THE COUNTY OF HASTINGS (DEFENDANT) ..... } APPELLANT;

AND

GEORGE CLINTON AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

1923
*Nov. 6, 7.
*Dec. 21.

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

Municipal corporation—Highway—Repair—Dangerous place—Warning to travellers—Negligence.

The failure of a municipal corporation to provide an adequate guard for the approach to a bridge at a place where the narrowing of the road and other conditions make such approach dangerous is a breach of its statutory duty to keep the highway in repair and makes it liable to compensate a person injured for want of such guard. *Raymond* v. *Bosanquet* (59 Can. S.C.R. 452) dist.

Judgment of the Appellate Division (53 Ont. L.R. 266) affirmed.

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

(1) [1898] Q.R. 8 K.B. 293.

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APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) affirming with a variation as to the damages, the judgment at the trial in favour of the respondents.

Just after dusk on the 18th day of September, A.D. 1921, the respondents, Dr. George Clinton, his wife Lillie M. Clinton, and their daughter Jean M. Clinton, travelling in a Ford coupe driven by the doctor, fell into a small gully or ditch over which was a culvert or bridge, on a road maintained by the County of Hastings, and under its jurisdiction. The culvert or bridge has a length of about 11 feet, and a driving width of about 12 feet, being about the same width as the via trita adjoining it on either end.

The culvert rests on stone abutments built up from the bottom of the ditch upon which are placed beams or stringers, and on these is laid a plank floor with a second plank floor on top. On each side of the culvert floor are secured wheel guards consisting of beams 6 inches by 6 inches, between which is the driving space. The perpendicular bank of the gully was concealed by small shrubs growing at the edge and from the bottom of the gully.

The doctor was driving very cautiously and when he was a short distance west of the culvert he saw by their lights that cars were coming towards him from around the slight bend in the road. He thereupon turned off the travelled portion of the road almost entirely on to the level grass and proceeded very slowly until the two cars passed him. At this point he was about 30 feet, or a little more, from the culvert. He was proceeding slowly and very cautiously back to the roadway when he came to the culvert or bridge, which he did not see and of which he was entirely unaware. The wheels on the right side of the coupe failed to gain the floor of the culvert securely, if at all, and the car dropped flat on its right side to the bottom of the gully, about five feet below, and lay parallel with the culvert, the left wheels being approximately at the south edge of the culvert.

The occupants of the car were all badly injured, the daughter especially so. Separate actions were brought against the county and each plaintiff was given damages.

(1) 53 Ont. L.R. 266.

The Appellate Division sustained the judgment and increased the amount awarded to the daughter.

Tilley K.C. and *Mikel K.C.* for the appellant. The municipality cannot be expected to keep all its roads in the same state of repair. The nature of the country, the character of the roads and various other matters must be taken into account. *Castor* v. *Uxbridge* (1) per Harrison C. J. And see *Delaney* v. *City of Toronto* (2); *Wilson* v. *Lambton* (3).

D. L. McCarthy K.C. and *F. E. O'Flynn* for the respondent referred to *Foley* v. *Township of Flamborough* (4); *Kelly* v. *Township of Carrick* (5); *Homewood* v. *City of Hamilton* (6).

THE CHIEF JUSTICE.—At the close of the argument in this appeal I entertained grave doubts of the appellant's liability. A subsequent reading of the evidence and the record did not result in the removal of my doubts.

I do not feel, however, that the judgment appealed from is so clearly wrong that I would be justified in reversing it, and for this reason I will not dissent from the judgment dismissing the appeal.

IDINGTON J.—The respondents sued the appellant county, which had for forty years or more assumed jurisdiction over the road in question, and was, at the time here in question, responsible therefor, to recover damages they respectively had suffered by reason of the motor car in which they were driving having capsized over the side of a bridge on said road five or six feet above the bottom of the creek or gully it crossed. It was a running brook but dry at seasons. The bridge was about sixteen feet in length, and in width of roadway over it about twelve to fourteen feet. There never had been erected thereon at either side thereof any hand railing, such as an engineer of long experience testifies it should have had, two or three feet high with projecting wings on the sides of the road beyond the bridge to warn and protect travellers.

(1) 39 U.C.Q.B. 113 at p. 122.
(2) 49 Ont. L.R. 245 at p. 251.
(3) 22 Ont. W.N. 474 at p. 476.
(4) 29 O.R. 139.
(5) 2 Ont. W.N. 1429.
(6) 1 Ont. L.R. 266.

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Indeed common sense alone, and what it usually dictates, would seem to me to have required appellant to furnish such protection. Calling this bridge, five to six feet high, a culvert, I respectfully submit, cannot change its real character.

The only pretence of such a guard was what appellant's counsel call a "wheel guard," consisting of a scantling six inches by four, nailed to the planks on top of the bridge, about a foot on either side thereof, and about a foot from the end of the planks covering the bridge. This six by four-inch scantling was probably nailed with the six-inch side to the floor of the bridge.

There was thus left about twelve feet of road to travel upon across the said bridge.

Mr. Justice Mowat the learned trial judge, on the invitation of counsel for the parties concerned, after the evidence was all in went with them to see and inspect said bridge and all relative thereto that could enable him to appreciate, correctly, the said evidence.

The immense advantage he thereby had, I respectfully submit, is, or ought to be held, hard to overcome.

In a full and able judgment dealing with all the points raised before him, and here, the learned trial judge concluded that there was no evidence of negligence on the part of the respondents, or either of them, and that there was evidence, as given by said engineer, of negligence on the part of the appellant, and gave judgment for each of the respondents and assessed their respective damages.

On appeal to the Appellate Division of the Supreme Court of Ontario that judgment was maintained save as to the assessment of damages to be allowed a daughter of the other respondents which were increased by adding $6,000 to what the learned trial judge allowed.

From this finding Mr. Justice Masten dissented as to the question of the responsibility of the appellant but, if responsible at all, agreeing with the majority of the court that the increased damages to the daughter should be allowed.

In his dissenting judgment he cites a large number of Ontario cases having little resemblance to this and of

which but two came to this court and would bind us, one being *Raymond* v. *Bosanquet* (1).

In regard thereto the circumstances there in question were quite distinguishable from those in question herein, and turned largely on the contributory negligence of those for whom the appellant there was responsible. Indeed it turned largely, if not entirely, upon questions of fact and I assented with much doubt, and I see two of my brother judges did also.

We must be sure of our facts before overruling a court below.

In the other case of *Magill* v. *Township of Moore* (2), which came here and is relied upon by Mr. Justice Masten, I dissented here, but the circumstances in evidence, I respectfully submit, as any one reading the case must see, did not turn upon anything like what is involved herein, but were complicated by the actions of a local telephone company.

I agree with the finding of facts by the learned trial judge save as to those bearing upon the assessment of damages due the daughter respondent herein, and with the reasoning of Mr. Justice Rose, writing the chief judgment of the majority in the court of appeal below, relevant to the facts in question herein and the increasing of damages already referred to.

I must therefore hold that this appeal should be dismissed with costs.

DUFF J.—I concur in the result.

ANGLIN J.—The very fact that the accident which occurred befell a careful driver almost establishes a case of *res ipsa loquitur* in regard to the necessity for a wing fence or railing on the approach to the bridge where it happened and consequent negligence on the part of the county in failing to provide that safeguard. That such a guard would have prevented the accident seems reasonably clear. That it could have been provided at a comparatively small expense is conceded, although it is claimed that the expendi-

(1) 43 Ont. L.R. 434; 45 Ont. L.R. 28; and 59 Can. S.C.R. 452.

(2) [1918] 43 Ont. L.R. 372; 59 Can. S.C.R. 9.

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ture involved in placing such fences at all places in the county where similar conditions exist would be considerable. Assuming that to be the case, however, the county cannot, on that account, be relieved if it was its duty to have furnished the guard suggested at the bridge in question.

The facts are fully and accurately stated by Mr. Justice Rose in delivering the judgment of the majority in the Appellate Divisional Court and it is quite needless to repeat them here. There is no ground for doubting that Dr. Clinton drove cautiously in approaching the bridge. It is certainly unquestionable that he did not see the 5-inch or 6-inch timber wheel-guard or kerb which lay along the outside. He could scarcely have failed to see a whitened wing fence or railing if placed along the approach to the bridge to mark the narrowing of the highway to the width of the bridge.

On the whole evidence I am of the opinion that the danger of some such accident as befell the plaintiffs would have been manifest to the officials in charge of the maintenance of the road had they given the situation such attention as it should have received. Fences along the sides of country highways at dangerous places are very familiar. Railings to mark any sharp narrowing of the travelable portion of the road are quite common where there is risk of vehicles passing from it to rough or dangerous ground. Wing fences guarding the approaches to bridges, especially where they are narrow, can be seen on almost any highway. After giving to all the facts in evidence much thought and consideration I am of the opinion that the approach to the bridge in question was not

> in such a reasonable state of repair that those requiring to use the road (might), using ordinary care, pass to and fro upon it in safety. *Foley* v. *Township of East Flamborough* (1);

that, on the contrary, a condition existed dangerous for persons travelling by night, which proper attention on the part of the overseers would have discovered and against which reasonable diligence on the part of the county authorities would have provided. The following language of Mr. Justice Teetzel in *Kelly* v. *Township of Carrick* (2),

(1) [1898] 29 O.R. 139. (2) 2 Ont. W.N. 1429, at pp. 1430-1.

cited by counsel for the respondent, correctly states the law and is much in point:—

While it is difficult to define by any general proposition the exact extent of the obligation of municipal corporations to erect railings along their highways, a practical test is, whether there is a dangerous object or place so near to the line of travel as to make the use of the highway itself unsafe in the absence of a railing. If there is such an object or place so located, the municipality is bound to maintain sufficient guards to protect travellers from the dangers incident to it. Williams on Municipal Liability, pp. 190-194. In other words, a corporation is bound to erect barriers or railings where a dangerous place is in such close proximity to the travelled part of the highway as to make travelling upon it unsafe, whether by day or by night, in sunshine or storm.

It is not possible to define at what distance in feet or inches a dangerous place must be from the travelled part in order that it should be held to be in such close proximity that it must be guarded. It is in every case a practical question, to be determined by the good sense of the trial court, in the light of the evidence and of the principles of law applicable, whether the highway is or is not reasonably safe for public travel.

* * * *

With a quiet horse and in daylight, a traveller using ordinary care would not be in any peril from the unguarded embankment in question; but at night time, with a storm raging, the ground covered with snow, and the tracks obliterated, as they were on this occasion, I think a traveller would be in serious danger of driving over the embankment.

If the highway is dangerous under the above conditions, which are to be expected in this country—and I think it is, although it may be free from danger in broad daylight, the corporation has failed in its duty.

As put by Mr. Justice Rose:—

Too much must have been taken for granted; too little consideration must have been given to the needs of travellers.

I agree with that learned judge that

the trial judge who heard the witnesses and inspected the road was quite warranted in finding as he did, that the defendants were negligent, and that their negligence was the cause of the disaster.

Raymond v. *Bosanquet* (1), much relied on by the appellants is clearly distinguishable on its facts. The accident there happened by day. Had that been the case here it would have been very difficult for the respondents to maintain that neglect of duty by the appellants was the cause of the injuries they sustained.

I see no ground for interfering with the assessment of the damages made in the Divisional Court, which unanimously increased the amount awarded by the trial judge to Miss Jean Clinton, in whose case that learned judge had entirely omitted to take into account a most important element of loss.

(1) 59 Can. S.C.R. 452; 45 Ont. L.R. 28.

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MIGNAULT J.—The locus where the accident occurred can be briefly described.

A country road leads up to a wooden bridge or culvert which spans a small ditch, five and a half feet deep. The road is practically level, including the part covered by grass on either side of the travelled portion. It is about forty feet wide, and the bridge is twelve feet in width, which is practically the width of the travelled part of the road or the *via trita*. The ditch, often dried up, has walls or abutments on both sides made of rough stones on which the bridge rests, and which extend a small distance on either side of the bridge. The result is that the roadway, including the grassy portion, narrows down at the bridge from about forty feet to twelve feet. There was at the time of the accident a piece of scantling four by six inches on each side of the platform of the bridge. There was no railing on the bridge nor were there wing rails or fences along the side of the ditch. The advantage of having such wing rails or fences, especially when whitewashed so as to be visible at night, is obvious; and when as here a roadway crossed by a ditch is narrowed down where the ditch intersects to the width of a narrow bridge or culvert, and nothing shows that it is so narrowed, there is at night a danger that the driver of a carriage or automobile, unaware of the narrowing of the road, and unable to see the bridge and ditch on account of the darkness, may drive into the ditch and sustain injury. This danger is increased where, as is shown in this case, the bed and sides of the ditch are covered with bushes or shrubbery so that a person approaching the ditch, especially at night, might be unable to see the break in the roadway.

Such was the situation when on the evening of September 18th, 1921, between 7 and 8 o'clock, the respondents, Dr. George Clinton, his wife, Lily Clinton, and his daughter, Miss Jean M. Clinton, approached this bridge in a Ford motor car which Dr. Clinton drove, the three sitting on the same seat and Dr. Clinton being to the left. Earlier in the day they had passed over this same road, which for some time had been used as a detour on account of repairs being made on the main highway. They had gone to Madoc and were returning from Madoc to Belleville where they resided. None of them knew that they were

approaching a place where the roadway narrowed and where they had to cross a bridge. Their car lights were burning because it was almost dark, and they were proceeding cautiously, being on the look-out for a defective bridge which they had observed on the way to Madoc. When near the bridge, of the position of which he was unaware, Dr. Clinton saw the lights of two motor cars approaching from the direction of Belleville. Being a timid driver, instead of keeping to his half of the travelled portion of the road as was his right he drove partially on to the grassy part which, as I have said, was on the same level as the travelled part, and moving slowly he allowed the two cars to pass him. When they had gone he moved in a slanting direction so as to gradually come back on the *via trita,* but in so doing, not knowing that there was a bridge there, his right front wheel failed to get on to the bridge, or if it did it got outside the scantling and the car fell into the ditch, its right side down. All three respondents were badly injured, the greatest sufferer being Miss Clinton who was on the right side of the car.

The learned trial judge found that the bridge itself was in good condition but that it should have been guarded by a wing rail, indicating the narrowing of the roadway and the approach to the bridge. He therefore condemned the appellant to pay as damages $1,000 to Dr. Clinton, $600 to Mrs. Clinton, and $4,000 to Miss Clinton. It is proper here to state that Miss Clinton's claim was much the largest for, as the learned trial judge finds, she sustained a permanent injury to her right shoulder causing it to sink. This was a disfigurement and, as Miss Clinton had received a very expensive musical education and proposed to go on the concert stage, it was claimed that the accident would prevent her from following her chosen career.

The Appellate Divisional Court, Mr. Justice Masten dissenting, confirmed the award of damages as to Dr. and Mrs. Clinton, but increased the amount given to Miss Clinton from $4,000 to $10,000. Mr. Justice Masten, who dissented on the question of liability, agreed with the other members of the court that, if the appellant was liable, Miss Clinton was entitled to $10,000 for the injuries she suffered.

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It is from this judgment that the appellant appeals to this court on the ground, first, that there was no legal liability on its part for the accident, and secondly, that assuming liability existed Miss Clinton's damages should not have been increased.

The whole case was exhaustively and very ably argued, and we were furnished plans and photographs so that the contentions of the parties could be easily followed.

It is urged that Dr. Clinton and his co-plaintiffs are not entitled to succeed by reason of their contributory negligence. I need not consider whether Dr. Clinton's alleged contributory negligence would be an answer to the action of his wife and daughter, because I am of the opinion that Dr. Clinton was guilty of no such negligence. If anything he was too prudent, and as he was unaware of his proximity to the bridge, and as the learned trial judge believed him when he said he did not know there was a bridge there, although the car lights were burning I must hold that the plea of contributory negligence is not made out. He was within his rights in driving on to the grassy portion of the road to avoid an accident.

On the question of the liability of the appellant I have no hesitation in agreeing with the judgments of the two courts below. Notwithstanding the good condition of the bridge, as found by the learned trial judge, my opinion is that the situation where the road narrowed was a dangerous one at night, and that the appellant should have guarded against this danger by placing wing rails or a fence on the side of the ditch and leading up to the bridge, which being painted white or coloured white would have been visible at night and would have served as a warning of the approach to the bridge. This is very frequently done on country roads, and its necessity is illustrated by the present case.

The decision of this court in *Raymond* v. *Township of Bosanquet* (1), has been referred to.

There is, however, a difference between the two cases. In the *Raymond Case* (1) the accident happened in broad daylight, and the driver of the car saw the turn in the road when several hundred yards away from the narrow bridge.

(1) 59 Can. S.C.R. 452; 45 Ont. L.R. 28.

It was shewn that a large number of cars crossed the bridge every day in perfect safety, and there was some ground for suspecting that the driver had approached what he knew to be a sharp turn in the road at an unreasonable rate of speed under the circumstances.

In this case it is quite possible that a person driving along this road during the daytime and seeing the bridge ahead would have no recourse against the county municipality had he failed to so drive his vehicle as to cross the bridge in safety. To such an accident the decision in the *Raymond Case* (1) could well be applied. But the situation is different at night. It does not follow that because a narrow bridge and a narrowing highway as it approaches a bridge may be perfectly safe for a reasonably careful driver in the daytime, they would not be dangerous during the night time to the same driver not seeing them in time to avoid an accident. I think that liability can be predicated here because the situation was a dangerous one after dark and the danger could have been easily guarded against by erecting a whitened railing or fence along the edge of the ditch leading up to the bridge. It is true that there might not have been a danger to a person travelling along the *via trita* even at night, but the situation was dangerous for a driver who, like Dr. Clinton, left the *via trita* to avoid a collision with crossing cars and in returning to it fell into the unguarded ditch. The expense of guarding such places would seem a trifling one when compared to the liability the appellant has incurred in this case, and without such a guard my opinion is that this road was not reasonably safe for travel at night.

I am therefore of opinion that the judgments below should be affirmed on the question of liability.

As to the increased amount awarded to Miss Clinton by the appellate court, on the ground that the damages claimed by her for the loss of the career she proposed to follow were not too remote to be considered in an action of this kind, without in any way dissenting from the proposition laid down by Mr. Justice Rose in the appellate court it appears to me sufficient to say that no reason exists

(1) 59 Can. S.C.R. 452.

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in the present case for departing from the practice of this court not to entertain appeals questioning the quantum of damages.

I would therefore dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Mikel & Alford.*

Solicitors for the respondents: *O'Flynn, Diamond & O'Flynn.*