FRED. B. STEVENS AND ORLAN E. WILLSON, CARRYING ON BUSINESS UNDER THE FIRM NAME AND STYLE OF STEVENS-WILLSON (PLAINTIFFS)... APPELLANTS;

1933
* Nov. 21, 22.
1934
* Mar. 15.

AND

THE MUNICIPAL CORPORATION OF THE CITY OF CHATHAM (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal corporations—Negligence—Failure of firemen to prevent spread of fire—Dangerous situation—Alleged negligent delay by local Public Utilities Commission in shutting off electric current—Liability of municipality.

Appellants' mill in the city of Chatham, Ont., was destroyed by fire, which started by lightning striking the electric wires by which power was supplied to the mill by the Chatham Public Utilities Commission (established under the *Public Utilities Act*, R.S.O. 1914, c. 204), and setting up an electric arc or short circuit at a point where the wires entered the conduit pipe running down the outside corrugated iron covered wall. The fire brigade of respondent, the City of Chatham, came to the fire but feared to cut the wires (for which they had certain appliances), or to fight the fire until the electric current was shut off. Telephone calls were sent to the operator at the Commission's sub-station, who refused to switch off the current without the Commission manager's instructions, and by the time the manager arrived and the current was shut off and the wires cut, the fire had spread and the mill could not be saved. Appellants claimed damages from the respondent City, alleging that the destruction of the mill was owing to negligence of it or its servants or agents.

Held, Crocket J. dissenting, that the City was not liable. Judgment of the Court of Appeal for Ontario, [1933] O.R. 305, affirmed.

Per Duff C.J., Rinfret, Lamont and Smith JJ.: There appeared no adequate reason for rejecting the findings of the trial judge and the majority of the Court of Appeal that, in the circumstances, the Commission's officials or servants had not acted unreasonably or negligently. (As to the governing rule in regard to the questions of fact in the appeal, *Johnston* v. *O'Neill,* [1911] A.C. 552, at 578, was cited). (The questions, whether the Commission, and whether the City, would have been liable for negligence of the Commission's servants, were not decided, decision thereon being unnecessary). As to the complaint that the firemen failed to take proper measures to stop the fire—the City was not liable in damages for what was merely inactivity on the part of the firemen. (Duff C.J. and Smith J. agreed with the reasons of Davis J.A. in the Court of Appeal who so held and who was further of opinion that in any case the firemen were not negligent under the circumstances.)

* PRESENT:—Duff C.J. and Rinfret, Lamont, Smith and Crocket JJ.

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Per Crocket J., dissenting: It was the Commission's duty to provide for the promptest action in such an emergency, by having competent men always in charge of its substations, clothed with sufficient authority to extinguish promptly a short circuit threatening destruction of property or endangering firemen's lives in their efforts to save property. The Commission, in its failure to shut off the current when first requested to do so by the fire department, was guilty of negligence causing damage to plaintiffs; and its negligence was chargeable against the City, of which it was the statutory agent (the principle affirmed in *Young* v. *Town of Gravenhurst,* 24 Ont. L.R. 467, being applicable).

APPEAL by the plaintiffs from the judgment of the Court of Appeal for Ontario (1) dismissing their appeal from the judgment of Rose, C.J.H.C., dismissing their action.

The action was brought against both the City of Chatham and the Chatham Public Utilities Commission (established under the *Public Utilities Act,* R.S.O. 1914, c. 204), but upon the hearing of the appeal to the Court of Appeal the plaintiffs abandoned their appeal as against the latter ("recognizing * * * that there was no cause of action against the Commission, it being merely a statutory agent of the municipality", per Davis J.A. in his judgment in the Court of Appeal) and the present appeal was against the judgment of the Court of Appeal in so far as it dismissed the plaintiffs' appeal as against the City of Chatham.

The action was for damages for alleged negligence in failing to prevent the spread of a fire which, on spreading, destroyed the entire mill building of the plaintiffs in the city of Chatham.

The fire was started by lightning striking the electric wires by which power was supplied to the mill by the Commission, and setting up an electric arc or short circuit at a point where the wires entered the conduit pipe running down the outside corrugated iron covered wall of the building. The fire brigade of the City feared to cut the wires (for which they had certain appliances) or, until the electric current was shut off, to turn on the water, and telephone calls were made to the operator in charge of the Commission's power sub-station to shut off the current. Plaintiffs complained of delay, in shutting off the current after demands made, and in fighting the fire, which, they

(1) [1933] O.R. 305; [1933] 2 D.L.R. 407.

claimed, was negligence for which the defendant City was responsible.

The trial judge, Rose, C.J.H.C., dismissed the action. He was of opinion that it could not be found that the firemen acted negligently or improperly in not cutting the wires in the conditions existing; but, in any case, he held that the City was not liable for the alleged failure in this regard complained of, expressing his opinion as follows:

> The liability of the city, if any, in this regard must be for failing to put out, or to take proper measures for putting out, the fire. The action, in other words, is an action, not for damage caused to somebody by the negligent doing of something undertaken, but for damages for not acting. The firemen sat down and waited. The action is against the city for its inactivity, not for something positive done wrongly; * * * For this nonfeasance on the part of the city I think there is no liability to the individual who suffers.

He held also, in effect, that upon the evidence and upon the conduct of the officials of the Commission under all the circumstances in question, the plaintiffs had not established negligence on their part causing the damage complained of.

The Court of Appeal dismissed the plaintiffs' appeal, Fisher J.A. dissenting.

Riddell J.A., after remarking generally on the duty of the City in such a case and referring to certain aspects of the present case which tended to support the plaintiffs' claim, stated that, upon the evidence, he could not say "that there was necessarily negligence either in the system or in the conduct of the servants of the City".

Davis J.A. (with whose reasons Duff C.J. and Smith J., in their judgment now reported, agreed) said (*inter alia*) in the course of his judgment:

> It is plain that the firemen did not attempt to cut the wires and that it was between twenty minutes and a half hour before the electric current was cut off at the Hydro station. Had the current been cut off within a few minutes after the lightning struck the wires, there can be no doubt that the loss of the plaintiffs would have been much less than it was; it is not unlikely that the whole building might have been saved.
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> Having read the evidence carefully, I am convinced that the firemen in this case, confronted with the sudden and unusual emergency, and the extreme danger of the situation, were not negligent if there is, as a matter of law, any duty upon them or the Municipal Corporation to cut electric wires, or in fact do anything at a fire, in circumstances more common and less dangerous.
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* * * It is true that they had ladders and rubber boots, a pair of rubber gloves and a pair of shears, but the firemen considered the situation too dangerous for them to deal with, and I think they were justified.

* * *

* * * While [the trial judge] could not find on the evidence that the firemen failed in doing what firemen ought to do, in abstaining from any attempt to mount the pole and cut the wires, he considered that discussion altogether unnecessary in his view of the law that the action was one not for something positive done wrongly, but for inactivity. With that statement I entirely agree.

There is no obligation upon a municipality in this province to maintain a fire brigade, and no obligation on a municipality to take charge of and extinguish fires that occur within the municipality. * * *

* * *

Nowhere in the statute is there any obligation imposed upon the municipality to provide fire protection—it is merely permissive.

The City of Chatham did, however, establish a fire department, and passed certain by-laws, rules and regulations (put in at the trial as exhibits), governing the organization, pay and management of the firemen, and sufficient equipment for ordinary purposes was furnished to the firemen for their work.

After referring to *Hesketh* v. *The City of Toronto* (1) (which he distinguished), he said:

In the case before us the complaint of the plaintiffs is that the firemen abstained from doing something that it is contended they ought to have done, and that it was negligence in law in that having taken control of the fire, they did not take proper and immediate steps to cut the electric wires that were on fire, so as to disconnect the current and make the use of water efficient to stop the spreading of the fire.

He thought that the principle of law applicable to this case is to be found in the decision of the English Court of Appeal in *Sheppard* v. *Glossop Corporation* (2) (which he discussed at length) and that that case "completely answers the plaintiffs' submission that there was a negligent breach of duty on the part of the Municipality". He referred also to certain Ontario cases.

Then, dealing with the allegation of negligence of the local Hydro Commission, he pointed out that any attack upon the "system" of the local Commission was not open upon the pleadings, and stated that, upon the complaint against it as pleaded, he agreed with the trial judge's conclusions on both the facts and the law. His judgment in this regard is quoted from at length in the judgment of Duff C.J. now reported.

Fisher J.A. dissented in a lengthy judgment, holding that there was a clear case of misfeasance; that the City, having established and maintained a fire department, was liable

(1) (1898) 25 Ont. A.R. 449. (2) [1921] 3 K.B. 132.

for damages if guilty of negligence in the performance of the duties undertaken; that the damage which ultimately arose from the initial escape could have been prevented by the exercise of reasonable care and courage on the part of the municipality or its statutory agents or in the proper actions of the fire department; and that there was negligence for which the City was liable in damages.

The plaintiffs appealed to this Court.

D. L. McCarthy K.C. and *A. L. Hanna* for the appellants.

W. N. Tilley K.C. and *J. A. McNevin K.C.* for the respondent.

The judgment of Duff C.J. and Smith J. was delivered by

DUFF C.J.—I have come to the conclusion that the appeal should be dismissed. The negligence charged is stated in two paragraphs of the statement of claim, paragraphs 10 and 11, which I quote:

10. The fire department of the defendant, the Municipal Corporation of the City of Chatham, were unable to fight the said fire, or in any event did not, for a long period after the arrival of the said department at the scene of the fire, by reason of the negligence of the defendants, or one of them, in that the defendants' servant in charge of the power at the Hydro station, operated by the defendant, the Chatham Public Utilities Commission, failed, neglected and refused to comply, with the demands made, by the officers of the fire department, operated by the defendant, the Municipal Corporation of the City of Chatham, to shut off the power, supplying the electrical energy, to the said building belonging to the plaintiffs.

11. The plaintiffs allege, as the fact is, that the fire department of the defendant, the Municipal Corporation of the City of Chatham, refused, failed and neglected to fight the said fire, until the power supplying the electrical energy to the said building, was shut off by the defendant, the Chatham Public Utilities Commission.

At the trial, the issues were strictly confined to those raised by these paragraphs, and the evidence directed to those issues; although the trial judge, upon a not il-liberal reading of paragraph 10, treated that paragraph as raising the issue whether a duty rested upon the Commission (as distinguished from the officer in charge of the substation) to respond to the alleged demands by the officers of the fire department by opening the switch. These are, therefore, the only issues which could properly be examined in the Court of Appeal, or can properly be examined here.

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Chatterton, who was in charge of the substation, says that, upon receipt of information that there was a fire near the appellants' premises, he telephoned first the line superintendent and then the manager. The manager proceeded at once to the scene of the trouble by motor; the superintendent had first to get his truck and appliances. The manager says that, arriving before the superintendent, and not having the necessary appliances for cutting the wires, he, after observing the situation, directed the proper switch to be opened; and, the wires having been cut, directed it to be closed. I mention these facts for the purpose of indicating what the officers of the Commission actually did. It is probable that if the line superintendent had not been accidentally delayed, he, being furnished with the necessary equipment, would at once have cut the wires, and that the switch would not have been opened. The manager's reasons for not directing the opening of the switch before reaching the scene of the fire are fully explained by him; and I perceive no adequate reason for rejecting the findings of the learned trial judge and the majority of the Court of Appeal that, in the circumstances, the Commission is not chargeable with failure to exercise proper energy and reasonable judgment because of the conduct of the manager or superintendent or that of the operator at the substation.

Rose C.J. says:

> Then as to the Public Utilities Commission. * * * The action against the Commission, as stated in the statement of claim, paragraph 10, is an action for damages resulting from the failure, neglect and refusal of the Commission to comply with demands made by officers of the fire department to shut off the power from the line supplying power to the plaintiffs' building. For the purposes of the case I treat the Commission as an entity, a corporation supplying power to consumers for purposes of light and other purposes, and having no special statutory privileges; and I treat information given to the man for the time being in charge of the Commission's substation as information given to the Commission, and requests made to that man as requests made to the Commission; and I judge of the duty of that man to act by attributing to him all the knowledge that the Commission by any of its officers possessed. I treat the case, then, as being a case against the Commission for failure, neglect and refusal upon the part of the Commission to comply with demands made to the Commission, and I ask myself what the liability is.
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> I assume also that it is the obligation of such a corporation as for the purposes of the case I am treating the Commission as being, to use the utmost care in the handling of anything so dangerous as electricity under high voltage, and I assume, without the necessity of deciding, that if it is brought to the notice of such a corporation that its wires have become, without any default on its part, a source of danger to the public

in general or to some person in particular, it is the duty of the corporation to take adequate and prompt steps to remove the danger. Making all these assumptions, which are the strongest assumptions that can possibly be made against the Commission, I ask what the duty of the Commission was in the particular case.

First of all, one must ask what information the Commission had. The Commission had information that there was a fire near the plaintiffs' premises, and that, in the opinion of some persons—first a private individual, later a policeman, later a fireman, and later still the chief of the fire brigade—the wires of the Commission were in some manner a source of danger, and perhaps were in some way obstructing the efforts of the firemen; but, as far as the evidence here goes, no precise information as to the state of affairs existing was conveyed to the Commission. There was no statement, so far as I am aware, that the trouble was in the power wires rather than in the lighting wires or the other way around, or as to the manner in which the trouble, whatever it was, on the wires was either endangering the building or obstructing the firemen. I suppose that the persons who telephoned were telephoning under a good deal of stress and in more or less excitement. No doubt they made known their desire that, as they expressed it, the power should be cut off, but the reasons for that desire or the conditions which had given rise to that desire were not conveyed, so far as the evidence goes, to the Commission.

Well, what was the Commission to do upon getting that kind of information? In my opinion the proper action was to investigate as quickly as possible and to take such action as investigation by a competent person showed to be necessary. Investigation might show the necessity or the desirability of opening a certain switch or certain switches or it might show that the proper action was the cutting of the wires, or it might show that the thing to do was to open the switches for a very short time while the wires were being cut and then to close them; but it was a case in which I think the Commission could not know what action was necessary or desirable until investigation had been made, and so, as I say, I think the duty of the Commission was to investigate with the least possible delay. The Commission did investigate. There was some delay, of course, and it is suggested that the delay was greater than it need have been. I do not think, however, that it is shown that the delay was excessive, or that, if there was any excess, the excess was the cause of the damage of which the plaintiffs complain. When the manager of the Commission arrived on the scene he caused the power to be cut off. Soon thereafter he was in a position to have the wires leading into the plaintiffs' premises cut, and the wires were cut, and the power was again turned on. I think there is no evidence upon which it can be found that there was unnecessary delay in communicating with the manager or unnecessary delay on the part of the manager in betaking himself to the scene of the trouble.

I need not go into all the reasons why I think that this investigation, rather than some blind action from the power house, was the proper action on the part of the Commission. The reasons are pretty obvious, and have been stated by witnesses and elaborated by counsel. The Commission owes a duty, not only to the person whose property is supposed to be in danger, but to all its customers. It cannot unnecessarily shut off power; great inconvenience may be caused by an unnecessary shut-down, and danger of one sort or another may be created. If the power is cut off, except upon the instructions of someone on the spot who knows what lines ought to be switched, no one in the office of the Commission

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can by any means tell how long the switches ought to be kept open. The Commission in its office, with such information as this Commission had, would be acting blindly, I think improperly, in opening switches upon the type of information or at the requests that were made in the particular case. So I think that there is no liability on the part of the Commission for not acting.

I pause here to call attention to the nature of the three findings of fact which the learned trial judge has enunciated in his judgment.

After weighing the evidence of the various witnesses, and examining the facts disclosed by the evidence, he concludes, first, that, in the special circumstances, it was not unreasonable on the part of these officers, that is to say, on the part of the Commission, not to open the switch at once, in compliance with the suggestions or demands made, without first taking proper steps to obtain a more exact knowledge of the circumstances. Second, he finds that there was no "excessive" delay in taking such steps, or in acting upon the information obtained; and third, that it is not shewn, if there was excessive delay, that such delay was the cause of the damage of which the appellants complain.

It was pressed upon us during the argument with a good deal of vigour that the learned trial judge omitted to take into account the contention of the appellants that the operator at the substation, if he had acted with reasonable energy, would have ascertained from the chief of the fire brigade, or from others who telephoned him, the fact in respect of which the Commission was not informed, as the learned Chief Justice says, through the communication received by the operator. I think the learned Chief Justice cannot justly be supposed to have overlooked this contention.

During the course of the cross examination of the operator the witness stated that the chief of the fire brigade, when requesting him to "cut off the service", did not tell him where the fire was. The witness proceeded:

Q. You swear that positively? A. Yes, sir.

Q. All right; what did he say? A. He asked me to cut the power off.

HIS LORDSHIP: Q. What power? A. The power; he did not specify any power at all.

The learned Chief Justice then asked the witness:

Q. Well, why didn't you ask him? A. It was all done so hurriedly, and I had had so many calls in a few minutes, that I didn't ask him anything at all before he hung up.

The operator, no doubt, had already been told approximately where the fire was, but this and many other passages in the evidence must have impressed the learned Chief Justice as well as the Court of Appeal as indicating the difficulties he must have encountered, owing to the state of confusion and excitement of those who were urging him to "cut off the power", in attempting to obtain from them more exact and reliable information. The learned Chief Justice seems to have proceeded upon the view, this, I think, is plainly implied in his judgment, that such efforts on the part of the operator would have been fruitless; and that the Commission cannot be charged with any lack of due diligence in obtaining information by reason of the conduct of the operator.

The appreciation of the situation in this aspect was peculiarly a matter for the trial judge who, having all the parties concerned before him, was in a specially advantageous position to pass upon the question whether or not, in this respect, there was any lack of diligence.

The learned Chief Justice then proceeds:

> If that is so, I need not consider another of the difficulties in the plaintiffs' way. If the Commission was required to act upon the information received on the telephone from some of the persons who did telephone, one ought to be able to fix the time at which the action ought to have taken place, the state of affairs at the fire at the moment, and all the other conditions, and ought to be able to say before the plaintiffs have judgment that action at that particular time would have prevented the loss which the plaintiffs have sustained. It would be very difficult indeed, upon the evidence here, to fix the moment at which action ought to have taken place, or to say what the result of action at that moment would have been, although there is some evidence upon which perhaps it could be found that if the Commission had opened the switch controlling the 550-volt circuit at the moment when the chief of the fire brigade telephoned, the firemen would have been able to save the building. The building of course would have been damaged to some extent, but, if the opinion of the two firemen who were inside is correct, perhaps at that time the building as a whole could have been saved. However, it would be necessary to fix either the time of the first message by the chief of the fire brigade or some other time as the time at which the Commission ought to have acted, and to say, before giving judgment for the plaintiffs, that if there had been action at that moment the loss would not have occurred or would have been diminished.

In the Court of Appeal, Davis, J.A., says:

> The complaint in respect of the local Hydro Commission as pleaded was that it refused to comply with the demand of the fire department to shut off the power and reliance was had by the plaintiffs upon secs. 21 and 22 of a by-law of the municipal council making provision for preventing fires.

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Sec. 21 requiring obedience to the demands of the fire chief applies only to inhabitants of the city "being present at a fire", and sec. 22 providing that no person shall prevent or obstruct the fire chief, has no application to the officials of the local Hydro Commission on the facts of this case.

The learned trial Judge very carefully reviewed the evidence on this branch of the case, and I entirely agree with his conclusions on both the facts and the law. There is no doubt a duty upon anyone generating and distributing electricity under high voltage, to use the utmost care and to take prompt and adequate steps within a reasonable time to remove any danger of which it has notice or knowledge. But having regard to the unusual emergency that occurred, upon the facts of this case, and the confused and uncertain information that was telephoned in to the night operator at the station,—(first a private individual, later a policeman, later a fireman, and later still the chief of the fire brigade),—the lack of anything definite as to the nature or extent or location of the fire,—the immediate telephone communication of the night operator, who had not himself the knowledge or information to cope with the situation, to the manager of the Commission; the manager's arrival at the place of the fire as quickly as he could possibly get there; his personal investigation of the situation and his immediate order and direction to the night operator, to turn off the power, and the prompt compliance with that order, all seem to me to amply justify the conclusion of the trial Judge that there was no negligence on the part of the Commission. In any event the case pleaded, and to which the plaintiffs were properly confined at the trial, and should be confined in this Court, was merely an alleged neglect or failure on the part of the Commission to comply with the fire chief's demand. It was in fact complied with, and under all the circumstances, without any unreasonable delay.

As regards the questions of fact involved in the appeal, we must not overlook the settled rule which governs us in *Johnston* v. *O'Neill* (1). Lord Macnaghten there stated the rule which is proper here:

> The appeal is in reality an appeal from two concurrent findings of fact. In such a case the appellant undertakes a somewhat heavy burden. It lies on him to shew that the order appealed from is clearly wrong. In a Scotch case, *Gray* v. *Turnbull* (2), where there was an appeal from two concurrent findings of fact in a case in which the evidence was taken on commission and neither Court saw the witnesses, Lord Westbury, after referring to the practice in Courts of Equity to allow appeals on matters of fact, makes this observation: "If we open the door to an appeal of this kind, undoubtedly it will be an obligation upon the appellant to prove a case that admits of no doubt whatever." In an English case, *Owners of the P. Caland* v. *Glamorgan Steamship Co.* (3), Lord Watson expressed himself as follows: "In my opinion it is a salutary principle that judges sitting in a court of last resort ought not to disturb concurrent findings of fact by the courts below, unless they can arrive at,—I will not say a certain, because in such matters there can be no absolute certainty,—but a tolerably clear conviction that these findings are erroneous."

(1) [1911] A.C. 552, at 578. (2) (1870) L.R. 2 Sc. & D. 53.
(3) [1893] A.C. 207.

Nothing has been advanced which produces in my mind such "conviction".

As to the issue raised by paragraph 11—here again I find myself in entire agreement with the views expressed by Rose C.J. and Davis J.A., and am quite content to rest my judgment in respect of this branch of the appeal upon those reasons. I add a reference to *Orfila's* case (1).

Two other questions were considered in the Court of Appeal. First, the question whether the Commission is answerable in legal proceedings for the negligence of its servants, in such a situation as that presented here, where negligence is established. It may be that—by reason of the pertinent decisions and the re-enactment, more than once, of the pertinent legislation after the decisions were pronounced, and the acceptance of the decisions as expressing the effect of the legislation, and, consequently, as giving an authoritative guidance in the conduct of municipal affairs—it may be that, for these reasons, these decisions are not now open to review. I express no opinion on that, or on the effect of the legislation. Neither do I discuss the question whether, by force of the legislation, the Corporation is responsible for the collateral negligence of the servants of the Commission in the execution of the duties of the Commission under the by-law and the statutes. On these questions it is better, I think, to say nothing, until a case arises in which a decision on one or more of them is necessary.

The appeal should be dismissed with costs.

RINFRET, J.—I concur with my Lord the Chief Justice.

The city is not legally responsible in damages, in this case, for mere inactivity on the part of its firemen. It is a question whether it is answerable for the negligence of the servants of the Public Utilities Commission, but assuming the point against the city, I do not feel warranted in disturbing the concurrent findings of fact made in this respect by the Honourable the Chief Justice of the High Court and by the majority of the Court of Appeal.

(1) *Sanitary Commissioners of Gibraltar* v. *Orfila*, (1890) 15 App. Cas. 400, at 411.

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LAMONT, J.—I concur in the judgment of the learned Chief Justice, and I do so because I am convinced that the law of Ontario does not impose responsibility upon a municipality for mere inactivity on the part of its servants.

In so far as the Public Utilities Commission is concerned two questions were involved: 1. Was the Commission, or its servants, guilty of any negligence which contributed to the loss sustained by the appellants? And 2. If so, was the Commission the statutory agent of the municipality?

The learned trial judge held that the course pursued by the officials and servants of the Utilities Commission was a reasonable one and was justified under the circumstances. He, therefore, absolved the Commission from any blame in connection with the burning of the appellants' mills. This finding was affirmed by the majority of the Court of Appeal, and I am not prepared to differ from it. As the Utilities Commission was not guilty of any negligence contributing to the appellants' loss, it is unnecessary to determine whether or not the Commission was the statutory agent of the municipality, and that question I wish to leave open for future consideration. In view of the finding of fact just referred to, the dropping of the Commission from the action as a separate defendant had no effect upon the rights of the plaintiffs.

The case against the municipality is different. As pointed out by the trial judge it is not an action for something positive done wrongly, but one for damages for inactivity. The allegation against it is: "that its fire department refused, failed and neglected to fight the fire until the power supplying the electricity to the building was shut off by the Utilities Commission". The truth of that allegation is admitted. The firemen arrived at the scene of the fire promptly after it commenced, and they saw an arc or ball of fire about three feet wide at the point where the wires entered the conduit pipe leading into the mill. This point was about sixteen feet from the ground and about four to six inches from the side of the metallic covered building, and was the place where the lightning had struck the wires. This arc or ball of fire gave forth what is described as a "sputtering noise", a "hissing sound as from an acetylene torch", a "sizzling ball of flame which sounded like a lot of fire crackers or fuses exploding". Before this unusual sight the firemen quailed. They annexed the hose

to the hydrant but did not turn on the water because they did not know what the water would do. They were afraid to do anything until the power was shut off, although they had in their possession the necessary equipment for cutting the wires and the evidence shews that they could have cut them and could have turned the water on the fire with perfect safety to themselves. This they did not do but stood milling around in helpless confusion until the fire had melted the conduit pipe and entered the building and got such a start that when, some twenty-five minutes after the fire commenced, the manager of the Utilities Commission arrived, shut off the power, cut the wires and got the water turned on, it was then too late to save the mill from destruction. It does appear to me not to be open to doubt that had the firemen, when they first arrived, cut the wires and turned on the water, very little damage would have been done to the mill. Their failure to act resulted from ignorance on their part as to what firemen should do in circumstances there existing. It seems to me to be too obvious for argument that at the present day, in a city where the lighting is derived from electricity and the power for most industries comes from the same source, the fire chief, or some person on the force, should know where and how to cut the wires leading into a burning building even if a short circuit has occurred. However, granting that this may be so, it does not affect the liability of the municipality, for, under the authorities referred to by the trial judge and the judges of the Court of Appeal, the law of Ontario seems undoubtedly to be that a municipality cannot be held liable for mere inactivity on the part of its servants.

The conclusion at which we have been forced to arrive in this case is to me very unsatisfactory, but the reason for its unsatisfactory character rests on the state of the law and not on the courts.

CROCKET, J. (dissenting).—The plaintiffs commenced this action against the respondent Corporation of the City of Chatham and the Chatham Public Utilities Commission to recover damages to the amount of $26,363.15 for the destruction by fire on September 15, 1931, of their flour mill in that city through the negligence, as they alleged in their statement of claim, of both the defendants or of one or other of them.

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Crocket J.

The action was tried before Rose, C.J.H.C., without a jury, by whom it was dismissed against both defendants, His Lordship holding that the negligence complained of against the city consisted merely of nonfeasance for which a municipal corporation was not liable and that there was no negligence upon the part of the Chatham Public Utilities Commission.

During the hearing of the plaintiffs' appeal from the trial judgment their counsel, acting upon the suggestion of the court that the Public Utilities Commission was the statutory agent of the City Corporation on the principle affirmed in *Young* v. *Town of Gravenhurst* (1) and other cases and was therefore an unnecessary party to the action, abandoned their appeal against that corporation, though maintaining that the City of Chatham was liable for the negligence, if any, of the Utilities Commission. The Appeal Court accordingly considered the appeal upon that assumption and dismissed it on a division of opinion, Riddell and Davis, JJ.A., supporting the judgment of the learned trial judge, while Fisher, J.A., dissented.

The fire in question started between 1.30 and 2 o'clock a.m. and was admittedly caused by lightning striking the electric wires by which the Utilities Commission supplied power to the plaintiffs' mill, and setting up an electric arc or short circuit at a point where the wires entered the conduit pipe running down the outside corrugated iron covered wall. The arc was noticed immediately by a witness (Whitely), who lived across the street from the mill, and who at once telephoned an alarm to the fire department. A fire brigade of eight men under charge of Captain Johnston arrived within a few minutes. The fire chief arrived on the scene some minutes later, possibly ten minutes according to the fire captain. The conduit pipe attached to the building was still aflame, while the wires about 20 to 25 feet away at the pole, from which they were carried to the conduit pipe, were throwing out sparks and sputtering. Both Captain Johnston and the fire chief decided that the water should not be turned on the arc or on the inside of the building until the electric current was shut off. Before the chief's arrival the operator in charge of the Commission's power substation had been

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informed of the fire over the telephone by Whitely and asked to switch off the current in that district; in fact Whitely telephoned him immediately after telephoning the alarm to the fire station, when he was told this could not be done until the manager came. The operator had also received a message to the same effect from a fireman acting on the instructions of the fire captain before the fire chief's arrival on the scene, when he said a man would be sent to the mill at once to open the line. The fire chief himself called up the substation operator within a few minutes of his arrival, requesting that the current be shut off in that section of the city, and was told that he could not cut off the current until he got hold of the manager. The fire chief called again two or three minutes later when he was told that the manager was on his way. In the result, the power was not shut off until the lapse of nearly half an hour after the arrival of the fire brigade, all efforts on the part of the firemen to save the building from destruction having been suspended until the current had thus been shut off. In the meantime the fire had broken out in the interior of the building and made such progress that the whole mill with its equipment was practically destroyed.

The evidence shews that the fire brigade upon their arrival were equipped with shears with rubber insulated handles for cutting electric wires but that no attempt was made to cut the wires because of the belief on the part of the fire chief and Captain Johnston that the situation was such as to involve too much danger to anyone making such an attempt.

These were the two main specific grounds of negligence which the plaintiffs sought to establish at the trial: first, the failure to open the switch at the hydro substation; and, second, the failure of the fire brigade, in the circumstances, to fight the fire until the electric current was shut off. The first primarily involves the Commission and the second the fire department.

Evidence was tendered by the plaintiffs for the purpose of proving that the Commission's system was insufficient and defective for want of an automatic expulsion fuse, which would have at once opened the circuit in the area where the fire occurred, but the learned trial judge, on objection being made by the Commission's counsel, rejected

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it as irrelevant on the ground that plaintiffs had made no allegation of a defective plant or system against the Commission in their statement of claim, and that the Commission was, therefore, not prepared to meet it. His Lordship held that the plaintiffs had based their claim of negligence against the Commission entirely on the ground of its or its servants' failure to comply with the request of the fire department to shut off the power.

In dealing with the case against the Commission he accordingly considered it solely from this standpoint. His decision that there was no negligence on the part of the Commission was clearly based on his finding that the messages to the Commission's operator at the substation did not convey sufficiently precise information of the emergency to warrant the Commission in shutting off the power without further investigation, having regard to the duty it owed to all its customers in the area affected; and that, although the information which these messages did convey imposed upon the Commission the duty of investigating the situation with the least possible delay, it was not shewn in the circumstances that there was any excessive delay, or, if there was, that it was the cause of the damage the plaintiffs sustained.

By their abandonment of their appeal against the Commission the plaintiffs have staked their whole case, in so far as it concerns the negligence which they charge against the Commission or its servants, upon the assumption that the Commission, though a separate corporation, is the agent of the municipality for the management of its light and power system, and that the present respondent, the City of Chatham, is therefore quite as fully responsible for any negligence on the part of the Commission or its servants as it is for the negligence of any other department of the civic government.

This at once raises the question as to whether the Commission is in fact the statutory agent of the respondent in the sense that its negligence is the negligence of the respondent and, if so, whether it is now open to the plaintiffs to impeach the finding of the learned trial judge that the Commission was guilty of no negligence in the circumstances.

The respondent contends that the question of negligence on the part of the Commission is *res adjudicata,* the plain-

tiffs having abandoned their appeal against that corporation. We think in the circumstances that it cannot well be so held and that the whole question as to whether there was any negligence on the part of the Commission for which the respondent municipality would be liable as the Commission's principal is now open to review as it was in the Court of Appeal. The intention of the court and of the parties plainly was that the plaintiffs' case, in so far as it was based upon charges of negligence on the part of the Commission, should be dealt with in the same way as if it had been charged against the municipality as being responsible for the negligence of its statutory agent.

Considering this branch of the case from this standpoint, the first question which naturally arises is as to whether the Commission is in fact the statutory agent of the respondent for the management of its light and power plant. As to this we think the Court of Appeal were right in holding that it was. All three of the Appeal Judges concurred in this view, though differing upon the question of negligence. It was argued by the learned counsel for the respondent that *Young* v. *Town of Gravenhurst* (1), on which the Appeal Court's decision was based, was not correctly decided. We think it was and that there is no substantial difference between the provisions of R.S.O., 1897, caps. 234 and 235, upon which that case was decided, and the provisions of the *Public Utilities Act,* R.S.O., 1914, cap. 204, in pursuance of which the Public Utilities Commission of the Corporation of the City of Chatham was constituted. The provisions of subs. 2 of s. 38, introduced into the Act in 1917, making the salaries of the commissioners as fixed by the various municipalities throughout the province subject to the approval of the Provincial Hydro-Electric Power Commission, cannot affect the question of agency as between the several municipalities and their local commissions; neither do any of the provisions of the provincial *Power Commission Act* relied upon by the learned counsel for the respondent authorizing the Provincial Commission to make rules and regulations regarding the construction, installation, repair, extension or alteration of all municipal works for the distribution of electrical power or energy throughout the province.

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It is further contended that in any case the employees of the Commission are not subject to the direction or control of the municipality and that the latter consequently cannot properly be charged with a loss caused by the negligence of the Commission's employees. This may be true as regards a loss directly attributable to a particular act of negligence on the part of a particular employee unless that act of negligence can be directly brought home to the Commission itself. The respondent claims that the act with which it was sought on the trial to charge the Commission was the failure or refusal of the operator at the Commission's substation to comply with the request of the fire department to shut off the power. It is true that this was the specific negligence charged in paragraph 10 of the statement of claim which seems to treat the operator as the servant of both the municipality and the Commission, and that the learned trial judge confined his consideration of the question of negligence on the part of the Commission solely to this allegation and the question as to whether there was any unnecessary or excessive delay in investigating the situation so as to see if the emergency was such as to warrant the current being shut off in the district in which the fire was burning. But he distinctly stated in his reasons that he treated "information given to the man for the time being in charge of the Commission's substation as information given to the Commission, and requests made to that man as requests made to the Commission", and that he judged "of the duty of that man to act by attributing to him all the knowledge that the Commission by any of its officers possessed". He added:

> I treat the case, then, as being a case against the Commission for failure, neglect and refusal upon the part of the Commission to comply with demands made to the Commission.

And again:

> If it is brought to the notice of such a corporation that its wires have become, without any default on its part, a source of danger to the public in general or to some person in particular it is the duty of the corporation to take adequate and prompt steps to remove the danger.

I am not at all prepared to say that, if it were sought to charge the municipality with liability for the consequences of the specific act of the operator in charge of the Commission's substation in failing in such circumstances to shut off the power without reference to any duty on the part of the Commission itself to provide for such an emergency, I would not agree with the respondent's

argument. It must be borne in mind, however, that the appellants in paragraph 13 of their statement of claim allege that they suffered the loss claimed for by reason of the negligence and want of care of the Commission and the municipality "or one or both of them". And it seems to me that, apart from the specific act charged against the operator at the Commission's substation in failing or refusing to comply with the request of the fire department, there is evidence which points very strongly to the fact that the operator's failure had its real origin in a failure of duty on the part of the Commission itself. I cannot but think that it was the clear duty of the Commission to provide for the promptest action in such an emergency as occurred by seeing to it that competent men were always in charge of its substations, clothed with sufficient authority to promptly extinguish a short circuit threatening the destruction of property or endangering the lives of firemen in their efforts to save property of the ratepayers of the city for whom the Commission had undertaken the management of the city's light and power distribution system, instead of allowing their hands to be tied with instructions that they must not, apparently in any emergency, shut off the power without the express authority of the manager or superintendent of the Commission.

It is quite apparent that the charge of negligence against the substation operator as alleged in paragraph 10 itself necessitates an investigation of the conduct of the manager and superintendent of the Commission in relation thereto. Indeed, as already intimated, the learned trial judge in making his finding considered the conduct of both the substation operator and the Commission's manager and superintendent. It is equally apparent that the consideration of the substation operator's conduct involves the question of his authority and instructions regarding the shutting off of the power as well as his knowledge and competency to take the appropriate steps in such an emergency. The learned trial judge, however, failed to deal with these features of the case, his finding, as already stated, resting solely upon his view that there was no excessive delay in investigating the situation after the request was made to open the switch. The members of the Appeal Court apparently considered the whole question of negligence on the part of the Commission open

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for review upon the evidence before them with the exception of the suggested negligence regarding the non-provision of automatic expulsion fuses which the trial judge refused to consider because that had not been complained of in the plaintiffs' pleading.

We agree with the Appeal Court that the appellants are precluded from availing themselves of this ground of negligence against the Commission or the Municipality. It was open to them to ask for an amendment on the trial which undoubtedly would have been granted upon the usual terms but they made no application therefor.

If the evidence in the appeal book satisfies us that there was any negligence upon the part of the Commission or of the Municipality which would entitle the plaintiffs to recover damages against the Municipality there can be no doubt that it is the right and the duty of this court to pronounce judgment accordingly notwithstanding that that negligence was not specifically complained of in the plaintiffs' statement of claim.

In my opinion, there cannot be any doubt upon this evidence that the loss which the plaintiffs sustained by the destruction of their mill would have been entirely prevented if the power had been shut off at the Commission's substation when the operator was first informed of the fire and requested to open the switch or if the fire brigade upon its arrival at the scene of the fire had used the implements with which they were provided and cut the electric wires. Moreover, I think there can be no doubt that had either of these things been done, even after the arrival of the fire chief, the plaintiffs' loss would have been, if not wholly avoided, confined to but a very small proportion of the loss which the plaintiffs sustained.

With all deference, I cannot agree that the information telephoned to the substation operator was not sufficient to warrant the immediate shutting off of the power and merely imposed upon the Commission the duty of investigating the situation without unnecessary delay. He had been called up by three different persons and asked to shut off the power before the fire chief himself asked him in the most urgent terms to do so: first, by Whitely, who informed him that the Kent Mills were on fire on Wellington Street East; second, by a member of the fire department at the instance of the fire captain then in charge of the

fire brigade, who told him he was a member of the fire department, that there was a fire in the Kent Mill and asked if he could turn off the power; and third, by the police sergeant in charge of the city police, who told him who was calling, exactly where the fire was, that it was a dangerous looking fire, one he thought was very bad, and made the same request that Whitely and the fireman had already made, that he cut off the line. All these calls had been made. Then five or six minutes after the police sergeant's call, the fire chief, on his arrival at the scene, himself called the substation, asked the operator to shut the power off and told him it would burn up the whole east end if they didn't. The fire chief called the substation a second time a few minutes later, and was heard asking "what the hell was the matter with them, they would burn up the whole town."

Surely these five calls conveyed sufficient information to do more than merely impose upon the Commission the duty of undertaking an investigation to ascertain whether the power should really be shut off. If the information conveyed by the first call was not sufficiently precise to justify the shutting off of the power, one would think that it would, on the receipt of the second request, made by a member of the fire department, who had just come to the telephone from the scene of the fire, have at once occurred to a man of ordinary prudence and intelligence, that he could instantly have ascertained from the fireman then at the telephone what the exact situation was, so as to be able to report it by telephone to the Commission's manager or superintendent and receive the necessary authorization instantaneously and thus avoid the fatal delay of awaiting the latter's personal arrival on the scene.

Moreover, if the explanation of the delay is to be found in the failure of the firemen to communicate sufficiently precise information, and the Commission is to be exonerated of all negligence upon that ground, is not the fire department thereby fixed with the responsibility as for misfeasance for the Commission's failure to shut off the power? In any event, if the municipality is responsible for the negligence of the Commission as well as for the negligence of the fire department, it makes no difference in the result whether the failure to shut off the power at

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the substation is attributable to one or to the other as the real cause of the plaintiffs' loss.

On the other hand, the plaintiffs' acceptance of the Appeal Court's decision dismissing their appeal against the Commission on the ground stated has produced the anomalous situation of the municipality, as the only respondent in the present appeal, now challenging, as the very basis of its legal position on this appeal, the correctness of the Appeal Court's decision that the Commission was improperly joined with it as a co-defendant in the action, while the plaintiffs support on that crucial point the judgment against which they are appealing. The practical result is that, if the Commission was guilty of the real negligence which caused the plaintiffs' loss, as I think it was, and it, as an independent corporation, and not the municipality as its principal, was legally responsible for such negligence, as the municipality now contends, the Commission has escaped its legal responsibility for its own negligence, on a mere question of misjoinder of parties; the plaintiffs' action is wholly defeated and this Court rendered powerless to correct the error because the Commission is not before us as a party to this appeal.

I am glad therefore, convinced, as I am, that the judgment of the Appeal Court ought not to be affirmed on the question of the negligence of the Commission, that a careful comparison of the statutory provisions under which the Public Utilities Commission of the City of Chatham was constituted with those upon which *Young* v. *Town of Gravenhurst* (1) was decided, has firmly assured me that the Appeal Court was fully justified in holding that the Commission is the statutory agent of the respondent municipality and that any negligence, of which it may be guilty, is properly chargeable against the municipality as its principal. The principle affirmed in *Young* v. *Gravenhurst* (1) has indeed been so consistently followed by the courts of Ontario in so many other cases that it may well be said to be the established law of that province.

It is obviously unnecessary, in the view I take of the case, to discuss the question as to whether there was any negligence on the part of the fire department either in the nature of non-feasance or misfeasance, in waiting upon the Commission to shut off the power before taking any

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active steps, other than the laying out of its hose, to prevent the spread of the fire. I shall only say that it seems to me in the circumstances that the fire department did the natural and prudent thing in first requesting the substation to shut off the current rather than subjecting any of its men to the danger which it appeared might attend any attempt to cut the wires at the pole.

In my opinion, this appeal should be allowed with costs throughout and the action referred to the local master in accordance with the terms of the agreement between counsel for the determination of the quantum of the damage sustained by the plaintiffs as a result of the failure of the Commission to promptly shut off the power when the operator was first requested to do so by the fire department.

Appeal dismissed with costs.

Solicitor for the appellants: *A. L. Hanna.*
Solicitor for the respondent: *J. A. McNevin.*

*PRESENT:—Duff C.J. and Lamont, Cannon, Crocket and Hughes JJ.