IN THE MATTER OF THE PETITION OF RIGHT OF

DAVID HARRISON.....SUPPLIANT;

1913
April 2

AND

HIS MAJESTY THE KING.....RESPONDENT.

Negligence—Public Work—Ice on approach—Injury to the person—Liability.

Suppliant sustained bodily injury by falling whilst walking on the footpath on one of the approaches to the Seigneur Street Bridge, over the Lachine Canal, in the City of Montreal. The place where he fell was under the care and control of the Dominion Government; and the Superintendent of the Canal and his assistants were charged with the duty of maintaining the footpath in question in good order. The accident happened at 11.30 o'clock of the night of the 6th of January, 1912, which date was a holiday. The footpath was in a slippery condition owing to ice, the weather at the time being very changeable. It was shown by a witness, whose specific employment it was to spread ashes over this footpath for the purpose of preventing accidents to pedestrians, tnat at four o'clock on the afternoon of the day before the accident he had spread ashes on the spot where the suppliant fell; and that, althougn it was a holiday, he visited the footpath at two o'clock on the afternoon of the accident, and found that the ashes were still there and that no more were required for safety.

Held, upon the facts, that as it was not shewn that the footpath in question had been allowed to remain an unreasonable time in an unsafe condition, no negligence was attributable to the Superintendent of the Canal or his assistants, and that the suppliant was not entitled to recover.

PETITION OF RIGHT for the recovery of damages against the Crown for personal injuries suffered by the suppliant on a public work.

The facts of the case are stated in the reasons for judgment.

March 31st, 1913.

The case was now heard before the Honourable Mr. Justice Audette at Montreal.

L. E. Curran, for the suppliant, argued that the liability was governed by the law of Quebec.

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Argument of Counsel

Under Article 1053 of the Civil Code "Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another." We maintain that through the negligence of the Crown, represented by its employees, this accident was caused and the suppliant has suffered damages.

It was the duty of the officers of the Crown to look after the sidewalk in question.

Now, to reason by analogy, what would be the obligation of the municipality in such a case? Take the by-laws of the city of Montreal, for instance.

By-law No. 92, sec. 1, sub-sec. 15, enacts:—

"Whenever during the winter season snow or ice shall accumulate on any of the sidewalks of the said City or any portion thereof, the person owning, occupying or having charge of the house, building or lot of ground, shall, after the ceasing to fall of any snow, whether by snowstorm, or from the roofs, if in the day-time within one hour, and if in the night-time before nine o'clock of the following morning, cause the same to be removed from such footpath or sidewalk, in such manner that the same shall present a flat and even surface and be uniform in level with the adjoining footpath or sidewalk, provided always that the ice or snow permanently left on any such sidewalk, and being hard and solid, shall not exceed six inches in depth."

The city of Montreal has control of the sidewalks, and they see that these obligations are discharged. So that, to reason by analogy the Dominion Government, is in the same position.

I refer to the case of *Leprohon* vs. *The Queen* (1).

In that case it was held that the Crown is under no legal duty or obligation to any one who goes to a post,

(1) 4 Ex. C. R. p. 100.

office building to post or get his letters, to repair, or keep in a reasonably safe condition, the walks and steps leading to such building. But here is a case where the public are invited to use the public walk. The Department, seeing that there is a large traffic at this point, placed a bridge there. There are two foot passenger bridges, one on the left and one on the right side. This is a direct invitation to the public to go across. The Department instead of properly supervising the sidewalk as they should have done, allowed ice and snow to accumulate.

The suppliant exercised ordinary care, and was in no way negligent. He maintains that there was negligence on the part of the employees of the Crown in not having this sidewalk properly looked after.

J. T. Hackett, for the respondent, contended that with regard to the spot where the man fell there was no proof that this is a public work. Conceding that the bridge is, there is no proof that the approach is. Nor is it in evidence that the maintenance of the approach to the bridge falls within the duties of the Department of Railways and Canals. The fact that a public servant, who, out of kindness or even out of a misconception of his duty in looking after it, does look after it, would not impose upon the Government or the Crown the responsibility for any non-compliance with the self-imposed obligation.

Counsel for the suppliant has put himself in some contradiction to well established authority in placing the Crown upon all fours with a municipal corporation. If there was any negligence it was not negligence by an officer of the Crown acting within the scope of his duties or employment, which alone would make the Crown liable. It has not been established that the maintenance of this particular

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work fell within the scope of any particular officer's instructions (1).

This last case lays down principles which have a very proper application to the suppliant's case.

The negligence, if any, in this case would be governed by *Leprohon* vs. *The Queen* (2).

Such cases as *Bonin* vs. *City of Montreal* (3) and *Gaffney* vs. *City of Montreal* (4) establish that the municipality is not liable if the slippery condition of the streets is produced by sudden climatic changes, and the municipal officers have not sufficient time to remedy the state of affairs.

AUDETTE, J. now (April 2nd, 1913) delivered judgment.

The suppliant brought his petition of right to recover the sum of $500 for injury sustained by him, on the 6th January, 1912, through a fall while walking on the footpath leading to the Seigneur Street bridge, over the Lachine Canal, in the city of Montreal.

At half past eleven o'clock on the evening of the 6th January, 1912, the suppliant was walking home from a grocery store where he had bought provisions. On his way home, before getting to the bridge, he met witness Lewis Gordon, and they walked together. Whilst crossing the bridge, and up to the moment of the accident, they were walking in single file, Gordon following the suppliant. When they arrived at the point marked B, on photograph filed as exhibit No. 1, the suppliant slipped and fell, striking his side on the beam separating the footpath from the road travelled by vehicles, breaking two of his ribs and resulting, he says, in severe nervous and physical shock to his general system.

(1) See *Olive* vs. *Town of Westmount*, Q. R. 16, C. S. 426; *Davies* vs. *The Queen*, 6 Ex. C. R. 344.

(2) 4 Ex. C. R. 100.

(3) Q. R. 15 S. C. 492.

(4) Q. R. 16 S. C. 260.

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Both witness Gordon and the suppliant contend that the spot in question was, at the time of the accident, icy and slippery. On this branch of the case both D. O'Brien, the Superintendent of the Canal, and witness Shannahan, a man whose business it was to maintain the sidewalk or footpath in good order, were heard. The Superintendent says that the bridge in question, including the approaches and the spot where suppliant fell, are under the control and care of the Government, and that his men see to them and it is within the scope of their duties to maintain them in good order. Witness Shannahan, whose specific duty it is to see to this walk says, that on the 5th January, 1912, (the day before the accident) on Friday afternoon, at four o'clock, he had spread ashes on the footpath, including the place where the suppliant fell. Moreover, on the 6th January,—which was Epiphany, a holiday in the Province of Quebec,— he went over the same path, including the place where the suppliant fell, at two o'clock in the afternoon, and found that ashes were still there and that it did not require any more,—it was in good condition and all right. There was no snow—it was not snowing but a high wind was then prevailing. It was a mild day on the Friday, but freezing, and it got very cold on the Saturday. Although witness Gordon says it was dark, Shannahan says the place where the suppliant fell is well lighted.

Now to succeed, the suppliant must bring the facts of his case within the provisions of section 20 of *The Exchequer Court Act* and that is, there must first be a public work; secondly, an officer of the Crown whose duty it was to do a given thing; and thirdly, that officer must have been guilty of negligence from which the accident resulted.

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It will be found for the purposes of this case that the bridge in question, including the approaches and the place where the suppliant fell, is a public work. It will also be found that Shannahan was an officer of the Crown whose duty it was to maintain the pathway in question in good condition, but the court is unable to find that he was in any manner guilty of negligence on the occasion in question.

Indeed, ashes had been spread at the very place on Friday at four o'clock,—on the day of the accident he visited the *locus in quo* at two o'clock in the afternoon and it was still in good condition, not requiring any more ashes. And as was said in the case of *Davies* v. *The Queen*(1) in this country where climatic changes are so sudden and numerous it is not possible always in winter to have the sidewalks in safe condition to walk on. Negligence in this respect, when it is actionable, consists in allowing them to remain an unreasonable time in an unsafe condition. Moreover there is a long catena of cases where it has been held that where a municipality has been duly notified of the unsafe condition of a walk, it should remedy it as soon as reasonably possible. And when this unsafe condition obtains in a travelled and central part of a city, the municipality is supposed to become aware of it sooner than if it were away from such central part,—the result being that a reasonable time is always allowed within which the defect can be remedied.

Counsel for the suppliant, in the course of his argument, cited section 1, sub. sec.15, of No. 92 of the By-Laws of the City of Montreal, which reads as follows, to wit:

"Whenever during the winter season snow or "ice shall accumulate on any of the sidewalks of

(1) 6 Ex. C. R. 344.

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"the said city or any portion thereof, the person "owning, occupying or having charge of the house "building or lot of ground, shall, after the ceasing "to fall of any snow, whether by snowstorm, or "from the roofs, if in the daytime within one hour, "and if in the night-time before nine o'clock of the "following morning, cause the same to be removed "from such footpath or sidewalk, in such manner "that the same shall present a flat and even surface "and be uniform in level with the adjoining foot-"path or sidewalk, provided always that the ice or "snow permanently left on any such sidewalk, and "being hard and solid shall not exceed six inches "in depth."

The sidewalk was in good order on the afternoon of the accident, no snow, or rain fell between the time of Shannahan's visit and the accident, and under the by-law of Montreal (assuming for the purpose of argument that it applied to the Crown in this case) if anything had gone wrong during the night, the officer is not supposed to be attending to the walk at night but only to have the walk attended to before nine o'clock in the morning. The walk was visited by Shannahan in the afternoon and the accident occurred at half past eleven at night. Under the evidence it cannot even be found that if the walk had, at any time been in a bad condition—a matter not clearly established—it had not been so during such a length of time as would under any circumstances make it actionable,—and moreover, everything that a prudent man would have done under the present circumstances has been done by the officer of the Crown whose duty it was to look after the footpaths. *Olive v. Town of Westmount*(1); *Gaffney v. City of Montreal*(2); and *Bonin v. City of Montreal* (3).

(1) Q. R. 16 S. C. 426. (2) Q. R. 16 S. C. 260. (3) Q. R. 15 S. C. 492.

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Now, it will be borne in mind that no evidence was adduced by the Crown, and that witness Shannahan, as well as all the witnesses heard in this case, are all suppliant's witnesses. And while the suppliant says the place was slippery, that very evidence is rebutted by the best possible evidence, namely by that of Shannahan, a witness who has reason to know the *locus in quo* better than anyone else.

The Crown can only be held liable in a case which falls within the statute. The burden of establishing negligence is upon the suppliant, and he having obviously failed to show any such negligence on behalf any officer of the Crown, the result of which would have caused the accident complained of, his action fails.

Might not the accident be explained by the fact that at the time it happened the suppliant was talking with his companion, perhaps with his head slightly turned as they were walking in single file, and so did not discover that at the end of the bridge the level changes and a slight slope begins? It may very well be that by this want of care in attending to his steps, while passing over a place which he admitted he recognized as covered with ice, the accident was wholly due.

In the result, however, the court finds that no negligence has been established and that the suppliant is not entitled to any portion of the relief sought by his petition of right. The Crown is entitled to recover the costs of the action.

Judgment accordingly.

Solicitor for the Suppliant: *L. E. Curran.*

Solicitor for the Respondent: *E. L. Newcombe.*