1933

*Oct. 6.
*Oct. 26.

DUNCAN A. CARMICHAEL AND DAISY CARMICHAEL (PLAINTIFFS) APPELLANTS;

AND

THE CITY OF EDMONTON (DEFENDANT) RESPONDENT.

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

Municipal corporation—Negligence—Pedestrian falling on icy sidewalk—Notice of accident—Not given within time prescribed by charter—Section 519 Edmonton charter—Whether city "prejudiced in its defence"—Findings of trial judge, as to reasonable excuse for delay and as to existence of prejudice, can be reviewed on appeal.

The appellants, husband and wife, brought an action for damages against the city respondent for personal injuries to Daisy Carmichael caused by falling on an icy sidewalk. The respondent alleged lack of notice of the accident within the delays prescribed by section 519 of the city charter. Subsection 1 provides that no action can be brought against the city in any case of injury due to negligence, unless notice is served within sixty days of the happening of the accident and within ten days "in the case of personal injury caused by snow or ice on a sidewalk." Subsection 2 further provides that "the want or insufficiency of the notice * * * shall not be a bar to an action if the" trial judge "considers there is reasonable excuse * * * and that the city has not thereby been prejudiced in its defence." The first notice was given by the appellants ten weeks after the accident and the city respondent had no knowledge of it until then.

Held that the appellants' action should be dismissed for want of notice required by section 519 of the respondent's charter. The inherent probability of prejudice to the respondent in making its defence arises from the undisputed circumstance of the lack of notice within ten days of the accident, coupled with the established lack of knowledge of the respondent. The respondent was deprived of any opportunity of inspecting the locality or condition of the sidewalk within ten days of the accident, and, after the lapse of ten weeks, no evidence of any weight upon these points could be procured.

Held, also, that the findings of the trial judge, that there was reasonable excuse for the appellants' delay in giving notice of the accident and that the respondent city had not been prejudiced in its defence by such delay, can be reviewed upon appeal; the words in subsection 2 of s. 519 "if the judge considers" do not give any discretion to the trial judge, the exercise of which should not be reviewed on appeal.

Judgment of the Appellate Division ([1933] 1 W.W.R. 533) aff.

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of the trial court, Ives J., and dismissing the appellants' action for damages.

*PRESENT:—Duff C.J. and Lamont, Smith, Cannon and Hughes JJ.

(1) [1933] 2 D.L.R. 702; (1933) 1 W.W.R. 533.

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

J. A. Ritchie K.C. for the appellants.
G. B. O'Connor K.C. for the respondent.

The judgment of the Court was delivered by

SMITH J.—The appellants, husband and wife, sue for damages resulting from the wife, just after midnight on the 23rd of December, 1931, having slipped and fallen on an alleged icy part of a sidewalk in the city of Edmonton. Her leg was broken, and the fracture has not yet knit.

No notice was given to the respondent within ten days, as provided by section 519 of the Edmonton Charter, which reads as follows:—

519. Save as otherwise by law provided, no action shall be brought by reason of the death of or any injury to any person or any injury to the property of any person arising out of any accident alleged to be due to the negligence of the City, its officers, employees or agents, unless notice in writing of the accident and the cause thereof has been served upon the City Clerk or the City Commissioners, within sixty days of the happening of the accident, (except in the case of personal injury caused by snow or ice on a sidewalk, in which case such notice shall be served within ten days of the happening of the accident) and any action for damages brought in respect thereof shall be commenced within six months after such right of action shall be barred and extinguished.

(2) In case of the death of any such person, the want of notice shall not be a bar to the maintenance of the action, and in other cases the want or insufficiency of the notice hereby required shall not be a bar to an action if the court or judge before whom the action is tried considers there is reasonable excuse for the want of such notice or insufficiency thereof, and that the City has not thereby been prejudiced in its defence.

The first notice was given to the respondent corporation ten weeks after the accident, and the corporation had no knowledge of it until then.

The evidence of the appellants and of witnesses for the appellants who examined the place where the accident occurred in the morning, a few hours after the accident, and of other witnesses who had observed the condition at this place for some time before and after the accident, was to the effect that the surface of the vacant lot adjoining the sidewalk at the west was considerably higher than the sidewalk, and that ice had accumulated on the sidewalk all along the frontage of this vacant lot, including the place

1933

CARMICHAEL v. CITY OF EDMONTON.

Smith J.

where the accident happened, extending over the westerly two-thirds of the sidewalk, being about eight inches thick adjoining the higher land of the lot, and sloping from there over the two-thirds width of the walk to a feather edge, the slippery and sloping surface making the place specially dangerous.

On behalf of the respondent corporation, the city street foreman and five men working under him testified that they were cleaning out ice and snow from the gutters on the 21st of December, 1931, and that they cleaned off the whole sidewalk at the place of the accident down to the cement, that the ice and snow came off in flakes, and was carted away with the ice and snow that was being taken away from the gutters; and that, when the ice was removed in this way, the sidewalk was left so clean that it was not slippery, and that it required no ashes.

On this contradictory evidence, the learned trial judge accepted the evidence on behalf of the appellants, and held that the sidewalk was in the dangerous condition alleged, and that the city was guilty of gross negligence. He also held that the female plaintiff (appellant) was excused by reason of her condition and suffering from giving notice within ten days, as required by section 519; and that the city was not prejudiced, within the meaning of that section; and gave the female plaintiff judgment for the damages.

The respondent appealed to the Appellate Division of the Supreme Court of Alberta, which did not disturb the trial judge's findings that there was gross negligence and that the lack of notice within ten days was excused; but reversed the finding of no prejudice. All the judges assumed, without expressly so holding, that the lack of notice within the ten days was excused, and, with the exception of Mr. Justice Clarke, based their conclusions upon the view that the defendant (respondent) was prejudiced in its defence. Mr. Justice Clarke took the view that even if there was excuse for not giving the notice within ten days, the female plaintiff was still bound to give notice within sixty days, and that there was no excuse for failure to give notice within that longer period. He expressed no opinion upon the other questions discussed. The judgment appealed

from was therefore set aside and the action dismissed; and from that judgment the plaintiffs appeal.

The appellants contend that the words "if the judge considers" give a discretion to the trial judge, the exercise of which should not be reviewed on appeal. *Ormerod* v. *Todmorden Mill Co.* (1), is cited, which holds that there must be a plain and clear case to justify the Court of Appeal in interfering with the discretion of the judge below, but the Court of Appeal will review the discretion if it be exercised in consequence of an opinion on a point of law which is wrong.

The cases of *Shotts Iron Co. Ltd.* v. *Fordyce* (2); *Burrell* v. *Holloway* (3), and *Hayward* v. *West Leigh Colliery Co.* (4), are also cited. These three cases, however, arose under the English *Workmen's Compensation Act,* where there is no appeal on a question of fact, and the finding can be reviewed only on questions of law. They therefore turned on the question of law as to whether or not there was any evidence upon which the trial judge could reasonably base his conclusion.

In *City of Kingston* v. *Drennan* (5), Sedgwick J., delivering the judgment of the majority of the court, said:

> I do not feel called upon to decide whether, in the present case, the certificate of the trial judge is reviewable.

The trial judge, in considering whether there was or was not prejudice, must come to his conclusion from considering and weighing the evidence and facts bearing on the question, and the conclusion that he reaches in this way is in fact an adjudication. His finding therefore, in my view, can be reviewed upon appeal, the same as other findings by a trial judge. It may be that in some cases the trial judge's finding as to prejudice would depend upon contradictory evidence relevant to the question of prejudice or no prejudice, and in such case a court of appeal would follow the usual rule in reference to a trial judge's finding of fact after weighing the evidence. In the Ontario courts, the law seems to be settled that the finding of the trial judge on the question of prejudice is open to review upon appeal: *O'Connor* v. *City of Hamilton* (5).

(1) (1882) 8 Q.B.D. 664.
(2) [1930] A.C. 503.
(3) (1911) 4 Butt. W.C.C. 239.
(4) [1915] A.C. 540.
(5) (1897) 27 S.C.R. 46.
(5) (1904) 8 O.L.R. 391; (1905) 10 O.L.R. 529.

1933

CARMICHAEL v. CITY OF EDMONTON.

Smith J.

Here there seems to be no dispute as to the facts relevant to the question of prejudice or no prejudice. No fact on that issue is in dispute. The respondent had no notice or knowledge of the accident until ten weeks after it happened, according to the only evidence on the record.

In the *Hayward* case (1), Lord Loreburn, discussing the arbitrator's finding of no prejudice from lack of statutory notice, says (p. 545):—

> I do not think it means that there is to be a presumption one way or another, but simply if upon all the facts before him the arbitrator is not satisfied that there was no prejudice, then the appellant fails.

Then after discussing the facts and circumstances, he refers, as a ground of his conclusion, to the fact of

> there being no inherent probability that I can see from the facts that the company would be prejudiced by the absence of notice for a few days.

Was there inherent probability of prejudice to the respondent in making its defence in this case? In my view there was. The respondent was deprived of any opportunity of inspecting the locality or having it inspected within ten days of the accident. It might, on receipt of notice within ten days, have had its foreman and five workmen, who claimed to have cleaned off the sidewalk on the 21st, make an inspection to ascertain the then condition and refresh their memory as to what they had done on the 21st. If this had been done, and they adhered to their story after such inspection, much more weight might have been given to their evidence. Other witnesses, who had opportunity of observing the conditions at the locality on or about the day of the accident, might have been questioned, and might have been able to give important evidence on the disputed question of the conditions of the sidewalk. After the lapse of ten weeks, no evidence of any weight upon these points could be procured.

Burrell v. *Holloway* (2), mentioned above, was a decision of the Court of Appeal in England. The claim was by a workman for injuries where the requisite notice was not given. Cozens-Hardy, M.R., in delivering the judgment of the Court, says:

> Every opportunity of challenging or testing the statement as to the source of the accident, the place where it happened, and the circumstances under which it happened, had been, I might almost say, lost to the employers by the delay.

* * *

(1) [1915] A.C. 540.

(2) (1911) 4 Butt. W.C.C. 239.

It is a very different thing to go the following day or within two or three days of the accident, when everything is fresh in everybody's mind, and the matter can be properly investigated. I think that it would be a most dangerous thing if we were to allow the employers to be held liable in a case like this.

The provision of the charter itself requiring notice within the shorter period of ten days in the special case of an action based on gross negligence owing to the presence of ice and snow indicates that the legislature regarded the short notice as necessary to prevent prejudice to corporations in such cases in the absence of circumstances shewing the lack of prejudice.

Against this inherent probability of prejudice arising from the bare circumstances, there might, in many cases, be offered by a plaintiff important evidence that there was no prejudice. If, for instance in the present case, the plaintiff had been able to shew that the respondent had actual knowledge of the accident within ten days, and as a result had investigated and had obtained such evidence as it could as a result of that knowledge and investigation, it might reasonably be held, on such evidence, that there was no prejudice. The inherent probability of prejudice, arising from the bare fact of the accident and the lack of notice, does not therefore necessarily prevail to counteract the excuse in every case. In the present case the inherent probability of prejudice arises from the undisputed circumstance of the lack of notice, coupled with the established lack of knowledge of the respondent; and there is absolutely no evidence that would go to refute the inference arising from these circumstances.

For these reasons, I agree with the conclusions of the majority of the Appellate Division, and find it unnecessary to discuss the point raised in the reasons of Mr. Justice Clarke.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Steer, Jackson & Gaunt.*

Solicitor for the respondent: *J. C. F. Bown.*