

DECEMBER 31ST, 1909.

FRASER v. GRAND TRUNK R. W. CO.

Railway—Injury to and Death of Person Crossing Track—Level Highway Crossing—Open Gates—Absence of Watchman — Negligence—Evidence—Findings of Jury.

Appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., upon the findings of a jury, in favour of the plaintiff, the administratrix of the estate of John Fraser, deceased, in an action to recover damages for his death by the negligence of the defendants. John Fraser was killed by a locomotive of the defendants at the level crossing at the foot of Bay street, in the city of Toronto, when attempting to cross on the night of the 24th May, 1907. The jury found for the plaintiff with \$6,000 damages, and judgment was given for that amount.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, J.J.A.

W. Nesbitt, K.C., and D. L. McCarthy, K.C., for the defendants.

F. Arnoldi, K.C., and J. F. Grierson, for the plaintiff.

MEREDITH, J.A.:—The case was one for the jury; and who can say, upon the whole evidence, that the very truth has not been reached respecting the cause of the accident? Even if that were a question for this Court.

It was the admitted duty of the defendants to have provided gates and a watchman for the protection of persons passing over this level crossing. It was urged that that duty did not apply at night, during the time of the year when the lake was not navigable, when few persons would have occasion to pass that way at night. Assuming that to be so; navigation had opened at the time: and all that can now be said for the defendants on this ground is, that their officers were not aware of the fact; which is, of course, no excuse in law for failure to perform a statutory obligation, or one imposed, as that in question was, by a Board clothed, by competent legislation, with power to impose it.

The accident occurred at night, upon a dangerous level crossing—exceptionally dangerous, for even a level crossing, by reason of the number of tracks upon it and the great number of trains passing over them. The deceased was a Scotsman, but recently come to Canada, who probably had no great knowledge of the