

CANADA / JUDGMENT

Hanson v. City of Saint John

[1974] SCR 354

COURT

Supreme Court of Canada

DECIDED

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Hanson v. City of Saint John

Collection

Supreme Court Judgments

Date

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Report

[1974] SCR 354

Judges

Judson, Wilfred; Ritchie, Roland Almon; Spence, Wishart Flett; Pigeon, Louis-Philippe; Laskin, Bora

On appeal from

New Brunswick

Subjects

Torts

Decision Content

Supreme Court of Canada

Hanson v. City of Saint John, [1974] S.C.R. 354

Date: 1973-05-07

John R. Hanson et al. (Plaintiffs) Appellants;

and

The City of Saint John and the Saint John Horticultural Association (Defendants) Respondents,

1972: October 24, 25; 1973: May 7.

Present: Judson, Ritchie, Spence, Pigeon and Laskin JJ.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Negligence—Occupier's liability—Licensees—Toboggan slide in park owned by horticultural association—Improvements to slide undertaken by city—Sudden drop at foot of slide—Toboggans landing on ice-covered lake—Injuries sustained by plaintiffs—City responsible for faulty design of slide—Association not negligent—Bullock order for costs.

The plaintiffs were injured in toboggan accidents which occurred at or near the foot of a slide in a park owned by the defendant horticultural association. The plaintiffs contended that the accidents were occasioned by the fact that at the time they occurred the conditions at the foot of the slide were such that there was a drop of some three or four feet from the end of the slide on to a frozen lake and that it was because the plaintiffs' toboggans were propelled at a high speed from the end of the slide on to the frozen lake that they sustained the injuries of which they complained. Following upon a request of the association for improvements, employees of the works department of the defendant city had been engaged in the clearing and widening of the slide sometime before the accidents under the direction of the city engineer.

The plaintiffs' claims for damages were dismissed by the trial judge as against the city and allowed as against the association. On appeal, the Court of Appeal allowed the association's appeal and dismissed the plaintiffs' appeal. The plaintiffs then appealed to this Court.

Held (Judson and Ritchie JJ. dissenting with respect to the appeal as against the city and Spence and Laskin JJ. dissenting with respect to the appeal as against the association): The appeal should be allowed as against the city and dismissed as against the association and the appellants should be allowed to add to the judgment against the city all costs payable by them to the association.

Per Pigeon J.: At the speed to be anticipated on the slide in question, the abrupt change of slope near the lake edge constituted a grave danger. It was a danger which, on his own admission, the engineer responsible for the improvements on the slide fully appreciated. Unfortunately he badly miscalculated when specifying a 3 to 1 slope and this miscalculation was negligence for which the city was answerable. In exonerating the city from any responsibility the Courts below failed to appreciate the legal consequences of facts proved beyond question.

With respect to the association, it was clear on the evidence that its responsible officials did not have actual knowledge of the danger until after all the accidents had occurred. It was, therefore, not in breach of its duty to the plaintiffs as licensees. The improvements made by the city were done under professional supervision and it could properly rely on that without further inspection.

Per Judson and Ritchie JJ., dissenting in part: The trial judge found no liability on the part of the city and with this finding all members of the Court of Appeal concurred. There were no exceptional circumstances which would justify a departure from the usual practice of this Court not to interfere with concurrent findings of fact made at trial and on appeal.

As to the claim against the association, the duty of an occupier to warn a licensee of any concealed danger of which the occupier is aware did not arise here. There was no evidence to support a finding that the association had knowledge of a concealed danger at the end of the slide nor did the evidence support the conclusion that the knowledge which it had was such as to make a reasonable man infer the existence of such a hidden danger.

Per Spence and Laskin JJ., dissenting in part: The dangerous situation (i.e. the fact that the slide for some 40 feet on its right-hand side terminated in an abrupt drop of three to four feet to the lake) was solely the work of the city's employees in widening the slide but failing to widen the entry from the end of the slide on to the ice of the lake. The city was liable to the various plaintiffs because it had assumed the task of improving the toboggan slide and then failed to carry out that task creating a very dangerous hazard due to its negligent performance of the task. The defence of assumption of the risk was not established and the plaintiffs were not guilty of contributory negligence.

The liability of the association depended solely on its position as occupier. If the association's superintendent failed to notice the sharp drop over which the plaintiffs fell at the time of their injuries then he was simply oblivious of what was before his eyes and the extension of the occupier's liability to the dangers of which the licensor actually knows or which he ought to have had knowledge because he was aware of the circumstances would apply to the superintendent and to his employer.

APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division[1], allowing the defendant association's appeal and dismissing the plaintiffs' appeal from a judgment of Pichette J., awarding the plaintiffs damages for personal injuries against the association and dismissing their actions against the defendant city. Appeal allowed as against the defendant city, Judson and Ritchie JJ. dissenting.

John Turnbull and Barry Roderick, for the plaintiffs, appellants.

J. Turney Jones, Q.C., for the defendant, respondent, Saint John Horticultural Association.

Thomas B. Drummie, Q.C., for the defendant, respondent, City of Saint John.

The judgment of Judson and Ritchie JJ. was delivered by

RITCHIE J. (dissenting in part)—This is an appeal from a judgment of the Court of Appeal of New Brunswick allowing the appeal of the respondent, the Saint John Horticultural Association from a judgment rendered against it at trial and dismissing the present appellants' appeal from the order of the same trial judge which had dismissed their actions brought against the City of Saint John.

These appeals were originally taken against the judgment of the Court of Appeal in four actions which were consolidated for the purpose of trial and had been brought against the City of Saint John (hereinafter referred to as the City) and the Saint John Horticultural Association (hereinafter referred to as the Association) to recover damages for personal injuries sustained by four of the appellants in accidents which had occurred on January 21 and 22, 1967, at or near the foot of a toboggan slide in a park owned by the Association.

Leave to appeal to this Court was granted by order of the Supreme Court of New Brunswick on March 10, 1971, but the appeals of Mary Shamburger against the Association and the City were discontinued by notices filed on August 18 and 27, 1971, respectively, and although her name appears in the style of cause, she is no longer a party to this appeal.

The accidents were found to have occurred at a time when the toboggan slide in question was in great measure covered by ice so that some children were skating down it. This condition had been created by the unusual weather which prevailed at and shortly before the time of the accidents and undoubtedly resulted in making the toboggan slide more hazardous than it otherwise would have been in that it created a situation which greatly increased the difficulty of steering or controlling a toboggan once it had embarked on the slide, and also had the effect of markedly increasing the speed of any toboggan using these facilities and this was particularly so in the case of those who elected to start the run at the top of the slide.

There can be no doubt that the Association was the owner and occupier of the park in which the toboggan slide was situated and I agree with the unanimous opinion of the Courts below that the appellants and other citizens using the slide were in the position of licensees qua the Association.

The City was joined in this action on the ground that employees of the City's works department had been engaged in the clearing and widening of the site of the slide during the summer months of 1965-66 and that in doing this work and in spreading gravel to fill in a drop of some three or four feet at the bottom of the slide by the shores of a small lake, they had executed the work negligently so as to create the conditions under which these accidents happened. I think that the role played by the city employees in this regard is fully and accurately described by Mr. Justice Hughes in the course of his reasons for judgment in the Court of Appeal where he said:

The toboggan slide on which the accidents occurred is about 465 feet in length and ends at the shore of Lily Lake. A paved trail which runs parallel to the shore of the lake and at a distance of about 15 feet from it intersects the slide. Between the top of the slide and the trail there is a descent of 66.7 feet and from that point to the lake, being a distance of 16 feet, a further descent of approximately 3.8 feet, as shown on the profile entered as exhibit P2. Measured between the tree line bordering the sides of the slide, the upper 200 feet has an average width of about 50 feet while the lower 250 feet gradually widens as it approaches the lake to a width of about 95 feet. Cross sections of the slide shown in exhibit P1 indicate that in the lower half of the slide and running downhill there is a depression or channel toward which toboggans descending the slide tend to gravitate.

From 1934, when the hill was cleared of trees to make the slide, until 1965 no work was done on it other than the removal of loose rocks which appeared on the surface from time to time. During that period the slide was open to the general public for tobogganing and sledding and was used each winter without charge and without being supervised by the Association. In the latter year the Association requested the City, with which it had close relations in its endeavours to provide recreational facilities for the public, to remove two boulders which projected about 3.5 feet above ground and were located on opposite sides of the slide at a place about 135 feet uphill from the lake, and to clear away some trees which had grown to a height of 6 to 12 feet, in order to protect persons using the slide from collision with these obstacles. The work was performed by work crews of the City under the direction of Albert E. Hanson, the Commissioner of Works for the City. Mr. Hanson testified that during the course of the work he noticed that there was what he referred to as an abrupt change in the grade of the slope between the paved trail and the lake and that he instructed T.A. Scribner the superintendent of the Water Department of the City to dump gravel fill on that part of the slide to flatten out the slope. Scribner testified that he dumped between 8 and 10 truck loads of gravel in that part of the slide in the autumn of 1965 and that when the work was done there was a gradual slope from the paved trail down to the water of the lake. During the season 1965-66 the slide was cleared of snow on several occasions by work crews of the City and the public used the slide without any accidents.

In the autumn of 1966, Scribner testified, he put about 5 yards of topsoil on the slide between the paved trail and the lake to a width which he estimated at 40 to 50 feet and also placed some fill in a depression in the slide uphill from the trail. According to William Ross the superintendent of the park for the Association this work was done by the City without request from him. Scribner further testified that he considered the slide safe when this work was done.

It is contended by the appellants that the accidents were occasioned by the fact that at the time when they occurred the conditions at the foot of the slide were such that there was a drop of some three or four feet from the end of the slide on to the frozen lake and that it was because the appellants' toboggans were propelled at a high speed from the end of the slide on to the frozen lake that they sustained the injuries of which they complain.

As I have indicated, the case against the City was based on the negligence of its workmen in widening the slide and filling in a gap near the lake and in this regard there are concurrent findings of fact by both the Courts below to the effect that no such negligence was proved. In this regard, the learned trial judge concluded that the City could not be regarded as an occupier of the lands where the slide was situated and further found that the work done by the City's crews on the hill had improved the slide and although it had made it faster, it could not be said to have been the cause of the accidents. He found that the drop from the end of the slide to the lake which he described as "a bump or scoop" was created by unusual weather conditions existing at the time. In my view, the matter is well put by Limerick J.A., in the course of his reasons for judgment in the Court of Appeal at p. 688 where he said:

There is in these cases no evidence of negligence on the part of the city and, as it was not in occupation of the toboggan run, there is no liability on the part of the city to the plaintiffs.

It would appear from the evidence that the injuries to all the plaintiffs occurred by reason of a combination of the very fast condition of the run due to sudden changes in the weather on January 21st, the great speed attained by the toboggans when the runs were commenced at or near the top of the slide and because of either a dip in the contour of the ground just at the foot of the slope or a drop to the lake surface, as well as to the fact that all plaintiffs injured were sitting on the toboggan instead of kneeling in the safer position thereby subjecting the ends of their spines to an uncushioned shock when landing.

Some were injured descending the beaten path at the left as well as in the middle of the run. None were injured when they started half-way up the hill. All injured started their run at or near the top of the hill and because of the great speed they attained soared into the air because of either a dip or hollow before coming to the bank of the lake, or the increased incline from the bank of the lake surface, and were injured.

The trial Judge found no liability on the part of the City and rightly so.

Similar views were expressed by all members of the Court of Appeal and Mr. Justice Bugold went so far as to say that:

Evidence was introduced in the cases at bar which establishes to my satisfaction that any work performed by the City of Saint John employees improved rather than caused a dangerous condition at the slope.

In so far as the claims against the City are concerned, I can find no exceptional circumstances which would justify me in departing from the usual practice of this Court not to interfere with concurrent findings of fact made at trial and on appeal. I would accordingly dismiss the appeal against the City with costs.

The claim against the Association stands on a somewhat different footing because like the trial judge and the Court of Appeal, I think they must be recognized as occupiers of the land where the slide was situated and as having permitted the public to use the slide without any payment during the winter months. I am accordingly of opinion, as was the trial judge and the Court of Appeal, that the Association's knowledge and consent to the public using their property gave rise to the duty towards the users which an occupier owes to a licensee at law.

The learned trial judge proceeded in conformity with the dictum of Lord Hailsham L.C. in *Robert Addie & Sons (Collieries), Ltd. v. Dumbreck*[2], to hold that:

The gist of the ... decisions is that the occupier has no duty to ensure that the premises are safe, but he is bound not to create a trap or to allow a concealed danger to exist upon the said premises, which is not apparent to the visitor, but which is known—or ought to be known—to the occupier.

There is no doubt that in that case Lord Hailsham did purport to extend an occupier's duty to a licensee to include not only the dangers of which he knew, but of those about which he ought to have known, but in the Addie case the plaintiff was a trespasser and Lord Hailsham's observations have generally been regarded as obiter and have not been followed in this country. The view now generally accepted is well expressed by Greer L.J. in *Ellis v. Fulham Borough Council*[3], where he said at p. 221:

In *Addie v. Dumbreck*, [1929] A.C. 358,364, in giving judgment Lord Hailsham L.C. directly laid down the proposition that in considering cases of this kind there are only three categories in which persons visiting premises belonging to another person may fall. Unfortunately, by what I think was a slip in giving judgment, he stated the rule as between licensor and licensee as being in effect the same as that between invitor and invitee. I do not think the other members of the House agreed with that part of the learned Lord Chancellor's speech. I therefore treat his speech as if the words "or ought to be known" were eliminated from it, because that would be in accordance with the authorities when we are dealing with a case of licensor and licensee.

In this Court in the case of *Booth v. St. Catharines*[4], which concerned an accident occurring in a park owned and occupied by the City of St. Catharines, Chief Justice Rinfret, with whom Mr. Justice Kerwin agreed, said, at pp.568 and 569:

Avoiding any controversial points, an occupier must warn a licensee of any concealed danger of which the occupier knows or, as it is put by Lord Greene M.R. in *Baker v. Borough of Bethnal Green*, [1945] 1 All E.R. 135 at p.140:

"A licensee must take the premises as he finds them, subject to this important qualification, that, if the licensor knows of a danger which is not apparent, or would not reasonably be apparent to the licensee, it is his duty to take steps to protect the licensee against it."

As Mr. Justice Hughes observed in the course of his reasons for judgment in the Court of Appeal at p. 696:

The principal difficulty in applying the rule respecting an occupier's liability to licensees is the question, what constitutes knowledge of the hidden danger where the occupier denies such knowledge. It has been held that in the absence of direct evidence of knowledge, proof that the occupier had knowledge of facts from which he should as a reasonable man have inferred the existence of the hidden danger, is sufficient; ...

This matter was dealt with in the case of *Hawkins v. Coulsdon and Purley Urban District Council*[5], where Pearson J.A. stated at p. 893:

The licensor is not liable if through lack of adequate inspection he has failed to ascertain the existence of physical facts which constitute the danger. But if the licensor does know of the physical facts which constitute the danger, and a reasonable man, having that knowledge, would appreciate the risk involved, the licensor is not excused by his own failure to appreciate the risk involved.

In the Court of Appeal in the same case[6], Denning L.J. put the matter in these words:

It seems to me that the real significance of an act of commission is that it means that the occupier must have actual knowledge of the state of affairs he has created. Taking that significant feature and applying it to an act of omission, you will find that liability depends on whether the occupier has actual knowledge of the state of affairs existing on the land, no matter whether he himself created it or someone else. Once he has that knowledge, then if he knows or ought to know that it is a danger, he is under a duty to use reasonable care to prevent damage from that danger.

I do not think that the Association was under a duty to make repeated inspections of the site of the slide. The fact that there had been no accidents of any consequence at this site for 33 years until January 21, 1967, coupled with the extraordinarily icy conditions prevailing when these accidents occurred and taken in conjunction with the fact that the slide had been improved by the work done in the autumn by city employees, makes it understandable that the Association would not have known of the potential danger created by the drop between the end of the slide and the frozen surface of the lake, and indeed the evidence of the park superintendent was that he had no such knowledge and from his experience saw no reason to be alarmed.

I am accordingly of opinion that there is no evidence to support a finding that the Association had knowledge of a concealed danger at the end of the slide nor in my opinion does the evidence support the conclusion that the knowledge which it had was such as to make a reasonable man infer the existence of such a hidden danger.

The finding of the learned trial judge as to the Association's knowledge reads as follows:

The Association probably did not know until the early evening of January 21, 1967 of the concealed danger existing at the edge of the slope but it certainly should have known of it at least after the accident to Mrs. Watts ...

But it is pointed out in the judgment of Mr. Justice Hughes in the Court of Appeal at p. 696 that the answer given by the park superintendent to the effect that he had inspected the toboggan slide after the accident on January 21st was incorrect and was later corrected after the judgment was delivered by the learned trial judge, at which time the parties agreed that the answer should read: "I inspected it on Sunday night after the accidents". Mr. Justice Hughes observed that it is probable therefore that the learned trial judge relied on that incorrect answer to conclude that Ross had knowledge of the hidden danger before the accident on January 22nd.

As I have indicated, the learned trial judge erred in treating the test of an occupier's liability for concealed danger as extending to concealed dangers of which "he ought to have known".

For all these reasons I would dismiss this appeal with costs.

Having regard to the fact that the conclusion reached by my brother Pigeon in allowing the appeal against the City of Saint John and dismissing the appeal against the Saint John Horticultural Association is on balance the prevailing opinion, I am in agreement with him that this is a proper case for a so-called Bullock order.

The judgment of Spence and Laskin JJ. was delivered by

SPENCE J. (dissenting in part)—I have had the opportunity of reading the reasons for judgment written by Mr. Justice Ritchie and I am ready to adopt the statement of facts as set out therein with such additions as will be necessary for my consideration of the issues.

The action was taken against two defendants, the City of Saint John and the Saint John Horticultural Association. The action as against the City of Saint John cannot depend upon any allegation of occupant's liability. Despite the argument on the appeal, I am not ready to agree that the City of Saint John was ever in occupation of the premises. On the other hand, the park was occupied throughout by the Saint John Horticultural Association and the City of Saint John had only two contacts with the situation, firstly, the City gave a grant, apparently annually, to assist the Saint John Horticultural Association in providing a facility for the use of the citizens and, secondly, the City of Saint John, from time to time, at the request of the Saint John Horticultural Association, performed certain services in the park.

It is in connection with the latter action of the City that there fails to be considered the question of the City's liability upon a pure ground of negligence.

In the year 1965, the Saint John Horticultural Association, through its officials, requested the City of Saint John to improve this toboggan slide which had been used by the citizens in this park for a great many years. Albert Edward Hanson was at that time the Commissioner of Works for the City of Saint John. When the action came for trial, he had retired and he gave evidence on behalf of the plaintiffs. One of those who was injured was his daughter-in-law, Roslyn Ann Hanson. Another plaintiff, Mary Shamburger, is Mrs. Hanson Jr.'s sister. Albert Edward Hanson testified that upon being instructed by Mr. Price, the manager of the defendant City of Saint John, he went to the park to see what work was required, found that there were boulders on both sides of the hill roughly about 135 feet from the water's edge and trees were growing up along the sides. He decided, when looking down the hill from the top, that it would be quite dangerous if a person got off the centre of the run so that he would collide with these boulders or trees. Therefore, Mr. Hanson, Sr., decided to remove these boulders and clear the trees and stumps. His evidence continues:

And in doing that we widened out the hill all the way from the lake to the top, a distance of about 450 feet. And in our opinion at that time the slide was much safer. But looking at the lake's edge I noticed there was an abrupt change in the grade or abrupt drop into the water of three or four feet and at that time I instructed the superintendent to put in some gravel fill there and flatten out the slope so anybody coming down on this berm, after you crossed the road there was a little berm between the hill and the lake; this would flare out and make not such an abrupt drop, and several loads of gravel put in.

Q. You used the word "berm", what does that mean?

A. It means a portion on the side of the lake which is an abrupt drop off from the top of this berm, that dropped right down roughly almost at right angles to the water.

Q. Now how deep was this drop you say?

A. It was between three and four feet.

Q. And how far across the face of the hill did it extend?

A. Well, the road ran at the foot of the hill and the road was about ten feet wide, and the edge of the road I would say to the top of the slope where it started to drop off abruptly would be a distance maybe of four or five feet. Q. This abrupt drop you described would be three or four feet, is that correct?

A. Right.

Q. How far across the base of this berm that is between the road and the lake—how far across the base of this did this drop?

A. This extended I would say across the whole width of the toboggan run where it would be roughly after we cleared it and fixed it up, about 40 to 50 feet, and I think right now the toboggan slide right now would be in the vicinity of 40 feet, maybe 50 in places; but prior to our work it was not much wider than 10 or 20 or 30 feet as it ran up the hill.

Mr. Hanson was very evidently in error as to the final width of the cleared area at the trial; instead of being 40 to 50 feet it was over 90 feet. But I stress that it was his intention to fill in with gravel across the whole width of the run. Mr. Hanson testified that he did not actually see the gravel dumped but that he instructed that it be put there. The man who carried out this work, Theodore A. Schribner, also testified for the plaintiff and confirmed that he had widened out the slope and had dumped gravel along the shore commencing at the edge of the trail and sloping the gravel down to the water. Although he was not positive as to the quantity of the gravel which was used for such purpose in the fall of 1965, he estimated it was between eight and ten loads. As to the placing of the gravel, he gave this evidence:

Q. And looking down the hill and from left to right and centre, can you describe where you dumped that fill?

A. We dumped a certain amount to the right and a certain amount to the left and centre. It was filled from the left hand side looking over until we came to the rock where there is a big depression there on the right hand side.

COURT: On the right hand side?

A. Yes. COURT: That is the right hand side as you go down?

A. Yes.

COURT: Your left hand if you are looking out on the lake?

A. Yes, if I am looking down.

COURT: Look at P. 3, you can see there are letters there. You just tell us where you put the gravel?

A. We started from there—

COURT: From where to where?

A. From X across to it shows W and Y, and beyond that we did put a bit. This here is all a rock ledge here.

Q. Further to the left from the Y is all a rock ledge, is that what you are saying?

A. Yes, when you come across from the X there is a moderate slope there and as you come over it is all ledge all the way along there.

Q. And you didn't continue to fill beyond that spot?

A. No, we didn't.

Also of relevance in considering this matter is the evidence of George Hamilton, a technician and surveyor, who testified that the hillside was cupped as it came down the slope but in the lower part of the slope when it approached the trail this cupping effect disappeared so that the hillside was practically level across its width from side to side at the trail. I am of the opinion that this evidence reveals that it was the intention of Mr. Hanson to widen the slide far beyond its original width and then finally that the widened slide when it came to the water's edge resulting in a three-to-four-foot drop to the level of the ice on the lake to slope this drop by placing gravel from the water's edge to the top of the bank. This would have resulted in toboggans going down the slope of the hillside and then sliding over the lake in a gradual slope from the trail on to the ice. Schribner did not carry out the work as he was instructed and only filled in the left side of that abrupt bank, speaking as one looking down the slope. Schribner purported to terminate his fill at a point which he indicated as being the position of a certain rock and to the suggestion of the Court that the width of the fill would be from 40 to 50 feet he agreed that it was approximately that distance.

It would appear therefore that there was about 40 feet at the right-hand side of the widened slope where the slope still would terminate in an abrupt three-or four-foot drop to the water. Various witnesses gave evidence as to the approximate course of the toboggans upon which they rode when the toboggans left the land and came down on the ice. Some of the witnesses were definite that the toboggans were at the right-hand side of the slope at such time but some were unable to say and some were of the opinion that the position of the toboggans was about the centre. I do not think much reliance can be placed on the evidence of a witness as to how far on the left- or right-hand side of the hillside his or her toboggan was running when it came down that slide, especially at night as was true in some cases, and taking the evidence of Hanson Sr. and Schribner together, I think it proper to infer that those plaintiffs who were injured in the drop to the ice surface had, in fact, been riding toboggans which crossed the edge and came down on the ice to the right-hand side of the slide over this abrupt drop of three or four feet.

The evidence of Mr. Hamilton to which I have referred indicated that the approach immediately above the trail was practically flat across the whole width of the cleared hillside so there would be nothing to keep toboggans in the course leading to the left side of the exit on to the ice of the lake, and a toboggan might well stray to the right although it would land on the ice over this abrupt drop. That would be especially true in the weather situation which pertained on Saturday, the 21st, and Sunday, the 22nd, of January, 1967, when, several witnesses testified, it would be quite impossible to steer a toboggan with any accuracy as it slid down that icy slope. This slope was provided by the Horticultural Association for the use of the citizens of Saint John and the work to improve it had been done by the municipal authorities of that City. The dangerous situation which resulted in the accident had been solely the work of the City's employees in widening the slope but failing to widen the entry from the end of that slope on to the ice of the lake. It is certainly the duty of a person who creates a dangerous state of things to either remove the danger or to give persons using the facility a warning of the danger: *Riden v. A.C. Billings & Sons Ltd.*[7], and this is apart from any question of occupancy.

It is noteworthy that although one when looking down the slope had an open invitation to let the toboggan slide down any part thereof and out on to the lake, thus exposing himself to the danger of the sudden drop, neither the municipality nor the association had placed any indicators to outline the area of safe entry on to the lake. Such a course would have required very little expenditure of money and work by either.

It is therefore my view that subject to the question of the assumption of the risk and possible contributory negligence by the various plaintiffs, the City is liable to them for their injuries because the City assumed the task of improving this toboggan slide and then failed to carry out that task creating a very dangerous hazard due to its negligent performance of the task.

The various plaintiffs had approached the slope over various courses. Most of them seemed to have parked their cars near a pavilion a short distance to the left of the foot of the slope on the same side of the lake, walked along the trail to the slope and then climbed the hill at either side of the slide. Those plaintiffs would not have had an opportunity to observe the drop on the right-hand side of the slide as it met the edge of the lake. Roslyn Ann Hanson and Mary Shamburger, however, crossed the ice directly opposite the toboggan hill and left the ice on their right-hand side facing up the slide. This, of course, would be the left-hand side looking down the slope and would be the portion of the entry of the slide on to the lake which had been gravel-filled by Schribner.

Although Roslyn Ann Hanson acknowledged that the face of the hill was directly in front of her as she crossed the ice, she was not asked whether she observed that the portion of the entry which at that time was at her left, i.e., the right-hand side looking down, had this four-foot sudden drop, nor was her fellow passenger, the plaintiff Mary Shamburger, subjected to any such examination.

In view of the evidence of Kandic, an expert called by the plaintiff:

A description I can't imagine that even person with a common sense, no education, will permit to be a section on toboggan slide, and especially the last section that is normally for speed, the biggest, to be left with that practical cut profile, so to invite practically every toboggan passing through that section that shall take in the air and crash-land after that.

I think it must be inferred that none of the plaintiffs recognized the fact that the apparent open entry of the slide on to the lake contained on its right-hand side a three- to four-foot sudden drop. It is true that all of the injured plaintiffs observed or should have observed the icy condition of the slope—two of them even saw boys skating down the slope, but after all ice on a toboggan hill is not unusual and if the toboggan hill is properly built there is no reason why it should be abandoned when ice-covered. On this evidence, I cannot find that the plaintiffs assumed the burden of the risk. The doctrine of the assumption of the risk has been discussed in this Court in three different cases over a period of years. Firstly, in *Car and General Insurance Corp. Ltd. v. Seymour and Maloney*[8], then in *Lehnert v. Stein*[9], and finally in *Eid v. Dumas*[10]. In the latter case, Ritchie J., speaking for the Court on this point, expressly adopted both of the former decisions, and in *Lehnert v. Stein*, Cartwright J., as he then was, speaking for the majority of the Court and referring to *Car and General Insurance Corp. v. Seymour and Maloney*, said at p. 43:

That decision establishes that where a driver of a motor vehicle invokes the *maxim volenti non fit injuria* as a defence to an action for damages for injuries caused by his negligence to a passenger, the burden lies upon the defendant of proving that the plaintiff, expressly or by necessary implication agreed to exempt the defendant from liability for any damage suffered by the plaintiff occasioned by that negligence, and that, as stated in *Salmond on Torts*, 13th ed., p. 44:

"The true question in every case is: Did the plaintiff give a real consent to the assumption of the risk without compensation; did the consent really absolve the defendant from the duty to take care?"

I am, therefore, of the opinion that the defence of assumption of the risk has not been established by the respondent the City of Saint John. Nor am I able to determine that the plaintiffs have been guilty of contributory negligence. After all, the provision of the facility was an invitation to the plaintiffs to use this slide as they were using it. The appearance, when standing at the top of the slide, was of a course opening up to a width of over 90 feet as it approached the edge of the lake, a width which had been cleared of all rocks and boulders and which appeared as safe across its whole width as any toboggan slide while, as I have pointed out, the ride of 40-odd feet was broken by an abrupt drop of three to four feet to the ice surface. Had any of the plaintiffs rolled or been thrown off the toboggans as they slid down the hill and injured themselves it would have been an ordinary sort of accident which persons using a toboggan slide could have expected but certainly none of the plaintiffs who were injured had any right to expect this sudden four-foot drop and cannot be found guilty of contributory negligence when using the slide in the fashion in which it was intended to be used.

The learned trial judge finding the respondent Saint John Horticultural Association only liable assessed the damages and gave judgment in favour of the various plaintiffs as against that defendant as follows:

John R. Hanson.....

\$ 859.00

Roslyn Ann Hanson.....

5,000.00

Mary Shamburger.....

3,344.00

William Robert Wasson.....

2,952.00

Richard Watts.....

778.00

Faith Watts.....

16,312.50

In the result, I would give judgment against the City of Saint John in the aforesaid amounts, except for Mary Shamburger who has discontinued her appeal.

I turn next to the question of the liability, if any, of the respondent the Saint John Horticultural Association. As I have said, any liability of this respondent depends solely on its position as occupier. There is no doubt that the Saint John Horticultural Association was the occupier of the premises throughout. I have found that the premises did have this hidden danger not known to the plaintiffs. The plaintiffs were licensees only and not invitees. In *Baker v. Borough of Bethnall Green*[11], at p. 140, Lord Greene stated: A licensee must take the premises as he finds them, subject to this important qualification, that, if the licensor knows of a danger which is not apparent, or would not reasonably be apparent to the licensee, it is his duty to take steps to protect the licensee against it.

That view was expressly adopted by this Court in *Booth v. St. Catharines*[12], at p. 568, and it reflects a refusal to adopt the view expressed by Lord Hailsham L.C., in *Robert Addle & Sons (Collieries), Ltd. v. Dumbreck*[13], where he stated, although the case dealt with trespassing, that the licensor was bound not to create a trap or allow a concealed danger to exist upon the said premises not apparent to the visitor but which he knew or ought to have known.

In *Hawkins v. Coulsdon et al.*[14], Denning L.J. gave what I regard, with great respect, as the best modern treatment of the issue of the knowledge of the occupier. I quote from the judgment:

It has sometimes been said that those observations, by introducing the phrase “ought to have known”, were made per incuriam; but an explanation has been put forward which has been described by Lord Greene as “very attractive”: see *Baker v. Bethnall Green Borough Council*. It is this: if the occupier actually knows the physical condition of the premises, and a reasonable man

would have realized that it was a danger, the occupier must be taken in law to have knowledge of the danger, because he ought to have realized it too. He ought to know what a reasonable man would know. I think that explanation is correct. It must be remembered that in *Fairman's case*, [1923] A.C. 74, the landlord through his caretaker actually knew of the condition of the stairs, but did not realize that they were a danger. When the statements of their Lordships are read against that background, it becomes clear that what they mean is this: once an occupier has actual knowledge of the state of affairs existing on his land, then if he knows or ought to know it is a danger he is under a duty to warn a visitor of it unless, of course, the danger is obvious. Thus far I have considered only the authorities; but when we come to consider the matter upon principle, it is clear that there should be no difference between an act of commission and an act of omission. If an occupier actually knows of a state of affairs on his land which a reasonable man would realize was a danger, he should not be allowed to escape from his responsibilities on the plea that he was not a reasonable man and did not realize it.

I ought to add that when I speak of the “actual knowledge” of the occupier of the existing state of affairs, I include also his presumed knowledge of it. It has been well said that “an absentee owner or an occupier oblivious of what is happening under his own eyes is in no better position than a man who looks after his property”: per Lord Maugham in *Sedleigh-Denfield v. O'Callaghan*, [1940] A.C. 880, 887; 56 T.L.R. 887; [1940] 3 All E.R. 349. That was, it is true, a nuisance case, but in this respect nuisance is an identical twin with negligence. Thus, in *Ellis v. Fulham Borough Council*, [1938] 1 K.B. 212, there was broken glass in the paddling pool. The council did not actually know that the piece of glass was there. They hoped that it had all been raked out, but owing to their negligence the rake was ineffective. They could not rely on their own negligence to excuse their want of knowledge. So knowledge was imputed to them. Similarly, if an occupier has once known of the state of affairs but has temporarily forgotten it, his forgetfulness would not avail him.

This view I adopt and I am of the opinion that the same principle was adopted by inference in the majority judgment given by Cartwright J., as he then was, in this Court in *Gilchrist v. A. & R. Farms Ltd*[15]. when he said at pp. 125-6:

The first is that the learned judges in the Courts below erred in failing to hold that a reasonable man in the position of this employer would have foreseen that the condition of the door was a probable source of injury to persons working in its vicinity, that this is sufficient to impose liability and that it is not necessary to determine whether he would have foreseen injury caused in the precise manner in which the appellant was injured. In support of this, reference is made to such cases as *Winnipeg Electric Railway Co. v. Canadian Northern Railway Co.*; *Re Bartlett* (1919), 59 S.C.R. 352, 50 D.L.R. 194, and *Hughes v. Lord Advocate*, [1963] A.C. 837.

The second submission is that in this case it was unnecessary for the learned trial judge to consider what the reasonable man would have had in contemplation and ought to have foreseen because the evidence shows that the employer contemplated and foresaw that injury of the very sort which the appellant suffered might well be caused by failure to put the door in a safe condition.

I have reached the conclusion that the second of these submissions should be upheld and this renders it unnecessary for me to reach a final conclusion as to the first, although I incline to the view that it should be upheld also.

The test therefore must be applied considering the evidence of William Ross who was the superintendent of Rockwood Park for the respondent Saint John Horitcultural Association. Mr. Ross has been the superintendent for 17 years, had worked in the park for 30 years, and had known it from his boyhood. Mr. Ross testified that he was familiar with the toboggan slide in the park. He knew that the city employees had come out in 1965 and had, to use his term, scarified the hill. He agreed that this process included the removal of trees and stumps as well as the use of a bulldozer. Mr. Ross further testified that this widening extended right to the top and, more relevant for the present purposes, that the City did dump fill at the base of the toboggan run into Lilly Lake where the slope approached the lake surface although Mr. Ross purported not to know how many truck loads had been used. He saw them start the work but did not watch and check the operation either then or afterwards.

The accidents with which these actions are concerned occurred on the 21st and 22nd days of January 1967 but Mr. Ross had not inspected the site prior to the accident. He testified: A. I couldn't see any reason for inspection. It had been inspected in the fall and I couldn't see no need at this time to inspect it.

COURT: By whom in the fall?

A. We checked it; we looked it over in the fall.

Mr. Ross was cross-examined by counsel for the plaintiffs and also by counsel for the City of Saint John. The latter availed himself in full of his right in cross-examination to lead the witness. I quote that evidence:

Q. Now it is a fact, isn't it, that this hill in January 1967 was pretty well as it was and always had been since 1934?

A. Yes, it was.

Q. And it is a fact, isn't it, that where this toboggan slide met Lilly Lake there was always a drop off on to Lilly Lake?

A. Well, all depends on the word "drop", there was a grade from the road surface to the lake surface.

Q. This drop was always there, wasn't it?

A. That is right.

Q. Now you probably have not seen the picture, Exhibit P.3, which was a photograph, Mr. Ross, taken apparently the day this accident happened. Have you seen this?

A. No.

Q. You can see apparently the end of the toboggan slide where it comes out on Lilly Lake on the ice surface?

A. Yes.

Q. Now you can see, can't you, where the entrance on to the lake from the slide is?

A. Yes.

Q. And off to the left, looking at the photograph, there appears to be a higher ground; that would be a ledge over there, wouldn't it, looking up?

A. You mean this black area?

Q. Yes.

A. That is not a ledge. It is a graded area to the ice surface.

Q. It is quite a drop?

A. I don't believe it is. Q. It is not?

A. No, I don't think so.

In view of Mr. Ross's previous testimony and of the evidence of Mr. Hanson, Sr., and Mr. Schribner, this evidence which I have just quoted is incomprehensible. He testified that he had witnessed the gravel being applied at the edge of the lake. The application of this gravel could not fail to have changed the slope from the old trail to the frozen surface of the lake. That was the purpose of such application. Again, looking at the photograph, ex. P.3, the contrast between what appears in that photograph as the right-hand side of the entry from the toboggan slide on to the lake (and which is the left-hand side looking down the hill) with the left-hand side in the photograph (the right-hand side looking down the hill) is startling. The left-hand side, as you look down the hill, could certainly be the graded area to the ice surface to which the witness refers as it is snow covered. The right-hand side, as you look down the hill, cannot help but be the sharp drop-off described by the various witnesses and by Mr. Hanson, Sr., and also referred to by the witness Schribner. Surely, Mr. Ross comes within Lord Justice Denning's description I have quoted above where he said:

It has been well said that "an absentee owner or an occupier oblivious of what is happening under his own eyes is in no better position than a man who looks after his property": per Lord Maugham in *Sedleigh-Denfield v. O'Callaghan*, [1940] A.C. 880, 887.

Ross had testified that he saw the gravel brought to the slope and applied although he did not stay to watch the whole process nor inspect it afterwards but he and his men did inspect the hill between that date in 1965 and the date of the accident, indeed, during the actual autumn before the accident. In view of the testimony of the other witnesses and the graphic illustration in the photograph, ex. P.3, if he failed to notice the sharp drop over which the plaintiffs fell at the time of their injuries then he was simply oblivious of what was before his eyes and the extension of the

occupier's liability to the dangers of which the licensor actually knows or which he ought to have had knowledge because he was aware of the circumstances would apply to Mr. Ross and to his employer, the respondent, the Saint John Horticultural Association. I would therefore allow the appeal in so far as that respondent is concerned and restore the judgments given at trial against such respondent.

In the result, I would therefore allow the appeal and award judgment in favour of the various plaintiffs against both defendants in the sums found by the learned trial judge. The plaintiffs should be entitled to their costs throughout.

In view of the disposition made by the other members of the Court which will result in judgment going against the City of Saint John only, I am in agreement with the view that the appeal should be allowed with costs in all Courts against the City of Saint John and the appeal dismissed with costs in all Courts against the Saint John Horticultural Association with the right, however, in the appellant to add such costs as he may be required to pay to the said Saint John Horticultural Association to the judgment against the City of Saint John.

PIGEON J.—Uncontradicted evidence has clearly shown that under the conditions existing at the date of the accidents, the toboggan slide in Rockwood Park was dangerous. Those conditions were essentially that there was not much snow, the slide was icy and the ice on Lilly Lake was bare. What constituted the danger was the abrupt change of slope, 16 feet past the point marked on the plan as the “Old Paved Trail”. The slide was some 450 feet long to that point. It started at a 10 per cent grade, increasing to 18.6 per cent near the middle, decreasing gradually to 7.8 per cent and, over the above-mentioned 16 feet, falling to less than 6 per cent. But, over the next 11 feet, the measured drop was 3.3 feet, that is a 30 per cent grade down to a few feet before reaching a little more gradually the lake level. The expert witness Steven Kandic said that, under suitable conditions, a toboggan starting from the top might reach a speed near 40 miles per hour at the bottom of the slide and this would cause the toboggan to leave the surface on reaching the steep incline and to land on the ice with the same impact as if falling from a clear height of some 4 feet. That such crash landing could cause spinal injury is obvious.

The slide had been built in 1934 and no such accident had ever happened before 1967. This was explained by the witness Albert E. Hanson, an engineer, who was Commissioner of Works for the City of Saint John for some 15 years until he retired in 1968. He said that before the slide was improved under his supervision in 1965, “I don't think the people went all the way up the hill”. This is not hard to understand. There were boulders on both sides of the hill about 135 feet from the lake and the opening between them was, he stated, only 10 or 15 feet. Further up, there were small trees growing on both sides leaving, as he said, the slide “not much wider than 10 or 20 or 30 feet as it ran up the hill”. It is not hard to understand that, at least when the snow conditions made a fast descent possible, no one slid from the top. In 1965, however, there were important improvements made under the instructions of the city manager. The boulders and the trees on both sides were removed and the slide was widened.

I do not believe that Hanson Sr. was in error when he said: "I think right now the toboggan slide right now would be in the vicinity of 40 feet maybe 50 in places". The width of the "slide" must not be confused with the width of the cleared area. The cross-section on ex. P-1, which is a plan prepared by plaintiffs' engineer George Hamilton, shows that, at 100 feet from the "Old Paved Trail", the "slide" was not quite one-half the width of the 80-foot cleared area. There were, on each side, steep banks rising nearly 10 feet above the "slide" in the centre. Those inclined banks, approximately 20 feet wide on each side, were obviously not considered by Hanson Sr. as part of the "slide". Hamilton said that the slide had obviously been "cut out", that at 50 feet from the "Old Paved Trail" its configuration was the same as at 100 feet, but at the trail it widened to 60 feet ("30 feet on either side of the base line") and, beyond that, there was "rock outcropping and what have you". His plan shows on the east side a bench mark on a point of rock five feet above the level of the slide.

Hanson Sr. considered that the improvements had made the slide much safer but he saw the sharp drop-off of three or four feet at the edge of the lake and, as he said in Court:

... that is why I instructed the superintendent to put gravel in between the berm and the edge of the road and the water on a slope of I would say 3 to 1 slope, so a toboggan coming off the road on to the lake would come down a flat slope rather than an abrupt drop. I saw the danger and that is the reason I instructed the superintendent to do it.

Hamilton's plan shows that although some of the gravel put on the slope may have disappeared as Hanson Sr. said, the slope at the time of the accidents was pretty much what he had ordered because a 3 to 1 slope is a 33 per cent grade and the survey shows a little better grade of 30 per cent. Unfortunately, the evidence of the expert witness Kandic is that this was not good enough: a sudden change from a gentle slope of about 6 per cent to a steep incline of 30 per cent was definitely dangerous at the high speed that could be reached when sliding from the top under favourable snow conditions.

At the hearing in this Court, it was strenuously contended that the appellants, or at least some of them, had been injured by dropping to the lake over a rocky ledge on the west side of the slope. This assertion was mostly based on evidence related to a photograph filed as ex. P-3. This picture was taken from across the lake which is a quarter-mile wide. It shows in the background the slide coming in at an angle from the left. In my view, no conclusions can safely be reached on the basis of such evidence. Any opinion as to the actual location of points shown on that picture rests solely on deductions from the perspective. Those deductions under such conditions are apt to be quite subjective. My personal view is that if a rocky ledge is what the picture shows, it is not really in front of the slide. But this depends on my interpretation of the perspective of which I am, by no means, certain. It therefore appears to me that the plaintiffs have failed to show that the accidents occurred in that way.

As Limerick J.A. noted, some of the plaintiffs, like the Watts, “thought they were in the centre of the run when they came to the lake”. Of course, they all felt a sudden drop when they were injured. But this is just what they would feel with an abrupt change of slope at a high enough speed. On the basis of the expert evidence, the sharp incline fully accounts for the injuries suffered.

From the above-mentioned facts which have all been established by uncontradicted evidence, it appears clear to me that the improvements made in 1965 and intended to make the slide safer, in effect, created a danger which caused the accidents. These improvements made it possible and apparently safe to slide from the top under conditions suitable for high-speed tobogganing. At the speed to be anticipated on such a slide, the abrupt change of slope near the lake edge constituted a grave danger. It is a danger which, on his own admission, the engineer responsible for the improvements fully appreciated. Unfortunately, he badly miscalculated when specifying a 3 to 1 slope and, in my view, this miscalculation is negligence for which the City is answerable. It took a narrow slide that could not be used for tobogganing at high speed from the top due to trees and boulders on both sides. By removing those obstacles and widening the slide, it made it possible for tobogganers to go down at high speed from the top. This made the approach to the lake dangerous unless the final slope was reduced. The necessity of this improvement was appreciated but not enough was ordered to be made and, in fact, done, so that there was created for the users of the slide a serious danger that was not readily apparent.

It is true that when the accidents occurred, the high speed and the slope were visible. The Hansons’ 5- and 6-year-old children were, in a way, wiser than their grandfather. They refused to go along with their parents when the latter decided to start from the top rather than from mid-slope. I do not think, however, that this means the parents or any of the other plaintiffs started from the top with a full appreciation of the risk. Although they had the advantage of seeing the actual conditions, it does not seem to me that it was unreasonable for them to trust that the slide had been properly designed for its intended use. They were persons that must have been considered as likely to suffer injury if this was not done and, therefore, the principle of our decision in *Canadian General Electric v. Pickford & Black*[16] is applicable.

It does not appear to me that this is a case in which the rule against interference with concurrent findings of fact should be applied. All the facts on which my conclusion against the City is based have been established by uncontradicted evidence. I differ from the Courts below solely because from those facts it appears clear to me that different inferences must be drawn. With respect, the Courts below have failed to appreciate the legal consequences of some important facts proved beyond question.

With respect to the Association, it is clear on the evidence that its responsible officials did not have actual knowledge of the danger until after all the accidents had occurred. It was, therefore, not in breach of its duty to the plaintiffs as licensees. The improvements made by the City were done under professional supervision and I think the Association could properly rely on that without further inspection. Also, in view of what I have said previously concerning the “width of the slide” after the improvements, I am not satisfied that the improved slope to the lake edge was

in fact of insufficient width. In any case, this would not make any real difference because the slope itself was so steep as to cause the accidents that occurred.

I would therefore affirm the judgment of the New Brunswick Court of Appeal with respect to the exoneration of the Association from liability to the appellants. However, this seems to me a proper case for a so-called Bullock order. The claimants could not ascertain prior to the institution of the proceedings where the responsibility lay for their injuries. I do not think a case has been made for a review of the trial judge's assessment of damages.

For those reasons I would allow the appeal of the above-named appellants against the City of Saint John and direct that judgment be entered in their favour for the respective amounts assessed in the Supreme Court of New Brunswick with costs throughout. I would dismiss the appeal against the Saint John Horticultural Association with costs and order that the successful appellants be authorized to add all costs payable by them to the Association to those payable by the City of Saint John. Appeal allowed against the City of Saint John, with costs, JUDSON and RITCHIE JJ. dissenting.

Solicitors for the plaintiffs, appellants: Palmer, O'Connell, Leger, Turnbull & Turnbull, Saint John.

Solicitors for the defendant, respondent, the City of Saint John: Gilbert, McGloan, Gillis, Jones & Church, Saint John.

Solicitors for the defendant, respondent, The Saint John Horticultural Association: Ryan, Drummie & Co., Saint John.

[1] [1971] 3 N.B.R. (2d) 477, 8 D.L.R. (3d) 685.

[2] [1929] A.C. 358.

[3] [1938] 1 K.B. 212.

[4] [1948] S.C.R. 564.

[5] [1953] 1 W.L.R. 882.

[6] [1954] 1 Q.B. 319.

[7] [1957] 1 Q.B. 46 (C.A.); [1958] A.C. 240 (H.L.).

[8] [1956] S.C.R. 322.

[9] [1963] S.C.R. 38.

[10] [1969] S.C.R. 668.

[11] [1945] 1 All E.R. 135.

[12] [1948] S.C.R. 564.

[13] [1929] A.C. 358.

[14] [1954] 1 Q.B. 319 (C.A.).

[15] [1966] S.C.R. 122.

[16] [1971] S.C.R. 41.

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