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*Mar. 6
*Jun. 16

LILLY McARTER (PLAINTIFF).....APPELLANT;

AND

A. E. HILL CO. LTD. (DEFENDANT) .....RESPONDENT.

AND

THE TOWN OF HARTNEY

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Highway—Non-repair—Trap-door installed in sidewalk covered with snow and not in reasonably good state of repair—Liability of owner of door when pedestrian slipped.

The appellant, while walking on the sidewalk in front of the respondent's premises, slipped on two iron trap-doors with studs on the top which the respondent had many years ago installed in—and flush with—the sidewalk. It had snowed for several hours before the accident and the snow had not been cleaned off the doors which were partially concealed. The trial judge found that the studs on the doors had been worn down during the years and that some had entirely disappeared, that the doors appeared to have sagged and were uneven and sloped, and that they were not in a reasonably good state of repair. The Court of Appeal reversed that judgment, and found that the studs were worn but that there was no evidence that the worn condition of the doors was the cause of the accident.

Held: The appeal should be allowed and the action maintained. There was evidence to justify the finding that the fall was caused by the slope of the doors. The appellant was entitled to find the sidewalk safe and convenient for travel. The respondent had placed the doors in the sidewalk, and by allowing them to sag and become uneven and sloped, had interfered with the rights of the public and impeded the way of the appellant as a traveller on the highway.

The contention of the respondent that it had no authority to repair the doors since they were part of the sidewalk fails since from time to time the doors were opened and used by the respondent.

Castor v. *Corporation of Uxbridge* (1876) 39 U.C.Q.B. 113 referred to.

APPEAL from the judgment of the Court of Appeal for Manitoba, reversing the judgment of the trial judge and dismissing the action for damages suffered by the appellant when she slipped on the sidewalk.

L. St. G. Stubbs and Harry P. Beahen for the appellant. There was sufficient evidence to support the findings of fact of the trial judge and the judgment based thereon. There was insufficient evidence to support the findings of fact of the Court of Appeal.

The Court of Appeal did not show that there was demonstrable error in the trial court in law or in fact.

*PRESENT: Kerwin, Rand, Kellock, Estey and Cartwright JJ.

This was on public property but controlled by the respondent.

The case of *Hamilton* v. *Parish of St. George* (1) is not applicable, but the cases of *Hopkins* v. *Corp. of Owen Sound* (2) and *Rushton* v. *Galley* (3) are relied on.

F. M. Burbidge Q.C. for the respondent. The onus is on the appellant to establish that her fall was due to the worn condition of the studs. If the matter is left in doubt and a fortiori, if the proper inference from the evidence indicates that she slipped on the snow, then she failed to prove her case. *Burgess* v. *Southampton* (4). The appeal does not involve the reversal of the trial judge on a question of fact but on the proper inferences to be drawn from undisputed facts. Not only did she not make her case but there was no case to be made. There is no positive evidence as to where she fell and what caused her to fall.

The duty was to keep the sidewalk in a reasonable state of repair. And the sidewalk was in such a state. The action is based on nonfeasance and not misfeasance. *Crafter* v. *Metropolitan Ry. Co.* (5). The evidence establishes that the doors were in a reasonable state of repair and the cases of *Ewing v. Toronto* (6) and *Anderson* v. *Toronto* (7) are relied on.

The doors were in the sidewalk with the consent and approval of the town, and being part of the sidewalk, the duty to keep the sidewalk, including the doors, in repair was on the town. The case of *Ewing* v. *Hewitt* (8) is directly at point and is sufficient to dispose of the present case.

The cases of *Hamilton v. Parish of St. George* (1); *Vestry of St. Matthew* v. *School Board for London* (9); *Horridge* v. *Makinson* (10); *Callaway* v. *Newman Mercantile Co.* (11); and *Schoeni* v. *King* (12) are relied on.

The *Hopkins* case (*supra*) does not apply and the *Rushton* case (*supra*) is rather in respondent's favour.

(1) (1873) L.R. 9 Q.B. 42.
(2) (1896) 27 O.R. 43.
(3) (1910) 21 O.L.R. 135.
(4) [1933] O.R. 279.
(5) (1866) L.R. 1 C.P. 300.
(6) 29 O.R. 197.
(7) (1908) 15 O.L.R. 643.
(8) (1900) 27 O.A.R. 296.
(9) [1898] A.C. 190.
(10) (1915) 84 L.J.K.B. 1294.
(11) (1928) 12 S.W. (2nd) 491.
(12) [1944] O.R. 38.

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The judgment of Kerwin, Kellock, Estey and Cartwright, JJ. was delivered by:—

KERWIN J.:—This is an appeal by the plaintiff, Mrs. Lilly McArter, against the unanimous judgment of the Court of Appeal for Manitoba, which had reversed the judgment at the trial of Campbell J., awarding the appellant $3,038.58 against the respondent A. E. Hill Limited, the correct name of which company counsel agreed is A. E. Hill Company, Limited. Originally the Town of Hartney was also a defendant but the trial judge dismissed the action as against it on the ground that proper notice had not been given it under section 463 of the *Municipal Act*, and there was no appeal from that determination. After the decision of the Court of Appeal and the certification by its Registrar of the Case, stated and agreed on by the parties to the appeal to this Court, the plaintiff appellant applied for an order amending the Case. We remitted the Case to the Court of Appeal, and that Court made an order amending it by the substitution of one word for another in this direct examination of the appellant at the trial:—

Q. You say you stepped, what happened? The door didn't get up and smack you in the face?

A. It certainly didn't. I don't know whether I slipped, I presume I must have slipped because after you could see the mark where I had cleared the snow off the top of the snow.

The word "door" was substituted for the last word "snow". The significance of this amendment will become apparent later.

About 6 p.m. on December 4, 1948, the appellant was proceeding southerly on the cement sidewalk on Railway Street in Hartney, adjoining the west side of a store building owned and occupied by the respondent. About midway between the front and rear of this building, two iron trap-doors with studs on the top had been installed in—and flush with—the sidewalk, and were hinged on their outer edges to enable them to be opened. The trap-doors were about 8 feet in width, measured from the wall of the building, by 4 feet measured along the length of the sidewalk. The sidewalk from the wall of the building was 10 feet 8 inches wide, of which the trap-doors took up the first 8 feet, so that 32 inches of cement extended from

the westerly edge of the doors to the westerly edge of the sidewalk. These trap-doors had been installed by the respondent about 1902 and, therefore, prior to the incorporation of the town in 1904. The cement sidewalk had been constructed by the town about 1930. The doors and the elevator in the area beneath the level of the sidewalk were used by, and were under the control of the respondent.

Snow had fallen the night previous and during the day of December 4, including the afternoon, but it had ceased snowing at the time of the accident. I agree with the inference drawn by the trial judge that the snow had not been cleaned off the doors and that they were partially concealed by it. I also agree with him that the studs on the doors had been worn down during the years and that in fact on the westerly limits of the doors some had entirely disappeared. The witness Baxter testified that "there is a hollowed out part where the door is bent down" and some of the photographs show, as the trial judge states, that the doors "appear to have sagged and, as a consequence, were uneven and slightly sloped." His finding, therefore, that the trap-doors were not in "a reasonably good state of repair" was justified.

The appellant slipped and sustained injuries for which damages were claimed and awarded by the trial judge. On the second page of his reasons in the case, he found that while the appellant had testified generally that some of the studs were missing at the time, she had not given evidence showing the missing studs to have been contiguous to each other or that she had stepped on any point where the studs were missing. However, in the witness box she had pointed to a spot on a photograph, made an exhibit at the trial, as indicating where she had fallen and testified that it was "about a foot in from the edge of the door." Counsel for the appellant argued that this was sufficient to warrant the finding of the trial judge, on the third page of his reasons: "I find that some studs were missing from the doors and the plaintiff stepped upon that area and slipped and fell by reason of the absence of studs and the slope of the doors." While I am not satisfied that the appellant fell by reason of the absence of the studs, I do think that there was evidence to justify the finding

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that the fall was caused by the slope of the doors. As to Mr. Burbidge's contention that the statement of claim did not allege any such condition, I am of opinion that the allegation therein that the respondent was negligent "(*a*) in the construction and operation of the said trap-doors" covers the point.

Speaking for the Court of Appeal, Adamson, J.A., after referring to the finding of the trial judge on the third page remarked that while there was no doubt that the studs were worn, there was no evidence that the worn condition of the trap-doors was the cause of the accident. He then referred to the evidence of the appellant transcribed above. In view of the change made in the transcript of the evidence, the conclusion drawn by the Court of Appeal, that the snow had been packed on the sidewalk and that fresh loose snow lay on the packed snow, does not appear to be warranted. Adamson J.A. continued: "She does not say that the worn condition of the doors caused her to slip and there is no evidence on which to base such an inference." As indicated above, I am inclined to agree with this statement, if it referred only to the studs, but it takes no account of the condition caused by the slope of the doors and, therefore, on that question of fact, I agree with the trial judge and his judgment should be restored unless the respondent is able to show that it is not responsible in law.

Long ago it was laid down in 1 Hawkins's Pleas of the Crown, 700:—

> There is no doubt but that all injuries whatsoever to any highway, as by digging a ditch or making a hedge overthwart it, or laying logs of timber in it, or by doing any other act which will render it less commodious to the King's people, are public nuisances at common law.

This extract and the old cases on the subject are referred to in the judgment of Chief Justice Harrison in *Castor* v. *Corporation of Uxbridge* (1). As he there points out, every obstruction which to a substantial degree renders unsafe or inconvenient the exercise of the right of the public to pass and repass on foot and with horses and carriages at their free will and pleasure over the highway is a violation of that right: per Erle C.J. in *Regina* v. *Train* (2). It was also pointed out in the Castor case that the plaintiff,

(1) (1876) 39 U.C.Q.B. 113 at 117. (2) (1862) 3 F. & F. 22 at 27.

if free from contributory negligence, would have the right to sue the company that had placed the poles on the highway thereby causing an unlawful obstacle. In the cases in England cited by the Chief Justice, the underlying principle is taken for granted and the same principle was followed in Ontario.

In *Hopkins* v. *Owen Sound and Trotter* (1), Ferguson J. held that a person who, with the knowledge of, and without objection by, a municipal corporation, constructs across a ditch between the sidewalk and crown of the highway an approach therefrom to enable vehicles to pass to and from his property, adjacent to the highway, is liable for injuries sustained, through want of repair of the approach, by a person using it to cross the highway. This decision was cited with approval by Riddell J. in a Divisional Court in *Rushton* v. *Galley* (2). In the present case the appellant was entitled to find the sidewalk safe and convenient for travel. The respondent had placed the doors in the sidewalk, and by allowing them to sag and become uneven and sloped, had interfered with the rights of the public and impeded the way of the appellant as a traveller on the highway.

In the statement of claim the appellant had pleaded that the respondent had constructed the areaway under the sidewalk and placed the trap-doors over it with the consent, licence and approval of the town. Whether the latter part of this allegation was directed only towards the town, which was then a party to the action, need not be discussed because Mr. Burbidge takes the position that it must be assumed that the work was done with such consent. Without agreeing with that as a proposition of law, it is only necessary to point out that no authority was cited for the town (or its predecessor, a rural municipality) to give such consent and to authorize an impediment to the right of travel. Then the contention was advanced that the respondent had no authority to repair the doors since they were part of the sidewalk and, therefore, situate on the highway. If, as the respondent contends, it had in fact the leave and licence of the town (or the rural municipality) to construct the areaway and install the elevator and doors, it is difficult to see how this argument can have

(1) (1896) 27 O.R. 43. (2) (1910) 21 O.L.R. 135 at 142.

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any basis since from time to time the doors were opened and used by the respondent. The decision in *Ewing* v. *Hewitt* (1) has not been overlooked but in this view of the present appeal, it need not be considered.

The decision in *Hamilton* v. *The Vestry of the Parish of St. George* (2), relied on has no application as it was concerned with the construction of an Act of Parliament and it was held that a certain area did not fall within the term "cellar" as used in the statute. Nor is the case of *Horridge* v. *Makinson* (3) of assistance as all that was held there was that where a nuisance had been created by a highway authority on a highway under their control, the owner or occupier of the land adjoining the highway was not liable in an accident caused by the nuisance.

The appeal should be allowed and the judgment at the trial restored with costs throughout. However, the costs of the motion to this Court to remit the Case to the Court of Appeal should be paid by the appellant as it was her oversight that occasioned the transcript of the evidence going to the Court of Appeal for the purposes of the appeal thereto, in the form in which it appeared; and that transcript had been approved by both parties as part of the Case submitted to this Court.

RAND J.:—The judgment in appeal was based on an error in the transcription of the testimony of the plaintiff which was corrected for the purposes of this appeal. The sentence originally appeared as "I presume I must have slipped because after, you could see the mark where I had cleared the snow off the top of the snow." This last word should have been "door". Adamson J.A., after quoting that answer, says:—

> This indicates that the snow had been packed on the sidewalk and that fresh loose snow lay on the packed snow. Slipping on the packed snow is the reason she gives for her fall. She does not say that the worn condition of the doors caused her to slip and there is no evidence on which to base such an inference.

The fact that she had slipped because of the worn condition of the studs and the slope of the doors was expressly found by the trial judge. That the defendant was under a duty to keep the substitution for the sidewalk in reasonably

(1) (1900) 27 O.A.R. 296. (2) (1873) L.R. 9 Q.B. 42.
(3) (1915) 84 L.J.K.B. 1294.

safe condition, cannot, in my opinion, be seriously questioned: but if it could be heard to say that since there was no right to be where it was, there was no duty, the action would lie in nuisance. The doors had been in place for 48 years without renewal or repair. Taken with the evidence of the plaintiff, there was, I think, sufficient support for the finding made.

I would therefore allow the appeal and restore the judgment at trial with costs here and in the Court of Appeal.

Appeal allowed with costs.

Solicitors for the appellant: *Stubbs, Stubbs & Stubbs.*

Solicitors for the respondent: *Laird, MacInnes, Burbidge, Hetherington, Allison and Campbell.*