IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

CLAIM NO. 2006 HCV 03551

BETWEEN	**DELROY O'CONNOR**	**CLAIMANT**
AND	**WEST INDIES ALUMINIA COMPANY**	**DEFENDANT**

Miss Christine Mae Hudson instructed by K. Churchill Neita & Company for Claimant
Mr. Christopher Kelman and Miss Shuana-Kaye Hanson instructed by Myers, Fletcher & Gordon for Defendant

Employer and employee; crush injury involving locomotive; employer's common law duty of care; contributory negligence; safe system of work; duty to provide protective equipment.

The constant, continuing congestion of the railway yard, exacerbated by the incestuous closeness of the lines at the point where the train jerks requiring movement on the step was a situation WINDALCO is presumed to have been aware of. And being cognizant of the danger arising therefrom, ought properly to have guarded against. Surely, the protection of the health and safety of all workers in the position of Mr. O'Connor required some positive act on the part of WINDALCO, preemptive of that slipping from the steps of the locomotive in the circumstances of a congested railway yard. The foreseeability of that eventuality was painfully palpable. The reasonable employer, seized with that foresight, would have been spurred into action to take reasonable care for the safety of his workers. An employer who allows himself to be lulled into negligent somnambulism by the passage of accident free years is just as liable as the one who is alert to the danger and cast his gaze in the other direction.

Heard: 14th April, 2010 and 1st June, 2010

E.J. BROWN, J. (Ag.)

1. On the 18th March, 2003, Delroy Washington O'Connor, a grade one process operator at West Indies Alumina Company (WINDALCO),

sustained a crush injury in an accident involving a moving locomotive at his place of work which was undoubtedly as traumatic as it was life altering. That day, as he had been doing for the last sixteen (16) years, he commenced his shift at the WINDALCO Kirkvine plant in Manchester, but this day at the loading station of the rail yard as process operator cum station master. O'Connor was then forty-five years old and hale and hearty. When his shift was abbreviated by the incident, Mr. O'Connor had suffered the loss of all but the fifth toe on his right foot. He was hospitalized for eight (8) days followed by seven to eight weeks inability to work. The result was an eighteen percent (18%) disability of the affected extremity and seven percent (7%) disability of the whole person.

THE CLAIM

2. That incident gave rise to a claim in negligence filed on the 6th October, 2006. Mr. O'Connor alleged that during the course of his employment, while travelling on the steps of the locomotive as he was required to do, the locomotive began to shake violently whereupon Mr. O'Connor lost his balance and his right foot slipped under the locomotive crushing his toes. This caused Mr. O'Connor to suffer losses, damage and incur expenses.

3. In the particulars of claim Mr. O'Connor further charged that WINDALCO failed to provide a safe place of work, in particular, failing to implement

any or any adequate or suitable system of collecting and stacking empty caustic cars together. Further, allowing the practice of employees, specifically Mr. O'Connor, travelling on the steps of the locomotive in the performance of the required tasks in the rail yard. Those steps were wet worn and in a state of disrepair. Additionally, Mr. O'Connor averred that WINDALCO also failed to provide proper, suitable and adequate gear or equipment for the carrying of the communication radio, thereby exposing him to the risk of injury. The averments continued, failing to provide adequate spacing in the railway yard to allow for easy movement along the rail lines to avert injury to Mr. O'Connor during the performance of his duties. Lastly, omitting to provide employees, including Mr. O'Connor, with proper and adequate Neoprene rubber safety boots with fitted steel toes for wear during the performance of his duties at the railway yard.

4. In the defence filed, saved for admitting the fact of the incident, the averments in the particulars were denied. Specifically, the defendant denied that the steps were wet, worn and in a state of disrepair. On the contrary, the steps were in good repair and safe condition. The steps did not cause Mr. O'Connor to slip. The counter averment was that it was Mr. O'Connor's own negligence and disregard for his personal safety, or alternatively, by his contributory negligence, which caused him to slip.

5. The defence particularized Mr. O'Connor's alleged negligence. First, boarding the locomotive whilst it was moving. Secondly, boarding the locomotive from the opposite direction to which it was travelling. Thirdly, boarding the locomotive while clutching a hand radio in one hand. Fourthly, failing to take any or adequate care in grabbing the handrails provided on the locomotive with both hands. Finally, boarding the locomotive in an unsafe manner, resulting in his loss of balance and slipping.

THE CLAIMANT'S EVIDENCE

6. In his witness statement, Mr. O'Connor said that there are several lines in the rail yard. There is a main line which runs from outside the rail yard, facilitating the transport of containers in and out of the plant. The locomotive is used to convey raw materials used and produced in the plant to disparate locations. The operators assigned to the rail yard travel on the steps of the locomotive on the ladders affixed to the hopper and oil tank. The hoppers are detachable cars used to transport alumina. Mr. O'Connor asserted that the operators would get onto and off the train by hopping. That, Mr. O'Connor elaborated, is a method of embarking and disembarking the locomotive while it is travelling at a speed similar to that

of a person walking. This Mr. O'Connor claimed is not in itself considered dangerous and is permitted under safety regulation of the Mining Act.

7. It was Mr. O'Connor's evidence further, that generally the rail yard is compact and congested. That is especially so in the area between the power house line and the main line. That is apparently is not helped by the proximity of those two lines. The congestion occurs when hoppers are parked on the power house line. This results in an overhang of about 2 feet 6 inches between the power house and main lines. Therefore, when hoppers are parked on the main line this further contracts the space between those two lines. Under these conditions, the operators travelling on the locomotive have to brace inwards while passing the hoppers to avoid getting squeezed.

8. Mr. O'Connor said that was the state of the rail yard at the material time. Mr. O'Connor hopped onto the train in the vicinity of the caustic and main lines. When the locomotive reached that narrowed section of the main line, Mr. O'Connor, in his words, "adjusted my position on the step, by shifting my body whereupon I lost my balance slipped and my toes were crushed by the locomotive." He denied the averments of the defence which conflicted with his account.

9. At the time of this incident Mr. O'Connor was carrying the communication radio in one hand. He said the absence of the radio holder or grip interfered with the firmness of his grip and balance. Also contributing to his fall was the jerking of the locomotive from side to side, according to Mr. O'Connor. This jerking Mr. O'Connor attributed to the loose metal bars forming the rail lines together with their improper alignment at that point. Further, the step on which he stood was worn and shone. This was the main step used by locomotive drivers and shunters. In amplifying his statement, Mr. O'Connor denied saying at an internal investigation that he was in the act of boarding the train and clutching a radio in one hand which prevented him from gripping the handrail.

10. Under cross examination, Mr. O'Connor finally admitted that of the three persons performing duties in the rail yard, he was the person in charge of the operations. He agreed that in March of 2003 he could be described as a very experienced workman as well as a careful one. It was not his experience that WINDALCO placed a high enough value on employee safety in all areas. When something needed correcting, one either got the run around or no response at all. However, a lot of emphasis was placed on employees wearing their protective gear.

11. Mr. O'Connor disagreed that there was a continuous program of safety at WINDALCO but conceded there were regular safety meetings. Like

all other workers, he was required to attend these meetings from time-to-time. As expected, the purpose of these meetings was to discuss safety at the plant, including the rail yard. Personal safety was emphasized at these meetings also. In answer to the suggestion that it was dangerous to board any moving vehicle, Mr. O'Connor said it was not; that from the training as a shunter, he was advised to hop on and off while the train was in motion.

12. Mr. O'Connor further testified in cross examination that there is a greater risk in slipping from a moving train than from one that is stationary. He disagreed with the suggestion that he knew right well that hopping onto moving trains was forbidden. Strangely, Mr. O'Connor admitted to learnéd counsel that that was one of the things mentioned in the safety meetings. At the time he boarded the train its estimated speed was 5 mph. Mr. O'Connor disagreed that hopping onto the train was a dangerous practice expressly prohibited, to his knowledge. He denied that the practice was dangerous. In re-examination Mr. O'Connor said that hopping onto a moving train was not dangerous because it was part of his training how to hop onto the moving train.

13. Cross examined on the reason the radio was in his hand, Mr. O'Connor denied that all radios came with holders or clips. He had however seen radios with clips on them between 1994 and 2006. It was his evidence that by the time the radios reached to workers at the floor level, the clips had

already been damaged. Personally, he had never been fortunate enough to have been given a radio with a clip. He disagreed that the radio he had in 2003 had a holder but he chose not to use it.

14. Further, he did not consider at the time of boarding that having the radio in his hand would have compromise his balance. Mr. O'Connor insisted that he boarded with both hands, even though he was clutching the radio. He conceded that he would have been better able to grip with a free hand. Sometimes the radio was placed in his front pants pocket but impeded his movement.

15. On the day in question, he boarded the train by gripping the two rails provided for boarding the train. When Mr. O'Connor boarded the train, he did so by stepping onto the lower of a three tread step. That lower step could have been dry and about 8 – 10 inches wide by 20 – 24 inches long, not 20" x 14", as was suggested to him. He said there was no obstacle on the step and he was holding both rails.

16. At the time of the accident, Mr. O'Connor said he was shifting his body. By that he meant he was twisting around to face out. He intended while doing so to switch handrails. However, he could not recall if he was holding onto only one rail at the time he slipped. At this time Mr. O'Connor said the train was coming up to where it bumps. That is, the train was

jerking from side to side, which he agreed was a normal vibration to which he was accustomed. This was the first time he was slipping from the steps of a moving train.

17. Questioned about the congestion in the rail yard, Mr. O'Connor said that state of affairs was not unusual. However, the usual congestion was exacerbated by the presence of the main line locomotive in the rail yard. He said that he might have worked in similar congestion prior to the fateful day.

18. When Mr. O'Connor was taxed about the condition of the step, he swerved neither to the left nor to the right. He maintained that the steps were worn and smooth. Specifically, the grids on the step were worn off. While the trains were regularly maintained, that was to the exclusion of the steps. In fact, Mr. O'Connor asserted, he had recommended that the steps be maintained but he was ignored.

EVIDENCE FOR THE DEFENCE

19. Mr. Nigel Miller, an employee of thirteen (13) year standing at the defendant company was the first of two witnesses to take the stand on behalf of the defence. On the morning in question Mr. Miller was the driver of the locomotive involved. Along with Donovan Minnifee and Mr.

O'Connor, Mr. Miller was in the process of assembling train number 66. That involved putting the hoppers together.

20. The locomotive was pushing eight (8) empty rail cars which were attached to it. At this time the locomotive was proceeding from the Caustic Station in the railway yard. As the train approached rail switching point number 12, Mr. Miller slowed the pace of the train from about 15 M.P.H. to about 5 M.P.H. to allow Mr. O'Connor to board. From his position in the operating cabin, located at back of the train, Mr. Miller saw when Mr. O'Connor hopped onto the train. Having satisfied himself that Mr. O'Connor had boarded, Mr. Miller increased the speed of the train and focused his attention ahead.

21. However, within a few seconds of Mr. O'Connor boarding, Mr. Miller noticed Mr. O'Connor's helmet airborne across the window which was to the side of the cabin. Mr. Miller immediately brought the train to a stop to facilitate the retrieval of the helmet. Not seeing Mr. O'Connor about that task, Mr. Miller stepped from the platform and noticed Mr. O'Connor crouching on the lower step of the train. Upon his enquiry, Mr. O'Connor told Mr. Miller that he had slipped and hurt himself. Mr. Miller assisted Mr. O'Connor off the train and went to get help.

22. Mr. Miller went on to say that he had not personally examined the steps of the locomotive. There was no rain during his shift, which commenced at 8 am that day. Neither was there any violent shaking of the locomotive at the time Mr. O'Connor embarked. In amplifying his witness statement, Mr. Miller said hopping trains was not permitted at WINDALCO in 2003.

23. In respect of the radio, Mr. Miller testified that normally when a new radio is given it comes complete with the holder on the radio itself. The radio Mr. O'Connor had at the time was one which should have had a holder. It did not have a holder at the time, neither was there one on Mr. O'Connor's person. Mr. Miller did not know if Mr. O'Connor had the holder somewhere else. Neither could he recall seeing Mr. O'Connor with the radio in the holder on his person prior to the date of the accident. Mr. Miller himself had a radio with a clip on the 18th March, 2003. The radios that came with the clip normally had the clip on, whether the radio was new or used. In cross examination Mr. Miller was unable to say if the radio Mr. O'Connor had on the day was new or used. If the radio needed to be repaired, it would be sent to the shop without the holder.

24. Continuing his amplification, Mr. Miller swore that at the material time the train was jerking from side to side. That jerking was attributed to the joining of the lines at this area, resulting in a rocking motion. This rocking motion was neither gentle nor violent. It was somewhere in between the two.

25. Cross examined by Miss Hudson, Mr. Miller testified that he had worked in the rail yard for about four years up to 2003. One of the instructions given during the training period was that one should not board a moving train. However, in the normal operation that was not the situation. In spite of the training, the practice was that the shunters would hop onto the train as it moved. That was a practice Mr. Miller observed when he went to the company and one which he continued.

26. Mr. Miller's evidence was that he would slow down the train to allow the shunter to board. That was what he did on the day in question. As the driver, he would ensure that the shunter was on safely before increasing his speed.

27. Following Mr. Miller to the stand was Mr. Everton Pennant. Mr. Pennant was employed as the Process Team Leader with responsibility for the Refinery Operations at the Kirkvine plant. Mr. Pennant's service to the company numbered three and a third decades. In March of 2003 he was a junior team leader with overall responsibility for the rail yard.

28. On the 18th March, 2003, at about 1.20 pm a telephone call led Mr. Pennant to the scene of the accident. There he saw Mr. O'Connor awaiting the company's ambulance. He was not there out of curiosity as

this type of accident fell within his remit. His was the responsibility for safety of the rail yard operations.

29. In his examination in chief, Mr. Pennant said Mr. O'Connor was properly trained. That training involved general safety and safe movement in the rail yard. Safety meetings were held by the department so called, once every two months. Mr. Pennant attended and participated in some of these meetings. He had seen Mr. O'Connor at the meetings.

30. Among the practices discouraged at the rail yard was the hopping onto and hopping off moving trains, according to Mr. Pennant. Indeed, this was the first accident resulting in injury to a workman boarding a train at the rail yard, in his experience. Mr. Pennant asserted that the system of stacking empty cars was a safe one. There was a document called Standard Practice Instructions (SPI). This document governed rail yard operations, including instructions on operating and shunting in the rail yard. As Station Master, Mr. O'Connor was trained in the SPI, testified Mr. Pennant.

31. In respect of the steps, Mr. Pennant denied that they were wet, worn or in a state of disrepair. There was a system in place for regular inspection of the locomotives. Regular maintenance was done, including examination

of the steps. Mr. Pennant personally examined the steps and found them to be dry and in good condition.

32. Mr. Pennant spoke to the likely part the radio may have played in the incident. He denied that Mr. O'Connor had to carry the communication radio in his hand. To this end, Mr. Pennant said all radios are fitted with holders or clips which can be attached to the employee's belt. The radio is disconnected from the belt or holder when in use. However safety training requires its return to the holder or belt as soon as that is at an end.

33. Coming to the question of Mr. O'Connor's footwear, Mr. Pennant joined issue with the claim that Neoprene rubber boots should have been provided. Rubber boots are in fact provided to employees working in wet areas of the plant. On the other hand, leather boots are distributed to workers toiling in dry areas such as the rail yard. Consequently, Mr. O'Connor was provided with leather steel toe boots. Mr. Pennant opined that the latter provides more protection with the likely consequence that Mr. O'Connor was spared more serious injuries.

34. Arising from the accident two internal hearings were held. Both Mr. Pennant and Mr. O'Connor were present at the second of the two. It was Mr. Pennant's evidence that Mr. O'Connor told the hearing he boarded the train while it was moving. Further, that when he did so he was

clutching the radio in one hand. Lastly, that he slipped at the time he was repositioning himself on the step of the train. Mr. Pennant was of the opinion that Mr. O'Connor showed disregard for his personal safety in boarding the train in the manner he did. Moreover, as Station Master Mr. O'Connor was well aware that was a dangerous practice which was expressly forbidden.

35. When Mr. Pennant was cross examined, he said he was not aware of the practice of shunters boarding moving trains. He had never seen that, although he would go to the rail yard once per week or once every two weeks. The locomotive should come to a complete stop. Having to come to a complete stop would not affect the operations of the plant.

36. Not only had Mr. Pennant never seen shunters hopping trains, he had never received any report from supervisors about the practice. That was a flagrant breach of safety policy he would have expected them to report. Additionally, he was not aware of anyone being disciplined for having hopped onto or off the train. Follow the investigations into the incident a manual was prepared. However, Mr. Pennant was not the one who prepared it.

37. Questioned about the radios, Mr. Pennant accepted that second hand radios were sometimes distributed to employees. He characterized a

radio sent for repairs as second hand. The responsibility for issuing the radios fell to the senior team leader, not Mr. Pennant. Neither was he part of the issuing process. Mr. Pennant considered the holder for the radio important in the whole operation. That view he based on the manual nature of the operations.

38. Learnéd counsel cross examined Mr. Pennant about the condition of the step. He said the original steps had diamond-shaped perforations called grids. These grids were not worn. Of the locomotives he said he went there and saw them. They were being used at Port Esquivel before they started coming there [Kirkvine] in the 1990s.

39. Concerning the clearance point, Mr. Pennant testified that there was a car too close to it. That he described as fouling. There were also several other parked hoppers. Mr. Pennant expressed the view that Mr. O'Connor had to move while on the train because of the one that was placed too close. It was the responsibility of the personnel in the rail yard to see that the clearance was not fouled. Not surprisingly, Mr. Pennant agreed with counsel for the claimant that this area was congested.

APPLICABLE LAW

40. According to Lord Hoffmann in **White v Chief Constable of South Yorkshire Police [1999] 2 A.C. 455, 506** as quoted by the learnéd authors of **Clerk &**

Lindsell on Torts 19th edition, paragraph 13-02, "the liability of an employer to his own employee for negligence ... is not a separate tort with its own rules. It is an aspect of the general law of negligence." Notwithstanding that, the relationship between the two is shaped by their proximity. The consequence is that the employer's control and the employee's reliance is sufficient to justify an exception to the mere omission rule and justify a duty to take care to protect the employee from harm: **Clerk & Lindsell**, *ibid*. The mere omission rule in essence is that a person, who negligently fails to act as opposed to negligently acting and thereby causing harm, owes no duty to the victim of the failure: **Clerk & Lindsell,** ibid. paragraph 14-29.

41. An employer's common law liability to his employee may arise either vicariously or personally. The employer's common law duty to his employees is to take reasonable care for their safety: **Charlesworth & Percy on Negligence** 9th edition, paragraph 10-02. **Clerk & Lindsell** say the protection of the health and safety of the employee is the primary purpose of the rule. Lord Wright expressed it this way:

> I think the whole course of authority consistently recognizes a duty which rests on the employer and which is personal to the employer, to take reasonable care for the safety of his workmen, whether the employer be an individual, a firm, or a company, and whether or not the employer takes any share in the conduct of the operations. The obligation is threefold, as I have explained (the provision of a

competent staff of men, adequate material, and a proper system and effective supervision). **Wilsons & Clyde Coal Co. v English [1938] A.C. 57, 84.**

42. Perhaps the best encapsulation of the employer's duty to his employee is to be found in the judgment of Viscount Simonds in **Davie v New Merton Board Mills Ltd and Another [1959] A.C. 604, 620.** With crystalline clarity, Viscount Simonds said:

> My Lords, I would begin, as did Lord Parker L.J., with a reference to the familiar words of Lord Herschell in **Smith v Charles Baker & Sons [1891] A.C. 325, 362**, in which he describes the duty of a master at common law as "the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk," words that are important in prescribing the positive obligation and in negativing by implication anything higher. The content of the duty at common law, thus described by Lord Herschell, must vary according to the circumstances of each case. Its measure remains the same: it is to take reasonable care, and the subject-matter may be such that the taking of reasonable care may fall little short of absolute obligation.

The employer's liability is discharged by the exercise of due care and skill.

43. Although Lord Wright disaggregated the employer's obligation into a troika, only two are relevant to the claim viz. adequate equipment and a proper system and effective supervision. Adequate equipment in the instant case means protective equipment. According to **Clerk & Lindsell**,

Lord Neill L.J. in **Crouch v British Rail Engineering Ltd. [1988] I.R.L.R. 404, 408,** said that the duty would depend on

> "the risk of injury, the gravity of any injury which may result, the difficulty of providing equipment ... the availability of that protective equipment ... and the distance which any individual workman might have to go to fetch it, the frequency on which the [claimant] was likely to need that protective clothing or equipment and, last but not least, the experience and degree of skill to be expected of the [claimant]."

44. The duty to provide a safe system of work "is an over-arching obligation, supporting and supplementing the other aspects of the personal duty," **Clerk & Lindsell**, ibid. paragraph 13-13. In the view of the learnéd authors:

> At its lowest, it requires appropriate instruction of the workforce as to the safe performance of the task. But with a task of any complexity, it requires the use of a safe system of work. This may involve the organization of the work, the procedure to be followed in carrying it out, the sequence of the work, the taking of safety precautions and the stage at which they are to be taken, the number of workers to be employed and the parts to be taken by them, and the necessary supervision. It can however, be applied to a single operation. In **Winter v Cardiff R.D.C [1952] 1All E.R.819, 823**, Lord Oaksy said that where "the mode of operation is complicated or highly dangerous or prolonged or involve a number of men performing different functions." Or where it is "of a complicated or unusual character," a system should be prescribed, but "where the operation is simple and the decision how it shall be done has to be taken frequently, it is natural and reasonable that it should be left to the ... workman on the spot." When there is an obligation to prescribe a system, the obligation is to "take reasonable steps to provide a system which will be reasonable safe, having regard to the dangers necessarily inherent in the operation." Thus, it is a

question of fact whether a system should be prescribed, and in deciding this question regard must be had to the nature of the operation, and whether it is one which requires proper organization and supervision in the interests of safety.

45. While the definition of system is somewhat illusive, that offered by Lord Justice Clerk in **Wilson and Clyde Coal Co. v English**, *supra*, was approved by Lord Green M.R. in **Speed v Thomas Swift and Company, Limited [1943] 1 K.B. 556, 562, 563:**

> What is system and what falls short of system may be difficult to define, and it may be often far from easy to say on which side of the line a particular case falls, but, broadly stated, the distinction is between the general and the particular, between the practice and the method adopted in carrying on the master's business of which the master is presumed to be aware and the insufficiency of which he can guard against, and isolated or day to day acts of the servant of which the master is not presumed to be aware and which he cannot guard against; in short, it is the distinction between what is permanent or continuous on the one hand and what is merely casual emerges in the day's work on the other hand.

Lord Green elaborated:

> It includes, ... or may include ... such matters as the physical lay-out of the job --- the setting of the stage, so to speak --- the sequence in which the work is to be carried out, the provision in proper cases of warnings and notices, and the issue of special instructions. A system may be adequate for the whole course of the job or it may have to be modified or improved to meet the circumstances which arise. Such modifications or improvements appear to me equally to fall under the head of system.

46. On the supervision aspect of the obligation, the law is perspicuously summarized by **Clerk & Lindsell.** The learnéd authors opine:

> When there is a duty to provide a safe system of work, the employer does not discharge the whole duty merely by providing it, but must take reasonable steps to see that it is carried out. This involves instruction of the workman in the system as well as some measure of supervision. It does not mean "that an employer is bound, through his foreman, to stand over workmen of age and experience every moment they do what they are supposed to do." The employer must take reasonable care to see that the system is followed, and it is a question of degree and of fact whether this has been done in every individual case.
>
> In some circumstances the risk may be so great that the employer has a duty to issue an absolute prohibition against using a dangerous method of working. On the other hand, it may be reasonable to expect experienced workers to guard against obvious dangers; and it is not necessary for an employer to tell a skilled and experienced man at regular intervals things of which he is well aware unless there is reason to believe that that man is failing to adopt the proper precautions or, becoming contemptuous of them.

RATIOCINATION

47. The first issue of fact to be resolved is, how did the accident occur? Mr. O'Connor averred in his statement of case that he was travelling on steps that were wet, worn and in a state of disrepair. On reaching a congested section of the railway yard, the locomotive began to shake violently whereupon he lost his balance and his right foot slipped under the locomotive. On the other hand, the defence countered that the incident

happened during the act of negligently boarding a moving train. And that while doing so, Mr. O'Connor was clutching a radio in one hand with the consequence that he failed to take hold of both hand rails provided for the purpose. That unsafe manner of boarding caused Mr. O'Connor to lose his balance and slip.

48. Did the evidence support the statement of case of either side? Both sides agreed that Mr. O'Connor boarded the train while it was in motion. Further, no issue was joined on whether Mr. O'Connor had the radio in his hand at the time of embarking. Additionally, both were *consensus ad idem* that the locomotive was jerking at the material time. However, agreement in these areas is somewhat deceptive.

49. Mr. O'Connor asserted that hopping onto the moving train was neither prohibited nor dangerous. In fact, part of his training was how to hop onto a moving train. That hopping onto the moving locomotive was a component of the training was contradicted by Mr. Miller who testified for the defence. *Au contraire*, instructions were given during the training period not to board a moving train. Mr. Miller however, did not leave the matter there. He elaborated that the practice in his four years at the railway yard was for the shunters to hop onto the train as it moved. Testifying in a similar vein was Mr. Pennant. Mr. Pennant said that hopping

was one of the practices specifically proscribed at the regular safety meetings which Mr. O'Connor was required to attend.

50. It would be absolutely astounding if hopping onto and off moving locomotive was part of official policy at WINDALCO, so much so that it entered the training module. In any event, Mr. O'Connor is self contradicted on the point. In cross examination he agreed with counsel that hopping onto trains in motion was one of the things mentioned at the safety meetings. His contradictory position would have to be juxtaposed with the very credible and forthright evidence of Mr. Miller, fortified by that of Mr. Pennant. Mr. O'Connor's assertion is rejected and consigned to the embellishment dust bin.

51. In respect of having the radio in his hand, Mr. O' Connor testified that when he boarded the train he did so by gripping both hand rails provided for the purpose. The defence joined issue with this in the statement of case but that's where the challenge ended. Neither of the two witnesses called on its behalf spoke to this aspect of the claim. Indeed, neither could, as Mr. Pennant was not an eye witness and Mr. Miller was hardly in a position to see if Mr. O'Connor did so. The court therefore accepts Mr. O'Connor's evidence on this score.

52. The evidence on the jerking was not quite as straight forward as the evidence concerning holding onto the hand rail. It is very explicit on the statement of case that the jerking of the train was a contributing factor of the accident as, at the critical moment, the locomotive began to shake violently. This evidence was considerably diluted under cross examination. Mr. O'Connor said the jerking was a normal vibration to which he was accustomed. The impression was never conveyed that normal was being used as a synonym for violent. Furthermore, the driver of the train, Mr. Miller, testified that there was no violent shaking of the train at the time. The court, in consequence, finds that at the material time while there was jerking of the locomotive, it was no more than to be expected. That is, normal, according to Mr. O'Connor and a median of violent and gentle on Mr. Miller's version.

53. So, Mr. O'Connor boarded the train by hopping onto it as it moved. When he embarked, although he held the radio in one hand, he gripped both rails provided for the purpose. Did he slip during the act of getting onto the train? The answer to that question lies at the end of the path through the antecedent question of where Mr. O'Connor was at the time of the accident. Implicit in the claimant's statement of case is that he was on the steps at the crucial moment. Further, there is the averment that Mr. O'Connor was required to travel on the steps of the locomotive.

54. The latter averment was not particularly, but generally denied in paragraph two of the defence. Nowhere in the defence's statement of case or in evidence was it suggested where Mr. O'Connor was expected to travel, once aboard. Mr. Miller said he saw Mr. O'Connor got onto the train and satisfied himself that he was on board before accelerating. Mr. Miller wasn't asked what he meant by satisfying himself vis-a-vis Mr. O'Connor's embarkation. The court understood Mr. Miller to be saying he made sure no part of Mr. O'Connor's body was protruding from the locomotive before increasing its speed. In fact, that was where Mr. Miller found Mr. O'Connor when he went to investigate what was preventing Mr. O'Connor from retrieving his helmet.

55. Mr. O'Connor himself said that he was on the steps. So, both material witnesses say Mr. O'Connor was on the step. The evidence of the defence is at variance with its statement of case on this issue. The court finds the conclusion that Mr. O'Connor was on the steps at the material time irresistible. Having so found, the court accepts Mr. O'Connor's denial that he told the internal inquiry that he was in the act of boarding the train when he slipped. His version that he was adjusting his position on the step when he slipped is that which finds favour with the court. There is no inconsistency between saying that and saying he repositioned himself on the step.

56. Merely adjusting his position on the step should not have had such disastrous consequences, in the ordinary course of things. What then precipitated the slipping? Although the statement of case charged that the steps were wet, Mr. O'Connor resiled from that position in his evidence in cross examination. The positive averment that it was wet became, the lower step could have been dry. He maintained that the steps were worn and smooth.

57. For his part, Mr. Miller's evidence was that he did not examine the steps post accident. What Mr. Miller knew was that no rain fell since his tour of duty began. Mr. Pennant denied that the steps were wet. Against the background of Mr. O'Connor's equivocation, it is hard to do anything but accept that the step was dry at the time of the accident.

58. Since the step was dry, assuming it was also in good repair, how did Mr. O'Connor came to slip? Perhaps it was his footwear? Mr. O'Connor does not describe his footwear, neither in his statement of case nor in evidence. From his particulars of negligence it may safely be concluded that it was not Neoprene rubber safety boots. Mr. Pennant testified that the standard issue for workers like Mr. O'Connor, assigned to dry areas such as the railway yard, was leather steel toe boots. However, Mr. Pennant's mind was not adverted to the design at the bottom of those boots.

59. Mr. O'Connor only, sought to make a connection between the boots and the slipping. He said even with the boots there was the risk of slipping owing to the worn and shiny state of the steps. The court understood him to be saying that ordinary footwear wouldn't provide as firm a footing as the boots, but the condition of the steps was such as to undermine the sure-footedness of the boot. While Messrs Pennant and O'Connor are in agreement that the locomotives were maintained, they parted company on the maintenance of the steps.

60. While Mr. Pennant was long, loud and eloquent in his insistence that regular maintenance was done, but equally short, silent and laconic on the details. He confined himself to saying the maintenance included an examination of the steps. And then what? Were treads removed, repaired and replaced? Or, did the company have to substitute new ones from time-to-time? What was the specific policy for the maintenance of the steps? The court remains unconvinced that such a policy or program was in place. Consequently, the court is inclined to the view that the steps were as worn as sworn to by Mr. O'Connor.

61. Since Mr. O'Connor was on the steps at the time, we come back to the question, was he required to travel on the steps? Or, was it the case that he was there in flagrant disregard for his personal safety? His averment that he was so commanded has been met by a global but bare denial.

The defendant has not even bothered to counter aver a position. This is not to place ultimate proof of the issue on the defendant. However, it is not unreasonable to expect some evidence from the defendant, they having denied that it was so. Surely, the information lies within the breast of the defendant.

62. On the contrary, Mr. O'Connor spoke to the operators having to brace in on the step while travelling on the locomotive. Since the defendant is alleging that Mr. O'Connor was the victim of his own negligence, it's reasonable to expect the defendant to have averred that, in any event, Mr. O'Connor was travelling on the train where he should not have been. The court is compelled to the conclusion that Mr. O'Connor was required to travel on the steps of the locomotive.

63. Therefore, Mr. O'Connor was required to travel on the steps of the train that were worn and in a state of disrepair, in an admittedly, usually congested rail yard. While doing so it was a further requirement for him to have his communication radio with him. That having the radio would have been an impediment to firmly taking hold of the hand rail is much too axiomatic to call for discussion. Where issue was joined was whether Mr. O'Connor had been supplied with the facility to carry the radio hand-free.

64. On this issue, Mr. O'Connor's testified that the radio he had that day had neither, holder nor clip. In cross examination he elaborated that by the time radios reached the workers at the floor level the clips had already been damaged. Personally, he was never fortunate enough to receive a radio with a clip. He disagreed with the suggestion that in 2003 he had a radio with a holder but chose not to use it.

65. Mr. Pennant tried valiantly to falsify those assertions of Mr. O'Connor. He spoke to the safety policy concerning the use of the radios. Mr. Pennant articulated clearly the system in relation to the issuing of the radios. He even agreed that second hand radios were sometimes distributed to the employees. However, since he was not part of the issuing process, no evidence came from him that Mr. O'Connor was actually issued with a radio with a holder, as was suggested.

66. Mr. Miller confirmed that Mr. O'Connor's radio was one that used the holder. He further confirmed that it did not have the holder on the day of the accident. He did not see the holder on Mr. O'Connor's person and could not say if Mr. O'Connor had the holder elsewhere. Mr. O'Connor's evidence therefore stands alone in relation to radios with holder and there is no reason to doubt it.

67. On the facts as found, the question of vicarious liability does not arise for consideration. The proven facts all fall under the rubric of the employer's personal liability. They are all omissions. So, did WINDALCO fail to take reasonable care in the provision of protective equipment for Mr. O'Connor? It is convenient to take the footwear first. Beyond the statement of case alleging a failure to provide Neoprene rubber safety boots, no evidence was led in this regard by Mr. O'Connor. The court was left where no properly constituted court should be, in the dark. Unless of course that aspect of the case is being abandoned. The result of that is Mr. Pennant's evidence as to the efficacy of the boots issued to Mr. O'Connor remains unchallenged.

68. The other subset under this head is the holder for the radio. From the evidence of Mr. Miller, it seems the problem was with the radios of the type issued to Mr. O'Connor. Mr. Miller appears to agree with Mr. O'Connor that second hand radios did not come with the holder. Mr. Miller said the radio would come complete with the holder when issued new. It seems reasonable to infer that second hand radios which used a holder were issued, at least sometimes, without the holder. The court accepts Mr. O'Connor's evidence that his radio did not have a holder. Juxtaposing all that with Mr. Pennant's evidence that the radio was important to the whole operation, it becomes axiomatic that a failure to

provide the holder must be a breach of WINDALCO's obligation to provide adequate material.

69. We come now to the complaint that WINDALCO failed to provide a safe system of work. Did WINDALCO fail in this, its over-arching obligation? Mr. Pennant did not explicitly say how long the practice of shunting had been in operation at Kirkvine up to 2003. However, by necessary implication, it had been for at least his thirty-three years with the company. On his evidence, it had worked perfectly for that duration, evidenced by the unprecedented injury sustained by Mr. O'Connor involving a locomotive.

70. However, it is something of a platitude to say that because a system has been free of incidents of the nature under discussion, the ensuing incident must be the result of the negligence solely of the victim. It is not unusual for conventional wisdom to be inverted and become a fallacy. The question is, would the reasonable employer have required Mr. O'Connor to ride on the steps of the locomotive in the conditions common place in the rail yard? The constant congestion and intimate proximity of the rail lines at a point compelled shunters, to use Mr. O'Connor's words, to brace in while travelling on the step.

71. It would have been within the contemplation of the reasonable employer that movement on the step while the train was in motion was fraught with

the likelihood of slipping. And if that probability was there, the reasonable employer, in the discharge of his duty to take reasonable care for the safety of his workman, would have provided against it. The exercise of due care and skill necessitated, first, the provision of adequate spacing in the railway yard to obviate the need for the workman on the train step to move. Secondly, ensure that the steps were in good repair. Thirdly, the provision of a mechanism to prevent the workman from slipping off and under the locomotive, for example, installing a swing gate with a latch at the steps.

72. Learnéd counsel for WINDALCO submitted that Mr. O'Connor had more than passing familiarity with the task he was performing on the day in question. The import of that, according to the submission, is that it is settled law that an experienced workman confronted with a familiar and obvious risk requires far less precaution from his employer in respect of his safety than an inexperienced workman. That submission is an accurate reflection of the law as cited in **Clerk & Lindsell** on the supervision aspect of the employer's obligation.

73. On the evidence, Mr. O'Connor faced an obvious danger. The learning in the areas is crystalline clear; it may be reasonable to expect experienced workers to guard against obvious dangers. But what was that obvious danger? The danger lay in the risk of being crushed between the parked

hoppers and the locomotive because of the overhang Mr. O'Connor spoke about. When that danger presented itself, Mr. O'Connor should have done what his experience dictated and, in his evidence, operators travelling on the locomotive did, brace inwards.

74. What did Mr. O'Connor do in the face of this danger? In examination in chief he said he adjusted his position on the step by shifting his body, at which time he lost his balance and slipped. Under cross examination he explained that he meant he was twisting around to face out. While doing that it was his intention to switch handrails, although he could not remember if he was holding onto only one handrail at the time of slipping.

75. It appears then, that on approaching the parked hoppers Mr. O'Connor was standing on the lower step facing inside the locomotive. Having boarded by holding onto both handrails, together with his avowed intention to switch handrails, it seems reasonable to conclude that he was not only inward facing, but also had the handrails in his grasp. Further, notwithstanding Mr. O'Connor's impaired memory, unless he was clothed with the stupendous elastic abilities of Stretch of Fantastic Four fame, it is inconceivable that he could have twisted around without letting go of one or both of the handrails.

76. On this understanding of the evidence, Mr. O'Connor did so much more than his experience ought to have dictated, for whatever reason. By bracing inwards, the court understood that to mean he would pull himself deeper into the recesses of the train by use of the handrails. There was no apparent need to attempt the elaborate, exaggerated movement described by Mr. O'Connor. In doing that he appears to have thrown caution to the wind and demonstrated a reckless disregard for his personal safety. The inevitable result is that Mr. O'Connor must shoulder some of the responsibility for the injury he sustained.

77. That said, however elaborate and exaggerated Mr. O'Connor's movement on the step was, this accident would not have occurred without the other contributing factors: the requirement to travel on the steps, a congested railway yard, steps in a state of disrepair, the absence of a holder for the radio and the non existence of any kind of safety net preventing slipping under the train.

78. The court rejects that the accident was caused or contributed to by Mr. O'Connor hopping onto the train and the jerking of the locomotive. The former was a postulate of the defence and much energy, time and space were spent taxing Mr. O'Connor on the so-called inherent dangers of hopping a locomotive in motion. As has already been indicated, Mr. O'Connor's evidence in this area was embellished. The latter remained an

unresolved conflict on Mr. O'Connor's evidence. His statement of case implied that his fall was precipitated by the jerking of the train and his evidence in chief names it as a contributing factor. However, when cross examined he conceded the jerking from side to side was an accustomed vibration. He was not re-examined on the point.

79. Since neither caused nor contributed to the events of March, 2003, they are both regarded as not going to the root of the case. On the central issue, that he was completely aboard the train at the material time, Mr. O'Connor is supported by Mr. Miller. Mr. O'Connor alone can speak to what transpired on the step and the court does not find his story incredible. His account has the ring of truth. Although he was in part the architect of his fate, WINDALCO was in breach of its duty to take reasonable care for his safety by virtue of the adumbrated omissions.

80. The system at the defendant company required persons performing duties such as were assigned to Mr. O'Connor that fateful day, to travel on the steps of the locomotive. The constant, continuing congestion of the railway yard, exacerbated by the incestuous closeness of the lines at the point where the train jerks requiring movement on the step was a situation WINDALCO is presumed to have been aware of. And being cognizant of the danger arising therefrom, ought properly to have guarded against. Surely, the protection of the health and safety of all

workers in the position of Mr. O'Connor required some positive act on the part of WINDALCO, preemptive of that slipping from the steps of the locomotive in the circumstances of a congested railway yard. The foreseeability of that eventuality was painfully palpable. The reasonable employer, seized with that foresight, would have been spurred into action to take reasonable care for the safety of his workers. An employer who allows himself to be lulled into negligent somnambulism by the passage of accident free years is just as liable as the one who is alert to the danger and cast his gaze in the other direction. Liability is apportioned at seventy-five percent (75%) against the defendant and twenty-five percent (25%) against the claimant.

DAMAGES

81. The court accepts the submission of learned counsel for the defence on the question of special damages. An award of eighteen thousand dollars ($18,000.00) is therefore made under this head. Reliance is placed on the guidance by **Franklyn Halsall v Radford Campbell (May 1985), Khan Vol. 2, page 32** and **Andrew Crawford v Tikal Limited (Trading as Super Plus Food Stores Limited) (January 29 & 30, 2007) Khan Vol. 6 page 68**, cited by both sides. The distinguishing features are all taken into consideration.

Under the head of general damages an award of $2.2m is made. Interest on special damages at 6% from 18th March, 2003 to 21st June, 2006 and thereafter 3%. Interest of 3% on general damages from 13th October, 2006 to 1st June, 2010. Costs to the claimant to be agreed or taxed. Stay of execution granted for six (6) weeks.