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JOHN PRENTICE AND SARAH PRENTICE (PLAINTIFFS) ..... APPELLANTS; *May 21. *June 12.

AND

THE CORPORATION OF THE CITY OF SAULT STE. MARIE (DEFENDANT) RESPONDENT.

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

Municipal corporations—Highways—Nuisance—Negligent creation of nuisance on highway by city's servants, causing special damage—Flushing of private sewer undertaken by city in exercise of statutory powers—Nuisance created consisting of dangerous ice on plaintiffs' houseway leading from street sidewalk, resulting in personal injury to plaintiff—Liability of city—Misfeasance—Liability at common law—Consolidated Municipal Act (Ont.) 1922, c. 72, s. 460—Place of accident not a "sidewalk" within s. 460 (3)—Notice of claim and injury not given under s. 460 (4)—Right of action—Construction and application of s. 460—Breach of private right.

The servants of defendant, a city corporation, in the course of flushing a private sewer of a neighbour of the plaintiffs, undertaken by the city, in the exercise of its statutory powers, by contract in its capacity as owner and operator of a public water service, negligently created (according to findings sustained by this Court) a nuisance consisting of a patch of dangerous ice on a private houseway, lawfully constructed, leading from the street sidewalk to plaintiffs' residence; the part of the houseway on which such nuisance was created being on the highway and immediately adjoining the sidewalk; and, as a result, one of the plaintiffs (wife of the other plaintiff) fell on such part of the houseway and was injured. Plaintiffs claimed damages from the city.

Held, that the place of the accident was not a "sidewalk" within s. 460 (3) of the *Consolidated Municipal Act, 1922* (c. 72), Ont., and, therefore, the question whether the city's servants' negligence amounted to "gross negligence" did not arise.

Held, further, that the plaintiffs' cause of action, being special damages sustained by reason of a nuisance on a highway, negligently created by the city's servants under the circumstances above mentioned, did not fall within s. 460 (1) of said Act, and, consequently, failure to give the notice prescribed by s. 460 (4) for claims based on default within s. 460 (1) was not available as a defence.

The introduction in 1913 of the phrase "whether the want of repair was the result of nonfeasance or misfeasance" into s. 460 (2) (which bars actions based on s. 460 (1) begun after three months from the time when the damages were sustained) did not have the effect that all the provisions of s. 460 should thereafter apply to every liability of a

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Rinfret and Lamont JJ.

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municipal corporation for disrepair on a highway caused by its servants' misfeasance. There existed in Ontario, before the 1913 amendment, a common law right of action against a municipality for a nuisance on a highway caused by its servants' negligence amounting to misfeasance, and which had caused special damage, apart from and in addition to any statutory liability for non-repair; and the abrogation of a well established common law right should not be inferred from a change of doubtful import, such as that made in 1913 by the introduction of the provision as to misfeasance into a subordinate clause of the section imposing the liability—a clause *ex facie* dealing only with a limitation of the time for bringing action where the claim rests on the statute. Moreover, if the amending words should be imported into s. 460 (1), their operation would still be confined to the subject matter of that subsection, i.e., actions based on default in discharging the duty of keeping in repair thereby imposed, which entails a liability entirely distinct from, and independent of, that resulting at common law from the creation of a nuisance on a highway.

History of the legislation in question discussed. *Glynn* v. *City of Niagara Falls* (29 Ont. L.R. 517, at 521); *Biggar* v. *Crowland* (13 Ont. L.R. 164, at pp. 165-6); *Keech* v. *Smith's Falls* (15 Ont. L.R. 300); *Weston* v. *Middlesex* (30 Ont. L.R. 21; 31 Ont. L.R. 148); *Halifax* v. *Tobin* (50 Can. S.C.R. 404); and *Patterson* v. *Victoria* (5 B.C.R. 628, at p. 645; affd. [1899] A.C. 615, at p. 620) referred to.

Per Duff J. (concurring in the result): The exercise of the plaintiff husband's right of access was wrongfully made dangerous by a nuisance for which the city was responsible. The right to complain of such a wrong is not limited to the owner, but inheres also in his wife and other members of his family residing with him. This *injuria* is an invasion of a private right incidental to the ownership and occupation of property—*Lyon v. Fishmongers' Company* (1 A.C. 662). S. 460 has no application.

Judgment of the Appellate Division, Ont. (61 Ont. L.R. 246) reversed.

APPEAL by the plaintiffs from the judgment of the Appellate Division of the Supreme Court of Ontario (1) which reversed the judgment of Rose J. at the trial.

The action was brought by the plaintiffs, husband and wife, against the defendant, a city corporation, for damages by reason of personal injuries suffered by the female plaintiff through slipping and falling on a patch of ice, existing, as was alleged, as the result of negligence of the city's servants, in the course of flushing a private sewer of a neighbour of the plaintiffs, undertaken by the city, in the exercise of its statutory powers, by contract in its capacity as owner and operator of a public water service. The ice in question was on a part of a private houseway, lawfully

(1) (1927) 61 Ont. L.R. 246.

constructed, leading from the street sidewalk to the plaintiff's residence; such part of the houseway being on the highway and immediately adjoining the sidewalk.

Notice of the claim and injury was not served in accordance with subs. 4 of s. 460 of the *Consolidated Municipal Act, 1922*, 12-13 Geo. V (Ont.), c. 72. Apart from the issues of fact (as to which this Court sustained the findings at trial in favour of the plaintiffs) the questions involved had to do with the construction and aplication of s. 460 of the said Act, and are indicated in the above headnote.

ROSE J. gave judgment for the female plaintiff for $2,500, and for the male plaintiff for $100 (cutting in two, by reason of his contributory negligence, the damages of $200 assessed to him). The Appellate Division reversed this judgment, and dismissed the action, basing its decision upon the non-compliance with said subs. 4 of s. 460, which it held to be aplicable (1). The plaintiffs appealed to this Court. By the judgment now reported the appeal was allowed, with costs in this Court and in the Appellate Division, and the judgment of Rose J. was restored.

Sir William Hearst K.C. for the appellants.

W. N. Tilley K.C. for the respondent.

The judgment of Anglin C.J.C. and Mignault, Rinfret and Lamont JJ. was delivered by

ANGLIN C.J.C.—An experienced trial judge found that the servants of the defendant municipal corporation, in the course of flushing a private sewer of a neighbour with water drawn through a leaky hose from a city hydrant adjacent to the plaintiffs' premises, had negligently created a nusiance (consisting of a patch of dangerous ice) on a portion of a private houseway, lawfully constructed and leading from the sidewalk of Church street in the city of Sault Ste. Marie to the residence of the plaintiffs; that the portion of such houseway on which the nusiance existed was on the highway and immediately adjoined the city sidewalk; and that the female plantiff was severely injured, without any contributory negligence attributable to her, by slipping and

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falling on such portion of the houseway as a result of the nusiance so created; but that the male plaintiff had been guilty of contributory negligence, as great as that of the defendant's servants, in having failed to take some steps to obviate the danger they had created, of the existence of which he was aware from the 22nd of February to the 7th of March, when the accident to his wife occurred. While he accordingly allowed the female plaintiff the full amount of damages which she had sustained, assessed by himself at $2,500, the learned judge cut in two the damages assessed to the male plaintiff at $200, and restricted his recovery to $100.

The learned judge held that the place where the female plaintiff fell was not a sidewalk within s. 460 (3) of the Ontario *Consolidated Municipal Act, 1922,* 12-13, Geo. V., c. 72, and, consequently, that the question whether the negligence of the defendant's servants had amounted to "gross negligence" did not arise. He further held that the plaintiffs' cause of action, being special damages sustained by reason of a nusiance on a highway negligently created by the defendant's servants, did not fall within s. 460 (1) of the *Consolidated Municipal Act, 1922,* and, consequently, that failure to give the notice prescribed by subs. 4 for claims based on defaults within subs. 1 was not available as a defence.

The defendant municipality appealed. There was no appeal by the male plantiff against the judgment reducing the damages recoverable by him to $100.

Fully accepting the findings of fact of the trial judge, the Appellate Divisional Court (1) reversed his judgment and dismissed the action solely because, in its opinion, s. 460 (1) of the *Consolidated Municipal Act, 1922,* applies to a claim for damages based on negligent misfeasance of a municipal corporation occasioning disrepair, amounting to a nusiance, on a public highway, in consequence of the introduction, in 1913, of the phrase: "whether the want of repair was the result of nonfeasance or misfeasance" into subs. 2, which bars actions based on subs. 1 unless begun within three months from the date on which the damages were sustained.

(1) (1927) 61 Ont. L.R. 246.

Both plaintiffs appeal to this court and ask the restoration of the judgment of the trial court. Special leave to appeal was obtained by John Prentice from the Appellate Division.

A perusal of the judgment delivered by Riddell J., in the Appellate Division, concurred in by Latchford C.J., and Masten J.A., (Middleton and Orde JJ.A., agreeing in the result), leaves the impression that the Appellate Court agreed with the opinion expressed by the trial judge as to the purview of subs. 3, which also commends itself to our judgment. On the issues of fact a careful perusal of all the testimony has satisfied us that there is evidence which, if believed, supports the findings of fact made in the trial court and that we cannot, especially in view of their having been affirmed without dissent by the Appellate Divisional Court, say that error in any of such findings has been demonstrated. They must, therefore, stand and will form the basis on which we dispose of the present appeal.

The sole question requiring further consideration is whether, on the proper construction of s. 460 (1), as was held in the Appellate Division, the cause of action against the defendant municipality, based on misfeasance of its servants which created a nusiance in the highway whereby special damage was caused to the plaintiffs, falls within that subsection and must accordingly fail, because the notice of the claim and injury provided for by subs. 4 was not given, or whether, as the trial judge held, such a claim is not within s. 460.

Section 460 of the *Consolidated Municipal Act, 1922,* 12-13 George V. (Ontario), Chapter 72, so far as material, reads as follows:

460 (1) Every highway and every bridge shall be kept in repair by the corporation the council of which has jurisdiction over it, or upon which the duty of repairing it is imposed by this Act, and in case of default, the corporation shall be liable for all damages sustained by any person by reason of such default.

(2) No action shall be brought against a corporation for the recovery of damages occasioned by such default, whether the want of repair was the result of nonfeasance or misfeasance, after the expiration of three months from the time when the damages were sustained.

(3) Except in case of gross negligence a corporation shall not be liable for a personal injury caused by snow or ice upon a sidewalk. 3-4 Geo. V, c. 43, s. 463 (1-3).

(4) No action shall be brought for the recovery of the damages mentioned in subsection 1 unless notice in writing of the claim and of the in-

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jury complained of has been served upon or sent by registered post to the head, or the clerk of the corporation, in the case of a county or township within ten days, and in the case of an urban municipality within seven days after the happening of the injury, nor unless where the claim is against two or more corporations jointly liable for the repair of the highway or bridge, the prescribed notice was given to each of them within the prescribed time. 3-4 Geo. V, c. 43, s. 460 (4); 11 Geo. V, c. 63, s. 22.

(5) In case of the death of the person injured, failure to give the notice shall not be a bar to the action, and, except where the injury was caused by snow or ice upon a sidewalk, failure to give or insufficiency of the notice shall not be a bar to the action if the court or judge before whom the action is tried is of the opinion that there is reasonable excuse for the want or insufficiency of the notice and that the corporation was not thereby prejudiced in its defence.

Two grounds were urged by counsel for the appellants why subsections 1 and 4 do not apply to this case:

(*a*) A claim based on negligent misfeasance by servants of the municipality creating a nuisance in a highway which caused special damage is not within subss. 1 and 4 of s. 460;

(*b*) Although a claim based on negligent misfeasance in the doing of work in the construction or repair of a highway, or occurring in the course of work done in the discharge of the municipal duty of keeping the highways in repair, should be within subs. 1 of s. 460, a claim based on a misfeasance of municipal servants, in doing an act or in carrying on work in no wise connected with the discharge of municipal duty in regard to the condition of highways and bridges, whereby a nuisance was negligently created in a highway which became the cause of special damage to the plaintiff, is not within the purview of s. 460 (1) of the *Consolidated Municipal Act, 1922,* but gives him a cause of action against the municipality at common law independently of any liability which might arise under s. 460 (1) by reason of failure to abate such nuisance amounting to default in keeping the highway in repair as required by the statute.

Although the distinction between grounds (*a*) and (*b*) may, perhaps, be of importance for other purposes (*Brown* v. *City of Toronto* (1)), in the present case they do not seem to call for separate discussion.

Section 460 (1) of the *Consolidated Municipal Act, 1922,* is identical in substance with its predecessor in the

(1) (1910) 21 Ont. L.R. 230, at pp. 238-9.

Consolidated Municipal Act, 1903 (3 Edw. VII, c. 19, s. 606 (1)), except that the latter subsection also contained, as its last member, but differently phrased, the three months' limitation provision now found in subsection 2. This latter clause was detached from subsection 1 in the consolidation of 1913 (3-4 Geo. V, c. 43), and was enacted as subsection 2 in its present form. The words: " whether the want of repair was the result of nonfeasance or misfeasance " were then first inserted.

Section 606 (1) of the *Consolidated Municipal Act, 1903*, and its antecedents, alluded to by Riddell J., were dealt with in Ontario in a " line of decisions," which, as the late Chancellor Boyd observed in *Glynn* v. *City of Niagara Falls* (1),

> restricted (their application) to cases wherein the default is attributable to nonfeasance. Cases of misfeasance were held to lie beyond the statute and untouched by its preliminaries as to notice and time of suing. True it is that, owing perhaps to the many subtle distinctions which have been drawn between nonfeasance and misfeasance, the Legislature has by the *Municipal Act, 1913*, 3-4 George V, c. 43, sec. 460 (2), limited the time for bringing actions occasioned by municipal default, whether the want of repair was the result of misfeasance or nonfeasance.

A list of the decisions referred to will be found in Meredith & Wilkinson's Municipal Manual, at pp. 620-1. Of these special reference may be made to *Biggar* v. *Township of Crowland* (2); *Keech* v. *Town of Smith's Falls* (3); and *Weston* v. *County of Middlesex* (4).

As put by Rose J., in the case now before us:

> A municipality, like everyone else, may be liable, apart from statute, for creating a nuisance in a highway, and if a person sustains damages—that is, special damage, different from the damage suffered by others—by reason of the nuisance so created, the person, whether a municipality or anyone else, who created it is liable for those damages; that rule being subject, however, in the case of a person or corporation exercising a statutory authority, to the qualification that if the nuisance is created in the exercise of that statutory authority, liability does not result unless the nuisance was created negligently. The case, therefore, * * * raises, as I think, only the question, did these defendants, exercising their statutory powers as a sewer authority, create a nuisance negligently, and if so did the nuisance so created cause the damage of which the plaintiffs complain.

(1) (1913) 29 Ont. L.R. 517, at p. 521.
(2) (1906) 13 Ont. L.R. 164, at pp. 165-6.
(3) (1907) 15 Ont. L.R. 300.
(4) (1913) 30 Ont. L.R. 21; 31 Ont. L.R. 148.

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The common law right of action against a municipal corporation for a nuisance on a highway caused by negligence of its servants amounting to misfeasance and which has caused special damage, apart from and in addition to any statutory liability for non-repair, admits of no doubt. *City of Halifax* v. *Tobin* (1). Its existence in Ontario up to 1913 is not seriously contested. The provisions of s. 606 of the *Consolidated Municipal Act, 1903,* including that requiring notice of claim to the municipality within thirty days (as it then was), were held in many cases not to apply to such common law actions. The abrogation of a well-established common law right should not be inferred from a change of doubtful import, such as that made in 1913 by the introduction of the provision as to misfeasance into a subordinate clause of the section imposing the liability—a clause *ex facie* dealing only with a limitation of the time for bringing action where the claim rests on the statute. In order that this amendment should affect subs. 4 and extend its requirement of notice to additional claims (if any) to which the limitation provision was thus made applicable, it is necessary to import the amendment of subs. 2 into subs. 1 and to read subs. 1 as if the Legislature had amended it instead of, or as well as, subs. 2. Indeed, if the intent had been that all the provisions of s. 460 should thereafter apply to every liability of a municipal corporation for disrepair on a highway or bridge caused by misfeasance of its servants, the only logical place for the amending words inserted in 1913 (if otherwise sufficient) would have been after the word "default" where it first occurs in subs. 1. It seems reasonably clear that the Legislature can have intended to affect only the limitation provision by the amendment made to it.

Moreover, if the amending words should be imported into subs. 1 as suggested, their operation would still be confined to the subject matter of that subsection, i.e., actions based on default in discharging the duty of keeping in repair thereby imposed, which entails a liability entirely distinct from, and independent of, that resulting at common law from the creation of a nuisance on a highway. *Patter-*

(1) (1914) 50 Can. S.C.R. 404.

son v. *City of Victoria* (1). It is noteworthy that the phrase inserted in subs. 2 is not restricted to misfeasance by a municipal corporation: it includes as well cases where disrepair of a bridge or highway has been caused by the misfeasance of others. The misfeasance of servants of the municipal corporation in the presence instance may be assimilated to an act of a third party creating a nuisance on a highway. Assuming notice to the municipality of a nuisance so created sufficient to entail its statutory liability for non-repair to a person sustaining special damage, there can be no doubt that the common law liability of the third party could also be invoked by him. Here the municipal servants were carrying out an obligation for which the municipality had contracted with a private citizen, not *qua* guardian of the highways but in its capacity as owner and operator of a public water service, which might have been in the hands of a private body. There would seem to be no reason for doing away with the common law liability of a municipal corporation in such a case.

But the words "whether the want of repair was the result of nonfeasance or misfeasance," if imported into subs. 1, would still apply only to a default in the statutory duty of keeping the highway in repair imposed by that subsection. They would merely declare that the statutory liability of the municipality for failure to discharge that duty would be the same whether the original cause of disrepair had been misfeasance or nonfeasance. The amendment was, perhaps, futile, as such liability might well exist under subs. 1 without it. But that is not a sufficient ground for giving to it an effect which it is most improbable the Legislature meant it to have, namely, the extinction of the well-known common law right of action against a municipality for a nuisance created by it on a highway which has caused special damage, and the substitution therefor of the greatly restricted statutory remedy conferred by s. 460.

We would require a declaration in express terms, or at least language leaving no doubt as to the necessity of the implication as a basis for imputing such an intention to the Legislature.

(1) (1897) 5 B.C.R. 628, at p. 645; affd. [1899] A.C. 615, at p. 620.

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For these reasons the appeal, in our opinion, should be allowed with costs here and in the Appellate Division, and the judgment of the learned trial judge restored.

DUFF J.—I concur in the result. The legal effect of the findings of the learned trial judge, which apparently were accepted by the Appellate Division, appears to be this. The exercise of the husband's right of access was wrongfully made dangerous by a nuisance for which the municipality is responsible. The right to complain of such a wrong is not limited to the owner, but inheres also in his wife and other members of his family residing with him. This *injuria* is an invasion of a private right incidental to the ownership and occupation of property. *Lyon* v. *Fishmongers' Company* (1). Section 460 of the *Consolidated Municipal Act, 1922,* has no application to it.

Appeal allowed with costs.

Solicitors for the appellants: *MacInnis & Brien.*

Solicitors for the respondents: *Hamilton & Carmichael.*