

of the whistle, as has been more than once pointed out by Courts, one of the purposes of this requirement is to warn people, whose attention is called away for the moment, the Court recognizing that people are not always alert, and the Legislature also recognizing that casts upon railway companies this duty for the protection of the public.

We think, therefore, as I have said, that the jury might draw from this evidence the conclusion that the absence of the warning board either caused or contributed to the happening of the accident and that with it the accident would not have happened.

The third ground of negligence which the jury found would give us a good deal of difficulty, if the determination of the case depended upon our having to say that there was any evidence—I am speaking for myself in putting it as strongly as that—any reasonable evidence to be submitted to the jury, that there was an absence of compliance with the statutory requirements in that respect.

It is well settled that evidence of persons who were in a situation to hear sounds who testify that they did not hear them, is evidence to go to the jury, and that such a case made by the plaintiff cannot be withdrawn from the jury.

What I understand "situation" to mean is that it means not only situation with regard to locality, but includes conditions which would make it likely that the person who deposes would have heard the sounds if they had been made.

Now the evidence in this case was very unsatisfactory. There was on the part of the appellants a very large body of evidence to shew that the statutory signals were given. Three or four witnesses were called by the respondent, they said they did not hear the whistle sounded or the bell rung at the place where it was the duty of the appellants to have done that. One of the witnesses said that he heard the whistle while the train was approaching, but that it was a whistle for a crossing some distance further away than the crossing at which the accident happened. That witness, however, while he said that his hearing was good and that there was nothing to prevent his having heard the sound, qualified his statement by saying, "unless it was because he was engaged in conversation with the persons with whom he was driving." A similar observation is applicable, I think, to the evidence of the other two persons who were driving with him.