Wyant v. Welch

[1942] O.R. 671-679

ONTARIO
COURT OF APPEAL

ROBERTSON C.J.O. and HENDERSON and GILLANDERS JJ.A.

November 16, 1942.

Negligence -- Breach of Duty Created by By-law -- Whether Civil Liability Exists -- Plaintiff Not Member of Particular Class -- Intention of Legislature and Municipality -- The Highway Improvement Act, R.S.O. 1914, c. 40, s. 21(2).

Animals -- Horse Running at Large on Highway -- Whether Owner Liable.

A municipal by-law, adopted under s. 21(2) of The Highway Improvement Act, R.S.O. 1914, c. 40 (later repealed), provided that it should be "unlawful for any person to suffer or permit any horses ... of which he is the owner, or which are in his possession or custody or under his control, to run at large on any highway." Penalties were provided for any breach of the by-law. Held, this provision did not of itself give a cause of action to a person injured through the presence of a horse upon the highway. Tompkins v. The Brockville Rink Company (1899), 31 O.R. 124; Orpen v. Roberts et al., [1925] S.C.R. 364, [1925] 1 D.L.R. 1101; Taylor v. People's Loan and Savings Corporation, 63 O.L.R. 202, [1929] 1 D.L.R. 160, applied; Direct Transport Co. Ltd. v. Cornell, [1938] O.R. 365, [1938] 3 D.L.R. 456; Hall et al. v. The Toronto Guelph Express Company et al., [1929] S.C.R. 92, 63 O.L.R. 355 at 364, [1929] 1 D.L.R. 375, distinguished. It could not be said that it was within the contemplation of the Legislature or of the municipality to do more than regulate the running of animals on the highway, and the common law rights of individuals were affected no further than was necessary to give effect to the clearly expressed provisions of the by-law; there was no intention of giving a right of action to an individual by reason of a breach of the by-law alone. Semble, it could not be said that the by-law was for the benefit of a particular class, of which the plaintiff was a member, as distinguished from the general public. Direct Transport Co. Ltd. v. Cornell, supra, considered.

AN appeal by the plaintiff from the judgment of Hope J., after the trial of the action before him and a jury, dismissing both the action and the counterclaim. The facts are fully stated in the judgment of GILLANDERS J.A.

16th November 1942. The appeal was heard by ROBERTSON C.J.O. and HENDERSON and GILLANDERS JJ.A.

M. Lerner, for the plaintiff, appellant: The municipality is empowered to pass such a by-law by reason of The Municipal Act, R.S.O. 1937, c. 266, s. 405(49). The by-law itself refers to the Highway Improvement Act, the relevant section of that Act now being R.S.O. 1937, s. 74(3), as amended by 1939 (Ont.), c. 19, s. 5. [ROBERTSON C.J.O.: This is a county road, not the King's Highway.] [HENDERSON J.A.: Where is there anything there to authorize the County to pass the by-law?]

horse, owned by the defendant. The horse which the plaintiff had seen, and turned out to avoid, did not belong to the defendant. As a result of the collision the plaintiff was injured and it was necessary to destroy the injured horse. The plaintiff sues for the damages he sustained, and the defendant counterclaims for the loss of the horse.

The first two questions put to the jury, and the answers thereto were:--

"1. Did the defendant fail to observe the duty imposed on him by By-law 1033? Answer: (Yes or no) 'No.'

"2. Was the defendant guilty of any negligence which caused or contributed to the accident? Answer: (Yes or no) 'No.'"

In answer to other questions the jury found that the plaintiff was not guilty of any negligence, and assessed the damages of both parties.

The defendant's horse had been placed in a pasture field with other horses, and how it got on the highway is not known. It is conceded that, apart from any absolute duty that might be imposed by the by-law to be later discussed, the defendant's horse did not get on the highway due to any lack of reasonable care on the part of the defendant. The appellant relies on a by-law passed by the Municipal Corporation of the County of Middlesex. This by-law was passed in 1924, purporting to be under the authority of The Highway Improvement Act, R.S.O. 1914, c. 40, s. 21(2), and provides, inter alia:

"1. That it shall be and is unlawful for any person to suffer or permit any horses, cattle, sheep, swine or goats, or any geese, ducks or other fowl of which he is the owner, or which are in his possession or custody or under his control, to run at large on any highway under the control of the County of Middlesex." A penalty is provided in and by the by-law for breach thereof.

The appellant contends that the only proper and possible answer on the evidence to the first question is "Yes", and that on this answer judgment should be entered against the defendant for the amount of damages fixed by the jury. He relies on the principle applied in Direct Transport Co. Ltd. v. Cornell, [1938] O.R. 365, [1938] 3 D.L.R. 456, and Hall et al. v. The Toronto Guelph Express Company et al., [1929] S.C.R. 92, 63 O.L.R. 355 at 364, [1929] 1 D.L.R. 375.

Even if one concedes that there was a breach of the by-law in question, I think the plaintiff's action cannot succeed. The principle which he seeks to apply to support his claim has been discussed in many cases. Before holding that it is applicable in support of the plaintiff's claim in the circumstances here present, it remains to consider two points:

(1) Is the plaintiff within a particular class intended to be benefited by the by-law in question? and

(2) Even if question 1 is answered in the affirmative, does the breach of this by-law in itself confer on the plaintiff a civil right against the defendant, enforceable by action?

In Tompkins v. The Brockville Rink Company (1899), 31 O.R. 124, Meredith C.J. carefully reviews many of the leading authorities then in existence. In that case a by-law had been passed by the council of a city, setting apart certain areas as fire limits, where no wooden buildings could be erected, and providing that buildings erected in contravention thereof might be pulled down and that a penalty might be imposed. The owner of an adjacent property brought action claiming that his property was injuriously affected by the defendant's contravention of the by-law. It was held that the by-law gave no such right of action. In the course of his judgment the Chief Justice points out that while the broad proposition stated in Couch v. Steel (1854), 3 El. & Bl. 402, 118 E.R. 1193, is not maintainable, the principle is as stated

and approved in the well known case of Groves v. Lord Wimborne, [1898] 2 Q.B. 402, where the opinion of Lord Cairns L.C. in Atkinson v. The Newcastle and Gateshead Waterworks Company (1877), 2 Ex. D. 441, is referred to with approval. In the course of his judgment the learned Chief Justice says in part, at p. 127:

"This case establishes that where, applying the test suggested by Lord Cairns and approved by Lord Herschell [in Cowley v. The Newmarket Local Board, [1892] A.C. 345], it appears that the statute 'provides for the performance by certain persons of a particular duty, and some one belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to perform it, prima facie, and if there be nothing to the contrary, an action by the person so injured will lie against the person who has so failed to perform the duty' (per Lord Justice Vaughan Williams, at pp. 415-16); and I take it to be a corollary of this that where the legislature renders a particular course of conduct imperative, and a deviation from it punishable by penalty in the general interest of the public at large prima facie, and if there be nothing to the contrary, an action by a person injured by failure to perform the duty imposed does not lie." And further, after some discussion of the legislation there in question, he continues at p. 130:

"When one looks at the number of acts lawfully to be done at common law which municipal councils are by the Municipal Act permitted to prohibit or to regulate, and the number of duties which do not exist at common law which they are permitted to impose in respect of persons and property within their jurisdiction, one is startled by the proposition that in each case a duty is imposed for the failure to perform which an action lies by one who is injured owing to the nonperformance of it."

This case is referred to with approval in Orpen v. Roberts et al., [1925] S.C.R. 364, [1925] 1 D.L.R. 1101, where Duff J., as he then was, says, at p. 369 (S.C.R.):

"Where the offence consists in the non-performance of a duty imposed by statute or the non-observance of a prohibition created by statute, then the rule, based upon the Statute of Westminster, 13 Edw. V, c. 50, is, as stated in Comyn's Digest ('Action upon Statute' (F)): "'In every case where a statute enacts or prohibits a thing for the benefit of a person he shall have a remedy upon the same statute for the thing enacted for his advantage or for the recompense of a wrong done to him contrary to the law.'

"Obviously, this leaves it to be determined in each case whether the enactment relied upon was passed for the benefit of the person asserting the right to reparation or other relief; and, assuming that question to be answered in the affirmative, there may still be the general principle to be considered, that, to quote Lord Selborne in Brain et al. v. Thomas et al. (1881), 50 L.J.Q.B. 662.

"'Where a statute creates an offence, and defines particular remedies against the person committing that offence, prima facie the party injured can avail himself of the remedies so defined, and no other.'

"But the object and provisions of the statute as a whole must be examined with a view to determining whether it is a part of the scheme of the legislation to create, for the benefit of individuals, rights enforceable by action; or whether the remedies provided by the statute are intended to be the sole remedies available by way of guarantees to the public for the observance of the statutory duty, or by way of compensation to individuals who have suffered by reason of the non-performance of that duty."

After discussing the history of The Municipal Act, R.S.O. 1914, c. 192, under the authority of which the by-law there in question had been passed, Duff J. says, at p. 375:

"There are many actions which have been successfully maintained though founded, in the last analysis, upon what were merely by-laws provided for by statute and well founded thereon, but few, if any, upon our Municipal Acts.

"This is one of the many cases in which I have had to turn to the judgment of Lord Cairns in the case of Atkinson v. Newcastle and Gateshead Waterworks Co. [supra], where he indicated that the right to a remedy, claimed to be founded upon a statute, must to a great extent depend on the purview of the legislature."

The question is succinctly and clearly dealt with by Middleton J.A. in Taylor v. People's Loan and Savings Corporation, 63 O.L.R. 202, [1929] 1 D.L.R. 160 (affirmed [1930] S.C.R. 190, [1930] 2 D.L.R. 891), where that learned judge says at p. 208 (O.L.R.):

"But on a far wider principle I think the entire argument is misconceived. Where a supreme legislative authority by its enactment imposes a duty upon any individual to do something for the benefit and protection of a particular class, an action will lie at the instance of any member of the class for an injury which has resulted from the neglect of that duty. Where a particular penalty is by the statute provided to secure the observance of the statute and as a punishment for the breach of its requirements, this may or may not indicate an intention on the part of the Legislature that this liability for a penalty is to be the sole result of a breach of the requirements of the Act. In each case the task confronting the Court is to discover the intention of the Legislature. It is true that it has been held that regulations made under the authority of a statute may be treated as being part of the statute for the purpose of this inquiry: Ross et al. v. Rugge-Price (1876), 1 Ex. D.269; but I know of no authority indicating that the same principle is applicable to municipal by-laws passed under the general authority of the Municipal Act, or under any specific provision of that Act."

After carefully considering the provisions, there in question, of The Municipal Act, R.S.O. 1927, c. 233, he concludes: "All this is cogent evidence of the absence of any legislative intent to give a right of action to an individual aggrieved."

An examination of The Highway Improvement Act, R.S.O. 1914, c. 40, leads to the same conclusion. Without entering into a discussion of its provisions, it is sufficient to say that neither this Act, nor The Municipal Act in force at the time the by-law was passed, was intended to give a right of action to an individual against another by reason of a breach of this by-law alone.

I do not think it can be said that it was within the contemplation of the Legislature by the provisions of the relevant statutes, or of the county corporation in enacting the by-law, to do more than regulate the permitting of animals to run at large on the highway. I cannot think that this by-law, and numerous other municipals by-laws, affect the common law rights of individuals to any greater degree than is necessary to give effect to their clearly expressed provisions, or that the Legislature intended here to make a breach of such a by-law statutory and actionable negligence. Such an intention cannot be read from the legislation and does not expressly or impliedly appear as part of the enactment.

It should be noted that the cases relied on by the plaintiff both concerned provisions of a provincial statute. In Hall et al. v. The Toronto Guelph Express Company et al., supra, it was held in effect that a section of The Highway Traffic Act providing for the maintenance of a tail light burning visibly on a motor vehicle, imposed an absolute liability apart from negligence, and that failure to have a light burning in accordance with the provisions of the Act might, if a cause of a collision resulting damages, involve civil liability, under the section of the Act imposing responsibility on the owner and driver of the motor vehicle for any violation of the Act, even where the light was burning until shortly before the accident and went out without the knowledge or personal fault or negligence of the driver. In Direct Transport Co. Ltd. v. Cornell, supra, this Court held that a section of The Highway Improvement Act, somewhat similar to, but not identical with, the relevant part of the by-law here in question, and referring to the King's Highway, imposed an absolute duty and that a breach, under certain conditions, of this absolute duty so imposed founded an action for damages.