

HON. MR. JUSTICE IDINGTON:—This is one of these somewhat numerous cases in which all those participating in the attempted crossing of a railway track were killed, and hence no explanation can be given by eye-witnesses of what really caused the accident.

The jury as in all such cases had to draw inferences from the proven attendant conditions and circumstances, and where the evidence relative thereto, or part thereof, conflicted, to decide which set of witnesses spoke the truth on the point.

There never was such a case where it was not urged with more or less plausibility that any conclusion deducible from the conditions and circumstances thus established was met by alternative suggestions, alleged to be equally possible or nearly so, and the whole matter thus reduced to the field of mere conjecture.

The acceptance of any of such alternative theories would generally speaking have rendered any recovery impossible. Yet such has not been the result.

The Courts and juries have generally assumed those thus fatally injured to have acted as reasonable human beings.

Starting with such presumption there is generally found some reason, in the neglect of the duties of the defendant as a probable cause, for such persons not having exercised that reason and common sense possessed by them.

Here we have people who knew the road, but by reason of the construction works going on alongside the beaten highway, were not so likely to readily observe exactly where they were, and especially so in face of the removal of the sign post they had previously had for their accustomed guide at the railway crossing. Let us also add to that the weather conditions proven to have prevailed.

Can we, under the circumstances, impute contributory negligence, in face of the finding of the jury to the contrary?

Assume, as found, there was none, and observe that their carriage or waggon was struck at right angles on the track attempted to be crossed. The jury find it may have been impeded by a grade not conformable to the statutory requirements, that the crossing sign post required by statute and usually to be seen, was, and had been, removed for some time, and that the signals of ringing of bell and blowing of whistle had been disregarded.

The learned trial Judge refused to nonsuit.