

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. E. 120 of 1986

BETWEEN JUSTIN ELLIS PLAINTIFF
A N D JAMAICA RAILWAY CORPORATION DEFENDANT

Ainsworth W. Campbell for Plaintiff

Steven Shelton and Douglas Leys for Defendant

Tried: September 19 and 20, October 27, 1989

CHESTER ORR J.

JUDGMENT

In this action the plaintiff claims damages in respect of injuries he received in a collision with a train on a railway line.

A portion of the railway line in the parish of Clarendon runs underneath a bridge across the Bustamante Highway. Under this bridge is a tunnel which is over the railway line. There is a track which leads from the highway to the railway line. There is a level crossing at Jacob's hut $\frac{1}{2}$ or $\frac{1}{2}$ chain from the bridge.

Plaintiff's Case

At about 7 a.m. on the 9th November 1985, he walked down the track to the railway line and while walking across the line he fell, hit his chest and became unconscious. He regained consciousness in the Kingston Public Hospital with injuries to his chest, both legs and other parts of his body.

A witness, Mr. George Cooke, stated that he was walking along the railway line and observed the plaintiff ahead of him crossing the line. The plaintiff tripped and fell face downwards with his feet on the railway line and the rest of his body on the ground.

A train approached from behind him going in the direction of the plaintiff. He heard the whistle of the train when the plaintiff fell. The train was about 20 chains from the plaintiff when he fell. Mr Cooke, was about 2 chains from the plaintiff. He started to run to the assistance

of the plaintiff but had to jump from the line because of the fast speed of the approaching train. The train continued at the same speed, ran over the plaintiff's feet and stopped about ½ chain from where the plaintiff was.

The plaintiff appeared to be dead and he assisted in placing him on the train.

Under cross-examination he stated that the train passed that spot regularly at 7 a.m. The train was about 3 chains behind him when he started to run towards the plaintiff.

Two other witnesses gave evidence to the effect that Mr. Cooke was present at the scene and did not arrive after the accident as suggested by the defence.

A Medical certificate from Dr. Warren Blake was tendered in evidence by consent. The significant injuries were -

1. 4 cm sutured laceration over the occipital region of the skull;
2. A fracture to left 4th - 7th ribs;
3. Fracture of midshaft of the right femur;
4. Comminuted fracture of the midshaft of the left femur;
5. Comminuted midshaft fracture of both the left tibia and fibula;
6. Severe crushing of several bones in the right foot.

A partial amputation of his right foot was performed.

The fractured left leg was solidly united although in a bad position. A planned operation to cut and realign the bones of the leg had not been done due to problems affecting the hospital.

The Defence

The sole witness was Mr. Calbert Holness who was a guard on the defendant's train at the time of the accident. He deponed that the driver, a Mr. Brown had met an accident and died. Cross-examination revealed that he had neither attended the funeral nor seen the dead body.

Mr. Holness stated that he was seated to the left of the driver as the train approached the bridge. He could not see clearly to his right because of the way in which the engine was constructed. He did not see

the plaintiff before the accident.

On approaching the tunnel there is a curve and then a straight stretch with visibility for about $\frac{1}{2}$ mile to the bridge. He could see into the tunnel but not clearly because the clouds cast a shadow. The speed of the train on approaching the tunnel was about 20 m.p.h., - As the train approached the tunnel, the driver applied the emergency brake and the train stopped about $2\frac{1}{2}$ chains from the point where the accident occurred. He asked the plaintiff what he was doing there to which the plaintiff replied that he was taking a rest.

In cross-examination he admitted that he could not drive a train. He could see an object on the line 2 or 3 chains away. In re-examination he said that if someone were lying on the line he could not differentiate between the person and a sleeper until he was about 2 chains away. At a distance of 20 chains, he could not make out a person lying on the line. The normal stopping distance was $2\frac{1}{2}$ chains when the emergency brake was applied at a speed of 20 m.p.h. This statement from a professed non-driver was unchallenged.

There was dispute as to the position of the plaintiff at the relevant time. The plaintiff and his witnesses placed him at the end of the tunnel; the defence had him under the tunnel. I prefer the evidence of the plaintiff and Mr. Cooke on this point.

I accept the evidence of the plaintiff and Mr. Cooke that the plaintiff fell while crossing the railway line. On the balance of probabilities, I find that he was unable to get up before the train collided with him. Mr. Campbell submitted that the fractured ribs supported the plaintiff's account that he fell and hit his chest. This is probable. If the train had ran over his chest he is unlikely to have survived.

It is beyond dispute, and I so find that the train ran over the plaintiff's legs while he was lying partly on the railway line, and thus caused him injury.

The plaintiff's claim is founded in negligence, the particulars of which are -

- (a) Failing to see the plaintiff;
- (b) Failing to bring the rail car to a stop or to brake in circumstances when it ought to have done so;
- (c) Colliding with the plaintiff.

The defence denies negligence and asserts that the plaintiff was wholly or contributorily negligent by lying across or on the rail line when it was unsafe to do so and by failing to take precautions for his own safety. In addition, a breach by the plaintiff of section 26 of the Jamaica Railway Corporation By-Laws which prohibits crossing or attempting to cross the line elsewhere than at an authorised crossing, is pleaded as the cause of the accident.

The evidence discloses that there were houses on both sides of the railway line but there was no evidence of any permission express or implied, given to the public to cross the railway line at this point.

In the circumstances, I hold that the plaintiff was a trespasser.

What then was the duty owed by the defendant towards him?

Mr. Leys cited -

TRZNADEL v. BRITISH TRANSPORT COMMISSION [1957] 2 All E.R. 196

at 198 B where LORD Morris said -

"The learned judge approached the case correctly when he pointed out that the duties of an engine-driver must be different from the duties of a driver of a vehicle on a public road. As he said, an engine-driver's duties are entirely different. The engine-driver is driving on fixed tracks; he is driving on private property; he has, of course, to watch for the signals, and he has to have in mind that he is driving to a schedule of time. He must take all reasonable steps that he can to ensure that he stops if there is any obstacle ahead. It is not, however, like a roadway; and those who have permission to use a railway track use the track with the knowledge that a train may be coming which is being driven at speed and cannot be pulled up in a very short space of time, and which is being driven by an engine-driver who cannot have the full check on everything that is on the track that the driver of a motor car on a road must be expected to have."

In Southern Portland Cement Ltd. v. Cooper [1974] A.C. 623

LORD REID said, at p. 642

"Their Lordships are breaking no new ground in holding that the nature and extent of an occupier's duty to a trespasser must be based on considerations of humanity. As long ago as 1820 in *Ilott v. Wilkes* [1820] 3 B and Ald. 304, a case dealing with injury to a trespasser by a spring gun, Best J. said, at p.319 the law of England will 'not sanction what is inconsistent 'with humanity'. In *Grand Trunk Railway Company of Canada v. Barnett* [1911] A.C. 361, the judgment of the board refers, at p. 370, to 'wilful or reckless 'disregard of ordinary humanity 'rather than mere absence of 'reasonable care'."

and at p. 644

"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."

Applying these principles to the instant case, it appears that that defendant contemplated the possibility that trespassers might cross the railway line at this point, hence the warning whistle referred to by both sides. However, there is nothing to indicate that the defendant could contemplate a person prone on the railway line on the approach of the train.

Therefore, the crucial issue is the distance at which the driver realised that the plaintiff was lying with his legs on the railway line.

The reasonable inference from the evidence is that the driver applied the emergency brake when this realisation dawned upon him. Mr. Holness put this distance at some 2½ chains away. There is no evidence to indicate a failure on the part of the driver to act once he realised that the plaintiff was in danger from the approaching train. I am unable to find that there was a wilful or reckless disregard of ordinary humanity by the defendant's servant, the driver, towards the plaintiff.

There is no evidence of negligence by the defendant: the plaintiff's claim therefore fails.

However, in the event that my conclusion is held to be erroneous, I will deal with the question of damages.

Special Damages

These were not contested.

Loss of earnings

Mr. Campbell submitted that the lower figure given by the plaintiff, \$400.00 weekly should be used as a basis for calculation.

The agreed net loss from 9th November 1985 to 19th September, 1989 the date of trial was \$67,600.00.

The plaintiff resumed work in January 1989 and his earnings are \$50.00 or \$65.00 per week.

The figure of \$60.00 per week was used as a basis. This I consider reasonable.

The agreed net loss of earnings is calculated at \$65,400.00.
Loss of clothing - \$175.00.

loss of future earnings

The net loss per annum is \$17,000.00
10 years purchase = \$17,000 x 10 = \$170,000.00
Scaled down for contingencies to \$130,000.00

General Damages

For pain and suffering and loss of amenities I would award \$150,000.00

There will therefore be judgment for the defendant, with costs to be agreed or taxed.