

APRIL 17TH, 1905.

DIVISIONAL COURT.

VAN CLEAF v. HAMILTON STREET R. W. CO.

Way—Non-repair—Injury to Person—Portion of Roadway Occupied by Street Railway Tracks—Liability of Railway Company—Misfeasance.

Appeal by plaintiffs from judgment of ANGLIN, J., ante 278, dismissing action brought to recover damages for the death of plaintiff's son, which was caused, as they alleged, and the trial Judge found, by the unsafe condition of the space between the rails of one of the tracks of defendants' railway laid upon one of the streets of the city of Hamilton under the authority of defendants Act of incorporation and a by-law of the city.

A. M. Lewis, Hamilton, for appellants.

E. E. A. DuVernet, for defendants.

The judgment of the Court (MEREDITH, C.J., TEETZEL, J., CLUTE, J.), was delivered by

MEREDITH, C.J.:— . . . The depression in the road which caused it to be out of repair and led to the accident, occurred in consequence of defendants having put in a switch there, and the earth which had been displaced and filled in again having sunk owing to the heavy rain which followed after the work was done. The condition of the road was not, therefore, due to mere wear and tear from the travel upon it, but to the acts of defendants in putting in the switch and either negligently replacing the material which had been removed in doing that work or negligently leaving the depression which had been thus created unfilled. This was an act of misfeasance, and defendants were therefore guilty of causing a nuisance in the highway, and, altogether apart from the question of their liability by reason of the terms of their agreement with the municipality as to keeping the highway in repair are answerable to plaintiffs for the loss they have sustained by the death of their son, which was occasioned by that nuisance: *Borough of Bathurst v. MacPherson*, 4 App. Cas. 256; *Bull v. Mayor, etc., of Shoreditch*, 19 Times L. R. 64, 20 Times L. R. 254.

Appeal allowed with costs, and judgment to be entered for plaintiffs for \$600 with costs.