

CANADA / JUDGMENT

Chand v. Martin

2017 BCSC 660

COURT

Supreme Court of British Columbia

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2017 BCSC 660 Chand v. Martin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Chand v. Martin,

2017 BCSC 660

Date: 20170424

Docket: M091858

Registry: Vancouver

Between:

Treves Rylendra Chand

Plaintiff

And

Morey Norman Martin, Southern Railway of British

Columbia Limited, City of Surrey, The Minister of

Public Safety and Solicitor General of the Province of

British Columbia, Her Majesty the Queen in Right of Canada,

The Attorney General of Canada

Defendants

Before: The Honourable Madam Justice Russell

Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.

February 6-10, 2017

February 14-17, 2017

Place and Date of Judgment:

Vancouver, B.C.

April 24, 2017

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Introduction

- [1] On April 16, 2007, the plaintiff, Mr. Treves Chand ("Mr. Chand"), was involved in a motor vehicle accident with a train owned and operated by Southern Railway of British Columbia Limited ("Southern"). The accident occurred at a railway crossing just north of the intersection of Scott Road and Larson Road (the "Scott Road Crossing" or the "Crossing") in Surrey, BC. As a result of the accident, Mr. Chand and the vehicle's two passengers, Mr. Kamaljit Kalyan and Mr. Rick Kumar, sustained serious injuries, with the latter's injuries being fatal.
- [2] Mr. Chand brings this action on the basis of negligence. It is his contention that the railway crossing lights did not activate to warn those travelling northbound towards the intersection that a train was about to cross. Consequently, he maintains that Southern was negligent in maintaining the lights. In addition, he submits that, at the time of the collision, at least one of the train's crew members was negligently carrying out their duties, raising the issue of vicarious liability.
- [3] Companion actions were filed by both the vehicle's passengers. In accordance with Master Taylor's order of October 8, 2013, the issue of liability was severed from the issue of damages, both in those actions, as well as in the case at bar.
- [4] Originally, this action involved a larger number of defendants. However, the claim against the City of Surrey was discontinued on October 30, 2013. Similarly, the claims against the Minister of Public Safety and Solicitor General of the Province of British Columbia, Her Majesty the Queen in right of the Province of British Columbia, Her Majesty the Queen in right of Canada, and the Attorney General of Canada, were dismissed by way of a consent dismissal order in January 2017.
- [5] Southern and its employees Martin and Cohen are the remaining defendants.
- [6] For the reasons that follow, I find Southern liable in negligence.

Facts

- [7] Scott Road is a major roadway in Surrey with three lanes of traffic in each direction. It generally runs north-south, and experiences heavy traffic. The Scott Road Crossing is located at the foot of the Patullo Bridge near the waterfront, approximately one block away from the Scott Road Skytrain Station.
- [8] The collision occurred at approximately 10:00 p.m. Mr. Chand was driving a 1992 blue Ford Taurus, with Mr. Kalyan in the front passenger seat, and Mr. Kumar in the back. The vehicle was driving northbound on Scott Road in the middle lane when it struck the front left wheel area of the train's locomotive as the train was moving through the Crossing.

- [9] Mr. Chand has no recollection of the accident.
- [10] Given that the accident occurred during the evening, it was dark. However, there was no rain, and visibility was generally good. The road surface was dry.
- [11] As noted above, the question of whether the lights at the Scott Road Crossing were working is a key contention in this matter. The evidence on this matter is split between that of independent eye witnesses testifying that the warning lights on the south side of the Scott Road Crossing did not initiate, versus expert evidence tendered on behalf of Southern, as well as the testimony of Southern employees, maintaining the opposite.
- [12] One of the independent witnesses in this matter was Mr. William Harkness, an experienced transit bus driver. At the time of the collision, he was in the left hand lane on Scott Road, driving the 640 Coast Mountain bus from Ladner Exchange northbound towards the Scott Road Skytrain Station. He maintains that, before the collision, the signal lights were not activated, nor did he hear the crossing bells or the train's whistle. However, he testified that, shortly after the collision, he witnessed the signal lights and bells activate. Moreover, he maintained that the plaintiff was not speeding or driving erratically immediately before the collision.
- [13] Mr. Harkness also testified that he had driven the night shift for the 640 bus for a long period of time, and was generally cautious when approaching the Crossing. He recalled at least one incident where he arrived at the Scott Road Crossing only to find a train crossing without any signals or bells operating to warn traffic of the train's presence.
- [14] I found Mr. Harkness to be an honest, forthright, and reliable witness.
- [15] Another independent witness to the accident was Bruce Angus, an assessment officer with WorkSafeBC. When the collision occurred, Mr. Angus was driving in the middle lane heading northbound on Scott Road, directly behind Mr. Chand. Like Mr. Harkness, he testified that the warning lights and bells at the Crossing did not come on before the collision, but only immediately after. Given his position relative to Mr. Chand, Mr. Angus testified that he thought that he could easily have been the one who collided with the train. He also testified that Mr. Chand was not speeding or driving erratically.
- [16] Like Mr. Harkness, I found Mr. Angus to be an honest and forthright witness.
- [17] Ms. Jennifer Palmer, a passenger on Mr. Harkness's bus also testified. While she maintains that she witnessed the collision, evidence given by Mr. Harkness suggested that she was not able to do so from her vantage point in the bus. Given my findings regarding Mr. Harkness as a witness, and some inherent flaws in Ms. Palmer's testimony, I am unable to give weight to Ms. Palmer's evidence about her observation of the impact.

- [18] Finally, independent eyewitness testimony was provided by Ms. Bonnie Venables. Unlike the other independent eyewitnesses, she was travelling southbound on Scott Road, and was north of the crossway when the collision occurred. According to her, on her side of the Crossing, the signal lights did in fact activate. However, she also testified that she could not recall hearing any bells or whistles as the train approached.
- [19] Members of the train crew also testified, including Mr. Martin, one of the defendants in this action. Mr. Martin is an experienced train engineer who was operating the train on the evening in question. As the train's engineer, he controls its acceleration, braking, and whistle.
- [20] He made it clear that as engineer, he operates the train from the front right of the cabin, and so he cannot see out of its left side. Given that the train was moving westbound, this means that he was only able to see what was outside the train on the north side of the tracks, whereas Mr. Chand entered the Crossing from south of the tracks. Consequently, while he was not able to testify as to whether the crossing lights were operating for northbound traffic, he did testify that the lights on the opposite side of the tracks were in fact operating.
- [21] In addition, Mr. Martin testified that he sounded his horn at the whistle board prior to entering the Crossing. However, he was not sure how many seconds before entering the Crossing he did this.
- [22] I found Mr. Martin was forthright in his testimony.
- [23] Mr. Steve Cohen, the train's conductor, also testified. The conductor's role includes, among other things, maintaining a lookout for hazards on or near the train tracks, and communicating any potential hazards to the engineer. At the time of the accident, he was located at the front left of the cabin, meaning he was able to see northbound traffic from the window nearest him.
- [24] Mr. Cohen testified that he observed the signal lights on the south side of the tracks operating normally in the moments leading up to the crash. However, I found Mr. Cohen to be an unreliable witness. He was combative, and changed his testimony on a number of key issues, including when he saw Mr. Chand's vehicle approaching the Crossing. As a result, I find that he did not observe the signal lights flashing in the moments before the collision, nor was he keeping a regular lookout.
- [25] The final member of the train crew to testify was Mr. Aaron Cruickshank. He was riding in the second locomotive at the time of the collision, facing eastbound. He testified that Mr. Martin always sounded the horn properly, though could not recall each crossing whistle. Moreover, he has no memory of the signal lights on the night in question. Finally, at odds with Mr. Cohen's evidence, he testified that there was poor visibility out of the left hand, conductor side of the cabin.
- [26] I found Mr. Cruickshank to be honest and forthright.

- [27] The defence also called Mr. Kevin Tobin as a witness. He is a long-serving employee of Southern, and the designated signal maintainer for the Crossing. At the time of the accident, he was a signal maintenance foreman for Southern's rail lines. His responsibility was to maintain, repair and build railway crossing signals for Southern.
- [28] Mr. Tobin was not called as an expert witness. Instead, he was called to provide evidence regarding his observations and practices in servicing and maintaining the signal lights.
- [29] Mr. Tobin regularly inspected the Scott Road Crossing. According to his Inspection Log, he had inspected the Crossing on April 12, 2007, four days before the collision, and found nothing wrong. In general, it seems that, at least in the month before the accident, he usually inspected the Crossing once per week.
- [30] Mr. Tobin arrived at the scene of the crash approximately one hour after the collision. He maintains that he inspected the signal system, and found that the system's relays were in their proper position. Specifically, he maintains that he tested the batteries, individual track circuits, and individual relays. In testimony, he also detailed the process by which he went through the signal box, examining each wire and connector on each terminal for corrosion or loose connections. Overall, he examined the signal system for approximately four hours that evening.
- [31] However, his testimony also revealed that the signal system's circuitry is complex. In addition, he admitted that any machine can fail, including the fail-safe crossing lights. Moreover, he conceded that this could include intermittent failure. He also noted that the lights facing southbound traffic are on a separate circuit from those facing northbound traffic, meaning that it is possible for lights on one side to fail but not the other.
- [32] I found Mr. Tobin to be a forthright witness, though at times he had to be pushed in cross-examination to admit key points favouring the plaintiff.
- [33] Testimony was also heard from Mr. Henry Pootsik and Mr. Maurice Jessiman-Phair. Both were Southern employees who attended at the collision site and who were asked by Mr. Tobin to observe the position of the relays in the signal box. However, neither witness had training in signal maintenance, and both admitted that they simply did what Mr. Tobin told them to do, that is to observe the circuits within the signal box.
- [34] I accept the plaintiff's submission that the testimony of these two witnesses constitutes oath-helping. On this subject, the Supreme Court of Canada stated as follows in *R. v. Burns*, [1994] 1 S.C.R. 656 at 667-668:

The rule against oath-helping holds that evidence adduced solely for the purpose of proving that a witness is truthful is inadmissible: *R. v. Marquard*, *supra*. The rule finds its origins in the medieval practice of oath-helping; the accused in a criminal case or the defendant in a civil case could prove his innocence by providing a certain number of compurgators to swear to the truth of his oath: see *R. v. Béland*, *supra*, per Wilson J. at pp. 419-20. In modern times, it is defended on the ground that determinations of credibility are for the trier of fact, and that the judge or jurors

are in as good a position to determine credibility as another witness. Therefore the fundamental requirement for expert evidence -- that it assist the judge or jury on a technical or scientific matter which might otherwise not be apparent -- is not met. The rule, as Iacobucci J. noted in *R. v. B. (F.F.)*, [1993] 1 S.C.R. 697, at p. 729, goes to evidence "that would tend to prove the truthfulness of the witness, rather than the truth of the witness' statements".

- [35] Given that Mr. Pootsik and Mr. Jessiman-Phair had no means to judge whether the relays were in proper working order, accepting their evidence on this point would simply serve to prove Mr. Tobin's honesty. Given this, and the witnesses' lack of expertise, I have disregarded their testimony.
- [36] Mr. Glenn Mullally also gave evidence. He was qualified as an expert witness on signal maintenance. He provided extensive expert testimony regarding how the signal system works, and maintained there had been no failure. However, he also confirmed that it was possible for the lights on the south side of the tracks to fail when the ones on the north side were still working, and that a partial failure of the signal system was possible.
- [37] In addition, Mr. Mullally testified regarding a data recorder on the train which noted when the train's whistle was blown. This data seemed to indicate that the whistle had been blown, though not at the correct time, or in the correct manner. However, Mr. Mullally explained to the Court how the data recorder could make false readings depending on how the whistle was being handled.
- [38] I found him to be an honest and forthright witness.
- [39] Finally, testimony was provided by Corporal Chu, the RCMP officer who performed an accident reconstruction following the collision. His report was tendered by the defence for the purpose of proving that Mr. Chand was not wearing a seatbelt during the time of the collision. I will return to this testimony at the end of my decision in the section entitled 'Contributory Negligence.' However, for now, I note that I also found him to be an honest and forthright witness.
- [40] Overall, I find that neither the signal lights south of the Scott Road Crossing nor the bells functioned properly at the time of the collision. Multiple independent eyewitnesses confirmed this, with the only eyewitness testifying otherwise being Mr. Cohen who, as I noted above, I found to be an unreliable witness. In addition, as outlined above, the technical evidence regarding the signal system provided by both Mr. Tobin and Mr. Mullally confirmed that such a failure, though highly improbable, was possible. Coupled with the independent eyewitness testimony, I believe that, on a balance of probabilities, the signal system's malfunction on the night in question has been established.
- [41] Moreover, as confirmed by both Mr. Harkness and Mr. Angus, I find that Mr. Chand was not speeding or otherwise driving erratically when entering the Crossing.

[42] In regard to the train whistle, none of the independent witnesses seems to have heard any whistle. However, given the evidence of Mr. Martin, and the technical evidence regarding the whistle, I find that it was sounded before the train entered the Crossing. I cannot find that, on a balance of probabilities, the plaintiff has established that the sounding of that whistle was inconsistent with the requisite regulations so as to ground a claim in negligence.

Negligence

[43] Recently, in *Agar v. Weber*, 2014 BCCA 297, the British Columbia Court of Appeal outlined the elements of negligence as follows at para. 29:

In negligence, the common law requires a plaintiff to establish:

1. a duty of care to conform to a certain standard of care for the protection of others against unreasonable risks. The duty does not extend to the removal of every possible danger, rather the test is one of reasonableness: *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at para. 28;
2. a breach of that duty by some act or omission by the defendant; and
3. the breach of duty is the proximate cause of a plaintiff's injury, meaning there must be a nexus between the injury sustained by the plaintiff and the defendant's negligent act or omission: see *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27; *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at para. 54.

[44] In other words, the elements of negligence are (1) duty of care; (2) standard of care; and (3) causation. I have followed this structure in my reasons.

(1) Duty of Care

[45] In this matter, surprisingly, Southern has not conceded that it owed a duty of care to members of the public entering the Scott Road Crossing. Given this, it is appropriate to outline why Southern owed a duty of care to Mr. Chand.

[46] Recently, this Court stated the following regarding duty of care in *Mineault v. Kamloops (City)*, 2017 BCSC 316 at para. 66:

The duty of care analysis begins by considering whether the relationship between the parties falls into a category which the law already recognizes as giving rise to a duty of care. If it does, then the court need not consider the two-stage analysis set out in *Cooper v. Hobart*, 2001 SCC 79 and refined in subsequent cases: *Douglas v. Kinger (Litigation Guardian of)*, 2008 ONCA 452, leave to appeal refused [2008] SCCA No. 363 at paras. 13-14.

[47] In regard to railway crossings, courts have long held that railway companies owe motorists a duty of care. In *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, the Supreme Court of Canada found the following at para. 41:

The first question is whether the Railways owed the appellant a duty of care. The Store Street tracks ran down the centre of an urban street, in direct proximity to the public. It was plainly foreseeable that carelessness by the Railways with respect to those tracks could cause injury to users of the street. Accordingly, a *prima facie* duty of care arose under the first step of the *Anns/Kamloops* test. See *Harris*, *supra*, at p. 155. Turning to the second step of the test, the Railways have not identified any legislative or judicial policies which would negate that duty or limit it. As noted, the authorities relied upon by the Railways concern the manner of carrying out a specific activity, and do not purport to limit civil liability. Those regulations do not affect the existence of a duty of care.

[48] While *Ryan* concerned railway tracks, rather than signal lights, in my view its findings apply to the case at bar. Clearly, train companies owe a duty of care to motorists who will be crossing their tracks to make certain that appropriate safety precautions exist to warn of a train's approach. It is not my understanding that the defendants contest that malfunctioning signal lights would constitute an unreasonable risk, and they did not make that submission. Consequently, *Southern* and, by implication, its employees, owed Mr. Chand a duty of care, something long established in the case law.

(2) Standard of Care

(i) Mr. Martin

[49] The evidence is clear that neither Mr. Martin nor anyone else on the train crew had anything to do with the signal lights. While they are able to manually turn those lights off, the process for doing so is quite complex, and the plaintiff does not claim that they had done so. Based on the evidence before me, I find that the crew members had nothing to do with the south-facing signal lights at the Crossing failing to engage. Consequently, given that my decision is premised on the failure of the signal lights, and my findings that Mr. Martin had no means to observe the south-facing signal lights, nor that he initiated the manual process for turning those lights off, I cannot find that he violated any standard of care.

(ii) *Southern*

[50] It is first important to note that, historically, there was a common law rule that the standard of care owed by railway companies to members of the public was limited to the discharge of statutory obligations. However, the Supreme Court of Canada overruled that rule in *Ryan* at para. 33:

The calls for reform expressed 24 years ago in *Paskivski* are more compelling today. The special status enjoyed by railway companies under the law of negligence can no longer be justified in principle and the time has come for that rule to be set aside. Although a doctrine of such long standing should not lightly be discarded, there is little to be gained from maintaining for its own sake a line of jurisprudence which has lost its relevance.

- [51] Instead, the Court outlined the relevant standard of care analysis to be applied to railway companies as follows at paras. 28-29:
- [28] Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.
- [29] Legislative standards are relevant to the common law standard of care, but the two are not necessarily co-extensive. The fact that a statute prescribes or prohibits certain activities may constitute evidence of reasonable conduct in a given situation, but it does not extinguish the underlying obligation of reasonableness. See *R. in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205. Thus, a statutory breach does not automatically give rise to civil liability; it is merely some evidence of negligence. See, e.g., *Stewart v. Pettie*, [1995] 1 S.C.R. 131, at para. 36, and *Saskatchewan Wheat Pool*, at p. 225. By the same token, mere compliance with a statute does not, in and of itself, preclude a finding of civil liability. See *Linden*, supra, at p. 219. Statutory standards can, however, be highly relevant to the assessment of reasonable conduct in a particular case, and in fact may render reasonable an act or omission which would otherwise appear to be negligent. This allows courts to consider the legislative framework in which people and companies must operate, while at the same time recognizing that one cannot avoid the underlying obligation of reasonable care simply by discharging statutory duties.
- [52] The defendants' submission on this point is that, even if this Court finds that the signal lights failed, the risk to the public was not foreseeable, as there was nothing to warn Southern that the lights at the Scott Road Crossing were faulty. Submissions were not provided on the other elements of the standard of care analysis.
- [53] The defence evidence regarding the signal lights at the Crossing indicated that they were operational in the few weeks before the incident in question. The only major exception to this is an incident that occurred on March 15, 2007, approximately one month before the accident. On that date, some person or persons stole hundreds of bonds at the Crossing. The bonds are metal pieces on the rails that when the train's wheels make contact with them, the signal lights and bells are triggered by the now-completed circuit. In the absence of the bonds, the lights and bells signal continuously. When they were stolen, repair crews were unable to return the Crossing to working order until March 20, 2007. In the interim period of time, the lights were shut off, and train crews were required to manually protect all trains travelling through the Crossing.

- [54] At trial, the defendants adamantly denied that the stealing of the bonds, or the subsequent repair process, may have seriously damaged the signal lights. Their expert evidence on this issue was that the signal lights were on a fail-safe system: if bonds were removed, the result was that the signal lights and crossing bells would constantly be active until manually shut down.
- [55] In light of the defendants' expert evidence, I cannot find any violation of the standard of care in regard to the maintenance of the signal lights. There was no evidence, expert or otherwise, indicating that the signal lights in question were inadequately or improperly maintained.
- [56] However, this does not end the standard of care analysis. As discussed above, even the witnesses called by Southern to defend the safety of the signal system conceded that a failure of the signal lights to engage was still a possibility, including intermittent failure. Consequently, in order to determine if Southern violated the requisite standard of care, it is necessary to look at what safety precautions were in place to deal with sudden failures of signal lights at railway crossings.
- [57] Mr. Cohen testified that, when approaching a railway crossing, it was his responsibility to maintain a look out from his side of the cabin to see if any vehicles were approaching the train. This would include checking to see if the signal lights at a crossing were properly working. Mr. Tobin testified that holes in the side of the signal lights, called "wigwags," show a white flashing light that train crews can see straight ahead of them when approaching a crossing to indicate that the signals have engaged. In regard to the signal lights on the south side of the Scott Road Crossing, Mr. Cohen testified that on approach, he saw these flashing wigwags, and so, according to him, there was no signal failure. Of course, he had no ability to see whether the actual signals that should appear to a north-bound driver were functioning. He further testified that he was keeping a lookout on the approach to the Scott Road Crossing and did not see the plaintiff's car until it was too late to warn Mr. Martin in time for the train to stop. However, as discussed above, I determined that his testimony was unreliable.
- [58] In essence, this evidence indicates that, in addition to the signal lights, Southern has implemented a system in which the train crew is supposed to maintain a lookout for hazards when approaching an intersection.
- [59] Southern conceded that the east side of the Crossing, the side from which the train approached, has an obstructed view from the street to the railway and vice versa. On this point, Corporal Chu testified to the trees and a house that block the view, testimony that was mirrored by Mr. Martin and Mr. Cruickshank. Mr. Cruickshank maintained that northbound traffic did not come into view until a train was 50 feet from the crossing. Similarly, though he was inconsistent on this point, Mr. Cohen maintained that he did not see Mr. Chand's vehicle until he was 40 feet from the Crossing.

- [60] In terms of the train's speed at the time of the collision, the evidence indicates that the train was either travelling the limit of 15 miles per hour or, at the most, 16 miles per hour. Southern's position on this limit was that there was no evidence that it was inappropriate, and that it was a limit of long standing.
- [61] Mr. Cohen also testified that, upon seeing Mr. Chand's vehicle, he immediately yelled to Mr. Martin to apply the train's brakes, and Mr. Martin quickly complied. The fact that Mr. Cohen yelled to Mr. Martin to apply the train's brakes is corroborated by Mr. Martin's testimony. In addition, Southern maintains that, at the distance of approximately 40 feet, there is nothing the train crew could have done to prevent the collision.
- [62] As was conceded by the defendants, a mechanical failure is always a possibility in even the best protected fail-safe system. While asking the train crew to keep a lookout when they approach railway crossings may usually be enough to deal with this contingency, at the Scott Road Crossing, it seems that this fail-safe is largely pointless: by the time a member of the train crew is able to see approaching northbound traffic, it is too late to prevent any collision, even when the train is travelling at the requisite speed limit. As noted above, I also found that Mr. Chand was travelling the requisite speed limit for motorists when entering the Crossing. Consequently, a means by which it could be found that Southern failed to fulfill the requisite standard of care would be the following: the obstructed view at the Scott Road Crossing, coupled with even a remote possibility that a signal light there would fail, constitute an objectively unreasonable risk of harm which was foreseeable.
- [63] One concern I have which prevents me from making this finding is that there was no testimony regarding at what point Mr. Cohen would have had the ability to see the wigwags flashing from the south-facing signal lights. Presumably, it was only possible for him to see Mr. Chand approaching the Crossing from 40 to 50 feet away, but he may have been able to see the wigwags from a greater distance. If it were possible to see the wigwags from a distance that allowed the train to brake in time to avoid a collision, then there would be no objectively unreasonable risk of harm that Southern could have foreseen. Instead, the expectation would be that, upon seeing that the signal light was not operating, the conductor would immediately ask the engineer to stop the train at a safe distance that it could stop before it entered the Crossing.
- [64] Given this contingency, I find that the plaintiff has not proven, on a balance of probabilities, that Southern in any way violated the standard of care placed upon it to reasonably maintain the signal lights at the Crossing.

(iii) Mr. Cohen

- [65] Southern's internal regulation, Time Table No. 6, makes it clear at s. 6.3.1 that Mr. Cohen was not permitted to allow the train to enter the Scott Road Crossing unless the signal lights had been flashing for at least 20 seconds. In addition, the plaintiff submits that, given that the south-facing signal lights at the Crossing were not operating, s. 103 of the Canadian Rail Operating Rules (TC-O-0-53) applied to him. This rule deals with public crossings which are

not equipped with automatic warning devices, such as signal lights. The plaintiff maintains that, as required by s. 103(g), in that circumstance, Mr. Cohen was under a duty to stop the train and manually guide it through.

- [66] As I have found the signal lights were not operating on the south side of the Scott Road Crossing, I find that this is an appropriate reading of the statute. In these circumstances, practically speaking, a crossing with malfunctioning signal lights is not a crossing with automatic signal lights.
- [67] As noted earlier in this decision, I found Mr. Cohen's testimony unreliable, and so I reject his claim that he saw the signal lights, as well as his claim that he was keeping a regular lookout. Consequently, my finding is that, Mr. Cohen either saw the signal lights were not working at the Crossing and failed to tell Mr. Martin to brake in a timely way, or he failed to notice that the lights were inoperative because he did not maintain his duty to keep a proper lookout.
- [68] In this context, as discussed above, the Supreme Court of Canada made it clear in *Ryan* that the old common law rule relating to railway companies and liability in negligence actions no longer applies. However, that rule was premised on the assumption that the railway company in question had not violated any statutory or regulatory requirements: *Ryan* at para. 30. Thus, even under this now-defunct rule, it was clear that any violation of the regulations would open a railway company to liability in negligence. In addition, the Court in *Ryan* made it clear that "[l]egislative standards are relevant to the common law standard of care .": *Ryan* at para. 29.
- [69] In my view, it is self-evident that a failure to either ensure a train stops before entering a crossing where the signal lights are off, or a failure to keep a lookout, constitutes an unreasonable risk of harm which violates the requisite standard of care. Either way, I find that Mr. Cohen failed to meet the standard of care which was incumbent on him as the train's conductor. He was the employee charged with ensuring the safety of the public by both watching for the signal lights, via the wigwags, (on his side of the train) and for observing the intersection (from his side of the train) through which the train was about to proceed. I am supported in this finding by the fact that both internal and general regulations required him to ensure that the train would not enter the Crossing in the event the signal lights that only he could observe from his side were not functioning. He failed in this regard.

Causation

- [70] The defendants did not contest that the collision caused the plaintiff's injuries. Instead, they merely denied that the plaintiff's damages were as severe as he claimed. As noted at the beginning of this decision, the issue of damages has been severed from this action, and so I will not deal with that aspect of the defendants' submissions. Given the parties' agreement on the issue of causation, I will only briefly outline the relevant law.

- [71] In *Clements v. Clements*, 2012 SCC 32, the Supreme Court of Canada outlined the basic rule on causation in negligence cases as follows at paras. 6-10:
- [6] On its own, proof by an injured plaintiff that a defendant was negligent does not make that defendant liable for the loss. The plaintiff must also establish that the defendant's negligence (breach of the standard of care) caused the injury. That link is causation.
- [7] Recovery in negligence presupposes a relationship between the plaintiff and defendant based on the existence of a duty of care -- a defendant who is at fault and a plaintiff who has been injured by that fault. If the defendant breaches this duty and thereby causes injury to the plaintiff, the law "corrects" the deficiency in the relationship by requiring the defendant to compensate the plaintiff for the injury suffered. This basis for recovery, sometimes referred to as "corrective justice", assigns liability when the plaintiff and defendant are linked in a correlative relationship of doer and sufferer of the same harm: E. J. Weinrib, *The Idea of Private Law* (1995), at p. 156.
- [8] The test for showing causation is the "but for" test. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's negligence was necessary to bring about the injury — in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails.
- [9] The "but for" causation test must be applied in a robust common sense fashion. There is no need for scientific evidence of the precise contribution the defendant's negligence made to the injury. See *Wilsher v. Essex Area Health Authority*, [1988] A.C. 1074 (H.L.), at p. 1090, per Lord Bridge; *Snell v. Farrell*, [1990] 2 S.C.R. 311.
- [10] A common sense inference of "but for" causation from proof of negligence usually flows without difficulty. Evidence connecting the breach of duty to the injury suffered may permit the judge, depending on the circumstances, to infer that the defendant's negligence probably caused the loss. See *Snell and Athey v. Leonati*, [1996] 3 S.C.R. 458. See also the discussion on this issue by the Australian courts: *Betts v. Whittingslowe* (1945), 71 C.L.R. 637 (H.C.), at p. 649; *Bennett v. Minister of Community Welfare* (1992), 176 C.L.R. 408 (H.C.), at pp. 415-16; *Flounders v. Millar*, [2007] NSWCA 238, 49 M.V.R. 53; *Roads and Traffic Authority v. Royal*, [2008] HCA 19, 245 A.L.R. 653, at paras. 137-44.
- [72] In the case at bar, I find that, but for Mr. Cohen's failure to meet the requisite standard of care, the accident would not have occurred, and the plaintiff would not have suffered his injuries. Therefore, the plaintiff has established causation.

Vicarious Liability

- [73] When it comes to Mr. Martin, it is not necessary to discuss vicarious liability, as I found that he did nothing negligent in his role as the train's engineer. In contrast, as I have found Mr. Cohen was acting negligently, it is necessary to discuss vicarious liability.
- [74] On this point, Southern submits that, in the plaintiff's pleadings, there is no mention of Mr. Cohen doing anything wrong, and no allegation is made against Southern concerning his actions so as to make them vicariously liable. In support of this argument, the defendants cited the following passages from *Canadian Bar Assn. v. British Columbia*, 2008 BCCA 92 at paras. 59-60:
- [59] The purpose of pleadings was described by Smith J. in *Homalco Indian Band v. British Columbia* (1998), 25 C.P.C. (4th) 107 (B.C.S.C.):
- [5] The ultimate function of pleadings is to clearly define the issues of fact and law to be determined by the court. The issues must be defined for each cause of action relied upon by the plaintiff. That process is begun by the plaintiff stating, for each cause, the material facts, that is those facts necessary for the purpose of formulating a complete cause of action: *Troup v. McPherson* (1965), 53 W.W.R. 37 (B.C.S.C.) at 39.
- [60] Pleadings prevent expansion of the issues, give notice of the case required to be met, and provide certainty of the issues for purposes of appeal. Complexity and confusion that can be created by a moving target is avoided by pleadings correctly drawn, as are subsequent quarrels in this Court as to the issues before the trial court. Pleadings are an elegant solution to issue definition and notice and are well-serving of the ultimate purpose of efficient resolution of a dispute on its merits (Rule 1(5) of the Rules of Court). Ideally, they avoid the "loose thinking" decried by Lord Denning in his foreword to I.H. Jacob, Bullen and Leake and Jacob's *Precedents of Pleadings*, 12th ed. (London: Sweet & Maxwell, 1975).
- [75] I am not persuaded by this authority. The defendants have known from the beginning of these proceedings that this matter concerned the collision, including the actions of each of the train's crew members. Extensive written and oral submissions were provided regarding Mr. Cohen's actions, and he gave oral testimony. In addition, an Amended Statement of Claim was filed by the plaintiff on February 23, 2017, with the following changes (made by consent) made to focus attention on Mr. Cohen's actions:
- 11.1 At all material times, the defendant Martin was working with the conductor of the Train, Steve Chad Cohen. Steve Chad Cohen was in the course and scope of his employment with the defendant Southern Railway.
17. Particulars of the negligence of defendant Southern Railway and its employees, including Steve Chad Cohen, singly or in combination, and/or the defendant City of Surrey are:
- (a.1) Failing to keep a proper, or any, lookout;

(a.2) Failing to alert, or reasonably alert, the defendant Martin that the railway crossing lights and/or signals were not functioning;

17.1 The defendant Martin, and the defendant Southern Railway, and its employees, including Steve Chad Cohen, singly or in combination, breached the following statutory duties required by the Railway Safety Act, [SBC 2004] c 8, and the Statutes, Regulations, Standards and Rules adopted thereby:

- (a) Sections 14 and 103(g) of the Canadian Rail Operating Rules (TC-O-0-53); and
- (b) Section 12(1) of the Highway Crossings Protective Devices Regulations, CRC c 1183.

[76] In keeping with the concerns outlined in the case cited by the defendants, there was no moving target or other fairness issue that would make it inappropriate to find Southern vicariously liable for Mr. Cohen's actions.

[77] In addition, the case law on vicarious liability supports my finding on this point. Recently, in *Genesis Fertility Centre Inc. v. Yuzpe*, 2017 BCSC 167, this Court found the following at para. 22:

There is no question that a claim can be advanced for vicarious liability without having the employee or agent named as a party. Counsel for the defendant shareholders referred to *Powell Estate v. British Columbia (Workers' Compensation Board)*, [2011] B.C.J. No. 1459 (S.C.). In that case, Mr. Justice Johnston refused an application to join an employee of the Workers' Compensation Board on the basis that any damages flowing from his actions, which were alleged to constitute misfeasance in public office, would be recoverable against the Worker's Compensation Board.

[78] In regard to vicarious liability itself, a useful summary of the appropriate legal test was recently provided by this Court in *Ari v. Insurance Corporation of British Columbia*, 2013 BCSC 1308 at para. 68 and 70:

[68] An employer is vicariously liable for (1) employee acts authorized by the employer or (2) unauthorized acts so connected with the authorized acts that they may be regarded as modes of doing an authorized act. This is referred to as the "Salmond test" (referring to the Salmond and Heuston text, *The Law of Torts*, 19th ed. (London: Sweet & Maxwell, 1987)) and was upheld in *Bazley v. Curry*, [1999] 2 S.C.R. 534 at para. 10 (Bazley). In other words, vicarious liability is a strict form of liability for employers.

[70] The Supreme Court of Canada in *Bazley* outlined a two-part approach for determining whether vicarious liability should be imposed in circumstances of an unauthorized act (para. 15). First, a court should determine whether there are precedents that "unambiguously" determine whether the facts give rise to vicarious liability. If no precedents exist, the court must then determine whether vicarious liability should be imposed in light of the broader policy rationales behind strict liability.

- [79] In the case at bar, I find that the plaintiff's actions fall under the first branch of the Bazley test. Though Mr. Cohen failed to maintain his lookout duties, clearly he was in the course of his employment. The case at bar thus qualifies as one where vicarious liability typically applies, that is, one where an employee acts negligently in the course of his duties and thereby injures a member of the public.
- [80] If I am incorrect on this point, and the case at bar falls under the second branch of the Bazley test, vicarious liability has still been made out. Given my finding that Mr. Cohen violated the internal safety protocols imposed on him by Southern, he was not performing acts authorized by the employer but was performing acts "so connected with the authorized acts that they may be regarded as modes of doing an authorized act". In keeping with the test outlined above, there are a large number of precedents that unambiguously determine that the facts here give rise to vicarious liability.
- [81] For example, in *MacEachern v. Rennie*, 2010 BCSC 625, the plaintiff was either walking or riding her bicycle along King George Highway in Surrey, BC when her head was struck by a passing tractor-trailer owned by Canadian National Transportation Limited ("CN"). The driver of the trailer was found to have been negligent by failing to keep a proper lookout, and CN was found vicariously liable for the accident: paras. 580 and 588.
- [82] Similarly, in *Aiken v. Van Dyk*, 2001 BCSC 1217, it was found that a truck driver was not directly negligent for striking and killing a young child. However, one of his casual employees, in his role as a 'swamper,' was required to keep a lookout, but failed to do so. Consequently, the Court ruled that the employer was vicariously liable for the child's death: para. 48.
- [83] Regardless of which branch of the Bazley test applies to the case at bar, Southern was clearly susceptible to a claim in vicarious liability. Given my determinations regarding Mr. Cohen's actions, I find Southern vicariously liable for his negligence.

Effect of the Guilty Plea

- [84] On June 22, 2009, Mr. Chand pleaded guilty to a charge under s. 144 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 [MVA] for driving a vehicle without due care and attention. As a result, a \$1,500.00 fine was imposed on him.
- [85] It is the defendants' position that, even if the signal lights at the Crossing were not operating at the material time, Mr. Chand was required by statute to approach the signals with caution. For this point, they cite s. 185(6) of the MVA. In addition, they argue that Mr. Chand's guilty plea constitutes proof that he was driving erratically.

- [86] The key decision regarding the effect of a guilty plea in a subsequent proceeding involving the same facts is *Toronto (City) v. CUPE Local 79*, 2003 SCC 63. In that case, the Supreme Court of Canada was considering whether the grievance of a dismissal following a conviction for sexual assault amounted to an abuse of process. The Court provided the following comments at paras. 51-53:
- [51] Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.
- [52] In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk*, *supra*, at para. 80.
- [53] The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against relitigation, either through the doctrine of *res judicata* or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision (*Danyluk*, *supra*, at para. 51; *Franco*, *supra*, at para. 55).

[Emphasis added]

- [87] I find that the case at bar fits within the exception emphasized above in CUPE Local 79 at para. 53. Mr. Chand had no memory of the collision, and so he could not offer a full and robust defence. In addition, the fine was quite minor, with the stakes of this subsequent proceeding being much higher. In those circumstances, it is not surprising that Mr. Chand chose to enter a guilty plea.
- [88] Consequently, I find that in these circumstances, Mr. Chand's guilty plea does not constitute proof in these proceedings that he was driving without due care or attention on the night in question. In keeping with the independent eyewitness testimony of Mr. Harkness and Mr. Angus, I find that Mr. Chand was not speeding or driving erratically.

Contributory Negligence

- [89] Despite finding that Mr. Chand was not speeding or driving erratically, it has long been recognized that a plaintiff can be found to be contributorily negligent due to their failure to wear a seatbelt. For example, in *Galaske v. O'Donnell*, [1994] 1 S.C.R. 670, the Supreme Court of Canada noted the following at para. 19:

The courts in this country have consistently deducted from 5 to 25 percent from claims for damages for personal injury on the grounds that the victims were contributorily negligent for not wearing their seat belts. This has been done whenever it has been demonstrated that the injuries would have been reduced if the belts had in fact been worn.

- [90] As outlined by this Court recently in *Van v. Howlett*, 2014 BCSC 1404 at para. 128, to establish contributory negligence on the basis of a plaintiff's failure to wear a seatbelt, the defendant must demonstrate the following:

For the defence to succeed, I must be satisfied on a balance of probabilities not just that the plaintiff failed to wear her seatbelt, but also that her seatbelt was in good working order and that its use would have avoided or minimized the injuries she suffered: see, for instance, *Harrison v Brown*, [1987] 1 WWR 212 (BCSC), and *Ford v Henderson*, 2005 BCSC 609 at para 69 .

- [91] In the case at bar, Corporal Chu testified that, given the deformity of the steering wheel post-collision, he concluded that Mr. Chand was not wearing a seatbelt at the time of the collision. However, he admitted that he did not test the seatbelt to see if it functioned properly. In addition, in regard to Mr. Chand's seatbelt being severed, which the pictorial exhibit indicates, he was not able to advise whether emergency responders had cut the belt off Mr. Chand after the collision, leading to the inference that he was still wearing it at the time of the collision, thus necessitating its removal.
- [92] Though I found Corporal Chu to be an honest witness, in light of these weaknesses in his testimony, I cannot find that, on a balance of probabilities, it has been established that Mr. Chand was not wearing a seatbelt. Consequently, I find that there was no contributory negligence on Mr. Chand's part.

Conclusion

[93] I find that, due to Mr. Cohen's conduct on the night in question, Southern is vicariously liable in negligence to Mr. Chand.

[94] The plaintiff's case is granted, with costs.

[95] If the parties require speaking to costs, they may notify the Registry within 10 days of the date of this decision to set down a date to appear before me.

"Russell J."

The Honourable Madam Justice Russell

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