

"Q. Did it enter into your mind that the car would slack up?

"A. Yes, sir.

"Q. Then it was not based upon the distance alone?

"A. No.

"Q. You thought the car might slack up?

"A. They generally always do slack up at the crossing there; I have crossed it hundreds of times . . ."

J. MacGregor, for plaintiff.

J. W. Bain, for defendants.

FERGUSON, J.—There is no evidence of negligence on the part of the defendants that caused or materially contributed to the disaster, beyond the very weak evidence of the car having run at a high rate of speed. There is no evidence of negligence on the part of the driver of the car after he saw or ought to have seen the danger in which the plaintiff was. The plaintiff was, I think, guilty of negligence in endeavouring to cross Yonge street in front of the car after having seen the car approaching (100 feet away) without looking for the car again and governing his conduct according to appearances. He says if he had looked again for the approaching car he could have saved himself by pulling up his horse at any time before the horse got upon the railway track in fact.

The plaintiff was going along the southerly side of Richmond street when, as he says, he saw the car 100 feet up Yonge street, and he says that he made up his mind then that he could and would cross Yonge street in front of the car without looking for it again. This he attempted to do, and the collision took place.

It appears to me that according to the later cases, such as *Danger v. London Street R. W. Co.*, 30 O. R. 493, and *O'Hearn v. Town of Port Arthur*, 4 O. L. R. 209, 213, 217, the plaintiff was guilty of such contributory negligence as disentitles him to recover. It looks much as if the plaintiff had run into the car instead of the car having run into the plaintiff. The evidence of this contributory negligence comes out in the plaintiff's case, and there was no conflict of testimony. The doctrine of the *Wakelin Case*, 12 App. Cas. 41, applies, and a nonsuit should be entered. Action dismissed with costs.