Privy Council Appeal No. 2 of 1919.

The Corporation of the Township of Richmond - - - *Appellants*

v.

Arthur Wellsley Evans and others - - - - - *Respondents*

FROM

THE COURT OF APPEAL OF BRITISH COLUMBIA.

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 6TH AUGUST, 1919.

Present at the Hearing:

VISCOUNT HALDANE.
LORD BUCKMASTER.
LORD DUNEDIN.
MR. JUSTICE DUFF.

[*Delivered by* MR. JUSTICE DUFF.]

This is an appeal from the judgment of the Court of Appeal for British Columbia by the Corporation of the Township of Richmond in an action in which the respondents recovered against the Corporation judgment for $5,000. The action was brought under the Families Compensation Act against the appellant Corporation as well as the Corporation of South Vancouver by the surviving husband and children of Annie Evans, whose death was alleged to have been caused by the negligence of the defendant Corporations. On the night when she met her death, the deceased Annie Evans was a passenger in a Jitney motor passing over a bridge which crosses the north arm of the Fraser River. In this bridge there is a span which when necessary is swung open to allow the passage of craft upon the river, and on the occasion in question, the span being open, the car in which the deceased Annie Evans was driving plunged through the opening and all the occupants but three were drowned. The respondents alleged that the bridge on the occasion in question was, and for some years before had been, in the possession and under the control of the defendant Corporations; that they were responsible for

seeing that when the swing span was open adequate warning should be given to persons using the highway, and proper safeguards provided for the protection of highway traffic; and the negligence charged was the failure to perform this duty.

The jury found that the accident was due to the negligence of the defendant Corporations and of the driver of the automobile. The learned Trial Judge gave judgment against the appellant Corporation, but dismissed the action as against South Vancouver on the ground that there was no evidence establishing that the persons in control of the bridge were persons for whose acts that Corporation was answerable. The appellant Corporation appealed to the Court of Appeal, and that Court being equally divided in opinion, the appeal was dismissed.

The appellant Corporation raises two contentions. First, that since there was no evidence showing the situs of the bridge to be within the territorial limits of the Township of Richmond, there is no foundation for the proposition that the appellant Corporation is legally responsible for maintaining it in safe condition for travel, or for the negligent acts of the persons in control of it; and, secondly, that assuming the Corporation to be so responsible, the finding of the jury ascribing the death of Mrs. Evans to the negligence of the Corporation is not supported by evidence. The first of these contentions was advanced at the conclusion of the trial, and their Lordships have no doubt that the learned Judge was right in declining to give effect to it. It was admitted that the Corporation had provided the funds for defraying half the cost of constructing the bridge; that it had in fact exercised control over it; and that the bridge-keeper was its servant. *Primâ facie* therefore it was the duty of the Corporation to take suitable measures for protecting the public against the dangers incidental to the working of the draw span; and it was incumbent upon the Corporation if it desired to dispute this responsibility to prove that the officials who had in fact exercised control were exceeding their lawful powers.

As to the second contention, there is, their Lordships think, no ground for question that the facts before the jury were sufficient to sustain a finding that the precautions taken for the protection of persons passing over the bridge at night and approaching the gap created when the swing span was open were not adequate for that purpose.

A lantern was hung at the centre of the span about 100 feet beyond the brink of the opening containing an ordinary coal oil lamp which exhibited a red light towards the highway when the span was open; and about 20 feet in advance of the opening gates were placed as a barrier for the protection of cattle. The presence of the light and the barrier it was alleged constituted sufficient notice to drivers of vehicles of the fact of the bridge being open for navigation, and in making this provision it was asserted the Corporation did all that was reasonably required in such circumstances.

One of the witnesses who was a passenger in the Jitney with Mrs. Evans, and survived the disaster, says that although as the motor crossed the bridge his eye was following the road ahead, he saw no red light; and it seems to be plain enough that when the span was in process of swinging the red light would not come clearly into view for an appreciable time after a gap had been created.

Moreover, it appears there were other lights on the bridge, calculated, by reason of their position and colour, to confuse and mislead. It was also stated that on bridges in the neighbourhood the gates placed across the approaches to such openings were surmounted by lights, and it was suggested in evidence that the distance between the opening and the gates ought to have been greater. The Trial Judge was manifestly right in holding that on this issue as to the sufficiency of the safeguards provided it was his duty to submit the case of the plaintiffs to the jury.

The chief argument advanced in support of the contention that the finding of the jury is not sustained by evidence is that the facts proved failed to connect the disaster with the fault of the Corporation as its cause; and the testimony of the bridge-tender to the effect that the swing span had been completely open and the red light shining full upon the roadway for a minute or two before the vehicle reached the gates is relied upon as establishing conclusively that the real cause of the accident was the negligent or reckless inattention of the driver. The learned Trial Judge, however, in pointed terms instructed the jury to consider how much weight should be attached to the statements of the bridge-tender, and although this evidence was not directly contradicted by any witness who could speak from actual observation of the position of the swing span as the motor approached the opening, their Lordships nevertheless entertain no doubt as to the propriety of the observations of the learned Judge on this point; and especially in view of the evidence of the passenger already alluded to, their Lordships cannot accept the suggestion that for the purpose of deciding this appeal they should evaluate this evidence themselves. To do so would be to assume a responsibility which it was within the exclusive province of the jury to discharge.

It only remains to observe that this case does not fall within the principle that a highway authority is not as a general rule answerable in an action by an individual for nonfeasance in respect of the maintenance of the highway. Their Lordships have no doubt that the opening of the span coupled with the negligent omission to take the precautions necessary for the protection of the public from the supervening danger constituted a wrong falling within the category of misfeasance, and actionable at the suit of persons suffering harm in consequence.

Their Lordships are therefore of opinion that the decision appealed from is right, and that this appeal should be dismissed with costs, and they have humbly advised His Majesty accordingly.

In the Privy Council.

THE CORPORATION OF THE TOWNSHIP OF RICHMOND

v.

ARTHUR WELLSLEY EVANS AND OTHERS.

DELIVERED BY MR. JUSTICE DUFF.

Printed by Harrison & Sons, St. Martin's Lane, W.C.

1919.