

drive through the narrow space in the highway which had been left open. This the plaintiff and others who were working with him objected to. Byrne thereupon pulled up his horse and so remained for a few seconds, but started up again. When partly through or past the obstruction, the front wheels having been got past by turning towards the boulevard, the driver stopped at the request of the workmen engaged with the plaintiff, and again stood for a short time; but before anything further was done started forward again, with the result that the hind wheel of the wagon caught on the girder and pulled it over upon the plaintiff—who was holding the girder on its edge—breaking his leg.

The action has been twice tried. It first came on for trial before Hon. Mr. Justice Latchford, and a jury, when a verdict in favour of the plaintiff was rendered. That verdict, however, was set aside, and a new trial directed, upon the ground that the learned Judge had stated to the jury as a conclusion of law that which was in the opinion of the Court properly a question of fact to be determined by the jury upon the evidence.

The second trial came on before Hon. Sir Glenholme Falconbridge, C.J.K.B., without a jury, and the plaintiff again obtained a judgment. That judgment is now moved against, upon the grounds (1) that there was no reasonable evidence of negligence, (2) that it is against the weight of evidence, and, (3) that in the circumstances the plaintiff was guilty of contributory negligence.

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE HODGINS.

J. J. Gray, for the defendant, appellant.

T. N. Phelan, for the plaintiff, respondent.

Their Lordships' judgment was delivered by

HON. MR. JUSTICE GARROW:—As to the first point, the defendant should probably have appealed against the order of the Divisional Court, directing a new trial; for if there was no evidence there was nothing to try. But I prefer to deal with the case on the broader ground of the merits, as disclosed in the evidence. The learned Chief Justice found that there was sufficient evidence of negligence and that the plaintiff had not been guilty of contributory negligence. A