Editor's note: Opinion released October 30, 2000

SUPREME COURT OF LOUISIANA

No. 00-C-0066

BOBBY DUNCAN, ET AL.

versus

KANSAS CITY SOUTHERN RAILWAY CO. ET AL.

KNOLL, J., concurring in part and dissenting in part.

I concur in the majority's conclusion that the jury manifestly erred in finding that Rachel's life expectancy was 81-years. Instead, the record evidence preponderated that her life expectancy was to the age of 57 years. This finding necessitated a reduction in the medical damage award to Rachel. However, I dissent from the majority's reduction in Rachel's general damage award and its reapportionment of fault. In my view, the jury's general damage award to Rachel and the apportionment of fault by the trial judge were clearly supported by the record and, therefore, were not manifestly erroneous.

Reapportionment of Fault

The majority correctly cites the factors contained in Watson v. State Farm Fire & Cas. Ins. Co., 469 So. 2d 967 (La. 1985), in its discussion of fault, but fails to properly apply the factors to the facts of this case. In my view, if the Watson factors were properly applied to the facts of this accident, the jury's apportionment of fault would have been affirmed. This can easily be discerned from the following analysis of these factors.

Whether the conduct resulted from inadvertence or involved an awareness of the danger. Any extenuating circumstances which might require the actor to proceed in haste, without proper thought.

The majority finds that "his (Mitchell) negligent conduct of proceeding across the tracks was more than likely inadvertent." Duncan v. Kansas City So. RR Co., No. 00-0066, slip op. at 11; (emphasis added). On the other hand, the record shows that "KCS knew of the unique situation posed by this crossing before the accident, they had knowledge of prior accidents at the crossing and other complaints about the crossing." Duncan, slip op. at 12. Thus, the evidence shows that KCS's acts of negligence were clearly paramount in comparison to Mitchell's inadvertent negligent acts.

How great a risk was created by the conduct.

The risk created by KCS's conduct was overwhelmingly dangerous, as shown by the majority's own appreciation of the evidence:

> Testimony was presented that the East Iowa Road crossing presented a unique situation since less than 200 feet after crossing the railroad tracks, there is a stop sign at the intersection of East Iowa Road and Highway 27. Approximately 80 feet before the crossing there is a rough cattle guard requiring drivers to stop or slow to cross. Thus, before reaching the railroad crossing, drivers have to slow down or stop for the rough cattle guard, then proceed another 40 feet and stop for the stop sign before the crossing. When drivers are slowed down or stopped for the cattle guard, the view of the tracks is obstructed by ground cover. At the stop sign, the view is unobstructed; however, the expert testified that most drivers have focused their attention on the intersection of Highway 27 by the time they reach this stop sign.

Id.

The significance of what was sought by the conduct. The capacities of the actor, whether superior or inferior.

It can hardly be gainsaid that KCS was the superior actor. KCS is a well established railroad giant with the financial resources and manpower to employ the appropriate studies, measures, devices, and expertise to operate trains nationally

across thousands of miles of track. KCS with its attendant superior capabilities is a profit-driven enterprise that should absorb the risk of injury that its conduct causes. It is the sophisticated user of the railway as compared to the unassuming motoring public. With its accessible, superior capabilities, KCS could have provided for a safer railroad crossing at this complicated traffic site for the safety of the motoring public. Not only was this traffic site inherently dangerous, the danger of the crossing was further compounded by trees and bushes on the KCS right of way which obscured an approaching train from the motoring public until the vehicle was dangerously close to the railroad crossing. Notwithstanding its superior capacity, it chose a path of callous disregard and merely relied upon a stop sign at this dangerous railroad crossing.

The evidence shows that a vehicle stopped 50 feet from the railroad crossing had a sight distance of only approximately 200 feet down the track to the south because of ground cover. The KCS train was traveling 42 m.p.h. coming from the south on the day of the accident. At 42 m.p.h. the train would have reached the crossing in 3.2 seconds from a distance of 200 feet — not much time for reaction.

In finding KCS at fault, the majority states: "KCS took no steps to remove the ground cover or to install additional warning devices." Id. Notwithstanding these paramount acts of negligence by KCS, the majority concludes: "We can, however, say that KCS was no more at fault than Mitchell and the trial court's allocation of fault, 68.4% to KCS and 31.06% to Mitchell, was clearly wrong." Id. This conclusion is out of sync with the majority's own reliance on the paramount acts of negligence by KCS in its finding of liability and fault against KCS. This reapportionment of fault flies in the face of well established jurisprudence from this court that instructs our courts of appeal to refrain from doing this very kind of judging: "If, in light of the record in its entirety, the trial court's findings are reasonable, then the appellate court may not

reverse, even if convinced it would have weighed the evidence differently sitting as the trier of fact." Duncan, slip op. at 3 (citing Sistler v. Liberty Mut. Ins. Co., 558 So. 2d 1106, 1112 (La. 1990)). Clearly, the trial court's apportionment of fault should have been affirmed by this court.

Reduction of Rachel's General Damages

In reducing Rachel's general damage award, the majority finds it excessive and states: "A review of the cases involving similar injuries reveals that the highest amount that could reasonably be awarded under the facts of this case is $6,000,000. Duncan, slip op. at 15 and footnote 6 (referencing a 1993 case involving a 15- year old boy). There are several major errors in the majority's analysis on this issue which also render this conclusion contrary to our well established jurisprudence.

The majority fails to heed that the jury assessed the effects of Rachel's quadriplegic injury on this 11 year old girl (at the time of the accident) given the paramount acts of negligence by KCS and inadvertent acts of negligence by Mitchell. There is no question that the jury had sympathy for Rachel as it would be inhumane not to. But evidence more compelling than sympathy was presented to the jury that showed Rachel as the beautiful, young girl she was, and is, whose beauty, personality, intelligence, and wholesomeness was reflected in a review of yet a cold record. It is clear from the record that she has not given up on life in spite of her quadriplegic condition. She now has her hopes and dreams as a quadriplegic. Simply stated, the jury was faced with a fantastic, young girl who suffered horrendous injuries and based its award for the particular injury for this particular tort victim under these circumstances.

As a woman, Rachel's injury will affect her childbearing ability unless the medical sciences can miraculously intervene. Her injuries have invaded every facet and

emotional aspect of a woman's life, but the most serious impact of Rachel's injury is her loss of life expectancy. It is sad that we have to declare this, but this statement is caused by the reality of litigation. Surely the jury was cognizant of Rachel's loss of life expectancy since the record clearly preponderated this fact. This probably explains the jury's award for future medicals beyond the age of 57, to 81 years, as an award to Rachel for her loss of life expectancy. Notwithstanding, the jury's general damage award was based upon the tort victim before them. In stark contrast, the majority references Simpson v. State, through DOTD, 636 So. 2d 608 (La. App. 1 Cir. 1993), writ denied, 94-0042, 04-0047, 94-1005 (La. 5/6/94), 637 So. 2d 471, a case which is vastly dissimilar to Rachel's. Although the Simpson case concerned a tragic accident, it involved an older tort victim of the opposite sex, and did not pertain to a quadriplegic. Moreover, the quantum recognized in Simpson is time-dated by approximately six years and fails to consider the diminishing effect of inflation. See Dolmo v. Williams, 99-0169 (La. App. 4 Cir. 9/22/99), 753 So. 2d 844; Jackson v. CSX Transp., Inc., 97-0109 (La. App. 4 Cir. 12/23/97), 712 So. 2d 514, 523; Ruiz v. Oniate, 96-2211 (La. App. 4 Cir. 8/6/97), 697 So. 2d 1373, 1386, reversed on other grounds, 97-2412 (La. 5/19/98), 713 So. 2d 442.

For the foregoing reasons, I respectfully dissent.