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*Oct. 21.
*Nov. 11.

WILLIAM DIXON AND UXOR (PLAINTIFFS) . APPELLANTS;

AND

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

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

Negligence—City operating winter slide—Accident—Liability—Ultra vires.

In January, 1923, the city respondent at the occasion of a winter carnival converted a portion of a street into a coasting slide for bobsleighs. At the head of the slide the city placed one of its employees in charge with instructions to see to the starting of sleighs and to collect the tolls prescribed for the use of the slide. The city had also there other men employed generally in connection with the slide. The appellants, Dr. Dixon and his wife, went down the slide in a bobsleigh until they reached a curve on the roadway where the city had constructed an embankment and then a rut caused the sleigh to upset, its occupants falling off and finding themselves sprawling on the slide. The appellants then attempted to go off the path of the slide by crossing the embankment, but the footing being found practically impassable on account of soft snow several feet in depth, they crossed the slide again in order to go out on the other side. Just then another sleigh coming down upset with its occupants in front of the appellants further up. It was followed at a short interval by a third sleigh which, while apparently trying to avoid the second overturned sleigh, came into contact with Mrs. Dixon, who sustained serious injuries. The appellants brought action against the city respondent to recover damages.

Held, that the city was responsible not only for the preparation of the slide but also, having assumed its control, it was its duty to see that no sleigh would be started from the top until the slide was clear; and that the city was negligent in not having a signal man stationed at a convenient point of observation to give notice or warning to the starter of any obstruction on the part of the slide which the starter could not see on account of the curve of the roadway.

The city of Edmonton, by s. 221 of its charter (Alta. [1913], c. 23), is authorized to "make by-laws and regulations for the peace, order, good government and welfare of the city of Edmonton."

Held that the city had authority under that section to pass a by-law in order to operate the slide; and, as the question of *ultra vires* had for the first time been raised before this court, it must be assumed that such a by-law had been passed.

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta, reversing the judgment of the trial judge and dismissing the appellants' action.

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*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgments now reported.

C. C. McCaul K.C. for the appellants.

Eug. Lafleur K.C. for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.) was delivered by

NEWCOMBE J.—The plaintiffs, husband and wife, brought this action against the defendant corporation, the city of Edmonton, to recover damages sustained by reason of injuries to the wife. It is alleged by the pleadings on behalf of the plaintiffs that the accident causing these injuries was due to the defendant's negligence; on the part of the defendant negligence is denied, and it is alleged in effect that the accident was due to the plaintiffs' negligence. Upon these issues the parties proceeded to trial and the learned trial judge found for the plaintiffs, assessing the damages at $1,200 for the husband and $6,000 for the wife. Upon the appeal the Appellate Division, composed of five judges, with two dissents, set aside the judgment of the trial judge and dismissed the plaintiffs' action.

It appears that in January, 1923, there was a winter carnival held at the city of Edmonton by decision and under the direction of the city authorities, and as one of the features of this carnival the city temporarily converted portions of 107th street and the roadway leading to 96th avenue into a coasting slide for bobsleighs. From where 107th street intersects 98th avenue going southerly on the first named street and by the roadway to 96th avenue, there is a natural declivity steep enough to afford an attractive slide, and this course in its ordinary condition had on occasions, albeit illegally, been used by the young people for coasting. From the point where 107th street or the prolongation of it, after crossing 97th Ave., turns in a southwesterly direction it passes through the park or grounds of the provincial government where the public buildings are situated, and the city obtained permission from the government temporarily to convert and to use this portion of the street for the purposes of the slide. Then the city

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authorities closed the street and roadway for general traffic between 98th avenue and the point of intersection of 96th avenue and 106th street where the slide terminated, and, in order to improve the sliding, constructed an embankment of snow on the westerly side where the roadway turns to the eastward, passing through the government grounds to 96th avenue, thus raising the level on the westerly side so as to compensate for the curve and to prevent the sleighs when reaching and traversing the curve from going off at a tangent, as they would otherwise be liable to do, and moreover they caused the surface to be iced at bare patches or where it was thought desirable to improve it. The roadway for its entire width was thus prepared for the sliding, and the area of the intersection of 107th street and 98th avenue became the head of the slide and the place of gathering for the adventurers in the sport. Here the city stationed Godfrey Morris, one of its employees, and placed him in charge, with instructions to see to the starting of sleighs and to collect the tolls prescribed for the use of the slide. The city also had three other men employed in connection with the slide; the manager of the carnival says:

> There was no actual place for them to be, they were to be spread over the slide at different points; * * * they were working on the slide.

Moreover, at the head of the slide the city also provided sleighs and steersmen for the use of persons in attendance who did not bring their own sleighs, or were not skilled in the sport.

The plaintiffs, Dr. Dixon and his wife, who resided in the immediate vicinity of the starting place, attended there on the evening of 24th January, with others, to slide with a boy named Gallinger, 14 years of age, a friend of the plaintiffs' son, who was in attendance with his own bobsleigh, and who apparently had acquired considerable experience in the management of it; his skill or capacity as a driver is not in question. Dr. Dixon paid the requisite toll of 25 cents to the man in charge, known in the case as the starter, and he, with his companions, his wife and Gallinger steering, were by the starter despatched in their turn. They proceeded down the slide until they reached the government grounds where they took the curve to the eastward which has been described. They were going on the westerly or right hand side upon the

upper part of the slope of the embankment, and at this point the sleigh was unfortunately caught in a rut, causing it to upset or to tilt over to the left to such a degree that the occupants fell off and found themselves sprawling on the slide. Nobody was hurt, they got up and realized immediately that they must quit the slide. The boy pulled his sleigh out of the rut and proceeded to cross with it to the east side, but the plaintiffs made an attempt to go off by crossing the embankment on the west side, nearer to which the upset had occurred. The footing was, however, found to be such that the lady, although a strong, active woman, could not comfortably or conveniently cross the embankment, which at the apex was composed of soft or lumpy snow several feet in depth and very difficult to cross, or for a matron of middle age practically impassable. Then, having proceeded up the slide in a northerly direction for a few steps looking for an opening or a convenient or possible place of exit to the left, and the lady having informed her husband that it was impossible for her to negotiate the embankment, they turned to the right crossing the slide which was very slippery in a northeasterly direction with a view to going out on the east side. At this time another sleigh with several occupants which was coming down the slide upset in front of them further up. It was followed at a short interval by a third sleigh, in charge of one of the city's employees, which, pursuing the usual course of the sliding on the upper side of the curve, and apparently being disturbed in its course by the upset of the second sleigh which had taken place between it and the plaintiffs who were making the crossing, swung to the left to avoid the overturned sleigh and its occupants and, having passed these, came into contact with Mrs. Dixon who had by this time reached a point two or three feet from the easterly limit of the slide which she was about to quit. It would appear that very little time could have elapsed between the upset of the plaintiffs and the passing of the third sleigh which caused the injury, because it is in proof that Gallinger who had disengaged his sleigh from the rut which had caused the upset proceeded immediately to the eastward, and that Dr. Dixon, who had assisted his wife in the crossing, was at the moment of the impact engaged in

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assisting Gallinger to lift his sleigh off the slide, and therefore that the plaintiffs must have arrived at the place very little later than the boy Gallinger who, so far as is known, had made all due haste to cross. When Mrs. Dixon was struck by the oncoming sleigh she sustained very serious injuries which will presently be described.

It is clear that the defendant corporation was responsible not only for the preparation, opening and working of the slide, but also that it assumed the control and direction of the sliding and established and collected tolls to be taken from the passengers.

No doubt sliding is, as observed by the learned judges in the Appellate Division, a somewhat dangerous amusement, and of course those who engage in it must assume the risks that are incidental to and inseparable from the sport. Accidents are liable to occur on the best constructed and regulated slides; the coasters take the risk of these; but it is the duty of those who construct and operate a slide, and assume the charge and regulation of it, to see that prudent and reasonable measures are taken for the prevention of accidents which may be avoided by proper regulation, and prevent the exposure of the participants in the sport to unnecessary and unexpected perils. Moreover, the operator as well as the user of the slide must be charged with knowledge of the incidents and dangers of the sport, and therefore is presumed to know that sleighs are liable to upset; consequently when midway of the slide a participant meets with this mischance he should at least be entitled to assume that he will not be overrun by an employee of the operator despatched by the operator's manager before he has time and opportunity, in the exercise of reasonable judgment and due expedition, to extricate himself from the unfortunate situation in which he is placed by common misadventure of the sport. On the Edmonton slide upsets were not uncommon, especially at the curve, and in the short space of time during which these plaintiffs were using the slide two sleighs parted with their occupants in this locality. It is maintained on behalf of the plaintiffs that in these circumstances it was negligence on the part of the city to permit a sleigh to start from the top until the slide was clear. It is said that in so far as the

starter could see the course, he ought to have seen that it was clear, and that, for the lower part of the course which he could not see, a signal man should have been stationed at a convenient point of observation to give notice or warning to the starter of any obstruction or of the absence of any obstruction which might interfere with the safety of the coasters. The learned trial judge found in effect that the city was negligent in this particular and that this negligence was the proximate cause of the accident. In my judgment his finding ought not to have been disturbed. I would apply the law as stated by Blackburn J., pronouncing the opinion of the judges, in the well known case of *The Mersey Docks* v. *Gibbs* (1), where he says:—

> In the absence of something to shew a contrary intention, the legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities as the general law would impose on a private person doing the same things.

When the defendant corporation closed the public highway and converted it to the extraordinary purpose of a place of dangerous amusement for the residents of the city and the patrons of the fair, and assumed the charge and direction of the sport for which the street and roadway had been adapted, they should have exercised their powers in a manner not inconsistent with the general safety, and it was by failure in this that the accident happened. It is not suggested that the corporation enjoyed any legislative immunity.

There is evidence that the city determined to put a man in charge at the top for several purposes, namely, to see to the collection of the prescribed tolls, to see that each sleigh was in charge of a person competent to manage it, and to regulate the despatch of the sleighs so that there should be no competition or conflict for place, and so that a reasonable time might elapse between each descent and the following one. The precise time usually occupied in going down is not proved. Doubtless it might vary somewhat in different cases, but at most it would be very short. According to the plan produced the slide was about 450 yards in length, and one of the defendant's witnesses estimates the speed at fifteen to twenty miles. There is

(1) L.R. 1 H.L. 93, at p. 110.

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no certain evidence as to the time which was in practice required to intervene between the departure of one sleigh and that of the next. Godfrey Morris did not testify; it was said that he had gone north. McClung, a witness for the defence, who was employed by the city to run one of the bobsleighs, and who was in charge of the sleigh which collided with Mrs. Dixon, says:

> When sleighs were lined up and people waiting I believe they went down about a minute apart.

This is the only testimony by which any attempt was made to fix the length of the interval of safety; and admittedly there was no system whereby, when a start was to be made, the starter could be informed of the condition of the slide beyond that part of it which he himself could see, or that he paid any regard to the possibility of sliders being in difficulties there. He was thus acting without the necessary knowledge for the discharge of his duties in a matter that directly affected the safety of those whom he started upon the slide. I have no doubt that this was negligent operation for which a private person operating the slide would have been liable and for which the city was answerable, in the event of an accident in which passengers upset upon the slide were run over by those following before the former had had reasonable time or opportunity to get out of the way.

In the Appellate Division, Stuart J. was not satisfied that the plaintiffs made sufficient haste to leave the slide, and Hyndman J. considered that the accident was due entirely to the lack of prudence and care on the part of the plaintiffs in not quitting the slide as soon as they should have done. I was at first disposed to think that the defence of contributory negligence might prevail, upon the view that the plaintiffs after the occurrence of the first accident had placed themselves in a position of safety from the down-coming sleighs by ascending to a portion of the westerly embankment which was not traversed by them; that they deliberately abandoned this position of safety in pursuance of a hazardous resolve to cross to the opposite side for their own convenience, when they should have found their way out by way of the embankment and not have attempted to cross the slide; the testimony of Mrs. Dixon as quoted in the judgment of Hyndman J. gives

some support to that view of the facts; but, upon a careful review of the whole evidence, I am convinced that the plaintiffs were not dilatory in their efforts to leave the slide, and moreover that the proof is utterly unconvincing to show that they had been able to find any place of safety. Also I think they pursued the course which might reasonably have been foreseen when they attempted, first to escape the dangerous position in which they were by the shorter way, and then, finding this impracticable, to cross to the eastward which was the alternative and really the method of exit which was advisable and prudent in the circumstances. One would think that at the trial the absence of any practicable exit to the westward was common ground. When Dr. Dixon was brought to this point in cross examination and had stated that they tried to go straight towards the west, defendant's counsel rejoins:—

Then you found you could not get out that way. (Answer): We could not get out that way,

and there is no further inquiry as to the project of crossing to the westward. In like manner when Mrs. Dixon was cross-examined, upon reference to the attempt to go to the westward, defendant's counsel says:—

And you found you couldn't? (Answer): We found we couldn't and went to the north. (Question): On account of the embankment? (Answer): Yes.

These are the only references in the cross-examination of the two plaintiffs to the attempt to cross to the westward, and it was not in any manner suggested to either of them that the westerly embankment formed a safe, convenient or possible way of leaving the slide; nor, as is now contended, that they had actually ascended the embankment to a place where they were not in danger from the coasters, and that the subsequent accident which occurred was due to an imprudent and unnecessary attempt to return and cross the slide. What was suggested at the trial was not that the plaintiffs should not have crossed the slide but that they should have crossed in a direct line rather than obliquely to the northeast; they explained that by reference to the condition of the slide, which was very icy at this place, and it is noteworthy that the boy, Gallinger, who was acting independently of the plaintiffs, went in the same direction in order to leave the slide with his sleigh. It must be remembered that these people were

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using a slide which they knew was regulated by city authority; that they had been started by an employee of the city, and that they were entitled reasonably to assume that the dispositions made by the city for the safety of the coasters would not fail to provide for the holding up of those at the top until the way was clear, and particularly until the curve, which was productive of accidents, was found to be free for the passage of the next party who were disposed to venture. Therefore, I do not think that the plaintiffs acted unreasonably or imprudently, or unnecessarily exposed themselves to danger in their efforts to extricate themselves, and in my judgment the defence of contributory negligence fails.

Stuart J., at the conclusion of his judgment, suggested a doubt as to whether the city council had power to close the streets, or as the learned judge aptly expressed it,

> to turn a street into an amusement park and to operate it and charge fees therefor,

and he said it was only because the point was not referred to that he did not expressly conclude on this ground that the corporation was not liable. This defence was not pleaded, neither was it raised in the argument before the Appellate Division, but it now finds place in the respondent's factum, where the point is taken that under the charter of the city of Edmonton, c. 23 of 1913 of Alberta, the city had no authority to operate the slide. It will be observed, however, that by s. 221 of this statute, the council is authorized to

> make by-laws and regulations for the peace, order, good government and welfare of the city of Edmonton,

and I think this court must assume in considering the point, which is taken for the first time on behalf of the city in its factum, that the city did pass any by-law which was requisite in the execution of the powers so conferred for the establishment, preparation and working of the slide. *City of Victoria* v. *Patterson* (1). The city not having pleaded nor suggested the defence of *ultra vires*, it was not incumbent upon the plaintiffs to produce or prove the by-laws; for the purposes of the trial the authority of the city was taken as admitted, or as not disputed, and it is therefore now too late to raise the point,

(1) [1899] A.C. 615, at pp. 619, 624.

unless it be that the general powers of the city to make by-laws do not extend to the making of a by-law which would have authorized the works in question.

These words "for the peace, order, good government and welfare," in the creation of colonial Governments, have been held

> apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to;

Riel v. *Reg.* (1); and in their use describe the powers of a municipal corporation, it is impossible to give them a meaning which would deny to the council the power to authorize the holding of a winter carnival or the establishment, maintenance and operation of a coasting slide as one of its attractions, incidents or features.

There remains the question of the amount of the damages which the plaintiffs are entitled to recover. The learned judge at the trial expressed his finding of damages as follows:—

> There will be judgment for the plaintiff, husband, in the sum of $1,200, made up by the out-of-pocket expenses, which may be termed those of medical necessity, $835, and loss of his wife's services and consortium, $365. As to the damages to be awarded to Mrs. Dixon, it is always an exceedingly difficult thing to arrive at compensation in money for personal injuries. One must discard and exclude sympathy, which is a difficult thing to do, and one must endeavour to value a broken hip or a broken leg, and the results that have been shown in evidence here. On the other hand these things actually and in fact cannot be compensated for; one can just do the best they can, that is all.
>
> I think that on the ground of compensation to her, the fairest sum I can arrive at is the sum of $6,000.

Upon the appeal Walsh J. in the minority, with whom Clarke J. concurred, considered that damages had been awarded to Mrs. Dixon upon a scale too generous. The learned judge says:

> Her actual physical injuries have, with one exception, all healed satisfactorily. That one exception is what the doctors think is an obstruction of the circulation of the blood. In addition, she suffers from traumatic neurosis. Her doctors' prognosis is that these two conditions will clear up and disappear in from two to three years from the date of the accident. The award to her is only for her pain and suffering and the inconvenience resulting to her from her injuries. All of the expenses are included in the amount awarded her husband. I think $4,000 a fair and reasonable assessment of her damages.

(1) [1895] 10 App. Cas. 675, at p. 678.

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Mrs. Dixon, before her unfortunate accident, was a healthy, active woman. She has three children aged respectively ten, twelve and fourteen years; her age is not directly stated in the evidence; she suffered double fracture of the left leg below the knee, severe contusion of the head, rendering her unconscious, profound nervous shock, and other injuries the nature and consequences of which had not at the time of the trial been precisely ascertained. She gives her testimony very intelligently and clearly; she was hurt on 24th January, and the trial took place upwards of nine months later. She had apparently not suffered from lack of surgical and medical treatment; but while she had made a good recovery with respect to her fractured leg, in that there had been a good reunion of the bones and the fractures were thought to have healed satisfactorily, she describes her condition as follows:—

Q. Is the leg strong; are you able to use it the same as you could before?

A. The broken part, where the bones were broken has set all right.

Q. What about the use of the left leg?

A. I haven't the use of it because of the swelling and the pain in it.

Q. Because of the pain?

A. Yes, the swelling and the pain.

Q. And where do you find that pain most intense?

A. Between my knee and hip.

Q. Up the thigh; up the left thigh?

A. Yes, that is the greatest amount.

Q. And in the hip?

A. Not in the joint.

Q. Not in the joint?

A. No, if I am on my foot on any account at all it swells badly in my ankle and in the leg, but that is not intense.

Q. How does that affect you when you walk; how do you get along when you try to walk?

A. Well, I do not get along very well.

Q. Well, just tell me how; why, what happens, if anything?

A. My leg gets numb and feels helpless, numb, dead; it is sort of something there, I do not quite know, I can't wield it, or just what I can do with it; helpless; I can't stand on it. Last night I fell with rather a bad fall because I forgot for an instant and put too much weight on it, and over I went.

Q. Are there any other times you find inconvenience from that thigh or leg?

A. If I lay on it a while and sleep it cramps so terribly. I can't turn myself in bed. I have to get the doctor or my girl, when the doctor was away in Chicago I had to get my girl to help me turn in bed. It cramps so badly when I lie on this side; then when I lie on the other side it is this arm and this thumb; I can't lie on my back because of the pain there and I can't lie on my head because it is a physical impossibility, and so there I am.

Q. Were you a good sleeper before the accident; did you sleep well?
A. Perfect; all I had to do was to go to bed and go to sleep.
Q. How has that been affected one way or the other since the accident?
A. That I can't sleep; I sleep maybe one or two hours or three hours; about three hours is the most sleep that I get in a night; no matter what time I retire it usually gets on to be one, two, three, four, five o'clock before I go to sleep.

She is unable or afraid to go out without an attendant. The doctors suggest a severe injury to the tissues of the thigh, but express uncertainty as to the precise nature of the trouble, although no doubt it resulted from the accident. While Dr. Conn thinks

it would be at least two or three years before she is going to begin to come back,

he adds that he doubts if she will be as well as she was before the accident. Medical testimony was introduced for the defence, based upon one examination just before the trial, which expresses a more hopeful view of Mrs. Dixon's condition and chances for speedy and permanent recovery; but upon the whole case her complete restoration to her former good health and activities is to my mind subject to very grave doubt, and I am not disposed to reduce the estimate of her damages to which the learned trial judge gave effect; I do not perceive that he misdirected himself, or that he proceeded upon any erroneous principle, and I do not think it can be said that the damages found are unreasonable or so excessive as to justify interference with the findings. No question is raised as to the amount of the recovery to which Dr. Dixon is entitled.

The appeal should be allowed with costs in this court and in the Appellate Division, and the findings and judgment of the learned trial judge should be restored.

IDINGTON J.—This action arises out of an action which took place in the respondent city which undertook, as part of a winter carnival, to organize a bob-sleigh slide on ground partly consisting of part of a highway belonging to the city, and partly over adjacent ground belonging to the Alberta Government.

The respondent barred ordinary travel over said part of its highway to be used for the occasion and obtained the consent of the Government to use that part of the ground owned by it for the said purpose on the said occasion.

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The said parties had bob-sleighs to hire or lend (with drivers) to those who had none; and others who had their own bob-sleighs were invited, upon payment of a fee, to use the said slide.

The appellants (who are husband and wife) had their own bob-sleigh and a friend as driver and they paid the fee required.

The man in charge of the operation was called the starter and seems to have been allowed to do as he pleased in regard to the time of starting one set of bob-sleighs after another, about one minute apart.

For the first six or seven hundred feet from the starting point of the slide, which was prepared by being frozen over so as to render it very slippery, it may have been possible to pass in safety, but beyond that distance, or less, there was a curve at such an angle as to make it highly probable that in steering round and through it an upset would occur.

It was impossible for any one at the starting point to see what happened in rounding that curve and yet no precautions of any kind were taken to protect those invited to use, and using, the said slide, in case of being upset at said curve or beyond that point.

It seems almost incredible that such reckless negligence on the part of those in charge could have been tolerated; for the probability of there being upsets at such a point was very great.

Someone, I admit, should have been stationed at such curve to warn the starter by some means against letting others start unless and until those happening to be upset had got clear of any danger of being run over, and also to direct those upset how to get out of the way as quickly as possible.

The starting began, we are told, after eight o'clock on the night of the 24th of January, 1923, when there could be no light except lamp light at certain points to help those engaged in the sport to see their way into or out of trouble.

The appellants upset just at said curve and tried to get off at a point near them to the west side of the slide, but found that had been banked up with loads of snow and ice to a height of from three to four feet. They found it

impossible to get out on that side for there was no opening of any sort, or path.

They turned back, therefore, and tried to get out on the east side and, owing to the slippery condition of the slide, had to climb as it were obliquely towards the east side.

Meantime another party had upset, and that led to the third party, the starter had let go, steering slightly towards the east side to avoid these upsets.

The result was that said third bob-sleigh struck the female appellant and threw her up in the air and thus inflicted most serious injuries, including breaking the bones of her leg, and rendering it necessary for her to be taken in an ambulance to the hospital.

The learned trial judge found the respondent guilty of negligence and responsible for the damages the appellant had suffered.

The respondent, on appeal to the Court of Appeal for Alberta, succeeded in convincing three of the five judges hearing the appeal that respondent was not liable.

Hence this appeal.

I am, with great respect, quite unable to agree with said majority, and indeed cannot understand why in so clear a case of negligence such reckless management should, in this reckless age, be tolerated or at all countenanced.

There was, I respectfully submit, no proper ground for interfering with the findings of fact by the learned trial judge, if we are to accord to the verdict of a trial judge that weight it must be given according to settled jurisprudence on the point, though perhaps easier to overrule than that of a jury.

There was a point started by Mr. Justice Stuart as to the responsibility of a municipal corporation for entering upon such an enterprise, which, if it had been pleaded, might have created some legal difficulties.

In my opinion there are two complete answers to that: In the first place, not having been pleaded, it cannot be raised here for the first time. But even if it had been pleaded, I cannot understand how a municipal corporation can create such a nuisance without being liable for its consequences.

Nor can I say off-hand, without evidence of all the facts which probably would have been developed if the plead-

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ing had called therefor, that it was not within the public welfare powers assigned to respondent, to have, in the spirit of modern municipal management, undertaken such an enterprise as the respondent's council apparently did.

I would, for the foregoing reasons, allow this appeal with costs here and in the court below, and restore the judgment of the learned trial judge.

As to the measure of damages, we have refused for at least twenty years or more to entertain any such grounds of appeal and, unless much more excessive than indicated herein, we have refused to interfere, holding that those on the spot are much more competent than we are to determine such a question.

Appeal allowed with costs.

Solicitors for the appellant: *Dickson & Paterson.*
Solicitors for the respondent: *J. C. F. Bown.*