Privy Council Appeal No. 67 *of* 1925.

Noe Letang - - - - - - - - - *Appellant*

v.

The Ottawa Electric Railway Company - - - - *Respondents*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH MAY, 1926.

Present at the Hearing :

THE LORD CHANCELLOR.
VISCOUNT HALDANE.
LORD ATKINSON.
LORD SHAW.
LORD PARMOOR.

[*Delivered by* LORD SHAW.]

There has in this case been very considerable difference of opinion among the learned Judges in Canada. The judgment in the case was pronounced on the 23rd April, 1923, in the Superior Court by Demers J. after a trial without a jury. It was in favour of the appellant and awarded to him a sum of $4,607. That judgment was appealed to the Court of King's Bench for Quebec, Appeal Side. The Court affirmed Mr. Justice Demers, but Dorion and Howard JJ. dissented. On a further appeal to the Supreme Court of Canada by the respondents these judgments were reversed and judgment given for the respondents, Idington J. dissenting.

The action is a claim for damages for negligence in respect of an accident to the wife of the appellant, who slipped upon certain steps on the respondents' property. The steps were covered with ice and she fell heavily and sustained serious injury. It is clear that

in such a case great weight must attach to the views and verdict of the Judge who tried the case.

The facts as to the place of the accident are, shortly, as follows :—

The line of the defendants' tramway passes over a portion of ground on the south bank but considerably above the level of the Ottawa River and known as Rockliffe Park. Gatineau Point is a village on the north side of the Ottawa River, opposite a part of Rockliffe Park where the bank rises steeply to the ground belonging to the defendants. That ground has no boundary fence upon it towards the river. In winter passengers proposing to travel by the tramway cross the river on the ice. In summer they are landed at a wharf at the bottom of the slope *ex adverso* of the tramway property. From that they climb up to the edge of the property. There are at several points courses of steps with regard to which no responsibility attaches to the defendants. At the edge of the tramway property, however, a course of steps had been placed ; two or three of these at the top were actually upon tramway ground, and from that point to the tramway line and platform was a distance of 80 feet in a straight line over ground which sloped slightly up to the rail level. Manifestly for the convenience of tramway passengers, the Company had built a series of concrete steps so that passengers coming up the steps from the river crossed straight to the tramway line, but for a portion of the way had the benefit of this flight. These simple facts seem, on the mere statement of them, to constitute something very like an unmistakable invitation by the respondents to passengers from Gatineau to come up to their tramways by the route thus formed.

The public so interpreted the position. The facts as to the actual use made of this convenient access are strong. It was habitually used, not by one or two passengers, as if by way of adventure, but by between 700 and 800 tramway passengers per day. It was, in short, their ordinary access to the tramway line, and this use must of course, have been known to the defendants and their representatives. In the opinion of the Board the appellant's wife, who was one of these passengers, must be regarded as an invitee, and the law applicable to the case is the law of responsibility in an invitee's case.

In the arguments before the Board it was not denied that, upon the day of the accident, the steps of the tramway property were in a bad condition and dangerous through the gathering of water, which in the occasional thaw flowed down the slope of the tramway property on to the steps and was there congealed by frost. No prohibition or warning against use was made, nor were any of the things done which were mentioned in the evidence as reasonable to be done in order to avert the danger, namely chopping the ice, clearing it away, or spreading sand or cinders upon the steps. For the convenience of persons using the stair

there was a handrail. The woman kept hold of this, but slipped so suddenly that she had no power to maintain her weight and she fell and was injured.

The case is accordingly that of an invitee who comes on to property of the defendant owner and on an errand of business as his customer. The familiar rule as to an invitee is expressed by Willes J. in *Indermaur* v. *Dames*, L.R., 1 C.P. 288 :—

> " We consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know ; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact."

The defendants' case pleaded at their Lordships' Bar, was not that their property had been kept reasonably safe for such an invitee. On the contrary and throughout the case they maintained that they had exercised no care of the steps at all as they had no duty with regard to them. They however maintained that the woman had been guilty of contributory negligence, and it was specially urged that the maxim *volenti non fit injuria* applied to prevent her from recovering compensation.

The defendants urged in the first place that, if the woman had avoided the steps, although these were hourly and generally used as already mentioned, and had gone round some considerable way upon a made road, which was in a safe condition for foot passengers, the accident would have been avoided. It seems at least doubtful whether this, in the circumstances, would have disentitled her to the legal rights of an invitee, but on this point it is unnecessary for their Lordships to pronounce ; for they are of opinion that it is not proved that this round-about road would have been at all safer. The evidence inclines one to the belief that, constructed at it was upon a winding slope, its condition at that season of the year, namely in February, was longer and possibly as hazardous, if not more so, than the direct and accustomed route taken. The defence, however, above stated remains quite apart from that point.

It is quite a remarkable circumstance that there is no trace of the defence of contributory negligence or *volenti non fit injuria* upon the respondents' pleadings. As, however, these subjects seem to have been fully argued in the Courts below their Lordships will accordingly deal with them.

The onus of establishing the plea of contributory negligence rests upon the defendants. In their Lordships' opinion this was a fair and most relevant subject for thorough and searching cross-examination of the appellant's wife, whose negligence the defendant Company was alleging and endeavouring to prove. It is sufficient to say that the defendant Company made no effort in this direction. The woman entered and left the witness-box without a question on the subject being put to her. It would rather appear that,

at that stage of the case, the real contest between the parties was as to the actual situation of the steps, whether they were or were not on the defendants' property, and whether the defendants had any duty to keep these steps in a passable condition. Whatever the reason, the only actor who could have spoken of contributory negligence, namely the appellant's wife, had not the subject of her alleged blame put to her. The Board thinks that the learned trial judge very rightly held that contributory negligence had not been established.

The truth is that this case has been, in its later stages, argued, as it was ably argued before the Board, as one in which the maxim *volenti non fit injuria* applied. In the view taken by the Board that maxim and the doctrine underlying it have not been correctly apprehended by some of the learned Judges in the Court below. This kind of problem is frequently before the Courts. It is quite a mistake to treat *volenti non fit injuria* as if it were the legal equipollent of *scienti non fit injuria*. As Lord Bowen expressed it in *Thomas* v. *Quartermaine* (L.R., 18 Q.B.D., p. 696) :—

> "The maxim, be it observed, is not '*scienti*' *non fit injuria, but* '*volenti.*' It is plain that mere knowledge may not be a conclusive defence . . . . . The defendant in such circumstances does not discharge his legal obligation by merely affecting the plaintiff with knowledge of the danger. Knowledge is not a conclusive defence in itself. But when it is a knowledge under circumstances that leave no inference open but one, namely that the risk has been voluntarily encountered, the defence seems to me complete."

A case very near the present on its facts is that of *Osborne* v. *The London and North Western Railway Company* (L.R., 21 Q.B.D., p. 220), in which *Thomas* v. *Quartermaine* was carefully founded on. The plaintiff was injured by falling on steps leading to the defendants' railway station. These steps the defendants had allowed to be slippery and dangerous. There was no contributory negligence on the part of the plaintiff, but there were other steps which he might have used (a direct analogy in fact with the present case), and he admitted that he knew the steps were dangerous and went down carefully holding the rail. The railway company was held responsible. Wills J. puts the matter thus :—

> "I should have thought it necessary that the plaintiff should be asked more questions than he has been asked in cross-examination. It is clear from his evidence that he knew there was some danger, but the contention on behalf of the defendants, that this circumstance is sufficient to entitle them to succeed, entirely gives the go-by to the observations of Lord Esher, M.R., in *Yarmouth* v. *France*, 19 Q.B.D., p. 657.
>
> "In the present case the plaintiff may well have misapprehended the extent of the difficulty and danger which he would encounter in descending the steps. For instance, he might easily be deceived as to the condition of the snow. I know quite enough about ice and snow to know how easy it is to make such a mistake and it is one that has cost many a man his life. In order to succeed the defendants should have gone further in cross-examination for, unless the question of fact had been found in their favour, the application of the maxim on which they relied could not be established. The County Court Judge has not found the fact the defendants need ; and upon the present materials I am certainly not prepared to supply the deficiency."

The law of Canada and England seems to be summed up in the leading proposition to Wills J.'s judgment :—

> " If the defendants desire to succeed on the ground that the maxim *volenti non fit injuria* is applicable, they must obtain a finding of fact that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it."

To apply these illustrations to the present case, there is no evidence whatsoever that the appellant's wife, holding on as best she could to the handrail, had full knowledge of the nature and extent of the danger ; or that, knowing this, she freely and voluntarily, with full knowledge of the nature and extent of the risk she ran, encountered the danger. As to this it is to be noted that she was merely traversing the same steps and under the very same circumstances as many hundreds of tramway passengers. Probably the legal situation is answered by the observation already made that neither the woman's knowledge nor will was made the subject of cross-examination at all. It rathers appears that the judgments, in so far as sustaining this defence, are based solely upon the fact that there was some danger from slipperiness apparent to anybody on the steps. Unless, however, the defendant Company, who had invited the woman to use that access and were accordingly bound to keep it reasonably safe, could establish that she fully knew and understood the nature and the extent of the danger and resolved voluntarily to undertake the risk, the defence fails. All that the defence put to the woman was whether she held on to the rail and should not have saved her fall in that way. They elicited the answer " Je le tenais, comme il faut," and there the defence founded on the maxim *volenti non fit injuria* came to an end.

Their Lordships will humbly advise His Majesty that the appeal should be allowed and the judgment of the Court of King's Bench and the judgment of the Superior Court restored. The respondents will pay the costs in the Courts below and such costs of this appeal as the appellant, suing as a pauper, is entitled to.

In the Privy Council.

NOE LETANG

v.

THE OTTAWA ELECTRIC RAILWAY COMPANY.

DELIVERED BY LORD SHAW.

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