THE BELL TELEPHONE CO. (THIRD PARTY) ..... } APPELLANT;

AND

THE CITY OF CHATHAM (DEFENDANT) ..... } RESPONDENT.

1900
*Oct. 26.
*Nov. 13.

THE CITY OF CHATHAM (DEFENDANT)..APPELLANT;

AND

MARY LOUISA ATKINSON AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Proximate cause—Telephone pole—Third party—Costs.

A person driving on a public highway who sustains injury to his person and property by the carriage coming in contact with a telephone pole lawfully placed there, cannot maintain an action for damages if it clearly appears that his horses were running away and that their violent, uncontrollable speed was the proximate cause of the accident.

In an action against the city corporation for damages in such a case the latter was ordered to pay the costs of the Telephone Company brought in as third party it being shewn that the company placed the pole where it was lawfully, and by authority of the corporation.

*PRESENT :—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

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THE BELL TELEPHONE COMPANY v. THE CITY OF CHATHAM.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment at the trial in favour of the plaintiffs against the City of Chatham, defendant, and reversing said judgment in favour of the third party, the Bell Telephone Co.

This action was brought by the plaintiffs against the Corporation of the City of Chatham, in Ontario, to recover damages sustained through a collision with a telephone pole while the horses of the plaintiff, Nathan H. Stevens, were running away on King Street in Chatham, the plaintiff, Mary L. Atkinson being thrown out of the sleigh drawn by the said horses, the sleigh damaged and the young lady having her leg broken.

King street is a long street, and at the westerly end of it there is a sharp curve of 117 degrees, and about 60 feet from the centre of this angle there is a telephone pole erected by the appellants, the Bell Telephone Company, (under its statutory powers,) in 1893, which stands on the edge of the gutter along the travelled part of the street. The plaintiffs allege that the street was so much out of repair that it caused the sleigh to partly go over on its side when the horses and sleigh arrived at the turn, the sleigh, which was a high covered carriage top set on sleigh runners, in swinging round at the curve, upset, and the top struck against the telephone pole, thereby causing the injury complained of, and that but for the pole the injury might have been avoided.

The action was brought against the City of Chatham alone. The city caused the Bell Telephone Company to be joined as third party, to indemnify the city if the latter was liable to the plaintiffs.

Mr. Justice Ferguson, before whom the action was tried, found a verdict for the plaintiffs against the defendants, the City of Chatham, and dismissed the city's claim for indemnity against the Bell Telephone

Company, although he expressed the view that the telephone company might have been successfully sued for the damage claimed.

From this judgment the City of Chatham appealed to the Court of Appeal for Ontario, where the judgment as to the liability of the defendant (the city) to the plaintiffs was maintained, but the Bell Telephone Company, the third party, was ordered to indemnify the city. The city now appeals against the plaintiffs from that part of the judgment of the court which holds it liable, and opposes the Bell Telephone Company's appeal against its liability to indemnify the defendant, the city.

The finding of the learned judge at the trial was, that by reason of the telephone pole being so near the centre of the street the latter was out of repair, and was the cause of the accident and the defendant (the city) was liable therefor.

The defendant (the city), beside denying that the street was out of repair, by reason of the position of the pole, or otherwise, contends that the pole was erected and maintained in the place where it was by the Bell Telephone Co. (third party), under its statutory powers, without any authority of the defendant, and plead also contributory negligence on the part of the plaintiffs, as an answer to the action.

Matthew Wilson Q.C. for the appellant, Bell Telephone Co., third party. The pole was placed where it was by order of the city engineer and was lawfully there under the statute. *Roberts* v. *Wisconsin Telephone Co.* (1); *Commonwealth* v. *City of Boston* (2); *Soule* v. *Grand Trunk Railway Co.* (3); *Ricketts* v. *Village of Markdale* (4).

(1) 77 Wis. 589.
(2) 97 Mass. 555.
(3) 21 U. C. C. P. 308.
(4) 31 O. R. 180, 610.

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Aylesworth Q.C. and *Douglas Q.C.* for the respondent, City of Chatham. As to liability of third party to indemnify city see *Boun* v. *Bell Telephone Co.* (1).

Wilson Q.C. in reply to City of Chatham.

Aylesworth Q.C. and *Douglas Q.C.* for the City of Chatham, appellant, referred to *Town of Portland* v. *Griffiths* (2); *City of Halifax* v. *Lordly* (3); *Foley* v. *Township of East Flamboro* (4).

Atkinson Q.C. for the respondent.

The judgment of the court was delivered by:

GWYNNE J.—In this action a verdict was rendered in favour of the plaintiffs against the City of Chatham for damages for which the third party was ordered to indemnify the City of Chatham.

The judgment of the learned trial judge having been confirmed in appeal, the third party, by leave of the Court of Appeal, at Toronto, in pursuance of a statute, affecting the case, appeals against the judgment as rendered against it, whether Chatham be or be not liable to the plaintiffs, and the Corporation of the City of Chatham by like leave appeals against the judgments rendered in favour of the plaintiffs against it.

As between the third party and the Corporation of Chatham, we entertain no doubt that the telegraph pole to which the learned judge attributes the accident which was the cause of the action, was planted in a street in Chatham, presumably by the servants of the third party, but by the authority of the corporation. And as between the Corporation of Chatham and the plaintiffs, we likewise entertain no doubt that the said pole so planted by the corporation was lawfully

(1) 30 O. R. 696.
(2) 11 Can. S. C. R. 333.
(3) 20 Can. S. C. R. 505.
(4) 29 O. R. 139; 26 Ont. App. R. 43.

planted where it was, outside of the portion of the highway appropriated by by-law for the use of horses and carriages, and so was not a nuisance of which persons lawfully using the highway could complain. But we hold it to be clearly established by the evidence that the pole was not the *causa causans* or any part of the cause of the accident, which was the running away of the horses with the carriage in which the injured plaintiffs were, in a violent manner, at excessive speed and wholly beyond the control of the person driving them.

The complaint at the trial was not that the pole caused the injury complained of, but the bad state of repair of the road, which it was contended caused the carriage to upset. The learned trial judge held, and we think rightly, against this contention, but as to the pole, instead of having caused the accident, the evidence seems to establish that it caused rather the separation of the horses from the carriage, (if it had any connection with the accident at all), and thereby prevented greater injury than might otherwise have happened.

But the *causa causans* was the violent, uncontrollable speed at which the horses were running away. Without saying that in no case can a person injured in a carriage drawn by running-away horses maintain an action for damages, we hold that in the present case the sole conclusion justified by the evidence is that the uncontrollable manner in which the horses were running away was the cause of the accident.

We are of opinion, therefore, that the appeal of the corporation must be allowed with costs, and that the action be dismissed with costs, but that the corporation be ordered to pay the Telephone Company their costs of this appeal and also the costs incurred in the

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action by reason of their having been made third party hereto.

Appeal of defendant allowed with special direction as to costs.

Solicitor for the third party, appellant: *S. G. Wood.*

Solicitor for the defendant, appellant: *Wm. Douglas.*

Solicitors for the respondents: *Atkinson & Atkinson.*