[2012]JMCA Civ 58

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 96/2010

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE MCINTOSH JA

BETWEEN UC RUSAL ALUMINA JAMAICA LIMITED APPELLANT

AND NORRIS FRANCIS RESPONDENT

Christopher Kelman and Krishna Desai instructed by Myers, Fletcher and Gordon for the appellant

Dale Staple instructed by Kinghorn and Kinghorn for the respondent

22 October and 20 December 2012

PANTON P

[1] On 13 July 2010, Frank Williams J (Acting) (as he then was) ordered as follows:

> "(i) The Court apportions liability equally (i.e. 50% and 50%) between the Claimant and the Defendant respectively.
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> (ii) General Damages:
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> (a) Pain and Suffering:- Six Million Dollars ($6,000,000.00) being 50% of the sum of $12,000,000.00, with interest thereon at the rate of 3% p.a. from the 8th November 2007 (date of

Acknowledgment of Service) to today's date – 13th July 2010.

(b) Handicap on the labour market in the sum of three hundred and seventy-five thousand dollars ($375,000.00) being 50% of the sum of $750,000.00.

(c) Future Care & Assistance in the sum of Six Hundred and Eighty-Three Thousand Seven Hundred and Sixty Dollars ($683,760.00) being 50% of the sum of $1,367,520.00.

(d) Wheelchair cost in the sum of Two Thousand United States Dollars (US$2,000.00).

(iii) Special Damages in the sum of $21,721.31 being 50% of the sum of $43,442.63 with interest thereon at the rate of 6% per annum from the 29th January 2004 (date of incident) to the 21st June 2006; and at 3% from the 22nd June 2006 to today's date – 13th July 2010.

(iv) Costs to the Claimant to be agreed or taxed."

This order is the subject of this appeal. It is noticeable that the quantum of damages is not under attack. It is liability that is being challenged.

The claim

[2] The respondent claimed damages for negligence against the appellant in respect of an accident that occurred at a railway crossing. The particulars allege that the respondent was driving a motor car while lawfully crossing the train line, when a train owned and operated by the appellant was driven in a negligent manner resulting in a violent collision with the respondent's car.

[3] The major particulars of negligence were itemized thus:

- failing to warn the respondent of the approach of the train;
- operating the train at too fast a rate of speed;
- failing to use reasonable care, vigilance and skill in the management of the train;
- failing to take reasonable care to stop or slow down or otherwise conduct the operation of the train; and
- failing to have flagmen, and/or gates and/or adequate warning signals at the crossing.

The defence

[4] The appellant, in its defence, admitted the occurrence of the accident but put the respondent to proof of the various allegations. It stated that its servants took all reasonable steps to avoid the collision by driving at the prescribed speed and sounding the prescribed horn signal on the approach to the crossing. The appellant maintained that the respondent's motor vehicle "suddenly drove unto the railway track after the subject train had entered the crossing and despite the operator of the train applying the train's emergency brake in an effort to stop the train as quickly as possible a collision could not be avoided". According to the pleaded defence, the collision "was caused either wholly or substantially contributed to by the [respondent's] negligence". The alleged negligence on the part of the respondent was particularized thus:

- failing to heed the warning horn of the train;
- failing to utilize reasonable care and skill whilst operating his motor vehicle;

- failing to obey the warning signs along the roadway on approaching the rail track; and

- failing to take reasonable care or stop at the said crossing in light of the on-coming train.

The evidence

[5] The respondent gave evidence in his cause and called Dr Rory Dixon in respect of the injuries that he sustained, and Miss Marla Christopher who produced medical reports and invoices. The appellant called Mr Owen Denton, the driver of the train, Mr Manley Brandon, a permanent way technician, and Mr George Peart, a shunter, who was monitoring the rear end of the train at the time of the accident.

[6] The respondent stated in his witness statement that he was a councillor in the St Catherine Parish Council. He was on his way to Guy's Hill "to pick up some persons to carry them to a crusade". It was about 3:00 p.m. when he got to the railway crossing. There was no one at the spot to signal that a train was coming and there were no warning signs or anything to alert anyone as to the approach of a train. He said that he heard no horn. There was a young lady in the vehicle with him. There was a big "banking" beside the cemetery that prevents one from seeing clearly down the train line from the direction of Linstead, and it was difficult to see anything coming from his right. Since the accident, he said, the "banking" has been removed.

[7] The respondent stated that he slowed down as he approached the train line. He heard nothing so he went ahead and attempted to cross the line. The next thing he remembered was waking up in the hospital. He gave details of sustaining injuries to his brain and all over his body. He cannot walk unaided and stated that he is confined to a wheelchair for the remainder of his life. His right hand has been permanently damaged. He concluded his witness statement thus:

> "The collision and the injuries that I have suffered as a result have left me a shadow of the man that I once was and I am sometimes very depressed about the entire situation."

[8] Under cross-examination, the respondent conceded that as a result of his use of this crossing over the years, he was aware that he was to "stop, look and listen", and he never required any sign to tell him to do so. He said that he never saw a "stop" sign at the crossing and did not recall ever seeing any such sign since his boyhood days. On this particular occasion, he said that he listened and heard nothing so he continued across. He agreed with the suggestion that one could hear the sound of the train's horn from half a mile distance. He also said that the radio in his car was not on, and the windows of the car were down. The "banking" prevented him from seeing clearly to his right. In crossing, he slowed down, looked and listened but neither saw nor heard the train. He rebuffed the suggestion that he was in a hurry and tried to "beat" the train.

[9] Mr Owen Denton was the driver of the train. At the time of the making of his witness statement, he had been a train driver for over 21 years. He said that on

approaching the crossing, he sounded the horn of the train continuously. There are no barriers or warning signals at this crossing. As he entered the crossing, he saw the respondent's motor car appear in front of the train. The train's speed at the time was approximately 16 kph. He applied the emergency brake but the collision could not have been avoided as he could not stop the train in time. After the collision, he noticed that the windows of the motor car were wound up. He estimated that the train could have been seen at a distance of approximately 290 metres from the crossing.

[10] During examination-in-chief, Mr Denton said that the train would have been making much noise as there were two locomotives and 15 empty hopper cars. Also, in that area, there are "short joints" and the train makes "a lot of noise to go over the joints". Under cross-examination, he said that there are whistling posts from which the driver of the train is supposed to sound the horn. He said that there was "banking" but he would not classify it as high. He also said that there is a "bend" about two chains from the crossing. When asked to indicate what he refers to as a chain, he pointed to what the learned judge considered to be about 12 feet. He said that there was no system to warn him of the presence of a vehicle in the crossing, or nearby. He said that the public knows the time when the train is scheduled to pass by but the schedule is not posted anywhere.

[11] Mr Manley Brandon stated that he was a permanent way technician employed to the appellant. He said that on the day of the accident he visited the crossing and observed the following three signs in place: "Railway Crossing 150 metres ahead",

"Stop, Look, Listen" and "Stop". Under cross-examination, Mr. Brandon said that he was responsible for the smooth and safe running of the train operations. He gave evidence as to the existence of other public crossings in the parish. One which is on the Spanish Town to Ewarton route is controlled by gates while another at Jacob's Hut is equipped with flashing lights. These lights were installed by JAMALCO "on their side of the track". Mr Brandon also said that the appellant inherited the train lines from the Jamaica Railway Corporation "and they are the ones which dictate which crossing requires to be unmanned or manned". In his view, manned crossings are usually safer than those that are unmanned.

[12] The final witness called was Mr George Peart who is a shunter employed to the appellant. He was on duty on the train on the day of the collision. His job was to monitor the back end of the train where he was positioned. He said that on entering the crossing he felt an impact as if the train had hit something. He felt the train slow down, heard the emergency brake when the train came to a halt and saw the pistons come up from the train. Under cross-examination, he said that he was not sure that the emergency brake came before he felt the impact.

The judge's reasons

[13] The learned judge, having taken time to consider the evidence and the submissions, determined that a resolution of the issues in the case turned "primarily on the issue of the credibility of the witnesses". He identified three sub-issues as:

(1) whether there were the warning signs as stated by Mr. Brandon;

(2) whether the train's horn was sounded; and

(3) whether there was on the part of the appellant an obligation to do more in respect of the safety of the crossing.

[14] The learned judge found that the horn was not blown as the train approached the crossing and that this failure amounted to negligence on the part of the driver of the train and vicariously on the part of the appellant itself. The crossing being un-gated, the judge found that sounding the horn would have been especially important as the ordinary exigencies of the use of the crossing might involve motorists failing to stop in obedience to the signs that were there.

[15] The learned judge regarded the failure to sound the horn as determinative of the cause, in that it showed negligence on the part of the appellant, and thereby made it unnecessary for him to consider whether there was a duty on the part of the appellant to employ additional measures to make the crossing safe for members of the public. In addition to the finding in respect of the horn, he found that the presence of the "banking" made it difficult for both the respondent and the train driver to see until they were practically at the crossing itself. This, he said, reinforced the need for extra caution on the part of both.

[16] As regards the respondent, the judge found that he was negligent in failing to proceed with caution, and not coming to a full stop when he approached the crossing.

Had he done so, the judge felt that he would have heard the sound of the trains as it rolled over the track.

The grounds of appeal

[17] The appellant filed the following grounds of appeal:

> "(a) Any advantage enjoyed by the learned trial Judge by reason of his having seen and heard the witnesses could not be sufficient to explain or justify his conclusion that there was negligence in equal proportions on the part of both the Claimant and the Defendant since, in so finding the trial Judge:
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> (i) Did not give any or any sufficient weight to the Claimant's evidence of his failure to stop as he was required by law to do when he approached the crossing;
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> (ii) Did not draw any adverse inference (for instance that the Claimant broke the law and was attempting to beat the train) from the Claimant's evidence of his failure to stop upon approaching the crossing, even though such inferences were justified and proper in light of this evidence.
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> (iii) Proceeded to evaluate the conflicting evidence of whether or not the horn of the train was sounded as it entered the crossing without putting the Claimant's denial that the horn was sounded in its proper context and against the background of his unreliability as a witness based on the trial judge's earlier rejection of his evidence regarding the presence of warning signs at the crossing as well as his acknowledged failure to stop his car at the crossing;
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> (iv) Having correctly found that the case turned primarily on the issue of credibility, nevertheless failed to consider at all whether his rejection of the Claimant's evidence that the

signs were not in place made the Claimant an unreliable witness on other matters, especially on one of such central importance to the issue of negligence as to whether or not the train horn was sounded;

(v) Failed to accord due weight to the Defendant's evidence that its train makes a loud noise when in operation (a fact denied by the Claimant) so that even if the Claimant did not hear the horn he should have been able to hear the noise of the moving train and thereby become aware of its approach;

(vi) Failed to consider sufficiently or at all the causal nexus between the Claimant's failure to stop when he approached the crossing and the occurrence of the accident; particularly to consider the fact that the Claimant's entry into the crossing without stopping was ***ipso facto*** unlawful;

(vii) Failed to properly evaluate the evidence, especially whether, given the Claimant's obvious disregard of the warning signs which the learned Judge found contrary to the Claimant's evidence was [sic] present, a motorist such as the Claimant would have heeded the sound of the horn.

(viii) Attached too much weight to the question whether the window of the Claimant's car remained up after the accident and conversely too little weight to the Claimant's obvious disregard of his personal safety and that of other users of the crossing as well as his disregard of the warning signs which were in place.

(ix) Rejected the evidence of two (2) very experienced employees of the Defendant, Owen Denton and George Peart regarding the mandatory and settled practice of blowing the train horn upon approaching and entering level crossings in favour of the evidence of the Claimant who he had earlier found to be an untruthful and consequently unreliable witness.

(b) In light of the foregoing matters enumerated in Ground 3 (a), the finding of the learned trial Judge that there was negligence in equal proportions on the part of both the Claimant and Defendant is manifestly unreasonable, is demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, a clear failure on the part of the learned judge to appreciate the weight and bearing of circumstances admitted or proved and against the weight of the evidence."

The arguments

[18] Mr Christopher Kelman was quite clear in his submissions that the gravamen of the appeal was in respect of the judge's findings of fact. He declared his recognition of the fact that appellate courts are very reluctant to interfere with such findings by a judge. Indeed, he conceded that he had an "uphill task". His main complaint was that the judge was too charitable in his evaluation of the respondent's evidence. In this regard, he submitted that a driver who is untruthful in respect of his evidence as to the signs, and who compounds it by disobeying the very signs, even though he is very familiar with the area, and who would have been able to see the line and the oncoming train, is not one who would readily respond or heed the horn of a train. He said that the respondent was not a cautious, careful, prudent driver. On that basis, he felt that the judge ought to have assessed the respondent less charitably.

[19] According to Mr Kelman, the learned judge did not consider the other noise source – the sound of the train over the tracks. Had he done so, he, having found against the respondent in respect of the warning signs, would have also found against him as regards other matters including this aspect.

[20] Mr Kelman relied on the case ***Jamaica Railway Corporation v Allen*** (1966) 9 JLR 504 for support. The headnote reads:

> "The respondent's truck was damaged when it was run into by the appellant's train on a level crossing on the line between Linstead and Bog Walk. The accident occurred at a point where the railway crosses a private road leading from the main road to the Bog Walk Rum Stores. The private road on the main road side of the crossing was lined by trees, the trunks of the last of which on either side were seventeen feet from the line. Within this seventeen feet clearing it was possible to see along the line towards Linstead as far as a gentle right hand curve the distance of which from the crossing was in dispute at the trial. The respondent's case was that he drove his truck to a point within ten feet of the railway line and from that point he had a clear view. He saw nothing coming and decided to cross the line having reduced his speed to a crawl. As he started to cross the line he saw a train, some forty-five feet away approaching from the Linstead side of the crossing at 40 m.p.h. The train collided with his truck. In an action for damages by the respondent the witness called on behalf of the appellant put the bend some seven hundred and fifty feet from the crossing. The driver of the train testified that he approached the crossing at 15 to 20 m.p.h. and that he had sounded his whistle on going around the bend. In formulating the duty owed by the appellant to the respondent the trial judge held that the driver's duty was "to approach [the crossing] with caution – to give warning and to proceed at a speed which is reasonable.
>
> He found that the driver did not sound his whistle. On appeal against the judgment in favour of the respondent it was argued on behalf of the appellant that (i) the judge had failed to distinguish between two different aspects of the law relating to an accommodation crossing, and (ii) he had placed the duty of care owed by a train driver too high, there being no duty to give a warning on approaching a crossing or to look out for persons approaching the crossing from a side road.

> **Held**: that the authorities do not establish a duty on the part of a train driver "to give warning and to proceed at a speed which is reasonable"; the duty of the driver and crew of a train is to use reasonable care, vigilance and skill in the management of the train, the degree of care depending on the particular circumstances of each case and what could reasonably be expected of them in those circumstances; the most important question to be determined in assessing the degree of care that might be expected of the driver and the crew was the distance between the crossing and the bend, this being the agreed range of clear visibility; in the absence of an answer to that question it was not possible to arrive at a conclusion whether the driver's failure to sound his whistle constituted an act of negligence and, in the result, there would have to be a new trial."

[21] This case is saying no more than that each case has to be determined on its particular circumstances. This point was made by Mr Dale Staple, for the respondent, in reply. There is really no blanket principle in respect of the driving of a train, as opposed to the driving of a motor car or truck. The physical circumstances and the conduct of the party in the circumstances will determine whether the tort of negligence has been committed. In this case relied on by Mr Kelman, it was important for the trial judge to make a finding as regards the distance between the crossing and the bend as that was the agreed range of visibility. The failure of the judge to make that determination meant that the real issue had not been tried; hence the order for a new trial.

Decision

[22] In the instant case, the learned trial judge made findings in respect of the relevant issues – the credibility of the witnesses, the signs, the "banking", the existence of a bend, and the blowing of the horn. It is against the background of the judge's

findings in respect of these matters that Mr Kelman has urged us to reverse the judge's decision. He contended that this court is in as good a position as the trial judge, "going by the transcript of the judge's notes". There is, he said, sufficient material for analysis of the evidence for us to come to a different conclusion from the trial judge.

[23] Mr Staple, predictably perhaps, relied on the principle in ***Watt (or Thomas) v Thomas*** [1947] 1 All ER 582 which has been restated and applied in several cases arising in this jurisdiction. Among such cases are ***Industrial Chemical Co. (Ja) Ltd v Ellis*** (1986) 23 JLR 35, and ***Green v Green*** [2008] UKPC 39 (Privy Council Appeal No. 4/2002 – delivered 20 May 2003). The principle being referred to is stated in the headnote of ***Watt v Thomas*** and reads thus:

> "Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

[24] We are satisfied that the learned judge appreciated the evidence that was before him and duly assessed same, thereby arriving at conclusions that are justified by

the evidence. He clearly took proper advantage of the opportunity that he had to view the witnesses as they gave their evidence. In the circumstances, there is no reason for us to differ from the findings and conclusion of the learned judge. The appeal therefore ought to be dismissed and costs awarded to the respondent.

ORDER

The appeal is dismissed. The judgment of Frank Williams J (Acting) is affirmed. Costs to the respondent to be agreed or taxed.