

DIVISIONAL COURT.

MARCH 30TH, 1911.

*JONES v. TORONTO AND YORK RADIAL R.W. CO.

Street Railways—Injury to Person Crossing Track—Negligence—Excessive Speed—Failure to Give Warning—Causal Negligence—Contributory Negligence—Ultimate Negligence—Rights of Foot Passengers—Findings of Jury.

Appeal by the plaintiff from the judgment of RIDDELL, J., ante 684, dismissing the action with costs.

The appeal was heard by BOYD, C., LATCHFORD, and MIDDLETON, JJ.

J. MacGregor for the plaintiff.

C. A. Moss, for the defendants.

BOYD, C.:—The rule of law which governs this appeal is expressed in the words of Lord Penzance in *Radley v. London and North Western R.W. Co.*, 1 App. Cas., at p. 759; “though the plaintiff may have been guilty of negligence, and though that negligence may have contributed to the accident, yet if the defendant could, in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff’s negligence will not excuse him.”

The evidence, though, as in most cases of accidents, conflicting and in this case contradictory (even as between the defendants’ witnesses), is sufficient to sustain the findings of the jury, and upon their findings judgment should pass for the plaintiff. The narrative of the transaction as verified by the jury may be given briefly: the plaintiff who is slightly deaf got out of his wagon, and proceeded to cross Yonge street on a skew (as he calls it) of about 45 or 50 to the street car tracks laid on the west side of the highway. Before crossing he looked up north and saw the defendants’ car at a standstill—he says at Davisville switch, but it may have been closer, so as to be 200 feet, instead of 550 distant—whatever the distance, he believed he had time to get across (to Robert’s house where he was going) before the car could reach the place, and he kept on till aroused by the impact of the car accompanied by shouting and ringing of the gong. He had been seen and shouted to from the approaching car behind him some 20 yards off, but though he could hear the gong he does not seem to have heard the shouts.

*To be reported in the Ontario Law Reports.