
(1899) 02 CAL CK 0005
In the Calcutta High Court

Kally Dass Mookerjee

APPELLANT

Vs

The East Indian Railway Company

RESPONDENT

Date of Decision : 17-02-1899

Acts Referred:

Evidence Act, 1872 — Section 35
Railways Act, 1890 — Section 59

Citation : (1899) ILR (Cal) 465

Hon'ble Judges : Prinsep, J; Francis W. Maclean, J; Ameer Ali, J

Bench : Full Bench

Judgement

O'Kinealy, J.—In this case the plaintiff is the father and the administrator of the estate of one Atindra Nath Mookerjee, who was fatally injured on the 27th of April 1896, while travelling as a passenger on the East Indian Railway between the stations of Secundrabad and Dadri. Atindra Nath Mookerjee died on the 5th of May 1896 of the injuries sustained by him, and the plaintiff charges that his death was caused by the neglect of the defendants. The relief claimed is of a two-fold character. The sum of Rs. 7,000 is claimed as damages for the loss resulting to the plaintiff from the death of his son, and a further sum of Rs. 8,000 is claimed by the plaintiff as damages for loss to the estate of Atindra Nath Mookerjee, such loss also having been occasioned by the neglect of the defendants. As to this latter portion of the relief claimed by the plaintiff I may say at once that no evidence has been given to show that any pecuniary loss or damage was caused to the estate of Atindra Nath Mookerjee by the neglect complained of, and I therefore, dismiss this portion of the claim.

2. The case for the plaintiff is that on the 25th of April 1896 Atindra Nath Mookerjee purchased from the defendants a 3rd class ticket from Bally in the District of Hooghly to Rawalpindi and proceeded on his journey; that on the 27th of April while on that journey the 3rd class carriage in which Atindra Nath Mookerjee was being carried caught fire owing to the negligence of the defendants and he was severely burnt in different parts of his body; that he was further injured by falling through the burning floor of the carriage, and in

consequence of these injuries he died on the 5th of May 1896.

3. Specific charges of the negligence and improper conduct, which the plaintiff brings against the defendants are set forth in the 2nd and 3rd paragraphs of the plaint. They are, first, that the fire was caused by a number of fire-works namely, bombs, which through the negligence and improper conduct of the servants of the defendants and in violation of the rules in that behalf had been allowed to be carried in the carriage by certain persons other than Atindra Nath Mookerjee; secondly, that at the time the fire took place the doors of the carriage were locked owing to the negligence and improper conduct of the defendants, and that thereby Atindra Nath Mookerjee was prevented from escaping from the burning carriage; and thirdly, that owing to defective arrangements in the connection cord and other appliances of the train to which the carriage was attached (such defective arrangements being the result of negligence and improper conduct on the part of the defendants) there was great delay in bringing the train to a stand and by reason thereof the escape of Atindra Nath Mookerjee from the burning carriage was prevented. Finally there is a general charge that the death of Atindra Nath Mookerjee was caused by the wrongful act, neglect or default of the defendant Company and their servants.

4. The defendants do not admit the plaintiff's right to institute this suit, or that they entered into any contract of carriage with Atindra Nath Mookerjee. They deny that they or their servants were guilty of any negligence, or unskillful or improper conduct regarding him. They deny that the doors on both sides of the carriage were locked at the time the fire took place, and they also deny that the arrangements in reference to the connection cord or any other appliances of the train were in any way defective. The second paragraph of the written statement is as follows: "The defendants admit that on the 27th of April 1896 certain fire-works or bombs exploded in a 3rd class carriage forming Part of the train known as the No. 5 up Bombay mail at mile No. 926 1/4 on their Railway between Secunderabad and Dadri stations, and several passengers in the said train were injured by the said explosion, but they deny that the said explosion was due to any negligence or improper conduct on the part of themselves and their servants or that their servants allowed or permitted the fireworks and bombs to be carried by any person in the said train as alleged in the second paragraph of the plaint."

5. From the evidence given at the hearing it appears that Atindra Nath Mookerjee, who was the son of the plaintiff, was a clerk in Government Service in the Arsenal at Rawalpindi. He was on leave of absence in the month of April 1896 during which time he lived with his father at Agarparah in the District of the 24-Pergunnahs. On the 24th of April 1896 he proceeded to join his appointment at Rawalpindi. On that day he went to Bally from Agarparah and stayed the night in the house of Sarut Chunder Chatterjee, the husband of the plaintiff's sister. On the next day Atindra Nath Mookerjee left for Rawalpindi by the train leaving Bally at about 2 o'clock in the afternoon. He obtained a 3rd class ticket for the journey which was purchased for him by Sarut Chunder Chatterjee. This afternoon train

is called the No. 5 passenger train, and it preserves that name all the way from Calcutta to Tundla near Agra where the Indian Midland Railway joins the Bast Indian Railway. At that place the No. 5 passenger train becomes the No. 5 up Bombay mail, which name it retains from Tundla on to Ghaziabad if not during the whole of the journey on to Kalka. At Tundla there are extensive changes made in the No. 5 up passenger train. The changes that were made in the train by which Atindra Nath Mookerjee was travelling appear to have been as follows: The engine which had taken the train from Calcutta to Tundla was taken off and another engine known as No. 96 class F was attached to the train. Two carriages, one belonging to the Great Indian Peninsular Railway and another to the Indian Midland Railway, were attached to the rear of the train; a brake-van belonging to the Indian Midland Railway, which was found to be defective at Tundla, was taken off and another brake-van substituted and the train was furnished with a communication cord. One end of this cord was attached to a steam whistle on the engine and the other to a wheel in the guard's van at the rear of the train. When the train was finally made up at Tundla it consisted of the engine No. 96 with its tender, both of which were fitted with hand brakes, a brake-van also fitted with a hand brake, fourteen carriages of different classes belonging to the Bast Indian Railway Company, two carriages belonging to the other lines which I have mentioned above and the guard's van at the end of the train. Before this train left Tundla the communication cord was tested and found to be in good working order, and so far as I can gather from the evidence the train, when it left Tundla, was in a fit condition for the journey before it. On the 27th of April 1896 the train arrived at Aligarh about noon; there it stopped 10 minutes, after which it proceeded on its journey to Secunderabad where it arrived shortly before 2 o'clock in the afternoon. It then proceeded on towards Dadri, and it was on the way between these two stations when the fire broke out which caused the deaths of Atindra Nath Mookerjee and eleven other persons. At this time the train was running on a down grade of one in five hundred at a speed of 33 miles an hour.

6. Leaving aside for the moment the documents which have been put in evidence as throwing light upon the occurrence of the fire, three witnesses have been examined with reference to it on behalf of the defendants. These are William Henry Dorry, a permanent way inspector in the employment of the defendants, who was travelling as a passenger in the train, William Gibson, the driver of the engine, and Carapiet John Hyrapiet, the guard of the train. There are also in evidence the statements of these witnesses made upon an officer's joint inquiry into the cause of the accident which was held at Ghaziabad on the 1st May 1896, and there is also the statement of Noor Ally, the brakesman of the forward brake-van who was also examined upon that inquiry. Derry seems to have been the first person who noticed the fire. He was in a second class composite carriage which was the fourth vehicle from the rear of the train. Two carriages belonging to the Indian Midland Railway and the Indian Peninsular Railway were the only carriages between him and the guard's van. He says that the first thing he noticed was a smell of oily burning jute; that upon perceiving this he looked out

of the carriage on both sides along the axle boxes thinking an axle box was running hot, but he saw nothing. About two minutes afterwards a volume of smoke passed the carriage in which he was sitting. He jumped up, and as he did so there was a loud explosion. He looked out and saw a ball of fire drop opposite the carriage in which he was on the right-hand side. He then goes on to say: "I immediately opened the carriage door seeing there was something seriously wrong. With my face in the direction of the engine I stooped and caught the cord and pulled it towards me. I pulled the cord into the carriage with me as much as I could with the object of sounding the whistle. I pulled in eight or ten feet. I then released the cord as it was useless my hanging on to it, having done all I could. I then looked to the guard's brake and saw him exhibit a red flag. I pulled in the cord that the slack might be on the brake-van side. I did not hear the whistle. When pulling in the cord I heard the noises of the passengers. When I saw the red flag I motioned to the guard to apply his brake and wind up the cord. He motioned back to me that he had done so. Seeing the confused state of the passengers I got out and walked to the rear brake-van on the foot-board telling the passengers not to be alarmed as the train was coming to a stand. I noticed the speed slackening when I got out of the carriage to go back. I saw the ball of fire at mile 925, telegraph post 16, gate No. 36. I went along the foot-boards back to the rear part of the brake. As soon as the train slackened speed sufficiently to allow me to run faster than it was moving, both I and the guard jumped out and ran ahead so that by the time the train had come to a stand we were practically opposite the burning vehicles. Before the train stopped the passengers were tumbling or jumping from the train. They were either tumbling or jumping I cannot say which it was. I cannot say exactly where the first person fell out of the train. I can say where he was picked up, about 925, telegraph post 20. The train came to a standstill at 926, telegraph post 15, nearly a mile from where I saw the fire."

7. Hyrapiet, the guard, says: "A loud report sounding from the front part of the train first attracted my attention.... As soon as I heard the report, I looked out and saw smoke issuing from the centre part of the train. I at once applied my brake and then pulled the communication cord. Then I took my red signal flag and waved it towards the driver. I opened the lobby door and put out the flag on the right side. I observed the permanent way inspector Mr. Derry beckoning me to put on my brake. He was in the third or fourth carriage from the rear brake. I observed men jumping out of the train. When I saw the men jumping out, I knew there was a serious accident, something radically wrong. I also then noticed men on the foot-boards. In the meantime the train slackened speed and came to a stand. It was just a few posts past mile 926. Before the train came to a standstill I jumped from the brake-van, ran towards the front part of the train, and saw the postal van and a third class carriage on fire. I immediately detached the third class carriage from the rear part of train and signalled to the driver to pull up the train. Before uncoupling the rear part I had seen Mr. Derry. He was standing by. I saw the driver coming from the engine. He said something to

Derry and then went back to the engine. Then I told the brakes-man to detach the two burning carriages from the front portion of the train. He did so, and I signalled to the driver to pull up ahead."

8. The account of the accident given by William Gibson, the driver, is as follows:

The whistle was opened wide. That was the first thing I noticed. I looked back without altering my position and saw the brakeman in the front brake showing the red signal. I immediately shut off steam and put the tender brake on, at the same time telling my second native fireman to put the engine brake on. When I had tightened up the tender brake I looked back upon that side of the train. I saw a number of people on the foot-boards of some carriages. I stepped to the left-hand side of the engine, reversed the lever, opened steam to the cylinders and steam to the steam-sanding gear. I then looked down on the left-hand side of the train and saw flames issuing from some of the carriages. As the engine slackened speed I jumped off and went back. Where I saw people standing on the foot-boards was towards the centre of the train. The brakeman was showing the red flag. I looked back on both sides of the train. I do not remember seeing the guard when I looked back. The place where I jumped off was on mile 926 near a culvert. I cannot tell exactly where by reference to the telegraph posts. After I got down, the train may have gone about ten yards. It was about 500 yards from the place where the whistle sounded to the place where the train stopped. I did not notice at the time what mile we were on when the whistle was sounded. I ascertained that afterwards, when we got to Ghaziabad, I enquired and got information from some one else. When I jumped off the engine and went back, I met the permanent way inspector Mr. Derry. I told him to detach the burning vehicles and I would draw the train up. He said he knew what to do and told me to go back to the engine and he would give me the signal. I met him seven or eight carriages from the engine. I went back to the engine and having received the signal from both Derry and the guard, and seeing that the passengers were clear off the vehicles, I drew the front part of the train for about fifty yards when I got the signal to stop. The burning vehicles were then detached from the front part of the train. I received signals and drew that portion of the train another fifty yards when I again received signals to stop.

9. According to the evidence of Mr. Derry, the explosion occurred on mile 925 at telegraph post No. 16, gate No. 36, and the train stopped with the burning vehicles at mile No. 926, telegraph post 15, nearly a mile from the place where he saw the ball of fire. According to the evidence of Gibson, the train was drawn up to a standstill within 500 yards of the place where the whistle sounded. Assuming that he means 500 yards from the place where his brakes came into full action, even then the train must have proceeded about a thousand yards after the explosion occurred before the driver's attention was attracted, and this delay has not been clearly explained. I am inclined to think that neither Derry nor the guard acted with the promptitude their evidence would seem to show, but it must be remembered that from the explosion to the stopping of the train

was hardly 2 1/2 minutes. Allowance must be made for the surprise of the moment, and a very slight delay in taking action would account for a good deal of the time during which the connecting cord remained unused and the whistle silent. This delay may have been partly due to the fact that the guard stopped to apply the brake to his own van before pulling the communication cord, or it may have been partly due to interference with the communication cord by Derry and the other passengers in the train, when the accident occurred. Indeed the connecting cord itself may have become defective owing to the explosion, for though the whistle was undoubtedly sounded, it is not clear by whom the cord was pulled at the time or from what part of the train that was done. I can find nothing to blame in the action of the train officials from the time the explosion took place till the train came to a standstill. I think they did the best they could under the circumstances.

10. What happened after the train stopped and the burning carriages were detached was as follows: The front part of the train was taken by the driver Gibson to Dadri Station. He says it was ten or twelve minutes past two in the afternoon when the train was brought to a standstill; that about twenty minutes after that he left for Dadri and reached there at about quarter to three. From there he sent two telegrams to Ghaziabad for additional carriages to convey the wounded passengers and for medical assistance. Having done this, he proceeded back to Dadri with a bhistee and some porters, arriving there at about a quarter to four. In the meantime what happened at the scene of the accident was this: The guard and some of the European passengers went back on the line towards Secundrabad for the purpose of picking up the wounded, but finding it impossible to carry them back to the train the guard and Derry with the assistance of the European passengers and some coolies shunted the guard's van back to gate No. 36 which Derry fixes as the place at which the explosion occurred. What took place with reference to assisting the injured persons is told by the guard Hyrapiet and by Derry. Hyrapiet says: "After the first portion of the train left for Dadri I went with some military officers who were passengers in the train to search for the persons who had fallen out of the train. I found a man very badly burnt. He was lying near the fencing wires. This was about 150 yards from the brake-van and about 30 or 40 yards further from the burning carriages which were the 7th and 8th carriages from the rear of the train at the time of the accident." Hyrapiet then goes on to say: "There was an officer with me, I think Captain Maclean, when I found out the first man. There was a Major Grant also there. This officer Maclean went with me when I went to search for the men. There were three coolies, but no other Europeans. I volunteered to carry the wounded man to the brake-van. The officer picked up the man and put him on my back and I carried him to the brake-van. I don't know the name of this wounded man. Captain Maclean accompanied me to the van. We got hold of a blanket, put the man into the blanket, and lifted him by holding the four corners of the blanket into the van. I was completely done up with the heat and the picking up of the man. I consulted the military officers and decided that it was advisable to detach the

van and push it along the line. I did this with the assistance of the coolies and the military officers. There was another man carried by a military officer in his arms. This other man was found over the fencing wires about 50 yards from the man I picked up. He too was carried to the brake-van. We hand-shunted the brake-van down the line and picked up the men who were lying on both sides of the line, and put them into the van. I picked up about 14 or 15 altogether. We shunted the brake-van down to gate No. 36; that was where I originally heard the report. I say that because there was a third class carriage door lying there. The report which I heard was the bursting of a third class carriage door. The doors and some of the splinters were lying there then, I cannot say if it was a door belonging to a third class carriage or to the combined postal and third class van. I cannot say if I found more than one door. There was a door end a lot of broken pieces. They were on one side of the line almost opposite the gate on the right facing Dadri; that would be on the east side of the line. There was a passenger completely charred and burnt almost shapeless just about a few yards from there. He was dead. I thought it best to leave the body there with a man in charge." Then he says: "I forgot to say that I found four bamboo bombs which I locked up in my box and gave to the police. These were four pieces of bamboo about six or seven inches long, hollowed in the centre and the bamboos were burnt. They were slips of bamboo. From what I picked up I could say that the diameter of the bamboo was about 2 1/2 inches. At that time I did not know what they were, but the military officer told me to look after them and lock them up in my box. I could not swear to the exact length of the pieces of bamboo. I should say it was between six and eight inches. I subsequently made them over to the police. These were picked up almost where the dead man was, a little past the gate almost close to where the carriage door was found." Then he says: "An English-speaking Bengali clerk was picked up half way between the gate house and where the train stopped. I can't say if there were more Bengalis than one amongst those I picked up. I noticed a few Marwaries were there. The Bengali lad was picked up clear of the rails. I cannot say exactly the particular spot. At that point the fencing would be about 18 or 20 yards from the rails." Having got all the wounded passengers into the van the guard tried to relieve the sufferings of the wounded, and with the aid of some coolies the van was shunted back to the rear portion of the train. By that time the driver had returned with the front portion of the train from Dadri, and oil was obtained from him for the purpose of putting upon the wounds of the injured persons.

11. Derry's account of the picking up of the wounded and dying is this: After he had sent the driver to Dadri he noticed that one of the passengers who had jumped out was being picked up by another passenger. He says: "I went to his assistance. The guard was there too. The wounded man was brought into a second class carriage and I attended to him. One of the gentlemen passengers and myself then walked back to attend to the burnt people that were lying on the road. The brake-van was uncoupled and shunted back. This gentleman and myself went on ahead and the brake-van followed us. We walked back to gate

No. 36 and gave water to the wounded and shade to those lying in the sun. My gangmen, line men, they were working close by, they came running up, they had blankets and we tied them to trees to give shade from the sun. I saw all the injured passengers; amongst them I saw one young Bengali Babu. I cannot say what his name was. There was only the one Bengali injured. He was about 40 or 50 yards from the gate No. 36 on the Ghaziabad side. He was lying on the left-hand side in what we call the three foot way. That would be about 6 feet from the rail on the left-hand side of the line. He was conscious. I spoke to him, he spoke to me. I gave him some water and he said I had saved his life. I noticed all his body from above his neck down to his waist all was burnt. He was put into the brake-van along with the others." Before all the wounded were picked up, Derry went back and got oil from the driver which he sent back to the brake-van where the wounded were lying. He then attended to the line.

12. Atindra Nath Mookerjee himself made two statements with regard to the accident, one on the 28th of April, and the other on the 30th. They were taken down by Inspector Fitzpatrick of the Government Railway Police, and these statements are to the effect that he was in the carriage where the explosion occurred; that it was an explosion of fire-works which were being carried in the compartment in which he was, and the effect of the explosion was that the seats and planks underneath the carriage gave way and he was thrown down senseless. He says that he did not see the fire-works in the compartment, and was not aware of their presence until the explosion took place. There were some 12 or 14 passengers in the compartment with him. The two statements do not agree in respect to the place in which Atindra Nath Mookerjee was at the time of the accident, and when we consider his condition at the time they were made and the extreme suddenness of the accident, very little definite information can be expected from them. In the first statement he says that he was in a compartment in the front of the post-office van, in the second statement he says that the compartment in which he was travelling was behind the post office, and I am satisfied that the second statement is true. None of the witnesses who were examined at the trial can speak to the compartment where the explosion took place, but it is quite clear that when the train came to a standstill, the post-office van and the carriage to the rear of it were in flames. The front part of the post-office van, though filled with smoke, was not in a blaze at the time the train came to a standstill, nor was the rear of the 3rd class carriage immediately behind, although the front part was. We have the additional fact that there was a strong nearly head wind against the train, the effect of which would be to drive the fire to the rear instead of the front. Taking the whole evidence into consideration, I am of opinion that the explosion took place in the 3rd class compartment in the rear of the post-office van.

13. As to the cause of the explosion I have no doubt that it was caused by the fire-works which were carried by one or two of the passengers in the compartment. It was suggested for the plaintiff that the gas cylinder, which was carried in the postal-van, was defective, and that it was the gas in the cylinder

which exploded and caused the accident; but I believe that the explosion of the gas cylinder took place after the train came to a standstill and not before.

14. It was contended for the plaintiff that the evidence showed that the communication cord was defective and had failed to sound the whistle when pulled, and that in any ease steps had not been taken in proper time to bring the train to a standstill. Now as I have already said I believe that there was a considerable delay in attracting the driver's attention, but I do not believe the cord was defective before the explosion. It was as I have said tested and found in good order at Tundla, and there is nothing to show it did not continue in good order till the explosion occurred. That the whistle was sounded by the communication cord being pulled Mr. Gibson swears to and I believe him. He impressed me as being on the whole a careful and accurate witness. Who was pulling on the cord when the whistle was sounded is not clear. If the communication cord was not defective before the explosion, which was the cause of the accident, no defect which could be attributed to the explosion would, I think, be sufficient to support this part of the plaintiff's case; but even if I am wrong on that view it does not seem to me that the plaintiff's case would be advanced in the least. Assuming the explosion to have taken place at gate No. 36, I think it is clear that Atindra Nath Mookerjee either fell out of or tumbled out of the train within half the distance from that gate to where the train came to a standstill, so that even if the train had been brought to a stand within half the distance in which it was, the effect so far as Atindra Nath Mookerjee is concerned would have been the same. There is no evidence before me to show that his death was due in any respect to injuries caused by his falling out of the train. It was solely due, as I gather from the evidence of the doctor, to the injuries which he received from the burning, that is to say, it was due to the injuries which he received while in the carriage at and after the explosion occurred, and so far as I can see no quickness in stopping the train could have prevented those injuries.

15. It was also said that the brake power upon the train was insufficient. As regards this, the evidence satisfies me that the brake power was ample for the train, and that even had the train been fitted with the steam brakes, as it was contended for the plaintiff it should have been, there would not be more than 5 or 6 seconds gain in stopping the train, and I do not think that additional gain would have in any respect saved Atindra Nath Mookerjee from the injuries he received and which were the cause of his death. It is true that the Agent of the East India Railway seems to have considered it a matter of regret that the engine had not been fitted with steam brakes, and that was relied on before me as an admission that the brake power was insufficient, but I am inclined to place more reliance on the evidence of the practical men who were called at the trial than to the remarks on this subject contained in the report to the Directors. It was also said that the engine itself was of an obsolete type and was insufficient, but I do not think the plaintiff has made out a case for relief on this ground. Neither do I think that the plaintiff has made out a case on the ground that the doors on both sides of the train were locked at the time of the accident. That, I believe, was not

the case. It is true the evidence shows the carriage doors were provided with catches at the bottom to prevent the doors from flying open and these catches would in the ordinary course of things be fastened, but I cannot hold that the use of these catches which were provided for the safety of the passengers is evidence of neglect or default on the part of the Railway Company, merely because they may have been the cause of retarding the escape of the passengers from the burning train.

16. It was also contended by the plaintiff that great delay took place after the accident in helping the wounded and in providing the medical assistance, and it was suggested that this delay had contributed to the death of the plaintiff's son. I do not think the suggestion is well-founded. Besides, it forms no part of the case made by the plaintiff in his plaint, and I cannot, therefore, take it into consideration.

17. One important matter still remains, and that is as to the causes which led to the explosion. I gather from the evidence that the fire-works were taken on the train at Aligarh (which station was reached at noon on the 27th) by two passengers, father and son, named Ahed Ally and Golam Hussain. It appears that between Aligarh and the scene of the accident the passengers smoked in the compartment. That seems to be in accordance with the rules of the Company, and the evidence seems to point to this that the smoking was in some way the cause of the explosion. Golam Hussain appears to have been killed on the spot, and upon him was found a piece of paper. This piece of paper when taken from the body of Golam Hussain was given to the guard Hyrapiet and by him handed over to the Police. The Railway Police Inspector, who made the investigation into the cause of the accident, arrived at the place where it occurred in the morning of the 28th. He says in cross-examination that he found a ticket and an order from a zemindar of Sonepet ordering the fire-works. He ascertained, he does not say how, that they were what are called Sangolas, that is bombs tied up with rope, and Catherine wheels. He then says: I don't remember if there was anything else.

Q.-Was a list prepared of what you ascertained were the fire-works carried at the time?

A.--I don't recollect. I say a list of fire-works was obtained. I think I saw that list.

Q.--When did you see it? How did you see it?

A.--I think it was found in the possession of the maker of the fire-works who was thrown out dead, and who still held this list and a bag and this order. I did not see the dead bodies. They were disposed of before I came.

18. And he goes on to say that he got his information from his Subordinate Police officers, Railway Police, and, he thinks, from Hyrapiet, the guard of the train. In answer to further questions on this point he said that Catherine wheels vary from a foot in diameter to 6 inches, but he did not try to ascertain what the Catherine

wheels carried in the compartment were like, nor did he personally make any inquiries at Aligarh respecting them. He said inquiries were made under his orders but by whom he does not remember. Then he is asked:

Q.--Did you make any inquiries as to how these fire-works were alleged to have been carried?

A.--Yes.

Q.--How were they carried?

A.--They could not be noticed; they were concealed.

Q.--Did you inquire as to in what they were carried?

A.--The men were dead.

Question repeated.

A.--No. I could not find out whether they were in baskets or in cloths. As far as I can remember I could get no information as to this.

Q.--You said that they were being carried concealed, Do you say so because you could not ascertain from anybody if they had seen these fire-works?

A.--I say so because even those who were in the compartment did not see the fire-works, including Atindra Nath.

Further on he is again cross-examined on this point.

Did you read the list of fire-works which you say was found?

A.--I had it read if it was found. It was in vernacular.

(To the Court)-I can't read that vernacular in which it was written. I don't remember to have had it read to me.

Q.--Did you report that a lot of fire-works was being carried?

A.--I may have done so.

Q.--Did you report that the order giving quantity and so forth had been found?

A.--I may have done so.

Q.--What is your belief?

A.--I can't remember at this distance of time what I wrote.

Q.--What is your belief as to the quantities sent?

A.--The first idea was all the fire-works mentioned in the list found were being carried, but it was afterwards found that a part of them were carried by road and those in the train were samples. I said a lot, my idea was-(stopped) that means a large quantity.

In re-examination he says:

I said one of these men was the maker of the fire-works. It was from his shops the fire-works were going. The man we found on inquiry was ordered to supply them.

Then this is put to him.

Q.--There were no traces of fire-works after the accident.

A.--The guard, I think, picked up the bits.

19. I think that this witness and the guard Hyrapiet were inclined when they gave their evidence to minimise the quantity of fire-works which were carried in the passenger compartment on the 27th of April. In the report which Fitzpatrick made on the 28th of April he states that it is uncertain where and how the fire commenced; that the injured persons who were then alive in hospital were too far gone in pain to give clear depositions as to where and how the fire originated. He then goes on to say: "It is possible the post-office van was first set on fire by a naked light, carelessly thrown match, or a chilam. On the other hand the compartment in rear of the post-office van contained a lot of fire-works being carried from Aligarh to Sonpet against rule and regulation by two persons and whose names are Ahed Hussain, the son of Faizbux, and Golam Hussain, the son of Ahed Hussain, fire-work makers of Jalali, Aligarh. The order on Ahed Hussain for fire-works was given by one Kedar Ally Khan of Chikari, Sonpet, and the"-- (the report is here torn but I take the word to be "list" or "order")--"giving quantity and so forth has been found, but both Ahed Hussain and his son are dead, so no prosecution against them can ensue. But whether the fire in the post-office set fire to the fire-works or vice versa remains to be proved by inquiry. This important point will be cleared up by the 30th when an officers' joint inquiry will be held."

20. Now it is clear from the evidence of this witness, and his report, that the first impression of those inquiring into the accident, was that there was a large quantity of fire-works being carried in the train that day, and that impression is supported by the extent of the damage caused by the explosion," The carriage panels were iron lined with wood, and the force of the explosion was sufficient to blow out the doors of the compartment to a distance of 10 feet from both sides of the line. The compartment was completely wrecked, and Hyrapiet in his evidence gives the state of the burning carriages at the time the train came to a standstill. He says in cross-examination: "At the time when the train came to a stand no attempt was made to save the mail. We could not do anything. The fire had taken such a command over the things that we could not do anything, but the whole thing was not ablaze. You could approach the two carriages at the ends--the post-office at the front end and the 3rd class at the Secundrabad end." And Derry in his evidence also says that the two carriages were in flames at the time when the train came to a stand.

21. Now it seems to me that to do such amount of damage in so short a time there must have been a considerable quantity of these fire-works in that compartment, and the hearsay evidence, for it seems to be nothing more, upon which Fitzpatrick relies now as his reason for supposing that a part of the goods mentioned in the list had been sent by road, and that only a portion had been carried in the train is not satisfactory. He suggests that they must have been concealed, because Atindra Nath Mookerjee says he did not know whether the fire-works were in the carriage until he heard the explosion. But there was probably nothing to turn the attention of Atindra Nath Mookerjee to the luggage carried by any other passenger into the compartment.

22. The evidence, as to the remains of the fire-works which were found after the accident also tends in my opinion to show that the quantity of fireworks carried in the compartment was considerable. Hyrapiet, the guard, says that he picked up four bamboo bombs which he locked up in his box, "slips of bamboos which were 6 to 8 inches long, the diameter of the bamboo would be about 2 1/2 inches." He picked these up on the 27th and locked them up in his box. In his evidence before the joint inquiry given on the 1st of May 1896, when nothing had arisen to cause a desire to minimise the quantity, he stated this--"I picked up on the side of the line three bamboos with holes in the centre called bombs, about 14 inches long, which had exploded, and other bamboos used as torches for illuminating marriage processions, all burnt. Derry in his evidence says that he picked up two or three fire-work bamboos, about 8 inches long and 1 inch in diameter, wrapped round with a peculiar twine, which had exploded. He says he picked up two or three on that day and more were picked up the next morning. And in his statement before the officers' joint inquiry he said he saw several exploded bombs picked up near the gatehouse No. 36, he also picked up some himself the next morning. Further it is extremely probable that besides the exploded bombs, which were picked up on the line on the 27th and the 28th, assuming that all those on or near the line were picked up [which is not clear, as no search seems to have been made for them other bombs and fire-works may have exploded and been consumed within the carriage.

23. On the whole the evidence leads me to the conclusion that a considerable quantity of fire-works was in the carriage at the time of the explosion. An expert witness, who is a pyrotechnist, was called for the purpose of showing that a small quantity of bombs would be capable of doing the damage which was done. I do not think this expert's evidence is very satisfactory. But even if a small quantity of bombs would be sufficient to do the damage that was done that does not necessarily give any reliable indication of the quantity of fire-works which was carried in addition to the bombs.

24. The question then is whether the defendants are responsible for the fire-works having been taken into and carried in the compartment of the passenger carriage as they were on that day, a carriage in which it was the practice for the passengers to smoke and therefore to have fire of some kind or another.

25. There can be no doubt that from the moment those fire-works were introduced into that carriage the lives of the passengers were in danger. The result of the explosion shows that from that moment the compartment became practically a powder magazine. It, therefore, ceased to be from that moment a vehicle fit or proper to be used for the purpose of carrying passengers. The question is, are the defendants responsible for that, and to determine this question it is necessary to inquire, in the first instance, what is the duty of the Railway Company with respect to providing for the safety of their passengers.

26. In the case of *Christie v. Griggs* (1809) 2 Camp 79, the facts were these. The plaintiff was travelling to London as a passenger on a stage coach belonging to the defendant when it broke down and he was greatly bruised. The first Court imputed the accident to the negligence of the driver, the second to the insufficiency of the carriage. The accident was caused by the axle-tree of the coach having snapped asunder, and Sir James Mansfield, in directing the jury upon the question as to the sufficiency of the coach, stated that the defendant "did not warrant the safety of the passengers. His undertaking as to them went no further than this that, as far as human care and foresight could go, he would provide for their safe conveyance." In *Read-head v. Midland Railway Company* (1867) L.R., 2 Q.B., 413, and on appeal (1869) L.R., 4 Q.B 379, which was a similar case, the Court, while of opinion that a carrier does not warrant the safety of his passengers, laid down that the obligation to take due care should be attached to the contract between them; and they went on to say--""Due care," however, undoubtedly means, having reference to the nature of the contract to carry, a high degree of care, and casts on carriers the duty of exercising all vigilance to see that whatever is required for the safe conveyance of their passengers is in fit and proper order. "In the case of *Ford v. London and South-Western Railway Company* (1862) 2 F. & F 730, the plaintiff was injured by the tender of the train being thrown off the line, and one of the causes Was alleged to be the defective tyre of one of the wheels of the tender. Erle, C.J., in his direction told the jury: "The action is grounded on negligence. Negligence is not to be defined, because it involves some inquiry as to the degree of care required, and that is the degree which the jury think is reasonably to be required from the parties, considering all the circumstances. The Railway Company is bound to take reasonable care to use the best precautions in known practical use, for securing the safety of their passengers." In the case of *Burns v. Cork and Bandon Railway Company* (1863) 13 Ir. Law 543, the Court laid down the principle that "it is the duty of a carrier to provide for his passengers a vehicle which shall be free from defects as far as human care and foresight can provide, and perfectly road-worthy." In the case of *Hyman v. Nye* (1881) L.R., 6 Q.B.D., 685, the defendant was a job master from whom the plaintiff hired a landau for a drive from Brighton to Shoreham and back. After having driven some way, and whilst the carriage was going down hill and slowly over a newly-mended part of the road, a bolt in the under part of the carriage broke. The splinter-bar became displaced; the horses started off; the carriage was upset; the plaintiff was thrown out and

injured, and he brought an action for compensation. No fault could be imputed to the horses or to the driver. The learned Judge at the trial told the jury in substance that the plaintiff was bound to prove that the injury which he had sustained was caused by the negligence of the defendant, and if in their opinion the defendant took all reasonable care to provide a fit and proper carriage (which opinion I may point out is to be arrived at on evidence given before them, because the jury can only deal with the facts which are proved at the trial) their verdict ought to be for him. Being thus directed, the jury found a verdict for the defendant; and in particular they found that the carriage was reasonably fit for the purpose for which it was hired, and that the defect in the bolt could not have been discovered by the defendant by ordinary care and attention. The plaintiff obtained a rule calling upon the defendant to show cause why there should not be a new trial on the ground of misdirection, and that the verdict was against the weight of evidence, and the rule was made absolute. Mr. Justice Lindley in his judgment, after referring to a number of authorities says: "A careful study of these authorities leads me to the conclusion that the learned Judge at the trial put the duty of the defendant too low. A person who lets out carriages is not, in my opinion, responsible for all defects discoverable or not; he is not an insurer against all defects; nor is he bound to take more care than coach proprietors or railway companies who provide carriages for the public to travel in; but in my opinion, he is bound to take as much care as they; and although not an insurer against all defects he is an insurer against all defects which care and skill can guard against. His duty appears to me to be to supply a carriage as fit for the purpose for which it is hired as care and skill can render it; and if whilst the carriage is being properly used for such purpose it breaks down, it becomes incumbent on the person who has let it out to show that the break-down was in the proper sense of the word an accident not preventible by any care or skill. If he can prove this, as the defendant did in *Christie v. Griggs* (1809) 2 Camp., 79, and as the Railway Company did in *Read head v. Midland Railway Co.* 1 L.R. (1867) ., 2 Q.B., 413; and on appeal (1869) L.R., 4 Q.B., 379, he will not be liable; but no proof short of this will exonerate him. Nor does it appear to me to be at all unreasonable to exact such vigilance from a person who makes it his business to let out carriages for hire. As between him and the hirer the risk of defects in the carriage, so far as care and skill can avoid them, ought to be thrown on the owner of the carriage. The hirer trusts him to supply a fit and proper carriage; the lender has it in his power not only to see that it is in a proper state, and to keep it so, and thus protect himself from risk; but also to charge his customers enough to cover his expenses."

27. The cases which I have cited are cases in which the dangerous condition of the vehicle was owing to a defect in some part of the vehicle itself; but it seems to me that the principles laid down in those cases are applicable to the case before me and are those by which I must be governed. A vehicle may become insecure and dangerous as well from having dangerous substances placed therein as from a defective wheel or axle or bolt, and may cease to be road-

worthy from the one cause as well as from the other, and if the causes owing to which in the case before me the carriage in which Atindra Nath Mookerjee was being carried by the defendants became insecure and dangerous and unfit for the conveyance of passengers, were causes which could have been prevented from becoming effective by care and skill on the part of the defendants, then that care and that skill the defendants were bound to exercise.

28. It was stated on behalf of the defendants that they could not prevent the introduction of the fire-works into the train, and the case was likened to a person entering a carriage with a box of matches or a piece of dynamite in his waist-coat pocket. But there is no evidence to show that the defendants had taken any steps to prevent passengers from taking fire-works with them into the passenger trains, and I cannot take the case before me as analogous to the case put in argument, the very statement of which shows how the explosives were concealed. There is nothing before me to show how the fireworks were taken into the train or that they were in fact concealed. The expressions found in some of the reports that the fire-works were carried against rule and regulation, or surreptitiously or clandestinely, are of no value as evidence in this case of the manner in which they were taken into the compartment, nor are the reasons given by Fitzpatrick for saying that the fire-works were concealed there. These expressions are at the most expressions to the effect that they were being carried without the knowledge of the Railway officials.

29. Even where it is shown that the explosives have been well concealed as in the illustration put in argument, I think it may fairly be said that, quite apart from the individual case, due care should have been taken by the defendants to impress upon their staff the necessity of being vigilant in preventing the carriage of fire-works, and also to bring home to their passengers that such an act would be severely punished, because the very fact of that having been done would, I have no doubt, tend to prevent even the secret carrying of explosives. It is not, however, necessary to pursue this hypothetical case. In the case before me I am asked to presume that the defendants took due care to prevent the carrying of these fire-works and that the person who carried them concealed them in such a way that they could not be discovered by the railway servants at Aligarh. I cannot presume these matters in favour of the defendants where the circumstances are such as to call upon them to show what care and caution they in fact did take.

30. I was told that every man must be presumed to know the law, that it must therefore be presumed that the man who took the fire-works into the train, especially as he was a maker of fire-works, knew he was committing a penal offence, that therefore it must be presumed he took every means to conceal his possession of these fire-works from the railway officials, and that in fact he was successful in doing so. I cannot rest the decision of a pure question of fact upon supposition of this character. No doubt every man must be supposed to know the law, and if Golam Hussain were being sued or prosecuted for introducing these

fire-works into the carriage, his plea of ignorance of the law would be no excuse for his conduct. But I think the maxim is limited to the determination of the civil or criminal liability of the person whose knowledge is in question and cannot be legitimately made use of in a case, such as the present, where the parties are entirely different and distinct from him. Even if he did know the law and knew he was committing a penal offence, there is no reason why I should assume further that he knew he must carefully conceal these fire-works from the railway officials. He may have acted on the belief (rightly or wrongly entertained) that the railway officials would not interfere with him, and that there was no necessity to conceal the fire-works.

31. That the introduction of a considerable quantity of fire-works into a railway carriage is not a thing which may not be prevented by the exercise of that due care which, according to the principles laid down in *Readhead v. Midland Railway Co.* (1867) L.R., 2 Q.B., 413; and on appeal (1869) L.R., 4 Q.B., 379, and *Hyman v. Nye* (1881) L.R., 6 Q.B.D., 685, the defendants are bound to take, is shown by the course taken by the defendants themselves after the accident. In the seventh paragraph of Mr. Dring's report to the Agent to the East Indian Railway Company, dated the 6th of May 1896, respecting the accident and the finding of the officers' joint inquiry, he says this: "A notice has since been issued to the staff to exercise great care in passing the luggage of passengers, and I have already received advice that in two instances passengers have been detected carrying fire-works: one case at Mogul Serai in which a Native Deputy Magistrate is said to be the offender, and a second case at Burhan." The fact that within one week two cases of the carrying of fire-works were detected after the notice was issued to the staff to exercise great care, shows that the carrying of fire-works by passengers into the compartment in which they travel is a thing which may be prevented by the exercise of that high degree of care which the Railway Company are bound to exercise for the safety of their passengers; and if that be so, I am of opinion that where loss of life and damage has resulted from the explosion of fire-works in the compartment of a passenger carriage it should be shown that due care was taken by the Railway Company to prevent the fire-works being carried in that manner.

32. The question at issue then resolves itself into this: Was there due care within the meaning of those words as defined in *Readhead v. Midland Railway Co.* (1867) L.R., 2 Q.B., 413; and on appeal (1869) L.R., 4 Q.B., 379, and *Hyman v. Nye* (1881) L.R., 6 Q.B.D., 685, taken by the defendants for the purpose of preventing these two persons, Ahed Hussain and Golam Hussain, from taking these fire works into the compartment with them at Aligarh on the 27th of April 1896? Not a particle of evidence, upon this part of the case, has been given by the defendants. Their contention is that they are not bound to give any such evidence and they say that it lies upon the plaintiff to show that they had not taken that due care and caution which they were bound to do to prevent the carrying of these explosives in the passengers' compartment. I do not think this contention is sound. If they had, previous to this accident, issued instructions to

the staff to take care and prevent the carrying of fire-works, especially during the marriage season, or if as a matter of fact any precautions were in the habit of being taken in the Aligarh Station to prevent the carrying of fire-works in the passenger compartment, these are matters peculiarly within the knowledge of the defendants themselves, who have the sole control of the traffic and alone know the methods by which that traffic is regulated. It is, therefore, in my opinion the duty of the defendants to produce the evidence on these matters to show that they had exercised due care and caution, and that it is not for the plaintiff to show that they did not. In the case of *Christie v. Griggs* (1809) 2 Camp., 79, the plaintiff having proved that the axle-tree snapped asunder at a place where there is a slight descent, from the kennel crossing the road, that he was in consequence precipitated from the top of the coach, and that the bruises he received confined him several weeks to his bed--there rested his case. Best, Sergeant, contended strenuously that the plaintiff was bound to proceed further and give evidence either of the driver being unskillful, or of the coach being insufficient. But it was held by Sir James Mansfield that the plaintiff had made a *prima facie* case by proving his going on the coach, the accident, and the damage he had suffered. That was the course taken in *Readhead v. Midland Railway Co.*, as I read the report in L.R., 2 Q.B., 413; and it is the course directed by that class of cases of which *Scott v. London Dock Company* (1865) 3 H. & C, 596, is one of the best known examples. It appears that the train was a crowded train, but it had no more than its proper complement of passengers according to the guard, and it has not been suggested that there was any crowding or confusion at Aligarh Station under cover of which the fire-works might have been introduced into the carriage notwithstanding the vigilance of the railway officials. In fact, so far as the evidence before me goes, there is nothing to show that during the ten minutes' stay at Aligarh any passengers left the train, or that any entered the train except the two who carried the fire-works. There is no evidence before me to show that the defendants took any precaution whatever which might have resulted in preventing the introduction of these fire-works into the passenger compartment at Aligarh Station on the 27th April. Mr. Dring, the Traffic Manager, who was called as a witness and who wrote the report I have above referred to as to the precautions taken after the accident occurred, was not asked a single question on this subject. I must therefore come to the conclusion that the defendants did not exercise that high degree of care in providing for the safety of their passenger Atindra Nath Mookerjee which the law imposes upon them, and that therefore they are liable to the plaintiff in this suit for the damages which he has sustained by the loss of his son.

33. With regard to the amount of damages I take the rule to be laid down in *Narayan Jetha v. Municipal Commissioners of Bombay* ILR (1891), 16 Bom., 254. There the Court says: "As regards damages, in cases of this nature, distinct evidence of the loss sustained or benefit expected is not necessary. The jury may look at all the circumstances of the case and especially at the position of the parents and age of the child, and call in aid their own experience in arriving at

their conclusions."

34. Now in this case the father has no settled income. He is about 48 years of age and suffering from paralysis. He was a schoolmaster, but owing to the disease from which he is suffering he had to give up his appointment. He also seems to have made some money by writing books, but at present he derives no income from that source, and his illness has involved him in debt. He has two other children living, but they are both infants, and it was to his eldest son Atindra Nath Mookerjee that he seems to have looked for his main support in future. That that son would be so to the best of his ability no one knowing the customs of this country can doubt. As for Atindra Nath himself, he entered Government service in 1894. He was in temporary employment till the beginning of 1896, when he was appointed permanently as a clerk in the Arsenal at Rawalpindi, on a salary of Rs. 25 a month. From this time onward one may, I think, consider that his future career was fairly assured. He appears to have lived at Rawalpindi in the house of his uncle who is employed in the Commissariat Department there, and to have taken sick leave for two months in February 1896. He was on his way to rejoin his appointment when he met with the accident which resulted in his death. In examination-in-chief the plaintiff said that his son used to send him Rs. 20 or Rs. 22 a month. In cross-examination he said "from 1894 he went on remitting me Rs. 10, 15, or 20 at a time, but after being permanent he sent me money once or twice. He sent me last Rs. 20 or Rs. 22. I cannot say when it was." Now I am satisfied that if Atindra Nath had lived he would have been a substantial support to the plaintiff, and looking at all the circumstances I think Rs. 1,500 would be a fair sum which the plaintiff should receive as damages in this case. I say which the plaintiff should receive because in dealing with the costs of this suit I think I am bound to see that he shall receive that sum. If I give the costs of this suit to the plaintiff merely as between party and party, his attorney and client costs of this protracted trial would, in all probability, exhaust the larger portion of it. In similar cases where larger damages were given than I feel disposed to give in this case, Westropp, C.J., ordered the defendants to pay the costs of the suit as between attorney and client. See *Sorabji Ratanji v. G.I.P. Ry. Co.* (1870) 7 Bom., (O.C.) 119, note, and *Ratanbai v. G.I.P. Railway Co.* (1870) 7 Bom 120, note; and on appeal (1871) 8 Bom., (O. C), 130. I shall follow those precedents in this case.

35. There will be a decree for the plaintiff for the sum of Rs. 1,500 with costs on scale 2 as between attorney and client.

36. From this decision the defendant Company appealed.

37. The Advocate-General.--Even on the findings of the learned Judge, the appellants are entitled to judgment; but they do not admit that the findings are properly arrived at.

38. Railway Companies are not insurers of their passengers; so that the facts alleged in the plaint do not constitute a breach of duty on the part of the

appellants. Unless the plaintiff can put his case so high as to say that the defendants should search every passenger entering a carriage, he cannot succeed in this action. In order to make the defendants liable, there must be a neglect on their part to take some reasonable precaution; and the breach of duty alleged should be specifically stated. There must be also a scienter on the part of the defendants; but in both these respects the plaint is demurrable.

39. It is not for the defendants to disprove negligence on their part, it is for the plaintiff to prove it; and although a high degree of care is required of a Railway Company in the carriage of its passengers, that cannot mean an impracticable degree of caution. The fact that after accident some precaution was taken which was not taken before it is no evidence, by itself, of negligence before the accident--Hart v. Lancashire & Yorkshire Railway Company (1869) 21 L.T 261; and in order to make the defendants liable, it must be shown what precaution they omitted which they ought to have taken.-Daniel v. Metropolitan Railway Company (1871) L.R., 5 E. & I. Ap., 45. The plaintiff must prove the neglect of some duty by the defendants, or want of due care, or knowledge on their part that something dangerous was being carried.

40. It was not possible for the Company's servants to examine the luggage of every passenger. Section 58 of the Indian Railways Act, 1890, provides that every passenger shall, on request, deliver to the railway servants an account in writing containing such a description of the goods he is carrying as may be sufficient to determine what freight he may be charged for them. There is no power to search the luggage; and it is only in cases where there are grounds for suspicion, that a package may be opened. It was a criminal offence to take dangerous goods into a passenger compartment and in no case can the wrongful act of a third party make the Railway Company liable.

41. Mr. Hill on the same side: The appellants did not contract to carry the deceased safely or securely, but only safely so far as reasonable care and foresight could avail. That does not mean the utmost possible foresight that a human being could exert. It means all that is reasonably and practically possible--See Nugent v. Smith I L.R.(1876), 1 C.P.D., 423 (437), and that was a case of the carriage of goods, which were completely under the carrier's control. The expression "utmost possible care" must be construed as the "utmost practicable care"--Moss v. Smith (1850) 9 C.B., 94 (103).

42. As to the legal obligation on the appellants apart from contract: The plaint alleges that they allowed fire-works to be carried: but the scienter is wanting. That being so, the legal obligation of the Company must be based on their knowledge or on reasonable grounds of suspicion. There is no guarantee to one passenger that another passenger carries no dangerous goods. Even if the law had cast that guarantee on the Company, it would keep it within the bounds of justice, so as not to impose impracticable duties.--Readhead v. Midland Railway Co. L.R.(1867) L.R., 2 Q.B., 413; and on appeal (1869) L.R., 4 Q.B., 379. In order to constitute negligence, there must be a legal duty to exercise control, and a

breach of that duty. But in all cases reasonable conduct is the ultimate test. The degree of control is the paramount factor in determining what is or is not negligence. That factor is not merely determinant as to the proof, but it even changes the nature of the obligation. The reason why the liability of a carrier is so much stricter as regards goods than as regards passengers is because of his greater control over goods. The fallacy in the reasoning of the learned Judge in the Court below lies in the expression "allowed fire-works to be carried," which must be taken to mean that the carriage of fireworks was preventable by the exercise of reasonable and practicable precautions.

43. A Railway Company must assume that passengers are not infringing the law. A passenger is entitled to take into the compartment anything except articles forbidden by law; and the Company cannot interfere except to prevent, u/s 59 of the Railways Act, a fraud on itself. No power to inspect luggage is given unless the Company has reason to suspect the presence of dangerous goods; and no reason is suggested as against the Company in this case. It cannot be alleged that the Company were bound to know the real state of things. For they could only know it by doing an act which they were not entitled to do, viz., opening the passenger's luggage.

44. Whether the occurrence of an accident is per se evidence of negligence depends on the degree of control exercisable, and on the knowledge not merely of the danger, but the knowledge--derived from experience--as to the probability of an accident occurring if due Care be not taken; mere knowledge of the danger is not enough--*Scott v. London Dock Co.* (1865) 3 H. & C, 596. Unless both these elements co-exist, the plaintiff must fail. It is not enough to show that the accident may have occurred through the negligence of the defendants' servants; the plaintiff must also show something that the defendants might have done but omitted to do--*Smith v. Great Eastern Railway Co.* I L.R (1866) 2 C.P 4(10).

45. If this case had been tried by a jury, the question for them would have been whether negligence could be predicated, and if so whether it ought to be--*Metropolitan Railway Company v. Jackson* I.L.R (1877) 3 A C 193 . If the facts proved are equally consistent with negligence or the absence of negligence, the Judge must withdraw the case from the jury--*Cotton v. Wood* (1860) 8 C.B. 568; *Briggs v. Oliver* (1866) 4 H. & C, 403. In order to render the defendants liable, the plaintiff must show facts more consistent with negligence than with the absence of it--*Toomey v. London, Brighton and South Coast Railway Co.* (1857) 3 C.B. 146. The plaintiff must prove that the death of the deceased was attributable to some negligent act or omission of the defendants--*Wakelin v. London and South Western Railway Co.* (1886) L.R., 12 A C 41.

46. Again: the plaintiff must prove that the accident was one which the defendants ought to have foreseen--*Gornman v. The Eastern Counties Railway Co.* (1859) 4 H. & N., 781. No previous accident of this kind has been proved; therefore there was nothing to show that the defendants could reasonably have foreseen this accident. The onus of proving knowledge on the part of the

defendants is also on the plaintiff--Welfare v. London, and Brighton Railway Co. (1869) 4 Q.B., 693, where the knowledge in question was the knowledge of the condition of the defendants' own premises.

47. If, however, the Court should think that the accident itself is evidence of negligence, then the plaintiff did away with his rights, because it follows that he must have known that the fire-works were taken into the carriage. All the reports admitted in evidence in the Court below are not evidence at all, and were inadmissible even though not objected to by the defendants' Counsel. All that they show is that a certain person made certain statements to a public official in the course of his duty; he was not a servant of the Company, but a Government servant; and therefore his admissions (if any) do not bind the defendants. But if the reports are to be taken as admissions, they must be taken as a whole; and if so, they show that the fire-works were carried surreptitiously by a passenger. Carrying fire-works is a criminal offence; and we are entitled to assume that the person who took them knew the law, because he was in a trade governed by special regulations. The probabilities, therefore, are that he would be extremely careful to carry them concealed. So that, even if there be a prima facie presumption in this case against the defendants, that presumption is rebutted by the evidence and by the probabilities of the case. Everybody has a right to suppose that a crime will not be committed and to act on that belief--Baxendale v. Bennett I L.R (1878) 3. Q.B.D 525 and even apart from any question of crime, it is surely reasonable for every man to assume that his neighbour will not do an illegal act, and to act on that assumption.

48. Further, there is no statutory obligation on the Railway Company to put up notices warning passengers of the penalties for carrying dangerous goods and, at the time of this accident, the Company were not working under rules framed under the Railway Act of 1890, but under the Act of 1879, as there had not been time to supply copies in the vernacular of the regulations for which the Company, without being obliged to do so, had applied to the Government.

49. In *Cliff v. Midland Railway Co.* I L.R (1870) 5 Q.B 258, the accident was preventable, for there the defendants had powers the exercise of which would have prevented the possibility of accident; and those powers were exercised after complaints had been made, and after a fatal accident had occurred. The jury found negligence; but the defendants moved for and obtained a new trial.

50. It makes no difference whether the legal obligation on the passenger is by law or by contract. In this case there was an obligation on the passenger not to take fire-works into the compartment; and the defendants were entitled to rely on his performing that obligation--*Daniel v. Metropolitan Railway Co.* IL.R1871) 5 I., Ap. 45 (60). A passenger cannot impose on the Company any obligation not laid upon them by law; nor can the wrongdoing of one passenger impose any greater obligation on them--*Degg v. Midland Railway Co.* (1857) 1 H. & N., 773

51. If the inspection of luggage is not reasonably possible, the Company are not

to be expected to examine" all the luggage--Richardson v. Great Eastern Railway Co. IL.R.(1876) 1 C.P.D., 342 (344). And in India the duty of examination would be infinitely more difficult than in England, by reason of the numerous religious and caste prejudices. Notice of the presence of dangerous goods is not to be imputed to the Company--see Bevan on Negligence, 2nd edition, p. 1059, and the cases there collected.

52. In Baldwin v. London, Chatham and Dover Railway Co. IL.R.(1882) , 9 Q.B.D., 582, the defendants were held liable because they admitted a breach of duty in misdelivering the goods; otherwise, it was the duty of the plaintiff to inform them that the goods were such as to require special care.

53. Mr. Pugh for the Respondent: The issue substantially is whether there was or was not, such negligence as, contributed to this accident. In the carriage of passengers, Railway Companies are bound to use the utmost care, and to do everything that human foresight can suggest to secure the safety of persons using their lines--Story on Bailments, 8th edition, Section 601. There is both a common law and a statutory duty cast on them. Their duty as to explosives would be incumbent on them apart from any statute; and how can it be said that they acted consistently with their duty when they allowed gunpowder to be carried in a compartment where they allowed smoking?

54. Section 47 of the Indian Railways Act, 1890, empowers the Company to make rules, and that power is given for the very purpose of meeting cases of this kind; but the defendants have not shown that they took any steps to fulfil their duties in this behalf. Indeed, the section says that they shall make rules; but from the passing of the Act until 1895 they made no rules whatever. Their suspicion is enough for the exercise of the power of inspecting luggage; and a package of this kind cannot be looked upon as the ordinary luggage of a passenger.

55. True, want of knowledge of law will not excuse any man charged with a crime; but that is a very different thing from saying that every man is presumed to know the law--Martindale v. Falkner (1846) 2 C.B. 706 ; 15 L.J., Q.B., 91 (94), approved in The Queen v. Mayor and Corporation of Tewkesbury (1868) L.R., 3 Q.B., 629 And even if people are to be taken to know the law they cannot be expected to know the bye-laws. But the defendants ask the Court to presume still further that, if anything is done contrary to the law or to their bye-laws, it is done in a secret manner.

56. The evidence shows that the defendants took no precautions whatsoever at Aligarh with regard to the examination of passengers' luggage. When they did issue notices on the subject, the result was that two prosecutions followed. They suggest that no precautions were possible, so that they clearly acknowledge that none were taken.

57. Different considerations apply to cases where a duty is imposed--whether by common law, or by statute or contract--and cases where there is no duty--see the

authorities collected and considered in Pollock on Contracts (5th edition), p. 416 et seq. The doctrine as to scienter has no application to the present case. The luggage of passengers was under the control of the defendants, so were the carriage into which it was taken, and the stations on the line; therefore the presumption of negligence arises. Even where the Company's trains run on another line, they are bound to make provision for the safety of a passenger who starts on their line--Foulkes v. Metropolitan District Railway Co. I L.R (1880) 5 C.P.D 157. The case of Wakelin v. London and South-Western Railway Co. IL.R(1886) ., 12 A C 41, is distinguishable, because there there was no breach of any duty, inasmuch as the premises on which the accident occurred were not under their control at the time.

58. Mr. Chowdhry on the same side:The defendants' own evidence proves them guilty of negligence. All that the plaintiff had to prove was that the carriage took fire, that there were fire-works, and that the line and the tram belonged to the defendants; and there is no question about any of these facts.

59. The reports made by the railway officials would be evidence against the defendants; they are reports made by the railway servants to their superior officers, and in them there was no suggestion of the surreptitious carriage of the fire-works until the Agent made his report after receiving all the other reports.

60. The unusual nature of the occurrence is an element in determining on whom the onus should fall, and it is unreasonable to throw the onus on the plaintiff. Not only was no evidence produced to contradict the railway inspector's report, but the Company even based their subsequent report on it, and, therefore, it ought to be taken as evidence against them, especially as they did not object to its going in.

61. Section 54 of the Indian Railways Act, 1890, imposes a statutory obligation to exhibit the conditions for the carriage of goods; no evidence has been given that such a notice was exhibited.

62. The exception in Section 72 of the Act applies only to the carriage of goods; therefore the common law as regards the carriage of passengers would be applicable to the Company.

63. Mr. Hill in reply: The passage cited from Story on Bailments, Section 601, lays down the law as it exists in the United States; but it is not English law and goes very much beyond the point at which English law stops, so far as the acts of a third person are concerned. A Railway Company is not liable for the acts of even its own servants, if those acts are not done in the course and scope of the servants' duty--Cobb v. Great Western Railway Co.IL.R., (1894) A C 419.

64. C.A.V.

Macleane, C.J.,

65. This is an appeal by the East Indian Railway Company from a decision of Mr.

Justice P. O'kinealy, dated the 8th of June 1898, by which he awarded a sum of Rs. 1,500 by way of damages to the plaintiff with the costs of the suit.

66. The plaintiff is the father and administrator of the estate of one Atindra Nath Mookerjee, who was injured, on the 27th April 1896, while travelling as a passenger on the appellants' line between the stations of Secundrabad and Dadri, Atindra Nath Mookerjee was so badly injured that he died on the 5th of May following. In the Court below, the plaintiff charged the defendants with negligence, on the ground that the communication cord was defective, that proper steps had not been taken in time to bring the train to a standstill, that the brake power of the train was insufficient, and, in that sense, defective, and that the carriage doors were improperly locked. All these issues, however, have been found in favour of the appellant Company; they have not been urged before us by the respondent, and it is unnecessary further to allude to them.

67. The evidence establishes that Atindra Nath Mookerjee, on the 25th of April 1896, took a third class ticket from Bally to Rawalpindi; that on the 27th April, while on his journey, the carriage in which he was travelling caught fire, that he was badly burnt, and injured by falling through the floor of the carriage, and subsequently died of those injuries.

68. There can be no reasonable doubt, upon the evidence, that the fire resulted from an explosion of fire-works carried by some fellow-passengers of the injured man in the compartment in question, and, the plaintiff's case is that it was through the negligence and want of due care on the part of the servants of the appellant Company, and in violation of their rules, that the fire-works found their way into the carriage. This is denied by the appellant Company.

69. There has been much discussion, in the course of the argument, as to the actual quantity of fire-works in the carriage when the explosion took place, though it is common ground, that any way, a certain quantity of fire-works or bombs did explode in the carriage, and that several passengers in the train were severely injured by that explosion. Both the passengers who were carrying the fire-works were killed, and any direct evidence as to the quantity is not forthcoming, though much light would, probably, have been thrown upon this particular point, if that which has been styled the "list" of fire-works, or "the order from the Zemindar of Sonpet," and which, with their railway tickets, was found upon the body of one of the men who were conveying the fire-works, had been produced. At one time it was in the hands of the guard, Hyrapiet, a servant of the Company, and was by him apparently handed over to the Police; but it has since disappeared. This is, at least, very unfortunate. Fitzpatrick, the inspector of the Railway Police at Tundla, speaks of the quantity of fire-works as a large quantity, and though that statement must be regarded as a matter of inference rather than of direct and positive knowledge on his part, upon the whole of the materials before us his conclusion strikes me as well-founded, and I am satisfied, that, when the explosion took place, there was a large quantity of fire works in the carriage.

70. It is contended for the Company that, if the quantity had been large, the fire-works must have been observed by the passengers in the carriage, and reliance is placed upon the two statements of Atindra Nath Mookerjee, to the effect that he did not see any fire-works. This is a matter of surmise and probability only, and is met by the counter suggestion that, whether the fire-works were carried in a basket or in bundles they would probably be placed under the seat, and a passenger, perhaps at the other end of the carriage, might not have observed them. But having regard to the condition of Atindra Nath Mookerjee when he made these statements, too much reliance cannot safely be placed upon them. The question of the actual quantity of fire-works is only material upon that of whether or not they were likely to escape observation, for whether the quantity were large or small, the fire clearly arose from their explosion.

71. It is proved then that Atindra Nath Mookerjee had paid for his ticket and was a third-class passenger by the defendants' train, that he was travelling as such passenger in the train, that when so travelling a fire resulting from the explosion of a considerable quantity of fire-works carried in the carriage, in which he was travelling broke out in that carriage, that he was severely injured, and that he died of those injuries; and the plaintiff contends, upon that state of facts, that he has made out a prima facie case of negligence against the appellant Company, and that, having made out such prima facie case, the onus is cast upon the defendants of showing that they had taken every reasonable care and precaution to prevent such dangerous goods being carried in a passenger's compartment of their train, a compartment in which, admittedly, smoking is permissible. In other words the plaintiff's contention is that the facts proved or admitted by the Company raise a presumption of negligence, which the Company are bound to rebut.

72. We have been referred by the appellants to a very large number of cases ranging over a somewhat diversified field of inquiry, many of which appear to me to refer to questions of negligence of a class widely different from that under consideration, and in that view I do not think it would be very profitable to discuss them. The authorities establish that, in providing for the safety of their passengers, it is the duty of a Railway Company to show, at the very least, such a degree of care, as may reasonably be required from them, considering all the circumstances of the case. The care has sometimes been spoken of as "a high degree of care," and it has been said that the Company must show that the accident was one not preventable by any care or skill.

73. The present case appears to me to range itself under that class of cases where such a prima facie case has been established as to necessitate an answer on the part of the defendants, to satisfy the Court that they have taken all reasonable care and precaution in the matter. A fire in a train is not an ordinary circumstance; a fire in a train resulting from an explosion of a large quantity of fire-works is an extraordinary occurrence, one which raises, at least, a presumption of possible negligence on the part of the Company.

74. Upon this class of case, which I may designate as the *res ipsa loquitur* class, there are many authorities, and the one very generally referred to, by reason of the principle formulated by Chief Justice Erle, is that of *Scott v. London Dock Co.* (1865) 3 H. & C, 596. Of these cases the strongest in favour of the plaintiff is that of *Kearney v. London, Brighton and South Coast Railway Co.* IL.R(1871) 6 Q.B., 759, whilst the appellants rely upon (amongst other cases) *Welfare v. London and Brighton Railway Co.* (1869) L.R., 4 Q.B., 693, and equally upon *Daniel v. Metropolitan Railway Co.* IL.R(1871) 5 Ap. 45, to which I will refer more particularly in a moment. The latest case in these Courts on this head is that of *Choutmull Doogur v. Rivers Steam Navigation Co.* I.L.R (1897) ., 24 Cal., 786, which has recently been affirmed by the Judicial Committee of the Privy Council (1898) Ante., p. 398.

75. That, however, was a case of damage to goods not of injury to a passenger.

76. The appellants, however, contend that this class of case has no application to the present, inasmuch as the fire-works were not under their control, but under the control of one of their passengers.

77. This leads us to consider to what extent the Company has control over luggage carried by their passengers.

78. The men who were taking the fire-works--there is nothing to show whether they were being carried in baskets or in bundles or how they were being carried--took their tickets and, inferentially, entered the train at Aligarh Station, and there is no evidence to show that any care or precaution whatever was taken at that station to prevent passengers, who might be suspected of carrying dangerous goods, from taking them into a passenger compartment. The Company urge that they have no power to search a passenger's luggage, and that if they have to search every parcel carried by every passenger it would become impracticable to work the passenger traffic of their line.

79. It is a strange thing to say that a substantial or indeed any quantity of fire-works can be properly described as passenger's luggage, but be that as it may, it would be difficult to say that fire-works are not dangerous goods within the meaning of Section 59 of the Railways Act (IX of 1890), and under that section no passenger is entitled to take such goods with him, and any railway servant may refuse to receive such goods for carriage; and if any railway servant has reason to believe that such goods are contained in a package, with respect to which no notice of their nature has been given to the station master or other railway servant in charge of the place, such servant may cause the package to be opened for the purpose of ascertaining its contents. There therefore, under certain conditions, a power of search in to the officers of the Company. There is not a particle of evidence adduced by the appellant Company to show that they took any precaution at Aligarh to prevent the men from taking the fire-works into the carriage. It is not suggested that there was any crowd at Aligarh Station; the train stopped there for ten minutes; and from the evidence of the guard the men

would have to pass through a gate where their tickets were checked. For aught we know these fire-works may have been carried in an open basket, and the servant of the Company--the man at the barrier--may have allowed the men to pass through with the goods so exposed. If that were so, and there is no evidence to show whether it was so or not, it is admitted that the Company would be liable. This was the Hindu marriage season--a time at which notoriously, fire-works were in demand for marriage festivities, and a(SIC) me consequently when the Company might not unreasonably be expected to have been specially on the alert. The circumstances under which the men were enabled to pass the barrier were facts peculiarly within the knowledge of the Company. They might have called the man at the gate who, if it were the fact, would have been able to say that there was nothing in the appearance of the baskets or bundles carried by the men calculated to lead him to suspect that they were carrying such dangerous goods; or they might have called others of their servants at Aligarh to show that reasonable precautions against the carriage by passengers in the compartment of such goods were taken. But they call no one to show this. On the contrary, they contend that it is for the plaintiff to call these witnesses and make out his case of negligence.

80. When a similar argument was advanced in the case of *Byrne v. Boadle* (1863) 2 H. & C, 722 it was characterised by the late Chief Baron Pollock as "preposterous." It must be remembered that the railway station at Aligarh, the arrangements at the station, the line, the train and the carriages, are each and all under the control of the defendants, and I cannot bring my mind to think that, when the plaintiff had proved what he did, it was not incumbent on the Company to show that they exercised every reasonable care and precaution to prevent the fire-works being taken into the carriage. I am not prepared to accept the contention of the Company that they have no control over the luggage carried by their passengers.

81. With respect to the case of *Daniel v. Metropolitan Railway Co.*, there the accident arose under circumstances, and from a cause, quite outside the control of the Company, and it was consequently held that the latter were not liable. The reasoning of the various judgments in that case shows that was the real ratio decidendi; but it would be materially extending the principle of that case if it were held to apply to the present.

82. It is however not so much upon the decision itself in that case that the appellants rely, as upon the observations of the late Mr. Justice Willes, when the case was in the Court of Common Pleas (1838) L.R.3 C.P 593. That learned and distinguished Judge says: "It is necessary for the plaintiff to establish by evidence circumstances from which it may be fairly inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendant might and ought to have resorted to." To my mind the plaintiff in this case has brought himself within this definition; he has established such circumstances as fairly warrant such an inference as is referred

to. It is a fair inference from the circumstances that there is reasonable probability that the accident resulted from the want of some precaution which might have been taken by the defendants at Aligarh Station, and which, if taken, might have resulted in preventing these fire-works being carried by a passenger into a passenger compartment. The defendants might have shown, what, if any, precautions were taken, but they have not condescended to do so.

83. For these reasons the judgment of the Court below must be affirmed and the appeal dismissed, and having regard to the length of time which the argument has occupied--I am not suggesting that it was too long--and upon grounds similar to those given by Mr. Justice O'Kinealy, with costs as between attorney and client.

Prinsep, J.

84. I am of the same opinion.

Ameer Ali, J.

85. Before dealing with the main and substantive question in this case, I desire to make a passing observation on the appellants' contention that the plaint does not disclose, with sufficient precision, the character of the negligence charged against the defendant Company. On this point it is enough to observe that if the allegation in the plaint was considered by the defendants as not reasonably explicit, it was open to them to require the plaintiff to supply the defect. No step, however, appears to have been taken, and the parties went to trial on the single issue of fact, viz., whether the defendants were or were not guilty of negligence so as to make them liable on the action.

86. Now, it may be regarded as settled law that in the case of carriers of passengers under statutory powers, there exists an express duty, independently of any implied contract, to carry them safely. This duty imposes on the carrier the obligation of exercising the utmost care and caution consistent with human foresight and diligence. I need only refer to the following cases among others in support of the proposition which I have enunciated--Collett v. London and North-Western Railway Co. (1851) 16 Q.B., 984; Marshall v. York, Newcastle and Berwick Railway Co. (1857) 11 C.B., 655; Austin v. Great Western Railway Co. (1867) L.R., 2 Q.B., 442.

87. In Foulkes v. Metropolitan District Railway Co. (1880) L.R., 5 C.P.D., 157, to which I shall have presently to refer in detail, Thesiger, L.J., pointed out in the clearest terms that the benefit which a carrying company derived, directly or indirectly, from the carriage of passengers imposed upon it the corresponding obligation of taking due and reasonable care for their safety. A violation of the duty thus imposed on a carrying company an omission on their part to take such due and reasonable care to insure the safety of their passengers whom they invite to travel by their carriages, is considered as negligence. Proceeding on this principle the learned Judge in the Court below has held in this case that the

defendants had omitted in fact to take the care which was incumbent on them to prevent the introduction into the carriage in which the plaintiff's son was travelling of the dangerous articles, the explosion of which caused the accident. And it is with this, finding that we are now concerned. It has been urged on behalf of the appellants that the learned Judge in the Court below has wrongly thrown the onus on the defendants whereas it lay upon the plaintiff to prove negligence, that he has imposed an obligation on them not warranted by law, and that in considering the question of omission on their part he has overlooked the fact that it is the amount of control possessed by the Company over the act or acts complained of that determines their liability.

88. These, in substance, represent the principal objections urged against the lower Court's judgment. If I understand the matter aright there is no fixed rule as to onus; each case must depend on its own special facts; in some instances the situation of the parties and the nature of the accident, or the circumstances leading to it, may give rise to a legal presumption of negligence against the defendants; in others it may be necessary for the plaintiff to establish affirmatively actual negligence before the Company can be made liable.--Byrne v. Boadle (1863) 2 H. & C., 722; Cotton v. Wood (1860) 8. C.B.568; Scott v. London Dock Co. (1865) 3 H. & C, 596; and Kearney v. London and Brighton Railway Co. IL.R(1870) 5 Q.B., 411, furnish examples of the first class of cases. In Scott v. London Dock Co. (1865) 3 H. & C, 596, the majority of the Judges held that where the thing is shown to be under the management of the defendant or his servant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care. In Kearney v. London, Brighton and South Coast Railway Co.i L.R(1870) 5 Q.B 411, the plaintiff was injured by the fall of a brick, while passing under a Railway bridge extending over the highway. The bridge rested on perpendicular brick walls, having pilasters, and from the top of one of these pilasters the brick fell, shortly after the passing of a train. It was held that these facts raised a presumption of negligence against the defendants In this ease, Cockburn, C.J., after stating the principle applicable to the case, said as follows:

89. "The Company who have constructed this bridge were bound to construct it in a proper manner (there was no evidence, however, that it was not so constructed) and to use all reasonable care and diligence in keeping it in such a state of repair that no damage from its defective condition should occur to those who passed under it, the public having a right to pass under it. Now, we have the fact that a brick falls out of this structure and injures the plaintiff. The proximate cause appears to have been the looseness of the brick, and the vibration of a train passing over the bridge acting upon the defective condition of the brick. It is clear, therefore, that the structure in reference to this brick was out of repair. It is clear that it was incumbent on the defendants to use reasonable care and diligence, and I think the brick being too loose affords prima facie a presumption

that they had not used reasonable care and diligence. It is true that it is possible that, from changes in the temperature, a brick might get into the condition in which this brickwork appears to have been from causes operating so speedily as to prevent the possibility of any diligence and care applied to such a purpose, intervening in due time, so as to prevent an accident. But inasmuch as our experience of these things is that bricks do not fall out when brickwork is kept in a, proper state of repair, I think, where an accident of this sort happens, the presumption is that it is not the frost of a single night or of many nights, that would cause such a change in the state of this brickwork as that a brick would fall out in this way, and it must be presumed that there was not that inspection and that care on the part of the defendants, which it was their duty to apply." The case was carried to the Exchequer Chamber where the judgment of the majority below was unanimously affirmed I L.R.(1871) . 6 Q.B., 759.

90. Before I refer to the decisions relied upon by the appellants, I desire to call attention to the facts of the present case. The plaintiff's son was proceeding to Rawalpindi in the Panjab, by the defendants' line, with a ticket purchased by or for him at Bally. At Aligarh two passengers entered his compartment with some bombs and catherine-wheels. Between Secundrabad and Dadri further up the line the fire-works exploded with such fearful effect that the doors of the compartment were blown out, the carriage was set on fire, eleven out of the fourteen passengers in the compartment were so seriously injured that they died within a short time, and considerable damage was done to the rolling stock of the Company. The facts are abundantly clear upon the official reports of the Company's servants to their superior officers which have been put in evidence on behalf of the plaintiff with the consent of the defendants' Counsel. They would probably be evidence as to the actual facts stated in them u/s 35 of the Evidence Act. It was contended that as in some of these letters phrases like "surreptitiously carried" or "clandestinely carried" occurred, they ought to be taken as evidence against the plaintiff, to disestablish the case of negligence. No fact is given which would justify the officer using the expression in saying that the bombs were carried clandestinely. 80 far as we can judge it was a mere hypothesis or opinion absolutely of no evidential value. Besides, it is noteworthy that the expression does not occur in the earlier reports or letters, but only in the later ones when presumably the officer of the company had awakened to a sense of the gravity of the situation and of the liability involved in the dispute. These facts which are more fully set forth in the lucid and exhaustive judgment of the learned Judge in the Court below, raise in my mind a strong presumption of gross carelessness on the part of the Company's servants, and cast upon the defendants the onus of showing that there was no neglect of reasonable precautions on their side, and that the explosives were really carried in a manner that avoided detection. These matters were within the cognizance of the defendants, but no attempt was made to discharge that onus. On the contrary it has been strenuously argued either that no precaution was possible, or that they do not know what precaution could be taken, which comes to the same thing.

91. Ex post facto evidence has no bearing on the question whether due or reasonable care was or was not taken, but when a contention of the character just referred to is vigorously pressed by a learned Counsel, the fact that subsequent to the accident steps have been taken which have in a great measure obviated the risk; becomes highly relevant. It is in evidence upon the reports that a special watch placed by the Company has succeeded in stopping in several instances the carriage of fire-works and in the conviction of offenders. In this connection I may observe that the suggestion of Counsel that these fire-works were, in order to avoid detection, carried tied up in a bundle, is not only not founded on any data but is also improbable. It appears from the depositions of the witness, that the bombs had bamboos eight to ten inches long stuck into them; we know what Catherine-wheels are like. To suppose that these things would be carried tied up in a bundle, which would simply spoil the things, is absurd. However that may be, it is enough to say that the defendants have given no evidence as to how they were carried, or that they were in fact carried so concealed as to escape the notice of the Company's servants.

92. Much stress was laid on *Daniel v. Metropolitan Railway Co.* IL.R.(1871) , 5 E. & I.A 45, and *Welfare v. London and Brighton Railway Co.* I L.R.(1869) ., 4 Q.B., 693, as furnishing the guiding principle in cases relating to the liability of Railway Companies. In *Daniel v. Metropolitan Railway Co.* AL.R(1871) E. & I. 45, it appears that the Corporation of London was authorised to execute certain works over the line of the Metropolitan Railway Company. These works consisted partly in placing heavy iron girders upon the walla running along the line of railway and were, therefore, works in the execution of which some danger was involved. The Railway Company had no control over these works, which were executed by contractors, engaged by the Corporation. By the negligence of the contractors one of the girders fell on a passing train and injured the plaintiff. It was held that it was not the duty of the Railway Company to assume that the contractors would be negligent or to take precautions against their possible negligence, and that the occurrence of the accident did not raise any presumption of negligence on the part of the Company.

93. In *Welfare v. London and Brighton Railway Company* IL.R.(1869) , 4 Q.B., 693, the plaintiff who was standing under a portico looking at a time table was injured by the fall of a timber and a roll of zinc from the roof which was undergoing repair. There was nothing to show that the defendants knew or had the means of knowing that the roof needed repairing, or that there was any obligation on their part to take steps to know the condition of the roof. It was held therefore that the plaintiff had failed to make out a case of negligence against the Company. The facts of these two cases differentiate them altogether from the case before us. In *Wakelin v. London and South-Western Railway Co.* IL.R(1886) ., 12 A C., 41, negligence was established against the Company, but inasmuch as the plaintiff failed to show the connection between the negligence, and the cause of her husband's death, her action was dismissed. Lord Watson stated his view in that case in the following words: "It appears to me that in all

such cases the liability of the defendant Company must rest upon these facts, in the first place that there was some negligent act or omission on the part of the Company or their servants, which materially contributed to the injury or death complained of, and in the second place, that there was no contributory negligence on the part of the injured or deceased person. But it does not, in my opinion, necessarily follow that the whole burden of proof is cast upon the plaintiff. That it lies upon the plaintiff to prove the first of these propositions does not admit of dispute. Mere allegation or proof that the Company were guilty of negligence is altogether irrelevant; they might be guilty of many negligent acts or omissions, which might possibly have occasioned injury to somebody, but had no connection whatever with the injury for which redress is sought, and, therefore, the plaintiff must allege and prove, not merely that they were negligent, but that their negligence caused or materially contributed to the injury." And Lord Fitzgerald said as follows: "There was evidence also intended to establish negligence on the part of the defendants in the absence of due and proper precautions for the safety of the public using that footpath. It seems to me that there was evidence of negligence, but it did not go so far as to establish that such negligence led to the death of Wakelin."

94. In the present case there can be no question that the negligence of the defendants, assuming that there was any, was the causa causans of the accident. It was urged on the authority of *Daniel v. Metropolitan Railway Co.* 1 L. R. (1871) 5 E. & I A., 45, that, as the defendants have no control over the passengers or over what they introduce into the carriages as their personal luggage, the Company could not be liable for negligence. I have already pointed out that in *Daniel v. Metropolitan Railway Co.* (1871) L.R., 5 E. & I A 45, the Railway Company had no authority over the contractors. Is it correct to say that the defendants had no control over their passengers? Does not the whole argument proceed on a pure assumption of fact? *Foulkes v. Metropolitan District Railway Co.* 1 L.R. (1880) ., 5 C.P.D., 157, has more analogy to the present case. There the plaintiff, as it appeared in the Court of Appeal, had taken a return ticket at the railway station at Richmond, which belonged to the South-Western Company, for Hammersmith belonging to the District Railway Company. The latter had running powers on the South-Western Company's line; and the plaintiff on his return journey from Hammersmith to Richmond in a carriage of the defendant Company was injured whilst alighting from the train. In the action brought by him it was contended on behalf of the District Railway Company that the contract with the plaintiff having been made by the South-Western Railway that Company were liable and not the defendants; and, secondly, that as the accident arose from the improper construction of the platform at Richmond, which was under the sole control of the South-Western, the District Railway Company were not liable. Both these points are thus dealt with by Baggallay, L.J.: "The train by which the plaintiff travelled was in every sense their own; the locomotive and carriages belonged to them, the drivers, guards and other servants in charge of it were in their employment, and in their pay, the line over which it ran was in part their

own, and over the other part they had running powers, and in respect of that portion of the line over which they had, and were exercising, running powers, they had the same duties and were under the same obligation relatively to their passengers, and to the public generally, as they had and were under in respect of the portion of the line which was their own. The plaintiff was admittedly properly travelling by their line; he had, in the sense in which the word is ordinarily used, been invited to travel by it." And he went on to add: "I should not have adverted to this subject [the question relating to the platform] had it not been suggested in argument that the accident was occasioned to the plaintiff, not by reason of any improper construction of the carriage in which the plaintiff travelled, but by reason of the improper construction of the platform, and that the construction and maintenance of the platform was under the sole control of the South-Western Company; but admitting the fact to be so, as it possibly is, it was the duty of the defendants either to adapt the foot-board or step of their carriage to the platform it would have to approach or to arrange for an alteration being made in the platform itself. To carry their passengers in carriages which were in any respect or for any purpose dangerous was, in my opinion, a misfeasance rather than a nonfeasance."

95. Now, what was the position of the Company in the present case? The carriage in which the plaintiff's son was travelling was theirs, it was entirely in the charge and under the control of their servants; the platform at Aligarh was under their control, the gate or barrier through which the passengers had to pass to get on to the platform was held, it would appear from the evidence, by one of their servants; the law had vested them with the fullest powers to make rules against the introduction of combustibles and explosives into the trains. And if, in spite of these powers and facilities, they omit or fail to take sufficient precautions, as in the absence of any rebutting evidence we must assume they did, their liability cannot be questioned. The learned Judge in the Court below has not, in my opinion, cast a higher obligation than the law imposes, the duty of taking due and reasonable care for the safety of passengers whom they invite to travel by their line.

96. For these reasons I agree in dismissing the appeal.