

the gong violently, shouted to the plaintiff, and applied the reverse. The car was equipped only with hand-brakes and not with air, but no point is made apparently of faulty equipment. What is said is, that the motorman should have seen him sooner, but the point at which he should have seen him is not determined, as it was in the somewhat similar case which came to this Court and afterwards went to the Supreme Court, of *O'Leary v. Ottawa Electric R.W. Co.*, partly reported in 2 O.W.R. 469. How much sooner in the plaintiff's progress toward the track should the motorman have seen him? Clearly only at the point at which it became reasonably apparent that the plaintiff intended to proceed in his course across the track. It was broad daylight. The plaintiff, to outward seeming, was a sober, capable man, in possession of his senses. The car was easily within his line of vision; and, if he had had ordinary hearing, he could have heard as well as seen it. It is no unusual thing, as every one knows, for one desiring to cross, to approach quite near the track and there await the passing of a car. What was there to shew that the plaintiff intended to pursue a different course, under such obvious circumstances? Nothing, apparently, except the circumstance that in advancing he was apparently not looking towards the car but towards the ground, or the west, or the south, as different witnesses say. But it did not follow that he had not looked earlier and was quite aware of the approaching car; indeed, his failure to look north when near the track pointed quite as much to that as to anything else. So that it is exceedingly difficult to see how the motorman can be blamed in proceeding as he did until he actually saw the plaintiff a few feet away, and still advancing, when he gave an alarm by gong and voice which would have stayed any one but one so deaf as the plaintiff was, and otherwise did all he could to prevent the collision.

The fact is, that the evidence puts the plaintiff very much in the position of the man referred to by Lord Cairns in *Dublin Wicklow and Wexford R.W. Co. v. Slattery*, 3 App. Cas. 1155, at p. 1166, as one who should fairly be regarded as the sole author of his unfortunate injury, by running into the car rather than having it run into him.

I would allow the appeal and dismiss the action, both with costs.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., MACLAREN and MAGEE, J.J.A., also concurred.