Supreme Court of Canada
German v. City of Ottawa, (1917) 56 S.C.R. 80

Date: 1917-11-28

W.M. German *(Plaintiff) Appellant;*

and

The City of Ottawa *(Defendant) Respondent.*

1917: November 7, 28.

Present: Sir Charles Fitzpatrick, C.J. and Davies, Idington, Duff and Anglin JJ.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Negligence—Municipal corporation—"Gross negligence"—Ice and snow—Personal injuries—Weather conditions—"Municipal Institutions Act," R.S.O. (1914), c. 192, s. 460(3).

Sec. 460(3) of the "Ontario Municipal Institutions Act" provides that "except in cases of gross negligence a municipality shall not be liable for injury caused by ice or snow upon a sidewalk." The City of Ottawa undertakes the work of removing snow from the sidewalks and keeping them safe for pedestrians.

Held, that failure to sand or harrow a sidewalk before 9 a.m. of February 2nd, when the conditions calling for it only arose on that morning, if negligence at all, is not "gross negligence," and the city is not liable for personal injury caused at that hour by ice on the sidewalk especially if it was not a place of special danger nor on a street of heavy traffic and did not call for immediate attention.

Held, also, that reducing the working staff on the day of the accident was probably not "gross negligence" in the absence of evidence that such reduction caused the injury.

Held, per Fitzpatrick C.J. and Idington J. dissenting, that after a thaw for some days the temperature fell on the afternoon of the day preceding the accident and the city officials should have realized that the sidewalks would be dangerous on the following morning. It was, therefore, "gross negligence" to reduce the working staff and to fail to do work on the sidewalk where the accident occurred.

The judgment of the Appellate Division (39 Ont. L.R. 176) was affirmed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario[1], reversing the judgment at the trial in favour of the plaintiff.

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[1] 39 Ont. L.R. 176.

The material facts are stated in the above head-note.

Belcourt K.C. for the appellant. “Gross Negligence” has been defined by this court to be “very great negligence:” City of Kingston v. Drennan[2].

[2] *27 Can. S.C.R. 46.*

The defendants in allowing the dangerous condition of the sidewalk, where the plaintiff was injured, to remain until 9 a.m., without sand or harrowing, was very great negligence. See *Huth v. City of Windsor*[3]; *Cranston v. Town of Oakville*[4].

The findings of fact by the trial judge should be maintained: *Johnston v. O'Neill*[5].

Proctor for the respondent, cited Ince v. City of Toronto[6]*; Bleakley v. Corporation of Prescott*[7]*; Lynn v. City of Hamilton*[8]*, and Palmer v. City of Toronto*[9]*.*

THE CHIEF JUSTICE (dissenting).—I concur with Mr. Justice Idington.

DAVIES J.—I concur with Mr. Justice Anglin.

IDINGTON J. (dissenting)—The learned trial judge gave effect to the claim of the plaintiff by finding that the respondent had been grossly negligent of its duty in relation to the ice on the sidewalk which caused the appellant to fall and thereby suffer serious injury. The Court of Appeal reversed that decision and much was made of the opinion judgments of the Chief Justice in appeal and of Mr. Justice Lennox on the part of the court, relative to the question of what constitutes gross

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negligence within the meaning of the "Municipal Act," section 460, sub-section 3.

Chief Justice Meredith, in attempting to define what might be claimed as and to define "gross negligence," said:—

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[3] 34 Ont. L.R. 245, 542.
[4] 10 Ont. W.N. 175, 315; 55 Can. S.C.R. 630.
[5] (1911) A.C. 552, at page 578.
[6] *27 Ont. App. R. 410; 31 Can. S.C.R. 323.*
[7] *12 Ont. App. R. 637.*

> If the same condition of the sidewalk; or a like condition, as that which existed when the respondent fell upon it had continued for a considerable number of days, negligence, and even gross negligence, would have been proved if that condition could practicably have been prevented.

I cannot agree with this definition, and to the implications therein when applied to streets in a thickly populated part of a city like Ottawa.

In every case in which the term "gross negligence" has to be considered, regard must be had to all surrounding circumstances in which the city or municipality is placed in relation to the work in question and the reasonable requirements for prompt and efficient service in relation to the maintenance thereof in good repair. What might be gross negligence in a densely populated part of a city like Ottawa might not be gross negligence, or perhaps negligence at all, in a rural municipality possessed of a highway over which there might not be a traveller for days at a time.

Parties concerned in litigation dependent upon the section in question might be well advised on either side to be ready to present more direct evidence of the surrounding facts and circumstances than are made clearly to appear in this case. What exists of common knowledge available to a judge and what inferences may be drawn from the evidence that was given I think must be held sufficient in this case to enable us to pass upon the judgment in question.

At all events I think the learned trial judge must be presumed to have been in quite as good a position to determine the crucial fact of whether there was

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"gross negligence" or not as any appellate court. We have some evidence as to the extent of Ottawa and some general knowledge of the size and general character of the city, and I think we

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[8] *10 Ont. W.R. 329.*
[9] *38 Ont. L.R. 20.*

may also be able to use our stock of common knowledge relative to the vicissitudes of climatic conditions in Ottawa.

Along with that we have evidence directly bearing upon the conditions existent in what is sometimes referred to in Canada as a January thaw.

It is explained that on Monday there was rain and thaw as there had been for five or six days preceding it. On Tuesday there seemed to come a change which any rational human being fit to appreciate the fact and to be in the service of the city in charge of a large part of its streets ought to have recognized immediately a freezing temperature which in all human probability, following the rain of Monday and preceding days, would render the sidewalks in Ottawa on Wednesday morning what the witnesses have referred to as a “glare of ice.”

The evidence of the foreman and other witnesses seems to put beyond doubt the facts that whilst there nine men engaged on Monday and a corresponding team force for the district in which the sidewalk in question exists, there were assigned to the duty there to be done on the Wednesday on which the accident took place only five men and little, if any, team force.

Then it is to be observed that it is conclusively proven that it was raining very much on Monday, some of the respondent’s witnesses going so far as to say that it had been raining all day on Monday, and others saying twenty-four hours rain on Monday, and others again that the sidewalks in some places were flooded. I incline to think some of the expressions relative to the extent of the amount of rain and

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thaw on Monday were possibly exaggerated, yet I cannot get rid of the impression that it was one of those days when the sanding process would result in little good by reason of the rain and thaw washing it away. Whether washed away or not, certainly the conditions of Monday and the

preceding days were clearly likely to prepare for the condition of things that did happen, of a freezing up on Tuesday afternoon and night which demanded, instead of a relaxing of effort and reduction of the staff of men to half of those engaged on Monday; that there should have been an effort to increase them, or at all events keep the force going.

A perusal of the entire evidence in the case leaves my mind much puzzled with what the foreman in charge of the sidewalk in question really was about.

The assistant city engineer tells of the force over the city having been doubled for these three days including Wednesday.

The city's street superintendent gives the figures for the entire city shewing the employment of fifty-three men on Monday and a corresponding increase in team force, that on Tuesday there were fifty-one men and sixteen horses and sleighs, and that on Wednesday there were only forty-five men and seventeen horses and sleighs.

It would be obvious from the consideration of these figures that the reduction of man force over the entire city would seem to have come almost entirely out of the force employed for St. George's Ward. Why there should be this remarkable falling off under the circumstances when it did not seem to occur to other superintendents to do anything like that (but on the contrary practically to maintain their whole force) is not explained and is inexplicable upon any other

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ground than that there was gross negligence on the part of those concerned in failing to appreciate the conditions they had to contend with on Wednesday morning.

The evidence is most unsatisfactory as to what they were doing on Wednesday and does not in any manner explain away the evidence of the appellant and Mr. Burns as to the condition of the street they had to travel on,

It is made clear by Mr. Burns that from the moment he stepped out of his house and took a survey of the street and the sidewalk, that he decided the centre of the road was the safest place to go on account of the ice on the sidewalk. I think evidence of that kind is of unquestionable force and worth a great many guesses on the part of civic employees as to what they thought they possibly did on that day, or some other day, or what they must have happened to be doing by reason of something else having happened.

Just by way of illustration of how that part of the city was being attended to I may refer to the evidence of Mr. Chapleau who was called for the defence. He tells us that he had phoned to the city hall to have some water removed from the street in order that he might get out of his house by other means than by laying down a plank to travel upon. His phoning brought no response in the way of service until the next day.

That incident, to my mind, illustrates what were the probable conditions permeating the force at the time in question. But not only that day but for eight years previously had Mr. Chapleau had occasion to make the like call, and yet in face of such experiences spread out upon the record in this case, counsel for the city sees fit to make it a ground of complaint against the appellant that neither he nor Mr. Burns

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had called the attention of the city authorities to the state of the sidewalk.

Perhaps this incident and Mr. Chapleau's experience illustrate better than anything else in the case how wretchedly in some parts of the city the business of taking charge of the sidewalks has

been managed. And I think it is from incidents like that that inferences may be drawn as to the general condition of the service.

If that fairly illustrates the nature of the service that was being given, then so much more reason for finding that there was gross negligence. We are furnished by witnesses for the defence with evidence of the kind of energy that was expected to be applied when sanding the sidewalk would be of any avail. They would seem to have been required to get up at two o'clock in the morning and be on duty at five o'clock, as they swear they were on Sunday night and Monday morning.

The changed condition on Tuesday afternoon and night demanded something akin to the like energy on Wednesday morning if the people were to be permitted to use the sidewalks with safety.

No doubt many thousands have to tread the streets of Ottawa between six and seven o'clock in the morning, and so on at various times till the hour when men like the plaintiff and the civil service part of the population proceed to work. Yet we are told, and it is conclusively established, I think, that there was no sanding done upon the sidewalk in question before nine o'clock on the day of the accident, and I doubt if there ever was that day. If that does not constitute "gross negligence" under such circumstances what would? It certainly would not have been "gross negligence" for the pathmaster in a country district to have delayed that long, but for a city such as

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Ottawa to be told that it is permitted by statute to neglect a service so obviously needed for the safety and comfort of those using its streets is, I most respectfully submit, to encourage that neglect of duty, only too obviously often apparent on the part of municipal authorities in our Canadian towns and cities.

Again, with great respect, I submit that Mr. Justice Lennox was under a misapprehension of fact when he speaks of what was done as follows:—

> It is shewn that a double force was employed, that the fires were lighted at two o'clock and the men and teams were at work on the streets by four o'clock on Monday morning and kept regularly on at work until the time of and after the accident, doing all that they could do, and as to ordinary level streets doing more, I venture to think, than the statute demands.

It was admitted in argument as already stated that this force which was applied on Monday was cut down on Wednesday morning to consist of five men instead of nine. I fear there has been a misapprehension in the court below of the actual facts as they appear when properly analyzed, and hence the reversal of the learned trial judge's judgment.

The conditions on Wednesday, I repeat, demanded more men, more sand and more energy. The battle on that morning was not the hopeless task that the men were sent to face on Monday, if the description of things that some give is correct, but it was a condition of things that required prompt energetic action with sand or harrowing or whatever might produce the best result most speedily, and enable the citizens to travel the streets at the time of day they needed them.

I think the judgment appealed from should be reversed, and that of the trial judge be restored with costs throughout.

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DUFF J.—The appeal should be dismissed with costs.

ANGLIN J.—Seriously injured by falling on an icy sidewalk on the south side of Besserer Street, east of Charlotte Street, in the City of Ottawa, "a trifle after 9 o'clock" on the morning of Wednesday the 2nd of February, 1916, the plaintiff recovered judgment against the municipal corporation for $2,250 damages after a trial before Mr. Justice Britton. That judgment was unanimously reversed, and the action dismissed by the Second Appellate Division. The plaintiff

now appeals to this court. Our right and our duty to review the evidence, to form our own conclusions upon it, and to reverse the judgment of the provincial appellate court, if satisfied that upon the whole case the respondent should be held liable, is undoubted. But it must clearly appear that the judgment of the Appellate Division was erroneous before we can reverse it. Demers v. Montreal Steam Laundry Co.[10]

In Ottawa the municipal corporation does not, as is the case in many other Ontario cities, impose upon property owners the duty of dealing with snow and ice so that the sidewalks on which their property fronts shall be kept passable and reasonably safe for pedestrians. It undertakes to perform that work itself. The system adopted is to remove the snow by horse-drawn plows and to deal with danger from slippery surfaces by harrowing them or sanding them. As the learned trial judge said:

> The city has a difficult and expensive proposition, involving the expenditure of large sums of money to keep miles of streets in a reasonably safe condition.

As said in the Appellate Division by the learned Chief Justice of the Common Pleas, a judge of many years' experience:

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> It was well proved and not denied that the appellants' methods and means for the performance of this duty were good. I should have no hesitation in saying, more than such as are ordinarily provided, and during this exceptional week, ending on the day of the accident, the usual road-gang had been doubled, and according to the testimony of those connected with it, testimony that is not questioned by other testimony or by any circumstances, there had been unusual vigilance and care during that trying weather.

As put by Mr. Justice Lennox:

> It is not pretended that the appellants did not make reasonable and careful preparation in advance to meet winter conditions, or that their system was improper or inadequate. This

[10] 27 Can. S.C.R. 537.

> was not a sidewalk of exceptional character nor was it a place of peculiar hazard. It was like other miles and miles of streets in Ottawa, a level, ordinary walk.

The plaintiff's complaint is not that the system was defective, but that there was gross negligence on the part of civic employees, as put by the learned trial judge:

> in not doing what it was intended should be done.

That at the time of the unfortunate occurrence the sidewalk was in an extremely dangerous condition is not controverted. Whether the failure of the city employees to prevent that condition arising or to remove it before 9 a.m. on Wednesday the 2nd of February amounted to "gross negligence" (defined by this court as "very great negligence"; Kingston v. Drennan[11]); which is the statutory condition of the defendants' liability (R.S.O. ch. 192, sec. 460 (3)), is, therefore, the vital question involved in this appeal. Its solution must depend upon the notice of the existence of the dangerous condition which the city authorities actually had, or which should be imputed to them, and their opportunity of remedying it. It is obvious that the state of the weather immediately prior to the accident, and the relative situation of the place where it occurred must be taken into account in determining whether there was such a failure to

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take advantage of reasonable opportunity to prevent or remove the admitted danger, as amounted to gross negligence.

There is no direct evidence that the city's servants had any actual or specific notice of the existence of the danger at the locus of the accident. But it would be absurd to suggest that they should not have realized at least the probability, if not the certainty, of its existence from early on Wednesday morning. Having regard, however, to the preceding weather conditions, it is also practically certain that similar danger must have existed at a great number of other places upon

[11] 27 Can. S.C.R. 46, at page 60.

the five hundred miles of sidewalks in the city—of which some forty or fifty miles were in St. George's Ward—many of them carrying much heavier traffic and therefore more urgently demanding attention than the part of Besserer Street in question, near the eastern limit of the city, upon which traffic is comparatively light. As stated, there is nothing in the record to suggest that this place was one of special hazard which called for preferential care or treatment. In view of these facts and assuming the adequacy of the city's system, which is not attacked, if the duty to remove the danger at the point in question arose only on the Wednesday, I should not be prepared to hold that failure to fufil it before 9 o'clock in the morning was such gross negligence as entailed liability to the plaintiff. As put by the ward street foreman, Hackland:

> St. George's Ward has a lot of hills and we have to sand them oftener than we sand the level streets. * * * We were looking for dangerous spots and probably had not reached that spot,

i.e., where the plaintiff fell.

I have not overlooked the fact that the nine men who had been employed on Monday and Tuesday

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were reduced to five on Wednesday morning. This may have been a mistake. But there is no evidence that if the services of the nine had been retained the place in question would or should have been reached by the sanding men before 9 o'clock on Wednesday morning. I rather think it would not, as places where there is heavy traffic and hills where danger is to be expected demanded attention first. The reduction of the staff, if negligence at all, has not been shewn to have caused the accident, and I think that in any case it probably could not be designated "gross negligence," If, therefore, there was not gross negligence in the failure to sand or harrow the spot in question if the condition requiring it only arose on the Wednesday morning, it becomes material to consider the evidence of the conditions which prevailed on the preceding days, and

especially on the Tuesday, in order to determine whether sanding or harrowing should have been done on that day.

The plaintiff himself says that for six days before he was injured there had been rain on and off, and his witness Burns says:

> It was raining for three or four days around that period * * * a very heavy downpour of rain.

Although the plaintiff and Burns both stated that there had been no attempt to sand the sidewalks on Besserer Street east of Charlotte Street for six or seven days before the accident, I am satisfied that they were mistaken. The positive and clear testimony of Lewis and Sauvé convinces me that they sanded these sidewalks on Monday the 31st of January. The evidence establishes that it rained heavily on that day, and it is quite possible that the sand had been washed away or, more likely still, that it had sunk to the bottom of the water lying on the sidewalks and had thus dis-

appeared before the plaintiff and Mr. Burns, who presumably went down town early in the morning, returned later in the day—possibly after dark in the afternoon or evening—or that it escaped their attention for some other reason. I am equally satisfied that the sanding done on Monday, however efficient at the time, proved wholly ineffectual to prevent the condition of glare ice which undoubtedly existed on Wednesday morning. No doubt because he realized that if the duty to sand or to harrow arose only on the morning of the accident, it would be almost impossible to maintain that there had been any negligence on the part of the civic employees—still less gross negligence—Mr. Belcourt strenuously contended that sanding should have been done on Tuesday, and, in order to establish this, he insisted that on that day there was frost and that, at all events in the afternoon, the sidewalks were frozen up. The plaintiff's own statement is that it began to get colder on Monday or Tuesday. The great weight of evidence, however, is that the thaw continued on Tuesday. The official weather record from 8 p.m. Monday

to 8 p.m. Tuesday is:—Night, overcast and mild; Day, cloudy, clearing, wind and a little colder—Temperature, maximum, 41°: minimum, 26° Fahrenheit. From 8 p.m. Tuesday to 8 p.m. Wednesday:—Temperature, maximum, 26°, minimum, 12°; and Thursday, Temperature, zero. This record of a steadily falling thermometer makes it clear that the frost began some time before 8 p.m. on Tuesday and warrants the inference, in my opinion, that it began about nightfall This conclusion is borne out by the statement of the plaintiffs witness, Burns, that “it turned cold on Tuesday night.” The foreman, Hackland, says, “it was tightening up a little that day.” During Tuesday his men were en-

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gaged in opening gully grates, digging trenches to let water off the sidewalks, picking bad spots and doing some sanding.

Mr. S.J. Chapleau, who resides on the north side of Besserer Street, about opposite where the plaintiff fell, tells us that there was “a lot of water” on the sidewalk opposite his house, and that on the Wednesday morning he had to procure a plank in order to cross this water when leaving his house. It was let off by a trench dug later on that day by city workmen in compliance with a request made by Mr. Chapleau at noon on the previous day.

While there is no evidence that it rained on Tuesday, it would seem not improbable that there was water on the sidewalks so that sanding or harrowing them would have been futile. The sand would have sunk to the bottom of the water and the grooves made by harrowing would have been filled up. As put by the learned Chief Justice of the Common Pleas:

> There is no evidence that sanding on Monday or on Tuesday would have prevented the condition existing at the time of the accident. So too, as to harrowing, the marks would be washed out or filled in by the rain or melted snow and ice each day and frozen over each night, * * * What (sand) was not washed off would have sunk in the water and be useless in the morning, if put there even the day before.

Referring to the sanding done on the Monday, the learned trial judge said:

> It may well be that water flowing from the south or following a rain froze over the sand so that none was in sight, and was not then of any use to render the walk more safe for persons walking on the street.

There is nothing to shew that sanding done on the Tuesday would not have been equally ineffectual. In my opinion the evidence rather indicates that it would.

Making due allowance for the exceptional weather conditions with which the civic employees had to contend, I am not convinced that the conclusion of the

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Appellate Division, that it was not established that the dangerous condition of the place where the plaintiff fell was attributable to gross negligence on the part of the defendants' servants, is so clearly erroneous that we should reverse it. On the contrary, an independent study of the evidence has led me to the same conclusion.

Appeal dismissed with costs.

Solicitors for the appellant: German & Morwood.

Solicitor for the respondent: Frank B. Proctor.