

The judgment of the Court (BARKER, LANDRY, McLEOD and WHITE, JJ.), was delivered by

BARKER, C.J.:—This is the third trial of this case, and as the evidence, which has been substantially the same at each trial, has undergone so much discussion before this Court on appeal, the real points involved have been reduced to a comparatively few. The action is one under what is known as Lord Campbell's Act, and brought to recover damages sustained by the plaintiff by reason of the death of her husband who was killed while working in the employ of the defendant on the construction of the Intercolonial Railway grain elevator at St. John, which accident, it is alleged, was the result of the negligence of the defendant. It was first tried before Hanington, J., and resulted in a verdict for the plaintiff for \$750. A new trial was granted; and at the second trial, which took place before Gregory, J., a verdict was entered for the plaintiff and the damages assessed at \$1,250. On the motion for a new trial this Court was divided equally and so the verdict stood, but on appeal the Supreme Court of Canada ordered a new trial (35 S. C. R. 625). This trial took place before Landry, J., and again the verdict was entered for the plaintiff and the damages were assessed at \$2,800.

After so protracted a litigation involving principally, if not altogether, a question of fact, this Court will not go out of its way to send the cause down for another trial, especially where three verdicts have already been given in favour of the plaintiff, and where the jury in the last trial was a special jury empanelled on the defendant's application.

Acting on the suggestion made by the Supreme Court of Canada, (35 S. C. R. at page 636), Landry, J., asked the jury but two questions. In answer to the first, they found that the defendant was guilty of negligence which caused the death of deceased. The other question was this: "If yes, in what did such negligence consist? The answer is this: "Insufficient help on the tramway, causing careless handling of lumber on same. Dogs not secured to joists of staging to prevent falling out." There is no dispute as to the fact that the deceased was struck by a plank which fell from the tramway; and we have in the finding which I have just quoted, what was absent on the former trial, that is, that this falling of the plank, as it did, was due to the insufficient help on the tramway. When this case was before