J A M A I C A

IN THE COURT OF APPEAL

R.M.CIVIL APPEAL NO. 109/71

Before: The Hon. Mr. Justice Fox, Presiding
The Hon. Mr. Justice Smith
The Hon. Mr. Justice Robinson (Acting)

K.S.A.C. v. MAVIS POTTINGER

H. Edwards, Q.C. for the appellant
W. Chin See for the respondent

6th July, 1972

FOX, J.A.:

This is an appeal by the Kingston and Saint Andrew Corporation, hereinafter called the K.S.A.C., against a judgment of one of the Resident Magistrates for the parish of Kingston, awarding damages to the plaintiff for injuries she sustained as a result of a fall into a manhole.

In the particulars of the plaintiff's claim it was alleged "that on the 23rd day of December, 1969, the defendants caused an opening and/or hole in the sidewalk on Wellington Street, Denham Town, in the parish of Kingston, to be left uncovered as a result whereof the plaintiff who was lawfully walking on the said sidewalk fell into the hole and sustained injuries and incurred loss and expense".

The plaintiff lives at 7, Wellington Street, which runs north to south. Her house is on the western side of the street. On the eastern side of the street about one and a half chains south of her gate at 8½, Wellington Street she keeps a restaurant. The plaintiff was accustomed to walk to and from her restaurant every day. In doing so she would pass near to a manhole on the western sidewalk of the street about two yards south of her gateway. Under cross-examination the plaintiff said it was within one foot of her gateway. In walking to and from the restaurant on the 23rd of December, 1969, there was nothing about the condition of the manhole to attract the plaintiff's attention. At about 9.00 p.m. that night she came home in a car. She alighted from the car, walked a few yards on the sidewalk, fell into the manhole which was open, and was injured. There was no street light in the

vicinity and the plaintiff did not see that the cover of the manhole was off. On the following day she saw the cover at the bottom of the manhole.

Theophilus Webb, a tin smith living at 8¼, Wellington Street, gave evidence in support of the plaintiff's case. He saw her fall into the manhole. He said that there was no cover on the manhole and that he had "noticed that for four weeks the manhole had no cover". From the printed record it is not clear whether this period of four weeks was immediately prior and up to the 23rd of December, 1969, or some other period.

For the defence, Stanford Bayliss, a foreman of the Street Cleaning Department of the K.S.A.C. said that he worked on Wellington Street every Thursday and had so worked on Thursday, 18th December, 1969. He supervised the work of two men. The cover of the manhole was of metal and 18 inches by 18 inches. It was lifted by a "dog" and the manhole was cleaned. The cover was then properly replaced. The manhole led to a tunnel under the sidewalk. By way of "weepholes" water could be drained off into the manhole. The cover could not go through the manhole but it could be taken off and pushed through the weepholes and in this way fall to the bottom of the manhole. The witness said that the manhole was not cleaned on the following Thursday because that was Christmas day. When he returned to Wellington Street on 8th January, 1970, he saw that the cover of the manhole was completely missing. In the course of his duties this witness had previously missed manhole covers. When he gave evidence in September 1971, there were 11 covers missing.

John Headley, one of the workmen who assisted in cleaning the manhole on the 18th December, 1969, gave evidence of the cover having been removed by a "dog" and properly replaced afterwards. This witness said that he had been working in the Wellington Street area since 1966. Prior to 8th January, 1970, when he discovered that the cover of the manhole at the plaintiff's gate was missing, he had never found any covers missing in that area. This was the Denham Town area in which the people were well behaved. In other areas he had found covers missing. In due course a cover was replaced on the manhole at Wellington Street.

The Magistrate did not expressly find that after cleaning the

manhole on 18th December, 1969, its cover had been properly replaced by the servants of the K.S.A.C., but both counsel accepted that such a finding was clearly to be implied from the tenor of the statements in her reasons for judgment. On the basis that the cover had been properly replaced, the Magistrate apparently thought that nevertheless the K.S.A.C. had failed to "take the necessary precautions to restore the highway to its normal condition so that it can properly and without undue risk be traversed by the public". She therefore determined the question of liability adversely to the K.S.A.C. in accordance with the general rule that whereas a plaintiff would fail in an action against a highway authority for mere nonfeasance of the authority in the discharge of its duties, he would succeed if he could show "some act amounting to positive misfeasance as opposed to mere nonfeasance". On this aspect of the case the magistrate relied for directions as to the law on paragraph 455 Vol. 16 of Halsbury's Laws of England, second edition. She seems to have concluded, again not expressly but by what is implied in her reasons for judgment, that the K.S.A.C. was, in the circumstances, liable as for a misfeasance in the discharge of its duties.

Quite apart from the circumstance that if the cover of the manhole had been properly replaced by the workmen of the K.S.A.C. on the 18th December, 1969, its removal thereafter by "intermeddling third persons", as the magistrate found elsewhere in her reasons, could by no stretch of the imagination be regarded as an act of the K.S.A.C. "amounting to positive misfeasance", the magistrate has altogether misapplied the general rule in Halsbury's Laws of England. The rule applies "only to repair of the road qua road" and does not extend to things put on the road. (Vide Charlesworth on Negligence, 5th Edition, paragraph 690). We are grateful to Mr. Edwards for reminding us of this most important distinction. At this stage it may be appropriate to record that the counsel who appeared for the K.S.A.C. at the trial was not Mr. Edwards.

The nonfeasance rule, therefore, does not apply to the covered manhole in this case. It is easy to see how the magistrate fell into this error. She was misled at the trial. The defence was slanted entirely in terms of the rule. In his closing submissions,

learned counsel for the K.S.A.C. appears to have been content to submit that the plaintiff had not proven that the cover of the manhole had been removed by the K.S.A.C., and that, as a consequence, she had failed to establish a misfeasance. In finding as she did on this aspect of the case, the magistrate was only attempting to dispose of the substantial defence at the trial, albeit she did so erroneously.

If the question of liability had been determined entirely within the framework of the nonfeasance rule, I would be inclined to conclude that the case would have had to be sent back for a retrial. But the magistrate rested her decision on a second limb. She considered the evidence in terms of the liability of a person who puts a dangerous obstruction on the highway. She relied on the law as it is stated in paragraph 490 of Vol. 16 of Halsbury's Laws of England second edition. She considered that the K.S.A.C. "could not escape liability caused by the intervening act of a third person, unless the defendants had taken reasonable steps to prevent mischief which they ought to contemplate as likely to arise from intermeddling third persons". She found that the K.S.A.C. "knew of the interference of third parties, but that no reasonable steps were taken to prevent such mischief". On this ground also she found the K.S.A.C. liable.

Mr. Edwards suggested that, on the evidence, the plaintiff had proven neither lack of reasonable care by the servants of the K.S.A.C. nor that such lack of care had been the cause of the injury to the plaintiff. It is entirely correct to approach the question of liability by considering the nature of the duty owed by the K.S.A.C. to the plaintiff. The K.S.A.C. had placed the manhole and the cover on the sidewalk. It was therefore under a duty to use reasonable care to maintain them in a safe condition. It must keep them free of defects which were likely to make them a source of danger to users of the sidewalk. It must also endeavour to ensure that the manhole is always kept securely covered. The duty to maintain embraces both obligations. The K.S.A.C. must therefore take such reasonable precautions as would have been operative to secure these results. This does not mean that the K.S.A.C. was bound to use every possible means to secure that the sidewalk was not dangerous to traffic. All that they were bound to do

was, as Shearman, J. said in Simpson v. Metropolitan Water Board (1917) 15 L.G.R. at 632; "use modern scientific appliances". But even this does not sufficiently or accurately state the obligation of the K.S.A.C. As with all obligations, this particular obligation to use satisfactory appliances is subject to those practicalities which are always present in any given situation. Modern scientific appliances may not be available in a country. If available, their costs may exceed the sum which a country can reasonably afford. There may be other inhibiting factors to the use of modern appliances in a particular country. The K.S.A.C. will have fulfilled its duty if it has done all that it is reasonably practical for it to do to make the sidewalk safe. If, having done all this, through circumstances beyond its control, safety is not achieved, the K.S.A.C. will not be liable for any resulting injury to persons.

The critical question in this appeal, therefore, is whether the magistrate's decision in holding the K.S.A.C. liable for what she found in effect to be the malicious act of a third person can be upheld. The burden of proof was initially upon the plaintiff. When she established that she fell into an open manhole and was injured, prima facie proof of the existence of negligence in the K.S.A.C. was made. It was then for the K.S.A.C. to rebut that prima facie position if it could, by showing that it had not been in breach of its duty to maintain the manhole and its cover. The burden is on the K.S.A.C. not only as a matter of law, but also of common sense, because the facts as to installation, maintenance and repair of the covered manhole lie for the most part within the knowledge of the K.S.A.C. and are not expected to be known by persons in the position of the plaintiff. If these facts described a defence, it was for the K.S.A.C. to adduce them.

There were two defences open to the K.S.A.C. It could have attempted to show inevitable accident. This defence was not specifically stated at the commencement of the trial, but there was no admission made then which would have prevented it from being given effect if, during the trial, evidence in support thereof had emerged. To successfully rely on the common law defence of inevitable accident, the K.S.A.C. would have had to prove, at the least, that even if all reasonable care had been exercised, the accident could not have been

averted. There is no evidence to show this. That particular defence was, therefore, not available to the K.S.A.C.

As a second defence, it was open to the K.S.A.C. to show that it had taken all such reasonably practicable precautions as were available to prevent the malicious act whereby the cover was removed, and the consequences of that act. This was the defence which the Water Board sought to set up in Wells v. Metropolitan Water Board, (1937), 4 All E.R. page 639. In this case, the plaintiff, a married woman, was injured through tripping up over the cover-plate of a valve-box belonging to the Board. When the cover of this valve-box was closed it was in no way objectionable or dangerous, but on this occasion someone, presumably a child, had opened the cover, and, when opened, it projected some three inches or four inches above the surface of the road. By way of the evidence of a Mr. Thorold, the distribution engineer in the employment of the board who was responsible for various things, including the maintenance of valve-boxes, the Board sought to show that the particular design of the valve-box and its cover was the only one which was reasonably practicable in the circumstances. The cover could be opened quite easily, but it was hinged and could not be taken away. The Board sought to convince the trial judge, Jumphreys, J. of the validity of its conclusion that it was "undesirable that any form of locking arrangement should be used, because such a lock might conceivably become rusty". The defence was not accepted. Under cross-examination, Mr. Thorold was forced to admit that it was well known that children were apt to tamper with the covers of valve-boxes. What did happen in that case therefore, was precisely what might have been expected to happen. The same is the position in the case before us. On prior occasions covers had been missing from manholes. The removal of the manhole cover in this case ought therefore reasonably to have been anticipated. In the final analysis, Humphreys, J. perceived in Well's case that the only objection to some simple form of locking apparatus was that it might possibly on some occasion get corroded or get choked with dirt so that it would not work easily. In addition to a locking device for the cover of the valve-box other safety measures suggested

themselves to the learned judge and were stated in his judgment.

The point to notice about the decision in Well's case is that the particular defence which was attempted was dissipated by the totality of the evidence which was given. In this case such a defence was not attempted at all. No evidence was given in support thereof. This, of course, is not surprising, having regard to the irrelevent line of defence which learned counsel for the K.S.A.C. pursued at the trial.

I have carefully considered the suggestion of Mr. Edwards that this case should be sent back for a retrial. I was at first inclined to agree with him, but after giving the matter such careful second thoughts as I am capable, I am of the view that this course should not be followed. In formulating these second thoughts I am indebted to Mr. Chin See for the assistance of his submissions. The K.S.A.C. had the opportunity at the trial to raise a proper defence. It failed to do so. On the other hand, the solicitor who appeared for the plaintiff at the trial stated the correct legal context within which the issues should be resolved. It would be unjust to the plaintiff to allow the K.S.A.C. to have a second opportunity to vindicate its position. They should not be given a 'second bite of the cherry'. In my view the appeal should be dismissed.

SMITH, J.A.: I agree and have nothing to add.

ROBINSON, J.A.(Ag.): I agree with the points put forward and the conclusions of Fox, J.A. Assuming the defendant should forsee the malicious act of the third person, that is if that is so, the defendant must show what they did to guard against this and that that was the only practical and reasonable way and the best possible way. This the defendant may be able to show, but it was not done.

In my view the appeal should be dismissed and the judgment of the Resident Magistrate affirmed.

FOX, J.A.: The appeal is therefore dismissed. The judgment of the Magistrate is affirmed. The respondent is to have the costs of this appeal fixed at Forty Dollars ($40.00).