

CN-12-447541

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

DAVID CARMICHAEL

Plaintiff

- and -

VIA RAIL CANADA INC.,
CANADIAN NATIONAL RAILWAY COMPANY,
and CANADIAN PACIFIC RAILWAY COMPANY

Defendants

Proceeding under the *Class Proceedings Act, 1992*

NOTICE OF ACTION

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiffs. The claim made against you is set out in the statement of claim served with this notice of action.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiffs' lawyer or, where the plaintiffs do not have a lawyer, serve it on the plaintiffs, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this notice of action is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.



IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

DATE: February 29, 2012

Issued by


Local Registrar

Address of court office:

10th Floor
393 University Avenue
Toronto, Ontario
M5G 1E6

TO: VIA RAIL CANADA INC.
3 Place Ville-Marie
Suite 500
Montreal, QC H3B2C9

AND TO: CANADIAN NATIONAL RAILWAY COMPANY
935 De La Gauchetiere St. W.
Montreal, QC H3B 2M9

AND TO: CANADIAN PACIFIC RAILWAY COMPANY
401 9th Avenue S.W.
Suite 500
Calgary, AB T2P 4Z4

CLAIM

1. The plaintiff claims:
 - (a) an order certifying this action as a class proceeding and appointing the plaintiff as representative plaintiff of the Class (as defined below);
 - (b) general and special damages in the amount of \$25,000,000 or such other amount as this Court deems appropriate;
 - (c) damages pursuant to section 60 of the *Family Law Act*, R.S.O. 1990, c. F.3;
 - (d) punitive damages in the amount of \$5,000,000 or such other amount as this Court deems appropriate;
 - (e) the cost of past and future insured health services provided by the Ontario Health Insurance Plan ("OHIP");
 - (f) a declaration that Via Rail Canada Inc. breached its contractual obligations owed to the Class Members;
 - (g) a declaration that Via Rail Canada Inc., Canadian National Railway Company and Canadian Pacific Railway Company were negligent;
 - (h) prejudgment and postjudgment interest pursuant to the provisions of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
 - (i) costs of this action together with applicable taxes;
 - (j) costs of notice and of administering the plan of distribution of all recovery in this action, plus applicable taxes; and
 - (k) such further and other relief as to this Honourable Court may seem just.

The Parties

2. The plaintiff, David Carmichael (hereinafter referred to as the “plaintiff”), resides in the City of Toronto, in the Province of Ontario. At all material times, the plaintiff was a passenger on VIA commuter train #092.

3. The defendant, VIA Rail Canada Inc. (“Via Rail”), is a corporation duly incorporated under the laws of Canada with its head office in Montreal, Quebec. VIA owns and operates railway rolling stock. It operates passenger rail service in the province of Ontario and elsewhere. In particular, Via Rail owned and was operating VIA commuter train #092 (hereinafter referred to as the “Train”) eastbound en route from the City of Niagara Falls, in the Province of Ontario, to the City of Toronto, in the Province of Ontario.

4. The defendants, Canadian National Railway Company (“CNR”) and Canadian Pacific Railway Company (“CPR”) are corporations duly incorporated pursuant to the laws of Canada. CNR and/or CPR were, at all material times, the owner(s) of the railway bed and switching mechanism upon which the Train was running at the time of the derailment as described below.

The Class

5. The plaintiff brings this action pursuant to the *Class Proceedings Act, 1992* on behalf of the following class (collectively referred to as the “Class” or “Class Members”):

- (a) all persons who were passengers on VIA commuter train #092 on February 26, 2012, except those persons who were employees of the defendants (“the Passengers”); and
- (b) all living parents, grandparents, children, grandchildren, siblings and spouses (within the meaning of section 61 of the *Family Law Act*, R.S.O. 1990, c. F-3, as amended) of the Passengers, or where such a family member has died, the personal representative of the estate of the deceased family member (“Family Law Claimants”).

The Train Derailment

6. On February 26, 2012, the Train derailed just east of Aldershot GO station, as a result of which the plaintiff and the Class Members sustained serious and permanent personal injuries and damages as hereinafter described.

Negligence of the Defendants

7. The defendants owed a duty of care to the plaintiffs to take appropriate steps to ensure the safe operation of the Train and the safety of the Passengers.

8. The derailment of the Train and the resulting injuries and damages were caused by the negligence, fault or breach of duty of the defendants and their agents, servants and employees, for whose negligence they are in law responsible, the particulars of which are as follows:

- (a) they failed to take reasonable or any care to ensure that the Passengers would be reasonably safe in using the Train and railway bed;
- (b) they failed to inspect or adequately inspect the railway tracks;
- (c) they failed to inspect or adequately inspect the Train;
- (d) they failed to have or maintain the Train in a proper state of mechanical report suitable for the safe use thereof on a public railway;
- (e) they hired incompetent employees, agents, servants, and are vicariously liable for the acts or omissions of their employees, servants or agents;
- (f) they permitted incompetent operators whose faculties of observation, perception, judgment and self-control were impaired to operate the Train;
- (g) they permitted an inexperienced person to operate the Train who failed to keep a proper lookout and therefore failed to discover the presence of a danger;
- (h) they permitted the Train to be operated at an excessive rate of speed considering the circumstances;
- (i) they failed to properly Train their operators on how to operate the Train and react in situations such as in the present situation;
- (j) they failed to apprise themselves of the dangerous condition of the railway bed and they ought reasonably to have so apprised themselves;
- (k) they failed to warn persons of the danger attendant in operating a Train on the aforementioned railway bed;
- (l) they permitted or allowed the railway bed and switching mechanisms to be constructed, designed and maintained, without due or any regard for the safety of persons lawfully using the railway bed;
- (m) they allowed their employees, agents or servants to position the switch at the derailment site in a dangerous position;

- (n) they failed to communicate to Railroad Traffic Control Division ("RTC") or anyone that there problems with the switch or that it was in a dangerous position;
- (o) they failed to take corrective measures to correct the danger and alleviate the risk of travelling on the railway bed, when the danger thereof should have been apparent;
- (p) they failed to erect and maintain warning signs on the said railway bed;
- (q) they failed to provide proper or any safeguards to ensure the safety and security of persons using the railway bed;
- (r) they failed to take reasonable or any steps to establish a procedure to ensure that routine maintenance, inspections or repairs of the railway bed were carried out on a reasonably regular and consistent basis thereby permitting a situation of danger to arise;
- (s) they allowed a situation of danger to exist when, by the use of reasonable effort, they could have prevented a situation of danger;
- (t) they failed to establish and maintain a proper communication system in the Niagara Falls-Toronto corridor that would ensure that the Train engineers, track repairpersons and RTC could openly and readily communicate with each other as to existing Train and track conditions including switches; and
- (u) further particulars of the negligence of the defendants are within the knowledge of the defendants.

9. The defendants are vicariously liable for the negligence of their employees and representatives.

Breach of Contract

10. Via Rail also owed contractual obligations to the Passengers to take appropriate steps to ensure the safe operation of the Train and the safety of the Passengers.

11. Via Rail breached its contractual obligations to the Passengers, the particulars of which are set out in paragraph 8 above.

Damages

12. As a result of the negligence and breach of contract of the defendants, the plaintiff sustained serious and permanent personal injuries, including, but not limited to, multiple spinal fractures, laceration of the liver, fractures of the ribs, nasal bone, and sternum, injury to the head, emotional trauma, psychological injury, nervous shock and general tearing and straining of the muscles, nerves, tendons and ligaments throughout his body.

13. This plaintiff has suffered, and will continue to suffer from pain and decreased range of movement. The plaintiff has sustained, and will continue to sustain, pain and suffering, a loss of enjoyment of life, and a loss of amenities. The plaintiff is unable to participate in those recreational, social, household, athletic and employment activities to the extent to which he participated in such activities prior to the accident.

14. As a result of the negligence and breach of contract of the defendants, the Class Members have also sustained serious and permanent personal injuries, and have

suffered, and will continue to suffer from pain and decreased range of movement. The Class Members have sustained, and will continue to sustain, pain and suffering, emotional trauma, psychological injury, nervous shock, a loss of enjoyment of life, and a loss of amenities. The Class Members are unable to participate in those recreational, social, household, athletic and employment activities to the extent to which they participated in such activities prior to the accident.

15. As a further result of the negligence and breach of contract of the defendants, the plaintiff and Class Members have sustained, and will continue to sustain, a loss of income, a loss of competitive advantage in the employment field, and a diminution of income earning capacity as they are no longer able to carry out the regular duties of their occupation.

16. As a further result of the negligence and breach of contract of the defendants, the plaintiff and Class Members have undergone, and will continue to undergo in the future, therapy, rehabilitation and other forms of medical treatment, and, in addition, have received and will continue to receive medication, including pain medication. The plaintiff and Class Members have incurred, and will continue to incur, great expense for all the aforementioned forms of medical attention, the full particulars of which are not known at this time.

17. The Family Law Claimants are entitled to damages pursuant to section 61 of the *Family Law Act*, R.S.O. 1990, c. F.3, as amended. The damages for these proposed Class Members include pecuniary losses resulting from the injury or death of their family member, expenses incurred for the benefit of the family member, expenses in visiting

their family member during his or her treatment and recovery, a reasonable allowance for loss of income and the value of nursing, housekeeping and other services rendered to their family members, an amount to compensate for the loss of guidance, care and companionship reasonably expected to be received from their family member if the misconduct of the defendants had not occurred.

18. The above described damages were foreseeable as a result of the defendants' actions.

Punitive Damages

19. The defendants' conduct warrants the sanction of this Honourable Court in the form of punitive damages. The defendants conducted their affairs with wanton and callous disregard for the Class Members' safety and were reckless.

Legislation

20. This action is commenced pursuant to the *Class Proceedings Act, 1992*.

21. The plaintiff pleads and relies on the *Family Law Act*, R.S.O. 1990, c. F.3., the *Railway Safety Act*, R.S.C., 1985, c. 32 (4th Supp.), *Canada Transportation Act*, S.C. 1996, c. 10, the *Railways Act*, R.S.O. 1950, c. 311, and the regulations promulgated thereunder.

22. The plaintiff proposes that this action be tried at the City of Toronto.

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Lawyers for the Plaintiff

DAVID CARMICHAEL

- and -

Plaintiff

**VIA RAIL CANADA INC., CANADIAN
NATIONAL RAILWAY COMPANY and
CANADIAN PACIFIC RAILWAY COMPANY**

Defendants

CW-12-44784

Court File No:

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding Commenced at Toronto

Proceeding under the *Class Proceedings Act, 1992*

NOTICE OF ACTION

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