

taking a drive in a motor-car, arranged that one of them, Scott, should procure the car, which he did by hiring it from a garage. Scott appeared to have been the only one of the party who knew how to drive the car, and he drove it. The members of the party entered the car at the garage and proceeded to drive around the town. When driving down Market street, the car collided with a car of the backing train, causing the injuries to the respondent of which he complained.

His case was that the collision was caused by the failure of those in charge of the train to obey the statutory requirements as to the ringing of the engine-bell, the sounding of the whistle, and the stationing of a man on the rear of the car that was in front of the backing train. This was denied by the appellant company, and it was contended that the accident was caused by the failure of those in the motor-car to take proper precautions before crossing the railway track, and driving at an immoderate rate of speed down Market street, where the street slopes towards the track, to the track.

Questions were put to the jury and answered as follows:—

1. Was the whistle sounded within 80 yards of the Market street crossing and was the bell being sounded continuously?

A. We believe the whistle was sounded. We do not believe the bell was being sounded continuously.

2. Was a person stationed on the foremost part of the train?

A. No.

3. Could the accident have been avoided by proper care by those in charge of the auto? A. Yes.

4. What, in your opinion, was the primary cause of the accident? A. Negligence in not ringing the bell.

It was contended for the appellant company that, upon these answers, it was entitled to judgment. For the respondent it was argued that Scott was the person in charge of the motor-car, and that the respondent's claim to recover was not affected by Scott's negligence.

The County Court Judge, applying *Mills v. Armstrong*, *The Bernina* (1888), 13 App. Cas. 1, was of opinion that the appellant company was liable, because the respondent never had control of the motor-car, was not capable of taking control, and trusted to Scott alone to do the driving.

The learned Chief Justice's view was, that the five men had the control of the motor-car: it was hired by them, although Scott was the one who acted for his companions as well as himself in hiring it; they entrusted the driving to Scott.

The *Bernina* case had no application if Scott in driving the motor-car was acting as the agent or servant of his companions. That he was acting as their agent was clear, because it was also