

And that is the interpretation given by our own courts to contributory negligence: *Forward v. City of Toronto, supra*, p. 359.

It must be borne in mind that the burden of establishing contributory negligence is on the defendants.

The defendants must prove not only that plaintiff's driver was guilty of negligence in not holding a tight rein, and not being on the alert when the whistle blew, but also that the driver's "negligence was such that the accident could not have been avoided by due diligence on their part; that is to say, that the negligence of the driver was the proximate cause of the accident."

It cannot be seriously contended that the driver's manner of holding the reins would have led to this accident if the whistle had not been blown.

"The party who last has a clear opportunity of voiding the accident, notwithstanding the negligence of his opponents, is considered solely responsible for it": *Forward v. City of Toronto, supra*, p. 361.

The defendants' engineer had here, clearly, the last opportunity of avoiding the accident by looking out on the highway immediately before blowing the whistle.

The blowing of the whistle was then, undoubtedly, the *proximate cause* of the accident. Pollock on Torts, pp. 291-5 (Rla. series); *Tuff v. Warman*, 5 C.B. N.S. 573; *Bridge v. Grand Junction Ry.*, 3 M. & W. 244; *Radley v. London & North-Western R.W. Co.*, 1 Appeal (H. Lords) 754; *Sherwood v. Hamilton*, 37 U.C.R. 410; *Tyson v. G.T.R. Co.*, 20 U.C. 25; *Forward v. City of Toronto, supra*.

It cannot be considered contributory negligence on the part of the driver merely because he has not anticipated the defendants' negligence, for the driver had a right to assume that defendants were going to act with ordinary care until he had some notice to the contrary, when it became his duty to take ordinary means to avoid it, that is, such means as a prudent man should: Smith on Negligence, 2 ed., p. 157, Blackstone series.

Nor is the fact that the driver had previously seen the whistle on the engine house and knew it was a steam whistle any answer to defendants' negligence, nor would that fact make it contributory negligence on his part not to have driven past with a tight rein. At page 158 of Smith on Negligence, *supra*, it is said: "The defendant is not excused merely because the plaintiff, knowing of a danger caused by the defendant, voluntarily incurs the danger; for the defendant may have so acted as to induce the plaintiff, as a reasonable man, to incur the danger."

So here, though the driver knew of the whistle, and had passed it over thirty times previously, he never heard it blown before, and had no reason to suppose it was going to be blown then.

It is without regret I find myself enabled to decline to assume the responsibility of approving of and thus continuing a state of affairs so fraught with danger to the public as the use by the defendants of this whistle in its present position.

It has not been attempted to be explained why this whistle would not have answered its purpose equally well by being placed in rear of the engine house, out of sight from the highway, as such whistles are usually placed.