

without lights and with a defective whistle, over the track on an extra trip, on a dark and windy night.

Lowery v. Walker, [1911] A.C. 10, followed.

H. Mellish, K.C., and *A. C. Mackenzie*, for defendant, appellant.
F. L. Milner, K.C., and *J. A. Hanway*, for plaintiff, respondent.

ANNOTATIONS ON THE ABOVE CASE FROM D.L.R.

ULTIMATE NEGLIGENCE.

There have been several recent important cases on this subject. The first is *Brenner v. Toronto R. Co.* (1907), 13 O.L.R. 423, 8 Can. Ry. Cas. 261, 15 O.L.R. 195; 8 Can. Ry. Cas. 100 and (1908), 40 Can. S.C.R. 540, 8 Can. Ry. Cas. 108. Then follow *Herron v. Toronto R. Co.* (1913), 11 D.L.R. 697, 28 O.L.R. 59; 15 Can. Ry. Cas. 373; *Loach v. British Columbia Electric R. Co.* (1914), 16 D.L.R. 245, 19 B.C.R. 177; 17 Can. Ry. Cas. 21 and *British Columbia Electric R. Co. v. Loach*, [1916] 1 A.C. 719, 23 D.L.R. 4, 20 Can. Ry. Cas. 309. With these cases should be read not only the case of *Columbia Bitulithic v. British Columbia Electric R. Co.*, 23 B.C.R. 160, 31 D.L.R. 241, and in the Supreme Court in the decision now reported, 37 D.L.R. 61, 55 Can. S.C.R. 1, 21 Can. Ry. Cas. 243, but also *Smith v. Regina*, 34 D.L.R. 238; *Critchley v. Canadian Northern R. Co.*, 34 D.L.R. 245; *Banbury v. City of Regina*, 35 D.L.R. 502, and *Honess v. British Columbia Electric R. Co.*, 36 D.L.R. 301. These last all contain recent instances of discussion upon "ultimate negligence" and may be useful where one is confronted with a somewhat similar state of facts.

Decisions upon this point as well as upon the whole subject of negligence are really little more than discussions by persons learned in the law of what is usually a difficult question of fact, namely, who is responsible for some injury which one of the litigants has suffered. In its simplest aspect it embraces three enquiries: (1) Is anyone responsible or is it a mere accident involving no actionable negligence? If so, no one is liable. (2) Is the plaintiff responsible? If so, he cannot recover from the defendant. (3) Is the defendant responsible? If so, the plaintiff may recover. In practice, however, few cases resolve themselves into these simple elements. An accident causing injury usually is both unforeseen and happens under circumstances arousing violent emotions and throwing off their balance both the judgment and powers of observation of participants and onlookers. Consequently not only to those participating fail to do the right thing to avert an injury but everybody present is unable to describe accurately just what happened. The latter consideration is important only in weighing testimony but the former has introduced further elements into torts of this kind, and therefore we must also frequently enquire (4) Were both plaintiff and defendant at fault? If so, under our law, there is no sharing the loss but the injured person bears it all. This question frequently involves great difficulty in so unravelling the tangled skein of evidence as to decide whether one or both and if so, which one, is responsible and if the answer is that both are at fault then we are faced with the anomaly that one bears all the loss and suffering while both must share the blame. This in practice leads to one of two results: (a) The plaintiff is sometimes absolved from all blame when he is in part responsible (and in