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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 92/89

COR: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE WOLFE, J.A. (AG.)

BETWEEN	JUSTIN ELLIS	PLAINTIFF/APPELLANT
AND	JAMAICA RAILWAY CORPORATION	DEFENDANT/RESPONDENT

Ainsworth Campbell for Appellant

Paul Dennis instructed by Myers, Fletcher & Gordon for Respondent

June 2 and July 6, 1992

ROWE, P.

The appellant, at about 7.00 a.m. on the 9th of November, 1985 whilst attempting to cross a railway line in the vicinity of the Bustamante Highway, fell with his legs across the railway line.

His fall was witnessed by one George Cooke who had been walking along the railway line. Cooke testified that while he was about two chains from the appellant he "pitched forward" and fell. At this time a train which was driven by the respondent's servant, one Brown (now deceased), was approaching. Mr. Cooke, realizing the imminent disaster began to run to the plaintiff's assistance but had to jump from the line because of the speed of the approaching train.

The train in question collided with the appellant, running over his feet. As a consequence the appellant suffered extensive injuries resulting in the partial amputation of the right foot and deformity to his left foot.

The appellant claimed damages from the defendant for negligence on the part of their servant for failing to see the plaintiff, failing to bring the railway car to a stop or to brake at before colliding with the plaintiff.

The learned trial judge found that there was no wilful or reckless disregard of ordinary humanity by the respondent's servant towards the appellant and that there was no evidence of negligence. He also found that:

> (1) The defendant's servant contemplated the possibility that trespassers might cross the railway line at this point. He therefore blew the whistle. He then satisfied his duty to warn persons whom he could reasonably foresee would be crossing the line. [Emphasis mine]
>
> (2) The defendant could not contemplate a person prone on the railway line.
>
> (3) The reasonable inference was that the driver applied the brake when he could see.

Mr. Campbell has argued three grounds of appeal. Firstly, that the learned trial judge took too narrow a view of the law as it applied to reckless disregard of the plaintiff/appellant's presence on the train line.

The railway tracks are the private property of the Railway Authority over which they have 'control'. Of this area they are properly regarded as 'occupiers'. It has been conceded by Mr. Campbell that the appellant when unlawfully crossing the railway tracks was a trespasser.

The singular issue for consideration is therefore this: Was the defendant's servant Brown negligent in performing his duty so that correspondingly the respondent is liable vicariously?

The law regarding an occupier's duty to trespassers is stated in **Herrington v. British Railway Board** [1972] A.C. 877 at page 909 where Lord Morris, having considered the facts of that case said:

> "... Because of these circumstances (all of them well-known and obvious) there was, in my view, a duty which, while not amounting to the duty of care which an occupier owes to a visitor; would be a duty to take such steps as common sense or common humanity would dictate: they would be steps calculated to exclude or to warn or otherwise, within reasonable and practicable limits, to reduce or avert danger."

It was this principle that guided the learned trial judge. He referred to Southern Portland Cement Ltd v. Cooper [1974] A.C. 623. Lord Reid at p. 644 stated:

> "The only rational or practical answer would seem to be that the occupier is entitled to neglect a bare possibility that trespassers may come to a particular place on his land but is bound at least to give consideration to the matter when he knows facts which show a substantial chance that they may come there."

It is clear, therefore, that an occupier is required in accordance with his duty of common humanity to take reasonable care regarding the well being of a trespasser where:

(1) there is a foreseeable risk of his acts doing harm to a trespasser, or

(2) he knows of the presence of the trespasser.

The learned trial judge found that the defendant could not contemplate a person prone on the railway line. Whilst it is reasonably foreseeable that persons could walk across the line it would not be within one's contemplation that someone whilst crossing would fall and would therefore be lying across the track. Any liability in negligence would be based therefore on the driver's failure to brake after being made aware of the respondent's presence on the track.

It is against this background that the trial judge found that there was no "wilful or reckless" disregard of common humanity.

Recklessness, properly so called, is defined in **R. v. Lawrence** [1982] A.C. 510 as occurring where a person has done an act which in fact involves an obvious and serious risk of causing injury and either:

> (1) he fails to give any thought to the possibility of there being any such risk, or
>
> (2) having recognized that there is some risk involved he nonetheless goes on to take it.

The evidence tendered indicates that only from a distance of 2½ chains could the guard have seen someone lying on the track. At any greater distance one could not distinguish a man's feet from railway sleepers. It is reasonable therefore to infer that the driver, sitting to the right of the guard and a yard away, had a comparable line of vision. There is further no indication in the evidence that the driver saw the plaintiff lying on the track before he was 2½ chains away or so.

It is also worthy of note that it is the plaintiff's testimony that only his legs and feet were on the line. Surely this fact makes it all the more likely that his presence would be difficult to detect.

From all indications, having regard to the evidence that the stopping distance of a train is 2½ chains at a speed of 20 m.p.h. and that the train stopped ¼ chain away from the site of the accident, the driver must have braked at the first moment when he could reasonably have realized that the plaintiff was lying with his legs on the track. The first ground of appeal therefore fails.

Mr. Campbell in oral submissions has suggested that the driver ought to have seen the plaintiff attempting to cross and witness his fall or in the alternative that he should have seen the plaintiff's witness, George Cooke, running along the side of the track and therefore be alerted to the fact of danger.

The dictum of Denning, L.J. in **Lloyds Bank Ltd v. British Transport Commission and Another** [1956] 3 All E.R. is instructive. There the learned judge said:

> "... 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."

I would apply this dictum to the instant case.

With regard to Mr. Campbell's submission that the driver ought to have seen Mr. Cooke, the plaintiff's witness, running along the side of the track and therefore be put on alert, it seems to me that if an engine driver is not expected to keep the same look-out for side roads or lanes coming up to the railway, as the driver of a motor vehicle on the highway, the engine driver cannot reasonably be expected to have seen a man running along the side of the track in the vicinity of a tunnel.

The third ground of appeal is that the trial judge attached too much weight to the uncontradicted evidence of the respondent's witness as regards the distance the train travelled before stopping.

The gist of the third ground appears to be that the respondent's witness was not a credible one. However the decision in **Benmax v. Austin Motor Co. Ltd** [1955] 1 All E.R. 326 at 328 makes it clear that an appellate court does not lightly interfere with a trial judge's findings of fact for the trial judge has seen and heard the witnesses, whereas the Appeal Court is denied that advantage and only has before it a written transcript of their evience. It was there stated:

> "No one would seek to minimise the advantage enjoyed by the trial judge in determining any question whether a witness is, or is not, trying to tell what he believes to be the truth, and it is only in rare cases that an appeal court could be satisfied that the trial judge has reached a wrong decision about the credibility of a witness."

Bearing these factors in mind, it is quite clear that there is nothing in the notes of evidence to suggest that the trial judge wrongly determined the reliability of the defendant's witness.

For these reasons the appeal was dismissed with costs to the respondent to be agreed or taxed.

FORTE, J.A.

I agree.

WOLFE, J.A. (AG.)

I agree.