1939

* Jan. 17, 18.
* June 27.

DESS McCREADY (PLAINTIFF).....APPELLANT;

AND

THE CORPORATION OF THE COUNTY OF BRANT (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal corporations—Highways—Negligence—Truck striking culvert wall on county road—Alleged dangerous conditions—Duty of municipality as to keeping in repair.

Plaintiff, while driving a truck on a straight stretch of a county road of defendant municipality about 7 p.m. on February 10, 1937, struck a wall of a culvert. He sued defendant for damages. He gave evidence that on account of pit holes in the road the rear end of the truck jumped and struck a rut which was on or near the edge of the travelled part of the road and prevented him from coming back until he struck the culvert wall. The trial judge gave judgment for plaintiff, holding that the accident was caused by, the narrowing of the travelled portion of the road from 22 or 24 feet to the 16-foot culvert, absence of warning signs, absence of wings approaching the culvert (the wing walls did not extend beyond the ground level), and the condition of the road surface (pit holes and rut). His judgment was reversed by the Court of Appeal for Ontario. Plaintiff appealed.

Held: Plaintiff's appeal dismissed. The above conditions did not constitute default of defendant to keep the road in repair within the meaning of s. 469 (1) of the *Municipal Act*, R.S.O., 1927, c. 233. The depressions were all caused by normal user of the highway, and in the circumstances and time of year defendant was not guilty of default in permitting them to exist. To hold that the rut was a

* PRESENT:—Duff C.J. and Rinfret, Davis, Kerwin and Hudson JJ.

condition causing the road to be out of repair would be imposing too heavy a burden on county municipalities. Further, on the evidence the accident was the result of plaintiff's own lack of care.

The principle as to a municipality's duty to keep roads in repair discussed and cases referred to.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario which, reversing judgment of McFarland J. at trial, dismissed his action, which was brought against the defendant county municipality for damages by reason of a truck, which plaintiff was driving, striking a wall of a culvert on a county road, the plaintiff alleging negligence in defendant because of dangerous conditions on the road, causing the accident. The material facts and circumstances of the case are stated in the judgments now reported. The appeal to this Court was dismissed with costs.

W. Ross Macdonald K.C. for the appellant.

Peter White K.C. and *Miss G. E. M. Wilson* for the respondent.

The judgment of the Chief Justice and Rinfret, Kerwin and Hudson JJ. was delivered by

KERWIN J.—About seven o'clock in the evening of February 10th, 1937, the appellant (plaintiff) was driving his 1934 half-ton Chevrolet truck westerly on a county road under the jurisdiction of the respondent municipality. There was some wind but, although there were light snow flurries, there was nothing, according to the appellant, to obstruct his having a clear view of the highway for three hundred feet, the distance illuminated by the head-lights of his truck. He was alone, the truck was empty except for a bushel of apples, and he was travelling about twenty miles per hour. There was no ice or snow on the road, which the appellant said was "rough and pitted." When about fifty feet east of a culvert, the rear end of the truck "jumped, with the pit holes, to the south." Later in his evidence the appellant stated: "I hit another cross-rut; at least it was of dark construction. I seen it, but I couldn't say it was a rut. It hindered me from coming back." This rut was on or near the edge of the travelled part of the road. The truck struck the southerly

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cement wall erected on the culvert (and 3·9 feet in height from the floor of the culvert), and in this action the appellant seeks compensation for the injuries he sustained and for the damage done his truck as a result of the impact.

At the outset it should be emphasized that appellant's claim is based upon subsection 1 of section 469 of *The Municipal Act*, R.S.O., 1927, chapter 233:—

> 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 subject to the provisions of *The Contributory Negligence Act* be liable for all damages sustained by any person by reason of such default.

To succeed, he must show that there was a default on the part of the respondent to keep the highway in repair. In addition to what has already been narrated, the evidence discloses that about 1922 or 1923 the road in question had been re-graded and gravelled, and that in the autumn of 1936 the surface had been stabilized by the addition of calcium chloride to an average width of twenty feet, although near, and for some distance easterly from, the culvert, the travelled part of the road was wider. The colour of the walls of the culvert merged into the colour of the road surface and complaint was made that this, together with the fact that the culvert itself was about sixteen feet in width, constituted a trap for users of the highway, in the absence of lights or reflectors on the ends of the walls of the culvert and in the absence of signs giving warning of the presence of what is termed on behalf of the appellant "a narrow culvert or bridge."

The trial judge agreed with these contentions and found that the accident was caused by four things,—one of them being the narrowing of the travelled portion of the road from 22 feet or 24 feet to the 16-foot culvert, and another, the absence of signs or warnings. Yet another he described as "the entire absence of wings approaching the culvert." There were wing walls which, however, did not extend above the level of the ground. Unless the suggestion be that if there had been wing walls a few feet in height above such level, a traveller on the highway might more easily be able to discern the presence of the culvert, it is difficult to see how the presence or

absence of such wing walls had anything to do with the accident. In any event, these three matters have been mentioned merely to be put aside as I cannot agree that they constituted any default on the part of the respondent to keep the road in repair. The culvert was built on a stretch of straight roadway and no obligation existed to give warning of what might be expected by a motorist on a county road in Ontario.

The fourth matter mentioned by the trial judge requires more attention,—the condition of the surface of the road. Undoubtedly there were a number of depressions,—but all caused by the normal user of the highway. The evidence of the different witnesses did not vary materially as to their width or depth, and it is impossible to hold that the respondent was guilty of any default in permitting them to exist. They had been caused since the respondent's power maintainer had last been used on the road some time previous to January 1st, 1937, and such depressions are likely to occur in the wintertime when it would be impracticable to make and maintain the road surface smooth and even.

In speaking of the condition of the road, the trial judge found that the evidence had established "the fact that the accident was caused by the pit holes and the rut." This is the rut referred to by the appellant as having prevented him bringing the rear wheels of the truck back to the centre of the travelled portion of the road. Its presence was testified to by other witnesses called by the appellant, including a son and two daughters, one of whom took a photograph of the *locus* on the day following the accident, in the presence of the other two. The respondent's engineer and an insurance adjuster inspected the locality on February 18th and they say there was no rut,—calling what they saw a wheel mark. The respondent's officials were apparently of the opinion that the photograph must have been taken at a date later than February 19th when, because of a thaw, it was found possible for the man in charge of the maintainer to use the machine on the road. After perusing this photograph, the engineer testified that it showed an impression left by the dual wheels of the maintainer, which he identified from the appearance of a mark caused by a diagonal lug not in

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use on any truck. In substance he described what the photograph indicated as a mark and not a rut. He stated further that if the maintainer had made a rut of the depth described by the appellant's witnesses, it should and would have been removed by the respondent the same day. While the trial judge concluded that a rut existed at the time of the accident, he did not find that the maintainer had caused it; and I find it impossible, on the record, to make such a finding.

From this and indeed from the pleadings, and the whole course of the trial, it is apparent that the appellant never claimed or suggested that the rut or mark had been caused by the maintainer or by any vehicle under the control of the respondent. This consideration renders it unnecessary to determine whether a claim could be eked out against the respondent for misfeasance, irrespective of the statute.

Accepting, as did the trial judge, the evidence of the appellant's witnesses, the question remains as to whether this rut was a condition in or near the travelled portion of the road causing it to be out of repair. With respect, I think that question must be negatived. To hold otherwise would be imposing too heavy a burden on county municipalities. It is undoubted law that they are not insurers of the safety of the travelling public. The obligation of a municipality in Ontario has been considered in numerous cases in the courts of that province but the problem has always been to apply the principle as exemplified in the words of Chief Justice Armour in *Foley* v. *East Flamborough* (1):—

> I think that if the particular road is kept in such a reasonable state of repair that those requiring to use the road may, using ordinary care, pass to and fro upon it in safety, the requirement of the law is satisfied.

This statement of the rule was approved in this Court by Idington and Anglin JJ. in *Raymond* v. *Township of Bosanquet* (2). To the same effect are the remarks of Sir Charles Fitzpatrick, C.J., and Duff J. in *Oakville* v. *Cranston* (3), the decision in which is merely noted in 55 Can. S.C.R. 630. The divergence of judicial opinion in that case is indicative of the difficulty experienced in applying the principle to particular circumstances. The

(1) (1898) 29 O.R. 139, at 141. (2) (1919) 59 Can. S.C.R. 452.
(3) (1917) 55 Can. S.C.R. 630.

trial judge had deemed it unnecessary to fix the exact dimensions of the hole or depression which was the cause of the accident but had found that the municipality had not kept the portion of the road, in which it was found, in proper and sufficient repair. In the Court of Appeal for Ontario an appeal from this judgment was dismissed on an equal division of opinion. This Court affirmed the order of the Court of Appeal with Davies J. dissenting. Sir Charles Fitzpatrick stated:—

> Both parties agree that the criterion by which the liability of the corporation is to be measured is safety and convenience for travel, having regard to the physical characteristics of the road, the public needs, the season of the year and the climatic conditions.

The present Chief Justice put the matter thus:—

> There is no controversy touching the fundamental principle governing the determination of the issues in this litigation. The duty of the municipality * * * is to maintain its roads in a reasonable state of repair, in other words, in a reasonably safe condition in so far as that can be done by the exercise of due diligence—*Jamieson* v. *Edmonton* (1),—safe, that is to say, for people using them lawfully and reasonably, due regard always being had in deciding what is reasonable in both these connections to the nature of the locality, the season of the year, the weather and the frequency of travel.

In the case at bar, I conclude that the appellant was not keeping a sufficient lookout as he did not see the culvert wall until he was within twelve feet of it; and that he did not have proper control of the steering-wheel of the truck as, otherwise, the pit holes would have caused no difficulty. I agree with the three judges of the Court of Appeal for Ontario who, I assume, in reversing the trial judge, must have decided that there had been no default on the part of the respondent to keep the road in repair. The appeal should be dismissed with costs.

DAVIS J.—Counsel for the appellant in a very clear and forcible argument presented the appellant's claim against the respondent municipality, as indeed the claim was founded, on an alleged breach of the statutory duty of the municipality to keep in repair its highways. But in my opinion he put the duty far too high. The statutory imposition upon Ontario municipalities has remained unchanged from earliest times (except that in 1927, by chap. 61, sec. 50, by an amendment the provisions of the *Con-*

(1) (1916) 54 Can. S.C.R. 443.

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tributory Negligence Act were made applicable) and the municipal law has long been established in Ontario as to just what is that duty, though, of course, the application of the general statement to particular facts may at times occasion some difficulty. The classic statement has always been that of Chief Justice Armour in the *Township of East Flamborough* case (1), where it was stated at page 141 that a municipality must keep the highway

> in such a reasonable state of repair that those requiring to use the road may, using ordinary care, pass to and fro upon it in safety.

If that is done, "the requirement of the law is satisfied."

Garrow, J.A., in *Hogg* v. *Township of Brooke* (2), put the same principle in an equally clear statement when he said at p. 285:

> A corporation must, I think, at the peril of a charge of negligence, use the means at its command to supply that which the travelling public is entitled to demand, namely, an open and reasonably safe highway.

I am satisfied on the evidence that what is complained of here did not constitute want of repair within the statutory obligation. What was so much emphasized as a "rut" in the shoulder of the travelled portion of the road, caused undoubtedly by the wheel of some motor truck, was nothing different from the common variety of ruts so-called that the everyday motorist encounters on any country road. It would be, in my view, an unbearable burden upon our municipal corporations to impose so high a duty of repair as is contended for in this case.

But quite apart from this aspect of the case, the evidence is abundantly plain that the appellant was the author of his own injury. He had a clear, open, straight stretch of road before him. He had driven over it a few hours before as well as having driven up and down the same road the day before the accident. It was a bright night in February; he says his windshield was clear and that he was driving along the road carefully and that he could see, with his lights on, about three hundred feet ahead of him. There was no one else on the road. And yet, on his own evidence, when he came towards the small bridge over a culvert with the abutments standing three feet nine inches above the ground he ran right into

(1) (1898) 29 O.R. 139. (2) (1904) 7 Ont. L.R. 273.

the abutment on his left side of the road and he admits that he did not see it until he was about twelve feet from it.

The Court of Appeal for Ontario unanimously concluded that the action could not succeed. They apparently thought the case too plain to require written reasons for their judgment.

The appeal should be dismissed with costs.

The application of the statutory onus provision of *The Highway Traffic Act,* R.S.O., 1927, ch. 251, sec. 42 (1) (now R.S.O., 1937, ch. 288, s. 48 (1)) that

> When loss or damage is sustained by any person by reason of a motor vehicle on a highway, the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver.

which was raised in *Groves* v. *County of Wentworth* (1) (a case on its facts in many respects similar to the facts of this case) and carefully considered by the Court of Appeal for Ontario in that case, was not raised in this case and consequently has not been considered by us in relation to the facts of this case.

Appeal dismissed with costs.

Solicitors for the appellant: *MacDonald & MacDonald.*
Solicitor for the respondent: *J. M. Harris.*

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(1) [1939] O.R. 138.