**BOTHA v ZAMBIA RAILWAYS BOARD (1974) ZR 65 (HC)**

HIGH COURT

CULLINAN J 35

10th JUNE 1972

(1972/HL/13)

**Flynote**

**Tort - Strict liability - Whether extends to implied statutory power.**

**Tort - Negligence - Duty of care of a Railway Company operating steam**40 **locomotives to adjoining agricultural land owners.**

**Headnote**

The Plaintiff claimed damages against the Defendant, Zambia Railways Board, by reason of the negligence and/or breach of statutory duty on the part of the Defendant in that: *(a)* The Defendant Railway

**1974 ZR p66**

CULLINAN J

Board failed to prevent sparks, coals or other inflammable material escaping from the Defendant's steam locomotive which was being driven along the permanent railway; *(b)* It had failed to maintain any adequate fire breaks so as to prevent the spread of fire caused on or adjacent to the permanent railway as the Defendant was required by law to do and as a result of which the Plaintiff sustained loss or damage.

*Held:*

   (i)   That statutory authority and indemnity extended not merely to the act itself but to all its necessary consequences and that 10 where the legislature had authorised an act as in the case of the Defendant Board, it must have envisaged the possibility, if not the likelihood and the necessity, for the use of steam locomotives and since the Act contained an implied statutory power which authorised the use of steam locomotives, the Defendant Board 15 was under no strict liability in the matter.

   (ii)   That although the Plaintiff had not established any negligence in the operation of the particular steam locomotive, there was, however, evidence of danger in the operation of the said locomotive adjoining agricultural land or grass land in the dry 20 season which said danger was fully appreciated by the Defendant Board, and in view of the fact that the evidence disclosed negligence on the part of the Defendant Board in this regard, the defendant was liable for the consequential loss to the plaintiff.

Cases cited: 25

   (1)   *Jones v Festiniog Railway Co.* LJR 1868 Vol. XXXVII.

   (2)   *Rylands v Fletcher* (1868) LR 3 HL. 330.

   (3)   *Quebec Railway v Vandry* [1920] AC 662

Legislation referred to:

   (1) Zambia Railways Act, Cap. 767, ss. 10 & 11 (1). 30

   (2) Railway Fires Act., 1905.

*A P  Enfield, Peter Cobbett - Tribe & Co.,* for the plaintiff.

*D M  Lewanika, Shamwana & Co.*, for the defendant.

**Judgment**

**Cullinan J:** The statement of claim in this matter reads as 35 follows:

   "2. The Plaintiff's claim is against the Defendant for damages by reason of the negligence and/or breach of statutory duty on the part of the Defendant in:

*(a)*   failing to prevent sparks, coals or other inflammable material 40 escaping from the Defendant's steam locomotive which was being driven along the permanent railway at or about 1.00 p.m. on the 16th day of May, 1971, and

**1974 ZR p67**

CULLINAN J

*(b)*   failing to maintain any or any adequate fire-breaks so as to prevent the spread of fire caused on or adjacent to the permanent railway as the Defendant was required by law to do as a result of which the Plaintiff sustained loss or damage." 5

The defendant in his defence avers that the alleged damage, if any, was not caused by any of the matters complained of and that "at the place where the fire is alleged to have occurred there is a fire-break of 14 ft wide and a roadway separating the railway line from the Plaintiff's land." 10

The plaintiff and three witnesses gave evidence. Between 1300 and 1400 hours on Sunday, 16th May, 1971, Enock Sinyambe, employed as a cattle foreman by the plaintiff at Metea Ranch some thirty - five miles north of Livingstone along the line of rail, observed a south bound steam locomotive pass by on the nearby railway line. The railway line was, under 15 ideal conditions, separated from the plaintiff's property to the west by a "fire strip", i.e. a belt of land some 100 to 180 ft in width, a further 10 ft of slashed grass and thereafter some 20 ft of land which had been scuffled of vegetation; the latter strip called a "fire path" was invariably used as a road, which assisted in keeping vegetation under 20 control. Enock Sinyambe observed smoke as the train passed by the plaintiff's fields, which contained ripe maize in process of being harvested. Enock was then a half mile distant from the point at which he observed the smoke. When he got there he found a large fire was in progress on the western side of the railway line which, fanned by a strong easterly 25 wind, had by then jumped the fire path and was burning in the plaintiff's maize fields; further it was also burning parallel to the railway line. Only the womenfolk were to be found in the workers' house some distance away. Amos Munkombwe the ranch foreman was then in Kabuyu some seventeen miles away where Enock headed in a tractor. By the time both 30 had returned and had collected some twenty fellow employees in the local beerhall, the fire had become extensive, having spread to grazing. They managed to rescue a combined harvester machine and some maize sacks, but were unable to contain the fire which eventually burnt out at night. 35

Amos Munkombwe informed the plaintiff of the fire when the latter returned to the ranch on Monday, 17th May. He informed the police and the railway authorities. At some stage a Mr Benn, Permanent Way Inspector, surveyed the scene and wrote a report. Subsequently Raymond Klassen, then a Senior Track Supervisor, now a Permanent Way Inspector, 40 was instructed by the District Civil Engineer Mr Vithal to accompany the plaintiff and a Railway Security Officer to Metea Ranch to survey the scene once again. The plaintiff had apparently requested the survey.

The plaintiff and Mr Klassen, on the former's suggestion, inspected the schedules of trains in the railway offices at Livingstone. Both testified 45

**1974 ZR p68**

CULLINAN J

that the schedules revealed that a steam engine had passed Metea Ranch on 16th May in the mid afternoon. The particular train was apparently scheduled to stop at Makoli Siding for longer than the usual time.

Some two miles from Makoli Siding, adjoining the ranch, some coals 5 were discovered near the railway sleepers. Coals were however to be found along the line of rail stretching up to the Copperbelt it seems. The plaintiff stated that particular coals near the line seemed to have been freshly burned. The direction of the fire was obvious from observation of the particular side of the vegetation which was blackened. All available 10 evidence indicated that the fire had burnt in a westerly direction away from the railway track towards the plaintiff's property. Some 300 to 400 yards of grass along the railway fire strip had been burnt.

Enock Siyambe testified that the damage to the plaintiff's property was widespread. Amos Munkombwe reckoned it would take him two 15 hours to walk around the area of damage. Both stated that the acreage of maize damaged was some 20 acres. The plaintiff testified that Metea Ranch measured some 4,000 acres including 300 acres of maize; he calculated that 10 acres of maize had been damaged; some 800 acres of grazing land had been damaged, however. The plaintiff assessed the total 20 damage at some K2,860.

Raymond Klassen testified than the defendant Board annually scuffled the fire path to a width of 20 feet slashed a further 10 ft of grass and then burnt the remaining grass towards the railway line. Such operation is commenced, depending upon the duration of the rains 25each year in April, May, or June. The vegetation can grow right up to and even between the railway sleepers if unchecked. In this respect the plaintiff testified that he had on previous occasions even seen the sleepers on the railway line being burnt by sparks and coals emitted by steam engines. Enock Sinyambe testified that the grass at the time was some 30 five feet high. The rains having finished early in 1971, the grass was also extremely dry by mid - May. Raymond Klassen approached the particular plate - layer responsible for clearing and burning the grass adjoining the plaintiff's property, a Mr Kabubi. The latter was working some two miles south of the scene where the fire occurred and had not then cleared 35 the latter area. Mr Klassen observed grass still growing north and south of the fire scene. The plaintiff recalled that the day before the fire he had observed that the adjoining fire strip had not been burned.

There were some inconsistencies in the evidence for the plaintiff. The plaintiff testified that the fire took place two miles on the Lusaka 40 or northern side of Makoli Siding; Mr Klassen stated it was two miles on the southern side. The plaintiff said Mr Klassen had pointed out the relevant coals to him; the latter was unable to corroborate this, stating he had pointed out that coals were to be found all along the line. Mr Klassen did not agree that the plaintiff had invited him to inspect the damage 45 or that he had declined to do so. He did say however that he walked around the farm but was unable to assess the damage.

**1974 ZR p69**

CULLINAN J

The learned counsel for the defendant, Mr Lewanika, stressed that Mr Klassen, being a friend of the plaintiff for many years, as a witness had an interest to serve. In fairness to Mr Klassen and indeed the plaintiff, one of the very first questions asked of the former by the learned counsel for the plaintiff, Mr Annfield, concerned his friendship with the plaintiff. 5 While he may have been a friend of the plaintiff for some 9 years he has been an employee of the defendant Board for some 14 years; the witness had served with a summons and judging from his demeanour in the witness box it seems obvious that he did not relish the performance of his civic duty as a witness. He gave his evidence in a dispassionate manner 10 and I cannot say that it showed any trace of bias in favour of the plaintiff. I do not consider the inconsistencies which showed through the evidence to be material and to my mind, after some three years' lapse of time, they merely serve to indicate the fallacies of human testimony. I find the plaintiff and Messrs Klassen, Munkombwe and Sinyambe to be credible 15 witnesses and I accept their evidence.

Mr Lewanika submits that such evidence does not establish that the fire was caused only by coals or sparks emitted from a railway engine. Enock Sinyambe who saw the train pass testified that "there was nothing else at the scene which could have caused the fire-it came from the 20 train". On the totality of the evidence I am satisfied that such was the case. The defendant sought an adjournment in order to adduce evidence in reply, which for reasons stated on the record the Court was not prepared to grant. The only evidence before the court therefore is that of the plaintiff and his witnesses. In this respect I would observe that while 25 Mr Klassen frankly admitted that his evidence contradicted a report by his immediate superior, Mr Benn, the latter has not given evidence in this case.

Mr Annfield submits that there is no express statutory authority contained in the Zambia Railways Act, Cap. 767, to operate steam 30 locomotives; in view of the judgment of Blackburn J in the case of *Jones* v *Festiniog Rly Co.* [1] burden of strict liability issuing from the rule in *Rylands* v *Fletcher* [2] lies upon the plaintiff. It seems to me that the dictum in the Jones' case has been rather too broadly stated if not misapplied in some of the textbooks on the subject. Blackburn J held, at p.216: 35

   "In the present case it is essential to show that the Act has authorised the company to use locomotives, and it is not enough to show that they might use them as a person might use one on his own land, and which he must do at his peril. The very utmost that can be made of the language of this Act is, that the 40 legislature did not prohibit the use of locomotives; it authorised the company to make a railway, and did not prohibit them from using locomotives."

My immediate reaction to the above passage is to observe that if an Act authorises a company to operate a railway then it surely impliedly 45 authorises the use of a locomotive, steam or otherwise. The above case was argued over 100 years ago in 1868. Counsel for the appellant then submitted:

**1974 ZR p70**

CULLINAN J

   "There is nothing in the Act of Parliament which can be said to authorize the use of locomotives; in all probability the legislature never contemplated their being used, as in 1832, when the Act passed, they were but little known, and the tramway was made 5 only two feet wide."

Those observations have no application today. Mr Annfield has made reference to the Railway Fires Act, 1905, which had the effect of imposing a maximum liability of £200 on railways, operating locomotives "under statutory powers" (the word "express" is not used in section 1 of the 10 Act), where agricultural land or crops has been damaged by fire caused by sparks or cinders emitted by such engines, i.e. without proof of negligence. The Act mitigated to some extent the situation whereby statutory railway companies could avoid their strict common law liability by virtue of their statutory authority. In 1905, however, I would venture 15 to say, that many railway companies existed in the United Kingdom which were not the creatures of and were not protected by statute. It seems to me, therefore, that the Act was passed to ensure that all statutory railway companies paid a minimum of compensation. If one is to apply Mr Annfield's interpretation then it seems that statutory railway 20 companies which had no express statutory power to use steam locomotives were subject to common law strict liability; under the 1905 Act those statutory companies which had such oxpress statutory powers here limited in liability without proof of negligence in the amount of £200. While it might be said that an English Parliament did not in 1832 25 consider the possible uses of steam I cannot see that the same Parliament could conceive the operation of a railway as such without the use of steam locomotives in 1905. Statutory authority and indemnity extends not merely to the act itself but to all its necessary consequences. When the legislature has authorised an act it must be taken by implication to have 30 authorised "that which is necessarily incidental to the exercise of the statutory authority". *Quebec Rly v Vandry* (3).

The relevant portions of sections 10 and 11 (1) of the Zambia Railways Act read as follows:

   "10. It shall be the general duty of the Board to provide or to 35 secure and promote the provision of an efficient and adequate system of public transport of goods and passengers by rail with due regard to economy and safety of operation . . ."

   "11. (1) The Board shall have power, subject as hereinafter provided, to do anything and to enter into any transaction which in 40 its opinion is calculated to facilitate the discharge of its duties under section ten or which is incidental or conducive thereto, including, in particular, but without prejudice to the generality of the foregoing, power -

*(a)*   to carry goods and passengers by rail, road, air and inland 45 water - way."

I cannot foresee that our legislature could in 1967 have entrusted the defendant Board with the wide powers contained in section 11 without envisaging the possibility if not the likelihood of and necessity for the

**1974 ZR p71**

CULLINAN J

use of steam locomotives. I consider therefore that the Act contains an implied statutory power authorising the use thereof and that the defendant is under no strict liability in the matter.

The question of negligence therefore arises. It cannot be said that the plaintiff or his servants were in any way negligent. The evidence 5 shows that they used the fire path as a road to assist in restricting vegetation. Again, the evidence shows that a further five feet of the firepath was ploughed. It cannot be said that on the day in question the servants of the plaintiff displayed negligence in attempting to quench the fire.

The plaintiff has not established any negligence in the operation 10 of the particular steam locomotive, i.e. in the emission of coals or sparks. No evidence has been adduced that the engine was not fitted with up - to - date equipment for the fuller combustion of coal and the suppression of sparks, etc. There was however ample evidence of the danger inherent in the operation of a steam locomotive adjoining agricultural land or 15 grass land in the dry season. The very fact that the defendant Board annually cleared a fire path and fire strip indicates that the danger from fire was fully appreciated. The evidence was however that after the rains had finished early, the grass, some five feet tall, had not been cleared by mid May and was indeed growing even between the sleepers in places, 20 a situation which to my mind invited disaster. Again the evidence showed that the fire path, which the fire apparently jumped, measured some 16 to 18 ft instead of the regulation 20 ft. Admittedly a plate layer was some two miles away at that stage working gradually towards the plaintiff's farm clearing the vegetation. That surely however indicates 25 that the defendant had not engaged sufficient labour in the completion of a very urgent task, or in the least had not given sufficient priority to adjoining agricultural lands.

In all the circumstances of this case therefore I am satisfied that the defendant Board displayed negligence in the matter. There will be 30 judgment for the plaintiff in the amount of K2,860.

**1974 ZR p71**