SIERRA LEONE DEVELOPMENT COMPANY LIMITED *v.* TAYLOR

WEST AFRICAN COURT OF APPEAL (Foster-Sutton, P., Beoku-Betts, Ag.C.J. (Sierra Leone) and Coussey, J.A.): June 17th, 1952
(W.A.C.A. Civ. Apps. Nos. 10 & 11/52)

[1] **Employment—safety—breach of common law duty—safe system of work—whether system safe should be established from evidence led at trial—trial judge should not rely on personal knowledge without affected party having opportunity to cross-examine:** In ascertaining whether a particular accident has occurred as the result of an employer's failure to provide a safe system of work or his employee's failure to observe the appropriate standard of care, a trial judge must not rely on his own personal knowledge and experience of what amounts to a safe system of work, or what standard of care is required, in the circumstances of the case without affording the affected party an opportunity to cross-examine his knowledge or experience; instead he should base his finding only on evidence led at the trial (page 242, line 39—page 243, line 15).

[2] **Evidence—judicial notice—matters within judge's knowledge—trial judge should not rely on personal knowledge without affected party having opportunity to cross-examine—should base finding on evidence led:** See [1] above.

The respondent brought two actions against the appellants in the Supreme Court to recover damages for the death of her husband from injuries received through the appellant's negligence.

The deceased was employed by the appellant company as a locomotive driver, and was required as part of his job to stop the engine on a siding between some rail catch-points and an unfenced cross-bar acting as a buffer. The engine's driving-seat, which was an open seat on an open platform, was less well protected when the engine was driven in reverse than when it was going forwards. The deceased was killed in a collision with the cross-bar at the end of the siding when the engine, which he was driving backwards, failed to stop. The respondent, the widow of the deceased and administratrix of his estate, brought one action on behalf of the estate and another for the benefit of his children to recover damages for the appellants' negligence in operating a locomotive which was either badly constructed or badly maintained.

It was established at the trial that at the moment of impact the engine's brakes were off and it was probably out of gear. The trial judge, while he found that the principal cause of the accident

was the deceased's own lack of care in failing to keep a proper look-out and failing to apply his brakes in time, and that the system of work was safe enough for an average European or equally alert African driver, gave judgment for the respondent on the ground that in his personal knowledge and experience the stopping distance was not adequate for an average African driver like the deceased.

On appeal, the West African Court of Appeal considered whether the trial judge had adopted the right criteria for deciding, on the strength of his own personal knowledge and experience, that the system of work was not safe in the circumstances of the case.

Miss Wright for the appellants;
Margai for the respondent.

COUSSEY, J.A.:

This is an appeal by the defendants in two actions in which it was agreed at the trial that the decision in one should govern the decision in the other. In Suit No. 369/49 the plaintiff, who sued as administratrix of the estate of Christopher M. Taylor (Deceased), claimed on behalf of the estate of the deceased damages for his death from injuries received while on duty in the defendants' service operating a locomotive which was badly constructed and/or maintained through the negligence of the defendants or their servants.

The claim in Suit No. 372/49 is a similar one against the same defendants, and is stated to be made for the benefit of the children of the deceased as his dependants. According to the particulars filed in Suit No. 372/49 the deceased was operating a locomotive running on rails which passed under a steel cross-bar. The shorter end of the locomotive faced the cross-bar in its running position instead of the longer end, where the cowling of the engine was fixed. The seat from which the deceased operated the engine was foremost, that is to say, it would reach the cross-bar before the cowling of the engine. The cross-bar was not fenced, nor was there any automatic device to check the engine, nor was there anything to prevent the driver coming into contact with the cross-bar as provided by law. The plaintiff further averred that the brake system of the engine was not regularly tested or adjusted and that no device was provided to protect the driver from danger as required by law. In consequence of this, according to the plaintiff, the deceased was crushed to death when the engine ran into the steel cross-bar.

By their defence, which is the same in both actions, the defen-

dants denied the negligence alleged, or that the deceased's injury and death were caused by any of the matters in the statement of claim or the particulars alleged. The defendants further pleaded that the locomotive was constructed with reversible gears so that it could travel in either direction. They denied that the brakes were not regularly tested or adjusted and they further denied that they were under any obligation or duty to fence the cross-bar, or that any Ordinance or regulation for the safety of the driver of the locomotive had been contravened, and they averred that there was contributory negligence on the part of the deceased in driving at an excessive speed and failing to stop the engine after crossing the change points on the rails, whereby the engine came into contact with the cross-bar although the brakes were in good order.

The following facts were found by the learned trial judge: The deceased (Taylor) was killed in a collision between the engine and the steel cross-bar at the end of the siding. The locomotive had a diesel engine and three gears driving all four wheels and a ratchet brake operating on one pair of wheels. The engine cowling was at one end of the locomotive and the driver sat at the other end facing sideways on an open seat on an open platform. He had a clear view all round in the direction facing the steel cross-bar. At the time of the accident the engine was running with the driver's seat first towards the cross-bar. The overall length of the engine was 9 ft. 10 ins. The maximum speed of the locomotive in top gear was about nine miles an hour. The distance found by the learned trial judge between the rail catch-points and the cross-bar was 23 ft. The engine could ordinarily be pulled up within a short distance when travelling unloaded on the level and it could, in an emergency, be stopped within two or three feet by shutting off the throttle and applying the brakes with the engine in gear so that the compression of the engine would act as an additional brake. The track between the points and the gate-head or cross-bar was on a slight up-grade. When the locomotive, driven by the deceased, came down the loop-line and crossed the catch-points, it would normally, according to the usual practice, have been stopped by the deceased just clear of the points and some distance short of the cross-bar; but, for some reason, in this instance, the engine ran on at a speed sufficient to get jammed firmly under the cross-bar. The brakes were off, and the learned judge also found that probably the engine was out of gear at the time of impact with the cross-bar.

After finding these facts the learned judge found that the posi-

tion in which the deceased must have been sitting, and the view he had, satisfied him that even if, for some mysterious cause, the driver found himself unable to stop the engine in time, he would at least have had opportunity of jumping clear if he had been paying proper attention to what he was doing. The learned judge was satisfied, on the evidence before him, that the principal cause of the accident was the deceased's own lack of care in failing to keep a proper look-out and to apply his brakes in time. But after further finding that the gate-head or cross-bar was not itself a dangerous piece of machinery, and that it did not need to be fenced—it was in fact similar to the buffers at a railway terminus beyond which a locomotive is not expected to travel—the learned judge considered whether the distance provided by the defendants between the rail catch-points and the gate-head or cross-bar was reasonably adequate to enable the locomotive to pass the points and be stopped in safety before colliding with the cross-bar. He confessed that he found himself in some difficulty in deciding whether a safe system had been provided by the defendants and he then proceeded to hold:

> "If the safety distance is to be determined in terms of a European locomotive driver or an equally alert African driver, I should unhesitatingly say that it was ample, but I have known Africans for many years and I know perfectly well that the average African driver of motor vehicles, and I assume of locomotives as well, is much slower when driving in appreciating that he has to do something, in deciding what he should do and in doing it. In other words there is a much greater time lag between the arising of an emergency and the completion of the action to meet it. So that a distance that would be considered safe for the average European driver is not necessarily safe for the average African driver."

And he continued:

> "I know of no statistics which give any guide as to what the difference between the two average types is and I must determine it to the best of my own experience and judgment, and in this case I hold that although the distance was sufficient if the locomotive was so travelling that the cowling took the first impact, it was not sufficient with the locomotive pointing the other way so that the driver himself first hit the gate-head."

With respect, in my opinion, the learned judge erred in applying his own judgment and experience of African and European motor drivers to find that what would be a safe system for a European or

alert African locomotive driver would not be a safe system for an average African locomotive driver. No evidence was given at the trial to establish different standards of care and attention as between different classes of drivers. Despite the fundamental finding already referred to that the principal cause of the accident was the deceased's own lack of care in failing to keep a proper look-out and to apply the brakes in time, the learned judge himself, in effect, gave evidence in order to establish the standard of safety which in his opinion the defendants were required to provide for the deceased, without affording the defendants an opportunity to cross-examine his knowledge or experience of drivers. Unfortunately there has been, therefore, an error in law in that the learned judge has applied his own personal knowledge and experience and the operative part of the judgment is based on evidence not on record; in other words, not on legal evidence. It cannot be overlooked that on many previous occasions the deceased had driven across the catch-points and brought up his engine successfully, short of the steel cross-bar; an operation which he must have repeated frequently, probably many times daily. On the occasion in question, however, the speed and the position of the gears and the brakes all suggest the negligence of the deceased, which no degree of safeguard would have averted. For these reasons, in my opinion, there has been an error in the actual determination of the facts in issue and the appeal must be allowed.

FOSTER-SUTTON, P. and BEOKU-BETTS, Ag.C.J. (Sierra Leone) concurred.

Appeal allowed.