EAST CREST OIL COMPANY LIMITED ..... APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

1944
*Oct. 18
1945
*Feb. 6

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Criminal law—Negligence—Child drowned in oil well—Charge against owner of failing to guard the well adequately—Criminal Code, ss. 247, 284, 287 (b)—Child a trespasser—Duty and responsibility of owner of well.

The appeal was from the conviction of appellant by the Appellate Division, Alberta, [1944] 2 W.W.R. 503 (which set aside the judgment of acquittal at trial), under ss. 247, 284 and 287 (*b*) of the *Criminal Code*, of failing to guard adequately the cellar of an oil well of appellant, in consequence whereof a child of tender years was drowned therein. The well was not, and for some time had not been, in use, and there had been erected a structure around and over it as a guard against danger. The child, in company with other children, had climbed on the structure and in walking along was accidentally pushed off by an older boy into the water below.

Held: The appeal should be allowed and the judgment of acquittal at trial restored.

Per the Chief Justice and Rand J.: Secs. 247 and 284 embody the common law rule and, under them, apart from s. 287, appellant could not in the circumstances be held criminally responsible for the accident. The child was a trespasser. Children were not tolerated about the well, there was no practice of playing there, and on the occasions

*PRESENT:—Rinfret C.J. and Kerwin, Taschereau, Rand and Estey JJ.

1945

EAST CREST OIL CO. LTD. v. THE KING

when a few played there, they were, if seen, warned off by the owner's employees, chiefly because of danger from gas and fire and the pressure in the pipes. There was no object of fascination alluring children nor active conduct by the owner in disregard of children's known or necessarily apprehended presence. In such circumstances the rule at common law that (with certain exceptions not present here) an owner of land is entitled to do with it what he pleases, and that trespassers move at their own risk and peril, is as applicable to children as to adults (*Holland* v. *Lanarkshire,* 1909 Sess. Cas. 1142, and other cases, cited). As to s. 287 (*b*), assuming the excavation here to be within its scope, what is there contemplated, as indicated by its language, is the prevention of injury from hidden openings; the required fence or guard must protect the unwary; but when the existence of the opening is made evident (as in this case) the purpose of the fence or guard is accomplished; the owner must protect the trespasser on the land from a trap, but he is not called on to protect against a subsequent danger from trespassing on the guard itself raised against that trap; and the scope of the duty is as limited in relation to children as to adults.

Per Kerwin and Estey JJ.: The evidence supports the trial Judge's finding that the child was a trespasser; and, under the common law rule, of which s. 247 of the *Criminal Code* is a restatement, appellant, in the circumstances of this case, would not be liable to trespassers, including children (*Hardy* v. *Central London Ry. Co.,* [1920] 3 K.B. 459, at 473, and other cases, cited); the precautions taken and the warning and chasing away of children exonerated appellant from any suggestion of intention to injure or trap or of callous or wanton disregard of consequences.

As to respondent's contention (in the Appellate Division and in this Court) that the facts disclosed an offence under s. 287 (*b*) (under which the charge was not laid and which was not brought to the trial Judge's attention) and that by virtue of ss. 951, 1013 (5) and 1016 (2) a conviction should now be directed—It is doubtful if the offence under s. 287 could, within the meaning of those sections, be an offence so included under s. 247, both because of the essentials required to constitute the offence and because it is a summary conviction rather than an indictable offence. Apart from these considerations, the evidence did not disclose that an offence was committed under s. 287, as the excavation was so far guarded that instead of accidentally falling therein within the meaning of s. 287 (*b*), the children climbed over the barrier.

Per Taschereau J.: The Appellate Division erred in finding a breach of the duty imposed by s. 287 (*b*). The duty imposed by s. 287 (*b*) is to fence the excavation in such a manner that a person riding, driving or walking shall not fall therein accidentally. It would unduly stretch the scope of s. 287 (*b*) and do violence to its text, to hold that the fence must be so built that entrance is impossible. What is contemplated is to protect a motorist or pedestrian from a danger of which he is unaware and which may accidentally cause his death; it does not apply to the present case, where a trespasser succeeded in making his way to the excavation where the danger was obvious and was accidentally pushed into the water by a companion.

1945

EAST CREST OIL CO. LTD. v. THE KING

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), which (setting aside the judgment of acquittal by Ives C.J.T.D.) convicted the present appellant

> For that it * * * being then the owner and operator and having under its charge and control an oil or gas well * * * the maintaining whereof in the absence of precaution or care, might endanger human life, and being under a legal duty to take reasonable precautions against, and use reasonable care to avoid, such danger, did omit, without lawful excuse, to perform such duty in that it failed to place adequate fencing around or covering over the cellar of the said well and did permit the said cellar to become full of water and gas, with the result that the said opening was dangerous to members of the public and particularly to children who might come on the said well site and in consequence whereof one John Douglas Stevenson, a child of tender years, was drowned as a result of falling into the said cellar.

for which offence it was adjudged that the present appellant forfeit and pay to His Majesty the King the sum of $1,000.

J. J. Saucier for the appellant.

H. J. Wilson K.C. for the respondent.

The judgment of the Chief Justice and Rand J. was delivered by

RAND J.—This is an appeal from a conviction for criminal negligence under sections 247 and 284 of the *Criminal Code*. The negligence was charged as permitting an oil well not then in use to remain unfenced or otherwise guarded, as a result of which a young child of about four years of age was drowned.

The well was approximately 250 feet from a highway and some greater distance from a small number of occupied houses. It had been temporarily discontinued under a conservation order issued by the provincial government. Centered around it was a pit ten feet square and eleven feet or so below the ground level, boxed in apparently to a distance of about two feet above the ground. It was within a larger area set with concrete pillars at the corners, four or five feet high. Between the pillars, on the north and south sides, were concrete walls about two feet in height. Supported on them were two large stringers twenty-four inches square running north and south about four feet apart and passing over

(1) [1944] 2 W.W.R. 503; [1944] 3 D.L.R. 535; 82 Can. Crim. Cas. 77.

1945

EAST CREST OIL CO. LTD. v. THE KING

Rand J.

the pit approximately one foot from each side. Lying longitudinally on each was a timber fourteen inches square. Across these was another lying transversely over the pit about two feet from the northerly side and extending well towards the sides of the larger square. From the east there was a sloping mound of earth which approached the northerly concrete pillar to within a few inches of its side and about one and a half feet from its top. Two loose planks lay across the easterly pillars, the inner of which passed close to the end of the transverse timber over the pit. In the pit was about nine feet of water, the surface of which was then seven feet or so from the top of the timbers. Access to this top could be gained by going up the mound from the east, onto the pillar and then by means of the planks to the timbers. The size of the opening into the pit inside the timbers was approximately six feet in length by four feet in width.

The young child had made his way to the top in company with three other children, two boys aged seven and eight years and a young girl of six, and in walking along was accidentally pushed off by the oldest boy into the water below. The other boy fell in also but he was able to save himself.

The well had been brought in about twelve years before and had been closed down for a year and a half. Children had from time to time played about it and in several instances had been seen by employees of the appellant. One of these latter had brought what he considered the danger of the well to the attention of the manager. He was prompted to this by a recent loss of two grandchildren by drowning; and with the permission of the manager he had secured the well by means of boards and fencing in a manner which he thought sufficient for all reasonable purposes. This was in the autumn of 1941. He considered the top of the structure—the timbers—to be beyond the reach of children too small to look after themselves. No doubt the well with its pillars and beams carried some degree of attraction to children from a point where they had a right to be, but in the local surroundings probably any visible structure would have done so. A small quantity of gas bubbled out through the water, but this could be seen only at the well.

The trial judge dismissed the charge. On appeal the court found the accused guilty under the sections mentioned by reason of a breach of the duty prescribed by section 287 (*b*), and a fine of $1;000 was imposed.

Sections 247 and 284 embody the Common Law rule and, under them, apart from section 287, the owners of the well could not in the circumstances have been held criminally responsible for the tragic mishap. The trial judge found the child to be a trespasser on the land and I do not see how he could have done otherwise. Trespass does not depend on intention. If I walk upon my neighbour's land, I am a trespasser even though I believe it to be my own, and this rule is as applicable to children as to adults. There was no evidence of license: that goes to the mind of the licensor either actual or as drawn from his actions. But here there was not only no willingness on the part of the owner that the children should play on this property but unequivocal demonstration to the contrary. Although children had, over the twelve years, played occasionally about the well, their numbers were few, they did not make a practice of it and, whenever seen by employees of the owners, they had been warned off, in one case somewhat vigorously. What was done made it perfectly clear that they were not being tolerated about the well. This was not wholly or even chiefly because of any special danger from the exposed pit, but rather the danger from gas and fire and the pressures in the pipes.

With certain exceptions, not present here, an owner of land is entitled, at common law, to do with it what he pleases: *Jordin* v. *Crump* (1); trespassers move at their own risk and peril; and in the absence of an object of fascination drawing children to their injury or of active conduct by the owner in disregard of their known, or necessarily apprehended, presence, that rule is as applicable to them as to adults. No such allurement was present here, nor is the case within the second qualification of the rule.

The facts are almost identical with those present in *Holland* v. *Lanarkshire Middle Ward District Committee* (2). There the defendants were the owners of a piece of ground which contained a disused and unfenced quarry,

(1) (1841) 8 M. & W. 782. (2) 1909 Sess. Cas. 1142.

1945

EAST CREST OIL CO. LTD. v. THE KING

Rand J.

with high and precipitous banks and containing water, at one point, eleven feet deep. A young child six years of age had gained access to the quarry through a defective fence from a strip of waste ground on which children were in the habit of playing. The child was drowned but the Court of Session held that no duty on the part of the owner had been shown. In the language of the Lord President (Lord Dunedin):

> It is a new and unheard of proposition that, if you have something on your ground as to which there is no duty of fencing, and someone else makes use of his ground in some particular way, a duty is thereby imposed upon you of doing what you were under no duty to do before, a duty, namely, of fencing. I know of no authority for such a proposition. The quarry here was old and disused long before this strip of ground had become open to the use of the children, and that, I think, ends the question.

And in this respect the law of England is the same as that of Scotland (*Addie's* case (1)). Cleasby, B., ruled to the same effect in a prosecution for manslaughter of the owner of an abandoned coal mine down the open shaft of which a trespasser had accidentally fallen: *Reg.* v. *Gratrex* (2).

But the conviction is placed on a violation of the duty imposed by section 287 (*b*) of the Code, which is as follows:

> 287. Every one is guilty of an offence and liable, on summary conviction, to a fine or imprisonment with or without hard labour, or both, who
>
> * * * * * *
>
> (*b*) being the owner, manager or superintendent of any abandoned or unused mine or quarry or property upon or in which there is any excavation of a sufficient area and depth to endanger human life, leaves the same unguarded and uninclosed by a guard or fence of sufficient height and strength to prevent any person from accidentally riding, driving, walking or falling therein.

Harvey, C.J., delivering the judgment of the Court, considered this language to be so precise in its delineation of the duty as to exclude any question of degree of fault or lack of care, and in effect to require such a fence or guard as must in any event prevent a person from falling into the well or opening; and in the case of young children, this would take into account their natural and likely behaviour in such situations as a circumstance to be anticipated in the measures of security taken.

(1) *Robert Addie & Sons (Collieries) Ltd.* v. *Dumbreck*, [1929] A.C. 358, at 371.

(2) (1872) 12 Cox C.C. 157.

But, assuming the excavation here to be within the scope of the subsection, does that interpretation pay sufficient regard to the purpose of the legislation as indicated by the language, "to prevent any person from *accidentally* riding, driving, walking or falling therein"? What is contemplated is the prevention of injury from hidden openings; the fence or guard must protect the unwary; but when the existence of the opening is made evident, the purpose of the fence or guard is accomplished. The owner must protect the trespasser on the land from a trap, but he is not called on to protect against a subsequent danger from trespassing on the guard itself raised against that trap. The duty is not to prevent a person from falling into an opening but from falling in "accidentally", that is, accidental as to the existence of the thing holding the threat. It is to safeguard against a concealed danger; but if the thing becomes known, it ceases to be the accidental circumstance; and the accidental may, as here, become a consequential circumstance, as the jostling of the older boy in the course of walking on the guarding structure.

A young child may not, of course, appreciate the danger; but we are dealing here with objective causation toward persons without rights: and if, considering the object of the legislation, the scope of the duty is clear, it is as limited in relation to a child as to a grown person. A child, as he plays or trudges over a field, may accidentally fall into an open shaft; against this the owner must provide a safeguard. It is quite another matter that the owner, otherwise blameless, should be called upon to afford physical security against apparent dangers to children who ought not to be on his land at all. Does such a rule protect the child within the precincts of his own home? Is such a responsibility placed upon those charged with his care? It would come as a shock to a parent to find himself guilty of manslaughter because he had failed to provide barriers to keep his child from climbing into a well in the farmyard.

The legislation is not specially intended for the protection of children, and we cannot allow sympathy to stretch its scope. The conditions in which we live bristle with hazards for the young but, from the standpoint of safeguarding them, there is no more reason to treat the

1945

EAST CREST OIL CO. LTD. v. THE KING

Rand J.

patent danger of such an opening as *malum prohibitum* than that of many other accessible structures or conditions equally dangerous. The balance between the responsibilities of owners of property and guardians of children is too close in accepted considerations of policy to justify our going beyond what the legislation has fairly indicated; and however poignant the death of a child in such circumstances may be, it is still one of the unhappy risks of living in this imperfect world, and not a happening to call for the infliction of punishment on others.

Having reached this conclusion on the scope of the duty under section 287 (*b*) and that the death of the child could not be charged to neglect of it, I do not find it necessary to consider the view of the Appeal Court that there could be no question of degrees of care in the performance of it. This would be to make it absolute against certain consequences and to rule out *mens rea*. It will be sufficient, of course, to deal with a case within the section when it arises but I desire to guard myself against being taken to assent to that interpretation of the obligation created.

I would allow the appeal and quash the conviction.

The judgment of Kerwin and Estey JJ. was delivered by

ESTEY J.—The accused company was tried before the Chief Justice of the Trial Division in Alberta without a jury, at Calgary, on a charge containing two counts, the first charging an offence contrary to the provisions of secs. 247 and 284, and the second an offence contrary to sec. 222, of the *Criminal Code*. At the conclusion of the hearing, the learned Chief Justice dismissed both charges and delivered the following oral judgment:

> There is not any doubt that the condition existing there with that ten by ten cellar, containing from eight to ten feet of water, and open at the top, irrespective of the dispute about its approach on the four sides under the timbers, but open on the top so that the child if he made a mis-step while walking on these timbers, would fall in the water and probably drown, or possibly drown, and it is quite clear from the evidence that there was nothing done to prevent children reaching the top of those timbers or stringers. That is the situation. It is quite clear that that could have been remedied by a fence around

the open cellar or well, or by the top being planked over. Either of those acts would have made it safe as regards children. That is the fact that I am bound to find.

I do think that the law is decidedly against the Crown obtaining a verdict of guilty. No doubt the law is, in my opinion, this child, however unreasonable you may think it or I may think it, was a trespasser. He had no right there. It does not matter whether he could read the sign or not, according to the best statements of the law in my opinion, and no duty was owed to that child or to the other children or to anyone else to fence that property or to plank that cellar, on ground in proper and legal occupation of the accused. Both charges will be dismissed.

Upon appeal to the Appellate Division of the Supreme Court of Alberta, the dismissal of the charge under sec. 247 was set aside and a verdict of guilty directed.

Section 247 is a restatement of the common law. *Union Colliery Co.* v. *The Queen* (1); *The King* v. *Baker* (2). The learned trial judge found the child to be a trespasser, and the evidence supports that finding.

The duty which at common law rested upon a landowner towards trespassers is stated by Scrutton, L.J., in *Hardy* v. *Central London Railway Company* (3):

> If the children were trespassers, the landowner was not entitled intentionally to injure them, or to put dangerous traps for them intending to injure them, but was under no liability if, in trespassing, they injured themselves on objects legitimately on his land in the course of his business. Against those he was under no obligation to guard trespassers.

In that case, "whenever servants of the company saw the children, they either drove them away or told them to go away," and they apparently went away but repeatedly returned. Upon this evidence the Court of Appeal refused to find permission express or implied and therefore held the children to be trespassers rather than licensees, as the learned trial judge had held them to be.

The authorities are reviewed in *Canadian Pacific Ry. Co.* v. *Anderson* (4), where Chief Justice Duff at p. 218 states:

> The respondent is precluded from recovering by reason of the fact that, being a trespasser, the only duty owing to him is that explained in *Barnett's case* (5), not intentionally to injure him or "not to do a wilful act in disregard of humanity towards him," "not to act with reckless disregard of the presence of the trespasser."

(1) (1900) 31 Can. S.C.R. 81.
(2) [1929] S.C.R. 354.
(3) [1920] 3 K.B. 459, at 473.
(4) [1936] S.C.R. 200.
(5) *Grand Trunk Ry. Co.* v. *Barnett*, [1911] A.C. 361.

1945

EAST CREST OIL CO. LTD. v. THE KING

Estey J.

It is sometimes suggested that a landowner is under an obligation to take special precautions with respect to children, but so long as the children remain trespassers the law seems to be settled that in principle there is no difference between a child and an adult.

It is recognized that where, as in cases of licensees and invited guests, a duty is placed upon a party in possession of land, from similar facts different inferences may be drawn where children rather than adults are involved, but the principle of legal responsibility is the same regardless of age. *Robert Addie & Sons (Collieries) Ltd.* v. *Dumbreck* (1), where at p. 376 Viscount Dunedin states as follows:

> The truth is that in cases of trespass there can be no difference in the case of children and adults, because if there is no duty to take care that cannot vary according to who is the trespasser. It is quite otherwise in the case of licensees, because there you are brought into contact with what is known as trap and allurement.

In this case there is no suggestion of any intention to injure the children or to place a dangerous trap or any trap for them. From time to time the children did play about this well, but whenever observed were always warned and chased away by both the employees of the accused company and by nearby residents. Mr. F. C. Tuckett was in charge of the property in question for the accused company over a period of years. He deposed that in 1941 two of his grandchildren were drowned in the Elbow River at Calgary, as a result of which he discussed the possibility of such a fatality at this well, and was then instructed by the company to fix it so as to keep small children out. He obtained material and did what he thought was sufficient, and the well remained substantially as he left it up to the time of the fatality that led to these proceedings. The taking of such precautions does not create any obligation towards trespassers but it does exonerate the accused from any suggestion that it intended to injure or to trap, and indeed any suggestion that it had acted with a callous or wanton disregard of consequences.

A tragedy such as this, that takes away a very young child, arouses our feelings of sympathy. However deep and strong these feelings may be, they must not influ-

(1) [1929] A.C. 358.

ence one either in ascertaining the law or in the application thereof to the facts and circumstances of a given case. If children in this case had been licensees or invitees, the obligation and responsibility of the accused company would have been very different.

The respondent contended before the Court of Appeal of Alberta and this Court that the facts disclosed an offence under sec. 287 (*b*), and by virtue of the provisions of secs. 951, 1013 (5) and 1016 (2) a conviction should now be directed. It is doubtful if the offence under sec. 287 can within the meaning of these sections be an offence so included under sec. 247, both because of the essentials required to constitute the offence and because it is a summary conviction rather than an indictable offence. Apart from these considerations the evidence does not disclose that an offence was committed under sec. 287. Under that section the accused can be convicted only when the excavation is left "unguarded and uninclosed by a guard or fence of sufficient height and strength to prevent any person from accidentally riding, driving, walking or falling therein." The evidence here discloses that the excavation in question was so far guarded that instead of accidentally falling therein, the children in question climbed over some obstruction which they described as a fence. Counsel contended it was not actually a fence, but, however styled, it did constitute a barrier. Two of the children were called as witnesses. Bennett Keith deposed as follows:

Q. Was there a fence all around the well?
A. Yes.
Q. Did you and Doug. and Spike and Jane climb over the fence?
A. Yes.

* * *

Q. Just tell me this, how did Douglas get on to the plank? How did he get over the fence you are talking about?
A. He just climbed over.
Q. Did he climb over it by himself?
A. Yes.

The other boy, Gordon Earl Andrews, deposed:

Q. How did you get up on to this plank? How did you get there?
A. We climbed up.
Q. Climbed up. What did you climb?
A. A plank.

* * *

1945

EAST CREST OIL CO. LTD. v. THE KING

Estey J.

Q. Now there is a fence around the well, is there not?
A. It is around the back part of it.
Q. Did you climb over the fence this day?
A. Yes.
Q. And did Doug. and Jane and Benny?
A. Yes.

Upon this evidence the children encountered the obstacles erected by the company to prevent people from getting into the well.

The charge was not laid under sec. 287 (*b*) and at the trial this section was not brought to the attention of the learned Chief Justice. His finding of fact must be read in relation to the issues raised before him. It is obvious that, had he been asked to find the accused guilty under sec. 287 (*b*), he would have dealt with the facts in the light of the provisions of that section, as well as the requirements of secs. 247 and 284.

The evidence is clear that the concrete posts on which the stringers rest extend about five feet above the ground. Photographs show that between the posts boards had been placed to prevent persons getting into the well. The stringers are on top of these posts. On the east side there are one or two mounds of earth which one might walk up and reach the top of these posts. The distance from the mounds to the top of the posts is a point upon which there is some conflict in the evidence but it is clear there is some distance; and some effort must be made to pass from the mounds of earth to the top of the stringers. The evidence also discloses a place or two where children and others by crawling under the boards might reach the well. In either case a party to get into the well must put forth an effort towards that end. These facts negative the commission of an offence under sec. 287, which requires only such protection as will prevent persons from "accidentally riding, driving, walking or falling therein."

In my opinion, the judgment of the Court of Appeal should be reversed, the conviction there directed quashed, and the judgment of the trial judge restored and the charge dismissed as against the accused.

TASCHEREAU J.—I believe that this appeal should be allowed and the conviction quashed.

The appellant was acquitted by the trial Judge, but the Court of Appeal found a breach of the duty imposed by section 287 (*b*) of the *Criminal Code,* and fined the appellant $1,000.

This section is to the effect that whoever is the owner, manager or superintendent of any abandoned mine or quarry in which there is an excavation of a sufficient area to endanger human life, must not leave the same unguarded and uninclosed by a guard or fence of sufficient height and strength to prevent any person from accidentally riding, driving, walking or falling therein.

The duty imposed by this section is, therefore, to fence the excavation in such a manner that a person riding, driving or walking shall not fall therein accidentally.

We would, I believe, unduly stretch the scope of this section and go further than the legislator did and, therefore, do violence to the text, if we held that the fence must be built in such a way that entrance to the premises is made impossible.

The law contemplates to protect a motorist or a pedestrian from a danger of which he is unaware, and which may accidentally cause his death. It does not apply, as in this case, to a trespasser who succeeds in making his way to the excavation where the danger is obvious, in the manner described by my brother Rand, and who is accidentally pushed in the water by a companion.

The judgment of the Court of Appeal should be set aside and the order of acquitment made by the trial Judge should be restored.

Appeal allowed.

Solicitors for the appellant: *Hannah, Nolan, Chambers, Might & Saucier.*

Solicitor for the respondent: *H. J. Wilson.*