

The plaintiff claimed at common law and also under the Workmen's Compensation for Injuries Act.

The action was tried before LENNOX, J., without a jury.

A. E. H. Creswicke, K.C., for the plaintiff.

W. A. Finlayson, for the defendants.

LENNOX, J.:—I cannot accept the evidence of Frederick Brennan. I cannot believe that the plaintiff was paid for riding up and down the trestle for three days, in order that Brennan should tell him when to throw the switch and where to put the cars; and this at a time when no change in the plaintiff's employment was contemplated; and, even if I believed Brennan, his evidence would fall far short of shewing that the plaintiff was instructed or warned, as he should have been; in fact, there is no suggestion that he had any notice or warning whatever of the dangers to be encountered.

It was not, and it cannot be, denied that the trestle presents exceptional dangers. The plaintiff was a green hand as regards this work. In the absence of specific instructions, his experience in the yard, on solid ground, would count against his chances of safety, rather than otherwise. The fact that he was set to work at night, to grope for experience in the dark, multiplied the risks for the plaintiff, and accentuated the duty of the defendants to take special care.

In the absence of notice or warning, the plaintiff, in attempting to alight as he did near the switch as the car stopped, had the right to expect and believe that he would find some platform, walk, or structure upon which he could land and proceed with safety to the switch. In face of abundant uncontradicted evidence of the practice of landing upon and running along the walls, and evidence too that the method the plaintiff was attempting was sometimes pursued, it is idle to argue that the defendants expected or intended that the plaintiff should remain upon the car until the switch-platform was reached. Brennan was with the plaintiff the first night he worked upon the trestle until midnight, but they were not working near the switch or track in question; and, in fact, the accident occurred upon the very first occasion upon which the plaintiff was called upon to turn the left switch. The plaintiff could not, by the exercise of reasonable care, have avoided the injuries he sustained.