

On the day of the accident to the plaintiff, he was riding a bicycle on Wellington street, going south towards the crossing. Seeing—as he deposed—that the gates were raised, he made towards the tracks, and when approaching the second track he became aware of an engine with a car or cars attached moving along it, proceeding towards the east. His attention was called to it by hearing the watchman shout. He looked back in the direction of the watchman, and then towards the west and saw the engine. He endeavoured to stop or to turn his bicycle, but failed, and was carried between the engine and the car and seriously injured. The engine was engaged in shunting operation, and was at the time moving reversely towards the plaintiff.

The following were the questions submitted to the jury, with their answers: (1) Were the plaintiff's injuries caused by the negligence of the defendants? A. Yes. (2) If so, in what did that negligence consist? A. That the gate was not down in sufficient time to give the necessary warning. (3) Could the plaintiff by the exercise of reasonable care have avoided the accident? A. No. (4) If so, in what did the plaintiff's negligence consist? (not answered.) (5) At what sum do you assess the plaintiff's damages? A. \$2,500.

The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

D. L. McCarthy, K.C., for the defendants.

J. M. McEvoy, for the plaintiff.

Moss, C.J.O.:— . . . It is contended on behalf of the defendants that upon the plaintiff's own testimony the case ought to have been withdrawn from the jury, on the ground that he was bound, before coming upon the crossing, to have looked more frequently or more carefully to see if the line was clear.

He was riding towards the tracks, and when about 60 feet from the rail nearest to him, and from 30 to 35 feet from the gates, he looked and saw that they were raised, and the watchman standing at his shanty about 3 feet from where the operating levers are. He was not using the levers. The plaintiff heard no bell ringing nor any other warning sound, and he rode towards the track looking straight before him. He was unaware of the approach of the engine until the watchman's shout caused him to turn his eyes. He then did all he could to avert coming into contact with the engine.

Upon this state of facts, it cannot be said that the plaintiff's conduct was so careless or reckless as to justify the learned Chief