IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

AT COMMON LAW

SUIT NO. C.L. C-019 of 1978

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| BETWEEN | HEADLEY CROSSBOURNE | PLAINTIFF |
| A N D | CARIBBEAN CONSTRUCTION CO. LTD. | FIRST DEFENDANT |
| A N D | JAMAICA RAILWAY CORPORATION | SECOND DEFENDANT |

F. K. Anderson for Plaintiff.

D. Scharschmidt instructed by Livingston, Alexander and Levy for the First Defendant.

D. Goffe and B. Hylton instructed by Myers, Fletcher and Gordon, Manton and Hart for the Second Defendant.

Heard on: July 28, 29 and 30, 1980, June 18, 1981
July 30, 1981.

JUDGMENT

CAMPBELL, J:

On Friday the 2nd of June, 1978, at about 12 noon, there was a collision between a Toyota Van owned by the first defendant and a Diesel Train owned by the second defendant.

The van and diesel train were each driven by a servant of the first and second defendant respectively. The plaintiff who was in the employment of the first defendant was a passenger in the Toyota Van. The collision occurred at a train line crossing situated on a partially completed Housing Scheme at Catherine Hall near Montego Bay in Saint James. There is a marl road running through the Catherine Hall Housing Scheme. This road crosses the train line and was in use by persons who lived in the completed Units in the Scheme. The crossing was also traversed by workmen on the site as also by dumper trucks, rollers and cranes. The train crossing on the evidence was an accommodation crossing.

The plaintiff suffered injuries as a result of the collision and as is usual and reasonable in these circumstances, instituted action for negligence against both defendants.

As against the second named defendant the plaintiff pleaded acts of negligence constituted by:

(a) Excessive speed, driving without care and attention and failing to keep any proper look out;

(b) Failing to give any or any sufficient warning of the approach of the train;

(c) Failing to give any or any sufficient warning to traffic in the area of the presence of the railway crossing or to take any steps to prevent traffic colliding with the train.

The first defendant in attributing the collision to the negligence wholly or partially of the second defendant, repeated in substance the particulars of negligence pleaded by the plaintiff.

In addition it pleaded negligence in not seeing the Toyota Van which was on the crossing and failing to take steps to avoid a collision between the train and the van which was across the train line.

The evidence of the second defendant's driver is that there is a gate crossing on the main road at Fairfield which is about a quarter mile from the crossingover the private road at which the accident occurred. Before reaching Fairfield, at a point which is a quarter mile therefrom, there is a signal post at which point he is required to blow his horn - one long and two short for the gate crossing. In addition he has to slow down to ascertain that the gate is open. He blew his horn, slowed down and negotiated the Fairfield crossing safely. He proceeded on to the crossing over the private road of which he was aware. He had blown his horn again as soon as he had passed the Fairfield crossing. About a chain from this crossing he heard his observer blow his the observer's horn and applied his emergency brakes; These trains have dual control, one for the driver the other for the observer. Before he could enquire of his observer what had happened, he heard a crash and the train came tc a stop about 107 feet beyond the crossing. He later discovered that a van had collided with the right step of the train engine. He said that from his position in the left compartment of the engine, he was not able to see to his right once he

has come within a chain of this crossing because the area to the right was dumped up right to the road crossing. From Fairfield crossing to the scene of the collision he had developed from a speed of 10 M.P.H. to about 20 M.P.H. The side of the train has an overhang of about 3 feet on either side.

The evidence of Roy Hall, the observer on the second defendant's train at the time, bears out substantially the evidence of the train driver, namely, that leaving the Fairfield gate crossing, the driver blew his horn. This witness said that after the horn was blown, he saw, approaching the crossing to his right, a van which was then about two chains or a little less from the crossing. The train was then about the same distance away from the crossing. He saw the van moving, so he blew his horn, the van slowed as if it was going to stop but speeded up again. Because of this he applied his emergency brakes. The wheels of the train started to slide on the rail line, in the meantime the front wheel of the van came over the first of the rail line into the four feet area between the rails. The step of the engine which has an overhang of 8 inches caught the van at the front door causing it to turn over into a ditch on the right hand side. The train at the time when the brake was applied was travelling at 20 M.P.H. The van never came to a complete stop before the collision.

As against the first defendant the plaintiff pleaded the usual particulars of negligence, namely failing to drive with due care and attention, to keep a proper look out and failure to stop, slow down or otherwise manouvre to avoid the collision. The second defendant added to these particulars of negligence others such as excessive speed, disobedience of stop sign directing traffic approaching the train line, and failing to heed the train's warning whistle.

The first defendant's driver gave evidence that travelling at about 20 M.P.H. on a marl road towards the train crossing he looked to see if the train line to his left was clear. Presumably he knew that any train approaching at that time of day, namely at noon, would be approaching from his left. He said he could see down the train line to his left for about 7 chains. This was when he was about 3 chains away from the

crossing. As he approached the crossing within this 3 chains his visibility is decreased so he had slowed down to 15 M.P.H.

He said he heard no sound of diesel engine nor of any train whistle. As he approached the crossing one Powell who was sitting to his left in front of the van, shouted "Diesel Keith", he immediately stopped, looked to his left across Powell and saw the diesel about 3 chains away. He stopped his van about 18 inches from the line. It was while he was in this position that he was hit by the train. He admitted that just before Powell shouted he had not looked to his left.

The plaintiff's evidence in relation to the facts on which negligence on the part of the defendants or either of them depended, was not very helpful. He first said he saw the first defendant's driver look up and down the line as he approached the crossing; that the van was on the line going over when he heard the lick. Under cross-examination by Mr. Scharschmidt for the first defendant, he admitted that he was unable to say whether the driver of the van looked to his right and left immediately before he reached the train line. He was equally unable to say what portion of the van had got over the train crossing. Under cross-examination by Mr. Goffe for the second defendant, he said "the van had stopped before reaching the line. It was not right up to the line when it stopped. It was a couple yards from the line". Next he said "when the van came to the line the driver slowed down, then stopped, then off again to approach the line; he was crossing the line then the crash". He said he did not hear the sound of the diesel horn. He later said that "the van did not at any-time before the accident shut off and stop".

The plaintiff, despite a bias in favour of the first defendant his erstwhile employer, has failed on this evidence to establish any negligence on the part of the second defendant either in regard to its management and operation of the railway at the crossing, or in regard to the manner in which its servants the driver and observer operated the train on the day in question.

The plaintiff did say under cross-examination on behalf of the first defendant that there was no sign at the train crossing. However in the absence of evidence of unusual features at or leading to this level crossing which obscured visibility along the line, or that the crossing albeit an accommodation crossing was frequently used by persons who were not of the locality and who would not know of the crossing, I would not be prepared to hold that the absence of any sign at this crossing "per se" constituted negligence on the part of the second defendant in the management and operation of its railway at the level crossing.

In regard to the manner in which the driver and the observer drove and managed the diesel on the day in question, I accept the evidence of the driver and the observer that the diesel horn was sounded twice by the driver before and after the Fairfield level crossing and once by the observer. That when the van driver was seen by the observer approaching the crossing he the observer immediately blew his horn and applied the emergency brakes. There was nothing negligent in the conduct of either of these two persons.

Mr. Goffe on the issue of liability as between the two defendants referred me to cases such as Knight v. G.W.R. Company [1942] 2 All E.R. page 296; Lloyds Bank Limited v. Br. Transport Commission & Anor. [1956] 3 All E.R. page 291 and Hazell v. Br. Transport Commission [1958] 1 All E.R. page 116. These cases clearly establish that in considering negligence of train drivers - it is in the words of Morris L.J. in Lloyds Bank Limited v. Br. Transport Commission at page 298:

> " Undesirable to seek to equate the approach to this matter to that made to the driving of a motor car along a public thoroughfare. The driving of a train and the driving of a motor car are two quite different things".

Further on, Morris L.J. stated the duty of care of a train driver thus:

> " A train has priority on its track; it is being driven on a fixed track; it is normally expected to proceed to a time schedule; the driver has obligations to look out for signal by which in the main the running of the train along the track

> " is controlled. Of course, he has a duty to do all that is reasonable to keep a look out along the path that he will travel and to watch for any obstructions that there may be on the line. But I think that it would be too exacting to require him to look sideways to see whether something was approaching him from a side road".

Denning L.J. at page 294 in similar vein said:

> " You cannot treat a train going along a railway as you can a motor car going along a road. The driver and fireman on an engine must keep a good look-out ahead of them. They must of course keep a good look-out for signals and for the track ahead; but they cannot be expected to keep the same look-out for the side roads or lanes coming up to the railway. They might quite reasonably assume that people who approach a crossing will look out for the trains. Even if the driver sees headlights on a car, he would assume reasonably that the car would halt and stop for the train to go through".

Accepting the principle of liability formulated by the Learned Lord Justices, I find as a fact that the second defendant was not negligent. Its driver and observer did keep a proper look-out not only for signals and for the track ahead but on the side road. The diesel horn was sounded when it could be heard by the first defendant's driver. The train was being driven at a speed, namely 20 M.P.H. which was not excessive.

The facts given in evidence by the first defendant's driver in my view clearly establishes negligence on his part. He said he looked to his left down the train line when he was about 3 chains from the crossing, he could see down the line to a distance of about 7 chains. He said he saw nothing, heard nothing so he continued to travel up to the crossing. He said that his range of vision down the train line became reduced as he approached the train line. Notwithstanding this fact he did not stop at any point nearer to the train crossing to see if the line was clear. In his own words he proceeded at a slow speed without again looking to his left until one Powell who was sitting in front to his left shouted "Diesel Keith". It was then that he stopped. Even on his evidence that he stopped about 18 chains from the train line, if his van in such circumstances was hit by a train having an overhang

of 3 feet on either side, he would be the sole architect of any ensuing tragedy. He was obviously negligent in not stopping at a safe distance from the edge of the train line to observe that it was safe for him to cross. He was doubly negligent having regard to the fact that his vision to the left would additionally be obscured by Powell who was seated to his left. I find as a fact that contrary to the first defendant's driver stopping 18 inches from the train line he tried to make the crossing in the self-created dilemna in which he found himself. This is consistent with the evidence of the second defendant's observer when he said he saw the van moving, it slowed as if it was going to stop then speeded up. The first defendant is wholly to blame for the ensuing collision and is accordingly solely liable to the plaintiff for damages in negligence.

As regards injuries suffered, the medical evidence is to the following effect:

(a) Bruising and swelling over the area of the left scapula with movements at the left shoulder joint restricted because of pain;

(b) The right knee was swollen and tender especially over the upper tibia with movements at the right knee joint restricted;

(c) The left shoulder showed a fracture of the left scapula through the glenoid fossa;

(d) The left knee showed a fracture over the upper tibia.

The plaintiff was given tetanus toxoid, the left arm was put in a collar and cuff sling while the lower limb was placed in a plaster of paris cylinder cast. He was later mobilized on crutches and discharged on 6th June, 1978. There was follow up examination at the Kingston Public Hospital. The last medical report showed that his leg was good, he had full squat and full abduction of his left shoulder. His permanent partial disability was estimated not to exceed 5 percent of his left lower limb and 5 percent of his left upper limb.

The plaintiff's own evidence is that his left leg was in

plaster for three (3) months and two (2) weeks, that is to say for fifteen (15) weeks. He had to use crutches for these fifteen (15) weeks plus a further six (6) weeks after the plaster cast was removed.

By December 1978 the plaintiff was thus fully weight bearing in respect of his left leg. He himself about the end of June 1979 requested a letter of fitness to be taken to his employer and was given one on 6th July, 1979.

On his evidence together with the medical evidence derived from the medical reports admitted in evidence Exhibits 1 and 1A, it is clear that the injuries cannot be considered very serious ones. This is not to say that until recovery the plaintiff would not have suffered pain and discomfort, but the residual partial disability is negligible.

An award of $8,500 for general damage would in my opinion be adequate compensation under this head.

The plaintiff was certainly incapacitated for about six months and may perhaps have been relatively unfit to resume work for a further six months. He however admitted that for the five months immediately prior to 2nd June, 1978, he did not work every week for the first defendant. He further admitted that he was employed on a weekly basis from time to time when he was needed by the first defendant. There is no evidence that when he was not so needed he secured employment elsewhere or what income he derived from the "little cutting" which he said he did whatever that means. I think it would be reasonable to consider him as working for forty-five (45) weeks out of the fifty-two (52) weeks when he was wholly or partially unfit for work. He was earning $62.00 per week when he did work. He would thus have lost $2,790.00. He was paid a total of $126.00 for three weeks by his employer. His actual loss of earnings is therefore $2,664.00. This sum together with the other expenses of $71.10 I award as special damage.

There will accordingly be judgment for the plaintiff against the first defendant in the sum of $11,235.10 being:

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| Special damage | ..... | $2,735.10 |
| General damage for pain and suffering and residual disability | ..... | $8,500.00 |

Interest is awarded on the Special Damage at 4% per annum from 2nd June, 1978, and on the General Damage at 8% per annum from date of service of Writ.

There will be judgment for the second defendant against the plaintiff with costs to be agreed or taxed.

The plaintiff will have his costs against the first defendant. In addition the costs payable by the plaintiff to the second defendant shall be recoverable by the second defendant direct from the first defendant.