

The question of the gong may be at once dismissed. The evidence is overwhelmingly against the idea that any amount of ringing would have prevented the accident; and, if it would not have done that, its omission cannot be said to have in any way caused or contributed to the accident. The unfortunate plaintiff is shewn to be very deaf. There is no dispute about the fact that the gong was rung and rung violently immediately before he stepped on the track, and when he was only a few feet distant, and that he did not hear it. Nor did he hear the shouts of warning addressed to him at about the same time—circumstances which clearly shew the inconclusiveness, and I had almost said the absurdity, of this particular finding.

The real point in the case arises, in my opinion, wholly upon the other two, which, notwithstanding their lack of definiteness, I assume to be sufficiently in the plaintiff's favour to support the judgment which he now has. And the question to be determined is, was there reasonable evidence proper for the jury to justify such findings?

The burden of proof was, of course, upon the plaintiff. He was bound to incline the balance in his favour by something more than a mere scintilla of evidence. There must be reasonable evidence; such evidence as would justify reasonable men in coming to the conclusion that it was within the power of the motorman, after he saw, or should have seen, that the plaintiff probably intended to cross the track in front of the car, to have stayed his advance and thus prevented the accident. And such evidence, after a careful and indeed anxious consideration of the evidence, I am quite unable to find.

About the plaintiff's own negligence there can, under the circumstances, be no doubt whatever, notwithstanding the exceedingly mild yet sufficient terms in which it is expressed in the 4th answer. He was so deaf that he could not trust his ears for defence; and he seems, upon the evidence, to have utterly failed to use his eyes, but kept them, as the witnesses say, turned upon the ground, or, as he says, looking only in the wrong direction, namely, toward the south, when he should have kept a look-out both ways. From where he commenced to cross the street to the track is said to be about 40 to 45 feet on the oblique course which he took. He was going, I will assume, at his usual pace, which may be put at three miles an hour, although one of the witnesses, John Cudmore, says he was apparently running. And at that pace he would traverse the 45 feet in about ten seconds. The motorman says he saw him for the first time when from 4 to 8 feet from the track. It is not suggested that he did not at once do what he could to stop the car then. He at once sounded