JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 20/2002

BEFORE: **THE HON. MR. JUSTICE DOWNER, J.A.**
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE WALKER, J.A.

BETWEEN:	**NEVROY GORDON SONIA DOUGLAS**	**PLAINTIFFS/APPELLANTS**
AND	**JAMAICA RAILWAY CORPORATION**	**FIRST DEFENDANT/ RESPONDENT**
AND	**ALEXANDER DOUGLAS**	**SECOND DEFENDANT/ RESPONDENT**

Danesh Maragh instructed by Taylor Deacon and James for the plaintiffs/appellants

Christopher Kelman and Nigel Jones instructed by Myers Fletcher and Gordon for the first defendant/respondent

July 1, 2, 3, 4, 2003 and March 11, 2005

BINGHAM, J.A:

This is an appeal from a judgment of Mrs Justice Norma McIntosh delivered in the Supreme Court on January 18, 2002 following a hearing lasting over three days. This matter resulted from a claim founded in negligence arising out of a collision on June 22, 1991 between a motor car owned and driven by the second

defendant/respondent Alexander Douglas, and a locomotive engine, the property of the Jamaica Railway Corporation, the first defendant/respondent. The plaintiffs/appellants were passengers in the motor car which was being driven along the Savannah Road in the parish of Clarendon. The train used for transporting bauxite was being driven on the railway tracks which led from May Pen to the terminal at Port Esquivel in Clarendon. The collision occurred at the Savannah railway crossing as the motor car was crossing the tracks at the same time that the train came along. The train collided into the rear section of the motor vehicle injuring the appellants and causing extensive damage to the rear of the motor vehicle.

The claim in negligence had been launched against both the Jamaica Railway Corporation and the driver of the motor car as joint tort-feasors. At the outset of the hearing, however, the claim against the second defendant – the driver Alexander Douglas was withdrawn. He was subsequently called as a witness for the plaintiffs.

At the time of the collision the first defendant's servants/agents were operating the locomotive engine on tracks which took it across the Savannah Road in the said parish and there was a collision between the train engine and the motor car as the latter was in the process of crossing the tracks.

The learned trial judge found that the plaintiffs were unable to give detailed evidence as to what was taking place as they sat in the motor car being driven along the road prior to the collision. Her reason for so concluding was that as the persons not in control of the vehicle, there was no duty on them to be paying close attention to the road conditions. They were no doubt deep in their own thoughts about their own business, unmindful of what was happening around them. They were in the vehicle on their way to the May Pen market. A duty was owed to them by the driver of the motor vehicle to take reasonable care in transporting them to their destination. It was Mr. Alexander Douglas, as the person in control of the motor car, whose judgment and perception were of crucial importance as he negotiated the vehicle along the road. As the learned judge found it was this circumstance which no doubt prompted the appellants to choose Mr. Douglas as their witness. His demeanour as he recounted the circumstances leading up to the collision was now brought into sharp focus in the determination by the learned trial judge as to how the collision took place and on whom liability as to the claim in negligence fell to be placed.

The facts

(a) The plaintiffs' case

The account of Mr. Alexander Douglas was that on the morning in question, he drove his motor car up to the crossing and stopped. He stopped not because there were any warning signs which directed him to stop, but because he was a cautious man. He said that he had lived in the area for a long time and he knew that the trains use the tracks and that the rules of the road (The Road Code) required motorists in such circumstances to stop, look and listen, on approaching train crossings. He was also aware of a situation to his right where the train comes out of a hole in the mountainside and it is not easily seen, around a blind corner overgrown with shrubs and trees. It was while he was crossing the tracks after waiting there cautiously that suddenly and without any warning signal, he saw the engine approaching at a fast speed of about 70 miles per hour. He then depressed the acceleration pedal in an effort to propel the car out of the way of the engine and off the tracks. The front of the car managed to avoid the impact but the engine collided into the rear of the vehicle pushing it off the tracks for some distance from the crossing. Mr. Nevroy Gordon, a passenger seated in the left rear of the vehicle received serious injuries. Mrs. Sonia Douglas, who was

seated in the left front seat of the vehicle was also injured but not as seriously as Mr. Gordon.

Given the account of Mr. Douglas, if believed, he would have discharged the common duty of care placed on him to his passengers by stopping and looking before attempting to cross the defendant's tracks on the morning in question and by proceeding only after seeing that the road was clear. Although this was a locomotive weighing some sixty-eight tons, for some strange reason, neither Mr. Douglas nor his passengers Mr. Gordon and Mrs. Douglas both of whom testified, heard the sound of the train engine as it approached the crossing that morning. They neither heard the sounds of the engine as it negotiated the tracks nor the sound of a horn signalling its approach. They could not see as a consequence of the overgrown shrubbery and trees.

(b) The defendant's account

The engine was being driven that morning by Mr. Lincoln Dwyer, with Mr. Gladstone DaCosta, a guard as observer. Mr. DaCosta had control and warning mechanism in the form of brakes and a horn. He was seated on the right while Mr. Dwyer was seated on the left. Mr. Dwyer said that he was travelling at about 25 miles per hour until he got to the whistle post which was about 300 feet from the crossing. At the whistle post, the speed of the locomotive was then reduced to 10

miles per hour, and the horn of the train was constantly sounded as the train approached the crossing. There was a stop sign at the crossing about 10 feet from the tracks. There was a warning sign in the shape of an X with the words "Stop! Look! Listen!" written on it. This warning sign was positioned some further distance down the road below the stop sign.

Mr. Dwyer, the train driver, could not see far ahead on the left side. From a quarter mile before reaching the crossing, he sounded the horn in keeping with the normal safety procedure. At the whistle post, 300 feet away he reduced his speed from 25 miles per hour to 10 miles per hour, and commenced constantly sounding the horn warning motorists and pedestrians of the approach of the train.

Mr. DaCosta, the observer, from his position to the right of the front of the engine, had a clearer visibility of the road ahead. He saw the car approaching the crossing about 100 feet away. The track at this point runs by a playfield and is straight in the direction of the crossing. On seeing the car, Mr. Dwyer sounded his horn and applied the emergency brakes. When the train got to about 10 feet from the crossing he realized that the car was still continuing and showed no signs of stopping on the approach of the engine. The engine had been driven that morning through three crossings before reaching the

Savannah crossing without encountering any difficulty. The car did not stop and as a result, there was a collision with the engine.

Following the collision, the driver and the observer got off the engine and assisted in taking the injured passengers from the car. The driver escaped injury. They noticed that the radio in the car was still turned on and was playing music at a fairly loud tone. The learned trial judge formed the view that this music may have prevented the occupants of the vehicle from hearing the sound of the horn and the engine as it approached the crossing.

The learned trial judge found that the defendant's servants/agents who were in control of the engine exercised the necessary care, and caution and were not to be blamed for the collision. The judge also found that the collision was due to the fault of the driver of the car, Alexander Douglas, who attempted to beat the train across the crossing.

The learned trial judge also made the following additional findings viz:

On the question of the speed of the approaching engine, the learned judge rejected the evidence of Mr. Douglas. She based her assessment of the evidence, on the weight of the engine being 68 tons, the height of engine 8 feet and its length 25 feet. At the speed of 70 miles per hour she concluded that "it is most improbable that Mr.

Gordon in particular and Mrs. Douglas (the appellants) would have survived the collision." She also found that "given the size of the engine it would be highly improbable that it would be capable of moving silently across the track."

We hold these findings to be well reasoned and compelling. Given the fact that on seeing the approaching vehicle, the observer applied the emergency brakes and blew the horn, it would be natural to expect that as the wheels of the train made contact with the track this would result in a screeching sound audible enough to be heard by an oncoming motorist such as the driver of the car approaching the crossing. At a distance of 100 feet and exercising reasonable care, he should have heard the oncoming locomotive engine and take the necessary steps to bring the vehicle to a stop before reaching the crossing.

The learned trial judge then made the following crucial findings. To quote from her judgment she said inter alia:

> "The procedure is that Mr. Dwyer, drives and Mr. DaCosta is the observer. That is a recognition by the defendant of the need for someone to control the other side as the driver is unable to do so from his side. So the fact that Mr. Dwyer was not able to see the right side does not mean that the defendant failed to take care. The defendant took care in having Mr. DaCosta on that side and his action may well have helped to save the lives of the occupants of that car that morning. ...

> I do not believe the plaintiffs and their witness that overgrown trees and shrubs made it impossible to see the engine and I accept the evidence of the defendant's witnesses as to the condition of the tracks in the area of that crossing."

Later after having reviewed the evidence of Mr. Alexander Douglas as to the circumstances leading up to the collision the learned judge then said:

> "I find that the defendant took all reasonable care and was not in breach of its duty to the plaintiffs. I believe that Mr. Douglas was seeking to get across the tracks before the train engine reached to the crossing – trying to beat the train engine – and he failed. Contrary to the submissions of the plaintiff's attorney-at-law, I find nothing strange or unbelievable about Mr. Douglas' action – He would hardly be the first person to have undertaken such a daring feat – and he almost made it as it was the back section of the car which was hit.
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> I find that the failure to take care was on the part of Mr. Alexander Douglas. Mr. Douglas failed to carry his passengers safely. The stop sign was intended for him and not for the driver of the engine. He is the person who was responsible for that collision that morning by failing to heed the stop sign on the clear warning that the engine was approaching and the plaintiffs ought to have continued their action against him."

The appellant sought to rely on the following grounds of complaint:

1. The judgment of the learned trial judge was unreasonable in the light of the evidence.

2. The learned trial judge erred in not considering the issue of Contributory Negligence.

At this stage it is necessary to make the following comments on each of these grounds. Ground 1 is clearly deficient in that it is lacking in the failure of the appellants to furnish any particulars in support of the ground as to the complaint made. The Court has, therefore, had to rely on the written submissions filed by the attorney-at-law acting for the appellants and on the oral submissions made by counsel during the hearing of the appeal.

The second ground of appeal is without any foundation in law and cannot be entertained in argument. It was not pleaded or argued in the Court below and was not an issue which fell for the determination of the trial judge. It cannot now be resorted to by counsel before this Court.

Mr. Maragh for the appellants, while conceding that the Savannah Road was a parochial road submitted nevertheless, that the respondent, the Railway Corporation, failed in their duty of care to motorists using the crossing by not having a gate placed there.

This submission is without merit. It was clear from the evidence before the trial judge that the Savannah Road was a minor road not frequented by vehicular traffic and so not, necessitating the need for a gate to be placed at the crossing. The first respondent sought to discharge their duty of care to motorists and pedestrians using the

crossing by placing warning signs at a reasonable distance from the crossing and by the operators of the engine namely the driver and the observer, following the safety procedures at various points along the route, all steps designed to warn oncoming motorists of the approaching locomotive, the objective being to keep the crossing clear until the train had negotiated its way across it.

The Law

Learned counsel for the appellants sought to rely on several authorities. The facts on which these cases were decided bear no relationship to the facts in this case. He relied mainly on the following:

1. ***Commissioner for Railways v. McDermott*** [1966] 2 All E.R. 162 a decision of the House of Lords. It is sufficient to refer to the holding of the Court. It was there held that –

   "(i) the carrying on of the inherently dangerous activity of running express trains through a level crossing, which was lawfully and necessarily used by local inhabitants, their guests and persons visiting on business, imposed on the appellant a general duty of care toward those who were lawfully on the level crossing; the duty owed by the appellant as occupier to M. as licensee existed in addition to this general duty and did not limit the general duty of care

   (ii) the appellant's general duty of care to take all reasonable precautions to ensure the safety of persons lawfully using a level crossing extended not merely to positive operations but also to static conditions, and included an

obligation to keep the crossing itself in reasonably adequate condition."

2. ***Lloyds Bank v. Railway Executive*** [1952] 1 All E.R. 1248. The facts in this case related to a situation in which the increased volume of traffic using a railway crossing resulted in a higher duty of care being placed on the railway authorities. It was there held (per Denning and Romer LJJ).

   "Apart from statute the defendants were under a duty at common law to prevent danger at these crossings. As the danger increases, so must their precautions increase. The defendants cannot stand by while accidents happen and say: 'This increased traffic on the road is no concern of ours'. It is their concern. It is their trains which help to cause the accidents, and it is often the increased number of trains which increases the danger as well as the increased traffic on the road. The defendants must, therefore, do whatever is reasonable on their part to prevent the accidents. They need not at common law go so far as to turn the crossing into a public level crossing with all the statutory obligations incident thereto, but they must do all that may be reasonably required of them, in the shape of warnings, whistles, and so forth so as to reduce the danger to people using the crossing."

3. ***Jamaica Railway Corporation v. Allen*** [1966] 9 JLR 504 related to a collision between a truck and a train at a level crossing after a bend in the main road. It was there held by this Court 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 ...".

In the instant case the evidence before the learned trial judge emanating from the observer/guard, Mr. DaCosta, was of a straight road leading to the railway crossing. This would have enabled the driver of the car to have seen the oncoming engine at a reasonable distance from the crossing and to have taken the necessary action to bring the vehicle to a halt before reaching it. This he failed to do and as the learned trial judge found rather than taking the necessary care for the safety of his passengers, he attempted to beat the train across the crossing.

In accepting the accounts of the witnesses, Mr. Dwyer and Mr. DaCosta as a credible narrative of the events leading up to the collision, the learned trial judge found that they followed the safety procedures by sounding the horn of the engine at the whistle post, a distance of a quarter mile from the crossing, at which point the speed of the train was reduced from 25 m.p.h. to 10 m.p.h. bringing the speed of the engine to a virtual crawl. She accepted that by so doing they acted with reasonable care and were not to be blamed for the

collision. Having seen and heard the witnesses and observed their demeanour, once there was evidence supporting her findings of fact and the conclusion to which she came, this Court would not lightly interfere with those findings nor with the decision to which she came: vide ***Watt or Thomas v. Thomas*** [1947] 1 All E.R. 582.

Learned counsel for the respondent in dealing with ground 1 (verdict unreasonable) and having summarized the evidence for the parties, submitted that the learned trial judge dealt with the issues of fact and determined which account was the more credible. He argued that once there was a basis for the learned judge's finding, then consistent with the reasoning and guidelines laid down by the House of Lords, per Lord Thankerton in ***Watt or Thomas v. Thomas*** (supra) the learned trial judge having the distinct advantage of having seen and heard the witnesses, a higher Court should be slow to interfere with, or to disturb, the findings to which she came.

We are firmly of the view that the issue before the learned trial judge was mainly a credibility matter and that it was a question for her to determine which of the accounts she believed. As there was sufficient evidence supporting her findings, there was no basis for the complaint made. This ground accordingly fails.

Ground 2, for the reasons previously set out, was without merit.

Counsel for the respondent relied in support on the following:

> ***Charlesworthy and Percy on Negligence,*** 9th Edition page 198 paragraph 3 – 13 under the sub-heading Contributory Negligence must be pleaded. It reads:
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> > "If the defendant intends to rely upon an averment of contributory negligence such allegations must be specifically pleaded against the plaintiff. In the event of a failure so to raise them, not only is the trial judge disentitled to apportion liability between the parties of his own motion but there is no obligation upon him even to take such possible considerations into account."

The case of ***Fookes v. Slaytor*** [1979] 1 All E. R. 137 is referred to in the footnote to the above statement by the learned editor. It is sufficient to emphasize the principle laid down by referring to the holding in the judgment of the Court of Appeal. It was held that:

> "The defence of contributory negligence was only available if it was pleaded. It followed that in the absence of a pleading by the defendant of contributory negligence the judge had no jurisdiction to make a finding of such negligence on the part of the plaintiff. ..."

It is worth mentioning that while the authorities cited have to deal with situations where the defendant has failed to plead the defence of contributory negligence, the consequence of such an omission, applies with equal force to whichever party is seeking to rely

on the defence. The plaintiffs/appellants not having raised it in their Statement of Claim below, the learned trial judge was without jurisdiction to consider it on her own motion, neither could counsel be permitted to argue the matter before this Court.

Conclusion

What the learned trial judge had to determine in this matter was which of two diametrically opposite accounts was to be believed. The plaintiffs/appellants version was an improbable account of an engine travelling at a speed of 70 miles per hour emerging suddenly and without any warning from around a bend and colliding into the motor car as the driver attempted desperately to propel the motor vehicle across the tracks at the crossing.

On the defendants'/respondents' part the version was of two employees, a driver and a observer/guard acting responsibly in adhering to the safety procedures as they sought to direct the engine with the necessary care and caution across the tracks to its ultimate destination. Given these two accounts, the balance of probabilities clearly was in favour of the respondents' account being the more credible of the two. The learned trial judge was right, therefore, in accepting that account.

It was for the foregoing reasons that on July 4, 2003 we dismissed this appeal, affirmed the judgment below and ordered costs to the first defendant/respondent to be agreed or taxed.

DOWNER, J.A:

I agree

WALKER, J.A:

I agree.