THE CORPORATION OF THE TOWN OF CORNWALL (DEFENDANT)..... APPELLANT;

AND

ANNIE DEROCHIE (PLAINTIFF).....RESPONDENT.

1894
*Oct. 26.
1895
*Mar. 11.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Municipal corporation—Negligence—Repair of street—Accumulation of ice—Defective sidewalk.*

D. brought an action for damages against the Corporation of the Town of C. for injuries sustained by falling on a sidewalk where ice had formed and been allowed to remain for a length of time.

*Held*, Gwynne J. dissenting, that as the evidence at the trial of the action showed that the sidewalk, either from improper construction or from age and long use, had sunk down so as to allow water to accumulate upon it whereby the ice causing the accident was formed the corporation was liable.

*Held*, per Taschereau J.—Allowing the ice to form and remain on the street was a breach of the statutory duty to keep the streets in repair for which the corporation was liable.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Chancery Division (2) in favour of the plaintiff.

The plaintiff was injured by falling on a sidewalk of a street in the town of Cornwall in consequence, as she alleged in her statement of claim, of water having been allowed to accumulate on said sidewalk which, by alternately freezing and thawing, rendered the surface uneven and slippery. The action was twice tried, the first verdict for plaintiff for $500 damages having been set aside by the Divisional Court and a new trial ordered which resulted in a verdict for plaintiff for $700 which was sustained by the Divisional Court and the Court of Appeal.

*PRESENT:—Sir Henry Strong C.J., and Taschereau, Gwynne Sedgewick and King JJ.

(1) 21 Ont. App. R. 279. (2) 23 O.R. 355.

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*McCarthy* Q.C. and *Leitch* Q.C. for the appellant. Unless the corporation could be indicted for a nuisance it is not liable to plaintiff in this action. *Ringland* v. *City of Toronto* (1); *Ray* v. *Petrolia* (2); *Boyle* v. *Dundas* (3); *Hutton* v. *Windsor* (4).

The corporation is not liable for mere non-feasance. *Sanitary Commissioners of Gibraltar* v. *Orfila* (5); *Municipality of Pictou* v. *Geldert* (6).

As to what constitutes negligence in a case such as this see *Skelton* v. *London & North-Western Railway Co.* (7); Beven on Negligence (8).

*Moss* Q.C. for the respondent referred to *The Queen* v. *Greenhow* (9); *St. John* v. *Christie* (10); *Town of Portland* v. *Griffiths* (11).

THE CHIEF JUSTICE.—My reasons for dismissing this appeal are so exactly identical with those stated in the judgments of the Chief Justice and the Chancellor, that anything I can say is only a repetition of what has already been well said by both these learned judges.

I am of opinion that the learned Chief Justice of the Queen's Bench could not have withdrawn the case from the jury. There was evidence to show that the sidewalk was in a defective state; that it had been either originally improperly constructed, or had from age and long use sunk down so as to allow water to accumulate upon it, and in consequence of this the ice which caused the accident was formed. There being this evidence a non-suit would have been manifestly wrong.

(1) 23 U.C.C.P. 93.
(2) 24 U.C.C.P. 73.
(3) 25 U.C.C.P. 420.
(4) 34 U.C.Q.B. 487.
(5) 15 App. Cas. 400.
(6) [1893] A.C. 524.
(7) L.R. 2 C.P. 631.
(8) P. 111.
(9) 1 Q.B.D. 703.
(10) 21 Can. S.C.R. 1.
(11) 11 Can. S.C.R. 333.

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The Chief Justice.

I do not consider the weather alone caused the formation of the ice on which the respondent slipped and fell, for without the structural defect there would, according to some of the witnesses whose testimony it was for the jury to consider and weigh, have been no ice at the spot.

The case on all the questions which arose was left to the jury in a charge which I have read more than once and which I consider to have been a clear, full and able exposition of the evidence and of the points on which the jury had to pass.

The admission in evidence of the by-law was, I think, a correct ruling, and even if it were not it would not, in my opinion, in the present state of the law, necessarily be ground for a new trial.

Apart from the insufficient condition of the sidewalk there may have been no evidence for the jury; probably there was none. I do not enter upon the question much dwelt upon in the judgment of Mr. Justice Burton as to the liability of municipalities generally for accidents caused by ice and snow on streets and highways for the reason that I do not think it arises in the present case.

The appeal must be dismissed with costs.

TASCHEREAU J.—This is a clear case for a dismissal. The case of *Caswell* v. *St. Mary's Road Co.* (1), seems to me to be good law; it was there held that if snow collect on a certain spot, and by the thawing or freezing the travel upon it becomes specifically dangerous, and if this special difficulty can be conveniently corrected by removing the snow or ice, or by other reasonable means, there is the duty on the person or body, on whom the care or reparation rests, to make

(1) 28 U. C. Q. B 247.

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the place fit and safe for travel. I agree with Chief Justice Hagarty's reasoning.

GWYNNE J.—I am entirely of opinion that there is no evidence in the case of any neglect upon the part of the corporation of the town of Cornwall to keep the street upon which the accident which caused injury to the plaintiff occurred free from ice, much less of the fact that such accident and injury can be attributed to any such neglect if there had been any. The accident was plainly attributable to the peculiar state of the weather at the time, namely, a severe frost suddenly ensuing upon a thaw and melting of the snow upon the sidewalk thereby causing some ice there upon which the plaintiff slipped and fell. The appeal should, in my opinion, be allowed with costs and judgment be ordered to be entered for the defendants as upon total failure of the plaintiff to prove the cause of action as alleged.

SEDGEWICK and KING JJ. concurred in the judgment of the Chief Justice.

*Appeal dismissed with costs.*

Solicitors for appellant: *Leitch, Pringle & Harkness.*

Solicitors for respondent: *Maclennan, Liddell & Cline.*