

earlier part of the charge, and to absolve him of that mentioned in the latter part.

Counsel for the plaintiff suggested that the jury should have been asked whether the motorman was negligent when he saw or ought to have seen the plaintiff; and the Divisional Court speak of the possible negligence of the motorman in not applying the brakes at an earlier stage, when he might have stopped the car.

I think both those points are well covered by the charge and by the answers actually given by the jury, and I cannot bring myself to hold that any question of "ultimate negligence" is raised. If it can, it must only be of the kind suggested by Mr. Justice Anglin in *Brenner v. Toronto R.W. Co.* (1907), 13 O.L.R. at p. 428: "Assuming that the degree of momentum which the motorman found himself unable to overcome should be ascribed to his failure to shut off power at an earlier point of time, and that such omission should be deemed negligence, can that omission, which occurred before the plaintiff's danger manifested itself, though its operation and effect continued up to the very moment of the injury, be deemed negligence which renders the defendants liable, notwithstanding the plaintiff's contributory negligence, because in the result the former might, but for this continuing though anterior negligence, have avoided the mischief?"

Upon this point I prefer the views on the subject of ultimate negligence and contributory negligence expressed by Mr. Justice Duff in the *Brenner* case when before the Supreme Court of Canada (1908), 40 S.C.R. at p. 556: "The principle is too firmly settled to admit in this Court any controversy upon it, that in an action of negligence, a plaintiff whose want of care was a direct and effective contributory cause of the injury complained of, cannot recover, however clearly it may be established that, but for the defendants' earlier or concurrent negligence, this mishap in which the injury was received would not have occurred."

This is the same view, as it appears to me, as is expressed in more concrete form in *Sim v. City of Port Arthur* (1911), 2 O.W.N. 864, by Mr. Justice Middleton. See also *Jones v. Toronto and York Radial R.W. Co.* (1911), 23 O.L.R. 331, 25 O.L.R. 158; *Rice v. Toronto R.W. Co.* (1910), 22 O.L.R. 446.

My conclusion is, that the negligence of the motorman as found and that of the plaintiff were "concurrent and simultaneous negligences of signal character by both parties," and that the jury have negatived any new negligent act of the defendants in addition to their first act of negligence.