THE OTTAWA ELECTRIC COMPANY (DEFENDANT) ..... } APPELLANT;

AND

LEO CREPIN, AN INFANT UNDER THE AGE OF TWENTY-ONE YEARS, BY HIS NEXT FRIEND AUGUSTIN CREPIN, AND THE SAID AUGUSTIN CREPIN (PLAINTIFFS) ..... } RESPONDENTS.

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*March 9.
*April 28.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Negligence—Res ipsa loquitur—Burden of proof—Obligation as to particularizing negligence alleged—Boy injured by falling on live electric wire on sidewalk—Interpretation of jury's finding.

The infant plaintiff was injured by falling, on the sidewalk, on a loose end of a live electric wire of defendant company, which wire had broken loose during a storm, by reason, apparently, of a swaying tree

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Cannon JJ.

(1) [1903] A.C. 299.

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branch bringing two wires together and causing a short circuit. It was in evidence that, at the place of the accident, there was a line of trees which overhung the sidewalk. The jury found negligence by defendant, causing the injury, which negligence they stated thus: "We consider the wire was defective, wires running close to trees should have more thorough inspection."

Held (1) The evidence of the wire being on the sidewalk was sufficient to attribute negligence to defendant, in the absence of any other apparent cause or explanation excluding negligence to the satisfaction of the jury (*Scott* v. *London & St. Katherine Docks Co.*, 3 H. & C. 596, at 601, cited). Plaintiffs thus adduced reasonable evidence upon which the jury might find a verdict.

(2) When plaintiffs' counsel, being asked at the opening of the trial (in accordance with a previous application for particulars which had stood over) to specify the negligence upon which he relied, specified, as his main ground, the leaving of a live wire lying on the highway, he was not bound to explain or particularize the facts or negligence which caused or contributed to that, since these were more in the knowledge of defendant; and the case thus appeared to be one in which the occurrence of such an accident in itself justified calling on defendant to prove that it happened without negligence on its part.

(3) The jury's intention was obviously to find defendant's negligence in the defective location of the wire and the inadequacy of the inspection, which permitted the danger incident to contact with the tree branch to remain undiscovered, until advertised by the accident itself.

Judgment of the Appellate Division, Ont. (66 Ont. L.R. 409), sustaining judgment of Kelly J. (*ibid*) for damages to plaintiffs (on the jury's findings), affirmed.

APPEAL by the defendant from the judgment of the Appellate Division of the Supreme Court of Ontario (1) dismissing its appeal from the judgment of Kelly J. (2), entered upon the verdict of a jury in favour of the plaintiffs for damages. The action was for damages for injuries suffered by the infant plaintiff when, as alleged, he slipped on a sidewalk and fell on a live wire of the defendant company which had broken loose, and which injuries the plaintiffs alleged were caused by defendant's negligence.

The material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

Geo. F. Henderson K.C. and *D. K. MacTavish* for the appellant.

J. Wilfrid Gauvreau and *J. Burrows* for the respondent.

(1) (1930) 66 Ont. L.R. 409. (2) *Ibid* at 410-412.

The judgment of the court was delivered by

NEWCOMBE J.—The infant plaintiff sustained serious injury, on 4th August, 1928, by falling on an electric wire of the defendant company which had broken loose during a thunder storm on Carling Avenue, opposite the Lady Grey Hospital, in the city of Ottawa.

The accident took place late in the afternoon. The boy, who was at the time eight years of age, was walking on the sidewalk with his brother, who was two years older, and another boy, and, when he fell, came in contact with a live wire belonging to the defendant's system, the loose end of which was at the time lying on the sidewalk. He lost part of his right hand, including four fingers, and he seeks to recover damages from the defendant for negligently causing the accident.

The case was tried by Kelly J., of the Supreme Court of Ontario, with a jury; and, at the conclusion of the learned judge's charge, he submitted questions to the jury, which, with their answers, are as follows:

1. Was there any negligence by the defendant (that is the Ottawa Electric Company) which caused injury to the plaintiff Leo Crepin?—A. Yes.

2. If there was such negligence by the defendants state fully and clearly what was or were the act or acts or omission or omissions which constituted such negligence?—A. We consider the wire was defective, wires running close to trees should have more thorough inspection.

3. Was there any negligence of the plaintiff Leo Crepin which caused or contributed to his injury?—A. No.

4. If there was such negligence by the said Leo Crepin, state clearly and fully what was or were his act or acts or omission or omissions which constituted such negligence on his part?—A. None.

5. At what amount do you assess the damages of Leo Crepin?—A. $10,000.

6. At what amount do you assess the damages of the plaintiff Augustin Crepin?—A. $100.

7. If you find there was negligence by the defendant and also negligence by the plaintiff Leo Crepin, then state the degree in which each of them was in fault and the manner in which the amount of damages found should be apportioned?—A. No answer because none necessary.

There had been a motion for nonsuit, and the learned judge heard argument upon that after the jury was discharged. He reserved his judgment, but subsequently announced his conclusion that there was evidence from which the jury could reasonably attribute the accident to negli-

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gence of the defendant company; and so he directed judgment to be entered for the plaintiffs for the damages as found (1).

The defendant appealed, and the appeal was dismissed by the Second Appellate Division (2). The appellant now appeals to this Court, alleging that none of the specific acts of negligence upon which the plaintiffs relied was proved; that there was no evidence upon which the jury could reasonably have found as it did; that the trial judge should have refused to enter judgment upon the findings; that the plaintiffs, having alleged specific acts of negligence, could not rely upon the doctrine of *res ipsa loquitur,* and that the learned Judges of Appeal erred in holding that there was a burden of proof upon the appellant. At the hearing the appellant's counsel emphasized two points. First, he urged that, in view of what took place at the trial, the appellant was limited to alleged acts of negligence which did not include those subsequently found by the jury. It appears that there had been an application for particulars, which had stood over to be disposed of at the trial; and, accordingly, the plaintiff's counsel was at the beginning of the trial asked to specify the negligence upon which he relied. The following is a narrative extracted from the record of what then took place:

His LORDSHIP: It may be difficult to put the case before the jury unless we know what you say the negligence is that you allege.

Mr. BURROWS: The first ground is in leaving a live wire lying on the highway.

His LORDSHIP: State all the acts of negligence upon which you are going to adduce evidence, because I do not want the jury wandering around finding negligence if it is not pleaded.

Mr. BURROWS: Suppose I prove by the evidence I intend to adduce that this wire was on the highway, is your Lordship going to make a ruling now as to whether the maxim (*res ipsa loquitur*) applies or not?

His LORDSHIP: No; I am giving you an opportunity to state what you allege were the acts of negligence on the part of the defendant on which evidence is now to be given.

Mr. BURROWS: If the maxim applies I am not bound to produce any specific acts.

His LORDSHIP: I am not going to shut you out from applying the maxim, but now that you have pleaded negligence if you have in mind the acts of negligence you are relying upon I think we should know what they are.

Mr. BURROWS: And I will not be debarred from applying the maxim?

(1) (1930) 66 Ont. L.R. 409, at 410-412.

(2) (1930) 66 Ont. L.R. 409.

Mr. HENDERSON: I submit that having pleaded negligence the maxim cannot apply.

His LORDSHIP: That is a matter of law.

Mr. BURROWS: My evidence will be as follows:

That a live wire belonging to the defendant company had fallen on the highway about 6.20 p.m.

That the defendant company were notified immediately that a live wire was lying exposed on the highway.

That the infant plaintiff was proceeding along Carling Avenue about 7 o'clock the same evening and fell on this live wire and sustained these injuries.

One act of negligence we complain of is the unreasonable length of time this wire was allowed to remain on the highway and their unjustifiable delay in failing to despatch a repair car or someone to guard the live wire so as to obviate the possibility of accident or injury to travellers on the highway.

Then I submit that it is an act of negligence on the part of the defendant company to allow a live wire to lie exposed on the highway.

Mr. HENDERSON: That is quite satisfactory. I now understand my learned friend's position.

In the case of *Scott* v. *London and St. Katherine Docks Co.*, in the Exchequer Chamber (1), it was said that

> There must be reasonable evidence of negligence, but where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.

And I think it is clear enough that, in this case, where a dangerous electric wire which should have remained affixed to the poles above the sidewalk, where it belonged, is found upon the public footway, the evidence of that condition is sufficient to attribute negligence to the appellant company, which was responsible for and had the wire in charge, in the absence of any other apparent cause or explanation excluding negligence to the satisfaction of the jury. In my view the plaintiffs thus adduced reasonable evidence upon which the jury might find a verdict.

I may add that when the plaintiffs' counsel specified, as his main ground, the leaving of a live wire lying on the highway, he was not bound to explain or particularize the facts or negligence which caused or contributed to that, since these were more in the knowledge of the defendant company; and the case would thus appear to be one in which the occurrence of such an accident in itself afforded justification to call upon the defence to prove that it happened without negligence on the defendant's part.

(1) (1865) 3 H. & C., 596, at p. 601.

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Then, secondly, it is said, and it appeared that this was the point upon which the appellant principally relied, that there is no evidence of the negligence found by the second answer, in which the jury says that

> We consider the wire was defective; wires running close to trees should have more thorough inspection.

It was in proof, and there was a rough sketch before the jury, put in by defendant's counsel, that the wires along Carling Avenue, at the place of the accident, passed through a line of trees which overhung the sidewalk; five of these trees are shewn upon the sketch.

Our attention was directed to the Dominion Act, c. 111 of 1894, incorporating the defendant company. Section 9 provides that the company may construct, erect, maintain and operate wires along the sides of and across or under any public highways, streets, etc., and supply electric current thereby; and may by its servants, agents and workmen enter any street or highway in any city, town or village, for the purpose of erecting and maintaining its wires along the sides of or across or under the same; and may construct, erect and maintain such and so many poles and other works and devices as the company deems necessary for making, supporting, using, working and maintaining its wires and systems, subject to provisions which include in juxtaposition,

> (*e*) The Company shall be responsible for all damage which their agents, servants or workmen cause to individuals or property in constructing, carrying out or maintaining any of the said works in this or the next preceding section authorized;
>
> (*f*) The Company shall not cut down or mutilate any shade, fruit or ornamental tree.

It was not suggested that the plaintiffs have a statutory right to recover, as for damage caused by the defendant's agents, servants or workmen in the maintenance of the line, even in the absence of any evidence of negligence on their part. Moreover, it was not shewn that, in order to rectify the location of the wire, it would be necessary to cut down any shade tree, or that a place of safety could not be found for the offending wire without mutilating the tree. In fact, the evidence rather suggests that the purpose might be effected without material injury to the tree. But in any event the defendant cannot justify damage caused by its negligence.

Now let us refer to the testimony. The inferences open to the jury are not obscure.

Peskett, one of the plaintiffs' witnesses, tells of finding the wire "detached from a pole * * * and looped over the branch of a tree and hanging straight down in to the centre of the sidewalk."

Clements, an electrician, one of the appellant's foremen, gave evidence for his side. In direct examination he answered as follows:

Q. Was there anything wrong with the line to cause the break there that night?—A. No, not so far as the line is concerned.

Q. Could you see from the condition there what had caused it to fall? —A. Yes; there was a limb which indicated a burn on it, and that limb had caused the two wires to come together and caused them to short circuit and caused it to come down.

Q. That is not an uncommon thing in storms, is it?—A. No.

His LORDSHIP: Q. What did you see on the limb?—A. A burn into the limb.

Mr. HENDERSON: Q. Two witnesses here have testified to hearing what sounded like an explosion. Tell His Lordship and the jury what happens when two wires are brought together by the swaying of a tree like that?—A. When two wires come together that are alive it will cause a short-circuit and burn either one off or burn the two off at one time, or sometimes one at a time, and perhaps the other has a little left to hold it on to keep it up, but it is not very much good.

The same witness was asked

Q. How do you know that the wire was not defective at the point where it broke?—A. It did not look it.

Q. You did not see the wire until you arrived on the scene?—A. No; but if there was a wire broken from its own condition there would be only the one fall and not the occasion of the two going at the same time. It chanced that a branch had put those two wires together and caused them to burn and drop down.

Edward Sims, foreman for the Ottawa Hydro Electric line, who arrived at the place of the accident before the appellant's employees, is asked what he found when he got there, and he answers:

I found the wires burned out; the two west ends were hanging up in the trees and the two east ends were down on the street. * * * A matter of 6 or 8 inches of the wire would be on the sidewalk, and the other end ran along the grass.

Peter Burke, the appellant's outside line inspector, says in cross-examination, that he heard about the wire breaking and does not know whether the wire was defective at the point of breaking or not. He says it would be natural for a wire that is defective to break during a storm.

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James T. Lambert, Superintendent of the appellant's lines, gives the following answers in cross-examination:

Q. Any kind of defect?—A. The word "defect" covers a lot of ground.

Q. Exactly. You were quite sure a minute ago that you would notice any defect?—A. A defect in a piece of copper would break the piece of copper and it would not stay up there.

Q. But it might be defective and break later on?—A. Possibly.

Q. It might not break immediately, and if it were defective you might not notice the defect at once,—is not that correct?—A. I think I would notice a defect.

Q. Probably, if you climbed up the pole and examined the wire?—A. A defect would not be very defective or it would show itself.

Q. Would you notice a defect if you glanced up at the wires?—A. I would notice if there was anything wrong.

Q. You want us to believe that you would notice any defect in a wire by glancing up at it?—A. A defect of any importance.

Q. Would you or would you not?—A. No, I would not.

Q. You would not notice the defect?—A. That word "defect" is a funny kind of a way to get at it.

His LORDSHIP: Q. You know the different kinds of defect?—A. A defect in the wire might be a little bit of the insulation scored on the top side of the wire pointing up to the sky, and I would not see that; but if there was a cut in the insulator when they were putting the wire on it would be interrupted by the defect. I would not see a little bit of insulation, but I would see a score in the copper.

* * * * *

Q. You do not know what condition the wire was in on the 4th August, 1928?—A. I have every reason to believe it was all right.

Q. But you have no knowledge personally of the condition of the wire?—A. I saw it put up there.

Q. In 1923?—A. Yes.

Q. And that is the reason why you think it should be in perfect condition?—A. Well, it should not be defective in that space of time.

* * * * *

Q. I am asking you about the wire that fell?—A. I know it was a good wire, the one wire you have reference to.

Q. How do you know?—A. Because it was put up good.

Q. Is that your answer, because it was put up in 1923 it must be good in 1928?—A. Put up with the best material we can buy.

Further on, at the close of his cross-examination,

Q. And because you saw this line constructed in 1923 you are under the impression that it could not have a defective wire in 1928?

His LORDSHIP: You had better give his other reason as well.

Mr. BURROWS: Is that the reason, because you saw the line constructed in 1923 and you know that the best materials were used?—A. Yes.

Q. That is why you think it should not have a defective wire in 1928?—A. Yes.

His LORDSHIP: He also said because he had been inspecting it from time to time.

Mr. BURROWS: Q. You cannot tell us the last time you inspected it? —A. No; it is not my job to inspect it, but Mr. Burke does the inspecting.

Q. You told His Lordship that you drew that conclusion from inspection. If you were driving along Carling Avenue in your motor car and looked up at the wires, would you call that "inspection"?—A. Yes.

The learned trial judge, in his reasons for judgment upon the motion, directed attention to the fact that while witnesses for the defence told of the manner and extent of the inspection of the wires, and said that they were in satisfactory condition, none of them appears to have observed their condition "at or for some time prior to the accident." He proceeds to say that

> The jury were entitled to draw any reasonable inference as to the condition of the wires from such evidence as that there was an explosion due to contact of the wire with the limb of the tree, and that there was a "burn" on the limb at the place of contact, etc., and it might have been pertinent for them to have considered whether the presence of the "burn" indicated want of insulation or defective insulation of the wire, and whether if there had been more careful or more frequent inspection the defect, if it existed, might have been observed.

He refers to the proximity of the burned limb to the broken wire which fell to the sidewalk and concludes with the observation that in his opinion there was, in the circumstances, evidence from which the jury could reasonably have inferred that the wire was defective.

The appeal was heard before the five judges of the Second Divisional Court, and, with one dissenting, and one who did not state his reasons, they interpreted the finding of the jury as having regard to the situation of the wire in relation to the trees and the limb which, even in accord with the testimony of the appellant's own witnesses, was the probable cause of the trouble.

I agree, and it is, to my mind, very obvious, that the intention of the jury was to find the defendant's negligence in the defective location of the wire and the inadequacy of the inspection, which permitted the danger incident to contact with the limb to remain undiscovered, until advertised by the accident itself.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Henderson, Herridge & Gowling.*

Solicitors for the respondents: *Gauvreau, Burns & Burrows.*