

SECOND DIVISIONAL COURT.

NOVEMBER 23RD, 1917.

*GALLAGHER v. TORONTO R. W. CO.

Negligence—Automobile Injured by Street-car Running into it—Cause of Accident—Findings of Jury—Negligence Consisting in Excessive Rate of Speed of Street-car—Failure to Connect Negligence Found with Injury—Finding against Contributory Negligence of Driver of Automobile—Evidence—Inference—Onus of Proof.

Appeal by the defendants from the judgment of one of the Judges of the County Court of the County of York, upon the findings of a jury, in favour of the plaintiff for the recovery of \$208.20 damages and costs in an action for injury to the plaintiff's motor-car by its being struck by a street-car of the defendants, by reason of the negligence of the defendants' motorman, as the plaintiff alleged.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL and LENNOX, JJ., FERGUSON, J.A., and ROSE, J.

R. McKay, K.C., for the appellants.

I. F. Hellmuth, K.C., for the plaintiff, respondent.

FERGUSON, J.A., in a written judgment, said that the first three questions to and answers of the jury were: "(1) Were the plaintiff's damages caused by the negligence of the defendants? A. Yes. (2) If so, in what did such negligence consist? A. Excessive rate of speed. (3) Was the plaintiff guilty of any negligence which contributed to the collision? A. No."

The expression "excessive rate of speed," as used by the jury, is a relative term: it does not mean a rate beyond that fixed by statute, by-law, or regulation, but a rate beyond which the street-car would not have been driven by a motorman exercising the care which a man of common prudence would have exercised, having regard to all the circumstances.

Whether or not that standard had been exceeded, and whether or not the excess was the cause of the accident, were questions of fact for the jury. They answered both in favour of the plaintiff; and the question before the Court on the appeal was not whether the speed was excessive, or whether the excessive speed was the cause of the accident, but, was there before the jury any evidence on which they could make those findings?