

FIRST DIVISIONAL COURT.

JUNE 29TH, 1918.

WESTCOTT v. CITY OF WOODSTOCK.

Highway—Nonrepair—Opening in Roadway—Absence of Guard—Injury to Bicyclist—Defective Eyesight—Negligence of Municipal Corporation—Negligence of Bicyclist—Findings of Trial Judge—Appeal.

Appeal by the defendants from the judgment of SUTHERLAND, J., 13 O.W.N. 480.

The appeal was heard by MACLAREN and MAGEE, JJ.A., KELLY, J., and FERGUSON, J.A.

Frank Arnoldi, K.C., and Peter McDonald, for the appellants.
W. T. McMullen, for the plaintiff, respondent.

FERGUSON, J.A., in a written judgment, after setting out the facts, said that the defendants set up that the trench into which the plaintiff fell was properly guarded and protected, and that the negligence of the plaintiff himself, in riding his bicycle too close to the trench, was the proximate cause of the accident; and contended that the trial Judge should have found that the embankment thrown up along the sides of the trench was a sufficient guard to the end of the trench.

The finding of the trial Judge was entitled to weight, and the Court should not reverse it unless the Court were of opinion that it was clearly wrong: *Colonial Securities Trust Co. v. Massey*, [1896] 1 Q.B. 38; *George Matthews Co. v. Bouchard* (1898), 28 S.C.R. 580. In this case the finding could not be said to be wrong; on the contrary, the evidence fully justified the finding of negligence on the part of the defendants.

Upon the question of the plaintiff's negligence, the law was correctly stated in *Gordon v. City of Belleville* (1887), 15 O.R. 26, at pp. 29, 30.

Any person riding for the first time up to the embankment beside the trench would reasonably conclude either that the end of the trench was protected in the same way as the sides, or that it was otherwise guarded so as to prevent persons riding or driving so close to it that they might meet with a mishap. Had the end of the trench been thus guarded, or even had the watchman been there, the accident would not have occurred. In the absence of a warning such as would be given by a watchman, it was not to be concluded that the plaintiff acted so unreasonably or imprudently as to relieve the defendants from the result of their negligence.