FRANCIS GLOSTER AN INFANT BY CORNELIUS GLOSTER HIS NEXT FRIEND AND THE SAID CORNELIUS GLOSTER (PLAINTIFFS) ..... APPELLANTS;

AND

THE TORONTO ELECTRIC LIGHT COMPANY (DEFENDANTS) ..... RESPONDENTS.

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*Nov. 9.
*Nov. 23.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Electric Light Co.—Wires on public highway—Proximity to bridge—Injury to child—Dedication.

Several years ago the owners of land in the Township of York built a bridge over a ravine for access to and from the City of Toronto and about 1894 the Toronto Electric Light Co. placed wires across the ravine about ten feet from the bridge. In 1904 the bridge was reconstructed and made wider, being brought to within from 14 to 20 inches of the wires, which had become worn and ceased to be insulated. G., a boy under nine years of age, while playing on the bridge, put his arm through the railing and his hand touching the wire he was badly injured.

Held, reversing the judgment of the Court of Appeal (12 Ont. L.R. 413), that the plans and deeds in evidence shewed a dedication as a public highway of the bridge and land of each side of it and such highway included the land over which the wires passed.

Held, also, that the wires in the condition in which they were at the time of the accident were dangerous to those using the highway and the company were liable for the injury to G.

APPEAL from a decision of the Court of Appeal for Ontario (1), setting aside the verdict for the plaintiffs at the trial and dismissing the action.

The facts are stated as follows by Mr. Justice Osler in the Court of Appeal.

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

(1) 12 Ont. L.R. 413.

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The facts of the case lie in a comparatively narrow compass. Several years before the occurrence which gave rise to the action, a private corporation known as the Scottish Ontario Land Company were the owners of a large plot of ground in the Township of York near the City of Toronto, part of which they laid out into building lots, laying out streets thereon which connected with existing highways in the township. They had also in order to provide for access to and from the city built a substantial bridge 24 feet in width over a wide and deep ravine on their property. Neither the street (Glen Road) as laid down on the plan through the ravine nor the bridge over it had been assumed by the defendant township as a public highway though the latter as the settlement in the township grew up came into constant and extensive use. After the bridge was built and some nine or ten years before action, the defendants, the Toronto Electric Light Company, carried their wires west of the bridge across the ravine on poles along the sides and bottom of the ravine, the wire as it came up the incline at the north end of the bridge being between six and seven feet from the west side of the bridge according to the recollection of such witnesses as could speak to its position at that time. The right of the defendants to erect these poles and carry their wires across the ravine in this manner was not in dispute and they or some of them were connected with poles for arc lights a short distance beyond the north and south ends of the bridge.

In course of time the bridge became out of repair and dangerous and while it had become of great importance to a large section of the public in the city and township, the company who had built it had ceased to have much, if any, interest in its mainten-

ance and had put up a notice that persons using it did so at their own risk, and the township disclaimed any obligation to repair it. The legislature finally intervened and by the 3 Edw. VII. ch. 89, after reciting that the bridge had become to all intents a public highway, enacted that the township without passing any by-law for the purpose should re-construct and repair it as a local improvement, assessing the cost upon the property benefited as described in the Act. The works were to be performed under the supervision of a competent engineer to be appointed by the county judge, but their construction was not to impose upon the township any liability for their future maintenance and repair.

The new bridge thus built by the township under the authority of the Act was being practically used for traffic of all kinds by the end of the first week in August, 1904, though some work remained to be done upon it and it was not finally approved by the engineer in charge until the middle of September, subject to some painting being done upon it which seems not to have been completed before the 1st of October.

The bridge was an iron structure four feet wider on each side than the old one, or in all a trifle more than 32 feet wide. On each side it was protected by a lattice-work iron railing 4 ft. 1 in. in height above the side walk of the floor of the bridge with lozenge shaped openings therein $16\frac{1}{4}$ in. in height by $10\frac{1}{4}$ in. in width. The distance between the railing and the defendant company's wire as reduced by the widening of the bridge was variously stated as from 14 to 20 inches, the wire being at the place where the plaintiff touched it a little lower than half way between the top of the railway and the floor of the bridge.

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On the 8th of October, 1904, the plaintiff, a boy of between 8 and 9 years of age, who was crossing the bridge or playing thereon with some companions, pushed his arm through one of the lower openings in the lattice work of the railing and touched or took hold of the wire. There was some reason to suppose from his examination before the trial that he was attempting to reach it with a small metal toy he had in his hand, but this he would not admit or did not remember when giving his evidence at the trial. The insulation of the wire being imperfect the result was that the boy's hand, where it had taken hold of the wire, and his head, which rested upon or touched part of the iron work of the railway, were very severely burnt.

Millar and *J. D. McDougall* for the appellants referred to *Nelson* v. *Branford Lighting and Water Co.*(1); *Thomas* v. *Wheeling Electrical Co.*(2); *Schweitzer's Administrator* v. *Citizens' General Electric Co.*(3).

Hellmuth K.C. and *G. L. Smith,* for the respondents. *Smith* v. *Hayes*(4), collects the cases on negligence to date of the decision.

Defendants had no notice of the widening of the bridge. *Styles* v. *Cardiff Steamboat Co.*(5); *City of Toronto* v. *Toronto Electric Light Co.*(6).

GIROUARD J. concurred in the reasons stated by Davies J.

(1) 8 Am. El. Cas. 542.
(2) 8 Am. El. Cas. 528.
(3) 7 Am. El. Cas. 571.
(4) 29 O.R. 283.
(5) 4 N.R. 483.
(6) 6 Ont. W.R. 443.

DAVIES J.—I am of opinion that this appeal should be allowed and the judgment ordered by the trial judge based upon the findings of the jury restored.

The action was brought to recover damages sustained by an infant boy of 8½ years of age through his hand coming in contact with an uninsulated wire of the defendant company carried near to a public bridge crossing a deep ravine in the outskirts of Toronto and over which bridge the boy was lawfully passing when the accident occurred.

This bridge had shortly before the accident been re-constructed and widened at the upper part over which the public passed by the Township of York under special legislation passed for the purpose.

Before the bridge was so widened the defendants' wires were stretched across this ravine, but at a distance from the bridge which prevented any such accident occurring, and it was the widening of the bridge which brought it and the wires to the close proximity which existed at the time the accident occurred.

The bridge as widened had been in use by the public for some months and there was evidence that the trimmer employed by the defendants crossed this bridge daily during that time in the discharge of his duties and ought to have seen and reported to his employers the danger.

The jury, after a charge to which no objection is made, found the defendants guilty of negligence and that there was no contributory negligence on the part of the boy.

There was an iron fence about four feet high along the sides of the bridge in which were lattice-work diamond-shaped openings 16¼ inches long by 10½ inches wide, and it was through one of these openings that

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the boy put his hand which came in contact with the uninsulated wire.

The ground upon which the judgment of the Court of Appeal proceeded was that the bridge was the extreme width of the highway and that while if the wires had been so close to the bridge that any one lawfully crossing it might accidentally touch them, a jury might find negligence, such a finding could not be made where the wire was beyond the side of the bridge outside of the highway and

> could not be reached or touched by any one without intending to do so or without stretching out through the railing beyond the side of the bridge and therefore outside of the highway.

Without expressing any opinion as to whether this statement of the law could be upheld or not, it is sufficient to say that in some strange way the facts were misapprehended by the Court of Appeal.

The plan with the writings from the owners and others put in evidence at the trial dedicating the lands across the ravine as a highway shews the latter to be of the same width across the ravine as the streets leading up to the ravine on each side. This plan was before us, having been returned amongst the exhibits, and leaves no doubt upon that point. Coupled with the legislation authorizing the enlarging and widening of the bridge there does not seem to be any reasonable doubt either of the dedication of these lands as a highway, or their acceptance as such by the township or the fact that the highway was much wider than the bridge. If these facts had not been misapprehended by the Court of Appeal, I think from the language and reasoning used by them their judgment would have been different.

A question was raised as to whether the defendant

company had had notice of the widening of the bridge, but the bridge had after its re-construction been used by the public as a highway for several months, and I have no doubt under the evidence that they must be taken to have had knowledge or at any rate ample means of knowledge of the material facts.

The defendant company transmitting such a dangerous element as electricity through their wires thus strung along a public highway fall short of being insurers, but are bound to exercise the greatest possible care and to use every possible precaution for the protection of the public.

Their wires in the condition in which they were at the time and place where the boy was so badly injured constituted a danger to those using the highway and were in fact a nuisance. They had become worn and defective and had ceased to be insulated and to offer any protection in case they came into contact with any one. These uninsulated wires were within a few inches, between 14 and 20, of the railing of the bridge, and it ought to have been present to the minds of the defendant company that if not grown up people at any rate children crossing the bridge or playing upon it would be exceedingly likely to touch the wires. To my mind the maintenance of these dangerous uninsulated wires charged with deadly electricity within a few inches of the bridge over which a large number of people daily passed for some months after its re-construction had been completed, and coupled with the other facts proved, fully justified the findings of the jury.

The observations of the judges of the Court of Appeal which decided the case of *Harrold* v. *Watney*(1) are much to the point.

(1) (1898) 2 Q.B. 320.

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IDINGTON J.—The appellant has taken before us a ground that seems to have been ignored in the court below.

Mr. Justice Osler, who writes the judgment of that court, says:

> the highway near which the wire was erected was a bridge. It extended to the width of the bridge and no further.

It seems to me that the return of the plans and deeds to the registry office, after the trial, kept out of sight of the Court of Appeal very important pieces of evidence, and hence, I am inclined to think, this conclusion of fact arrived at by Mr. Justice Osler, upon which his judgment rests.

In light of the documents I refer to I cannot arrive at the same conclusion of fact as Mr. Justice Osler proceeds upon, and hence I arrive at a very different result from that he concludes with.

Unquestionably the highway extended far beyond the side of the bridge at the time of the accident.

A company known as the Scottish, Ontario and Manitoba Land Co., Limited, acquired, in the Township of York, a tract of land to be developed as a residental district outside of Toronto. A part of this land was surveyed into lots and plans were registered, of which plan No. 661, filed herein was one that was registered by the company in 1886. The land thus surveyed stretched northerly from a point about 600 or 700 feet beyond the line dividing that township from the City of Toronto. A deep ravine filled the intervening space between this line and that land.

At about that time this company acquired a strip of land eighty feet wide, stretching across the ravine and connecting the land plotted, as in plan No. 661, and other plans referred to, with the end of Glen Road

(a street in Rosedale, now in the City of Toronto), which had run up to the boundary line between Toronto and York township.

The company opened from the ravine, through their land on the northerly side of the ravine, in the course of the surveys just referred to, a road running northerly under the same name of Glen Road.

Obviously, the acquisition by the company of the strip across the ravine was for the express purpose of using it as a highway and by means of building thereon a bridge (on a level high enough to make it easy of access to travellers), to connect thereby the Rosedale end of Glen Road and the extension of Glen Road on the surveyed lands of the company on the north side of the ravine. The bridge was built at a height of about 125 feet above the deeper parts of the ravine.

The conclusions I draw from all the facts before us relative to this strip of land, and especially the conformation of the ground; the improbability, if not impossibility, of its use for building purposes; that it was intersected by a public highway, and the temporary device of granting by deed the use of this bridge to each purchaser of a lot of these surveys, are that the company never intended to use it for any other purposes than to subserve the uses of a public highway; that the future appropriation of the entire strip, for such purpose, was intended by the company; and its dedication also intended so soon as the development of the settlement being created would induce some public authority to accept, for the public, such dedication and save the company from the burthen of maintenance of such a structure as this bridge.

As things progressed the settlement came to need light. The respondents furnished the light. They

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were, under the law by virtue of which they had become incorporated, entitled to use any street, highway or public place subject to agreement between them and the municipality in which the street, highway or public place lay, for erecting poles and stringing thereon the necessary wires to conduct their electric current.

They used Glen Road, clearly then a public highway, on either side of this ravine, for stretching thereon the electric wire of which the connecting part is now in question.

This use of Glen Road is, I think, attributable to an exercise of the right I advert to. In process of exercising that right, I have no doubt, they stretched across this ravine alongside of the bridge and over the strip thus intended for dedication, the wire they were putting up on Glen Road, as already stated, under the impression that the strip referred to across the ravine formed part of the public highway. The place where they thus stretched the wire across the ravine, some ten years or more after the bridge was built, would present the appearance of a public highway to any one looking at it then, used as it was, as part of the public highway known as Glen Road.

It would be manifestly absurd to suppose that such a company as respondents, at every step, verified the public title to the highway, rather than accept the appearances as facts.

Such being the interpretation I put upon the facts as a matter of historical research gathered from the evidence, now in the case, what follows? Can the respondents claim that they are not bound by the events that followed as clearly as if they had built along and upon what was an actual public highway?

Whether built under license such as would be conformable to the purpose of the company, or as of right, looking at the place in question as part of the highway, the company are clearly subject, in light of what happened afterwards, to the liability that attaches to them in every case where they use the public highway.

What happened is this. The bridge was needing reconstruction; the public needs were growing; the company and other owners of lands were getting tired of so irksome a situation. They agreed to dedicate, and so far as they could dedicated, by making a plan, dated 28th July, 1902, and registered as No. 1,248, in the registry office on the 22nd July, 1903.

This plan bears upon it the following certificate:

> This plan shews the lands coloured pink which by this plan and registered plans numbers 528, 661 and 1135 are laid out as Glen Road, Pelham Place, Bin-Scarth Road, Scholfield Avenue, Edgar Avenue and Maclennan Avenue and all parts of the said roads, avenues and place which are not or have not already been dedicated as public highways *are hereby dedicated as public highways* and for such purpose all estate and interest therein *is hereby assigned and conveyed to the corporation of the Township of York*, as witness the hands and seals of the parties hereto. Dated the 28th of July, A.D. 1902. (Signed, sealed and delivered, in the presence of R. J. Maclennan.)

It is executed by the company affixing their seal and many other owners signing and sealing the same. It is certified to by a surveyor as correct. The roads or road allowances referred to as pink coloured include the eighty foot wide strip across the ravine which has been referred to so frequently already.

Lands were thereafter sold and deeds thereof registered in accordance with said plan in a way that, by the terms of R.S.O. ch. 181. sec. 39, constituted this strip of land a public highway.

But we find, side by side with these events, others

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marching along to fit into and so supplement these acts as to complete the dedication of the entire strip.

That intended dedication was acted upon by the legislature of Ontario, by 3 Edw. VII. ch. 89, being "An Act respecting Glen Road Bridge, in the Township of York."

I think a good deal might be said in support of the position that this Act might be taken as a legislative declaration that the bridge had long before the passing of the Act which was assented to on the 12th June, 1903, become to all intents a public bridge, and, therefore, to be presumed as dedicated at an earlier stage than the date of this legislation.

I do not conceive it necessary to do more than indicate that a consideration of the various dates, and the order of events I have related might be taken to indicate that this legislation as well as this declaration, emanating from the company who owned the land, was in truth the fulfilment of a long settled purpose that something like this should happen to the bridge and the land in question. Clearly, as if it had been admitted on the pleadings, I take it these acts, at all events coupled with the action of the township council in obeying the mandate of the legislature by reconstructing the bridge, may be looked upon as a final and conclusive acceptance by the public of the proffered dedication.

Let us see how that bears on the company and its obligations now in question. It is not now, as the result of all this, the case of an owner of a highly dangerous wire adjoining or adjacent to the highway, but of an owner, whose highly dangerous wire has, by reason of neglect, become a public nuisance on the highway, even assuming it to have been in some way or other brought there in the first place lawfully.

The statute enabling the company to use the public highway enables them to maintain works so constructed and must, I think, be taken, by implication, to mean a maintenance in a proper manner so as not to become a public nuisance.

It seems needless to argue that a wire of the character in question, fourteen or twenty inches from a bridge, such as that in question, strung along and over a public highway, is a nuisance. Companies engaged in such operations must conduct them with due regard to the public safety when enjoying the liberty of using the public highway in common with the rest of the public.

This solution of the highway question changes the whole aspect of the case. The question of notice can hardly be said to arise upon such a solution.

The conceivable case of a company having a clear grant of right to use a piece of private property a distance from the public highway, and that highway being suddenly enlarged in width, so as to render a continuation of the wire dangerous, although on private ground, might raise the question of the necessity for notice in a way that is not now raised in this case.

This case is: The company believing all the time that they were on the public highway and for over a year, at least, before the accident actually being thereon, chose to set up that they had not notice of the changes of structure upon the highway. I think the company are not relieved from their duty to the public by simply constructing properly. They must observe what experience teaches them more than anybody else the possibility of wires of this character getting out of repair, breaking down, or in many other ways becoming a source of danger to the public. If they choose for a long period of time to neglect that

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duty, I think they must, when on a public highway, in like manner as municipal corporations, be presumed to know that which it was their duty to know in relation to the want of repair of their property on the public highway. The obligation to repair in such a case is analogous to the obligation of a municipal corporation bound to repair. I think the analogy may well be, in relation to notice, treated as complete.

The facts are found by the jury, on evidence proper to be left to the jury, and I think the judgment of the learned trial judge thereon ought to be restored. The appeal should be allowed with costs; but I cannot help remarking that the proof adduced might well have been made clearer and ought to have been, when once made, kept before the court.

MACLENNAN and DUFF JJ. concurred with His Lordship Mr. Justice Davies.

Appeal allowed with costs.

Solicitors for the appellants: *Millar, Ferguson & Hunter.*

Solicitors for the respondents: *Smith, Rae & Greer.*