

HON. MR. JUSTICE MIDDLETON. NOVEMBER 17TH, 1913.

MILLER v. COUNTY OF WENTWORTH.

5 O. W. N. 317.

*Negligence—Municipal Corporation — Automobile Accident—Alleged Defective Guardrail—Contributory Negligence—Recklessness on Part of Driver of Car — Right of Passenger to Recover—Knowledge of Passenger—Assumption of Risk.*

MIDDLETON, J., *held*, that where the driver of an automobile was killed in attempting to descend a steep road with sharp turns at night and with an automobile whose head lights were injured so as to give little light, the accident was attributable to his own negligence and not to an insufficient guardrail upon the road.

That a passenger in the automobile, a brother of the driver, could not recover for injuries sustained in the accident, as the facts were all known to him and he, as much as his brother, voluntarily incurred the risk.

*Plant v. Normanby*, 10 O. L. R. 16, distinguished.

Two actions tried at Hamilton on the 31st October, 1913, arising out of an automobile accident which happened on the 23rd of July, 1913.

W. S. McBrayne, for plaintiff.

J. L. Counsell, for defendant.

HON. MR. JUSTICE MIDDLETON:—The late Duncan Miller, the plaintiff Fred Miller, and his wife and three daughters left Hamilton on the evening in question at 7.15, driving along the Guelph road, ascending what is locally known as the Clappison Mountain. They returned well on in the evening, and, while on the road before turning to descend the mountain, the automobile ran into a ditch from which it was extricated with some difficulty. The result of this mishap was that the searchlights of the automobile were in some way rendered useless and could not be lit. The automobile is not shewn to have been otherwise injured. It was then very dark and raining and manifestly most dangerous to descend the road. The remaining lights upon the car were so small and dim as to give no useful light. Nevertheless, Mr. Duncan Miller decided to make the attempt.

Dr. McClenahan had arrived upon the scene while the automobile was yet in the ditch, and it was arranged that he should go down the hill first, Miller following. The road takes three turns as it descends the hill and the grade is