

BRITTON, J.

JUNE 1ST, 1914.

GUARDIAN TRUST CO. v. DOMINION CONSTRUCTION CO.

Master and Servant—Death of Servant—Action by Administrator under Fatal Accidents Act—Negligence—Railway—Deceased Walking on Track Struck by Train—Death Caused by Reckless Act of Deceased.

Action by the administrator of the estate of Antonio Andriola, deceased, to recover damages for his death, caused, as the plaintiff alleged, by the negligence of the defendant company.

The action was tried before BRITTON, J., and a jury, at Toronto.

Frank Denton, K.C., for the plaintiff company.

R. McKay, K.C., for the defendant company.

BRITTON, J.:—This action is brought by the administrator of the estate of one Antonio Andriola, who, while walking between the rails on a line of railway, was struck and killed by a moving train, which was run and operated by the defendant company.

The deceased left him surviving a wife and one child, also father and mother.

The deceased, with 40 or more others, was in the employ of the defendant company "track-lifting." Boarding-cars were provided by the defendant company for these workmen. These cars were upon a siding, a short distance from the main line, within the railway company's right of way, but far enough removed from the main track to leave ample space for a safe way or walk between the boarding-cars and the main track. At the western end of the line of boarding-cars was a car used by the defendant company as a pay-car. About 10 o'clock on the evening of the accident, the deceased went with others from the boarding-car to the pay-car, where the deceased received a cheque for his work. On his way back from the pay-car to the boarding-car, the deceased, walking easterly, instead of walking upon the way or space between the main line track and the boarding-car, walked upon the track, between the rails. The deceased was not invited to do this, was not told to do it; and, so far as appears, no permission had been given. The night was dark, and probably the walking was easier between the rails than upon the space mentioned. While so walking, the deceased was struck by