JUDGMENT : **LORD JUSTICE BROOKE**: C.A. 22nd February 2002

1 This is an appeal by the claimant, Susan Jane Dunnett, from the judgment of His Honour Judge Graham Jones in the Cardiff County Court on 1st December 1999, whereby he dismissed her claim against the defendant, Railtrack Plc, for damages arising out of the death of three of her horses on 17th June 1996 on the Swansea to London Railway Line near Bridgend.

2. The claimant lives at a farm, Penyfai, which she and her partner rent along with a field adjoining the railway line. They keep horses for livery. There is an accommodation crossing across the railway line, although the land on the other side of the line is in separate occupation, and a gate from the field leads to the crossing. There used to be a wooden five-bar gate there which fell into disrepair. This gate was replaced by Railtrack contractors, who installed a new iron gate shortly before the accident. The old gate was sprung in a way that it would close without the need for it to be properly shut. However, it was so stiff that it would barely open, and this caused a lot of problems. The new iron gate swung open much more easily, but it would not shut unless it was specifically closed.

3. Railtrack workmen used to have access to the line along a track through the claimant's field. The claimant was keen that arrangements might be made whereby she was given a key to the gate, which would be available to Railtrack's men who passed her cottage on the way to the line. She thought that they would not have to suffer significant delay while calling for the key and that, if the gate was kept locked, children would desist from using the crossing, as had been their practice.

4. The judge found that the only time when she or anyone acting on her behalf made a request of this kind to any representative of Railtrack was when the new gate was being installed. Two contractors' men brought the new gate to the site in a yellow van with drop-down sides, which they parked by the gate to the claimant's yard. When they got out of the van they chatted to the claimant about her horses, and one of the men told her they were working on the gate. She commented that it was often left open, and she inquired if there was any chance of it being padlocked. The man replied that there was a legal requirement for them to have access to the line, and it would therefore be illegal to padlock the gate. It would not be feasible for there to be a key kept available for railway workers as well as for the claimant, because it might happen that the claimant would be out and the men could not gain access to the line. This would be illegal. After saying what an improvement the new gate would represent, he went off to do his work.

5. On 17th June 1996, soon after the new gate was installed, the claimant put four horses out to graze in the field before 9.30 a.m.. Before she left she checked that the new gate was properly shut. When she returned at about 11.15 a.m. she found the gate wide open and three of the horses no longer in the field. They had strayed on to the railway line, where they had been struck and killed by an express train some way down the line. The claimant claimed not only £9,000, being the agreed value of the horses, but also damages for post-traumatic stress disorder (PTSD). The Judge found that she had seen the mangled remains of at least two of her horses on the railway line in the immediate aftermath of the accident. After this incident the iron gate was replaced by a fence.

6. It is necessary at this stage to say something about the way the claimant's case was developed. In the original particulars of claim dated 12th December 1997 seven allegations of negligence were made. The first two asserted that the defendants' servants or agents were negligent in that they had failed to take adequate steps to ensure that the new gate would shut automatically, and that they replaced the old gate, which had an automatic shutting device, with a new gate without such a device.

7. Shortly before the trial, Judge Graham Jones conducted a pre-trial review at which he directed the parties to file skeleton arguments. As a result, the claimant's former solicitors served on the court and on the defendants' solicitors a six-page formal statement of the claimant's case. Under the heading "LIABILITY" appear two paragraphs:

> *"(a)The Claimant alleges that the Defendants, their Servants or Agents were negligent. The Claimant now relies upon paragraph 10(c) of the Particulars of Claim, supplemented by paragraphs 10(f) and (g) insofar as those paragraphs supplement 10(c). It is the Claimant's case that by indicating to the Claimant that it was illegal to allow gates to be kept locked, and/or failing to action the request that those gates be kept locked, the Defendant's Servants*

or Agents failed to comply with their duty of care to ensure the safety of the occupiers of the land adjoining the railway. Given the knowledge that the Claimant kept horses in the field adjoining the railway, and that the crossing was used illegally by inter-alia, children, the failure to heed the Claimant's request was made worse. If the Servants or Agents of the Defendants' required the gate to remain available for use, a system should have been devised which would have enabled it to be used safely, such system allowing the gate to be kept locked except when in lawful use.

(b)Given the factors mentioned above, it was reasonably foreseeable that if the gate was not kept locked, it would be left open by those using it, and horses would then stray onto the railway line putting them at great risk. It is the Claimant's contention that the failure to lock the gate was the primary cause of the horses being killed, thereby giving rise to a claim in damages against the Defendant Company."

8. It follows that the defendant had notice before the trial started that the claimant no longer relied on the first two of her particulars of negligence in the particulars of claim to which I have already referred. Instead, her case was founded only on particular 10(c) of the particulars of negligence, supported to a certain extent in an ancillary way by particulars (f) and (g). Particular 10(c) reads:

"(c)Failed to heed the Plaintiffs request that the said gate be kept locked to prevent it inadvertently being left open.

(f) and (g) read:

"(f)Failed to pay any or any adequate heed to the presence of the Plaintiffs horses in the said field;

(g)Failed to devise a system of fencing and/or gates which would have enabled the path to be used without placing at risk the horses in the field."

9. One other feature of the claimant's claim should be mentioned at this stage. In paragraph 5 of her original particulars of claim it was said that on occasions which she cannot now particularise she had asked the defendants, their servants or agents to lock the said gate, leaving a key at the farmhouse, in order to limit the use by trespassers on the path and to ensure that the gate was properly secured at all times. The defendant had refused to allow the said gate to be so locked. When she was asked formally to provide particulars of this allegation, the answer came back:

"There was only one occasion on which the request was made."

10. Then follows a reference to the occasion on which the new gate was replaced.

11. Mr Levene, who has appeared for the claimant on this appeal, drew our attention to an internal Railtrack letter to the Railtrack solicitor from an Infrastructure Liability Manager at Swindon, dated December 1994, which related to an agreement being made with the owner of the land on each side of the railway line. In that letter appears the statement that the owner, who is described as "the user", had requested that the private footpath crossing at this point was closed. He was having serious problems with people trespassing on his property and then crossing the line at this point. But no point was made in the claimant's pleaded case of complaints which she had made, or complaints which anybody had made, about trespass over her land or the occasions when the gate was being left unlocked except for the single occasion when she had the conversation with the workmen.

12. At the trial the claimant and her partner gave both written evidence, through their witness statements, and oral evidence. The defendants, who now knew that the claimant's claim had been limited in the way that I have described, called no evidence. At the end of the trial, after hearing the arguments put forward by her counsel (who had not had the carriage of the case throughout the time when the particulars of claim were first issued), the judge noted in his judgment that counsel had departed some way from his client's pleaded case; and at the end the judge said that her case was now formulated to the effect that when the defendants' servant or agent indicated to her that it would be illegal to allow the gate to be kept locked, the defendants were thereby vicariously liable for a breach of their duty of care to take reasonable steps to ensure the safety of the chattels or other goods of those who occupied the land adjoining the railway. In essence the judge said that it was being asserted that the defendants were liable because the workmen who attended to instal the new gate wrongly told her that the gate could not be kept locked.

13. The judge referred to section 68 of the Railway Clauses Consolidation Act 1845, which imposes statutory duties on railway companies to maintain gates used for accommodation crossings over their lines. He then said that the company's duty of care in performing that statutory duty was met by providing a gate which was not defective; in other words, an efficient gate to prevent stock

moving onto the line. He said that there was no suggestion that this gate or its closing mechanism were defective. The judge said that any extra duty of care would only arise if the circumstances were of a special kind, such as to impose some special or additional duty. Such a duty usually arose, he said, when persons, or possibly animals, were actually in the course of crossing the line. He knew of no case where it was held that the duty of the defence of animals on the line went further than the provision of a gate of the type for which this Act provided.

14. He refused to find that in the circumstances of the present case the defendants owed the claimant a duty to take reasonable steps to make sure that the advice given to her by one of Railtrack's employees on the question whether it was illegal for this gate to be padlocked was correct. He added that even if, contrary to his view, such a duty existed, it was not reasonable in the circumstances for the claimant to rely on the advice she received from a workman who arrived at her premises to repair a gate. He was not a man in any particular position of authority. The claimant had raised the matter with him, and had simply accepted what he said. If she had any real concern on the subject she could have gone to Bridgend Station or contacted the defendants' local office to speak to someone with a degree of authority.

15. For these reasons, the judge rejected her claim on liability. He said that if he had held in her favour, he believed that he would have been constrained by the decision of this court in Attia v British Gas Plc [1988] 1 QB 304 to hold that she was entitled in principle to recover damages for PTSD. That case has never been expressly overruled, although more recently the House of Lords have been restricting recoverability of damages in this kind of case. But until Attia was expressly overruled, the judge considered he was bound by it.

16. The appellant now appeals by permission of Schiemann LJ on the liability issues in the case, and the respondent cross appeals on the judge's comments in relation to the recoverability of damages for PTSD.

17. In advancing his client's case in this court, Mr Levene frankly admitted that he could not challenge the judge's finding that the legal advice given by one of the defendants' workmen was such as to enable the claimant to bring an action against the defendants following her reliance on this incorrect advice, although he submitted that he did wish to rely on the fact that this incident had effectively prevented her from doing something about the gate. His quarrel was with the gate itself. He submitted that in the circumstances of this case it was transparently obvious that a gate which had to be shut in the way that the new iron gate had to be shut, and which was not self-closing, was not an appropriate fulfilment of the defendants' duty to use reasonable care in the performance of their statutory duty imposed by section 68 of the 1845 Act. Mr Levene appreciated that he faced the formidable obstacle that his client's former solicitors and counsel had, without formally abandoning it, made it clear that they did not rely against the defendant on the case set out at the beginning of their particulars of negligence, in which it was said that they had failed to take adequate steps to ensure that the gate would firmly shut automatically, and that they replaced the old gate that did have an automatic shutting device with a new gate which did not have such a device.

18. We did not call on Mr Lord to respond to this appeal or to indicate to us the basis of his client's legal defence to a case that against a background of constant trespassing and the gate permanently being left open, his clients were at risk in installing a gate with the feature to which I have referred.

19. The court does not know, and Mr Levene does not know, why his predecessors decided not to pursue this case. It may be that there was a sound legal defence based on the case law which is of some antiquity. I do not know. But once the claimant's former advisers had decided no longer to pursue their case, it appears to me that there was not very much left which could be properly sustained in relation to the claimant's case at trial. This appears to have been the claimant's view on the matter, because the original notice of appeal, which did not raise any issue which was sustainable against the other side, was that she felt badly let down by her former legal advisers.

20. However that may be, Mr Levene gallantly sought to put on its feet, for the purposes of this appeal, a case which still fell within the four corners of what was left of his client's case at the trial. He submitted that the appropriateness of the gate remained in issue given that the claimant had been

complaining about it in the context which is set out in particular (c) of the particulars of negligence. It was in those circumstances that he should be entitled to succeed on the appeal because the gate, in the circumstances, was not adequate and, as the judge said (and as was recognised by Holmes LJ in **M'Elhinney v Londonderry & Loug Swilly Railway Company (**unreported) 20th December 1909, noted in 1916 50 ILTR 37 at 39), although a good and sufficient gate, as mentioned in section 61 of the Act (which is in many ways comparable to section 68), is not necessarily a gate kept closed by a person employed by the railway, there might be other circumstances from which negligence could be inferred.

21. But in my judgment, on the facts of this case, as limited by the claimant's former legal advisers by their pleadings at the trial, there was no material on which the judge could have made a finding in favour of the claimant on liability. In those circumstances it is not necessary for this court to turn to the very interesting issues which would arise for argument on the cross-appeal.

22. For these reasons I would dismiss this appeal.

23. **LORD JUSTICE ROBERT WALKER**: I agree, although I do so with considerable reluctance. It appears that what was potentially - although I stress that I say no more than "potentially" - the best point in the claimant's case was not relied on at trial. This may have been because counsel who was instructed on behalf of the claimant at a late stage may have been inhibited by the terms of the statement of case (in fact a skeleton argument) already prepared and put in by his instructing solicitors.

24. I feel great sympathy for the claimant, but it would not be fair to the defendant to allow the claimant to start again and deploy grounds which were abandoned, or virtually abandoned, either at trial or at the earlier pre-trial review.

25. Mr Levene has skilfully said all that could possibly be said in favour of the appeal, but I agree that it must be dismissed.

26. **LORD JUSTICE SEDLEY**: While I agree that the appeal has to fail, I too find this a troubling case. Brooke LJ has described what happened both to the claimant's horses and in the litigation which followed. The claimant's original pleading, which had support in the evidence, set out a case of elementary simplicity. It was that the defendants had installed on an accommodation crossing a gate which neither closed itself nor latched itself when shut. If she was right, the risk, not only to livestock in the adjacent field but, for example, to trespassing children, and to staff and to passengers if a train were derailed by colliding with livestock, was apparent. This case, which is the one that Mr Levene would now like to be in a position to run, was indeed pleaded under the first head of negligence in the particulars of claim. It did not depend on any question about the permissibility of padlocking. That only arose, if at all, in rebuttal of the paragraph of the defence which blamed the claimant - if blame there was - for not locking the gate herself. If her simple primary allegation were right, none of that would arise. But it was an allegation that was never tried.

27. Why the claimant's case at trial took the form it did is still a mystery to me, at least in the absence of any explanation - which, for all I know, there may be - from the author of the statement of case and, if it was a different person, counsel who appeared at trial.

28. Brooke LJ has described the events in detail. The defendants, unable - it may be - to believe their luck, responded with a statement of case which, again unaided by argument, appears to me at first blush to take a somewhat laid-back view of the limit of Railtrack's statutory duty in relation to gates giving directly onto railway lines under section 68 of the Railway Clauses Consolidation Act 1845. But none of this, in the event, mattered. The case presented against them fell without their needing to call any evidence.

29. I stress that these are no more than first impressions. We have not found it necessary to call on the respondents, and we have not heard from those who had conduct of the case below on behalf of the claimant. On the case presented to him, the judge, I agree, was plainly right to find for the defendants. In spite of Mr Levene's commendable endeavours, there is no way in which he can now run a case on liability which was explicitly dropped before the trial.

30. In the circumstances I reluctantly agree that this appeal has to fail.

Order: Appeal dismissed.

SUSAN DUNNETT v RAILTRACK : [2002] EWCA Civ 303 Friday, 22nd February 2002

1. **LORD JUSTICE BROOKE:** When the appeal was dismissed, Mr Lord (on behalf of the defendant) asked for his clients' costs. He showed us letters written by his clients' solicitors in relation to this matter. The first was dated 13th March 2001, after Schiemann LJ had given leave to appeal. The letter read:

   "We refer to recent exchange of e-mails and now have our client's instructions on your suggestion that this action could be compromised.

   As will appear from the skeleton arguments served with the accompanying letter, our clients are confident that your appeal will fail and that an order for costs of the appeal will be made against you.

   Nevertheless, they are prepared to offer to you the sum of £2,500 as a lump sum in full and final settlement of all your claims in this action including interest and costs."

2. Attention was drawn to Part 36 of the Civil Procedure Rules.

3. We have also been shown a later exchange of e-mail correspondence this month. It was initiated by the claimant and followed by an e-mail from the defendants referring to an offer whereby, if she was to discontinue the appeal, their clients were prepared not to enforce their entitlement as to costs and extending the time in which that offer might be accepted. The claimant responded that she

   "...would be happy to settle this matter outside of a court action thereby avoiding your clients having the expense of preparing for the court date and minimising the stress of this matter resulting in another day in court for myself."

4. She asked if Railtrack could be asked

   "...if they have any offer of a settlement so that this matter may be dispensed with for the benefit of us all."

5. It appears that another offer of £2,500 was made, which the claimant did not consider to be a reasonable or fair offer.

6. Throughout this time the claimant was acting as a litigant in person. It has only been very recently that she has had the good fortune of being assisted by Mr Levene, who has appeared for her as part of the Bar's pro bono scheme.

7. In the usual way, it would follow that she should pay the defendants' costs. However, Schiemann LJ, before whom she appeared on 11th August 2000, said in terms in paragraph 9 of his judgment:

   "I have advised her that she ought to explore the possibility of Alternative Dispute Resolution, so as to get shot of this case as soon as possible. She has indicated that she is in favour of doing that, if the other side are also willing to do that. I cannot say any more about that, beyond suggesting that she tries it."

8. The claimant referred this suggestion to the defendants, who instructed their solicitors to turn it down flat. They were not even willing to consider it. They then instructed their solicitors to oppose Miss Dunnett applying for an extension of time for filing her notice of appeal. She was a little bit out of time.

9. The matter came back before Schiemann LJ. We have seen the transcript of what he said. He was critical of the defendants' solicitors in opposing this application. He said:

   "I am conscious of the fact that Railtrack say that they have limited funds to deal with a litigant who may well not be able to reimburse them; but they would have been better advised if they had kept those limited funds for fighting the substance of the case rather than taking the point that she is a little out of time in filing a notice of appeal."

10. The court has not seen everything which passed between the parties. From something that Mr Lord told us, it appears that passions were running fairly high on the claimant's side in relation to the death of her horses and the attitude that Railtrack, no doubt on sound legal advice, were adopting. It appears to me that this was a case in which, at any rate before the trial, a real effort should have been made by way of alternative dispute resolution to see if the matter could be satisfactorily resolved by an experienced mediator, without the parties having to incur the no doubt heavy legal costs of contesting the matter at trial. There is no evidence that this was ever suggested by the court.

I say nothing more about that except to say that it is understandable, in these circumstances, that passions may have been running fairly high.

11. However, the time did come when this court in terms suggested that this was a case for alternative dispute resolution. CPR 1.4 reads:
"(1) The court must further the overriding objective by actively managing cases.
(2) Active case management includes
(e)encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure."

12. In the helpful notes to that rule in the Autumn 2001 edition of the White Book Service 2001, the editors write on page 18:

> *"The encouragement and facilitating of ADR by the court is an aspect of active case management which in turn is an aspect of achieving the overriding objective. The parties have a duty to help the court in furthering that objective and, therefore, they have a duty to consider seriously the possibility of ADR procedures being utilised for the purpose of resolving their claim or particular issues within it when encouraged by the court to do so. The discharge of the parties' duty in this respect may be relevant to the question of costs because, when exercising its discretion as to costs, the court must have regard to all the circumstances, including the conduct of all the parties (r.44.3(4), see r.44.5)."*

13. The value of that observation is that it draws attention to the fact that the parties themselves have a duty to further the overriding objective. That is said in terms in CPR 1.3. What is set out in CPR 1.4 is the duty of the court to further the overriding objective by active case management, which includes the feature to which I have referred.

14. Mr Lord, when asked by the court why his clients were not willing to contemplate alternative dispute resolution, said that this would necessarily involve the payment of money, which his clients were not willing to contemplate, over and above what they had already offered. This appears to be a misunderstanding of the purpose of alternative dispute resolution. Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve. This court has knowledge of cases where intense feelings have arisen, for instance in relation to clinical negligence claims. But when the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live. A mediator may be able to provide solutions which are beyond the powers of the court to provide. Occasions are known to the court in claims against the police, which can give rise to as much passion as a claim of this kind where a claimant's precious horses are killed on a railway line, by which an apology from a very senior police officer is all that the claimant is really seeking and the money side of the matter falls away.

15. It is to be hoped that any publicity given to this part of the judgment of the court will draw the attention of lawyers to their duties to further the overriding objective in the way that is set out in Part 1 of the Rules and to the possibility that, if they turn down out of hand the chance of alternative dispute resolution when suggested by the court, as happened on this occasion, they may have to face uncomfortable costs consequence.

16. In my judgment, in the particular circumstances of this case, given the refusal of the defendants to contemplate alternative dispute resolution at a stage before the costs of this appeal started to flow, I do not think that it is appropriate to take into account the offers that were made. In my judgment, taking into account all the circumstances of the case, as we are bound to do under CPR Part 44, which applies as much to the Court of Appeal as it does to courts at first instance, the appropriate order on the appeal is no order as to costs.

17. **LORD JUSTICE ROBERT WALKER**: I agree.

18. **LORD JUSTICE SEDLEY**: I agree.

Order: As above.