THE

ONTARIO WEEKLY REPORTER

(TO AND INCLUDING OCTOBER 1ST, 1904.)

VOL. IV. TORONTO, OCTOBER 6, 1904. NO. 6

FERGUSON, J. MARCH 31ST, 1904.

TRIAL.

GOSNELL v. TORONTO R. W. CO.

Street Railways—Injury to Person Crossing Track—Negligence—Contributory Negligence—Failure to Look a Second Time—Nonsuit.

Action for damages for injuries received by plaintiff by reason of an express waggon which he was driving being run into by a street car upon defendants' electric railway.

The plaintiff was driving east along Richmond street in the city of Toronto and the collision occurred when he was crossing Yonge street. The car was going south on the west side of Yonge street. The collision occurred at night.

The plaintiff in his evidence at the trial said that he could not see up Yonge street before arriving at the corner of Richmond and Yonge streets, owing to a large building at the corner.

"Q. When you reached that corner what did you do?

"A. I looked up and down to see if there were any cars coming, and there was none coming up, but I seen one coming down. It was about opposite the hotel there, coming down Yonge street. . . .

"Q. What rate was it going at?

"A. When I seen it first I could not say exactly, but when it came near me I know it must have been running about 10 miles an hour.

"Q. Did the car slacken its speed at all from the time you saw it?

"A. No, sir.

"Q. From the time you saw the car first, how far did you go before you were struck?

"A. I went from the crossing on to the track, where they struck me, and I was very near clear of it when they struck the hind wheels. . . .

"Q. Then the horse and yourself were past the line of the car that collided with you?

"A. Yes.

"Q. What became of you after the collision?

"A. I was thrown off the waggon on to the street. . .

"Q. How did you fall?

"A. I must have fell on my head when my head was cut. . . .

"Q. What injury did you sustain?

"A. My head was cut and my nose was broken. . . . My side, my hip, and my shoulder. I cannot use this arm yet. . . .

"Q. From the time that you saw the car until it struck you, could the car have been stopped?

"A. It could.

"Q. How?

"A. If they had the brakes on, they could stop it surely.

"Q. Did you hear whether any warning was given?

"A. I heard none at all. . . .

"Q. Was the gong sounded—was there any kind of warning by anybody?

"A. No.

"Q. No warning of the car?

"A. None that I heard.

"Q. You say that the car could have been stopped before it reached you?

"A. Yes. . . .

"Q. Have you ever crossed in front of a car at the same distance as this was and not received any injury?

"A. Yes, I have crossed them closer. . .

"Q. From your experience as a driver did you think there was any danger in crossing that street at that time, under the circumstances?

"A. No."

On cross-examination:—

"Q. How long have you lived in Toronto?

"A. About 15 or 16 years.

"Q. Have you been driving all that time?

"A. Yes, sir.

"Q. So that you were accustomed to the cars?

"A. Yes, sir.

"Q. And you knew that the cars were running down Yonge street?

"A. Yes, sir. . . .

"Q. You were driving fast?

"A. Yes, the horse was trotting.

"Q. And did you pull the horse up?

"A. No. . . . I slacked a little when I was coming where I could see up and down the street. . . .

"Q. And when you looked up Yonge street whereabout were you?

"A. I was on the crossing. . . .

"Q. And that is the first time you looked, when you were on the crossing.

"A. Yes.

"Q. And where did you see it?

"A. Right about opposite that hotel on Yonge street.

"Q. How far do you say that would be?

"A. It is about 100 feet or over. . . .

"Q. How long did you look up?

"A. I looked up, just turned my head, looked up that way, and seen the car coming.

"Q. Then turned it back again?

"A. Yes.

"Q. Driving across when did you look again for the car?

"A. I didn't look at all after for it.

"Q. Never looked again for it?

"A. No. . . .

"Q. If before your horse had got to the track you had looked for the car you could have seen it?

"A. Yes. . . .

"Q. You could have pulled it up, couldn't you?

"A. I could have.

"Q. You looked and saw the car 100 feet away from the crossing; then you made up your mind you would have time to cross Yonge street before that car would come down?

"A. Yes.

"Q. And you paid no further attention to the car and drove on?

"A. Yes. . . .

FERGUSON, J.: "Q. You saw the car and thought you would have time to cross before the car came down the street?

"A. Yes.

"Q. Did you base that upon the distance you had to go and the distance the car had to go?

"A. Yes.

"Q. Did it enter into your mind that the car would slack up?

"A. Yes, sir.

"Q. Then it was not based upon the distance alone?

"A. No.

"Q. You thought the car might slack up?

"A. They generally always do slack up at the crossing there; I have crossed it hundreds of times . . ."

J. MacGregor, for plaintiff.

J. W. Bain, for defendants.

FERGUSON, J.—There is no evidence of negligence on the part of the defendants that caused or materially contributed to the disaster, beyond the very weak evidence of the car having run at a high rate of speed. There is no evidence of negligence on the part of the driver of the car after he saw or ought to have seen the danger in which the plaintiff was. The plaintiff was, I think, guilty of negligence in endeavouring to cross Yonge street in front of the car after having seen the car approaching (100 feet away) without looking for the car again and governing his conduct according to appearances. He says if he had looked again for the approaching car he could have saved himself by pulling up his horse at any time before the horse got upon the railway track in fact.

The plaintiff was going along the southerly side of Richmond street when, as he says, he saw the car 100 feet up Yonge street, and he says that he made up his mind then that he could and would cross Yonge street in front of the car without looking for it again. This he attempted to do, and the collision took place.

It appears to me that according to the later cases, such as Danger v. London Street R. W. Co., 30 O. R. 493, and O'Hearn v. Town of Port Arthur, 4 O. L. R. 209, 213, 217, the plaintiff was guilty of such contributory negligence as disentitles him to recover. It looks much as if the plaintiff had run into the car instead of the car having run into the plaintiff. The evidence of this contributory negligence comes out in the plaintiff's case, and there was no conflict of testimony. The doctrine of the Wakelin Case, 12 App. Cas. 41, applies, and a nonsuit should be entered. Action dismissed with costs.

SEPTEMBER 22ND, 1904.

DIVISIONAL COURT.

RE SOLICITORS.

Solicitor—Delivery and Taxation of Bill of Costs—Præcipe Order—Agreement with Clients—Special Order.

Appeal by clients from order of TEETZEL, J., 3 O. W. R. 771, reversing order of Master in Chambers, 2 O. W. R. 1082, and setting aside a præcipe order for delivery and taxation of a bill of costs, without prejudice to a special application, upon notice, for an order.

W. E. Middleton, for appellants.

E. E. A. DuVernet, for solicitors.

THE COURT (MEREDITH, C.J., IDINGTON, J., MAGEE, J.),, suggested a different order from that appealed against, and the order suggested was accepted by counsel. It was as follows. The præcipe order to stand, a provision being added making it clear that the solicitors may raise the question of the agreement set up and their not being liable to render a bill, and the taxing officer to report specially. Costs, including the costs of the motion to set aside the præcipe order and of the two appeals, to be disposed of by a Judge in Chambers after the taxing officer's report.

MEREDITH, J. SEPTEMBER 27TH, 1904.

CHAMBERS.

CANTIN v. NEWS PUBLISHING CO. OF TORONTO.

Discovery—Examination of Past Officer of Company—Rule 439a—Rule 485.

Appeal by plaintiff from order of Master in Chambers, ante 162, dismissing motion by plaintiff for an order to examine for discovery, under Rule 439 (*a*), as amended by Rule 1250, a person who was formerly a servant of the defendant company, but had ceased to be so.

W. N. Ferguson, for plaintiff.

Casey Wood, for defendants.

MEREDITH, J., agreed with the Master's opinion, and dismissed the appeal with costs to defendants in the cause.

SEPTEMBER 28TH, 1904.

C.A.

BILLING v. SEMMENS.

Master and Servant—Injury to Servant—Negligence—Dangerous Machinery—Defect—Want of Guard—Absence of Direct Evidence of Cause of Injury—Factories Act—New Trial—Appeal.

Appeal by defendants from order of a Divisional Court (3 O. W. R. 17, 7 O. L. R. 340) setting aside nonsuit and directing a new trial.

W. R. Riddell, K.C., and G. L. Smith, for defendants.

J. W. Nesbitt, K.C., and J. G. Gauld, Hamilton, for plaintiff.

THE COURT (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.) dismissed the appeal with costs.

CARTWRIGHT, MASTER. SEPTEMBER 29TH, 1904.

CHAMBERS.

DUNSTON v. NIAGARA FALLS CONCENTRATING CO.

Particulars—Statement of Defence—Application before Examination for Discovery — Particulars for Pleading — Particulars for Trial—Affidavit in Support of Application.

Motion by plaintiff for particulars of paragraphs 3, 4, and 5 of the statement of defence.

A. R. Clute, for plaintiff.

A. B. Armstrong, for defendants.

THE MASTER.—The statement of claim alleges that plaintiff and defendants on 10th October last agreed that plaintiff should make certain labels for defendants for $392.79; that plaintiff duly in accordance with said agreement made and tendered said labels, but defendants refused to accept or pay for same.

The statement of defence, after usual denial of the plaintiff's allegations, pleads the Statute of Frauds (paragraph 2); says (paragraph 3) goods not of good quality or workmanship; (paragraph 4) not equal to sample agreed on by parties; (paragraph 5) not fit for purpose of defendants' business, for which plaintiff well knew they were intended.

On 23rd instant plaintiff demanded particulars in writing of paragraph 3 as to want of good quality and workmanship; paragraph 4, respects in which the goods manufactured by the plaintiff were not equal to sample; and paragraph 5, of respects in which said goods were not fit for purpose of defendants' business.

The cause is not at issue yet.

The motion is supported only by affidavit of plaintiff's solicitor that he believes "plaintiff cannot safely proceed to trial without delivery by defendants of the particulars demanded."

In Uda v. Algoma Central R. W. Co., 1 O. W. R. 246, Meredith, C.J., relied in part on the fact that there was no affidavit from the plaintiff that the nature of the defence intended to be set up was not known to him.

What necessity there can be for the particulars for the purposes of reply is not apparent, nor does the affidavit state any. It may be assumed that there was a certain amount of correspondence leading up to the alleged documents, and subsequent letters stating refusal of defendants to accept, and their reasons for such refusal.

However that may be, there is yet plenty of time to examine some officer or servant of defendant company, who will be bound to inform himself fully of the facts relied on by way of defence.

Until this has been done the motion is, in my view, premature: see Becker v. Dedrick, 2 O. W. R. 786; Quebec Bank v. Phœnix Ins. Co., 3 O. W. R. 603; and cases referred to in these decisions.

If after discovery has been had the plaintiff is still of opinion that he cannot safely proceed to trial, he can renew this motion.

At present I think that it cannot succeed, and should be dismissed with costs to the defendants in the cause.

SEPTEMBER 29TH, 1904.

DIVISIONAL COURT.

RE MCLEOD AND TOWN OF EAST TORONTO.

Municipal Corporations—Annexation of Town to City—Petition for Submission of By-law—Numbers and Qualifications of Petitioners—Delegation—Withdrawal of Names—Addition of Names—Mandamus—Time.

Appeal by town corporation from order of ANGLIN, J., ante 26, directing the appellants to submit to the ratepayers a by-law for the annexation of the town to the city of Toronto.

W. Proudfoot, K.C., for appellants.

W. E. Middleton, for Alexander McLeod.

THE COURT (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) dismissed the appeal with costs, but modified the order by extending the time for taking the vote of the electors for 4 weeks from 3rd October, 1904, and by adding that nothing contained in the order is to interfere with the right, if any, of the council to act under secs. 336, 337, and 337*a* of the Municipal Act.

SEPTEMBER 29TH, 1904.

C.A.

BOYLE v. CITY OF GUELPH.

Way—Non-repair—Injury to Traveller — Death—Action by Widow — Negligence of Municipal Corporation — Dangerous Condition of Highway—Open Ditch—Proximate Cause of Injury—Contributory Negligence—Intoxication —Damages.

Appeal by defendants from judgment of BRITTON, J., 3 O. W. R. 322. Cross-appeal by plaintiff for increased damages.

D. Guthrie, K.C., and W. R. Riddell, K.C., for defendants.

J. E. Day and J. M. Ferguson, for plaintiff.

THE COURT (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.), dismissed the appeal and cross-appeal, both with costs.