THE CITY OF HALIFAX (DEFENDANT)..APPELLANT; 1892

AND *Feb. 26,29.

MARY ANN LORDLY (PLAINTIFF)... ..RESPONDENT. *May 2.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Municipal corporation—Duty to light streets—Liability for negligence—Obstruction on sidewalk—Position of hydrant.

L. was walking along the sidewalk of a street in Halifax at night when an electric lamp went out and in the darkness she fell over a hydrant and was injured. In an action against the city for damages it was shown that there was a space of seven or eight feet between the hydrant and the inner line of the sidewalk, and that L. was aware of the position of the hydrant and accustomed to walk on said street. The statutes respecting the government of the city do not oblige the council to keep the streets lighted but authorize them to enter into contracts for that purpose. At the time of this accident the city was lighted by electricity by a company who had contracted with the corporation therefor. Evidence was given to show that it was not possible to prevent a single lamp or a batch of lamps going out at times.

Held, reversing the judgment of the court below, Strong and Taschereau JJ. dissenting, that the city was not liable; that the corporation being under no statutory duty to light the streets the relation between it and the contractors was not that of master and servant, or principal and agent, but that of employer and independent contractors, and the corporation was not liable for negligence in the performance of the service; that the position of the hydrant was not in itself evidence of negligence in the corporation and that L. could have avoided the accident by the exercise of reasonable care.

APPEAL from a decision of the Supreme Court of Nova Scotia affirming the judgment for the plaintiff at the trial.

The facts presented to the court on this appeal sufficiently appear from the above head-note and from the judgment of Mr. Justice Gwynne.

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*PRESENT:—Sir W. J. Ritchie C.J., and Strong, Taschereau, Gwynne and Patterson JJ.

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MacCoy Q.C. for the appellant. As to the general liability of a corporation for negligence see *McCafferty* v. *Spuyten Duyvil, &c., Railway Co.* (1); *Chicago* v. *Starr* (2).

The statement of claim does not show any cause of action against the city. *Rounds* v. *Stratford* (3); *Soule* v. *The Grand Trunk Railway Company* (4).

Drysdale for the respondent, referred to *Carty* v. *City of London* (5).

Sir W. J. RITCHIE C.J.—I am of opinion that this appeal should be allowed for the reasons contained in the judgment of Mr. Justice Gwynne.

STRONG J.—I agree in all respects with the judgment of Mr. Justice Graham before whom this action was tried. The hydrant was an obstruction placed in the public highway, the sidewalk being, of course, part of the highway. I do not say that the city had not power to maintain the hydrant within the limits of the sidewalk, or that it was guilty of a nuisance in so maintaining it.

My opinion proceeds upon this, that in exercising statutory powers the city was bound to exercise due diligence and to proceed without negligence. This is a general principle of law well and authoritatively laid down in Lord Blackburn's judgment in the case of *Geddis* v. *Proprietors of Bann Reservoir* (6) cited in the judgment of Mr. Justice Meagher. It therefore becomes a question of fact whether the appellants were guilty of negligence in maintaining this hydrant within the limit of the way for foot passengers in a street lighted only by an uncertain mode of illumination,

(1) 19 Am. R. 267.
(2) 89 Am. Dec. 422.
(3) 25 U.C.C.P. 123.
(4) 21 U.C.C.P. 308.
(5) 18 O.R. 122.
(6) 3 App. Cas. 430.

such as the electric light described in the evidence, and I am of opinion that on this question of fact the learned judge who tried the action rightly found for the plaintiff. The question of the cost of removing the hydrant outside the sidewalk is no element in the case; the paramount duty was that of caring for the safety of the public using the street, and this, as a judge of fact and speaking from the evidence, I hold was not properly provided for.

The appeal should be dismissed.

TASCHEREAU J.—I dissent. I have come to the conclusion that the city is liable for negligently and improperly placing an iron hydrant on the sidewalk on Barrington street in such a position as to be dangerous to persons lawfully using that street, and wrongfully and negligently keeping and continuing such hydrant in that position. I would dismiss the appeal.

GWYNNE J.—The plaintiff's right of action in her statement of claim is rested upon the following grounds, namely, that Barrington street is a street in the city of Halifax, owned by and in possession of and under the control and management of the defendants; that the night of the 28th August, 1889, was dark, and that the lights provided for lighting the said street were so negligently and improperly managed, and the machinery provided therefor was so inadequate and inefficient, that the said lights so provided were not lit on said night and did not afford any light; that the defendants had notice and knowledge for a long time previous to said night that said lights provided for lighting said street were negligently and improperly managed, and that the machinery provided therefor was inadequate and inefficient, and that the lights in the said street were very frequently not

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lighted, and that the said street was very frequently entirely without light and left in total darkness; that the defendants had long prior to said 28th day of August negligently and improperly placed an iron hydrant on the sidewalk on Barrington street aforesaid in such a position as to be dangerous to persons lawfully using said street, and the defendants wrongfully and negligently kept and continued said hydrant in said position; and that the plaintiff on the night of the said 28th of August, and while Barrington street aforesaid was in total darkness, was lawfully walking along the said sidewalk, and in consequence of the said street not being properly lighted and the said hydrant being so improperly placed and continued on said sidewalk the plaintiff fell over the said hydrant and was bruised and seriously injured, &c. The question now is whether there was any evidence to support the judgment for the plaintiff which was rendered by the learned judge who tried the case, and I am of opinion that there was not. With the unanimous judgment of the learned judges of the Supreme Court of Nova Scotia, that the maintaining the hydrant complained of in the place where it was lawfully erected upwards of twenty years ago constituted no evidence of negligence upon the part of the defendants as to the hydrant, I entirely concur.

Then as to the charge of negligence in the alleged defect in the lighting of Barrington street on the night in question. The city of Halifax was first incorporated by the provincial statute, chapter 55 of the statutes of 1841. That statute not only did not impose any obligation or duty upon the city to light the streets, but it did not make any provision empowering the city to raise funds necessary for that purpose. Provision had been made by the legislature for lighting the town of Halifax be-

fore its incorporation as a city by an act of the legislature, ch. 16 of the statutes of 1840, which incorporated a company under the name of the Gas Light and Water Company, which act was amended by an act of the Nova Scotia Legislature in ch. 72 of the statutes of 1844, whereby the powers of the said company to supply the city of Halifax with water were expressly repealed and the name of the said company was declared thenceforth to be the Halifax Gas Light Company. Now, the provision made for lighting the city by the act of incorporation of this company was wholly independent of the city corporation. It rested wholly with the proprietors or a majority of the proprietors of any street whether such street should be lighted or not. If a majority only of the proprietors and not all desired their street to be lighted they had to apply to the Court of General Sessions of the Peace, before the incorporation of the city, or to the city council since such incorporation, who, on being satisfied that a majority of said proprietors had actually agreed that the street in question should be lighted, were required to cause a fair and proportionate rate to be made on the whole of the property in such street, and when such rate should be made and approved by the court, the court (*i.e.* city council) should order such street to be lighted. If all the proprietors on any street should by written agreement fix a rate they might contract with the company without the intervention of the city council, and provision was made for enforcing payment of the rate agreed upon as well as of that imposed under the authority of and approved by the city council. Under this act the streets of the city of Halifax which were lighted were lighted until the month of November, 1887, the Gas Company increasing the number of lamps in any street and locating them according to the wishes of the council. In the meantime in the year

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1851 the city council was first empowered to control and regulate the lighting of the city. By the 149th section of an act of the legislature of 1851, 14th Vic. ch. 19, it was enacted as follows:

> The city council shall make by-laws, orders and regulations for lighting the city, and also for supplying water therein, and they may make any necessary contracts on behalf of the city for these purposes.

And by the 152nd section it was enacted that a sum of not less than £400 should be annually included in the general assessment for the purpose of supplying the city with public fountains, hydrants and fire plugs, and that the Halifax Water Company should for that sum of £400, to be paid to them annually by the city, supply a specified number of fountains, hydrants and fire plugs in such places as had been or might be appointed by the city council. At the time of the passing of the above act the city of Halifax was supplied with water by the Halifax Water Company, and with light by the Halifax Gas Light Company, under the provisions of the statute ch. 16 of the statutes of 1840 above referred to; the section 149 of the statute of 1851 in so far as lighting the city was concerned, was acted upon by the city council thenceforward in determining the number of lamps which should be erected in each street and locating them and paying therefor, and for the gas light supplied. Now by the provincial act, 27 Vic. ch 81, provision was made enabling the city of Halifax to purchase the property, rights and privileges of the Halifax Water Company, and enacting several precise clauses enabling the city council to undertake itself the duty of supplying the city with water. No such provision is at all made with respect to lighting the city. The only provision upon that subject is made by section 409 which is a limitation of the provision of section 149 of the act of 1851, as follows:

The city council shall make by-laws, orders and regulations for lighting the city, and they make any necessary contracts on behalf of the city for that purpose.

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And on the same day as this act 27 Vic. ch. 81 was passed an act 27 Vic. ch. 64, enabling the city council to inspect, test and prove the accuracy of the gas meters furnished for use by the Halifax Gas Light Company, or by any other gas light company which might thereafter be established within the city; and by that act it was enacted that towards payment of the inspector by the city the gas light company should pay $200 annually into the hands of the city treasurer. It is obvious, therefore, I think, that section 409 of 27 Vic. ch 81, which is the provision on the subject still in force, is fully complied with by the city council making the necessary contract for the lighting the city with persons or companies competent to enter into the same with the city, and that not only is no obligation imposed upon the city to erect, maintain and work the necessary works for providing gas or other light, but that they are not empowered to erect or purchase, or to raise the funds necessary for the erection and purchase, of such works. Now, as already said, the sections 149 of 14 Vic. ch. 1 and 409 of 27 Vic. ch. 81, have been complied with by the city council making contracts for the lighting of the city with the Halifax Gas Light Company until the month of November, 1887, when a contract went into operation which the city council entered into in the month of September previous with a company doing business under the name, style and firm of J. W. Chandler and Company, for the lighting of the city with electric lamps for three years from the 24th November, 1887. That company, in accordance with the provisions of that contract, erected the lamps, and it is for the failure of one of those lamps to give light on

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the night of the 28th August, 1889, that, as is alleged, the injury sustained by the plaintiff was occasioned, which failure of such lamp to give light at the time in question is charged as negligence of the defendants giving cause of action to the plaintiff. In the statement of claim this negligence is charged thus:

> That the lights provided for lighting said street (Barrington street), were negligently and improperly managed and the machinery provided therefor was inadequate and inefficient.

As already shown, the lights and the machinery provided for supplying the electric lights were not under the management of, or provided by, the city council but under the management of, and provided by, the company with which the city council had, under the authority of sec. 409 of 27 Vic. ch. 87, entered into a contract for lighting the city. But it was contended that the city could not avail themselves of their contract with the electric light company to relieve themselves from responsibility to the plaintiff upon the principle of law that a person upon whom a liability is imposed, whether by common law or by statute, cannot absolve himself from his liability by delegating his duty to another, and in support of this contention were cited *Gray* v. *Pullen* (1); *Pickard* v. *Smith* (2); and *Carty* v. *The City of London* (3). The principle is not questioned but its application to the present case is. It is not disputed that where a particular duty is imposed upon any person as incidental to the doing of any work which he by statute is authorized to do such person cannot, by employing a contractor to do the work authorized, evade responsibility to a person injured by the non-fulfilment of the incidental duty imposed. That was the case of *Grey* v. *Pullen* (1), *Pickard* v. *Smith*, (2) and *Carty* v. *City of London* (3). But in entering into the

(1) 5 B. & S. 970.
(2) 10 C.B.N.S. 470.
(3) 18 O.R. 122.

contract with the Chandler Electric Light Company, the terms of which the city council had full power to arrange, the council while thus exercising the power vested in them by the statute discharged the duty imposed upon them by the statute; they were not employing the company to do work which the statute had required them to do themselves, nor had the statute imposed upon the council the duty of lighting the city by works of their own, or enabled them to raise the funds necessary for the purchase or erection and maintenance of the necessary works; they had in effect no power but that of entering into contracts with persons able to supply the light which in the exercise of their discretion the council should think necessary, and this they did by the contract they entered into with the Chandler Electric Light Company. The relation thus, which by statutory authority was created between the council and the company, was not that of master and servant or of principal and agent but that of employer and independent contractors, and the law applicable to such a case applies, namely, that if any one suffers injury from any negligence in the execution by the contractors of the work they have undertaken the contractors alone are responsible. In the present case the negligence alleged to have existed is improper management of the lights on Barrington street and defect in the machinery provided for producing the light. No evidence whatever, either of defect in the machinery or in the management of the light, was offered by the plaintiff. The plaintiff's case as to negligence causing the light in question to go out consisted solely of the bare fact that as the plaintiff reached the place where the hydrant over which she fell was the light in the street flickered and went out—a thing not unusual in the use of electric light, the cause of which does not seem to be well known, or at least it was not

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shown in evidence to be attributable to any negligence. Evidence was given to the effect that " it is not possible to prevent a single lamp, neither is it possible to prevent a batch of lamps, going out; it is not possible to guard against particular lights going out suddenly." So that the evidence failed to show that the flickering and going out of the particular lamp in question was attributable to any negligence whatever. Much irrelevant matter was admitted in evidence from which it appeared that the council were not quite satisfied with the manner in which the company fulfilled their contract with the city in other parts of the city quite apart from the place where the plaintiff met with her accident, and the case seems to have been determined by the learned judge who tried the case upon this irrelevant matter. The gist of the case lay in establishing, 1st, negligence to have been the cause of the light on Barrington street flickering and going out, for if the light had been good the plaintiff beyond doubt could and should have avoided the hydrant; and 2ndly, that the city corporation is responsible for such negligence; in both of these points the evidence, in my opinion, wholly fails, and therefore the appeal must be allowed with costs and the action in the court below dismissed with costs.

PATTERSON J.—I am also of opinion that this appeal should be allowed and the plaintiff's action dismissed.

Appeal allowed with costs.

Solicitor for appellants: *W. F. MacCoy.*

Solicitor for respondent: *Joseph A. Chisholm.*