

(8) In the motorman not giving proper warning of the approach of the car.

The accident took place a few minutes past five o'clock in the evening of the third day of June, 1912, on the east side of Bathurst street, 125 feet north of Robinson street. The plaintiff was driving up Bathurst street at a slow trot. While turning out to pass a rig that was standing on the street close to the kerb on the permanent pavement, his attention was attracted for a moment—three or four seconds—by a boy on roller skates trying to get on the back of his wagon. It was the plaintiff's duty to see that the boy was not hurt by getting on the wagon. While looking back to keep the boy from the back of his waggon, the plaintiff's horse and waggon got over on the car track. As soon as he turned his head and saw where he was, the plaintiff at once pulled his horse to the east to get off the car track away from the car. The car was then from 180 to 225 feet—four or five car lengths—up Bathurst street. There was nothing to prevent the motorman from seeing the plaintiff the whole of that distance. The evidence is that he must have seen him. The car was running down grade at a rate of fifteen or twenty miles an hour. The motorman never slackened speed, the car came right on and ran three or four car lengths after it struck the plaintiff's waggon. The gong was not sounded. The car struck the hind wheels of the waggon, smashed it and threw the plaintiff about thirty feet. He received two scalp wounds and a compound fracture of the leg.

The learned trial Judge submitted the following questions to the jury, who returned the following answers:—

“(1) Q. Was any negligence on the part of the defendants the proximate cause of the plaintiff's injury? A. Yes.

(2) Q. Or was any negligence of the plaintiff the proximate cause of it? A. No.

(3) Q. Or was it caused by an accident for which neither party was blameable?

(4) Q. If caused by the negligence of either party, what was the negligence, state fully; and if more than one thing, state fully? A. Not sufficient warning; the high rate of speed.

(5) Q. If by the negligence of the defendants, then might the plaintiff by the exercise of ordinary care have avoided it? A. No, the company could have avoided it.