Neutral Citation Number: [2023] EWHC 853 (KB)

Case No: QB-2021-001050

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/04/2023

Before :

Mrs Justice Lambert DBE

- -

Between :

Sean Drummond	**Claimant**
- and -	
Keolis Amey Docklands Ltd	**Defendant**

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- -

Michael Rawlinson KC and Max Archer (instructed by **Fieldfisher**) for the Claimant
Prashant Popat KC and Angus Withington KC (instructed by **DWF**) for the Defendant

Hearing dates: 14 – 20 March 2023

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JUDGMENT

If this Approved Judgment

This judgment was handed down remotely at 10.30am on 17 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mrs Justice Lambert DBE:

1. The claimant spent the evening of 23 March 2019 celebrating the end of his exams with friends in Canary Wharf. At around 10pm he is seen on CCTV footage walking northwards along platform 1 at Canary Wharf station on the Docklands Light Railway. The footage, although incomplete, picks him up as he walks towards the gate at the end of the platform which leads on to the track. He looks up to the camera and behind him along the platform before he makes his way on to the track. Unfortunately the available footage does not show how the claimant got on to the track, whether by opening the gate and walking through it or by sidestepping around the gate at the edge of the platform. The claimant's journey along the trackside is then seen on the footage at various stages. He passes along the back of West India Quay. At a point approximately 230 metres from Canary Wharf Station he reaches a round curve under a railway viaduct, the Westferry Underpass.

2. The Westferry Underpass is a particularly dangerous zone for those trespassing on the line due to the degree of the right hand curvature of the track at this point. In order to follow the curve of the tracks, the left (nearside) corner of the train projects almost as far as the protective barrier rails leaving virtually no room for anybody on the side of the track. It was just at this point that the claimant was struck by a Bombardier B09 DLR train which was travelling towards him from Westferry to Canary Wharf. He sustained life changing, catastrophic, head injuries from which he was lucky to survive. He has enduring severe physical and cognitive impairments and his needs are now complex and constant.

3. Proceedings against the defendant, the operator of the DLR, were commenced in March 2021. The claim was for damages for breach of duty under the Occupiers Liability Act 1984 and/or in negligence. The particulars of breach included failing to take any, or any adequate, steps to prevent the claimant from accessing the track and failing to provide an adequate protective barrier between the platform and the tracks. Although a request for further clarification of those paragraphs was served, the claimant responded only that the case was sufficiently pleaded. As to the means by which the claimant had made his way from the platform onto the track, the Particulars of Claim was non-committal, referring only to the claimant proceeding past the gate and on to the track. Whether it was being asserted that the claimant opened the gate and passed through it, or sidled around the gate at the point of the platform edge was not made clear. When a request for further clarification of this aspect of the case was made, the claimant responded that further details could not be provided as the claimant was unable to provide instructions and the footage from the overhanging CCTV camera was uncomplete. The claim also included an action under the Human Rights Act 1998 for breach of Articles 2 and 8, although this was subsequently deleted by amendment.

4. The action came before me for a trial on liability only on 7 March 2023 with a time estimate of 7 days. There had been no pre-trial review. At the outset the claimant sought permission to re-amend his Particulars of Claim to plead, as particulars of breach of duty under the 1984 Act, the failure to ensure that the gate at the north end of Platform 1 at Canary Wharf station was locked and the failure to ensure that it was alarmed. As to the means by which the claimant made his way on to the track, it was proposed that the pleading be amended in the following way: "*he passed the platform end gate as previously described and in order to do so, interacted with the same*

physically (most probably by opening it towards himself unhindered by any locking mechanism) but in any even to the extent that had any alarm been present, that would have been activated thereby". Mr Rawlinson KC acknowledged that by referring to the claimant "*physically interacting*" with the gate, he was referring to the claimant opening the gate, although perhaps not fully.

5. The proposed amendments were strongly opposed. But having heard preliminary submissions from both counsel on the application, it was clear that the amendments relating to the twin failures to lock and alarm the gate were only causally relevant if the claimant was able to establish on balance that the claimant had opened the gate and passed through it, rather than side-stepping along the platform edge.. I therefore dealt with and determined that question as a preliminary issue.

6. The parties took a day to prepare for the preliminary hearing during which the experts oversaw a reconstruction with men of roughly the same size and stature as the claimant passing from the platform onto the tracks by either opening the gate and walking through, or stepping around the gate at the point where it abuts the tracks on the platform. Those various reconstructions were filmed from the overhead CCTV camera so that I was able to compare the footage thus obtained with that depicting the claimant on 23 March 2019. The experts gave limited evidence (concurrently).

7. I concluded that I was not satisfied on balance that the claimant had gone through the gate rather than sidestepping it. It followed that any further deliberation concerning the proposed amendments was otiose. I gave only brief reasons for my ruling. As I indicated, I set them out now in this judgment in more detail. These are those reasons.

8. The exit gate bore four graphic warnings each displayed in coloured bands on the front of the gate itself: "Danger of Death" with a hazard sign; "No unauthorised access onto the track" with a "no go" symbol; "Gate is alarmed" with exclamation mark symbol and "CCTV cameras in operation" with a CCTV camera sign. Of course, those approaching the gate would not know that the warning that the gate was alarmed was, in fact, not the reality.

9. I do not know how much alcohol the claimant had consumed during his celebrations as his blood alcohol level was not measured at hospital. However much he had consumed though, it was apparent from the CCTV footage of him walking down the platform to the gate that it had not affected his gait. He can be seen walking quite normally along the platform. Nor does he appear to be unable to read and to comprehend the warnings displayed on the gate. He is seen on more than one occasion looking up at the CCTV camera positioned above the gate. He can be seen looking behind him along the platform, the inference being that the was checking that no member of staff was on the platform observing his movements.

10. I find, on the basis of the footage of the claimant on his approach to the gate that the claimant knew that his movements were being filmed and that he knew, or at least had read the warning, that the gate was alarmed. Given these findings, it would be distinctly odd if the claimant, clearly not wishing to be detected in the act of leaving the platform and venturing on to the trackside, would then open what he believed to be an alarmed gate. He did not know that the gate was not in fact alarmed. It would be far more likely in this situation that the claimant would have side-stepped around

the gate at the edge of the platform and thus avoided triggering the alarm. The claimant was a fit and athletic sportsman. I have no doubt at all that he would have been able to sidle around the gate without effort. It would have involved him simply placing his hands on the gate or near the gate and then stepping around the edge of the gate with his toes and the balls of his feet on the platform. It would have been an easy effortless manoeuvre for a fit and agile young man. I do not accept, as Mr Rawlinson suggested, that it would have been a complex movement "worthy of a cat burglar."

11. Notwithstanding the efforts of the parties to assist their respective cases by their filmed reconstructions of various permutations of opening, part opening and side-stepping around the gate, I found those reconstructions to be of limited value. The real difficulty is that in the original footage the claimant is seen only partially, and then only for a second or two. Whilst both parties sought to persuade me that the reconstruction footage supported their interpretation of the original footage, unfortunately I found that the original footage simply did not provide sufficient imagery to afford a sensible comparison. As for the original footage, it seems to me to be more likely that the claimant is shown in the act of sidling around the gate but any judgement on the footage must be marginal only. My ruling on the issue as to how the claimant got on to the tracks is informed by the claimant's actions before he approached the gate and the sensible inferences to be drawn from those actions.

12. Having given my ruling on this issue, I was later informed that the claimant sought the approval of the court to discontinue the claim with no order for costs. There were, in reality, no other viable allegations against the defendant. Although the claim included an allegation against the Passenger Support Agent who was on the train which collided with the claimant, this allegation was unlikely to succeed. Setting aside the question of whether there was any breach by that person, it would have been near impossible for the train to be stopped in time to avoid the claimant being hit. I therefore gave my approval to the discontinuance.

13. Having set out the history of this litigation, even in only brief terms above, I must record my dismay that it was only on day 4 of a trial which had been listed for several months and after litigation had been ongoing for over two years that this litigation was resolved. I make no comment concerning the progress of the litigation before the application to amend the particulars of claim. No doubt there were difficulties arising from disclosure which made it difficult for the claimant's team to crystallise its case. However, after the application to amend the pleadings had been made, the case was crying out for a pre-trial review before the trial judge. The application was not, as Mr Rawlinson sought to persuade me at one stage, unnecessary because the claim had been adequately particularised. If this had been so, then he would not have made the application. This was not an application which tinkered with the outer edges of the claim: the proposed amendments went to the root of the claim. If, as I am informed, there was to be no joint meeting for the purpose of narrowing the issues, then a pre-trial review would have saved some costs and no doubt the claimant's family much stress and anxiety. Both parties should have ensured that the amendment issue was resolved, or at least case managed, before the beginning of the trial.