

5. Did the deceased come to his death by reason of the defendants operating the railway by a negligent system? A. Yes.

6. If so, what was the negligent system? A. By allowing Weymark to operate a snow-plough train without having passed the eye and ear test.

7. Might the deceased, Gilbert Jones, have avoided the accident by the exercise of reasonable care? A. No.

8. At what sum do you assess the damages? A. Six thousand dollars.

(a) To the widow \$3,500.

(b) To the daughter \$500.

(c) To the son \$2,000.

The learned Judge, accordingly, on the 3rd October, 1911, gave judgment for the plaintiff in accordance with the finding of the jury.

The respondents, with the consent of the plaintiff, appealed direct to the Court of Appeal for Ontario, and by the judgment appealed from the latter Court set aside the judgment of the trial Judge on the ground of misdirection and ordered a new trial, on the terms, however, that if the plaintiff would accept the sum of \$2,000 paid into Court to the credit of the action, and if the company did not object thereto, judgment should be entered for the plaintiff for that sum.

The misdirection relied upon by the Court of Appeal is, as stated by Mr. Justice Meredith, this, that the jury were not told, as they should have been, that the mere breach of the rule or order of the Commissioners did not give a right of action, that injury must flow from that breach to give such a right, and that unless the injury was caused by the incapacity or negligence of the signalman the plaintiff had no right of action, and again at p. 60 he says:—

“Upon the whole evidence it might reasonably be found that the accident was not caused by any want of qualification or negligence on the part of the signalman, and in that case the defendants’ liability would be limited, because, as the defendants admit, the accident was caused, not by any breach of the rule, which, it is admitted, has the effect of an enactment, but by the negligence of the engineer a fellow workman in common employment with the man in respect of whose death this action is brought.”