C
98 Md. 637, 57 A. 4

Court of Appeals of Maryland.
MAYOR, ETC., OF **BALTIMORE**
v.
WALKER.
Feb. 19, 1904.

Appeal from Baltimore City Court; J. Upshur Dennis, Judge.

Action by William Walker, by his next friend, against the mayor and city council of Baltimore. From a judgment for plaintiff, defendant appeals. Affirmed.

West Headnotes

Municipal Corporations 268 ⚿788.1
268k788.1 Most Cited Cases
(Formerly 268k788(2))
In an action to recover for injuries from a water box projecting above the sidewalk, which had been so placed by the city, as it was the original wrongdoer, and its negligent act caused the injury, it is unnecessary to submit to the jury the question of whether or not the city had notice of the existence of such water box.

Argued before McSHERRY, C.J., and FOWLER, BRISCOE, BOYD, PEARCE, PAGE, SCHMUCKER, and JONES, JJ.

Albert C. Ritchie, for appellant.
C. Hopewell Warner and Thomas Mackenzie, for appellee.

BRISCOE, J.
This is a suit instituted by the appellee against the mayor and city council of Baltimore to recover damages for personal***5** injuries received by him while walking on one of the public streets in the city of Baltimore, and alleged to have been occasioned by the negligence of the city in not maintaining one of its streets in proper repair. At the trial of the case there were four bills of exception reserved by the appellant. Three relate to the rulings upon the admissibility of evidence, and one to the rulings upon the players. The declaration contains two counts. The first alleges that the defendant is an incorporated city, and is bound to keep its streets in repair; that one of its streets, called "St. Paul Street," was negligently suffered to be out of repair, whereby the plaintiff, in traveling on this street, and using due care, was hurt. The second count alleges: "For that the defendant is an incorporated city, and, as such, owns and controls the waterworks and system whereby water is distributed throughout the city; that, as part of the system, a water cock was placed in the foot pavement of St. Paul street, a public highway in the city of Baltimore, and used by the city in cutting off, whenever it should be necessary to do so, the water served to premises known as 325 St. Paul street; that the water cock was placed about six inches inside of the curb line of the pavement, and was negligently suffered by the defendant to extend about three or four inches above the footway, so that it obstructed and interfered with the free and unobstructed use by the public of the highway; that on the night of the 24th of November, 1900, the plaintiff, while passing along the highway and over the pavement, without the knowledge of the existence of the water cock, and which (it being nighttime) he neither saw, nor was able to see, though using ordinary care, the foot of the plaintiff came into contact with the water cock, and he was thrown violently to the ground, striking his head with great force against the pavement, in consequence of which he became unconscious, and so remained for a long time, and besides, in falling, struck and severely injured his neck, left leg, and knee, and received other injuries, whereby he suffered great pain, and has been, besides, permanently injured and rendered unable to earn his livelihood, and the injuries were caused by the negligence of the defendant, as above set forth, and not by want of due care or caution on his part,

or on the part of his lawful guardian, or Bernice Jones, his next friend, thereunto contributing." The material facts, as shown by the record, are as follows: The appellee, William Walker, a youth about 10 years of age, while walking along the sidewalk on St. Paul street, in the city of Baltimore, on the night of November 24, 1900, stumbled and fell over what is called a "water pipe or stop box," which projected about 2 or 3 inches above the pavement where the accident happened. The water pipe was located on the pavement at 325 St. Paul street, and was constructed by the city for the purpose of turning on and cutting off the water from the premises. The pavement is described as about 9 feet wide, but a portion of this space was covered by a doorstep, which left the footway at the place where the accident occurred about 41/2 feet wide. On the night of the accident the plaintiff was returning home alone, having gone with his grandmother to deliver some laundry, and was coming south, on St. Paul street, when he struck his foot against the water pipe, and was thrown violently to the ground, striking his head against the pavement, and sustained severe and permanent injuries. Robert M. Killmeyer, the only witness to the accident, testified that the night was dark and rainy, and, as he was returning home, he heard a boy hollo, and at the same time he saw him fall; having stumbled over the water pipe in front of 325 St. Paul street. He also testified that "he heard the boy hollo, and went and picked him up, and asked him if he had hurt himself and he said he had; he had hurt his head; that he had stumbled over the water pipe. I picked him up and carried him home, and the next morning he was lying in bed, and said he felt badly." The boy's condition was such as to prevent him from testifying in the case. It also appears from the evidence that the water pipe had been allowed to project above the pavement for over 10 years, and that it was repaired after the accident by the city water department, and is now even with the pavement. Mr. Read, secretary to the water department of Baltimore, testified that there are about 90,000 of these water pipes or top boxes in the city, and they are supposed to be put in flush with the pavement, and, if they protrude above the pavement, it is owing to the sinking of the pavement. There was other testimony on the part of the plaintiff and defendant, but, as the evidence stated by us presents the material facts, we do not deem it necessary to review it here. As the questions presented for our consideration arise on bills of exceptions, we will examine them in their regular order.

The first and second exceptions can be considered together, and they relate to the admissibility of certain evidence tending to prove how long the pavement had been permitted to remain out of repair after the accident to the plaintiff. It is difficult to perceive in what respect the answer of the witnesses contained in these exceptions could have prejudiced the defendant's case. The evidence, when considered in connection with the defendant's evidence, could in no way have affected the verdict in the case. We find no such error in this ruling as entitles the appellant to a reversal.

The third exception having been abandoned by the appellant, we come to the fourth, which embraces the rulings of the court on the prayers. The law applicable to this case, we think, was correctly stated by the court in the plaintiff's first prayer, which asserted ***6** the proposition that if the jury found that "St. Paul street is a public street in the city of Baltimore, and that in the foot pavement thereof, in front of premises No. 325, a water cock connected with the water pipes leading from the mains under the bed of said street into said premises No. 325 was there located, and that the water pipe or cock extended above the level of the pavement some three or four inches, as testified to by the witnesses, and that said water pipe was an obstruction to the free use of said pavement by pedestrians, and made the same dangerous to

passers-by thereon, and that on the night of the 24th of November, 1900, the plaintiff, while passing along said pavement, and using the same as a foot passenger, came in contact with the said water pipe or cock, striking his foot against it, and was thereby violently thrown to the ground, and received the injuries as testified to by the witnesses, then the plaintiff is entitled to recover in this action, providing the jury believe that he was using such care in the use of the street as a boy of his age would ordinarily use under similar circumstances." The liability of a municipal corporation in an action of this kind has been established by a number of decisions of this court. In the recent case of Baltimore City v. Beck, 96 Md. 190, 53 Atl. 976, it was said that, as the municipal authorities of Baltimore had the power and authority to regulate and to remove obstructions from its streets, "*** it was its plain duty to have kept the avenue in safe condition for public travel on the night of the accident in question. If it negligently fails so to do, and persons acting without negligence on their part are injured while passing along its highways, the city is liable in damages for the injuries caused by the neglect, and the person so injured can recover against the municipality therefor."

The duty, then, of maintaining in safe condition the sidewalk of a public street, as well as all other parts of the highway, clearly rests upon the municipality. But it is contended upon the part of the appellant that the appellee's prayer was defective because it omitted to submit to the jury the question of whether or not the city had notice of the existence of the water box or pipe in the street; and Hitchins' Case, 68 Md. 100, 11 Atl. 826, 6 Am.St.Rep. 422, and Keen's Case, 93 Md. 34, 48 Atl. 444, are cited and relied upon to sustain this position. We do not, however, regard those cases as in conflict with the principle of law controlling this. This is a suit to recover damages for injuries resulting from an obstruction or nuisance existing in one of the highways of the city of Baltimore, and permitted there by the city itself. The city was the original wrongdoer, and it was its negligent act which caused the injury. In Guest v. Church Hill, 90 Md. 695, 45 Atl. 882, the rule of law is thus stated. If a person who has not constructed a work which is a nuisance or causes damage comes into possession of it, he is entitled to knowledge or notice of its injurious character, and an opportunity to abate it, before he can be held liable, but the wrongdoer is not entitled to any notice before being sued for the injury caused by his own act. Met. Savings Bk. v. Manion, 87 Md. 68, 39 Atl. 90; Lion v. Baltimore City Pass.R.Co., 90 Md. 266, 44 Atl. 1045, 47 L.R.A. 127.

We find no error in the ruling of the court upon the plaintiff's first prayer, nor in the rejection of the defendant's ninth prayer, which asserted a converse proposition. We think it is clear that the existence of an obstruction in one of the public highways of Baltimore City, in the mode and manner described by the evidence in this case, constituted a nuisance, and the city is liable to respond in damages for injuries caused by its neglect in maintaining and failing to remove it.

We find no reason for disturbing the verdict of the jury in this case. The plaintiff's prayers were properly granted, and contained the law of the case. There was no error in the rejection of the defendant's prayers, and, as the evidence was legally sufficient to entitle the plaintiff to recover, the judgment will be affirmed. Judgment affirmed, with costs.

Md. 1904.
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