

MIDDLETON, J.:—Dunn was last seen alive upon the train some time before it crossed the bridge over the Welland Canal feeder. Some 20 minutes after he was last seen by the engine-driver, he was missed, and, upon search being made along the road, he was ultimately found upon the bridge in question, either then dying or dead.

The plaintiffs' theory is that in the discharge of his duty Dunn leaned from the train at the gangway between the engine and tender, or while standing upon the buffer beam of the tender, and that he was struck by the steel girders of the bridge, thrown from the train, and killed. I reserved judgment upon a motion for a nonsuit, and let the case go to the jury. The jury have found that Dunn met his death in the way suggested, and that the defendants were guilty of negligence, as the girders of the bridge were dangerously near the train.

The essential facts are not in dispute. The bridge was constructed many years ago by the Grand Trunk Railway Company. Under an agreement between the Grand Trunk Railway Company and the defendants, the defendants have running rights. At the time the bridge was built, according to the uncontradicted evidence, it was good railway practice to have 4 feet of clearance from the inside of the rail to the nearest upright. In the construction of this bridge the clearance was 4 feet 9 inches. At that time the engines in general use were 7 inches narrower than the particular engine upon which Dunn was riding at this time. Half of this increased width would be on each side of the centre line; so that the clearance would still be $5\frac{1}{2}$ inches more than required by good railway practice. I do not think it was open to the jury to find, in opposition to all the evidence, that the defendants were negligent in the use of a bridge having this clearance.

It also appears to me that the plaintiff fails on another ground. There was some conflict as to the necessity of the fireman leaning from the train at this point. None of the witnesses said that it was necessary to lean from the train beyond a foot, or 14 inches at the most. The clearance between the extreme end of the buffer beam of the tender, the part which projected most, was 2 feet 2 inches. This would leave a clearance of at least one foot. That Dunn fell from the train upon the bridge there can be no question; that his head struck the bridge, I think, admits of little doubt; but there is nothing to indicate that he was thrown from the train by the blow. It may well be that he fell from the train and that he hit the bridge girder as the result of his fall.