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*June 21, 22
*Nov. 15

J. EDWARD BRESLIN and SAM BRESLIN, carrying on business under the firm name and style of Breslin Industries, (*Defendants*) . . APPELLANTS;

AND

SAMUEL JOSEPH DRISCOLL (*Plaintiff*) . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Invitee—Dangerous Premises property of Third Party—Liability of Invitor knowing of danger and failing to warn of hidden peril—Breach of City By-law.

The respondent with another truck driver was instructed by a fuel company to deliver two truck loads of coal to the appellants' premises. On arrival they were told to put the coal through a window in the

east wall of the appellants' building by one of the appellants' employees who for the purpose removed a wooden covering from the window. The east wall was separated from the street curb by a sixteen foot concrete strip and a station wagon was parked near the window. After it was moved by the appellants' employees, the respondent's companion moved his truck close to the window. The appellants knew, but the respondent did not, that the truck was then over a part of the cellar which extended under the strip and that the latter formed part of the city sidewalk. The respondent was between the truck and the wall when the concrete collapsed causing the loaded truck to tilt and pin him against the wall. In an action in damages for injuries sustained.

Held (Locke J. dissenting): That the appellants were liable.

Per Kerwin C.J., Estey and Cartwright JJ.: The appellants invited the respondent to use a part of the highway adjoining their premises in the course of carrying out a mercantile transaction in which both they and the respondent were interested, without warning him that such use was attended by a hidden peril of which they knew and of which he was ignorant. The appellants' contention that the injuries were caused by the joint negligence of the two truck drivers in driving an overloaded truck on the sidewalk in contravention of a city by-law did not amount to negligence contributing to the accident. It was at most a *causa sine qua non*. The sole effective cause of the accident was the existence of the trap, consisting of the concealed cellar and the failure to warn the respondent of its existence. *Coburn* v. *Saskatoon* (1935) 1 W.W.R. 392 at 396-7; *Beven on Negligence* 4th Ed. Vol. I, p. 9, approved.

Per Kellock J.: There was sufficient evidence upon which the learned (trial) judge could make the finding of invitation.

Per Locke J. (dissenting): There was no evidence that the appellants either invited or authorized any one to invite the respondent or Day (his companion driver) to drive their loaded trucks on to the sidewalk in defiance of the by-law, and it cannot be suggested that the act of a servant in indicating the place where the appellants stored their coal should be construed as an invitation to deliver it there in a manner offending against the by-law, or that the appellants could reasonably anticipate that persons employed by the fuel company would deliver the coal in a manner involving a breach of the by-law.

Decision of the Ontario Court of Appeal [1954] O.R. 913, affirming the judgment of the trial judge, Judson J., affirmed.

APPEAL from a judgment of the Court of Appeal for Ontario (1) affirming by a majority, the judgment of Judson J. (2) awarding the respondent damages for personal injuries. Laidlaw J.A. dissenting, would have allowed the appeal and dismissed the action.

B. V. Elliot, Q.C. for the appellant.

J. D. W. Cumberland for the respondent.

(1) [1954] O.R. 913; [1954] 4 D.L.R. 694.

(2) [1954] O.R. 62; [1954] 2 D.L.R. 124.

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The judgment of Kerwin C.J. and of Estey and Cartwright JJ. was delivered by:—

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario, affirming, by a majority, the judgment of Judson J., awarding the respondent damages for personal injuries. Laidlaw J.A., dissenting, would have allowed the appeal and dismissed the action.

The respondent was injured on November 26, 1951 as a result of being crushed between a coal truck owned by Toronto Fuels Ltd. and the wall of a factory building owned and occupied by the appellants. The respondent was the owner of a truck and, pursuant to a contract between him and Toronto Fuels Ltd., was delivering coal which had been purchased from that company by the appellants. Carl Day, an employee of Toronto Fuels Ltd., was also delivering coal to the appellants. Day drove to the appellants' premises and the respondent followed him. Neither of them had previously delivered coal to the premises of the appellants. It appears that Day and the respondent had arranged to assist each other in getting the coal from the trucks into the cellar. On arrival they made enquiries as to where they were to put the coal. Edward Numajari, an employee of the appellants, told them to put the coal through a window in the east wall of the appellants' building and removed a wooden cover from the window. The appellants' building is situate at the north west corner of Adelaide and Duncan streets in the city of Toronto. The east wall of the building is on the westerly limit of Duncan Street. The building is bounded on the north by a lane, 15 feet wide, running westerly from Duncan Street.

After receiving the directions given by Numajari, Day, whose truck was to be unloaded first, drove it from the north east corner of Adelaide and Duncan Streets northerly on Duncan Street and into the lane. He then backed out, drove southerly on Duncan Street and stopped the truck parallel to and distant 2 or 3 feet easterly from the east wall and a few feet north of the spot in which he intended to place it for the purpose of delivering the coal. The reason for stopping at this point was to place the conveyer, which was carried on the truck, in position for making delivery. Before driving the truck into this position, either the

respondent or Day asked Numajari to move a station-wagon which was standing on the street or sidewalk and this was done either by Numajari himself or by another employee of the appellants at his direction. I think that the learned trial judge drew the proper inference from all the evidence on this point, i.e. that Numajari had the truck moved so as to enable Day to drive his truck into the very position into which he did in fact drive it and into which he could not drive it until the station-wagon was moved.

The respondent was assisting Day in adjusting the conveyer and was standing between the truck and the wall. Day got back into the truck and started to drive it forward. As he did so the right rear wheel of the truck broke through the concrete surface of the sidewalk with the result that the truck tipped over against the wall crushing the respondent as it did so.

Beneath the concrete which collapsed was a cellar or vault occupied by the appellants and used by them for the storage of materials. There is no evidence of any agreement with the city as to the construction or maintenance of this cellar under the street.

By-law No. 12519 of the Corporation of the City of Toronto provides in part:—

> 20. (*a*) No person shall ride, drive, lead or back any horse, carriage, cart, wagon, sled, sleigh or any vehicle over or along any paved or planked sidewalk, unless at a regular crossing provided thereon. Provided, however that this prohibition shall not apply to prevent the sidewalk being crossed for a lawful purpose if permission prior thereto is obtained from the Commissioner of Works so to do, as follows:—
>
> (1) For vehicle and load of gross weight of less than 10,000 pounds, the sidewalk must be covered with planking at least two inches in thickness, securely fastened, and chamfered or bevelled off at the ends and at the curb, so as to be no obstruction to pedestrians, and there shall be constructed across the drain, gutter or water-course opposite the proposed crossing, a good and sufficient bridge of planks or other proper and substantial material, so constructed as not to obstruct such drain, gutter or water-course.
>
> (2) For vehicle and load of gross weight of more than 10,000 pounds the protection for the sidewalk shall be the same as provided in sub-section (1) above, except that the thickness of the planking shall be at least four inches.

The by-law does not define "sidewalk" but an employee of the City Works Department testified that the sidewalk on the west side of Duncan street extends out eight feet from the appellants' building. The respondent said that he

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knew it was forbidden to drive vehicles on the sidewalk but that he did not know that this strip of land was a sidewalk. Day gave evidence to the same effect and the learned trial judge accepted their evidence.

The licence issued to Toronto Fuels Ltd. for the truck driven by Day stated the weight of the vehicle to be 8,200 pounds and the gross weight of vehicle and load to be 20,000 pounds. The gross weight of the vehicle and load at the time of the accident was 22,150 pounds but the respondent did not know this. There was no evidence as to what weight the concrete over the cellar would have supported.

The learned trial judge made the following findings of fact; that the respondent and Day found a 16 foot concrete strip along the east wall of the appellants' premises; that the lay-out suggested to them that this strip was meant to be used for deliveries; that they were invited to use the space in the way they did; that they did not know that the truck was on the sidewalk; that someone in the employ of the appellants moved a station-wagon owned by the appellants to enable the truck to be placed in position; that the appellants knew that the cellar undermined the sidewalk; and that the respondent and Day did not know of the existence of the cellar. All of these findings of fact were concurred in by the majority in the Court of Appeal (1). Aylesworth J.A. with whose judgment F. G. MacKay J.A. agreed said:—

> In my view, the findings of fact made by the learned trial judge to which I have referred are findings which are supported by the evidence, either by way of direct testimony or by reasonable inferences therefrom, and I am therefore not prepared to disturb those findings.

I am unable to find any sufficient reason for disturbing these concurrent findings of fact.

On these findings the learned trial judge held the appellants liable on two grounds.

The first ground is stated as follows by the learned trial judge:—

> . . . My opinion is that the defendants and their employees should have foreseen the risk of danger here and should have warned a person making a heavy delivery to the premises not to drive a vehicle over the lightly bridged cellar. Had this warning been given, in some form or other, there would have been no accident. I am therefore finding that the defendants

(1) [1954] O.R. 913.

are liable in this case because they failed in their duty to warn against a foreseeable danger to persons with whom they were in business relations and who themselves were ignorant of the danger.

The second ground he states as follows:—

The facts of this case indicate an invitation on the part of the defendants or their servants to the truck drivers to make a delivery at the window and to make use of the concrete strip which at the trial was identified as a sidewalk. I think the case is within the principle stated in *Great Lakes Steamship Co.* v. *Maple Leaf Milling Co. Ltd.* (1) and *Drinkwater* v. *Morand* (2) in these terms:

> The principle thus established is that those who invite another to use the property of a third person or of a public body impliedly warrant that the place to be used is safe for the purposes indicated, and the invitation imposes a duty upon those who invite, to make sure that it is fit for the purposes suggested.

These cases were reviewed, I think with approval, in *MacDonald* v. *The Town of Goderich et al.* (3), although the Court found it unnecessary to express an opinion as to precise scope of the doctrine. It was, however, pointed out in the judgment of Aylesworth J.A. at p. 634 that in these cases the invitor had the right to issue an invitation to those having business with him to come on the premises of the third person. In the present case the defendants had no such right. However, they did, as I find, issue the invitation to use the sidewalk. They knew the place was a sidewalk and that it was undermined. The drivers did not know those things. I am finding, in these circumstances, that the duty still exists and that the case is within the general principle I have just set out.

I share the view of Aylesworth J.A. that it is unnecessary to deal with this second ground.

In my opinion the judgment of the learned trial judge should be affirmed on the first ground mentioned above. The finding of fact that the appellants invited the respondent and Day to use the sidewalk in the manner in which they did use it, which I have already indicated we should accept, appears to me to be fatal to the appellants' case and it would appear that it is because he rejects this finding of fact that Laidlaw J.A. dissented. That learned Justice of Appeal says in part:—

. . . I prefer, however, to rest my judgment on the grounds that there was no duty on the part of the appellants to foresee and guard against the wrongful conduct of the respondent and that there was no evidence to support a finding that the respondent was invited by the appellants to use the sidewalk for the purpose of unloading the coal.

On the facts found by the learned trial judge and concurred in by the Court of Appeal no question can arise as to

(1) (1924) 41 T.L.R. 21. (2) (1929) 64 O.L.R. 124, 128.
(3) [1949] O.R. 619, 634.

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the appellants' duty to foresee the conduct of the respondent and Day. A person cannot be heard to say that he did not foresee the probability of another acting in the very way in which he has invited him to act. I agree with the view of the learned trial judge and of Aylesworth J.A. that the appellants should have foreseen the probability of the truck breaking through the concrete bridging the cellar.

It is unnecessary to consider whether in the circumstances of this case the appellants impliedly warranted that it was safe for the respondent and Day to use the strip of land in the way in which they had invited them to use it. The appellants are liable because they invited the respondent to use a part of the highway adjoining their premises in the course of carrying out a mercantile transaction in which both they and the respondent were interested, without warning him that such use was attended by a hidden peril of which they knew and of which he was ignorant. The fact that the appellants were personally absent at the time of the occurrence is unimportant. The invitation was extended by the words and actions of their servant acting within the scope of his authority. On his uncontradicted evidence, Numajari was entrusted with the duties of seeing to the proper delivery of the coal and the invitation was given in the course of performing such duties.

It is argued for the appellants that the injuries of the respondent were caused by the joint negligence of the respondent and Day in driving the truck, when loaded in excess of the maximum weight specified in the licence mentioned above, on the sidewalk in contravention of By-law No. 12519. On this point I agree with the learned trial judge and with Aylesworth J.A. who, in rejecting this defence, adopted the reasoning of the Court of Appeal for Saskatchewan in *Coburn* v. *Saskatoon* (1) and that of the learned author of *Beven on Negligence,* 4th Edition, Vol. 1, page 9. In particular I would adopt the language of Turgeon J.A., as he then was, in *Coburn's* case when he says at page 396:—

> Trespass is only a civil wrong against the owner or occupier of property and when, in some of the cases cited, it is said that the plaintiff in order to succeed must have been *lawfully* upon the premises at the time of the accident "lawfully" merely means *not tortiously* in respect to the defendant.

(1) [1935] 1 W.W.R. 392.

and at page 397:—

> It is also alleged by the defendants that if the deceased was a trespasser upon the Canadian National Railways right of way at the time he was killed he was thereby committing a statutory offence because s. 408 of the *Railway Act*, R.S.C., 1927, c. 170, punishes trespassers on railway property. But such a breach of the statute by the deceased cannot be considered as an element in the case unless it amounted to negligence contributing to the accident. The mere fact of the deceased being in breach of a statute at the time he suffered from the defendant's negligence is not sufficient to defeat the plaintiff's claim.

In the case at bar the breach of the by-law did not, in my opinion, amount to negligence contributing to the accident. It was at most *causa sine qua non*. The sole effective cause of the accident was the existence of the trap, consisting of the concealed cellar, and the failure to warn the respondent of its existence. With regard to the argument based on the load exceeding the maximum specified in the licence, it is sufficient to say that, as was pointed out by the learned trial judge, there was no evidence that the excessive weight was a cause of the accident.

I would dismiss the appeal with costs.

KELLOCK J.:—The appellants contend that the judgment below should be reversed upon the ground that there was no foreseeable danger with respect to which the appellants ought to have warned the respondent, and that there was no invitation from the former to the latter to enter upon the place below which the vault existed to the knowledge of the appellants but of which the respondent was unaware. These two questions are closely related.

The appellant Sam Breslin testified that the appellants began to purchase coal from Toronto Fuels Ltd. in October, 1951. While he said that it did not matter to him whether the coal came in bags or in bulk, he admitted that he knew that coal in bags was more expensive than loose coal and that in ordering the particular coal here in question, he had discussed price.

Further, his evidence that coal had always been delivered through the manhole and not through the wooden window was contradicted by the appellants' own employee Numajari, also called on their behalf, who testified that both were used. He said it made no difference which, as both led to the same place. This also contradicts the evidence of the appellant J. E. Breslin who, when asked as to whether he

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had ever "seen" anyone drive up where the station wagon had been parked to deliver coal, said that prior to the occasion in question "coal was always put into the coal chute and the truck was on the road."

It is, moreover, significant that when cross-examined as to his knowledge of the existence of the wooden window as a place for delivery of coal, Sam Breslin said "That is the window we got with the building, and that is what *we use.*" He also admitted that when trucks came with coal they would have to find somebody to tell them where to put it.

The witness Numajari further testified that, as well as being engaged in the industrial process carried on by the appellants on the premises, it was his duty to look after the furnace, to keep watch over the supply of coal, and when the supply got low, to inform one of them. In addition to that, when coal came to be delivered it was his duty to "see that it got in all right," that is, "into the proper place in the building."

Upon the occasion in question, Numajari was on the third floor when the coal trucks arrived and was called down to the basement by another employee. This would seem to indicate that Numajari's duty to see to the getting of the coal into the building was an understood thing among the appellants' employees.

The above evidence justifies the findings of the learned judge that the appellants knew that they were buying coal to be delivered in bulk and not in bags, that the cellar window was the delivery window for the coal and that it was part of the duty of Numajari, who opened the window, to tell the drivers that fact, and that he did so. These findings were affirmed in the Court of Appeal. In my opinion, it is implicit in these findings that Numajari was placed by the appellants in their place for the purpose of accepting delivery.

It is the contention of the appellants that the truck ought to have remained on the roadway east of the curb and that they had no reason to anticipate anything else, particularly in view of the city by-law. The learned trial judge, however, on the evidence, gave "no credit whatever" to the statement of both defendants that they reasonably expected the coal to be delivered in bags or by means of an unloading

apparatus operated from a truck standing on the road and passing over the sixteen feet of concrete lying to the east of the appellants' building into the cellar window.

The appellants next contend that the proper way in which delivery ought to have been made was for the truck to have backed up on the easterly eight feet of the sixteen feet of concrete between the curb and the building and discharged the coal, presumably by chute or conveyor, over the westerly eight feet. While the part of the sixteen feet occupied by the cellar vault was not stated in evidence, the inference would appear to be that so long as the truck was not driven closer to the building than eight feet, it would not have been over the vault.

As to this contention, Sam Breslin deposed that the whole sixteen feet were paved in exactly the same manner throughout, while the appellant J. E. Breslin refused "to accept the term 'boulevard'" with relation to the most easterly eight feet of the concrete. He testified as to the entire sixteen feet that

> My conception of it always was a sidewalk, and I believe most people would recognize it as such, because people approach off the roadway to that point in crossing roads and so on. There was never any question in my mind as to its ever being anything but a sidewalk.

Accordingly, the above contention on behalf of the appellants involved the use of at least part of the sixteen foot area, which, in the view of the appellant J. E. Breslin, constituted as much a use of the sidewalk as any other part, and so far as the by-law was concerned, equally within its provisions. The appellants themselves parked their station wagon in this area without obtaining the permission called for by the by-law. Such use would be some indication to persons coming to the premises for the purpose of making deliveries, as the respondent did, that from the standpoint of danger at least, there was no reason why it should not be driven upon.

Just why the appellants in this contention draw the line at eight feet is not, in the light of the above evidence, apparent. Moreover, Sam Breslin, in his evidence, testified that in his view, only the four feet, or four feet six inches immediately next to the building constituted the sidewalk.

Once, therefore, the idea is rejected, as the learned judge, properly in my view, did reject it, that the appellants expected the coal trucks to remain on the roadway, it is clear

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that they contemplated the trucks being driven upon the sixteen foot area in order to unload and there is no basis in the evidence upon which a line is to be drawn at the middle line of that area.

It may be remarked that there is no definition of "sidewalk" in either the *Municipal Act* or the by-law and there is really no basis upon which it can satisfactorily be said that all of the sixteen feet were not sidewalk even for the purposes of the by-law itself. The evidence of a city employee that the city regarded the westerly eight feet as sidewalk, adds nothing to the relevant considerations so far as the issues here in question are concerned, however relevant such evidence might be in a proceeding to which the city was itself a party.

The respondent admitted that he was well aware of the by-law but did not believe they were on the sidewalk. The learned judge accepted this evidence and further found that the "lay-out" of the area east of the building suggested to the truckers that it was meant to be used for deliveries. Unquestionably, that part of the area to the north was so used.

The respondent testified that the truck was not backed up on the sixteen foot strip because the conveyor by which the coal was to be unloaded was not long enough. He was not cross-examined upon this statement with relation to the fact that had the truck been backed up to the edge of the most westerly eight foot strip of concrete, with its overhang of two feet it would have been within six feet of the building, while the conveyor was from ten to twelve feet long. There may have been some reason due to the method of operation of the conveyor which would explain this, but, as I have said, the respondent was not asked. He further testified, in any event, that even had it been long enough, they would not have operated it that way, as to do so would have completely blocked the use of the whole sixteen feet by the combined means of the truck and the conveyor. It cannot be said that the appellants could have expected any such unreasonable method to be employed.

The learned trial judge drew the inference upon all the evidence that the appellants knew that the delivery would be made exactly as the respondent and Day proposed to make it and these findings were confirmed by the Court of

Appeal. That the learned judge was justified in so doing is, I think, further supported by the fact that when it was pointed out to Numajari by the truckers that they intended driving the truck into such a position with relation to the building that in order to do so the appellants' station wagon parked on the easterly eight feet of the strip would have to be moved, he had it moved. In so doing he did not in any way indicate that the course the respondent and Day were thus proposing to follow was in any way unusual or a departure from the method followed in the case of prior deliveries of loose coal through the window. Although called on behalf of the appellants, he was not examined on these matters. His removal of the station wagon was, in the circumstances, a sufficient invitation to use the area the trucks had indicated they proposed to use.

Accordingly, there was, in my opinion, sufficient evidence upon which the learned judge could make the finding of invitation upon which his judgment in favour of the respondent is founded. I would therefore dismiss the appeal with costs.

LOCKE J. (dissenting):—The facts disclosed by the evidence in this matter, in so far as it is necessary to consider them in determining the question of liability, appear to me to be as follows.

The appellants J. Edward Breslin and Sam Breslin are manufacturers and are the owners of a building in which they carry on their business, situate at the northwest corner of the intersection of Adelaide and Duncan Streets in Toronto and fronting on the former street. The building is approximately 82 feet in length and its westerly wall is built flush with the property line. At the rear there is a lane 15 feet in width. As shown by the evidence of an official of the Works Department of the City, a concrete sidewalk extends out 8 feet from the west wall of the building along the east side of Duncan Street. From the westerly limit of the sidewalk to the curb, a distance of 8 feet, what would normally be a boulevard is also paved with concrete. This concrete was built flush with the westerly limit of the sidewalk. Photographs put in evidence show that this portion so laid with concrete extended throughout the length of the appellants' building but was not carried past the lane to the north. The street curb is plainly visible in the photographs

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but, at a point opposite what was described as a delivery door in the west wall of the building some 20 feet from its northern extremity, the curb is shown as being lower than it was further south towards the intersection.

At some time prior to the date of the accident, the Breslins had ordered coal from Toronto Fuels Ltd. to be delivered at their premises, and that company instructed its employee Carl Day and the respondent, an independent contractor engaged in the trucking business, to deliver the fuel. Day drove a Ford truck, the property of his employer, the weight of which, empty, was 8,200 pounds and which was carrying a load of 13,950 pounds at the time of the accident. This was a weight about one ton in excess of the amount permitted to be carried upon the truck under the terms of the permit issued to the employer by the Motor Vehicles Branch of the Department of Highways.

Neither of the two drivers had delivered fuel to the premises theretofore and on their arrival, according to the respondent, he asked a Japanese named Numajari, who proved to be an hourly worker employed by the appellants part of whose duty was to attend the furnace in the building, where the coal was to be put. According to the respondent, Numajari opened a window, which the photographs show to have been to the south of the above mentioned delivery door and about 30 feet from the southerly limit of the building, and in answer to the question "Where does the coal go?" said "Go here." The photographs show the window in question to be between 2 and 3 feet in height and some 2 feet in width and let in to the wall, the bottom portion of the window being a few inches above the level of the pavement. Opposite the window the street curb is shown on the photograph Exhibit 4 as being of normal height. Day's account of the discussion with Numajari was expressed in these terms:—

> We walked across to the building, and I went around to the front to see who would look after the coal. I had not been there before. I didn't know just where to go. In the meantime, I think it was a Japanese fellow, a young fellow, he came and opened a slide down by the wall at the sidewalk, and he told us the coal went in there.

and said further:—

> When he opened this door (sic.) for us he told us that is where the coal went in. We asked him to move a car that was there. I don't know whether it was him or someone else that came out and moved the car up and left us room to get in between the car and the building.

The other car referred to was a station wagon owned by the respondents, which was standing on the concrete between the westerly limit of the sidewalk and the curb where, according to the evidence, it was parked with the permission of the police. The identity of the person who moved the station wagon was not disclosed, but it was undoubtedly an employee of the appellants.

It was decided by the two men to deliver the coal on the truck driven by Day first. There was let in to the sidewalk immediately in front of the window which had been opened by Numajari a manhole over a coal chute into which coal was, according to Samuel Breslin, customarily delivered but, while this is plainly visible in one of the photographs put in by the respondent, apparently it was not observed by either of the men. Day's truck was equipped with a conveyor specially designed for the delivery of coal from such conveyances which, he said, was either 10 or 12 feet in length and thus amply sufficient to have carried the coal from the rear of the truck either to the entrance of the manhole or to the window itself, had the truck been stationed with its rear wheels on the concrete to the west of the sidewalk. For reasons which are not explained in the evidence, this was not done. It is not suggested that Numajari or any one else had been asked for instructions as to the *manner* in which the coal was to be removed from the truck and put in to the basement of the building.

How they proceeded to do this may best be described in Day's language:—

> I got in my truck. I was on Adelaide Street. Drove around the corner to the right, up Duncan, and Mr. Driscoll, he followed me, and he left his truck there. We could only unload one at a time. And I drove up to the lane there, north of the building, west off Duncan. I drove in there, backed up, and then went down past the end of the building, along the wall, to the coal window.

After a reference to one of the photographs which I find to be unintelligible, the examination continued:—

> Q. When you got down there, what did you do? A. I stopped there, just before I got to the place, before I put the coal in the hole, to take the conveyer off, it is on that side.
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> * * *
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> Q. Why were you using the conveyer? A. You need the conveyer to put it through the hole in the wall, the window that is there.
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> * * *
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> Q. You took the conveyer off. What was Mr. Driscoll doing at this time? A. Mr. Driscoll took one end of the conveyer off. He took the

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front end off first. It is pretty heavy to lift. He put his end on the ground. I took the back end off, set it down on the ground. He picked up the front end immediately I put my end on the ground. I got back in the truck, backed up the truck and moved it up to the window so he could put the conveyer in crossways behind it.

Q. What happened? A. I started ahead and went six or seven feet, when the right hind dual wheel dropped through the concrete. I suppose that would be out may be two or three feet from the wall.

According to the respondent, the position in which the station wagon was standing interfered with placing Day's truck alongside the building opposite the window and they accordingly asked that it be moved. His account of the manner in which Day put his truck into position differs from that given by the latter, in that he says that, after Day had driven into the laneway facing west and backed up on to Duncan Street, he "cut across the front of the receiving door" and, continuing, said:—

For one reason, we are not supposed to drive on the sidewalk, and the receiving door is the most potent (sic) place to cross over, because I imagine it would be built up stronger, the portion of the sidewalk there, than it would be further down. Going over a curb with your tires is not very good either.

and said that Day had pulled up along the side of the building and that he was close to him "guiding him in."

At the place where the right rear wheel of the truck went through the pavement, which the photographs would indicate to have been some six or eight feet to the north of the window referred to, a vault for the storage of materials had been constructed under the sidewalk, apparently by one of the predecessors in title of the Breslins. This excavation was on city property and the evidence does not show that it had been constructed or used with the City's permission. The Breslins had purchased the property in 1945 and thereafter continued to use the vault for storage. Whether the fact that Day's truck was overloaded contributed to the occurrence is not disclosed by the evidence. The effect of the sidewalk caving in was that the respondent, standing near the rear of Day's truck, was pinned against the wall of the building and suffered serious personal injuries.

In the Statement of Claim the respondent alleged that on arrival at the premises he had proceeded to a place:—

where a delivery door or entrance way into the said lands and premises was located and to which a servant or agent of the defendants invited the plaintiff and the driver of the other coal truck to make delivery.

Referring to the vault under the sidewalk, it was alleged that the defendants maintained it:—

at or near the point where the plaintiff and the driver of the other coal truck had been invited or requested to make delivery of coal.

Negligence was alleged in maintaining the vault without providing it with a safe roof and in not warning the plaintiff of its existence and condition and in:—

inviting or requesting the plaintiff to make delivery of coal in such a manner and at such a place as to necessitate his standing on or near the said vault.

It was further said that the vault constituted a nuisance.

Upon this evidence, the learned trial judge made the following findings of fact which were accepted by the majority in the Court of Appeal:—

There is a large delivery door at the north end of the easterly wall and provision at the curb, in the form of a small ramp, for trucks to back up to the delivery door. Day drove his truck over this ramp in order to get alongside the wall.

* * *

The plaintiff and the other driver, Carl Day, found a 16 foot concrete strip along the east wall of the premises. The layout suggested to them that it was meant to be used for deliveries. They were invited to use the space in the way that they did. Further, somebody in the employment of the defendants moved a station wagon owned by the defendants to enable the truck to get into position . . . They did not in fact know that they were on the sidewalk. They thought that they were on land owned by the defendants and used for loading and unloading goods. Both drivers admitted knowledge of a City by-law prohibiting the presence on the sidewalk of a vehicle such as the one in question here.

On the other hand, the defendants knew that the easterly wall of their building was on the street line and that their cellar undermined the sidewalk. They also knew that the cellar window was the delivery window for coal. Their employee gave instructions for the delivery to be made at this window.

The negligence found was in failing to warn the respondent against a foreseeable danger of which the appellants were aware and the respondent ignorant.

In my opinion, the material part of these findings is not supported by the evidence. As the photographs show, the curb for some distance south from the lane was reduced in height and, according to Samuel Breslin, when they first occupied the building they had for a time taken advantage of this to have a truck back up to the delivery door across the sidewalk, but this practice had been discontinued on the instructions of the police. There was nothing in the nature of a ramp. At the point opposite the window

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indicated by Numajari, which the photographs would indicate was at least 30 feet to the south of the delivery door, the curb was of the usual height found in the city streets. There is no evidence to support the finding that the drivers were invited to use the sidewalk in the way that they did. They were told where the coal was to be delivered but there is not the slightest suggestion in the evidence that they were instructed as to the *manner* in which it should be put there, which was indeed none of the concern of the appellants. Neither of the drivers said that he thought he was on land owned by the appellants and I am sure neither would have made any such statement, which would have involved asserting a belief that the western boundary of the appellants' property extended to the curb line. The act of removing the station wagon standing on the portion of the concrete between the western boundary of the sidewalk and the curb line, done at the request of the respondent, cannot be held in itself to have constituted an invitation to drive the truck on the sidewalk. The fact that the station wagon was standing in this position might well indicate to the two drivers that it stood there with the permission of the police and might have justified them placing the truck on this space with its rear end towards the window and, with the aid of the conveyor, delivering the coal, either through the window or in the manner it had always theretofore been delivered, into the manhole. While Day said that the conveyor was not long enough to reach from the truck to the window, he must have meant that it was not long enough if the rear of the truck was at the curb since the width of the sidewalk itself was only 8 feet and the length of the conveyor from 10 to 12 feet.

The City by-law referred to prohibits any person from driving any vehicle over or along any paved sidewalk, except at a regular crossing provided thereon, without the permission of the Commissioner of Works and, if such permission should be obtained, the manner in which the sidewalk should be protected is specified. It is said in the reasons delivered at the trial that the fact that the actions of the respondent were in contravention of the City by-law does not afford a defence, though it might be that in an action against the City a claim of breach of the by-law or trespass would succeed. But this, with great respect, is not the point.

There is no evidence that the appellants either invited or authorized any one to invite the respondent or Day to drive their loaded trucks on to the sidewalk in defiance of the by-law, and it cannot, I think, be suggested that the act of a servant in indicating the place where the appellants stored their coal could be construed as an invitation to deliver it there in a manner offending against the by-law, or that the appellants could reasonably anticipate that the persons employed by Toronto Fuels Ltd. would deliver the coal in a manner involving a breach of the by-law. No one, as shown by the uncontradicted evidence of the appellant J. E. Breslin, had ever done so during the time they had owned the property. While moving the station wagon might be construed as an indication that the truck might be placed in the position thus made available, I fail to understand how that act can be construed as an invitation to drive the truck on to the *sidewalk* between the portion of the pavement so vacated and the window. It is suggested that the trial judge drew the inference that there had been such an invitation, but inferences may only be properly drawn from proven facts and here there are none such to support any such inference. To hold otherwise is to read something into the evidence that is not there. The fact—if it was a fact—that the drivers did not know they were driving on the sidewalk is, in my opinion, an irrelevant circumstance.

While the majority of the learned judges of the Court of Appeal have accepted the findings of fact made at the trial, and there are thus concurrent findings, this cannot be decisive of the matter in a case such as this where those findings are not supported by the evidence.

In agreement with Mr. Justice Laidlaw, I think the evidence in this case does not disclose a cause of action. I would allow the appeal, with costs throughout if they are demanded.

Appeal dismissed with costs.

Solicitors for the appellants: *Borden, Elliot, Kelley, Palmer & Sankey.*

Solicitors for the respondent: *Low, Honeywell & Murchison.*