

This is, of course, only an amplification of the well known rule to which all subsequent cases hark back, laid down by Lord Penzance in the *Radley* case¹⁶: "Though a plaintiff may have been guilty of negligence and although that negligence may in fact have contributed to the accident which is the subject of the action, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him."

The *Brenner* case¹⁷ contains a very interesting discussion of the law of contributory negligence with a review of the authorities, by Mr. Justice Anglin. The conclusion reached by the Divisional Court in that case was that negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff's negligence, may, in some cases, though anterior in point of time to the plaintiff's negligence, constitute "ultimate" negligence, rendering the defendant liable notwithstanding a finding of contributory negligence of the plaintiff. This judgment was reversed in appeal, but the judgments of the Court of Appeal¹⁸ and the Supreme Court of Canada¹⁹ turned not upon the law of contributory negligence, but upon the question of the sufficiency of the judge's charge to the jury.

In the *O'Leary* case²⁰ the Ontario Court of Appeal divided equally, Chief Justice Moss and Mr. Justice Osler being of the opinion that the plaintiff whom the jury found had by his negligence contributed to the accident, was nevertheless entitled to recover, and Mr. Justice Garrow and Mr. Justice MacLaren being of the contrary view. Mr. Justice Osler re-states the doctrine of the *King* case and of the *Gosnell* case, that is to say, the doctrine of equality of rights, in these terms:—

"If the motorman ought to have seen from the course the deceased was taking and from the surrounding circumstances,

16. *Radley v. London & N.W. Ry.* (1876), 1 A.C. 754.

17. *Brenner v. Toronto Railway Co.* (1907), 13 O.L.R. 423.

18. 15 O.L.R. 195.

19. 40 S.C.R. 540.

20. *O'Leary v. Toronto Railway Co.* (1908), 12 O.W.R. 469.