1956

* May 22, 23
* Jun. 11

THE MUNICIPAL DISTRICT OF SERVICEBERRY NO. 43 (*Defendant*) } APPELLANT;

AND

CARL LUND (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Automobiles—Municipal corporations—Negligence—Hole in road—Tractor overturned—Road condition known to driver—Duty of municipality—Whether breached—Municipal Districts Act, R.S.A. 1942, c. 151.

While driving a farm tractor on a road within the appellant municipality, the respondent, in order to avoid a large hole in the centre of the road, swung to his left and ran into loose sand at the shoulder of the road. The tractor slid into a ditch, overturned and injured him. He knew there was a hole there and had been warned by his employer to be careful. The road was a dirt road, lightly travelled, with a little natural gravel, and had been gravelled a year and one-half prior to the accident.

His action for damages for injuries, alleging negligence of the municipality in failing to keep the road in repair, was dismissed by the trial judge who found that the respondent might have been driving too fast and too close to the edge of the road; that the hole was not much of a hazard and that he was the author of his own misfortune. This judgment was reversed by a majority in the Appellate Division on the ground that the municipality should have known of the condition of the road and defaulted in the performance of the duty imposed upon it by s. 189 of the *Municipal Districts Act*, R.S.A. 1942, c. 151.

*PRESENT: Taschereau, Locke, Cartwright, Fauteux and Nolan JJ.

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Held: The appeal should be allowed.

Per curiam: The Appellate Division was wrong in holding that the municipality defaulted in its statutory duty to repair the hole. That duty can only arise if it is justified on the evidence as to the character of the road and the locality in which it is situated, and if it should have known of the hole in the road. Under the circumstances here, the failure of the municipality to repair the hole did not constitute a breach of its statutory duty. Moreover, the facts do not support the finding of the Appellate Division that the municipality should have known of the disrepair of the road.

Per Taschereau, Locke, Fauteux and Nolan JJ.: The accident was caused by the negligence of the respondent in the operation of the tractor; he did not have it under proper control.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division, reversing, O'Connor C.J.A. dissenting, the judgment at trial which had dismissed the action.

H. W. Riley, Q.C., for the appellant.

J. J. Urie, for the respondent.

The judgment of Taschereau, Locke, Fauteux and Nolan JJ. was delivered by

NOLAN J.:—This is an appeal from the majority judgment of the Appellate Division of the Supreme Court of Alberta reversing the judgment of McLaurin C.J.T.D. of Alberta dismissing the action of the respondent to recover damages for personal injuries suffered in an accident.

On May 24, 1951, at approximately 1.30 p.m., the respondent was operating a farm tractor on a road running from east to west between Rockyford and Keoma within the appellant municipality. At a point on this road about five miles west and one mile south of the village of Rockyford the respondent, who was proceeding in a westerly direction, in order to avoid driving through a depression or hole about the centre of the road, swung to his left and ran into two feet of loose sand at the extreme south edge, or shoulder, of the road. The respondent endeavoured to get the tractor back on the road, trying to put it into reverse, but it slid into a five-foot ditch on the south side of the road and overturned, pinning the respondent underneath and causing him to sustain serious injuries.

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The road at the point of the accident was twenty-four feet wide and had been given a light coat of gravel about a year and a half before the accident. The depression or hole where the accident occurred was, according to the estimate of the witness Deitrich, a municipal employee, approximately four feet wide, six feet long and eight inches deep. The witness Dyer, the employer of the respondent, estimated the depression or hole to be two to three feet across. The respondent estimated it to be two to two and one-half feet wide, three to three and one-half feet long and twelve inches deep.

At trial the respondent stated that the accident occurred at a hole in a culvert on the road, but his evidence on that point was contradicted by the witness Deitrich, who stated that the depression was seventy to ninety feet west of the culvert. The learned Chief Justice held that the accident occurred seventy-five feet west of the culvert.

The respondent was employed by a farmer in the vicinity to work on the land. He had previously passed the place on the road where the accident occurred approximately twenty times and had also passed it earlier on the day of the accident.

The respondent knew that there was a hole in the road and had been warned by his employer, Dyer, to be careful when driving past it and he admits that on previous occasions he had been able to pass safely on the south side of the road. He felt that there was room to get past if he drove with caution.

On the morning of May 24, 1951, prior to the accident, the road foreman, Geeraert, was driving a municipal employee, Deitrich, in a half-ton delivery truck to his equipment and, at twenty-five miles per hour, passed over the place where the accident occurred. The depression gave the Geeraert vehicle a sort of jolt, but he retained control of it without difficulty. Deitrich says a person going over the depression, which had sloping sides, would get a bump, but could pass over it without difficulty.

The depression itself was the result of a frost boil, which was brought about by the freezing of sub-surface water which caused a sinking of the road. Deitrich says that eight yards of dirt were dumped into the depression when he repaired it shortly after the accident.

The learned Chief Justice of the Trial Division found that the respondent might have been driving too fast and might have got too close to the edge of the road because of the hole or depression. The learned Chief Justice also found that the hole or depression was not much of a hazard and that the respondent was the author of his own misfortune.

The Appellate Division, in a majority judgment, allowed an appeal from the judgment of the learned Chief Justice and directed that judgment for $6,800, including special damages, be entered for the respondent, on the ground that the appellant should have known of the condition of the road and defaulted in the performance of the duty imposed upon it by s. 189 of *The Municipal Districts Act,* R.S.A. 1942, c. 151. That section provides as follows:—

189. (1) Every council shall keep all roads, bridges, culverts and ferries, and the approaches thereto, which have been constructed or provided by the municipal district or by any person with the permission of the council, or which, if constructed or provided by the Province, have been transferred to the control of the council by written notice thereof, in a reasonable state of repair, having regard to the character of the road or other thing hereinbefore mentioned, and the locality in which it is situated, or through which it passes, and in default of the council so to keep it in repair, the municipal district shall be liable for all damages sustained by any person by reason of its default.

(2) Default under this section shall not be imputed to a municipal district in any action without proof by the plaintiff that the municipal district knew or should have known of the disrepair of the road or other thing hereinbefore mentioned.

Subsection (2) is not found in a similar Act in any other province.

The liability of the appellant municipality depends, in the first place, upon whether the road in question was kept in a reasonable state of repair, regard being had to the character of the road and the locality through which it passed.

The road in question is between Keoma, consisting of two houses and two elevators, and Rockyford. It is a dirt road, lightly travelled, with a little natural gravel, and had been gravelled a year and one-half prior to the accident.

The liability of the appellant municipality depends, in the second place, upon whether it should have known of the depression in the road.

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I am of the opinion, with respect, that the Appellate Division was wrong in holding that the appellant municipality defaulted in its statutory duty to repair the depression in the road where the accident occurred. In my view that duty can only arise if it is justified on the evidence as to the character of the road and the locality in which it is situated.

There is evidence in the case that there are road bans every year in the appellant municipality because of the frost leaving the ground and that depressions in the roads are caused by frost boils.

There is also evidence that the road had been gravelled one and one-half years prior to the accident. It is situate between two small communities and the traffic upon it is light. There had been excessive moisture in the fall of 1950, heavy snow during the winter of 1950-51 and a heavy snowfall in April, 1951. In addition, at the time of the accident, a late wet spring had added to the difficulty of keeping the 1,100 or 1,200 miles of road in the municipality under repair.

In my opinion, taking all these facts into consideration, the failure of the appellant municipality to repair the depression did not constitute a breach of its statutory duty and the learned Chief Justice of the Trial Division was right in holding it to be free from negligence. Moreover, I think that these facts, accompanied by the difficulty of frequent inspection, do not support the finding of the Appellate Division that the municipality should have known of the disrepair of the road.

The Appellate Division was of the opinion that the dimensions of the depression were in excess of those given by any witness and in support of this view made mention of the fact that eight yards of dirt were hauled to make the necessary repairs. While it is true that the witness Deitrich says that this amount of material was dumped in the depression, which would suggest that it was larger than the evidence indicated, I agree with the learned Chief Justice of Alberta in his dissenting judgment that it is reasonable to assume that some portion of this fill was spread over the road in order to level off any unevenness caused by the fill in the depression.

The respondent was proceeding in daylight along a road twenty-four feet wide in a tractor six feet four inches wide. He approached a depression in the road which was well known to him, having passed over it a number of times, the danger of which had been brought to his notice by his employer and which was not a trap. In attempting to go around the depression—and there was plenty of room for him to do so—he drove too close to the loose sand on the extreme south edge, or shoulder, of the road and, in trying to get the tractor back on the road, it slid into a five-foot ditch, overturned and injured the respondent. I do not think that the respondent had the tractor under proper control and if the instability of tractors is notorious, as is indicated in the judgment of the Appellate Division, I think a greater degree of care is required in their management. In my view the accident was caused by the negligence of the respondent in the operation of the tractor.

I would allow the appeal with costs.

CARTWRIGHT J.:—For the reasons given by my brother Nolan I agree with his conclusion that no breach of the statutory duty resting upon the appellant was established and consequently do not find it necessary to consider whether the conduct of the respondent amounted to negligence.

I would dispose of the appeal as proposed by my brother Nolan.

Appeal allowed with costs.

Solicitors for the appellant: *Macleod, Riley, McDermid, Dixon & Burns.*

Solicitors for the respondent: *Fitch & Lindsay.*