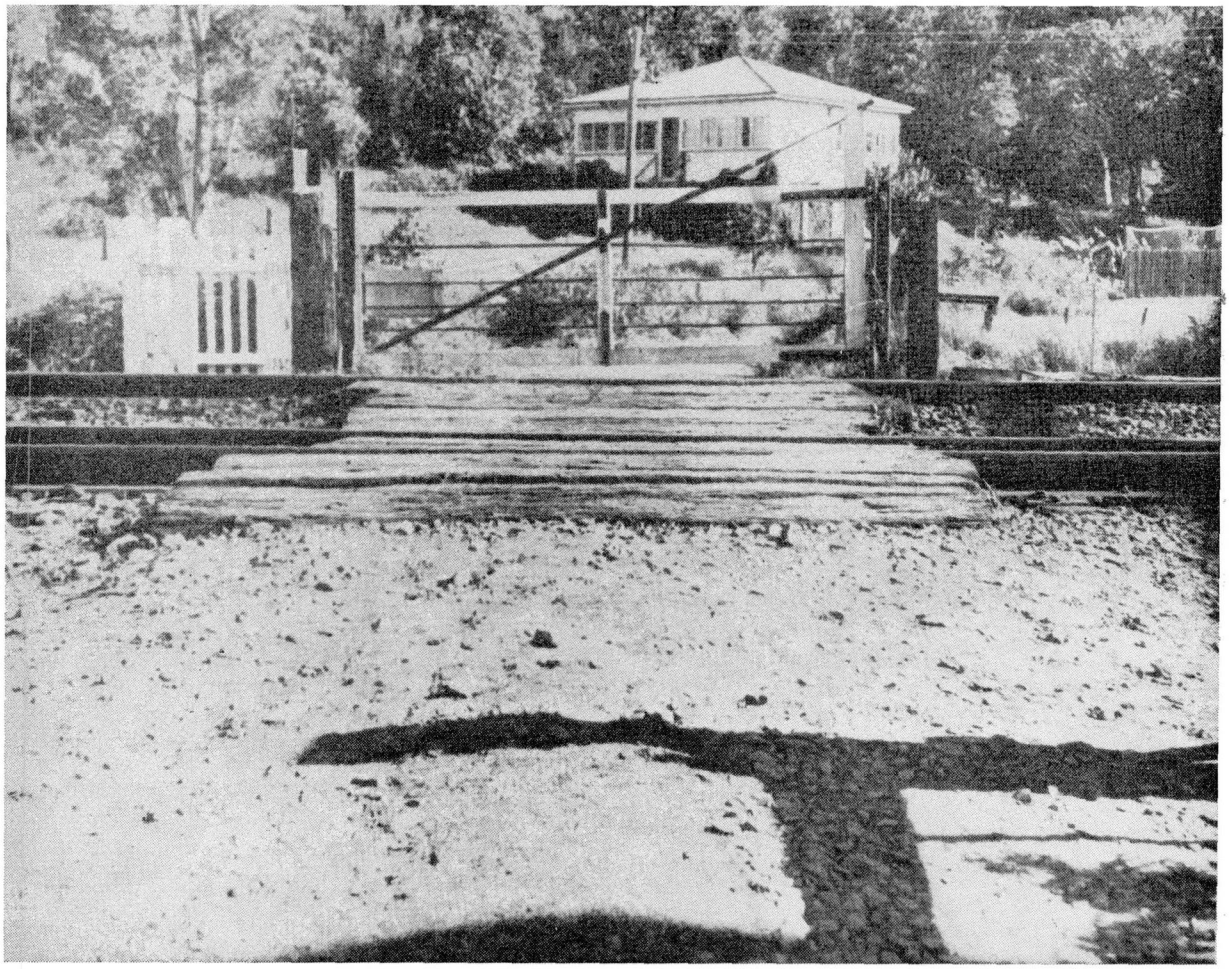

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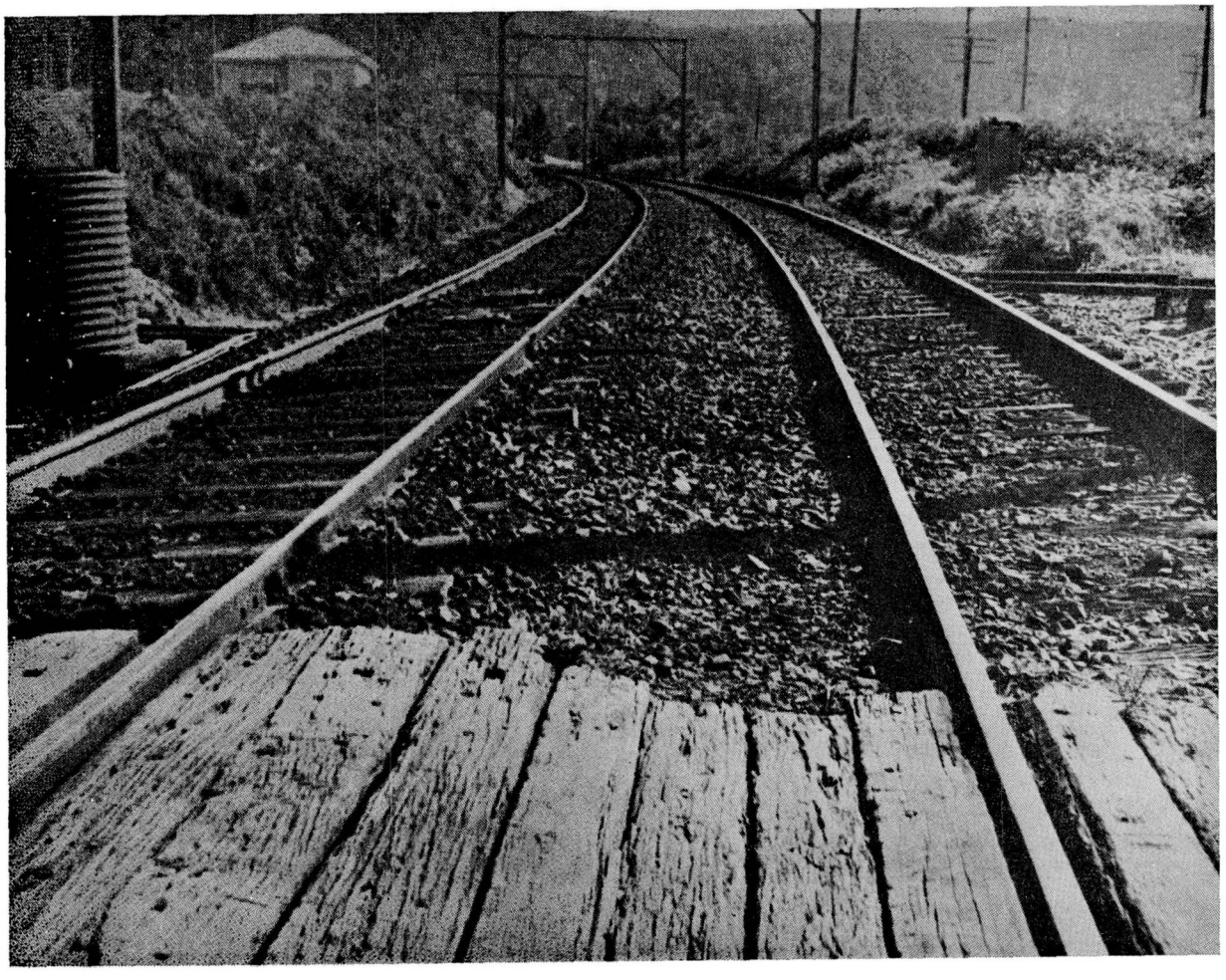

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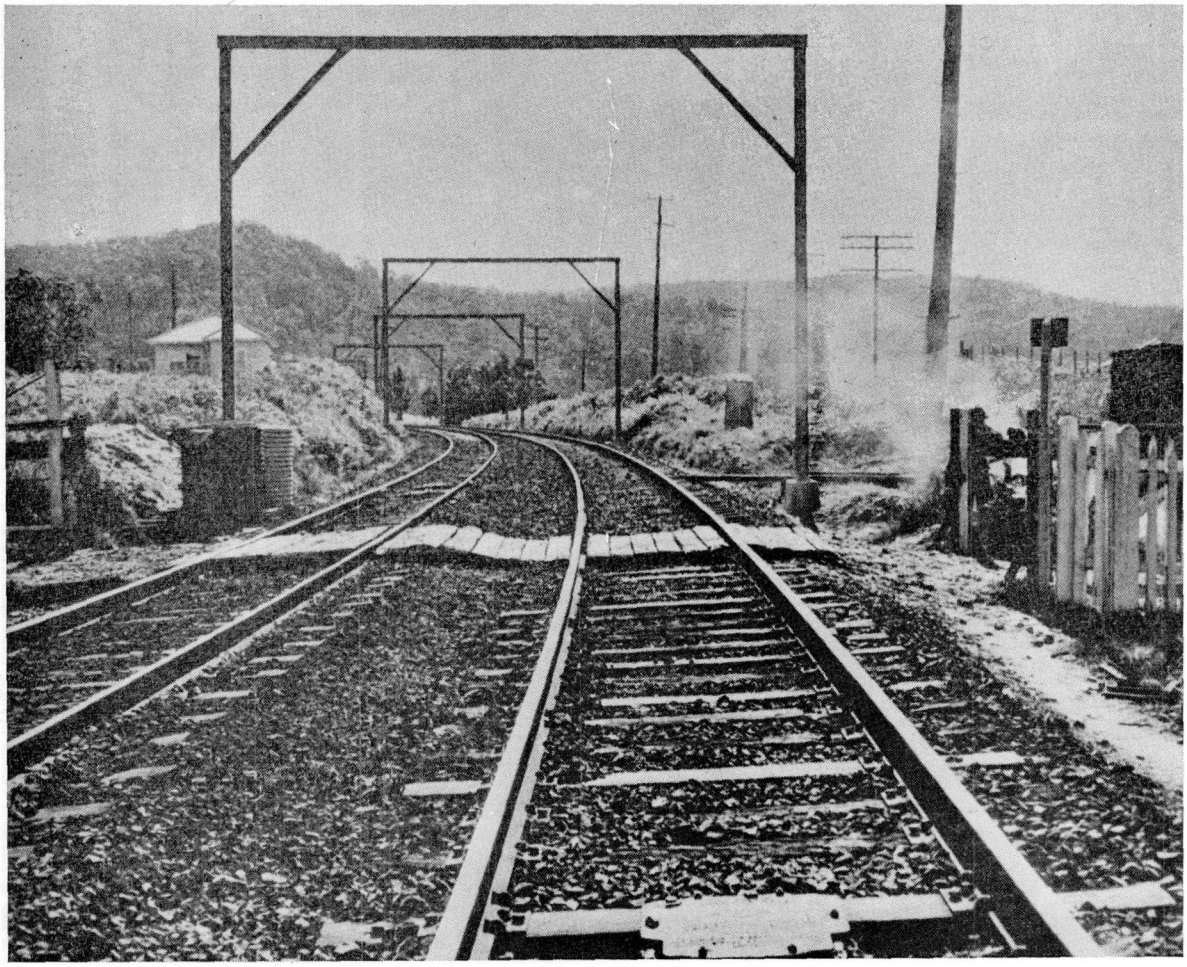

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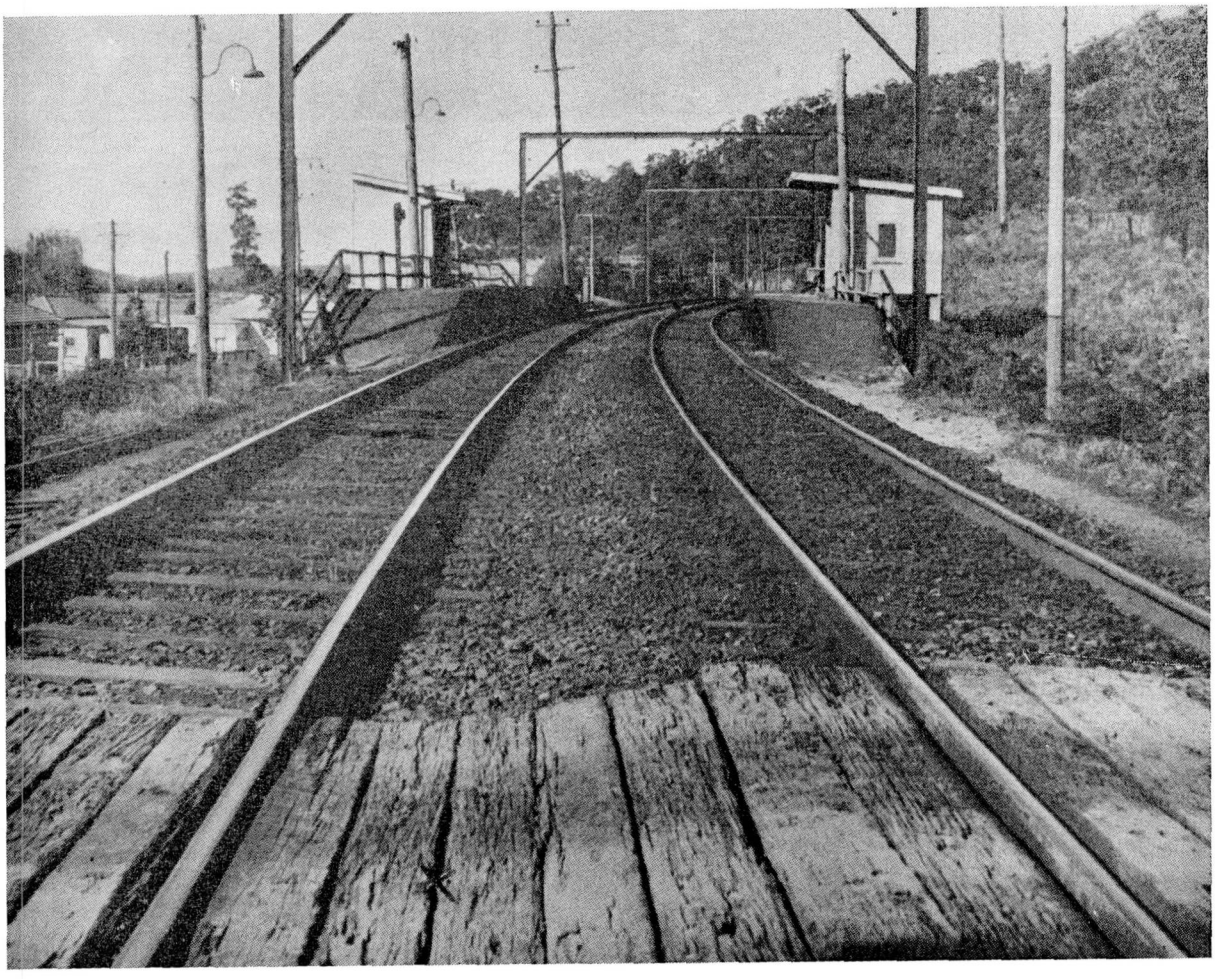

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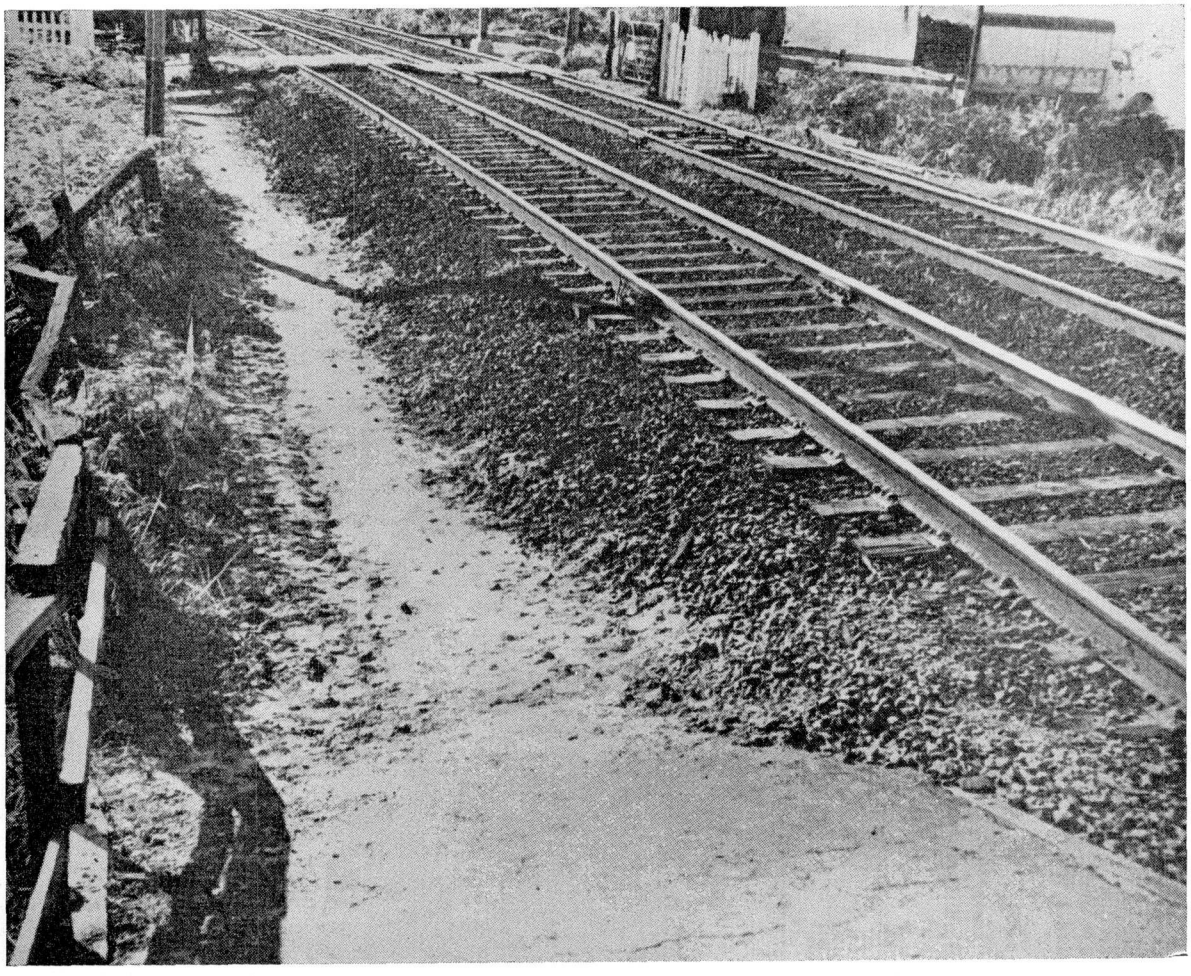

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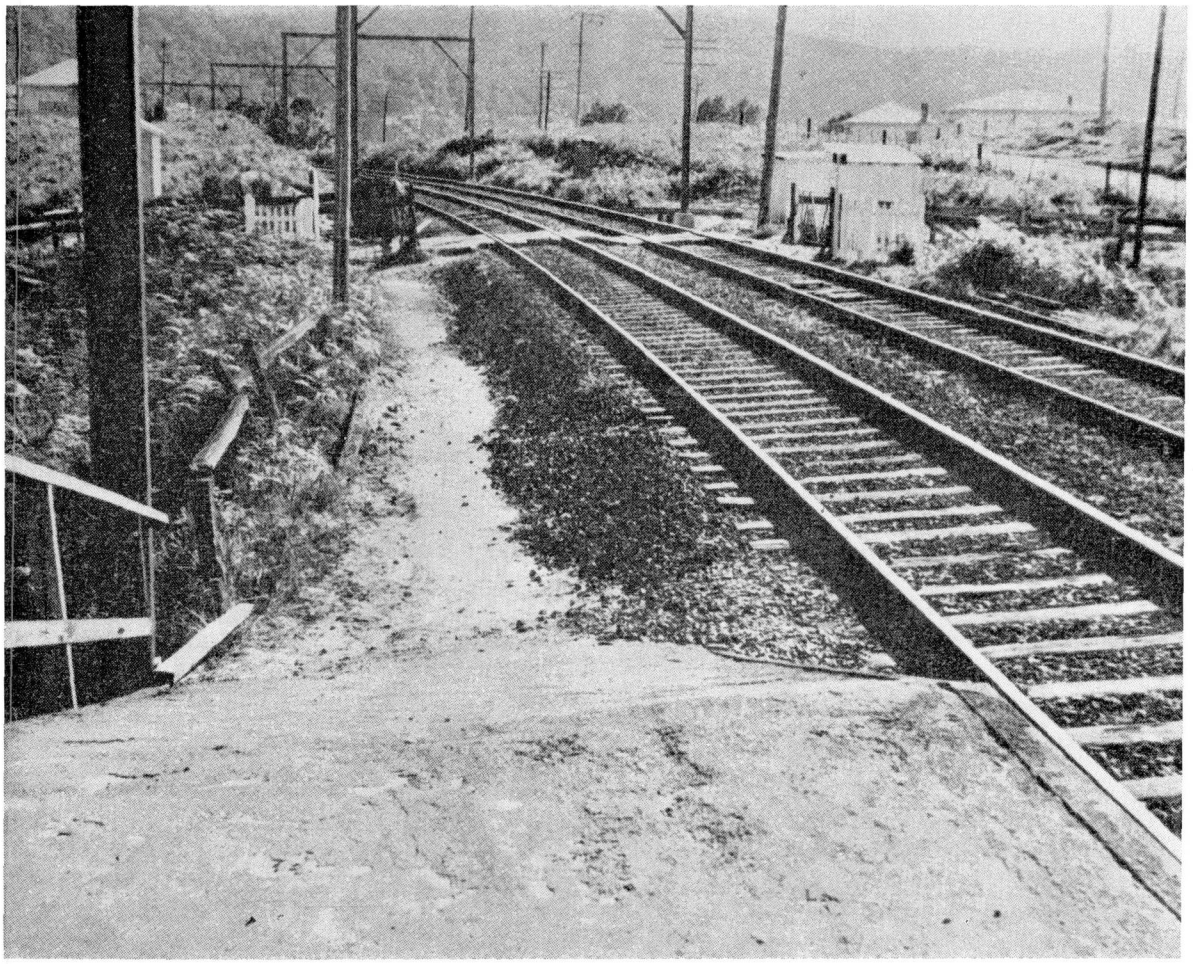

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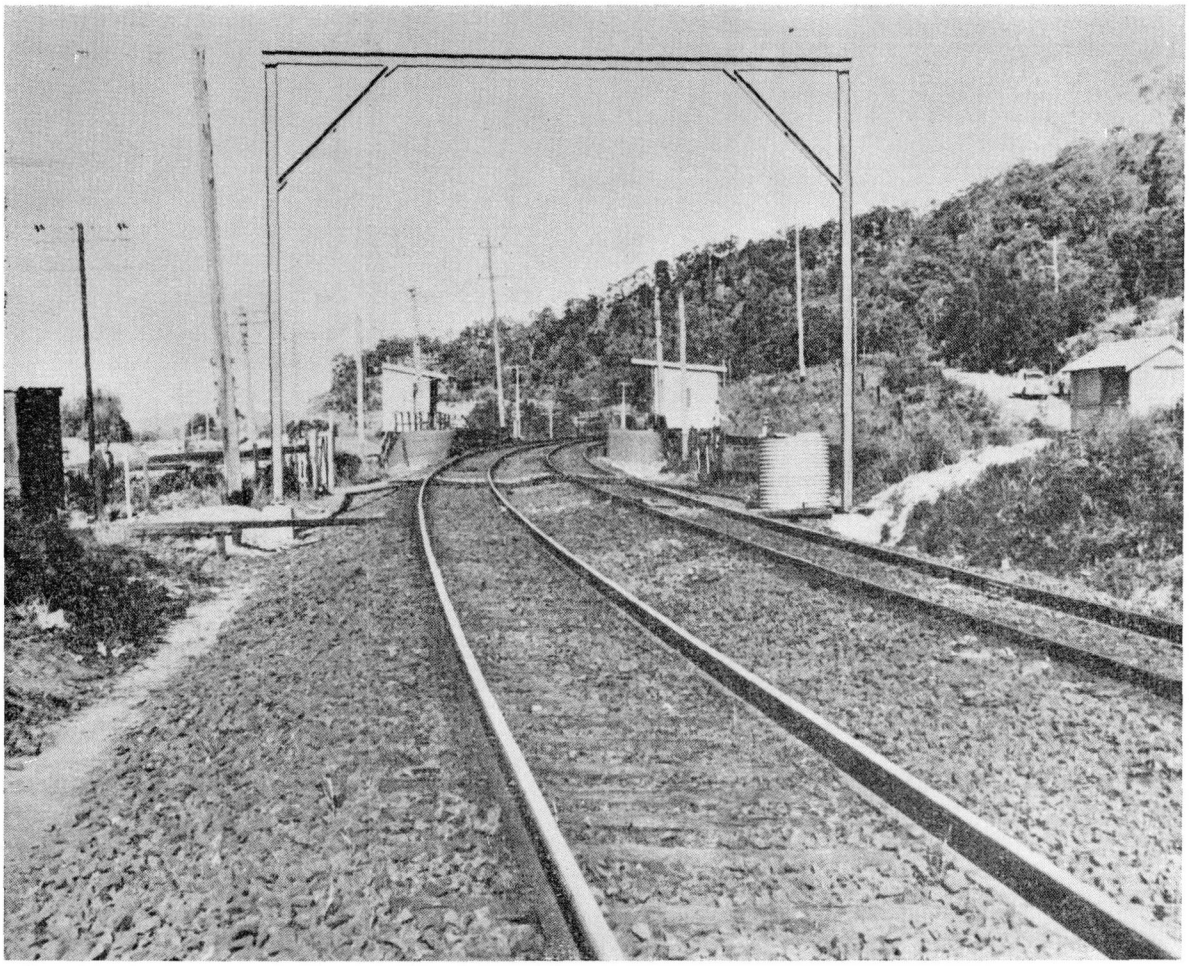

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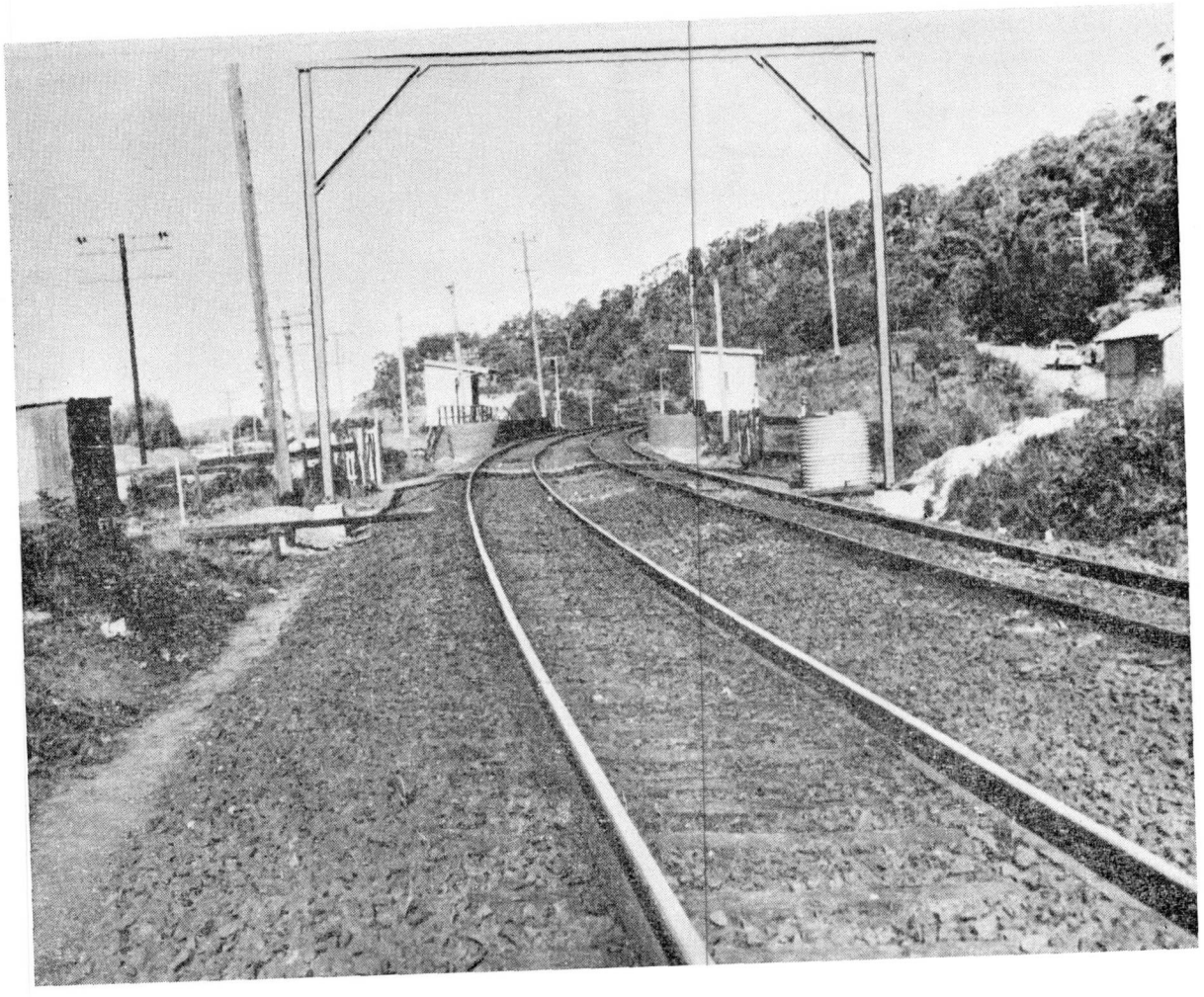
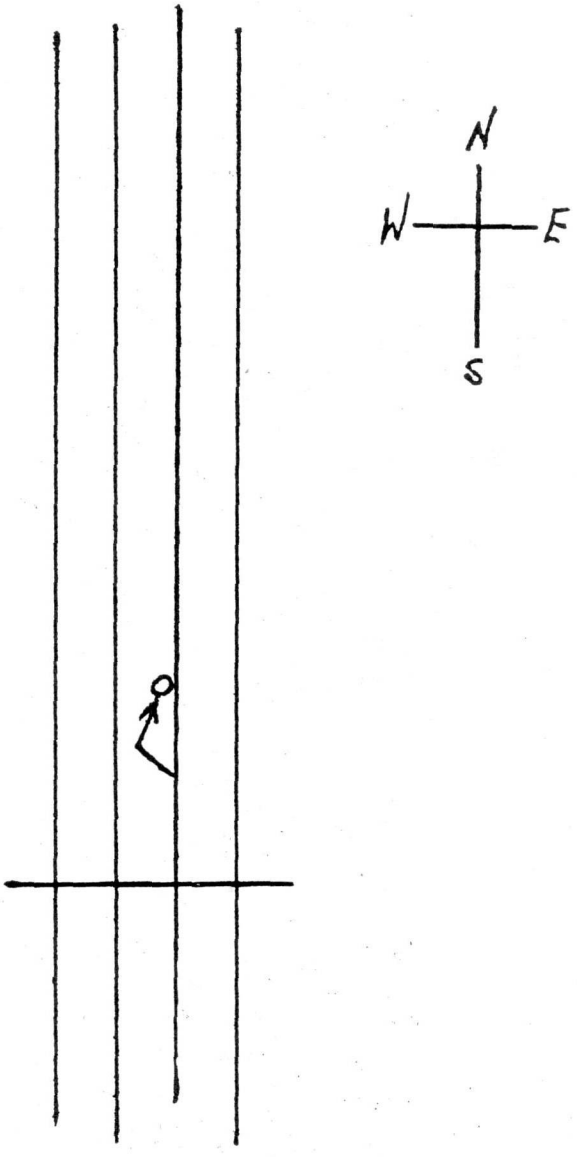


Exhibit C

Exhibit F



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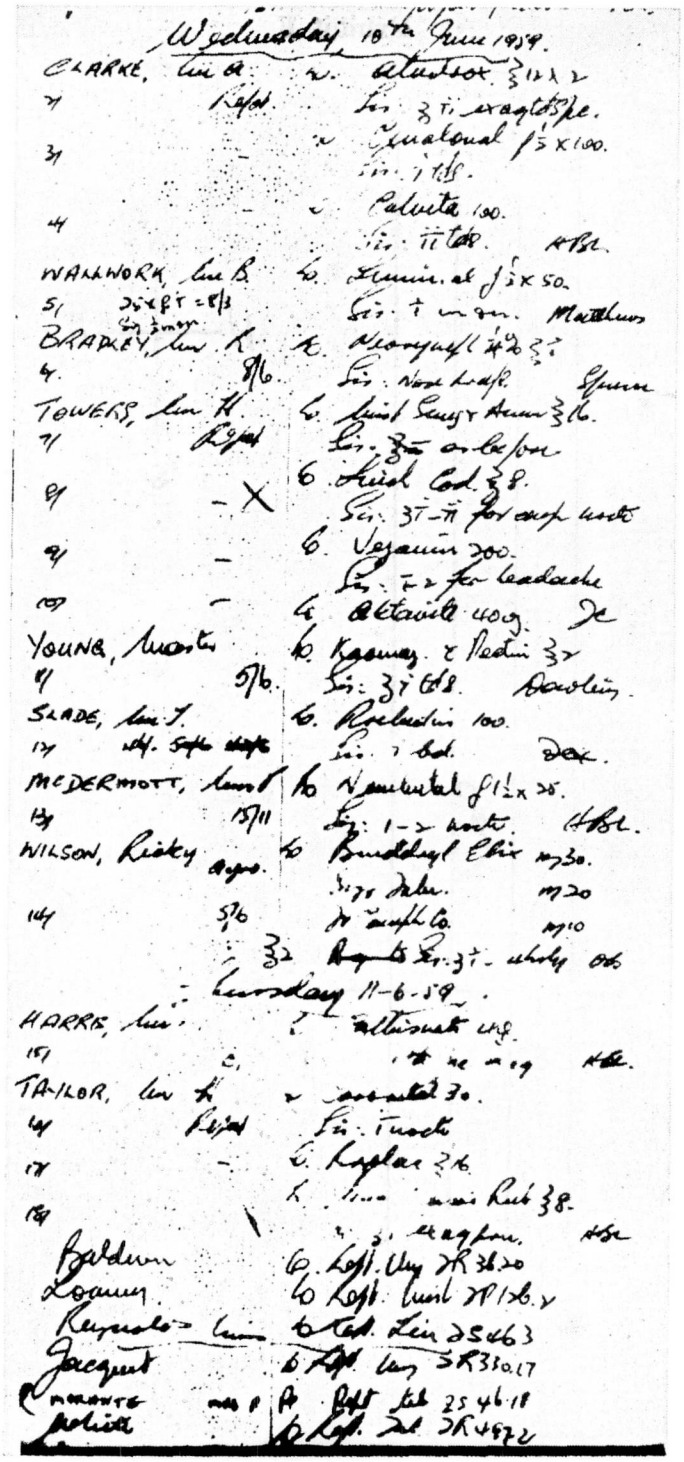


Exhibit H

15th July, 1959.

The Commissioner,
Department of Railways, N.S.W.,
19 York Street,
SYDNEY.

Dear Sir,

TAKE NOTICE that PATRICIA VERA McDERMOTT of 29 Old Gosford Rd., Koolewong, intends after expiry of one month from the service of this Notice upon you, to take action in the Supreme Court of New South Wales for damages arising out of your negligence or that of your servants or agents. Particulars of the negligence are as follows:-

On the 10th June, 1959 at about seven o'clock the Plaintiff fell on or between the railway tracks at the Koolewong level crossing, injured her shoulder, and was later struck by a railway train at the said crossing, suffering thereby serious multiple injuries. It is alleged that the crossing was dangerous in construction, and dark and unlighted, and that the train driver and fireman failed to keep a proper look out.

K. R. JONES,
Per:

59/1737/N2

Exhibit K1

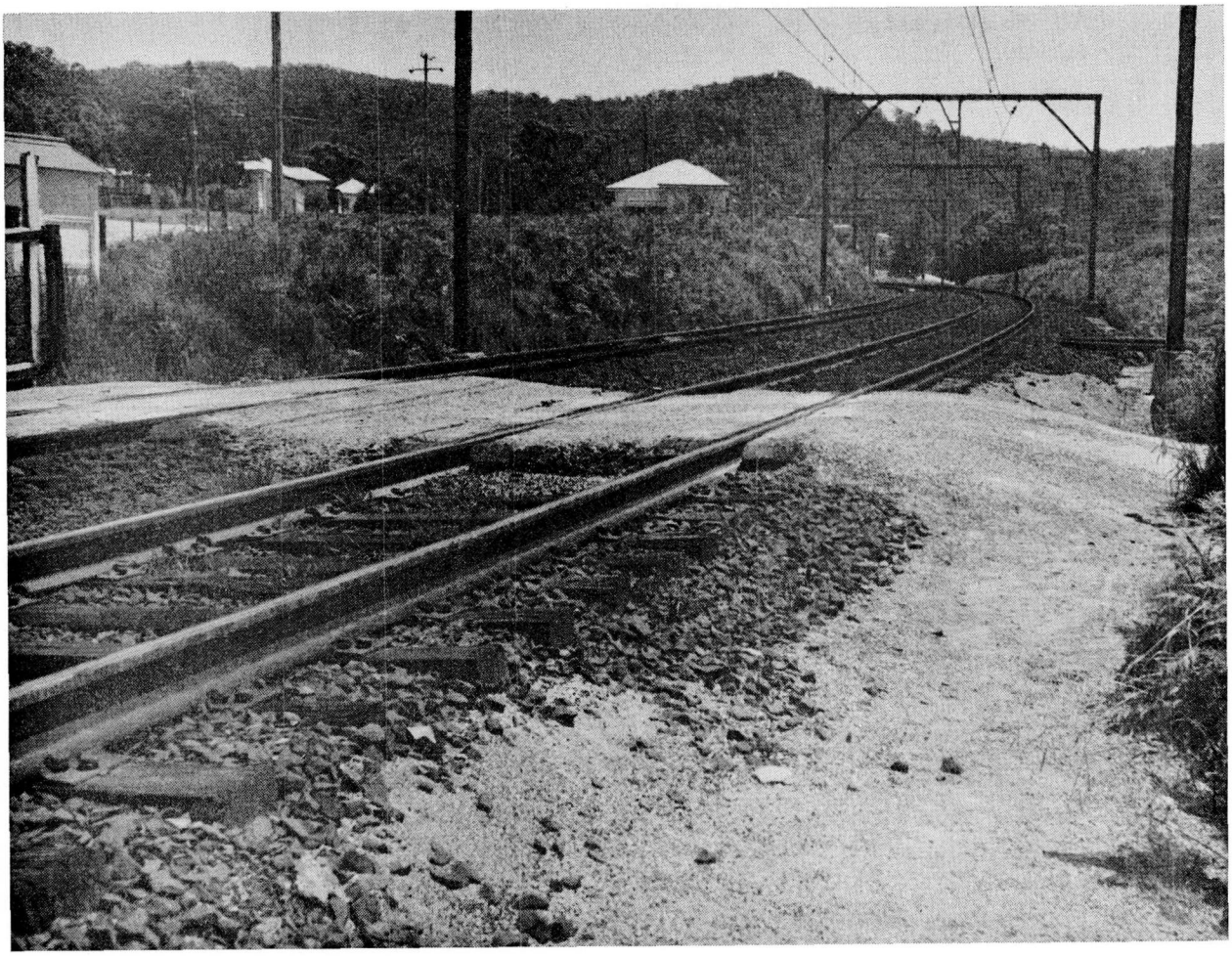
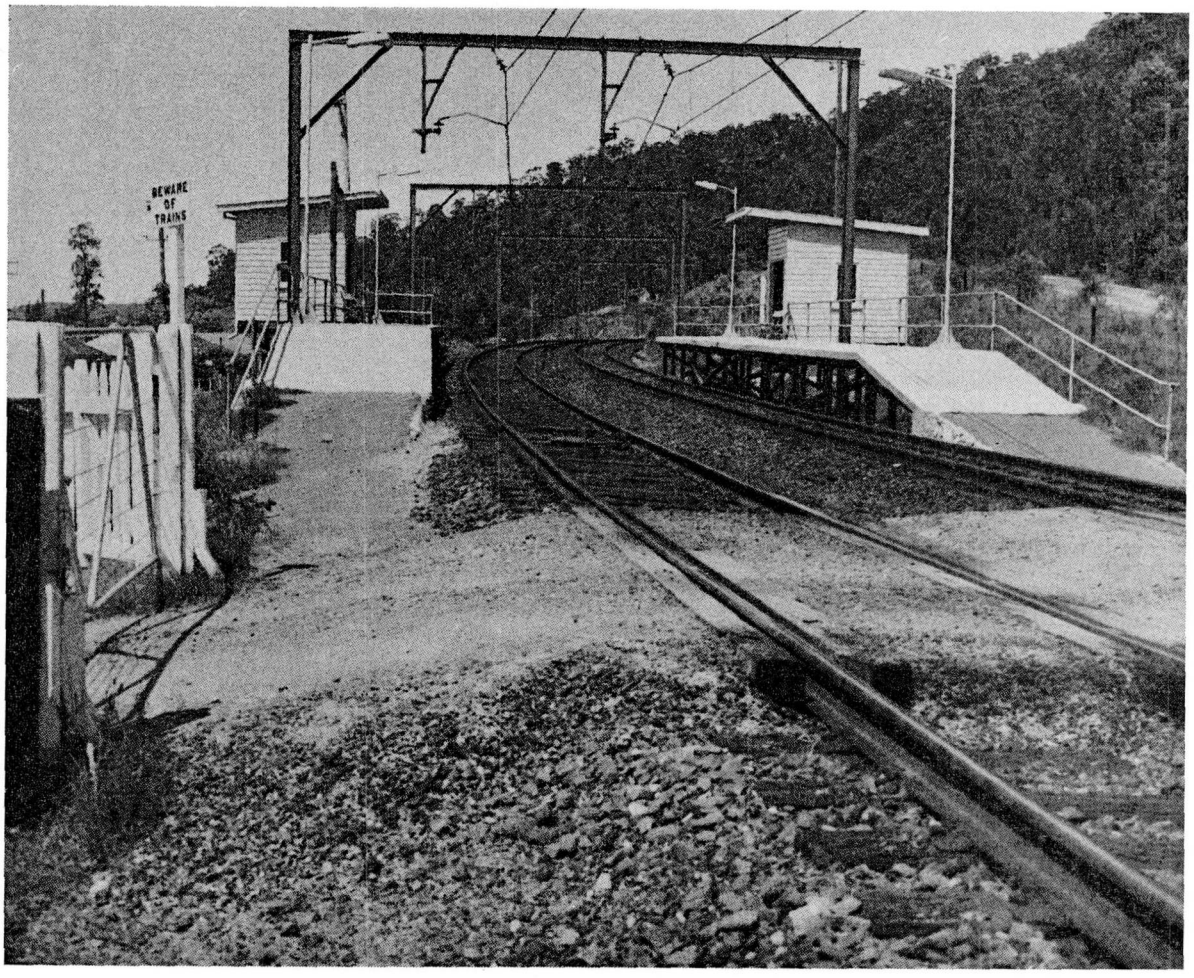


Exhibit K2

Exhibit K3



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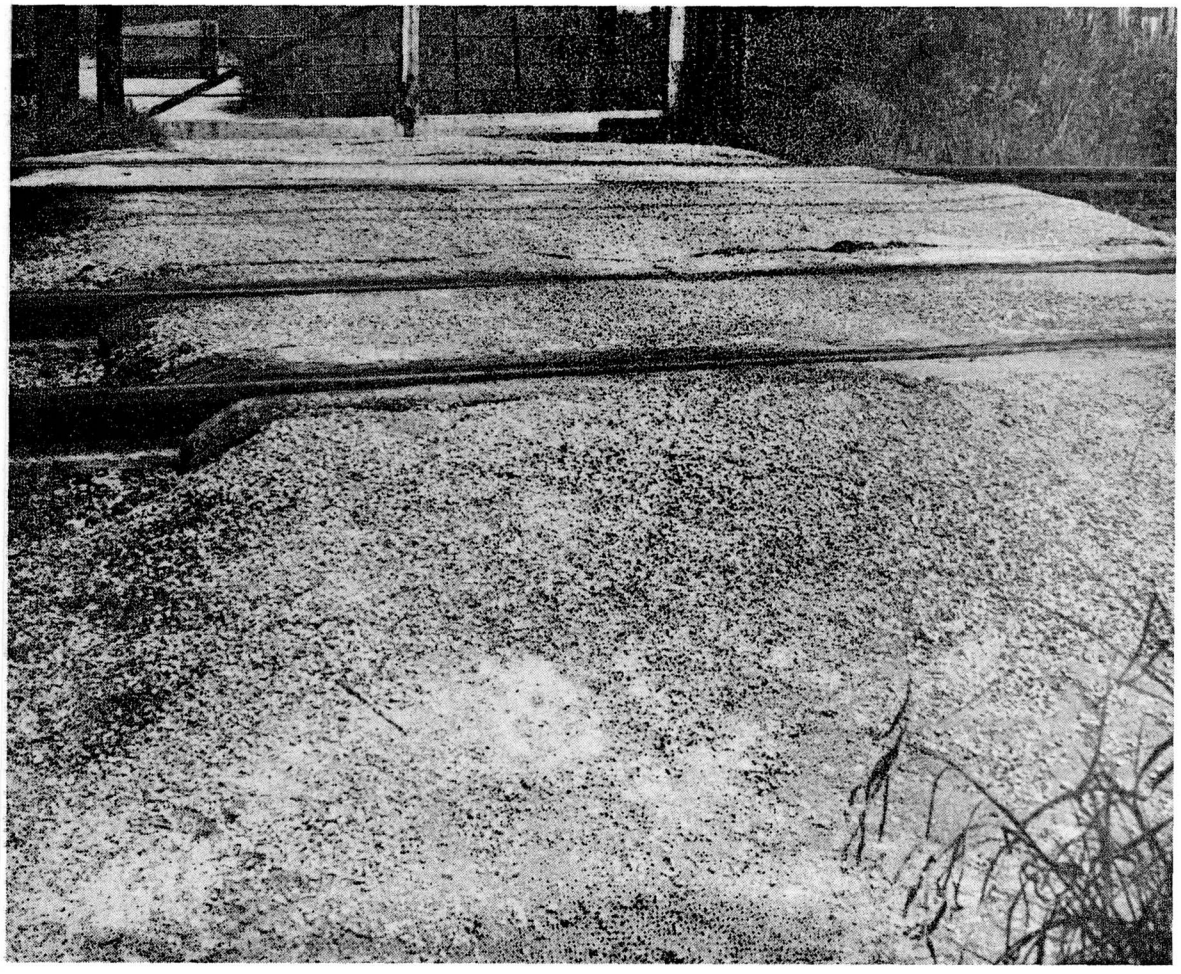
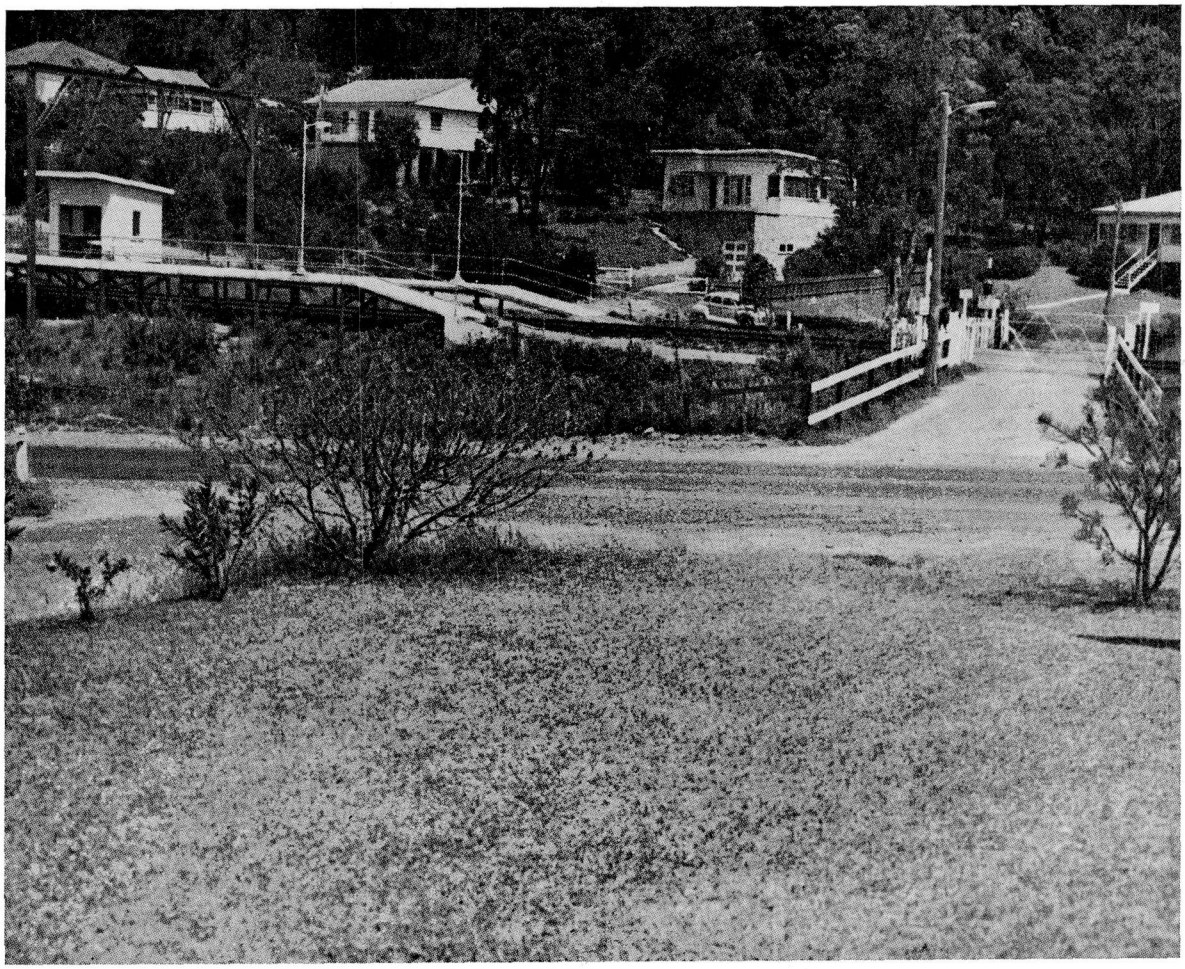
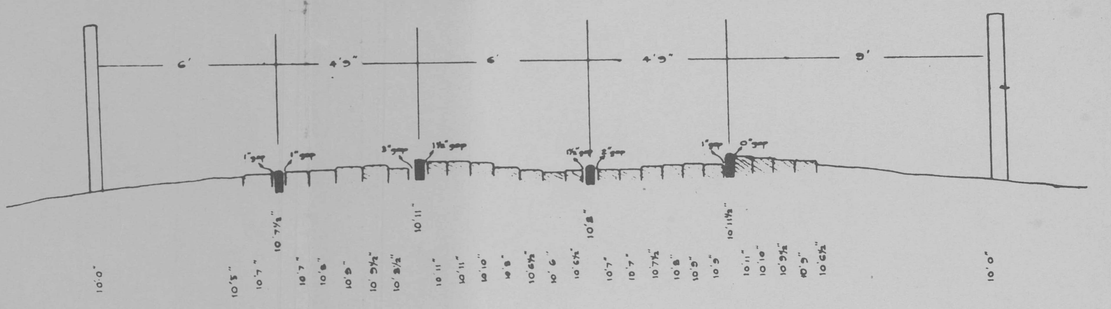


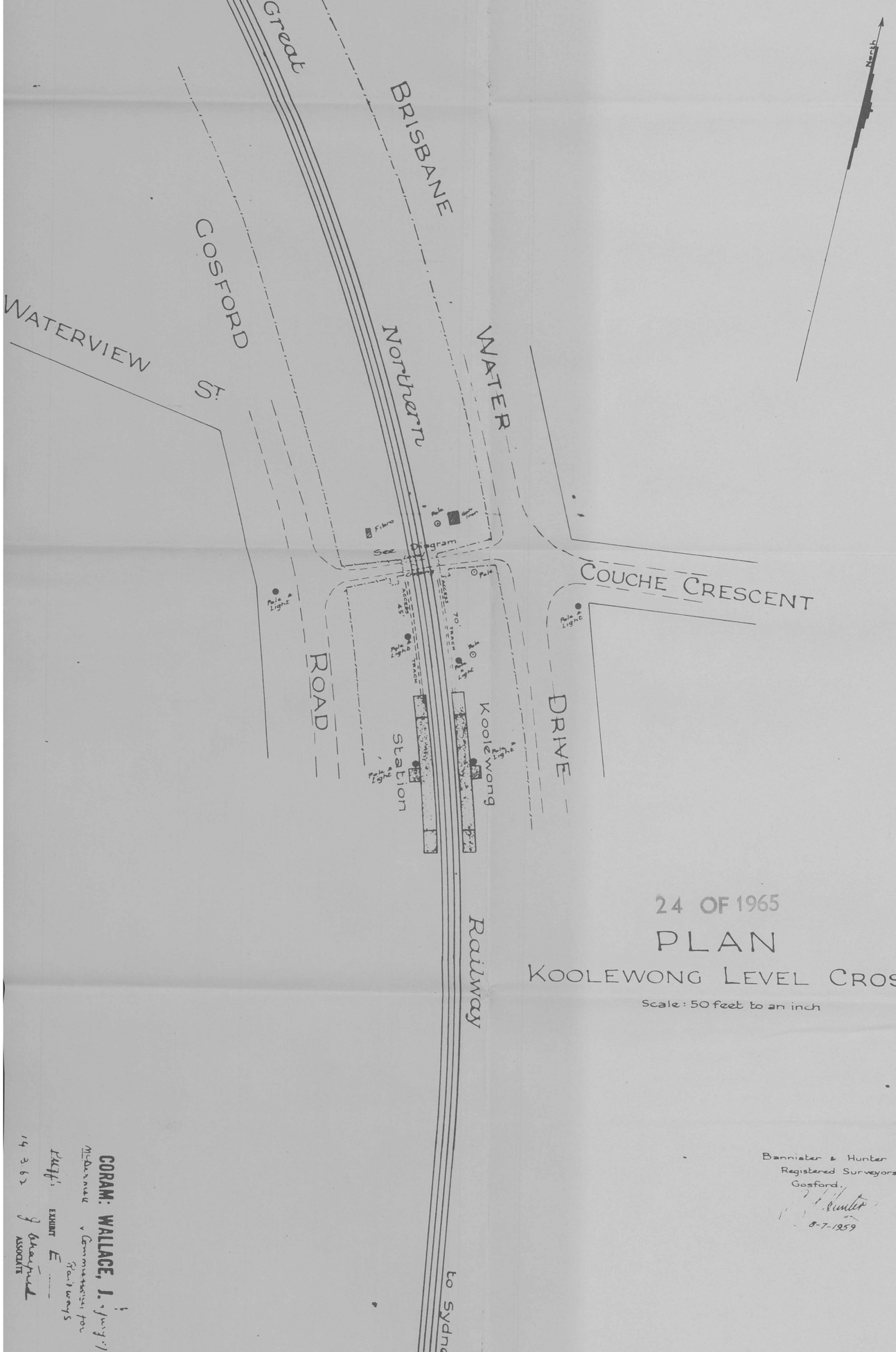
Exhibit L





CROSS SECTION OF LEVEL CROSSING

Scale Horizontal 3 feet to an inch.
Vertical 3 feet to an inch.



24 OF 1965

PLAN

KOOLEWONG LEVEL CROSSING

Scale: 50 feet to an inch

Bannister & Hunter
Registered Surveyors
Gosford.
8-7-1959

CORAM: WALLACE, J.
McDermott v Commissioner for Railways
EXHIBIT E
14 3 62
ASSOCIATE