MOSS, C.J.O., IN CHAMBERS. MAY 9TH, 1912.

DART v. TORONTO R.W. CO.

Appeal—Leave to Appeal to Court of Appeal from Order of Divisional Court Refusing to Dismiss Action, but Directing New Trial—Leave to Appeal Granted on Terms—Abandonment of New Trial—Payment of Costs.

Motion on behalf of the defendants for leave to appeal to the Court of Appeal from an order of a Divisional Court setting aside the judgment entered at the trial in favour of the plaintiff and directing a new trial.

D. L. McCarthy, K.C., for the defendants.
D. Inglis Grant, for the plaintiff.

MOSS, C.J.O.:—The plaintiff was driving in a sleigh along Wilton avenue going west, and, while crossing Church street at its intersection with Wilton avenue, his sleigh was struck by a trolley-car of the defendants coming south on Church street, and he was severely injured, and the sleigh completely demolished.

The plaintiff seeks to recover damages from the defendants, on the ground of negligence of the defendants' servants operating the car in approaching the crossing at an excessive rate of speed with the car not under proper control, without sounding the gong or giving any warning.

At the trial, the jury, in answer to questions, found the defendants guilty of negligence in these respects. But to another question, viz., "Could Dart, by the exercise of reasonable care, have avoided the accident?" they answered, "Yes, to a reasonable extent." And to the further question, "If Dart could have avoided the accident, in what did his want of reasonable care consist?" they answered, "By lack of judgment."

The jury assessed the damages at $800, for which sum judgment was entered in the plaintiff's favour. From this judgment the defendants appealed to a Divisional Court, upon the ground, as set forth in their notice of appeal, that, upon the findings of the jury, the defendants were entitled to judgment dismissing the action—the answers to the questions above set forth amounting to a sufficient finding of contributory negligence. They did not ask for a new trial.

The Divisional Court was of opinion that these answers were