Privy Council Appeal No. 41 *of* 1963

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

v.

Francis John Quinlan – – – – – – – *Respondent*

FROM

THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 9TH MARCH 1964

Present at the Hearing:
VISCOUNT RADCLIFFE
LORD EVERSHED
LORD GUEST
LORD UPJOHN
LORD DONOVAN
[*Delivered by* VISCOUNT RADCLIFFE]

This is an appeal from a judgment of the Full Court of the Supreme Court of New South Wales dated 23rd November 1962, dismissing the appellant's appeal from a judgment of the Supreme Court dated 27th November 1961, entered for the respondent for £3,250 by way of damages awarded to him by the verdict of a jury. The respondent's damages were in respect of personal injuries suffered by him in an accident which occurred on the 5th January 1956 and in which the motor truck that he was driving was run into by a steam railway train operated by the appellant's servants on a railway line belonging to the appellant.

The legal issues raised by the appeal are of general importance, and it will be necessary to state their Lordships' opinion on them at some length. It is convenient therefore to say at the outset that in their opinion the appeal must succeed, because the direction which the learned trial Judge (Richardson J.) gave to the jury in the course of his summing up did not correctly state the law applicable to the circumstances of the accident and imposed upon the appellant a liability or duty towards the respondent which was more onerous than that which the law requires him to bear.

The relevant facts need to be set out as simply as possible, since after the careful investigation that they have received in the summing up of the trial Judge and in the judgment of the Full Court, as well as in the arguments of counsel before the Board, their Lordships are in no doubt as to what the evidence showed or was capable of showing as to the circumstances of the accident.

First, as to its site. It took place on a private level crossing which ran across the appellant's railway track at a point between two stations known as Carlingford and Telopea. This track had been constructed as an extension line under the powers of a Private Act of the Parliament of New South Wales passed in 1893, and a section of that Act contained the customary requirement that the entrepreneur, a Mr. Simpson, should provide such " convenient gates, bridges, arches, culverts and passages over, under, or by the sides of or leading to or from the railway " as should be necessary for the purpose of making good interruptions caused by the railway to the use of lands through which the extension was made. The extension line became vested in the appellant many years ago; it was not suggested that he did not thereupon come under the obligation of maintaining any crossings that had been formed under the private Act.

This particular crossing was known as " Walters' crossing ". At any rate it was so referred to at the trial, the reason being that it was originally formed for the accommodation of a Mr. Walters, who owned farming land on the eastern side of the railway line. Until late in 1955 there was no building on that side in the vicinity of the line except a farmhouse, which had stood there for many years and had been occupied by Walters. At the time of the accident it was occupied by a Mr. and Mrs. Carroll, of whom the husband was a farmer owning two motor vehicles. He was a tenant of Walters' executors and made use of the crossing.

At the crossing the railway line ran north and south, north to Carlingford, south to Telopea, though in the Carlingford direction there was a marked bend to the north-west about 50 yards above the crossing. A train coming round this bend from Carlingford would be obscured by a belt of trees on the west of the line from the sight of anyone on the crossing. The track was laid on a continuous strip of land owned by the appellant and it was guarded by fencing on each side. At the crossing itself the fencing was replaced by gates, opening outwards away from the track. The surface of the crossing was very roughly made up. The gate on the east gave access to Walters' farm, as has been said: that on the west to a public highway called Adderton Road which, after running parallel with the railway northwards from Telopea Station, turned virtually at a right-angle to the west opposite to Walters' crossing. There was no made-up road or surface beyond the crossing on the east side. There were notice boards saying " Beware of Trains " facing outwards from the crossing on each side.

Secondly, as to the user of the crossing. There was no evidence that prior to late 1955 anybody had ever used it except the occupiers of Walters' farmhouse and, presumably, those having cause to visit them for purposes of society or business. The gates were not kept locked, but it was the duty of the ganger responsible for that section of the appellant's line to ensure that they were kept closed and secured except when actually in use. Early in November 1955, however, a large area of land on the east, known as Dundas Valley, came under development by the Housing Commission of New South Wales. That meant that building operations were put in hand, and, although no house had been completed as ready for occupation by the date of the accident, the work itself and the uncompleted structures were visible to and were in fact observed by the appellant's servants while carrying out their duties on the line.

The start of these building operations led to some user of the crossing by motor cars and trucks during the weeks preceding the accident. Three witnesses were called by the respondent to say that they had taken loads of building materials and, in one case, workmen, to and fro over it, and the trial Judge told the jury, no doubt correctly, that it was open to them to infer that " a number of loads of building materials had come across Walters' crossing ". According to the evidence, the gates were sometimes open and sometimes closed. That is really all that the evidence disclosed on the question of user. It could have been quite substantial, but, since it was all connected with the building project in Dundas Valley, whatever was going on could only have been going on for eight weeks or so.

Thirdly, as to the appellant's knowledge of and attitude towards this user of the crossing, outside its user as an accommodation crossing for the Walters' house and land. Four of the appellant's servants who were regularly employed on the branch line, the driver, fireman and guard of the train that was involved in the accident, and a senior sub-inspector for the section running up to Carlingford, who was responsible for the supervision of its maintenance, all denied having seen any person or vehicle passing over the crossing. They had never seen the gates open. In effect the driver had regarded it as a closed crossing and in approaching it took no precautions against the possibility that somebody might be on it. Apart from what follows, there was therefore no evidence at all to show that the appellant knew of the beginning of additional or unauthorised user of his line at this point.

There were however two letters put in evidence and proved to have been received by the appellant. One was a letter dated 1st December 1955 from a building contractor employed in the housing project, addressed to the

Secretary of Railways and asking permission to use Walters' crossing for a period of three months " for access to building sites from Adderton Road ". This request was refused. There was a second letter of the same date addressed to the Secretary and written by the Secretary of the Housing Commission. It was a letter of some length, containing a good deal of material, but for some reason that is not plain to their Lordships only two paragraphs of the letter were admitted by the trial Judge and allowed upon the transcript of evidence. These paragraphs read: " The Commissioner has let contracts for the erection of 212 cottages on the eastern side of the railway between Telopea and Carlingford stations. As part of the general development of this project, these cottages will be completed progressively between February and June next. There are two level crossings in the vicinity of Telopea station and these are at present being used by building contractors and suppliers ". It was conceded by the appellant that Walters' crossing was one of the two level crossings there referred to. The other, which was rated as a public crossing, was almost on the station itself.

There was no evidence of a reply to this letter, of any discussions or interviews which followed upon it, or of any attitude, positive or negative, adopted by the appellant in response to the information that it conveyed.

Lastly, as to the circumstances of the accident itself, which took place at the early hour of 5.20 in the morning of the 5th January 1956. If it were proper for their Lordships to examine the case of contributory negligence that was made against the respondent it would be necessary to state in some detail his movements and actions prior to the collision. But the evidence on this issue was before the jury, the trial Judge directed them on the law in a manner to which there is no need to take exception, and in their Lordships' opinion it is not for them, any more than it was for the Full Court, to entertain any appeal against the verdict on the basis that the respondent ought to have been found guilty of contributory negligence. That being so, it is sufficient to say of his movements that, being employed by his brother to take a load of tiles to one of the building sites on the Dundas Valley development and having received instructions from the manager of the tile works as to where to go and how to get there, he took a route which brought him on to the crossing. Both gates were open at the time. Before he was clear of the crossing his truck was run into by the train coming down from Carlingford and he was flung out on to the side of the line. There was no suggestion that either he or any one for whom he worked had obtained any permission from the appellant to make use of the crossing: nor was it suggested that there would have been any difficulty in his reaching the site by other means of access. He suffered injuries in the accident for which the jury awarded him £3,250 by way of damages.

The train that ran into him was in fact the first train of the day, the 5.7 a.m., coming south from Carlingford. It left that station at the scheduled time, gave one whistle from its engine on pulling out of the station and gave a second shortly before coming round the bend above Walters' crossing, at a distance of about half a mile from Telopea station. It was coming down a grade sufficiently steep to allow steam to be shut off on the descent, so that it was running fairly silently: the engine was facing in reverse, bunker foremost, there being no turn-table at Carlingford. Owing to the trees which obscured the view of the line below the bend, it was not possible for the driver or fireman to see the respondent's truck until they were round the bend: when they did see it, there was not sufficient time for them to pull up before the collision took place. The train's speed on the descent was put at about 25 miles an hour, the normal speed for that part of the journey. The driver admitted that his second whistle was given at a point too near to Walters' crossing to be of any use to avert a collision, if anyone was then actually on the crossing.

The respondent's declaration was founded on the allegation that the appellant, having the care, control and management of the crossing and the train, had been so negligent in and about that care, control and management and in failing to take reasonable and proper steps to secure the safety of persons using the crossing that he, the respondent, had been struck by the train. At the trial the case made for him on the issue of negligence came

down to an alleged failure on the part of the train driver to give any sufficient warning of its approach, although other possible precautions for the safety of persons using the crossing were canvassed from time to time. The declaration did not allege that the respondent was lawfully on the crossing: in fact it was conceded at the hearing that he was a trespasser.

The directions on law given to the jury by the trial Judge can be summarised as follows:—

(*a*) On the evidence the respondent was neither an invitee nor a licensee.

(*b*) That, however, did not dispose of the matter. The question was whether the appellant was negligent in the manner of operating the train on the line, because " a duty of care rests upon a Railway Department to safeguard others from the grave danger of serious harm if knowingly the defendant created a danger or is responsible for its continued existence and is aware of the likelihood of others coming into proximity of that danger and has the means of preventing it or averting it or bringing it to the knowledge of others ".

(*c*) The jury could assume that the respondent was a trespasser. Nevertheless in certain circumstances the appellant could be under " a general duty to exercise reasonable care " for the safety of persons using the crossing, and if there was a likelihood of people coming to the crossing, the duty did not disappear because in coming they would be trespassing.

(*d*) The appellant had received notice in the letter dated 1st December 1955 from the Housing Commission. While therefore " he is not required to protect against their own carelessness people who proceed without any regard to their own safety, it is his duty to take every reasonable precaution to ensure that the crossing will be safe for members of the public generally who act with due care while passing over it, subject nevertheless to it being an accommodation crossing and to the problem associated with an accommodation crossing as he saw it ". The jury had then to consider whether this duty of care was owed to " this member of the public ", that was, the respondent using the crossing in existing circumstances, not in those ruling when it was originally constructed.

It is not easy to summarise the full purport of a summing up which contains a great deal of matter and in which the legal rulings are not expressed in language of extreme clarity; but their Lordships think that there is no doubt that the jury must have received the definite impression that the law that they were to apply to the facts was that, once they thought that there was " a likelihood " of people coming to the crossing and that the appellant was aware of such a likelihood, the appellant owed a general duty to the respondent as " a member of the public " to take reasonable precautions to secure his safety, and that this duty was not affected by the fact that the respondent was a trespasser.

In their Lordships' opinion this direction was not in accordance with law. It is fair to the trial Judge, however, to say that a direction on these lines was in effect made obligatory for him by a previous judgment of the Full Court (60. N.S.W. State Reports 629), which had been delivered on appeal from a judgment in an earlier trial of this action. In that appeal a judgment in favour of the respondent, entered in pursuance of the verdict of a jury, had been quashed on the ground that there had been no evidence capable of supporting the view that the respondent when injured on the crossing had been the appellant's licensee. The Court had nevertheless ordered a new trial, because in their view the case, if retried, might show that the respondent, though a trespasser, was nevertheless entitled to claim from the appellant the duty of general care and a liability in negligence for breach of it: such a duty, it was suggested, might be founded on a general principle derived from the House of Lords' decision in *Donoghue v. Stevenson* [1932] A.C.562. Their Lordships think this view mistaken. They cannot see that there is any general principle to be deduced from that decision which throws any particular light upon the legal rights and duties that arise when a trespasser is injured upon a railway

level crossing where he has no right to be: more particularly, they consider that it is not correct in principle to suppose that the mere fact that there was a likelihood, apparent to the occupier, of a trespasser being present on the crossing at some time or another is sufficient to impose upon the occupier any general duty of care towards such a trespasser. The consequences of such a supposition would be far-reaching indeed. Before considering this proposition, however, and certain authorities upon which it is said to rest, it is necessary to make reference to the views expressed by the Full Court in the judgment which is now under appeal.

The Full Court considered that the judgment appealed against should stand. They stated two principles in support of their view. One was the principle laid down by Scrutton L. J. in *Mourton v. Poulter* [1930] 2 K.B. 183 at 191 that there is liability when " a man does something which makes a change in the condition of the land, as where he starts a wheel, fells a tree or sets off a blast, when he knows that people are standing near. In each of these cases he owes a duty to these people, even though they are trespassers, to give them warning." This principle, they thought, applied because of the evidence from which it could be " inferred that it was very probable that the Commissioner knew of the use of this crossing by members of the public." In their Lordships' opinion the judgment cannot be upheld on this ground. Apart from other objections, the principle as laid down by Scrutton L. J. was not the one upon which the jury were directed. If they had been told that they must find whether or not the appellant knew that the respondent was or would be on the crossing at the time of the accident or even that his presence then was "expected or foreseen" (see per Dixon C. J. in *Commissioner for Railways (N.S.W.) v. Cardy* 104 C.L.R. 274 at 285), there is no knowing what their verdict would have been. In fact there was no evidence that could reasonably support such a finding: even if there had been, it would only impose a duty to avoid wilful or reckless injury, not the general duty of care in respect of foreseeable damage, which was the duty put to the jury.

Secondly, the Full Court relied on a principle which they though was to be found in three recent decisions of the High Court, *Thompson v. Bankstown Municipal Council* 87 C.L.R.619, *Rich v. Commissioner for Railways (N.S.W.)* 101 C.L.R. 135, and *Commissioner for Railways (N.S.W.) v. Cardy* 104 C.L.R. 274, a principle which they stated in the following terms:— " 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 railway 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 per Lord Macmillan at p. 104)."

Their Lordships must examine later the three decisions referred to, particularly in relation to other and earlier authorities, in order to see what principle it is for which they are supposed to stand: but, if the Full Court's view means, as it appears to, that, given a railway operator's knowledge of the likelihood of some trespassers on a private crossing, there is no significance for the law, if an accident occurs, in the fact that they are trespassers, and the operator owes to any such trespasser the same duty of general care that he would owe to members of the public using a public level crossing, their Lordships must say that in their opinion this is not the Law, because it is in direct conflict with an inescapable weight of established rules of the common law.

It is necessary to turn first to the general duty of the occupier to the trespasser, and to recall the familiar terms in which it has so frequently been laid down. There is an early statement of the law by Bramwell B. in *Degg v. Midland Railway Co.* [1857] 1 H. and N. 773 at 781/2 which makes an important distinction. " It is not negligent or wrong ", he says, " for a man to fire at a mark in his own grounds at a distance from others or to ride very rapidly in his own park: but it is wrong so to fire near to or so to ride on the public highway . . . So the act of firing or riding fast in an inclosure becomes wrong if the person doing it sees there is someone near whom it may damage. But the act is wrong in him only for the personal reason that he knows of its danger: it would not be wrong in anyone else who did not know that ". The

distinction is useful, because it suggests that the measure of the occupier's duty is directly related to the presumption that it is not careless in him to make free use of his own land, even by doing on it things which would be dangerous to those he encounters, subject of course to the rights of others over it or to the visible presence on it of anyone to whom he can see that his acts would be dangerous. This is reinforced by the fuller statement of the point in the speech of Lord Uthwatt in *Read v. J. Lyons & Co.* [1947] A.C. 156 at 184/5. Their Lordships think therefore that it is unlikely to be helpful to treat occupation in itself as being either a source of liability, as has recently been suggested, or a source of exemption, as it has sometimes been termed. The truth seems to be that, when the relationship of occupier and trespasser comes in question, that relationship is expressive of certain incidents, such as the unpredictability of the trespasser's presence, movements and purposes, which themselves condition the amount of foresight that the law will require of the occupier in determining what kind of duty he owes to a trespasser.

The content and limits of the duty have been laid down in words that do not seem to admit of much qualification or to invite the skill of the amplifier. Lord Sumner stated the rule of the English common law with maximum brevity in *Latham v. Johnson* [1913] 1 K.B. 398 at 410. " The owner of the property is under a duty not to injure the trespasser wilfully; 'not to do a wilful act in reckless disregard of ordinary humanity towards him'; but otherwise a man trespasses at his own risk." This statement of the law received the full approval of the House of Lords in *Robert Addie & Sons (Collieries) v. Dumbreck* [1929] A.C. 358 where the Scottish rule of liability was held to be the same. The principle was reaffirmed by the House of Lords as recently as 1952 in *Edwards v. Railway Executive* [1952] A.C. 737, in which Lord Goddard said at p. 747 " It follows therefore that unless there is evidence of wilful or reckless behaviour on the part of the motorman in failing to stop the train before it ran over the boy he can have no case. There is no evidence to support such a charge against the driver. A man can only act recklessly with regard to the safety of another if he knows of or has reason to believe in the presence of that other."

The same principle was laid down by this Board for the law of Canada: see the opinion delivered by Lord Robson in *Grand Trunk Railway of Canada v. Barnett* [1911] A.C. 361. " The case must therefore be taken on the footing " he says (p. 369) " that the respondent was a trespasser, and the question is, what under those circumstances are his rights against the appellant company? . . . The railway company was undoubtedly under a duty to the plaintiff not wilfully to injure him; they were not entitled, unnecessarily and knowingly, to increase the normal risk by deliberately placing unexpected dangers in his way, but to say that they were liable to a trespasser for the negligence of their servants is to place them under a duty to him of the same character as that which they undertake to those whom they carry for reward. The authorities do not justify the imposition of any such obligation in such circumstances." To impose liability, he says later, there must be some wilful act, " something worse than the absence of reasonable care ". The decision in *Herdman v. Maritime Coal Co.* [1919] 49 D.L.R. 90, another railway case, affords an instance in which the Supreme Court of Canada adopted and applied the same limited conception of the occupier's duty. Judgments by courts of the United States of America can be cited to a similar effect.

In *Addie's* case, the test for determining the occupier's liability to the trespasser was stated to be that there must be found " injury due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm, or at least some act done with reckless disregard of the presence of the trespasser " (see per Lord Hailsham [1929] A.C. at p. 365). This test was accepted and applied without qualification by the High Court of Australia in *Transport Commissioners of N.S.W. v. Barton* 49 C.L.R. 114. Their Lordships have given the most careful attention to the judgments of the various members of the Court in that case, and they have been unable to find in any of them any intention of formulating the duty of the railway company to the trespasser in terms wider than those sanctioned by *Addie's* case. The most that can be said

is that in one of them, that of Dixon J. (as he then was), a passage occurs (at p. 127) in which it is said that, in so far as the loss of the plaintiff's mare was attributable only to the character of the undertaking established upon the premises (presumably, the railway and the conduct of it) its owner could not complain, since she ought not to have been there. " But it does not follow that those conducting the undertaking might with impunity destroy or injure the animal in the course of their actual operations. Even in reference to the condition of the premises an occupier in the absence of just cause or excuse must abstain from intentional injury to a trespasser, actual or possible. In the performance of acts likely to inflict harm, the measure of duty towards persons, who are upon the land, although wrongfully, is perhaps greater and certainly can be no less." There are however several succeeding passages of the judgment that makes it plain that in the view of the learned Judge it is only the " known presence " of the trespasser upon the property that imposes upon the occupier any duty at all towards him.

There are some comments that need to be made upon the accepted formulation of the occupier's duty to a trespasser, if subsequent misunderstandings are to be avoided. First, it is plain that what is intended is an exclusive or comprehensive definition of the duty. Indeed there would be no point in it if it were not. It follows then that, so long as the relationship of occupier and trespasser is or continues to be a relevant description of the relationship between the person who injures or brings about injury and the person who is injured—an important qualification—the occupier's duty is limited in the accepted terms. It is so limited because the character of trespassing is such that the law does not think it just to require the occupier to speculate about or to foresee the movements of a trespasser: and this is equally true whether the trespasser fills the unsympathetic part of the burglar or the sympathetic part of the traveller who has lost his way. As Evatt J. said in *Barton's* case, supra (see p. 134) in words that have considerable bearing on the present case, " In my opinion, the appellant conducting its railway entirely upon its own property was not under any duty to the respondent to forecast the probability of trespassing cattle and to run its trains so as to prevent, by all reasonable precautions, injury to such trespassers . . . trespassers accept the risk, not only of the premises as land and buildings but also of the enterprise conducted thereon ". Having regard to the plain fact that the definition of the occupier's duty is comprehensive, their Lordships feel doubt whether the solution of particular cases of injury to trespassers is likely to be assisted by observations to the effect that the decision in *Addie's* case related to the duty of the occupier " as such " or to the right of the trespasser " as such ". It does not seem to them that there is room for any useful distinction between an occupier as such and an occupier in some other character or capacity.

Secondly, the formula in terms covers activities of the occupier on his land and cannot legitimately be regarded as confined to the situation where injury arises from what is sometimes called the " static condition " of the land. The main point of it is to prescribe, not merely that a trespasser must take the land as he finds it, but also that he must take the occupier's activities as he finds them, subject to the restriction that the occupier must not wilfully or recklessly conduct them to his harm. From time to time there have been judicial observations on this topic, one that involves so many conflicting considerations and invites such various responses, to the effect that *Addie's* case applies only to the occupier's duty in respect of the " static condition " of his premises. In their Lordships' opinion this refinement is unmaintainable, either in principle or on authority. The opportunity of inflicting wilful or reckless damage on a trespasser will hardly arise in respect of this " static " condition, unless in the special, and perhaps rather old-fashioned, device of setting man-traps and spring guns explicitly designed to cause him injury. It will arise, more typically and more frequently, when an occupier insists on conducting potentially dangerous activities on his land with indifference to the known presence of a trespasser who is likely to be injured by them.

Thirdly, the formula does not ignore the significance of knowledge in affecting the relationship between occupier and trespasser. Indeed, as Lord

Goddard observed in the passage already quoted from *Edwards v. Railway Executive* [1952] A.C. at 747, a man can hardly act wilfully or recklessly with regard to another unless he knows that that other is present or has reason to believe that he is there. But the knowledge required to set up any duty at all in the occupier is his personal knowledge of the other's presence: " the duty depends ", said Dixon J. in *Barton's* case, see p. 131, " upon knowledge of the intrusion and relates to harm then actively done to the person or thing intruding." A person's knowledge is a question of fact: such a fact is a very different thing from the objective question whether there was a reasonable likelihood of someone being present at the relevant time and place and whether a person ought to have foreseen that likelihood. Given the fact of the knowledge, the occupier comes under the obligation not to inflict intentional or reckless injury upon the person of whose presence he is aware. This again is a very different thing from an obligation to take precautions in advance against the likelihood of a trespasser being present.

It is true however that an occupier can be treated as having knowledge of a trespasser's presence, even though the latter is not visibly before his eyes at the time when the act that causes injury is done. He can be in a position in which he " as good as " knows that the other is there. It is this transference from direct to imputed knowledge that has been responsible for several decisions that would otherwise be difficult to explain consistently with the accepted definition of the occupier's duty. In *Mourton v. Poulter* [1930] 2 K.B. 183 Scrutton L. J. suggested (at p. 190) that the distinction between the House of Lords' decisions in the *Excelsior Wire Rope Co.'s* case [1930] A.C. 404 and *Addie's* case lay in the fact that in the former the man who started the machinery in motion was close to the children injured and could have seen their presence without moving from his position. Their Lordships accept this distinction as bearing directly on the recklessness of the act. " There was", said Lord Atkin (*Excelsior Wire Rope Co. v. Callen* supra at 413), " a swarm of children frequenting the spot where this machine was used and frequenting it to the knowledge of the owners of the machine." Lord Dunedin said roundly (p. 411) that " the appellant's servants acted with reckless disregard of the presence of the trespasser". It was acting so reckless as to " amount to malicious acting ". And, of course, any Court that forms such a view of an occupier's actions, whether he occupies land or a mere structure, is bound to find him guilty of a breach of his duty according to the very terms of the formula that it is to apply.

In general, their Lordships would regard the example given by Scrutton L. J. in *Mourton v. Poulter* supra (see p. 190/1) as a typical instance of an occupier's breach of duty. He was himself dealing with a case of a tree that was felled, without warning, with children standing round. " The case may", he said, " be compared to one in which, while blasting operations are going on and people are standing round, a man engaged in the work fires a blast without giving any previous warning. It seems to me that the man firing the blast would clearly be guilty of a breach of duty to these people even though they were trespassers, because he would have done an act which might do them an injury and would have done it without warning." Such a man is one who " does something which makes a change in the condition of the land, as where he starts a wheel, fells a tree, or sets off a blast when he knows that people are standing near ". The shunting case, *Haughton v. North British Railway Co.* 20 R. 113, where injury was inflicted on children known to be in the path of moving railway trucks, must also be regarded as one in which " malicious injury " was caused to trespassers: and *Lowery v. Walker* [1911] A.C. 10, though it contains no statement of principle, was either a case of malicious injury or of a duty of care owed to someone having permission to use the land.

It must be stressed however that the knowledge that is here material is knowledge in the occupier sufficient to impose upon him the duty not to be wilful or reckless towards the man to whom otherwise he would owe no duty at all; and such knowledge is something a great deal more concrete than a mere warning of likelihood. The presence, if it is to be treated as anticipated, must be " extremely likely ", to use Lord Buckmaster's words in the *Excelsior Wire Rope Co.'s* case, supra, at p. 410. There was " great likelihood, not to say certainty of boys and others coming upon the site ", per Dixon C. J. in

Commissioner for Railways (N.S.W.) v. Cardy 104 C.L.R. 274 at 286: the trespasser must be one whose coming is " expected or foreseen ". In the same case Windeyer J. says that " the occupier's immunity from actions by trespassers may be qualified if he knows that they are or very probably may be present " (see p. 320). This is the same thing as was said by Evatt J. in *Barton's* case supra at p. 135, " As a general rule the plaintiff must show that the occupier knew of the actual, or at least the very probable presence, of the trespasser on his land at the very time when some activity fraught with danger to the trespasser was being continued ". In their Lordships' opinion, if an occupier is being charged with breach of duty towards a trespasser in not giving him warning of some dangerous activity that is conducted on the occupier's premises and by which the trespasser has been injured, the law requires that the occupier's knowledge of the other's presence at the material time should be established in some such terms as those quoted above.

Lastly, it is impossible and, indeed, misleading to approach the established formula that defines the occupier's duty as if it were " old " or " the older " law. A definition which has been stated in precise terms by judges as learned and humane as Lord Sumner, Lord Justice Scrutton, Lord Dunedin and Lord Porter, to mention only United Kingdom judges who are recently dead, is not likely to be either old-fashioned or to be impaired by an inadequate appreciation of the general law of tort, whether under the wide heading of negligence or of other more specialised categories of obligation. Their Lordships do not think that it can be right to say that this duty has somehow been recast in a different and much more onerous form as a consequence of what was decided by the House of Lords in *Donoghue v. Stevenson* [1932] A.C. 580. That case, no doubt, illumined the legal conception of negligence in relation to the subject with which it was dealing, the duty of a manufacturer towards the ultimate purchaser of his product, and in so doing made it admissible to apply the formula that it employed to other relationships, some perhaps unsuspected until then. But there seems to be no warrant for the idea that the measure of liability there approved, which in its terms differed little from what had been said in another context by Brett M. R. in *Heaven v. Pender* 11 Q.B.D. 503, added a new dimension to the occupier/trespasser relationship, already so clearly and so long established. The idea of such an addition was unanimously rejected by the Inner House of the Court of Session in *McPhail v. Lanarkshire County Council* [1951] S.C. 301 (see per Lord President Cooper at 314/5 and per Lord Keith at 318/9) and was plainly unknown to the High Court of Australia in *Barton's* case, in which, while *Donoghue v. Stevenson* is noticed in the judgments (see pp. 122/3), the occupier's duty is defined in the accepted form. Again no change in the situation can have been perceived by the members of the House of Lords who decided *Edwards v. Railway Executive* supra, twenty years after the *Donoghue v. Stevenson* decision. Indeed, the possibility that that well-known case had or could have a bearing upon the formulation of an occupier's duty to a trespasser must have escaped the observation of the very judge whose words are most often quoted as expressing the essence of the *Donoghue* principle, for in *Hillen v. I.C.I. (Alkali)* [1936] A.C.65, Lord Atkin himself observed " I know of no duty to a trespasser owed by the occupier other than, when the trespasser is known to be present, to abstain from doing an act which, if done carelessly, must reasonably be contemplated as likely to injure him, and of course, to abstain from doing acts which are intended to injure him ". The ambit of the duty, it will be seen, is confined by the condition " when the trespasser is known to be present ": if he is so known, he must not be injured intentionally or recklessly.

Their Lordships must now notice the three recent decisions of the High Court of Australia which have been treated by the Full Court in the present case as justifying the trial Judge's direction to the jury. Each decision is accompanied by five separate opinions of the learned Judges who constituted the respective Courts and there is an unavoidable difficulty in saying, when different lanuage is used and, to some extent, different lines of reasoning, for what common principle of law a decision must be taken to stand. Nevertheless, when this difficulty is allowed for, it does remain possible to state summarily what is involved in each Court's decision.

The first in order of time is *Thompson v. Bankstown Corporation* 87 C.L.R. 619. A boy of thirteen years was horribly injured when trying to reach a bird's nest on a pole, which carried high tension wires belonging to the Corporation's electricity undertaking. The line of poles was planted in a public highway, and the pole in question had attached to it a defective earth wire, charged with electricity, and ending at a distance three or four feet above the ground. The boy standing on a bicycle either clasped the pole with his arms or caught at the wire, and so was injured. The High Court (Webb J. dissenting) held that it was not a case in which the relationship of occupier and trespasser and the duty arising therefrom could be treated as expressing the true relation between the parties at the moment of the accident. The boy was lawfully upon the highway, and the real cause of the accident was that the Corporation was maintaining its poles and wires for the transmission of a highly dangerous electric current, neglecting proper precautions and " allowing its system to be in an improper and dangerous condition " (per Dixon C. J. at 630).

In those circumstances the Court refused to attach significance to the fact that at the actual moment when he was burned by the current the boy was a trespasser on the pole or the wire. The point was that " the defendant's responsibility to the plaintiff does not depend on the defendant's control 'or occupation' of the pole or the character that the plaintiff assumed in reference to the pole when he placed his bicycle against it, leant his body upon it and put his arms round it, or, if that be what he did, when he grasped the wire " (see p. 628). The case was said to be analogous with the English decisions in *Buckland v. Guildford Gas Light & Coke Co.* [1949] 1 K.B. 410 and *Glasgow Corporation v. Taylor* [1922] 1 A.C. 44, in which latter case a child, lawfully in a public park, had unlawfully picked poisonous berries from a shrub belonging to the Corporation. As Lord Sumner said in the House of Lords (see p. 64), " The child had no right to pluck the berries, but the Corporation had no right to tempt the child to its death or to expose it to temptation regardless of consequences ".

Their Lordships have no doubt that *Thompson's* case was correctly decided. It was one of those in which the Court, for sufficient reason, is able to hold that, as regards the accident and the injury caused, the relation of occupier and trespasser does not bear upon the situation of the parties. The reason there held sufficient was that the Corporation was maintaining on and over a public place a highly dangerous electric transmission system in a defective condition. But in the application of any principle derived from this case there are two comments that need to be made. The first is that the facts of the case are very far away from anything which happened in the present, where injury was caused to an adult, seeking to cross the appellant's railway line on its property, and warned of the danger from trains, the injury being caused in the course of the appellant's regular conduct of his service. The second comment is that in the judgment of Kitto J. there does occur a passage which, with very great respect to that learned Judge, can be read as suggesting that an occupier owes a duty of care or " foreseeingness " towards a trespasser that is both undefined in extent or content and is inconsistent with the established law as set out earlier in this opinion. The passage in question is as follows (pp. 642/3) " The respondent's contention appears to assume that the rule of law which defines the limits of the duty owed by an occupier to a trespasser goes so far as to provide the occupier with an effective answer to any assertion by the trespasser that during the period of the trespass the occupier owed him a duty of care . . . It would be a misconception of the rule to regard it as precluding the application of the general principle of *McAlister (or Donoghue) v. Stevenson*, to a case where an occupier, in addition to being an occupier, stands in some other relation to a trespasser, so that the latter is not only a trespasser but is also the occupier's neighbour, in Lord Atkin's sense of the word: see *Transport Commissioner of N.S.W. v. Barton*."

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 duty of care appropriate to the *Donoghue v. Stevenson*

formula: and, if the relation of occupier and trespasser is to be displaced by " some other relation ", as may happen, the grounds upon which that displacement can be held to occur must admit of reasonably precise definition, otherwise the task of charging juries as to what the law requires or allows will become virtually incapable of formulation.

The next decision is that of *Rich v. Commissioner for Railways (N.S.W.)* 101 C.L.R. 135. 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 a 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 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. at p. 149. 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 " a 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 licensee. Whether, even so, such a character would have protected the respondent in this case it is not necessary to enquire. Presumably, in accordance with the principle laid down by the Court of Queen's Bench in *Gallagher v. Humphrey* 6 L.T. (N.S.) 684 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.

Finally, there is *Commissioner of Railways (N.S.W.) v. Cardy* 104 C.L.R. 274. Their Lordships do not demur at all to the decision that was come to in this case. A boy of fourteen sustained grievous injuries by burning from sinking his feet through the crust of an ash-tip, which contained a mass of red hot material. A pathway that was freely used by pedestrians ran along one side of this tip, and people, particularly children, frequently visited the tip

despite " casual and intermittent warnings " by railway servants. It was held that the defendant was liable in damages to the injured boy.

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. In any accepted use of the word the ash-tip, with its burning interior, was a " trap " or an " unusual and hidden danger ". 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 of injury is an adult. What is allurement to a child and, being so, imposes by itself a measure of responsibility, is not an allurement to an adult; and those conceptions of licence or permission, which may be highly relevant for the determination of the adult's rights, are virtually without meaning, at any rate as applied to small children.

Taking the five judgments as a whole (of which one was a dissenting opinion), the case does not appear to stand for any more general conception of the railway authority's liability than that which has been outlined above. The learned Chief Justice evidently reconciles it with the regular definition of an occupier's liability: see pp. 285 6, where he says, " Such a recognition of liability by no means involves the imposition upon occupiers of premises of a liability for want of care for the safety of trespassers . . . The rule remains that a man trespasses at his own risk, and the occupier is under no duty to him except to refrain from intentional or wanton harm to him. But it recognises that nevertheless a duty exists where to the knowledge of the occupier premises are frequented by strangers or are openly used by other people and the occupier actively creates a specific peril seriously menacing their safety or continues it in existence." Their Lordships take it that in such a situation it is to be presumed that the occupier's conduct is so callous as to be capable of constituting wanton or intentional harm, and, no doubt, in such circumstances it could be so regarded.

Admittedly, passages occur in one or two of the other judgments that suggest that a trespasser can somehow become the occupier's " neighbour ", within the meaning of the somewhat overworked shorthand of *Donoghue v. Stevenson*, by the mere fact that he or other trespassers (it must be the class, not the individual, that matters for this purpose) are in the habit of trespassing and that the occupier has notice of their habit. " In such cases ", it is said, " it seems hardly possible to classify or enumerate the factors which will be relevant to the question whether by act or omission the defendant has fallen short of the standard of care of the reasonable man." . . . (see p. 298).

Having reviewed the authorities relied upon by the Full Court as supporting the trial Judge's direction in the present case, their Lordships are now in a position to state where it departs from what they believe to be the correct formulation of the law. If on the evidence a plaintiff is a trespasser, a person present without right or licence, the occupier's duty to him is determined by the general formula as laid down in *Addie's* case. That formula may embrace an extensive and, it may be, an expanding interpretation of what is wanton or reckless conduct towards a trespasser in any given situation, and, in the case of children, it will not preclude full weight being given to any reckless lack of care involved in allowing things naturally dangerous to them to be accessible in their vicinity. What the law does not admit however is that a trespasser, while incapable of being described otherwise than as a trespasser should be elevated to the status of an ordinary member of the public to whom, if rightfully present, the occupier owes duties of foresight and reasonable care. It does not alter a trespasser's description merely to christen him a " neighbour ". If this additional duty of care were to be thought to be imposed upon the occupier by the circumstance that, to his knowledge, there is a likelihood of the trespasser's presence on the land—and it does not seem that

any other circumstance is regarded as critical for the purpose—their Lordships consider that the law, as established, would not so much be applied or developed as contradicted.

For the dilemma presented would be this. The most obvious and direct instance of a trespasser's presence being known to the occupier is when he is actually visible, and the occupier has time and means to adjust his actions in response to that knowledge. What is his duty in those circumstances? It is, we know, not to inflict intentional or reckless injury, no more. In railway terms, he must at least not run him down. Suppose, however, the case in which the occupier, having no definite knowledge of anyone being on his land but having notice that the presence of someone at some point of time is possible or likely; can that circumstance by any process of reasoning give such a trespasser a higher measure of protection, the right to claim a general duty of care, which would not be owed to him if he were actually present before the eyes of the occupier?

A level crossing, even if only a private accommodation way, is, certainly, not the same thing as an ordinary stretch of the permanent track. Its surface will be to some extent made up across the line and in all probability it will be secured by gates. It will have the appearance of a means of access. Only a brief period of time however will be required for any one person to make the transit, and, unlike the train, the trespasser runs by no schedule. Now, if notice that some unauthorised persons have begun to or do use a private crossing for their own purposes is sufficient to impose upon the railway operator a duty of care towards each one of those persons who may happen to be present at any time that a train comes down the line, it seems impossible to say what practical measures the operator would have to take in order to escape liability. Can he run his trains at their normal speed if the track does not give long sight of the crossing, or must he nose along in the vicinity of such a crossing in case someone might be there? It is very difficult to think that a whistle correctly timed can itself make the difference. If he cannot secure the consent of the owner of the accommodation to the gates being kept locked, as he probably cannot, must he station a guard at each crossing, merely because he is warned that there is improper use of it? Their Lordships have studied with care and respect the judgments of the members of the Court of Appeal in England in *Videan v. British Transport Commission* [1963] 3 W.L.R. 374, two of which adopt much the same line of reasoning as that upon which their Lordships have commented in the recent High Court cases in Australia: but they remain quite unpersuaded that the measure of an occupier's duty to a trespasser can be determined in all cases by what is called the foreseeability test or that it is correct to describe the nature of the duty by saying that if the circumstances are such that the occupier " ought to foresee " even the presence of a trespasser, the duty of care extends to the trespasser also. Surely there is a danger of begging the very question at issue, if it is premised by the assumption that there are some unspecified circumstances in which the occupier " ought " to foresee that the trespasser is likely to be present. It may be that such words are not intended to add more to the occupier's duty than the definition of it given by Scrutton L. J. in *Mourton v. Poulter* supra, to which their Lordships have already referred: but if so, they think, with respect, that the situation would be less liable to be misunderstood if it were explained that the only trespasser to whom the occupier is accountable for his actions, even if dangerous, is one of whose presence he actually knows or one whose presence at the time of injury can fairly be described as extremely likely or very probable. To go further is to accept the proposition that a trespasser who insists on forcing himself on to the occupier's premises and lets him know that he intends to enter in this way can impose upon the latter, against his will, a duty to take precautions and have care which may seriously impede the conduct of his lawful activities. In their Lordships' opinion the law does not admit of this result.

They conclude then that the jury's verdict and the consequent judgment cannot stand. They have anxiously considered whether it is right that this unhappy litigation should be further prolonged by an order that the action should be tried once more. On the first occasion the respondent obtained a

verdict on the ground that he entered on the crossing as a licensee, and this verdict was upset on appeal because there was no evidence of any such licence. On this occasion he has obtained a verdict on the ground that, though he was himself a trespasser, the appellant had sufficient notice of the likelihood of his presence to owe him a duty of care, which was breached by the locomotive engine not giving sufficient warning by whistle before it approached the crossing. This verdict must now go, because an occupier's duty to a trespasser cannot be measured in such flexible terms. The point to which their Lordships have directed their attention is whether, assuming the evidence given at the second trial to be given over again, it would be open to a jury, properly directed, to find for the respondent. In their opinion that would not be possible. 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. Neither the respondent nor his employer had sought any permission to use the crossing; although there had been some, perhaps even much, use of it in the weeks before the accident, for the purposes of the building work, there was no evidence to contradict that of the appellant's servants that they neither knew nor had observed any of this; there was no evidence that the appellant knew of or sanctioned the gates being open at the crossing. Everything would have to turn on the appellant's receipt of the letter dated 1st December 1955, which spoke of the user of the two crossings for building purposes; and, considering the short period of time involved and the fact that it covered the Christmas/New Year season, no reasonable finding on that evidence could extract from the circumstances acquiescence in or implied permission for the respondent's trespass.

Alternatively, could a jury, properly directed, find on the evidence that the respondent's presence on the crossing was, to the appellant's knowledge, a very probable event? Here again, the facts were such that they would deny such a finding. The most that the Housing Commission's letter could have conveyed to the appellant was that this crossing, like the one lower down, was being used for the service of those doing its building work. Nothing in that would make it even probable that a builder's truck would be on the line at 5.20 in the morning, more than two hours before the working day began. The reason for the respondent's early start does not seem to have been investigated at the trial, but weight would have to be given to it in any measurement of a rate of probability.

Their Lordships are of opinion, therefore, for the reasons they have given, that the only order that they can humbly advise Her Majesty to make is that the appeal be allowed, the judgment of the Full Court dated 23rd November 1962, reversed, the judgment in the action set aside and judgment entered for the appellant with his costs of both hearings. The respondent must pay the costs of this appeal.

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In the Privy Council

THE COMMISSIONER FOR RAILWAYS

v.

FRANCIS JOHN QUINLAN

DELIVERED BY
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