INTHE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2007 HCV 03957

BETWEEN NORRIS FRANCIS CLAIMANT

AND UC RUSSAL ALUMINA JAMAICA LIMITED DEFENDANT

Mr. Dale Staple, instructed by Kinghorn & Kinghorn for the claimant.

Mr. C. Kelman, instructed by Myers, Fletcher & Gordon for the defendant.

Claim for Damages for Personal Injuries – Collision at level crossing- Duty of Care of Motorist and of Train Driver –Calculation of Damages.

Heard February 25 & July 13, 2010.

Coram: F. Williams, J (ag).

Background

This matter arises from a motor-vehicle accident which occurred on January 29, 2004. The accident occurred at an un-gated level crossing at Vanity Fair district in the parish of St. Catherine. The claimant's motor car, which was proceeding over the crossing, came into collision with a train owned by the defendant, which was also using the crossing. The claimant, as a result, sustained severe injuries. For these he seeks compensation from the defendant, alleging negligence. The defendant denies negligence on its part, instead alleging negligence on the part of the claimant.

In the pleadings as originally drafted the Jamaica Railway Corporation (the JRC) was the first defendant. The claim against it was grounded in negligence as a result of its ownership of the train line in question. The main allegations against the JRC were that it negligently controlled, managed and/or supervised the use

of the said train line- for example, by not having flagmen and/or gates and/or adequate warning signals at the said crossing.

However, by order of McDonald, J on June 1, 2009, summary judgment was entered against the claimant in favour of the first defendant (JRC). That judgment was founded on the first defendant successfully arguing that the claim against it was statute- barred by virtue of section 67 of the JRC Act. The claimant was, in the result, left to pursue its claim against the remaining defendant (UC Rusal) alone.

The Issues

The issues in this case might be identified by looking at the parties' Statements of Facts and Issues. From the perspective of the claimant, the "Legal Issues in Dispute" are:

a. Whether the collision between the train and the Claimant (sic) motor vehicle was caused by the negligence of the Defendant's agent and/or servant.
b. Whether the Claimant contributed to the collision.
c. Whether the collision was caused solely by the negligence of the Defendant's servant and/or agent.

From the perspective of the defendant, the "Legal Issues" are stated thus:

(i) Whether the collision was due to the sole negligence of the Claimant, and if so, whether he is entitled to any relief sought.
(ii) Whether the Claimant contributed to the collision between the Defendant's train and his motor vehicle.
(iii) Whether the Jamaica Railway Corporation had a duty to erect warning signs.

(Of course, a consideration of this last-stated issue has been rendered unnecessary by the aforesaid order of McDonald, J).

So that, at the end of the day, the central issues are: whether either of the parties was negligent and whether, if there was negligence, that negligence was sole or joint.

The Claimant's Case

In his witness statement filed on September 3, 2010 the claimant states that he was on his way from Spanish Town to a crusade in Guys Hill, St. Catherine. He approached the crossing around 3:00 p.m. It was an unmanned crossing. There were no warning signs or anything else to alert motorists to the approach of a train. He also says: "I heard no horns at all coming from anywhere that would signify that a train was coming". His radio was not on. He had a female passenger in the car. He normally drives on that road. He also says:"Normally, if a train is coming and you hear it, you would stop before the line and allow the train to pass". There was "a big banking" to his right making it "difficult to see anything coming from the right" – the direction from which the train was coming.

At paragraphs 7 and 8 of his witness statement he says:

> "7. So as I approached the train line, I slowed to cross the train line. You have to slow down because the train line in (sic) on a slight upward incline. I never saw the train at all. I didn't even hear the train. Because of my angle how I was approaching the train line, I was able to see there was nothing coming from the left side of the track. But I repeat that because of the banking, it was almost impossible to see anything coming.
> 8. The train wasn't really loud either. I didn't hear anything strange or unusual to indicate that a train was coming and so I went ahead and attempted to cross the train line."

In his Particulars of Claim, the claimant's injuries are particularized as follows:-

(i) Cerebral oedema;

(ii) Brain contusion;

(iii) Rib fracture with pneumohaemothorax;

(iv) Loss of consciousness;

(v) Severe head injury;

(vi) Suffering weakness in all limbs;

(vii) Spastic quadriparesis (right side weaker than left side).

The Defendant's Case

The substance of the defendant's case is that: "its servants and/or agents used all reasonable care, vigilance and skill in the management or operation of the train". (See paragraph 4 of the Defence). More particularly, the defendant avers that (a) the train was travelling at the prescribed speed (for an un-gated crossing) of approximately 16 kilometres per hour (kph); (b) the prescribed horn signal was sounded to alert motorists and pedestrians that the train was approaching; and it was so sounded up to the point of impact; (c) the emergency brake was applied; and (d) the claimant drove suddenly onto the track after the train had entered the crossing; (e) the claimant failed to observe the warning signs along the roadway approaching the track.

For the defendant, three persons gave witness statements and oral evidence:- (i) the train driver, Mr. Owen Denton; (ii) Mr. Manley Brandon, a "permanent way technician"; and (iii) Mr. George Peart, a shunter on the said train.

Mr. Denton's evidence is to the effect that on the day in question around 3:40 p.m. he was driving the train which consisted of two locomotives; four loaded cars carrying caustic soda; six loaded oil tanks; and 15 empty hopper cars. On approaching the crossing, he sounded the horn of the train to alert the motorists and pedestrians that the train was approaching. This was done continuously. He

estimates that the train can be seen from some 290 metres away and the train's engine is easily heard.

The train approaches the crossing from an angle, making it impossible for the train driver to see oncoming motor vehicles until they have already entered the crossing.

As the train entered the crossing that day, he saw a white motor car "appear in front of the train". He immediately applied the emergency brake; however, a collision still occurred as he couldn't stop the train in time. This was in spite of the fact that the train was travelling at 16 kph. After the collision, he noted that the windows of the motor car were wound up.

Mr. Brandon's evidence is to the effect that, as permanent way technician, he is responsible for proper maintenance of all railway lines. Although under a Track User Agreement between the defendant's predecessor and the JRC it is the latter's responsibility to put up gates and signs, the defendant: "without any obligation to do so, took the initiative to have signs placed at the designated railway crossings due to the JRC's lack of funds". At the time of the accident the following signs were in place: - (a) Railway Crossing 150 meter ahead; (b) Stop, look, listen; and (c) Stop Sign (located at the crossing).

For his part, Mr. Peart states that, as a shunter 11, he is responsible for the back end of the train. On approaching the crossing the driver sounded the train's horn. He heard this from his seat at the back of the train. He felt an impact, felt the train slow, heard the emergency brake and saw pistons on the train come up (these come up when the brake is applied).

Submissions

For the Claimant

The claimant's submissions on liability are summarized at paragraph 8 of its written submissions as follows:-

> (i) 'The Defendant is liable to the Claimant by their breach of duty to properly alert the Claimant as to the approach of the said train and by failing to manage the operation of the train line so as to avoid the collision in the particular circumstances of this level crossing; and/or
>
> (ii) The Defendant is liable to the Claimant vicariously through its servants and/or agents, the driver of the train, for failing to operate and/or manage the said train so as to avoid the collision at this particular level crossing."

For The Defendant

The defendant's submissions are summarized at paragraph 18 of its written submissions in some six points:- "(i) The Claimant has not discharged the burden of proof of Negligence of (sic) the part of the Defendant; (ii) The Claimant's management of his motor vehicle was the proximate cause of the accident; (iii) Since the Claimant failed to come to a complete stop, at the time he entered the crossing his entry was unlawful; (iv) The Defendant's servants and/or agents did not act negligently as alleged or at all and instead acted reasonably in all the circumstances; (v) The train driver and crew used all reasonable care, vigilance and skill in the management of the train; (vi) The Defendant's evidence is more reliable and probable than the Claimant's and the balance of probabilities is therefore in favour of the Defendant's version being the more credible."

Analysis

A resolution of the issues in this case turns primarily on the issue of credibility of the witnesses. It will be seen, as well, that three sub-issues exist: - (i) whether there were the warning signs that Mr. Brandon testified about, or any other signs; (ii) whether the train horn was sounded, as indicated by Mr. Denton; (iii) whether there was on the part of the defendant an obligation to do more in respect of the safety of the crossing.

In respect of the issue of credibility and the question of whether the signs were in place, the court regarded Mr. Brandon as a witness of truth and finds that the signs of which he testified were in fact in place on the day in question.

Concerning the question of whether the horn was sounded as the train approached the crossing, the claimant contends that he did not hear any. Two witnesses for the defendant contend that it was blown and blown continuously from the whistle post some ¼ mile away until the train got to the crossing. These two witnesses also indicate that, after the accident, the windows of the motor car were observed to have been wound up. The court asks itself, however, whether it is likely or even possible for the windows of the motor car to have remained intact if wound up, after what must have been a very violent collision with the train – seemingly a broadside – considering especially the severity of the injuries sustained by the claimant. In the court's finding it is highly unlikely- if at all possible. Even if the claimant had been conversing with his passenger or listening to his radio, a horn that loud, sounded at such close proximity would have had the effect of jarring him from any distraction in which he was engaged.

However, even if the windows had been wound up as the car approached the crossing; if the horn (which, on the defendant's evidence, can be heard up to half mile away) was sounded, then must the claimant not have heard it-even if he was conversing with his passenger? It is my finding that the horn was not blown as the train approached the crossing and that this failure amounted to negligence

on the part of the train driver and vicariously on the part of the defendant itself. The court finds that the necessity of sounding the horn would have been especially important at this, an un-gated crossing, at which the ordinary exigencies of its use might involve motorists failing to stop in obedience to the signs that were there.

The claimant must also have been negligent too in failing to proceed with caution and indeed to come to a full stop when he approached the crossing, which might have availed him the opportunity of hearing the sound made by the train as it rolled over the tracks. The presence at the time of the banking and the existence of a bend which made it difficult for both motorist and train driver to see until they practically arrived at the crossing itself, reinforce the need for extra caution in using the crossing on the part of both.

The circumstances of this accident also suggest that the prescribed maximum speed of 16 kph would have been excessive in all the circumstances – given the "blind" approach for both motorist and train driver.

The court finds that there was negligence on the part of both the claimant and the defendant, and apportions this negligence between the parties in equal proportions.

This finding of negligence in relation to the failure to use the horn is, by itself, enough to attach liability to the defendant, rendering it unnecessary to consider whether the defendant had a duty to employ additional measures to make that particular crossing safer for members of the public. However, for what it is worth, I must state that I do accept that the defendant, in its operation of its train(s) owed a duty of care to its "neighbours" – those persons who might have had occasion to use the crossing.

It now falls to the court to assess the quantum of damages that would be fair and reasonable compensation for the claimant.

Damages

General Damages

Apart from the particulars of injuries set out in the Particulars of Claim, it is important to note that the medical evidence indicates that the claimant is left with a permanent partial disability (PPD) of 50% of the whole person. He suffered loss of consciousness and had a Glasgow coma – scale 5/15. In fact, he was in a come for about a month. He can now ambulate, using a walker, but his gait is unsteady.

The evidence of Dr. Rory Dixon is to the effect that the claimant may return to a level of productivity, but he will need to have access to his workplace and to use a computer.

Counsel for the claimant relied on three cases as a general guide in an effort to persuade the court that an award in the sum of $30,000,000 would be reasonable for pain and suffering and loss of amenities.

One of those cases was **Sylvester Frazer v. Charles Brown** et al, reported at Volume 5 of Khan's **Recent Personal Injury Awards** at page 203. That was a case involving, inter alia, paralysis of the lower body, unconsciousness, decreased muscle tone, fracture of the glenoid process of the scapula and other similar injuries. Additionally, the medical evidence was to the effect that the claimant in that case would not be likely to walk again. On June 5, 1998 damages were assessed in the sum of $5,320,000, with the sum of $4,500,000 of that amount being for pain and suffering. In today's money that award would be $14,360,100.

Another case cited was that of **Anthony Wright v Lucient Brown**, reported at page 164 of Volume 6 of Khan. That case, briefly, involved a gunshot injury which resulted in damage to that claimant's spinal cord. His injuries rendered him a paraplegic and also suffering from impotence, as well as urinary and fecal incontinence. That case saw an award of $8,000,000 being made, which would be $22,904,315 in today's money.

The other case cited was that of **Everette Sutherland v Anthony Gordon et al**, reported at page 168 of Volume 6 of Khan. The injuries in that case included: bilateral C5 lamina fractures with anterior subluxation of C5 on C6 vertebrae; fracture of three ribs and "flail chest". He was assessed as having severe spinal cord lesion with sacral sparing. He required future periodic medical and urological examination regularly; he was required to have a power wheelchair and a wheelchair-accessible environment. On July 4, 2007 general damages were assessed in the sum of $16,000,000 – which is $23,012,252.59 today.

The submission for the defendant in relation to general damages was to the effect that the **Sylvester Frazer** case would be the best guide to be used, as the resultant disability in both cases is similar. To award the claimant the $30,000,000 being sought in this case would be to double the award in the Frazer case, and there is no justification for doing so.

In the defendant's further submission, the **Anthony Wright** case featured far more severe injuries that the instant case and also featured disabilities that are absent from the instant case. To take account of these considerations, that award, if it is to be used at all, should be reduced to, say, $15,000,000.

The **Everett Sutherland** case provides no assistance to this court (in the defendant's further submission) as the claimant in that case suffered from sequelae that are absent from the instant case.

The court takes the view that the **Sylvester Frazer** case is indeed the one that most closely approximates the injuries and resulting disabilities in the instant case- with one important exception. The exception is that, whereas the medical evidence is to the effect that the claimant **Frazer** would be unlikely to walk again; the claimant Francis can walk with the aid of a walker, though his gait is unsteady. This, in the court's view, makes the **Frazer** case somewhat more serious that the instant case with the result that the award in that case will have to be scaled down when using it as a guide. In all the circumstances, an award of $12 million would be appropriate.

In the court's view, it would be unwise to use the global award stated as general damages in the Sutherland case as that award could possibly include sums for future medical care and perhaps handicap on the labour market. It would also be unwise to use the Wright case, which featured paraplegia and a whole-person disability of 70%.

Future Care and Future Assistance

For future care, the claimant's counsel suggested a sum of $2,400,000. This sum was arrived at by using a multiplier of 7 along the lines of that used for a 39 year old claimant in the Dennis Brown case reported in Volume 5 of Khan. The multiplicand was arrived at by using a figure of $5,000 per week. This figure (the argument goes) would be more appropriate than the minimum wage, as the assistance the claimant needs is that of a personal assistant.

The defendant's counsel agrees that the multiplier of 7 would be appropriate. He, however, contends that the minimum wage of what he agrees is $3,700 should be used. The resulting award would therefore be $1, 243,200.

It seems to the court that the use of a figure other than the minimum wage would appear to be arbitrary and unsupported by evidence. The minimum wage figure is that which will be used. To the court's knowledge, the minimum wage for

household help is $4,070 per week, or $195,360 per annum. Applying the multiplier of 7 to this multiplicand, the award under this head is $1, 367,520.

As regards the claim for a motorized wheelchair, the evidence of Dr. Dixon seems to support it. The claimant seeks the sum of US$2,000. The defendant did not address this at all, which apparently is meant to signify its agreement. The amount sought will therefore be awarded – that is, US$2,000.

Handicap on the Labour Market

Under this head, the claimant seeks a lump sum award of $5,000,000. The defendant, on the other hand, suggests the much more modest figure of $650,000, on the basis that there is no evidence as the claimant's capacity for work or otherwise; and none of his inability or lack of success in securing employment and other such necessary information.

In light of all the circumstances and the paucity of evidence, the award under this head will be $750,000.

Special Damages

Both sides are agreed that the amount that has been properly proven under this head is $43,442.63; and that will be the quantum under this head.

The order of the court is therefore as follows:-

1. The court apportions liability equally (i.e., 50% and 50%) between the Claimant and Defendant respectively.

2. General Damages – a. Pain & suffering:-

   Six million dollars ($6,000,000) being 50% of the sum of $12 million, with interest thereon at the rate of 3% p.a. from 8.11.07 (date of acknowledgement of service) to today's date – 13.7.2010.

b. Handicap on the labour market in the sum of three hundred and seventy-five thousand dollars ($375,000) being 50% of the sum of $750,000.
c. Future assistance in the sum of six hundred and eighty-three thousand, seven hundred and sixty dollars ($683,760), being 50% of the sum of $1,367,520).
d. Wheelchair cost in the sum of two thousand United States dollars (US$2,000).

3. Special Damages –

Twenty-one thousand, seven hundred and twenty-one dollars and thirty-one cents ($21,721.31), being 50% of the sum of $43,442.63, with interest thereon at the rate of 6% p.a. from 29.1.04 (date of incident) to 21.6.06; and at 3% p.a. from 22.6.06 to today's date – 13.7.2010.

4. Costs to the claimant to be taxed, if not agreed.