IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. W054 of 1980

BETWEEN	EDWIN WHITE	PLAINTIFF
AND	LEON WILLIAMS	1ST DEFENDANT
AND	RONALD WHITE	2ND DEFENDANT
AND	THE WEST INDIES SUGAR CO. LTD.	3RD DEFENDANT
AND	CECIL BROOKS	4TH DEFENDANT

W. Arthur Scholefield instructed by Judah, Desnoes, Lake, Nunes & Scholefield for Plaintiff.

Steve Shelton and H. Frazer instructed by Myers, Fletcher & Gordon, Manton & Hart & Company for 1st and 2nd Defendants.

W.B. Frankson Q.C. instructed by Gaynair & Fraser for 3rd & 4th Defendants.

JANUARY 18, 19, & 20, 1982 AND 30TH NOVEMBER; 1982

J U D G M E N T

GORDON J.

The third defendant, the West Indies Sugar Company Limited (hereinafter referred to as "The Company") is engaged in the sugar industry with farms cultivated in sugar cane and a sugar factory in the parish of Westmoreland. So vast is the enterprise, in 1975 the Company maintained a private railway used to convey sugar canes from the farms to the mills at this factory. One farm, Belle Isle is about one and a quarter miles from the factory and the train which runs from this farm to the factory takes all of $\frac{3}{4}$ hour to travel this distance. The Company maintains a road which connects some farms and the factory and is used to convey canes from the farms to the factory. The road is used by all who may wish to use it. This road crosses the train line at a place called the Cabaritta Bridge crossing. This is a level crossing at

which a flagman is stationed. On the 14th May, 1975 at about mid-day there occurred at this level crossing a collision between a train and a tractor-drawn cane cart resulting in the amputation of the left leg of the plaintiff, a brakesman on the train, and this action sought to determine the liability in negligence of the owner/driver of the tractor, and the first and second defendants and the owner and driver of the train, the third and fourth defendants.

At the conclusion of the trial I found for the plaintiff against the first and second defendants and in fulfillment of a promise I made, I now elaborate on the oral findings I then gave.

The plaintiff in evidence said he was at his accustomed post on the train at the time of the accident. In this position he stood on a platform above the coupling of the engine with the first car of the train, holding a metal bar affixed to the body of the car. His face was thus turned towards the rear of the train and he looked occasionally to see a red flag attached to the last car of the twelve-car train. This flag could be easily seen when the train negotiated a bend. It could be seen not so easily while the train was on straight tracks. The train went around a bend some distance from the level crossing, he heard the bell on the train ringing while he was looking for the flag. He next heard the driver of the train, the fourth defendant, exclaim "what dat man"; there followed a crash, the train stopped, he discovered his left leg was crushed. He was taken to the Savanna-La-Mar hospital where his left leg was amputated at the knee. Subsequently he went to the Mona Rehabilitation Centre, a further operation saw to the amputation of another portion of his left lower limb to facilitate fitting a prosthesis.

The second defendant said he was returning to Belle Isle farm from the factory driving a tractor which pulled four empty carts as trailers. Chains in the cartsused for holding the canes rattled and made so much noise he could hear nothing. He did not hear the bell of the train but he saw the flagman come from the house provided for his use. The flagman gave him the green flag to proceed and he held the red flag to the engine direction.

He proceeded slowly across the tracks to prevent the "spred-o-bars" held by cranes from falling off the carts. He felt a jerk, stopped and discovered the engine of a train had hit the rear upright of the last cart and had been derailed. The train had come from his left and at the crossing he had a clear view of the line for 3 - 3½ chains on his left; beyond this there was a bend in the line. He maintained he did not hear the bell of the train and in crossing did not see the train on the tracks. In effect his evidence is that he was unaware of the imminent approach or presence of the train. "If the train had come around the bend I would see it. The bend is no problem to the accident", he said.
He said the flagman did not give him the red flag indicating he should stop. He said he did not dash across the line at the flagman. He denied the suggestion that the flagman then dropped the flag and ran into the canefield.

He said his pay is determined by the amount of canes he takes to the factory and at the time of the accident he had made four trips that day. He admitted the Law allows a tractor to draw only two carts on the main road but asserted the company allowed four carts on it's road. He said there were no signs on road indicating level crossing. This witness' evidence was supported by that of his sideman and friend

Cedric Gopaul. He rode on the tractor and neither heard nor saw the train. He said he was two chains from the flagman when he first saw him. The flagman was then in the road. The tractor was one chain from the flagman when the flagman signalled.

For the third and fourth defendants Cecil Brooks the train driver of twenty-four years standing, Leonard McCallum the conductor on the train and Samuel Dewar the flagman gave evidence. These witnesses maintained that the level crossing was controlled by four signs - two on either side on the road approaching the level crossing. The first sign, a caution sign, is placed about 200ft from the level crossing and warns traffic of the location of the crossing. The other a STOP sign is located about 15ft from the line and requires traffic on the road to stop at that point. There is also placed there a flagman whose duty it is, on hearing the bell of an approaching train, to go into the road and stop traffic using a red flag and ensure the unmolested passage of the train. The flagman would signal the train on with a green flag. Mr. Brooks said part of his duty when crop is off and the trains are not in use, is to maintain the track and the road signs. He said under the supervision of Mr. McFarlane a supervisor for the railway he had planted the posts bearing the signs on this road. The signs were in position at the time of the accident, he said.

Mr. Brooks in evidence said that he was sitting on the right of the engine driving the train which pulled twelve cars laden with canes en route to the mills at the factory. Each car was 17.5 - 17.8 tons gross weight. Mr. McCallum the conductor sat to the left of the engine. The conductor's duty included receiving messages, observing signals and conveying them in instructions to the driver.

The flagman at a level crossing would assume a position from which he could be seen by the conductor. The train negotiated a bend eight to ten chains from the level crossing, rang the bell to alert the flagman and caution vehicles on the road approaching the crossing. He got instructions to proceed from the conductor and so he did. When he was about four chains from the level crossing he observed the tractor with trailers approaching the level crossing. The tractor was approaching from his right. He continued ringing the bell as he got closer to the crossing. He observed the tractor continuing on its path unheeding. He realised when he was about three chains from the level crossing that the tractor was not going to stop so he ceased ringing the bell, eased on the acceleration and applied his brakes, he was then about one and a half chains from the level crossing. He saw the tractor approaching the level crossing, he yelled to the driver who appeared to be smiling "Hey man! what is that?" The engine collided with the end of the last cart on the tractor and was derailed. He alighted and rendered assistance to the injured plaintiff. When he applied his brakes the train was travelling at a speed about 4-5m.p.h. and at the moment of impact the speed was about 3m.p.h. Maximum speed of the train did not exceed 8m.p.h. In cross examination he said he could not stop the train travelling at the speed he was, 4-5m.p.h., before reaching the level crossing. He also said he could stop the train in one and a half chains. "I was carrying a heavy load whic pushed the engine, if I applied brakes too hard engine would skid." He insisted he could and did see tractor as the canes in the field were 3-4ft high - young canes, not canes for reaping 6-8ft tall.

Leonard McCallum the conductor on the train had served in that position for ten years, prior to that he worked as a brakesman for thirteen years. On the day of this incident

he was at his post at the left of the driver. On approaching the level crossing he heard the bell being rung by the driver, he saw the flagman at his position. The flagman held the green flag to the train the red one to the road. Mr. McCallum instructed the driver to proceed. The train continued. He kept watching the flagman then he saw the flagman running towards the canes. After the flagman ran he saw the tractor with carts crossing the line and the engine collided with the last cart. In the collision the engine was derailed and the flagman's hut overturned. He later saw the flags on the road.

Samuel Dewar the flagman was not abundantly endowed with intelligence, he was nervous and at times confused but not lacking in common sense. He had been working in that post three weeks. On hearing the bell of the train he sprung to duty and went in the road from his hut with the flags. He saw the engine and the tractor and he gave the tractor the red flag, the engine the green. He expected the tractor to stop but it did not so he began waving the red flag at it. This to no avail so he dropped the flag and ran into the canefield. "I ran to save my life" he said. He was still employed at Frome, he never lost his job but he was transferred to other areas of employment. Continuing his evidence in cross examination he said -

> "Only time I give a flag signal is when I hear train coming. When no train is coming vehicles on road do not stop."

When asked the question:

> "Is there any circumstance you can think of when you would give train red flag?"

it could be seen he was faced with a problem that never entered his contemplation, his hesitation was understandable;

he replied -

"unless anything break down on the line."

Mr. Shelton on behalf of the first and second defendants submitted that the common law principle in negligence applied to the facts of this case. This principle was stated by Lord Dunedin in Fardon vs Harcourt Rivington 1932 ALL E. Reprint p.81 page 83C :-

> "If the possibility of danger emerging is reasonably apparent, then to take no precaution is negligence."

This principle was applied in Lang vs London Transport Executive and anor 1959 3ALL E.R. p.609 and supported in Hall and Spence vs Shepherd 1968 10J.L.R. p.515.

In Fardon vs Harcourt Rivington the liability of the owner of a dog for injury resulting from an act of the dog was considered. The facts are peculiar to that case. In Lang vs London Transport and anor and in Hall vs Spence & Shepherd liability for a collision occurring at or near an intersection and a road junction was considered.

The common law principles embraces a railway. Per Pearson J. in Hazell vs British Transport Commission and another (1958) 1 ALL E.R. p.116 at para 118H :-

> "If the engine driver becomes aware that there is something on the line, or that something is likely to come on to it when the train is approaching, he must take the proper steps to avoid an accident."

Mr. Shelton submitted he was not relying on the facts just the dicta of Pearson J. in Hazell's case. The facts are interesting. A tractor driver was fatally injured by a train at an accommodation crossing. On the evidence Pearson J. found that -

> "the main cause of the accident was the deceased's failure to switch off the engine of his vehicle very shortly before he drove over the line, since if he had switched the engine off, he would have heard the train coming."

Hazell's case he submitted, differed significantly from Crossbourne vs Caribbean Construction Co. Ltd and Jamaica Railway Corporation. C.L. C019/78 (30/7/81) Campbell J. (unreported), in the duty of care owed by an engine driver at an accommodation crossing.

In Knight vs Great Western Railway Company 1942 2ALL E.R. 286 there is a definition of an accommodation crossing in the editorial note.

> "Suchaa crossing is provided for the convenience of particular persons, well acquainted with its dangers, and, subject to the provision of proper gates and notice boards, trains are not restricted as to the speed at which they may proceed."

In Hazell (supra) the

> "accommodation crossing was created primarily for the benefit of a farm which had lands on both sides of the railway line."

In this case the evidence is that both the road and the railway line were the property of the third defendant. The road was referred to as an estate road and the first and second defendants contended that the crossing, the Cabaritta Crossing, is dissimilar in law to an accommodation crossing and Crossbourne's Case is distinguished from this case. The railway was used exclusively by the Company to convey the Company's canes to the factory for the Company's benefit. The road was similarly used by the Company and in addition by employees of the Company and the public presumably as an

access road to the homes of employees and their families who lived and worked on the various farms.

In Jenner vs South Eastern Railway Company 1911 27 T.L.R. p.445 - 1911 L.J. Vol.105 p.131 - the headnote is:-

> "The deceased was endeavouring to cross the line with a horse and cart when he was struck by a train travelling at a speed of between twenty five and thirty miles per hour and killed, there being no suggestion of any negligence upon the part of the driver of the train the jury found -
>
> 1) That the crossing was habitually used for vehicular traffic to the knowledge of the defendants and without hinderance by them; and
>
> 2) That the company were (sic) guilty of negligence in failing to provide sufficient safeguards for vehicular traffic having regard to the character of the neighbourhood, and that the accident was the result of such negligence. (On appeal) Held, that the crossing being used by vehicular traffic to the knowledge of the defendants, they were under an obligation to take proper precautions for the protection of persons using the crossing, and that upon the above facts there was evidence, having regard to the locality upon which the jury might come to the conclusion that such precautions had not been taken."

As both the road and the railway line were the Company's property the Company as occupier had the common duty of care imposed on it under the Occupier's Liability Act - Section 3(2)

> "to take care as in all the circumstances is reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is invited

"or permitted by the occupier
to be there."

This the Company said it did by the provision of the road signs and posting of a flagman on duty at the crossing. It is accepted by all parties that a flagman was on duty at the time of the accident. The first and second defendants however challenge the existence of warning signs.

The second defendant had been working at Belle Isle as a tractor driver from 1972 drawing canes to the factory, he must have known the road and the level crossing very well. He knew of the train and had on previous occasions heard the bell. He knew of the existence of the flagman at the level crossing. On this day he said he did not hear the bell of the train, because of the noise made by his tractor and the chains on his carts. Had he stopped on approaching the line he would not only have heard he would also have seen the train approaching. (Hazell's case supra). His evidence is that his tractor and carts made so much noise he could not hear a warning given by another vehicle on the road indicating its approach or position. In driving so noisy a vehicle his driving was a danger not only to himself but to other users of the said road.

This defendant should have been alerted to the imminent approach of a train when he saw the flagman take up his position. I reject his evidence that the flagman gave him a signal every time he passed. I accept that of the flagman that he sprung to action when he heard the bell of an approaching train. If one should accept second defendant's evidence that the bend on the line is 3-3½ chains from the crossing and that he crossed the line at 5m.p.h. and at the time of crossing he did not see the train because it had not come around the bend, one

finds that the tractor and carts would have cleared the line in approximately 13½ seconds while it would have taken the train from the bend 52½ seconds to reach the crossing travelling at 3m.p.h., 37 seconds at 4m.p.h., 31½ seconds at 5m.p.h. In such an event there would have been no collision at all. This was a slow train.

I do not accept this defendant and the witness Gopaul as witnesses of truth and I reject their evidence. I find that this defendant was aware of the presence of the train, he saw it, got the signal to stop from the flagman and ignored it and indulged in the hazardous passtime of trying to "beat the train" at the level crossing. In this attempt he failed.

I now turn to consider the submission made on behalf of the first and second defendants that even if the tractor driver was negligent it is negligence on the part of the engine driver if he could by the exercise of reasonable care have avoided the result of the negligence. I find that the Company had erected on the road on either side of the level crossing a warning sign and a stop sign. The train had a loud warning bell which carried nearly a mile and a flagman was at the crossing to see to the uninterrupted passage of the train. Plaintiff said -

> "I have never seen the flagman give the train a red flag ..... I have never seen the train stop to allow traffic on the road to pass."

He had been working with the company from 1957 formerly on the tracks as a line repair man and latterly as a brakesman. The conductor was at his post as the train approached the level crossing he instructed the driver to proceed based on the proper signal given by the flagman.

The driver on the right could not see the flagman but he saw the tractor, the conductor on the left could not see the tractor as it approached the crossing but he saw the flagman. The conductor's and driver's vision was limited by the body of the engine which extended several feet beyond their position.

In LLoyd Bank Limited vs British Transport Commission and anor /1956/ 3 ALL E.R. p.291 Morris L.J. said at p.298. It is

> "undesirable to seek to equate the approach of 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."

Continuing further he said:-

> "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 to watch for any obstructions that there may be on the line. But I think it would be too exacting to require him to look sideways to see whether something was approaching him from a side road."

The fourth defendant Brooks saw the tractor approaching the level crossing from the side road. He rang the bell more than ever to warn the tractor driver of the train's approach. This warning was ignored. When he was about three chains from the level crossing he realised the tractor was not stopping so he ceased ringing the bell, eased on the acceleration and applied his brakes. He was then about one and a half chains from the level crossing and he said he could stop in one and a half chains.

The first and second defendants pinned their case on the estimate Mr. Brooks gave of the distance he was from the level crossing when he first became aware the tractor was not stopping and he applied his brakes. Mr. Brooks gave distances varying from 1½ to 3 chains. He gave a stopping distance of the train as 1½ chains. He also said that the train had a heavy load - 210 tons - - and he could not stop suddenly without courting disaster. In order to get a fair picture of the time frame within which the fourth defendant could act to avoid the accident it is necessary to examine the evidence with acare.

1) The plaintiff said he heard the bell ringing, then he heard the fourth defendant Brooks say "what dat man" then there was the collision.

2) Samuel Dewar the flagman said when he got up after hearing the bell, he saw the train he did not see the tractor. When the tractor came into view the train was nearer to him at the level crossing. The tractor failed to obey the signal to stop. Obviously he became aware as the tractor bore down on him, that collision was inevitable so to save his life he ran into the canefield.

3) Leonard McCallum saw the flagman at his post. He then saw him running towards the canes. After the flagman ran he saw the tractor and carts crossing the line then there was the collision between the engine and the fourth cart.

4) The second defendant reduced the speed of the tractor to five miles per hour as he crossed the line. On this evidence it would have taken him approximately 13½ seconds to clear the line. His last cart

was hit by the train.

Estimating distances from a moving vehicle is at best a very difficult undertaking not rendered easier by a laspe of seven years. An examination of the fourth defendant's evidence shows the difficulty he had in arriving at estimates of the distance of not only his train but also that of the tractor from the level crossing. An evaluation of the evidence just reviewed leads to the conclusion that the fourth defendant had only a few seconds in which to act in anattempt to avoid the collision. I find that he did all that could reasonably be expected of him in the circumstances.

I find that the second defendant, the servant agent of the first defendant was solely to be blamed for the collision. On these findings I entered Judgment for the third and fourth defendants against the plaintiff with costs to be taxed if not agreed.

Judgment for the plaintiff against the first and second defendants for Special Damages	$3,220.00
Loss of Earnings	13,300.00
General Damages Pain & Suffering & Loss of Amenities	45,000.00
Loss of Prospective earnings	5,200.00
TOTAL	$66,720.00

Interest on Special Damages at 4% from the 14th May, 1975 to the 20th January, 1982. Interest on General Damages of $45,000.00 at 8% from the 1st November, 1979 to the 20th January, 1982. Costs to be taxed if not agreed.

Costs of third and fourth defendants to be recovered from first and second defendants.

Judge.