

of the drowning of the horse was his running away and being no longer under the control of his driver or of any one else; and the appellants also contend that the learned County Court Judge misdirected the jury as to the effect of sec. 287, and that the running away of the horse was occasioned by the negligence of the respondent, who, it was contended, was under the influence of liquor and unfit to drive the horse, in driving in that condition a horse which had run away on the previous day.

The question of contributory negligence was fairly left to the jury, and their verdict acquits the respondent of it, and there was evidence which warrants the jury's finding.

The main question is as to the liability of the appellants for injury done to a runaway horse.

That it was the duty of the appellants, both at common law and under the provisions of the Code, to guard the hole that had been made, is, I think, undoubted; and that such a duty exists was decided by a Divisional Court in *Pennock v. Mitchell* (1908), 12 O.W.R. 767.

It may be that sec. 287 imposes a greater duty as to the nature of the guard than is imposed by the common law; but it is unnecessary, in the view I take, to consider that question.

[The learned Chief Justice quoted sec. 287.]

While the purpose of this enactment was the safeguarding of human life, I have no doubt that a hole, opening, aperture, or place, left unguarded, in contravention of it, in a public highway, as the Bay of Quinté is, is a nuisance; and, if it be a nuisance, the respondent, having suffered damage different in kind from that which was suffered by the public at large, is entitled to maintain an action for the recovery of the damages which he has sustained.

There is more difficulty as to the liability of the appellants in the circumstances of the case, the horse having run away, without, as the jury have found, any negligence on the part of the respondent, and in his flight having broken through the thin ice which had formed over the hole cut by the appellants. . . .

[Reference to *Elliott on Roads*, 3rd ed., pp. 194, 195, para. 793; *Toms v. Township of Whitby* (1874-5), 35 U.C.R. 195, 37 U.C.R. 100; *Price v. Cataract Bridge Co.* (1874), 35 U.C.R. 314; *Sherwood v. City of Hamilton* (1875), 37 U.C.R. 410; *Steinhoff v. Corporation of Kent* (1887), 14 A.R. 12; *Foley v.*