

The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

D. L. McCarthy, K.C., for the defendants.

A. B. Armstrong, for the plaintiff.

GARROW, J.A. (after setting out the facts at length):—In the charge, the learned Chief Justice seemed to regard the evidence as conflicting, and from that point of view addressed the jury, pointing out that Mrs. Hare said certain things which were in conflict with certain other things said by the witnesses for the defence. I am, with deference, unable to see any material conflict, if due allowance is made, as I think should be made, for the different points of view of the several witnesses. . . . The jury, in effect, negatived the several allegations of negligence contained in the statement of claim, unless the finding of the motorman's failure to observe the child in time may be said to fall within one of them. Why they should have assumed so readily that the motorman did not observe the child, is not apparent. He unfortunately had died before the trial; and we, therefore, have no means of knowing directly whether he did actually see the child or not. But, so far as the evidence which we have goes, there is no reason to suppose that he did not see it as soon as Mrs. Hare and the others did. And the real question is: Wherein did he fail, if he did fail, to take such reasonable care as the circumstances demanded, after he saw or should be assumed to have seen the child? He sounded the gong after leaving Shaw street. The car was proceeding slowly. He was able to bring it to a stop within a few feet. As to these the evidence is perfectly clear and not in conflict. What more should he have done? Should he have brought the car to a standstill and waited to see what the child would do, whether it would advance or retreat, or be perhaps rescued by its mother, who was in the house near-by? Or should he have left his car for a moment and removed the child entirely from the street, for it was in almost as much danger while on the south track, along which a car might be expected at any moment, as from the car then on the north track.

The motorman had to consider, not merely the call of humanity in the shape of this little wandering, aimless child, but his duty to his employers and to the passengers; and the circumstances demanded an immediate conclusion one way or the other. Was it on his part, under all these circumstances, an act of negligence, or from which negligence can be reasonably