Privy Council Appeal No. 24 *of* 1965

The Commissioner for Railways – – – – – – *Appellant*

v.

Patricia Vera McDermott – – – – – – – *Respondent*

FROM

THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH MARCH 1966

Present at the Hearing:
THE LORD CHANCELLOR (*Lord Gardiner*)
LORD MORRIS OF BORTH-Y-GEST.
LORD GUEST.
LORD PEARCE.
LORD PEARSON.
(*Delivered by* THE LORD CHANCELLOR)

This case arises out of a tragic accident which befell the plaintiff on the 10th June 1959 at Koolewong in New South Wales. She had somehow fallen on to a railway track a few feet from a level crossing. She was lying there, presumably unconscious or dazed, with the rest of her body safely within the " four foot " space between the rails, but with her feet over one of the rails. In the darkness a train came round a curve in the railway line, travelling at forty miles an hour or more. The fireman with the aid of the engine light saw her lying there, but by that time the train was only about 150 feet away from her and could not be pulled up in time. The train passed over her amputating her feet.

In October 1959 she commenced an action in the Supreme Court of New South Wales against the Commissioner for Railways, claiming damages for negligence. There have been two trials and two appeals to the Full Court with both of the jury verdicts and both of the decisions of the Full Court in favour of the plaintiff. The present appeal is by the Commissioner for Railways (who will be referred to as " the defendant ") against the decision of the Full Court, given on the 1st December 1964, dismissing his appeal against the verdict of the jury in favour of the plaintiff on the retrial.

The main question of law raised in this appeal is, what was the measure of the duty of care owing by the defendant to the plaintiff ? The direction given by the judge to the jury on the retrial was in these terms:

> " 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."

The duty so measured can conveniently be referred to as " the general duty of care ". The direction given by the learned judge on the retrial was in conformity with the direction given by another learned judge at the first trial and with the judgments of the Full Court given on the 11th April 1963 in the first appeal, and it was approved by the Full Court in the second appeal after careful consideration of the effect of the decision of the Judicial Committee in *Quinlan's* case (*Commissioner for Railways* v. *Quinlan* [1964] A.C. 1054) that the general duty of care was not in that case owing by the defendant to the plaintiff as the plaintiff was trespassing on the private level crossing at which he was injured. Thus *Quinlan's* case was concerned with a trespasser. This

present case is concerned with a person who was a licensee, though there were additional circumstances which will be mentioned as materially affecting her position in relation to the defendant. The defendant has contended that the *ratio decidendi* of *Quinlan's* case applies here, so as to exclude the general duty of care and to leave in operation only the special limited duty of care owing by an occupier to his licensee. As to the nature of this special limited duty of care Dixon J. said in *Lipman* v. *Glendinnen* (1932) 46 C.L.R. 550 at p. 569–70:

> " 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."

As the plaintiff had lived in Koolewong for about ten years before the accident, the defendant contends that she must have known very well the state and condition of the level crossing and therefore the conclusion follows that she cannot succeed in her claim if only the special limited duty of care was owing by the defendant to her. That conclusion is disputed by the plaintiff, but at any rate the determination of the proper measure of the duty of care is the crucial point in the case, although there are also some other disputed points which will be mentioned. Some aspects of the facts of the case and of the history of the action are material for the determination of the proper measure of the duty of care and there are some special, rather artificial, problems to be elucidated.

It is convenient to adopt Herron C.J.'s description of the scene of the accident, and to insert a few additional points from the evidence or from other judgments.

Koolewong, the scene of the accident, is a small village between Woy Woy and Gosford on the central coast. At that place there is a small unattended railway station with two platforms between which run two sets of rails, one on the western side for north bound trains, the other on the eastern side for south bound trains running towards Sydney. The village is on the western side of the line and in 1959 it contained between thirty and forty houses. On the eastern side is Brisbane Water Drive with Brisbane Water beyond it, and there is a shop and a telephone. A little north of the station is a level crossing available to both vehicles and pedestrians. The crossing has large vehicular gates to close the crossing to vehicles and these, so far as relates to the present case, were always in the closed position. They are " penalty gates ", that is to say that a person who opens them to take his vehicle through will be liable to a penalty if he does not close them again. There were on the southern side of the crossing wicket gates for pedestrians which were always available for their use, night and day. Residents could enter or leave the village only by crossing the lines. No other mode of ingress or egress was available, as the road through the village, running parallel with the railway line, ended at the north in bushland and at the south came to a dead end, and on the west of this road there was impenetrable scrub, heavy bush and a rock escarpment. Furthermore the only means of access to the station was by the use of the crossing and the permanent way. Thus passengers embarking or alighting at this station would have to use the crossing if the relevant platform was not on their side of the line, and therefore they would have a special right (greater than a mere licensee's right) to use the crossing as invitees of the defendant or as persons contracting or intending to contract with him.

The crossing had been constructed by the defendant some distance north of the station and was in the centre partly paved with disused sleepers about five feet long (eight feet long according to one witness) placed north and south between and a little beyond the sets of rails. There was evidence that the ground was not level and the sleepers were roughly laid on the ground in such a way that the sleepers were not level with each other or with the rails, and gaps existed not only alongside the rails (where gaps are required to take the flange of a wheel) but also between the sleepers. Also there was evidence that they did not lie firmly: they would " jump " when a vehicle went over them,

and might move when stepped on. Evidence was given that persons crossing over the sleepers might fall, and instances of actual or near falls were deposed to by witnesses. The evidence may have convinced a jury that a hazard existed for pedestrians, especially at night, as the crossing was in darkness, the nearest light in the station some distance away not illuminating the crossing at all. Furthermore the sleepers made only a narrow bridge, as it were, and were laid in the centre of the crossing, and therefore were to the north of the wicket gates, so that a pedestrian, entering by one of the wicket gates and wishing to cross on the sleepers, could not walk directly to the other wicket gate but would have to walk somewhat diagonally.

It could not be ascertained with certainty what the plaintiff had been doing immediately before the accident. She herself remembered nothing of what had happened for a considerable time before the accident. Nobody saw her going on to the level crossing or on to the track or falling down. There was some evidence as to her movements and condition on that afternoon, but it was not wholly consistent. It was submitted on behalf of the defendant that the plaintiff was a trespasser, being on the track and away from the level crossing and so outside the area of the licence, or that at any rate her presence on the track remained unexplained and she had failed to prove that she was lawfully there or that the accident was due to any fault on the part of the defendant. *Wakelin* v. *London and South Western Railway Co.* 12 A.C. 41 was relied upon. It is however possible, on the basis of the evidence and by drawing inferences from the verdict of the jury in conjunction with the summing-up, to form a view as to what probably happened to the plaintiff before the accident. The view expressed by Herron C.J. on the first appeal to the Full Court was adopted and repeated by Macfarlan J. giving the first judgment in the Full Court in the second appeal, the evidence having been almost identical in the two trials. Their Lordships accept this view of what happened as being the probable version. Herron C.J. said—

> " 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 taxicab 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."

From the acceptance of this version of the probable events it follows that the defendant's contentions (*a*) that the plaintiff should be inferred to have been deliberately or negligently trespassing on the track, and alternatively (*b*) that her presence on the track was unexplained and her case was not proved, must be rejected.

In the first trial of the action the learned judge had in effect directed the jury that the defendant owed to the plaintiff the general duty of care (" a general duty to do everything which in all the circumstances was reasonably necessary to secure the safety of persons using the crossing ") and in the first appeal that direction was approved by the Full Court. He had however left to the jury as possible heads of negligence, not only the roughness of the sleeper-built crossing, but also three other matters namely (i) the lack of a warning system at the crossing; (ii) excessive speed of the train in all the circumstances and (iii) lack of a gatekeeper. It was held by the Full Court that these matters should have been withdrawn from the jury, as none of them could reasonably be regarded as in itself constituting negligence or as a proved cause of the accident. Therefore a new trial was ordered. The plaintiff would naturally not rely in the new trial on any of these three matters as heads of negligence. There was however no intention to restrict the

circumstances to be taken into account by the jury in deciding whether the defendant's failure to provide a smooth and firm surface for the crossing and his failure to light it constituted negligence. Herron C.J. said :—

> " The whole of the appellant's works and operations at the point of the crossing must be considered together. The state of darkness, the absence of lighting, the position and state of the sleepers and of the crossing apart from them, the compulsion for the residents to use the crossing and the knowledge of the appellant that a fast express train would pass the spot according to a known timetable, all were factors to be considered not in isolation but taken together. I may also add the circumstance, even if it is no more than a factual consideration, that there was an absence of warning devices at the crossing and that the small gates were at all times open for pedestrians."

However, as the Full Court had decided that the complaint of excessive speed had been wrongly left to the jury at the first trial, there was inevitably no such complaint at the retrial; and thus the allegations of negligence related only to 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. That is a feature of the retrial which complicates the argument, because no complaint of any positive activity was made.

Another feature of the retrial is that it was conducted on the basis that the plaintiff and the other persons using the crossing were licensees of the defendant. The learned judge said in his summing up:—

> " 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 from the manner in which the case has progressed, it has been fought on the basis of the plaintiff being a licensee of the defendant."

That may well have been a sufficient assumption according to the law as it had been previously understood, but it is another feature of the retrial which complicates the argument in the appeal.

In the second appeal to the Full Court, and in the present appeal, the defendant has been asking only for a verdict to be entered in his favour and has not been asking for a retrial. Mofftt J. said in his judgment:—

> " 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."

The defendant's main argument has been that (1) the plaintiff was at the time and place of the accident a mere licensee; (2) at the trial she was complaining only of the static condition of the crossing, and was not complaining of any positive activity carried on by the defendant; (3) therefore the defendant owed to her only the special limited duty of care which belongs to the relationship of an occupier and his licensee; (4) there was no breach of that duty, because there was between these parties no concealed danger, the plaintiff having from some ten years of experience full knowledge of the state of the crossing and the absence of light. Is the defendant entitled to succeed with that argument?

In their Lordships' opinion the basic principle for a case such as this is that occupation of premises is a ground of liability and is not a ground of exemption from liability. It is a ground of liability because it gives some control over and knowledge of the state of the premises, and it is natural and right that the occupier should have some degree of responsibility for the safety of persons entering his premises with his permission. In the language of the well-known passage in Lord Atkin's speech in *Donoghue* v. *Stevenson*

[1932] A.C. 562 at pp. 580–1 there is a ' proximity ' between the occupier and such persons, and they are his ' neighbours.' Thus arises a duty of care, but the measure of it is not defined by or derivable from *Donoghue* v. *Stevenson*. At common law the measure of that duty is a limited one: that has been established by many well-known authorities, as was stated in the passage in *Lipman* v. *Glendinnen* which has been cited above. In Australia there has been no statutory alteration of the common law such as has been effected in England and Wales by the Occupiers' Liability Act 1957 and in Scotland by the Occupiers' Liability (Scotland) Act 1960. Therefore whenever there is a relationship of occupier and licensee, the special duty of care which arises from that relationship exists. If there is no other relevant relationship, there is no further or other duty of care. But there is no exemption from any other duty of care which may arise from other elements in the situation creating an additional relationship between the two persons concerned. Theoretically in such a situation there are two duties of care existing concurrently, neither displacing the other. A plaintiff could successfully sue for breaches of either or both of the duties if the defendant had committed such breaches, although for practical purposes the plaintiff could be content with establishing the general duty and would not gain anything by adding the special and limited duty.

Subject to the two rather artificial problems which have to be considered, it can be said that there was in this case another relevant relationship, creating a general duty of care and justifying the direction given by the trial judge to the jury. The defendant was carrying on the inherently dangerous activity of running express trains through a level crossing which was lawfully and necessarily used by the local inhabitants and their guests and persons visiting them on business. Such an activity was likely to cause serious accidents, unless it was carried on with all reasonable care. Therefore there was a duty for the defendant to use all reasonable care. It was open to the jury to find that there was some negligence on the part of the defendant in respect of the state of the sleepers and the lack of lighting at night, and that the plaintiff's accident was caused by that negligence.

One problem arises from the weakness of the assumed title of the plaintiff and others using this level crossing. It was assumed only that they crossed with the permission of the defendant. In most of the cases in which an operator of railways has been held to owe a general duty of care to persons using a level crossing there has been a public road or street across the railway or at least a public right of way. Australian examples are *Alchin* v. *Commissioner for Railways* (1935) 35 S.R. (N.S.W.) 498; *South Australian Railway Commissioner* v. *Thomas* (1951) 84 C.L.R. 84; *Commissioner for Railways* v. *Dowle* (1958) 99 C.L.R. 353. But in principle the liability is not based on matters of title but on the perilous nature of the operation and the *de facto* relationship (which after *Donoghue* v. *Stevenson* would be called ' proximity ' or ' neighbourly ' relation) between the railway operator and a substantial number of persons lawfully using the level crossing. In England and Scotland we have had the following cases: *Bilbee* v. *Brighton Railway Company* (1865) 18 C.B. (N.S.) 584 (where the road was described as an accommodation road); *Cliff* v. *Midland Railway Co.* (1870) L.R. 5 Q.B. 258 (where the road was described as an occupation road); *Ellis* v. *Great Western Railway Co.* (1874) L.R. 9 C.P. 551 (" The case must be looked at with reference to the great additional danger to the foot passengers from the velocity of trains and the fatal consequences of a collision when produced by a train " per Cockburn C.J. at p. 555); *Jenner* v. *South Eastern Railway Co.* (1911) 105 L.T. 131; *Liddiatt* v. *Great Western Railway Co.* [1946] K.B. 545, 550–1 (citing Mellor J. and Lush J. in *Cliff's* case); *Smith* v. *London Midland and Scottish Railway Co.* [1948] S.C. 125; *Lloyd's Bank Ltd.* v. *Railway Executive* [1952] 1 A.E.R. 1248; *Lloyd's Bank Ltd.* v. *British Transport Commission* [1956] 3 A.E.R. 291. In *Smith's* case (supra) at p. 136 the Lord President said:—

> " I deduce from the decision in *Cliff* v. *Midland Railway* and from (what is probably more significant for us) a whole series of Scottish decisions, beginning with *Grant* v. *Caledonian Railway Co.* and going on to *Hendrie*, that the railway company has a duty at every level-crossing

> where members of the public have a right to be, and where there is reason to expect them to be, to take all reasonable precautions in train operations (and perhaps in other respects) to reduce the danger to a minimum, the nature of the precautions which are required and the question whether the duty has been fulfilled depending upon the circumstances of each case . . . I do not, therefore, think that in a case of this kind the critical question is whether the crossing is, in the technical sense of the Railway Clauses Act, an 'accommodation crossing' or not, but whether it was used legitimately by members of the public, and the nature and volume of such traffic reasonably to be anticipated. There is all the difference in the world between an accommodation crossing which carries public vehicular traffic along a made road, and an accommodation crossing which consists of a gate in a railway fence in a remote rural area to enable a farm labourer or a shepherd to pass at rare intervals from one field to another."

In the present case there is at least a *de facto* accommodation crossing for the use of the inhabitants of Koolewong and their guests and persons having business with them, and such persons lawfully use the crossing, and necessarily use it as there is no other means of access. Moffitt J. in the course of his discussion of the possibility that on proper investigation a public right to use this crossing might be found to exist, said:—

> " 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."

However that may be, their Lordships, accepting the assumed weakness of the title, consider that there was in this case the general duty of care in respect of the level crossing towards those who were lawfully upon it.

The other problem arises in respect of the nature of the breaches alleged. In all or most of the decided cases the breaches have been acts or omissions in the actual operation of the trains or the signalling or the giving of warnings, and not in the condition of the level crossing. It can be contended that the general duty of care applies only in respect of such positive operations, whereas the limited duty applies to the static condition of the crossing. This contention however is, on the facts of the present case, too artificial and unrealistic to be acceptable. The positive operations and the static condition interact, and the grave danger is due to the combination of both. It is dangerous to drive the trains, especially at night, round the curve in the line and into the crossing at 40 miles per hour, because the state of the crossing is so bad that somebody may fall on it in the path of an oncoming train. The bad state of the crossing involves serious danger because there are trains coming fast round the curve in the line and into the crossing. The railway operator's general duty of taking all reasonable precautions to ensure the safety of persons lawfully using a level crossing must include an obligation to keep the crossing itself in reasonably adequate condition according to the circumstances. The breaches alleged were breaches of this obligation.

This case is concerned with a level crossing lawfully and necessarily used to a substantial extent by all the inhabitants of a village and their guests and persons having business with them. No opinion is expressed with regard to private crossings or crossings only slightly used.

Quinlan's case is readily distinguishable, because the position of a trespasser is radically different from that of a person lawfully using a crossing. A trespasser should not be there at all, and it would be unfair to allow him by his wrong-doing to interfere seriously with the occupier's freedom of action in making proper use of the premises. Moreover the interference with the occupier's freedom of action would be very serious, if a general duty of care were imposed on the occupier in relation to the trespasser, because it is often not foreseeable when or where or by what route or for what purpose the trespasser will be entering and moving about the land. The *reductio ad*

absurdum would be to require trains to be limited to a speed of 10 miles per hour because there always might be a trespasser on the line at any place at any time. No duty is owing to a trespasser until it becomes known either that he is present or that the presence of a trespasser is extremely likely. The duty, when it arises, is a duty of a very limited character—not to injure him wilfully, and not to behave with reckless disregard for his safety. These considerations do not apply in the case of a person lawfully using a well-defined level crossing provided by the railway authority.

There is also in *Quinlan's* case a *dictum* at pp. 1082–3 as to what the position would have been if the respondent plaintiff had been a licensee instead of a trespasser:

> " 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* 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."

That was of course a summary statement, not going into problems of demarcation and combination of static condition and positive operations, but recognising that the duty arising from the relationship of occupier and licensee did not exclude any duty which might arise from other features of the situation.

There have been two further contentions on behalf of the plaintiff. The first was that the plaintiff is in this case not prevented by her previous experience of the crossing from showing a breach by the defendant of the limited duty which he as occupier owed to her as licensee. It was said that her previous experience of the crossing was according to her own evidence only in daylight and so was not sufficient to give her full knowledge of the perils of crossing in darkness. It was said also that the licensee's knowledge of a peril should not exempt the occupier from responsibility, if the licensee had no option to avoid the peril, and in this case the plaintiff could not reach her home without using the crossing in the darkness. These are interesting points but could not properly be dealt with here as the case was fought on a different basis at the trial and there were no directions given to the jury with regard to them.

Secondly it was contended that the plaintiff is entitled to recover for breach of a " *Donoghue* v. *Stevenson* duty ". But, in this case at any rate, there is no room for a separate " *Donoghue* v. *Stevenson* duty ". The general principle of " proximity " or " duty to a neighbour " is illustrated in the present case by the two relations which give rise to duties of care owing by the defendant to the plaintiff (a) as occupier to licensee and (b) as railway operator to lawful user of this level crossing. There is no other relevant relation.

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant defendant must pay the respondent plaintiff's costs of this appeal.

(93759) Wt. 8052/124 90 3/66 Hw

In the Privy Council

THE COMMISSIONER FOR RAILWAYS

v.

PATRICIA VERA McDERMOTT

DELIVERED BY

THE LORD CHANCELLOR

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
HARROW

1966