

The appeal was heard by MEREDITH, C.J.O., GARROW, MAGEE, and HODGINS, JJ.A.

J. J. Gray, for the defendant.

T. N. Phelan, for the plaintiff.

The judgment of the Court was delivered by GARROW, J.A.:—The plaintiff was employed in assisting to place a heavy steel girder in a house in Dufferin street, in the city of Toronto. To enable this to be done, the girder was set up on edge (it was 28 ft. long and 21 to 24 in. by 6 in.), and was being moved from the street into the house upon iron rollers. The operation necessarily caused a temporary block of the highway. Just at that time, the defendant's servant, one Thomas Byrne, driving what is called a bread waggon, having a covered top, came along and proposed to 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 waggon 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 Latchford, J., and a jury, when a verdict in favour of the plaintiff was rendered. That verdict, however, was set aside, and a new trial directed by a Divisional Court, 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 Falconbridge, C.J., 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.

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