

SECOND DIVISIONAL COURT.

JUNE 11TH, 1918.

*BRUNELLE v. GRAND TRUNK R.W. CO.

Railway—Injury to and Death of Person Crossing Track—Foot Caught in “Split-switch”—Negligence—Contributory Negligence—Findings of Jury—Evidence—Inference as to Cause of Death—Statutory Authorisation of Switch—Exceeding Statutory Powers—Danger to Public—Order of Board of Railway Commissioners—Railway Act, R.S.C. 1906 ch. 37, sec. 238 (8 & 9 Edw. VII. ch. 32, sec. 5)—Protection of Crossing—Highway Crossing—Establishment of Highway.

Appeal by the defendants from the judgment of LATCHFORD, J., upon the findings of a jury, in favour of the plaintiff, for the recovery of \$6,000 and costs, in an action by the administrator of the estate of Telesphore Desrochers, to recover damages for his death, which was caused, as the plaintiff alleged, by the negligence of the defendants.

The appeal was heard by MULOCK, C.J.Ex., MAGEE, J.A., CLUTE, SUTHERLAND, and KELLY, JJ.

D. L. McCarthy, K.C., for the appellants.

H. J. Scott, K.C., for the plaintiff, respondent.

KELLY, J., reading the judgment of the Court, said that on the night of the 6th April, 1915, at about 10 o'clock, Desrochers was found to have met with an accident on the tracks of the defendants at their intersection with Queen street, in the town of Penetanguishene, from which his death resulted. He was found “lying beside the tracks with practically both thighs amputated above the knee and one foot tightly caught in the frog or switch” of the defendants’ tracks (evidence of the local physician of the defendants, who was summoned as soon as the man was found lying beside the tracks).

The jury, in answer to questions, found that the death was caused by the defendants’ negligence, which (they said) consisted in having a “split-switch” on the public highway; they found against contributory negligence.

Queen street runs in a north-westerly direction, ending at the water’s edge of Penetanguishene Bay, a short distance from the tracks. Running in a north-easterly direction across Queen street, the tracks lead to their terminus at the present station. The station was moved in 1913 from a place nearer to Queen street than that which it occupied at the time of the accident.

It was urged, for the defendants, that the approval by the Board of Railway Commissioners, by an order of the 16th May,