1919
*Nov. 4.
*Nov. 10.

THE CITY OF SYDNEY (DEFENDANT) .... APPELLANT;

AND

JAMES SLANEY (PLAINTIFF) .... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Municipal corporation—Negligence—Care of streets—Duty to repair—Ice on sidewalk.

A municipality under a statutory obligation to keep a street in repair fails to discharge such obligation if ice is allowed to remain on the sidewalk in a condition dangerous to pedestrians, and is liable in damages to a person injured by reason of such condition.

APPEAL from a decision of the Supreme Court of Nova Scotia(1), affirming, by an equal division of opinion, the judgment at the trial in favour of the plaintiff.

The plaintiff fell on a sidewalk and was injured. The trial judge found that the fall was due to the slippery condition of the sidewalk and that the municipality had neglected to keep it in repair. His judgment for the plaintiff was affirmed by an equal division of opinion in the full court.

Finlay Macdonald K.C. for the appellant. The municipality is not liable for non-feasance. *Municipality of Pictou* v. *Geldert*(2); and see *City of Vancouver* v. *McPhalen*(3).

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) 46 D.L.R. 164.
(2) [1893] A.C. 524.
(3) 45 Can. S.C.R. 194.

As to the duty of the city in regard to the sidewalk see *Palmer* v. *City of Toronto*(1). See also *German* v. *City of Ottawa* (2).

Rogers K.C. and *J. McG. Stewart* for the respondent. *Municipality of Pictou* v. *Geldert*(3), was decided on the ground that no express duty to repair was imposed on the muncipality by the legislature.

This case is governed by *City of Vancouver* v. *McPhalen*(4).

THE CHIEF JUSTICE.—Accepting as I do the findings of fact of the trial judge, confirmed as they are by the full court in Nova Scotia, and giving proper weight to the frank admissions of the learned counsel for the city appellant on the argument at bar, I find myself, after giving the facts and admissions much consideration, unable to hold the city not to be liable for the injuries sustained by the plaintiff.

The city's statutory duty to keep the street in repair on which the accident to the plaintiff happened was certainly not discharged by the simple giving of a notice to the "frontager" to remove the frozen slush and ice. That notice given in pursuance of its by-law was one of the means adopted by the city of having its statutory duty with respect to the streets discharged. Whether neglect on the part of the frontager after such notice to remove the dangerous snow and frozen slush would render him liable to an injured party is quite another question not now before us. But it is clear that the giving of such a notice would not in itself be a discharge of the city's statutory obligation and duty.

The injuries sustained by the plaintiff from the

(1) 38 Ont. L.R. 20; 32 D.L.R. 541.
(2) 56 Can. S.C.R. 80; 39 D.L.R. 669.
(3) [1893] A.C. 524.
(4) 45 Can. S.C.R. 194.

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dangerous condition of the sidewalk were, therefore, in my opinion, attributable to the defendant's negligence in not causing the frozen slush to be sanded or otherwise made reasonably safe for pedestrian traffic.

In Ontario the legislature has deemed it necessary for the due protection of cities and municipalities to provide that for injuries which may be sustained by pedestrians and others by reason of ice and snow on their sidewalks they shall only be liable for "gross negligence." But there is no such provision in the legislation of Nova Scotia.

That provision or limitation upon the city's liability may account for some of the decisions in cases which at first sight may seem at variance with the conclusion I have reached as to the city's liability in this case.

The appeal must be dismissed with costs.

IDINGTON J.—The liability of the appellant rests upon section 249 of the Act incorporating it as a city, which reads as follows:—

> The City Council shall keep in repair all such streets as prior to the passing of this Act have been dedicated to and accepted by the Town of Sydney by resolution of its council, and all streets laid out under any law of the Province and no other.

There might be a doubt arise, from the peculiar wording of the limitations therein, as to whether or not this street in question fell within the definition of the streets in regard to which the duty to keep in repair was imposed; but for the clear admission in the statement of defence relative to paragraphs one, two, and three of the statement of claim.

The said third paragraph alleged that

> The streets of the City of Sydney are vested in the defendant, City of Sydney, and the said City is required to keep them in repair.

The facts found by the learned trial judge amply justify the conclusion he reached.

It is now well settled jurisprudence relative to the measure of responsibility imposed upon municipalities by legislation providing for their repair of highways that on such facts as he finds the municipality is liable.

The appeal should, therefore, be dismissed with costs.

DUFF J.—I concur in the view that section 249 of the Sydney "Corporation Act" gives a right of action to persons who suffer harm in consequence of default in performance of the duty thereby imposed on the municipality to repair certain streets. I think the contention fails that George Street is not one of those streets in respect of which this duty arises. Accepting the construction suggested by Mr. Justice Mellish and urged upon us by counsel for the municipality that the sections confer upon the city council the power of determining by resolution what streets shall be kept in repair and that the statutory duty exists only in relation to such streets—I think there was sufficient evidence to establish a *primâ facie* case that responsibility for repairing George Street had been accepted by the municipality. *City of Victoria* v. *Patterson*(1).

It has repeatedly been decided that natural accumulations of snow and ice on a highway may amount to disrepair within the meaning of statutes requiring municipalities to keep highways in repair; and counsel for the appellant did not deny that these decisions may legitimately be appealed to as a guide for the construction and application of the statute now before

(1) [1899] A.C. 615.

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us. There can, I think, be little doubt that the accumulation of ice and snow which occasioned the respondent's injury constituted a serious danger to pedestrians, though proceeding with ordinary care, a condition which amounts to disrepair within the contemplation of the statute.

It is desirable, I think, to add a word of comment upon an argument based upon the supposed necessity of notice to the municipality of the dangerous condition of the street as one of the conditions of liability. The statutory duty is to keep in repair. That does not, of course, involve absolute responsibility for disrepair. Such provisions, it has been many times held, do not create liability for the consequences of a state of things which has not arisen through the failure of the municipal authority to observe reasonable precautions to prevent it. *Jamieson* v. *Edmonton* (1), *Hammond* v. *Vestry of St. Pancras*(2); *Bateman* v. *Poplar District Board of Works*(3).

But where the disrepair complained of consists in a condition such as that in question here in a frequented street a condition, not to put it moderately, outside the purview of reasonable anticipation in a Nova Scotia winter, then the municipality can only escape responsibility by shewing that the measures taken came up to the standard of reasonableness and this may include a proper system of inspection.

I concur in the opinion of the majority of the court below that the municipality failed to discharge its duty.

ANGLIN J.:—I would dismiss this appeal. I agree with Chisholm, Russell and Ritchie JJ. that the

(1) 54 Can. S.C.R. 443, at pp. 454-5; 36 D.L.R. 465, at p. 473.
(2) L.R. 9 C.P. 316.
(3) 37 Ch.D. 272.

City of Sydney is civilly liable to a person injured through non-repair of streets in respect of which the city charter (s. 249) imposes the obligation to repair where such non-repair is due to inattention to the duty so imposed sufficient to constitute negligence. I accept Mr. Justice Russell's view that

> the law imposing upon the city the duty of keeping the streets from falling into disrepair in consequence of snow and ice must be reasonably interpreted and applied.

With him also

> I am unable to say that it has not been so applied by the learned trial judge in this case.

The facts in evidence establish a condition amounting to disrepair likely to be productive of danger known to the city authorities at all events on the day before the plaintiff met with his accident. It was the duty of the city officials to see to it that that state of affairs was remedied and they had abundant opportunity to do so. The finding of negligence is supported by the evidence. It follows that there was a breach of statutory duty resulting in an injury to the plaintiff which entailed civil liability on the part of the city.

BRODEUR J.—The only question in this case is whether the appellant municipal corporation has been negligent.

The snow had been permitted to accumulate on the sidewalk at the place where the respondent fell, and the slush which the mild weather had formed was converted into ice as a result of the night frost. The sidewalk became dangerous for pedestrians. The City of Sydney is bound by the law to keep in repair all its streets. That would involve the duty to take reasonable precautions against the streets becoming dangerous by reason of the ice and snow.

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I would distinguish this case from *Pictou* v. *Geldert* (1), and *Sydney* v. *Bourke*(2), because no duty to repair was imposed by the statute then under consideration.

It is not contended at bar that the duty to repair would not cover the removal of the ice and snow on the sidewalk, or the sanding of the sidewalk. As a question of fact, the sidewalk had been sanded some time before; and by a by-law of the city the snow should be removed by the riparian owners.

The question is whether the municipality has discharged its duty in a reasonable manner. That becomes then a question of fact and the concurrent findings of the courts below in that respect should not be disturbed.

The appeal should be dismissed with costs.

MIGNAULT J.—On the findings of fact of the learned trial judge that the accident was caused by the slippery condition of the sidewalk; that the appellant was aware of the condition of the sidewalk and allowed the snow to remain there for some time, when, to the knowledge of the city officials, a lowering of the temperature was very likely to take place and the slush to be frozen over night; that the street in question was one of the principal streets of the city, travelled over by thousands of people by day, or at all events on Sunday; that its condition on the day of the accident could have been prevented, the city having the means to clear the sidewalk and having failed to employ these means; and on the admission of the learned counsel for the appellant that to leave ice on the sidewalk for an unreasonable time would be a lack of repair, an admission which I think he rightfully made—I am

(1) [1893] A.C. 524. (2) [1895] A.C. 433.

of the opinion that the judgment of the learned trial judge should not be disturbed.

The statute obliged the city council to repair the streets and it failed to fulfil this obligation and under the circumstances it is liable for the accident.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Finlay Macdonald.*
Solicitor for the respondent: *A. D. Gunn.*