

The action was tried without a jury at Sandwich.  
T. Mercer Morton, for the plaintiff.  
J. H. Rodd, for the defendants.

MIDDLETON, J., in a written judgment, said that the plaintiff was driving a heavy car along the road, his wife, her brother and sister, and some children, being in the car, on the 30th June, 1918, about midday, when it started to rain and soon rained very heavily. He was about to turn into the premises of one Desmarais for shelter, when the car skidded and slid on the clay to the side of the road (as travelled), the wheels going into the ditch, the car was overturned, and the plaintiff's wife was instantly killed.

A drain had been constructed along the road, at the instance of residents in the adjoining township (Gosfield), for the purpose of draining lands in that township; and the sole function of the drain was to afford the waters from Gosfield an outlet in Silver creek, a stream crossing Mersea and Rochester. The drain was constructed under the sanction of the law and under the supervision of a competent engineer, over whom the defendants had no jurisdiction. The use thus made of the highway was an abnormal use, permitted and approved by the Legislature having jurisdiction in the premises. The ditch was necessarily wide and deep to carry the water to the outlet, and manifestly any one who left the travelled way and fell into the ditch might sustain injury. The road ran beside the ditch, and was formed of the natural clay, graded and kept in fair condition. The crown of the road was 11 inches—less than the height necessary under the "good roads" requirements of the Highway Improvement Act, R.S.O. 1914 ch. 40.

So far as the road itself was concerned, it was admitted that there was no negligence. It was contended that the neglect to provide an adequate guard or fence along the course of the ditch was such negligence as to create liability, and that the accident was caused by this negligence.

The defendants not only denied their liability, but contended that the accident was the result of the plaintiff's fault.

There was no concealed trap—the danger was obvious and known to the plaintiff:

The plaintiff's heavy car, without chains on the wheels, required most cautious and skilful handling to make the turn into Desmarais' lane. What the plaintiff did was to depart from the crest of the road so as to make the turn on a wide curve, and it was when he did so that the fatal skid occurred.

The proximate cause of the accident was the plaintiff's omission to do the things which, in the circumstances, he ought to have done, and his doing the things he ought not to have done—this in law being negligence.