

defendants to run their train through the locality in question at a speed greater than 6 miles an hour. As pointed out in *Tabb v. Grand Trunk R. W. Co.*, 8 O. L. R. 203, 3 O. W. R. 885, while there is in sec. 259 of the Railway Act, as enacted by 55 & 56 Vict. ch. 27, sec. 8, no express direction to fence, there is a clear prohibition against maintaining a speed exceeding 6 miles an hour unless the track is fenced as prescribed by the Act.

The engine driver in charge of the locomotive swore that the train was running at the rate of 25 miles an hour, and this was not disputed by defendants. The jury in answer to questions found that the death was due to negligence or breach of duty on the part of defendants, consisting of the poor condition of the fence which permitted the boy to get on the track.

They also found that the death was not due to the boy's own negligence, and that he was not capable of reasonable thought in the matter, and that they could not consider him a trespasser owing to the condition of the fence. They did not make any express finding as to the rate of speed, but, considering that no question was raised as to it, and having regard to the charge, it may properly be inferred that the finding of excessive speed is involved in the finding that the death was due to the condition of the fence. In any case Rule 817, which enables the Court to draw inferences of fact not inconsistent with the findings of the jury, applies, and it is proper to find that the negligence or breach of duty leading to the boy's death was allowing their train to pass through a thickly peopled portion of the city without the track being properly fenced.

Upon such a finding it follows upon what has been said in *Tabb v. Grand Trunk R. W. Co.*, *supra*, that there was a failure properly to protect the public in a thickly peopled portion of the city.

It was for the jury to say, upon the testimony, whether the deceased boy was chargeable with having brought about or contributed to his own death, or whether he had displayed such reasonable care as was to have been expected from him, having regard to his youth and general intelligence.

Upon these questions the jury have found unfavourably to the defence. It was conceded by Mr. Curle that if defendants were liable for the death, there was evidence to sustain the award of damages.

The judgment should be affirmed and the appeal dismissed with costs.