

IN THE SUPREME COURT OF QUEENSLAND

No. 109 of 1983

CIVIL JURISDICTION

BEFORE MR. JUSTICE DEMACK

ROCKHAMPTON, 15 MARCH 1990

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BETWEEN:

RONALD WILLIAM POSSINGHAM

Plaintiff

- and -

THE COMMISSIONER FOR RAILWAYS

Defendant

JUDGMENT

HIS HONOUR: In this action I reduce my reasons to
writing which I now publish. There will be judgment for the
plaintiff against the defendant for \$236,588.93 with costs
to be taxed.

IN THE SUPREME COURT OF QUEENSLAND

No. 109 of 1988

ROCKHAMPTON

BETWEEN:

RONALD WILLIAM POSSINGHAM

Plaintiff

AND:

THE COMMISSIONER FOR RAILWAYS

Defendant

JUDGMENT - DEMACK J.

DELIVERED the 15th day of March 1990.

Mr Possingham was born on 3rd March, 1948. On 1st July, 1981, he was injured whilst riding a motor cycle over the Brendonna railway level crossing near Gladstone. He was seriously injured, and there is little dispute about the measure of his damages. The question of negligence has, however, been strongly contested.

The level crossing is over the Gladstone-Monto railway line which, along with other rail traffic, carries coal trains from Moura. The train in question was a "triple-headed coal train of about 4,200 ton" (p. 91). It was travelling towards Gladstone. In the vicinity of the crossing, the train was travelling in a northerly direction. Between 300 and 400 metres south from the crossing, there is a curve and, in that vicinity, a whistle board.

The driver of the train, Mr Chadburn, said that from the curve to crossing is down hill, and he had the dynamic brakes on. The speed of the train was 50 kilometres per hour. After the impact at the crossing, he "slammed the brakes into full emergency", (p. 92). The train came to a halt with its leading locomotive about 600 metres north of the crossing. This gives some idea of the risk to which users of the crossing are exposed. The speed limit for trains, fixed by the defendant in the vicinity of the curve, is 80 kilometres per hour (ex. 30). However, a 4,200 ton coal train travelling along that stretch of line at 50 kilometres per hour travels 600 metres under emergency braking before coming to a halt.

The High Court has stated the duty of the defendant in respect of level crossings in The South Australian Railways Commissioner -v- Thomas (1951) 84 C.L.R. 84, at p. 89, in these terms:-

"In considering whether adequate warning was provided at a level crossing over a public road all the circumstances of the locality and of the traffic passing over it and the conditions prevailing at the relevant time must be taken into consideration: Alchin v. Commissioner for Railways (1935) 35 S.R. (N.S.W.) 498, at p. 502; 52 W.N. 156. The duty of the commissioner is to do everything which in the circumstances is reasonably necessary to secure the safety of persons using the crossing: Cliff v. Midland Railway Co. (1870) L.R. 5 Q.B. 258, at p. 261; Ellis v. Great Western Railway Co. (1874) L.R. 9 C.P. 551, at p. 555; Liddiatt v. Great Western Railway Co. (1946) K.B. 545, at p. 550. This must include a duty to give reasonable warning of the approach of a train where the commissioner does not provide gates which are closed when a train is approaching. That duty is not fulfilled by providing means which would enable persons of acute vision and hearing exercising the most anxious care to avoid injury. The fact that all sorts and conditions of people use the highway must be taken into account, and, whilst the commissioner is not required to protect against their own carelessness people who proceed without any regard to their own safety, it is his duty to take every reasonable precaution to ensure that the level crossing will be safe for the members of the public generally who act with due care while exercising their rights of passing over it."

This passage was quoted in the subsequent decision of Commissioner for Railways -v- Dowle (1958) 99 C.L.R. 353, at p. 358. In Dowle's case the way in which the High Court framed the question for the jury (p. 359) indicates that the traffic on the railway is a significant consideration as well as the traffic using the crossing.

What did the defendant do to discharge its duty to the plaintiff?

The Brendonna level crossing provided access from the Dawson Highway to the Brendonna Caravan Park and an adjoining nursery.

From ex. 14, a scale plan prepared by a surveyor, it appears that the road from the Dawson highway to the Brendonna Crossing is a straight gravel surfaced road, 128

metres long. This road approaches the railway line at an angle of about 75°. At the crossing it begins to curve to the left, or in a southerly direction. From the crossing to the entrance of the Brendonna Caravan Park is a distance of 145 metres. There was considerable debate about the angle at which the road approaches and crosses the railway line. I have relied on exhibit 14 in preference to the estimates given by the witnesses. It was tendered by consent so both parties have accepted its accuracy.

Exhibit 14 shows that on either side of the railway reserve there is a road reserve. At a point opposite the entrance of Brendonna Caravan Park the road reserve is approximately 60 metres wide. At the point where the Brendonna Crossing Road enters the Dawson Highway, the distance from the railway reserve to the edge of the Highway is approximately 110 metres. These distances give some indication of the angle at which the respective parts of the road travel in relation to the railway line. The remaining significant distance is that from the southern edge of the crossing along the railway line to a point opposite the entrance to the caravan park. That is approximately 115 metres.

The road reserve between the Brendonna Caravan Park and the adjoining nursery on the one side, and the railway reserve on the other, is timbered. The type and density of the timber varies, although the witnesses were happy to give a general description to the trees as gum trees. Opposite the entrance to the Caravan Park the trees form an open forest, with little under-storey. In the area opposite the nursery, the timber was much thicker and in the area between the gravel road and the railway reserve, 25 to 50 yards before the crossing, the trees can fairly be described as a thicket, (exs. 15A and 15D).

The railway reserve, as at 1st July, 1981, had grass and scattered timber regrowth on it. The grass was up to 750 mm high and the regrowth up to fence height. The grass and regrowth was not of sufficient height or density to

block visibility, but it gave an appearance of a branch railway line with low traffic and low maintenance.

The warning signs in the vicinity of the crossing consisted of the crossed arms on a post with a red triangle below. From the direction of the Brendonna Caravan Park the sign was situated behind high grass on the road reserve, (ex. 15C). Finding the sign on ex. 15C became one of the challenges of the trial, until Mr Payne fixed it for all to see. I suspect that it can also be found on ex. 15D. I have peered at ex. 15D with a magnifying glass and there is a blur in a position that corresponds with the marked position in ex. 15C. Of course, I take Mr Payne's point that, in natural colour, the sign is more conspicuous than upon a black and white photograph.

In my opinion, it cannot be said that, in placing that sign where it was, the Commissioner has done everything, which, in the circumstances, was reasonably necessary to secure the safety of persons using the crossing. The Commissioner knew that the crossing was approached through a closely timbered road reserve over which he had no control. What was necessary was to warn crossing users that behind that timber a 4,200 ton triple headed coal train might be approaching. It seems to me that it was imperative that the sleepy little branch line image be dispelled. That required, as Dr. Wigglesworth suggested, both a sign back from the crossing indicating that there was a railway crossing ahead and a stop sign before the track. It is beside the point that users of that part of the road would be on a return journey across the railway. It is the Commissioner's duty to remind them of the potential danger, and he does not discharge that duty by expecting crossing users to find out the danger for themselves.

I am satisfied that there was inadequate warning of the danger to the persons using the crossing.

As exhibit 14 shows, the fence line at the crossing is truncated at about 45°. There are cattle grids on either side of the crossing, and these have a return post and rail

fence. From each of the four posts closest to the crossing a barbed wire fence runs to the boundary fence of the railway reserve. Those fences are at about 45°. The railway reserve on the caravan park side of the railway tracks is 18 metres wide.

As I have previously said, once the road crosses the railway tracks it begins to curve. In the first 20 to 25 metres from the railway tracks there were a number of pot holes. Beyond that the road had a fair gravel surface. There seems to be some uncertainty in the minds of those responsible for the maintenance of the road as to where the Commissioner's duty ended and the Calliope Shire Council's started. The potholes in the part of the road which crosses the line of the railway reserve indicate that. The Shire Engineer, Mr Jones, said that there were practical difficulties performing earth works with road plant in that confined area.

For present purposes, I shall assume that the Commissioner's responsibility for maintenance stops 0.5 metres from the railway tracks (Railways Act s. 73(7)). If it stops 2 metres from the tracks (Local Government Act (s. 35 (17)) this is of no practical consequence, so I do not intend to discuss the interaction of these sections. I am inclined to think that neither applies to a rural situation where I suspect the land vested in the Commissioner is delineated by the continuation of the boundary fence line of the railway reserve. However, there is no evidence of that.

For the purposes of this case I shall assume that the Commissioner's obligation to maintain the road surface was limited to 0.5 metres on either side of the rails. On the evidence this space was poorly maintained at 1st July, 1981. The rail on the Caravan Park side of the Crossing was exposed to the extent of between 2 to 4 inches. Estimates varied, but that seems to be the range. Between the tracks there were potholes up to 6 inches deep.

Of the witnesses who gave evidence about the state of the crossing, I was most impressed by Mr Clements. He was not directly involved in the case, but had been the manager of the Brendonna Caravan park for 22 months prior to 1st July, 1981. He was thoroughly familiar with the crossing, and was a forthright witness. I do not accept all of his estimates about distances, but I do accept his evidence about the state of the crossings. Specifically I accept his evidence and that of Constable Hughes to the effect that the state of the roadway in the immediate vicinity of the railway track and between the rails required the cautious attention of a motor cyclist who used the crossing.

From what I have said, it is apparent that if a motor cyclist wearing a full face helmet rode out of the Brendonna Caravan Park at about 15 kilometres per hour, and travelled towards the crossing at a speed of about 20 kilometres per hour, any train travelling towards the crossing from the south 50 kilometres per hour would at least 350 metres from the crossing when the cyclist left the Caravan Park, ie. 145 metres x two and one half. Thus the part of the railway line opposite the park which was visible through the open forest would be empty. Once the motor cyclist turned left, the approaching train would be behind his right shoulder and his helmet would restrict his hearing of any whistle and his view of any train and its light. As he approached the curve towards the crossing the thicket of trees provided an additional obstruction to his vision and to some extent his hearing. Only as his motor cycle entered upon the poorly maintained part of the roadway did he begin to have the possibility of seeing the train back across his right shoulder. However, at that point, the surface of the roadway commanded his attention and only twenty metres ahead were the exposed rails and potholes of the actual crossing.

The way the Commissioner's duty has been expressed in the passage I have quoted clearly requires the Commissioner to take account of the possibility of such a motor-cyclist using the crossing at a time when a triple-headed coal

train approached. Specifically the Commissioner needed to take account of the angle of approach of the road from the caravan park, a matter Dr. Wigglesworth referred to, and a significant issue in Dowle's case (supra). If there had been the signs I have referred to, and more frequent maintenance of the actual crossing, the motor cyclist would not only have been reminded of the danger, but would have a reasonable opportunity of looking to his right in the approach to the crossing. These things were reasonably necessary to secure the safety of people using the crossing.

Turning then to the events on 1st July, 1981, I accept generally the evidence of Mr Possingham and his pillion passenger, Mr Brancovic. I do not accept all their evidence about estimates of distance where those estimates do not conform to exhibit 14. I do accept their estimate of speed, about 15 - 20 kilometres per hour in the 120 metres or so from the entrance to the caravan park and then slowing in the vicinity of the potholes. I accept that as the motor cycle came very close to the train track Mr Brancovic "caught the flash of it", (p.55) and went back off the motor cycle. He reached out to grasp Mr Possingham who rode slowly into the path of the train. I accept Dr. Wigglesworth's explanation that the different helmets worn by the men had different effects upon their peripheral vision.

I am unable to accept the evidence of the fireman, Mr Blackman. He spoke of seeing the motor cyclist leaving a caravan, jumping on his bike, the pillion passenger waving as if to acknowledge the Klaxon and motor cycle being ridden down the road and onto the crossing, (p. 97). When the motor cycle came to the vicinity of the crossing it was travelling at 10 kilometres per hour, (p. 95) and the passenger stepped off the bike. I accept Mr Chadburn's evidence of the constant speed of the train at 50 kilometres per hour. I cannot accept that Mr Blackman saw all that he said he saw in the light of the findings I have already made. I accept that he did sound the klaxon some

time after Mr Chadburn sounded it at the whistle board. I am satisfied that Mr Possingham was unaware of the approach of the train and that Mr Brancovic became aware of it only at the last moment. I am satisfied that this is reasonably explained by the noise of the motor cycle and the effect of the safety helmets. It seems to me to be clear that the effectiveness of the klaxon as a warning device has been greatly reduced by the widespread use of helmets by motor cyclists, and, indeed, of air conditioning in cars and tractors. This simply highlights the importance of visual warnings.

I am satisfied that the factors, that I demonstrated as indicative of the hypothetical steps the Commissioner should have taken in discharge of his duty, came into play on 1st July, 1981. Mr Possingham did not hear the audible warning given by the train. The visual warning of the danger at the crossing was inadequate in itself and barely visible. The potholes at the crossing became the focus of his attention. I am satisfied the Commissioner was in breach of his duty to Mr Possingham, and that that breach caused his injuries.

So far as contributory negligence is concerned, there is something compelling about the proposition that to ride into the path of a triple headed coal train on a clear day is to show scant regard for one's own safety. Mr Possingham knew the railway crossing was there. His approach to the line was leisurely and careful, so far as the road surface was concerned. He simply failed to look out for trains, which is the basic task every level crossing user undertakes in discharging the duty to take reasonable care for personal safety.

I have given the question of apportionment a great deal of consideration, but in the end it seems to me that this is a case of equal responsibility. On both sides there was scant regard for basic considerations and it seems to me to be impossible to distinguish between the plaintiff and the defendant.

After the train stopped, Mr Brancovic went looking for Mr Possingham. He first found his right foot, still cased in its boot. Mr Possingham's left leg were also badly injured. He was taken to the Gladstone Hospital.

On admission he was suffering from a right below knee traumatic amputation. He had a severe compound comminuted fracture of his left patella and knee region. He had a grossly comminuted fracture of his pelvis with dislocation of his sacro-cliac joints. In initial surgery his right leg was amputated above the knee and compound scrub and debridement of the left leg was performed. Several operations were required to remove all the pieces of the fracture knee cap. Between 1st July, 1981 and 1st November, 1984, he spent 430 days in three hospitals.

For the purposes of litigation he was seen by Dr. Graham Anderson, whose report was tendered by consent, is sufficient to quote from his report (ex. 7):-

"It is clear from this description that this man is gravely disabled. He has permanent changes of a major nature in both lower limbs.

In his left lower limb, he has lost about 50% of its efficient function, because of the permanent stiffness of the left knee, and in the right lower limb because of the changes in the right hip and the amputation he has lost about 95% of its efficient function.

The combination of an above knee prosthesis with a pelvic band and a totally stiff knee on the opposite side is a very awkward combination in terms of ambulation. Further it means with sitting there must be room for his stiff leg to sit out in front of him. As well as this, he has quite marked changes in the low back region, which I do not believe are related to the accident. However it may be and indeed probably is so that the interference with the function of his legs has had an undesirable secondary effect on his low back region.

He will be permanently committed to the sort of sedentary activities he is doing now under the circumstances of a Sheltered Workshop."

As appears from this, at the time he saw Dr. Anderson, Mr Possingham was working at the Endeavour Foundation Sheltered Workshop. That work lasted about twelve months. The workshop supervisor explained his problems, (p. 89):-

"He appeared to be interested in what he was doing?-- Yes, he showed interest in most things.

Was he required to sit down or stand up or both?-- Well, probably, you know, working in furniture and that sort of thing you are required to stand, but because of his disability he had to sit down occasionally.

Was he able to do everything required of him by himself?-- No.

Did he need some assistance?-- He needed a T.A. at most times.

What particular things did you find that he had difficulty in doing?-- He couldn't move the articles on which he was working because he used both hands with his crutches and he had to stand and manoeuvre himself, hence it was very difficult to move the articles that he was working on.

What about the pieces of material that were used to manufacture the items?-- Some of them were too long for him to move. Once you start putting something together, it was too difficult for him to move or turn over or turn around, hence the need for a T.A.

When he was there, was he able to work a full day?-- Not always no.

On those occasions when he didn't work a full day, what did he do?-- We have a sick bed there for anyone that required it and quite often it was necessary for him to spend half a day or some time on the bed.

What was the quality of the work that he actually performed?-- It was like most people that are down there. It is not totally professional. It was quite good.

Average quality? Better than average?-- It would be average quality.

Did you have occasion to give him instructions in the course of his work there?-- Yes.

How did he take that instruction?-- Differently. Different days, if he was having a good day, relatively well; if he was having a bad day, not very receptively.

Did his disposition vary from day to day?-- Yes."

This really highlights why Mr Possingham is permanently unemployable: he uses crutches to move around, he needs space when sitting because of his stiff left knee and he needs assistance to perform uncomplicated manual tasks. He had been a labourer in building construction work and was training as a dogman. There is no question of his returning to any similar job, and it was not suggested that he was employable. It may be that he will find some way of occupying some of his time in a remunerative way, but there is no reason to think that the remuneration will be other than nominal.

Turning then to the measure of damages, past economic loss has been calculated in ex. 25. This is based on continuous employment as a dogman. It seems to me unlikely that Mr Possingham would have been so continuously employed. On the other hand it makes no allowance for overtime, which has been a normal part of work in the construction industry. I shall allow \$100,000.00, of which \$48,000.00 shall bear interest. I shall allow interest in the sum of \$25,000.00.

For the future, Mr Possingham is aged 42 years, and I shall allow 15 years to take account of the usual contingencies and the particular vicissitudes of construction work. The present net weekly wage for a dogman is \$337.51. I shall allow a weekly loss of \$300.00. I shall allow \$165,000.00.

Special damages were agreed at \$76,977.87. There are recurrent expenses which are specified in ex. 27. There was a quibble about the frequency of fitting hand controls to a motor vehicle, but it seems to me that in the overall range

of this award the claim is reasonable. I accept that Mr Possingham's life expectancy is 30 years, and I shall allow \$3,200.00 for recurrent expenses.

On occasions Mr Possingham experiences a kind of choking sensation. I accept Dr. Howison's opinion that this is due to paralysis of the left vocal cord, a consequence of having an endo-tracheal tube in place for a long period. Nothing can be done about this. It is simply a further disruption of Mr Possingham's grossly disrupted life.

Mr Possingham has been seen by Dr. Peter Mulholland whose opinion of him is as follows:-

"Since I last examined him three years ago there have been some changes such that the views expressed under the heading of "Discussion" in 1987 have to be revised in the light of subsequent developments.

His general psychological status has much improved such that whilst he is still prone to some of the previously described features his psychological abnormalities these days are shortlived and by positive thinking he is 'able to pull himself out of his depressed moods.'

He still does have some of the previously described features of depression and anxiety however these are of much less degree these days. He still does have some minor phobic features but they are less than what they were.

He still does have a negative self image particularly in respect of females however it is less than previously and he now does admit to there being at least some sort of possibility that somewhere, sometime, somehow he may be able to have a relationship with a female.

I have considered the question as to whether he has or has not suffered from organic brain damage with considerable detail. On the one hand, one could say that his mental state subsequent to the accident as described in the Gladstone Hospital report was the result of his general medical condition at the time and the general changes in his personality functioning and including his memory disorder (and I do take into account Mr. Salzman's

opinions) could have been the result of a depressive disorder which he certainly did have until about one or two years ago.

On the other hand it is possible that he may well have suffered from an organic injury to his brain which went unrecognised at the time and from which he has made, a partial recovery.

On considering these various possibilities I think that I have to say that there is not sufficient supportive evidence to the hypothesis that he had a significant head injury in the accident and I consider that the more reasonable proposition is that his mental state abnormalities after the accident were the result of his general medical disorder and subsequent changes in his mental state were mostly the result of his being depressed."

It is eight years and eight months since the accident, and for much of that time Mr Possingham has had medical worries - blood clots, infections, skin grafts and weeping wounds. Prior to the accident Mr Possingham's marriage had been shaky, but his wife ceased visiting him in hospital. He was divorced in 1982. He believes he is unattractive to women. He suffers still from phantom pains.

Prior to the accident he played Australian Football, went fishing, sailed small catamarans, played in ten pin bowling competitions and enjoyed horse riding. Now, all of these, except fishing, are denied him. He goes fishing once a week, in a limited fashion.

Clearly enough Mr Possingham was gravely disabled by the accident. He suffered great distress and pain. His life style has been completely changed and this is reflected in his personality. Under this head of damages I shall allow \$85,000.00, \$35,000.00 of which shall bear interest which I fix at \$18,000.00.

The total of the award of damages is \$473,177.87. There will be judgment for the plaintiff against the defendant for \$236,588.93 together with costs to be taxed.