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HAZEL McGONEGAL and THE TRUSTEES OF LEEDS and LANSDOWNE FRONT TOWNSHIP SCHOOL AREA, (DEFENDANTS) ... APPELLANTS;

AND

CHARLES GRAY by his next friend, WILLIS EDWIN GRAY and WILLIS EDWIN GRAY in his personal capacity and MILDRED GRAY (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Schools—Liability of teacher and trustees supplying hot food to pupils—Public Authorities Protection—When attempting to light gasoline stove on teacher's instructions pupil injured—Action not commenced within six months—The Public Authorities Protection Act, R.S.O. 1937, c. 135, s. 11—The Public Schools Act, R.S.O. 1937, c. 357, ss. 15, 63, 89 and 103, as amended.

The appellant trustees by virtue of *The Public Schools Act* (Ont.) conducted a public school at which the respondent Charles Gray, a 12-year-old boy, was a pupil and the appellant McGonegal was a teacher. For the purpose of heating soup the boy was instructed by the teacher to light a gasoline stove, the property of the appellant trustees. In attempting to do so he was severely burned. In an action to recover damages for the injuries sustained the trustees at the trial, and the teacher on appeal, pleaded s. 11 of *The Public Authorities Protection Act*, R.S.O. 1937, c. 135, which provides that no action shall be brought against any person for an act done in pursuance or execution or intended execution of any statutory or other public duty in respect of any alleged neglect unless commenced within six months next after the act or neglect complained of. The trial judge held both the teacher and the trustees liable and fixed damages for injuries to the infant Gray at $8,000 and the expenses incurred by his father at $1,208.75; adjudged that the plaintiffs recover against the defendants $9,208.75, and directed that $8,000 of that sum be paid into Court to the credit of the infant.

Held: That the injuries were suffered as a result of the teacher's act of negligence and since the act was committed by her in the course of her employment both appellants were liable unless s. 11 of *The Public Authorities Protection Act* applied.

Held: also, (Rinfret C.J., Kerwin and Estey JJ. dissenting) that s. 11 did not apply.

Per Taschereau, Rand and Cartwright JJ. The act which resulted in the injury was not one in the course of exercising any direct public purpose for the children: it had not yet reached any public aspect: it was an authorized act in a private aspect and therefore the Act did not apply. *Griffiths* v. *Smith* [1941] A.C. 170; *Bradford* v. *Myers* [1916] A.C. 242 and *Clarke* v. *St. Helen's Borough Council* 85 L.J.K.B. 17, referred to.

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand, Estey, Locke and Cartwright JJ.

**See footnote p. 298.

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Per: Locke J. The proper construction to be placed on the evidence was that the teacher intended to heat the soup for her own use and not for the children. She therefore was not performing or attempting to perform an act of the nature referred to in s. 11 and the section had no application.

Per: Rinfret C.J. and Kerwin J. (dissenting). While the teacher's illness prompted the attempt to light the stove, the soup was to be used also for some of the pupils, and the use of the stove supplied by the trustees for the purpose of heating soup furnished by them to be partaken of by pupils as well as the teacher brought the case within the decision in *Griffiths* v. *Smith, supra,* and the trustees, therefore fell within the protection of s. 11 of the Act. As by s. 103 of *The Public School Act,* the teacher's duty was not only to teach but also to give assiduous attention to the health and comfort of the pupils, she was a public authority and entitled to the same protection.

Per: Estey J. (dissenting). In the circumstances it could not be said that what was done by the trustees and teacher, acting in their respective capacities and supported by a grant from the government, was other than "an act done in pursuance or execution or intended execution of any statutory or other public duty or authority" with the meaning of s. 11 of the Act. The case upon its facts appeared to be an even stronger case in favour of the trustees and the teacher than *Griffiths* v. *Smith, supra,* and distinguishable from *Bradford Corporation* v. *Myers, supra.*

Held: further, that since the action was commenced before the 1949 amendment to the Supreme Court Act, R.S.C. 1927, c. 35, came into force, under s. 39 no appeal lay to this Court in respect of the sum of $1,208.75, leave not having been obtained from the Court of Appeal under s. 41. *Dorzek* v. *McColl Frontenac Oil Co.* [1933], S.C.R. 197.

APPEAL from the judgment of the Court of Appeal for Ontario (1) dismissing the defendants' appeal (Hogg J. dissenting as to the liability of the defendant trustees) from the judgment of Wells J. (2) in favour of the respondents.

G. W. Mason, K.C. and *C. M. Smith, K.C.* for the appellant trustees. The negligence alleged against the trustees in the Statement of Claim was that they had failed to see that the gasoline stove was kept in proper working order. There was no other allegation of negligence against them and there was no other allegation of negligence against the teacher. The case, therefore, upon which issue was joined was that made by para. 16 of the Statement of Claim, that "the burns to the infant plaintiff were caused as the result of the negligence, carelessness and breach of duty of the defendant trustees *not seeing to it that the said gasoline stove was kept in proper working order having*

(1) [1950] O.R. 512; 4 D.L.R. 395. (2) [1949] O.R. 749; 4 D.L.R. 344.

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regard to the use that was to be made of the said stove as part of the said equipment by the said trustees for the school area."

The negligence complained of must be the *causa causans* of the injuries sustained, and it is clear from all the evidence that the negligence alleged, that is to say, the condition of the stove was not the cause of the accident. There was also the admission of counsel for the plaintiff when he said. "The negligence was not in the operation of the stove. It was letting an 11-year-old boy fool with matches and gasoline." It is to be noted that no such negligence was contemplated when the writ was issued, nor is there any allegation of such negligence in the original pleadings, or in the pleadings as amended, and it is submitted that the defendants were only called upon at the trial to meet the negligence charged in the Statement of Claim. This was recognized by the trial judge and pointed out by him to the Plaintiff's counsel.

The Court should not of its own motion set up a cause of action not disclosed by the pleadings. *Andanoff* v. *Smith and Nadeff* (1). An amendment to set up such a case at this time would be barred by the limitations section of *The Public Authorities Act*. *Mabro* v. *Eagle Star* (2); *Schubert* v. *Sterlings Trust* (3).

It would also mean that the plaintiff must rely on the maxim *Respondeat Superior,* as now applied. This rule does not apply in the wrongful or negligent acts of those engaged in the public service. 7 C.E.D. 233; *Whitfield* v. *Le Despencer* (4); and inasmuch as Public School Trustees are public or quasi-municipal in character, it is the generally accepted rule that they are not liable for injuries resulting from negligence or failure to keep equipment in a proper manner, unless made so by statute. Corpus Juris Vol. 56, pp. 367, 528, 531. In any event the doctrine would only apply if the teacher was acting within her authority, or in the course of her employment. *Griggs* v. *Southside Hotel Ltd.* (5), and the action would have to be brought within six months. *The Public Authorities Protection Act* c. 132, s. 11. The duties of school trustees are

(1) [1935] O.W.N. 415 at 417.
(2) [1932] 1 K.B. 485 at 487.
(3) [1938] O.W.N. 133.
(4) 2 Cowp. 754.
(5) [1947] O.R. 674.

set out in *The Public School Act*, c. 357, s. 89. In the absence of a breach of their statutory duty they should not be held liable. *Scoffield* v. *North York* (1); *Koch* v. *Stone Farm School* (2); *Langham* v. *Governors of Wellingborough School and Fryer* (3); *Urquhart* v. *Ashburton* (4).

In *Davis* v. *London County Council* (5), it was held that the education authority was not liable for the negligence, if any, of persons performing operations on school children, provided they engaged competent professional persons to operate. See also *Wray* v. *Essex County Council* (6).

It has frequently been held that trustees are not liable if a reasonable standard of precaution is maintained. In the case at bar the trustees had done all the Public School Act required of them and therefore should not be held responsible for something which could not reasonably be foreseen. *Chilvers* v. *London County Council* (7); *Jones* v. *London County Council* (8).

There is a further and fundamental reason why the action cannot succeed. It was not commenced within the time provided by s. 1 of *The Public Authorities Protection Act*. *Levine* v. *Board of Education City of Toronto* (9); *Griffiths* v. *Smith* (10); *Greenwood* v. *Atherton* (11).

The case of *Bradford Corporation* v. *Myers* (12) applied by Wells J. is distinguished in *Griffiths* v. *Smith*, supra. There the House of Lords held that The Public Authorities Protection Act did not apply because the act of contracting to see the coke to the purchaser, and of supplying it was purely voluntary. The sale was effected by a private bargain, with no correlative public duty and the corporation was unprotected.

A. W. S. Greer, K.C. and *C. L. Dubbin, K.C.* for the appellant, McGonegal. The Court of Appeal erred in holding that the action against Hazel McGonegal was not barred by the provisions of s. 11 of *The Public Authorities Protection Act*. In giving instructions for the preparation of hot refreshments for the pupils she was doing an act in

(1) [1942] O.W.N. 458.
(2) [1940] 2 D.L.R. 603.
(3) [1932] 101 L.J.K.B. 513 at 515.
(4) [1921] N.Z.L.R. 164.
(5) (1941) 30 T.L.R. 275.
(6) [1936] 3 All E.R. 97.
(7) (1916) 80 J.P. 246.
(8) (1932) 96 J.P. 371, C.A.
(9) [1933] O.W.N. 152.
(10) [1941] 1 All E.R. 66.
(11) [1939] 1 K.B. 388 at 392.
(12) [1916] 1 A.C. 242.

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pursuance or execution or intended execution of a statutory duty and that being so, afforded the full protection of s. 11. It must be remembered that the section does not take away from the plaintiffs any causes for action for any alleged wrong but prevents the action being instituted, if not commenced within six months after the injury is alleged to have occurred. The Court of Appeal erred in holding that because no statute imposed a duty on the teacher to supply hot meals that this section was not applicable. It is submitted that a proper test is where the act done by her was one permitted to be done and incidental to and forming part of her general duties and that if this were applied the section would be applicable. *Nelson* v. *Cookson* (1); *Greenwell* v. *Howell* (2); *Freeborn* v. *Leeming* (3); *Venn* v. *Tedesco* (4); *Levine* v. *Board of Education of Toronto* (5).

In the alternative, the trial judge erred in holding the defendant teacher responsible on the allegation of negligence which was not pleaded against her. In the further alternative, the trial judge erred in failing to find that the infant plaintiff was guilty of contributory negligence. The fact that he was carrying out the instructions of his teacher does not relieve him of any responsibility for his own negligence. It must be remembered that he was a bright and intelligent boy and had been warned by his father not to touch the stove. *Yachuk* v. *Blais* (6).

R. A. Hughes, K.C. and *J. M. Kelly* for the respondents. The first question in issue is whether the defendant McGonegal in instructing the infant plaintiff to light the gasoline stove in the circumstances was acting "in pursuance of execution or intended execution of any statutory or other public duty or authority . . ." so as to bring her negligent conduct within the protection of *The Public Authorities Protection Act*. It is submitted that although she was acting within the course of her employment, she was not acting in pursuance or execution or intended execution of any statutory or other public duty or authority.

(1) [1939] 4 All E.R. 30.
(2) [1900] 1 Q.B. 535 at 539.
(3) [1926] 1 K.B. 160 at 165, 168.
(4) [1926] 2 K.B. 227 at 229.
(5) [1933] O.W.N. 152; 238.
(6) [1949] A.C. 386.

It was admitted in the pleadings of both defendants that she was the servant of the defendant trustees and it is clear from the evidence that they authorized her to serve hot food at noon hour during the winter months and would not disapprove of her doing so after the winter months even though she was using up supplies. It was left to her discretion and there was no obligation on her to serve hot food at the school at any time. In asking the infant plaintiff to light the gasoline stove for the purpose of heating some hot soup she was therefore clearly acting within the course of her employment, but not in the performance of some public duty or obligation or public authority so as to bring her conduct within the protection of the Public Authorities Protection Act. A servant of a public authority although acting in an official capacity under a power of the public authority, and acting within the course of employment is not protected by the Act if the alleged neglect or default occurs in the doing or not doing of some act voluntarily undertaken beyond the obligation, duty or authority imposed upon the public authority by statute. *Clarke* v. *St. Helen's Borough Council* (1); *Lyles* v. *Southend-on-Sea Corp.* (2).

The defendant trustees were under no duty under the Public Schools Act, R.S.O. 1937, or any other statute known to them, to have hot food provided for the pupils. Can it be said that the defendant McGonegal in preparing to provide the hot soup was acting in pursuance or execution of any statutory or other public duty or authority? This duty in so far as the teacher is concerned is set out in s. 103 of the Public Schools Act. The trial judge found that on any fair reading of the section it could not be said that the serving of hot foods to the pupils was part of the statutory duties of a school teacher and the Court of Appeal were in agreement. The finding was that it was not at any time part of the statutory duty. The evidence goes much further in establishing that on the day in question the defendant McGonegal was doing so for her own purposes, because she was ill and to deplete the supplies on hand. In so doing, although she was acting within the course of her employment, she could not be fairly said to be doing so in order to carry out her obligations as a

(1) [1916] 85 L.J.K.B. 17 at 21. (2) [1905] 2 K.B. 1 at 13.

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teacher under any statutory obligation to her pupils. *Bradford Corporation* v. *Myers* (1), approved in *Griffiths* v. *Smith* (2).

The supplying of hot food to the children was a purely voluntary act on both the part of the defendant trustees and the defendant McGonegal, and was something that went completely outside of the duties, in so far as the defendant trustees were concerned, of carrying on the school in conformance with the statute and, in so far as the defendant teacher was concerned, of carrying on her duties as a teacher in the school. It was not an act done as something incidental to, or part of, the process of carrying on the duties and authority under the Public Schools Act as a teacher. It was something that lay outside of that altogether. *McDowall* v. *Great Western Ry. Co.* (3); *Corby* v. *Foster* (4); *Yachuk* v. *Blais* (5); *Kelly* v. *Barton* (6); *Williams* v. *Eady* (7).

As to the second question in issue, whether or not the plaintiffs are entitled to rely upon the doctrine of *respondeat superior* in charging the defendant trustees with the negligence of the defendant McGonegal, both defendants admitted in the pleadings that she was the servant of the defendant trustees. The only question which arises in this regard is whether or not the plaintiffs are entitled to rely upon the doctrine in charging the trustees with her negligence due to the fact that the plaintiffs charged direct negligence against the trustees in para. 16 of the Statement of Claim. Hogg J. in his reasons for judgment states that the only foundation of any negligence on the part of the defendant trustees was that alleged in the Statement of Claim as direct negligence for their failure to properly maintain the equipment of the school and further that the plaintiffs did not at any time base their claim on the simple ground of the relationship between the trustees and the teacher of master and servant. It is submitted this finding is not justified, having in mind para. 6 of the Statement of Claim where it is alleged the defendant McGonegal was acting in the course of her employment.

(1) [1916] 1 A.C. 242.
(2) [1941] A.C. 170.
(3) [1903] 2 K.B. 331.
(4) (1913) 290 L.R. 83.
(5) [1949] A.C. 386.
(6) 26 O.R. 608.
(7) (1893) 10 L.T.R. 41.

The only reasonable inference to be attached to this material fact, as pleaded, was that if she were negligent while acting in the course of her employment then her employer would of necessity by conclusion of law be charged with that negligence. If some further allegation is necessary in order to charge the trustees with her negligence committed within the course of her employment, it is submitted that leave should be given to amend the Statement of Claim. Leave was given at the trial to the trustees to plead The Public Authorities Protection Act, and in the Court of Appeal, to the defendant McGonegal. The application of this statute is the prime issue in this appeal. *Zwicker* v. *Feindel* (1); *Steward* v. *North Metropolitan Tramways* (2).

Mason, K.C. replied.

The judgment of the Chief Justice and Kerwin J. was delivered by:

KERWIN J. (dissenting in part):—The appellants, The Trustees of Leeds and Lansdowne Front Township School Area conduct a public school in the Province of Ontario. The respondent, Charles Gray, then twelve years of age, was a pupil in the school on June 12, 1947, at which time the teacher was the appellant Mrs. Hazel McGonegal. Charles was burned severely when attempting to light a gasoline stove and there is now no question that the injuries were suffered as a result of the teacher's negligence.

Mr. Justice Hogg considered that the only claim of negligence against the trustees was that contained in paragraph 16 of the statement of claim:

> 16. The plaintiffs allege that the burns to the infant plaintiff were caused as the result of the negligence, carelessness and breach of duty of the defendant trustees not seeing to it that the said gasoline stove was kept in proper working order having regard to the use that was to be made of the said stove as part of the said equipment maintained by the said trustees for the said school area.

However, in paragraph 6, it is alleged that the teacher "acting in the course of her employment" instructed the infant to light the stove, paragraph 16 was not referred to on the argument before this Court and, notwithstanding what appears in the factum filed on behalf of the trustees,

(1) 29 Can. S.C.R. 516. (2) (1886) 16 Q.B.D. 556.

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counsel for all parties argued the case on the footing that if the doctrine of *respondeat superior* applied, the trustees were responsible for the teacher's negligence.

In any event, even if not formally admitted, there is really no doubt that both appellants are liable for the damages awarded by the trial judge unless absolved by s. 11 of *The Public Authorities Protection Act*, R.S.O. 1937, c. 135, which reads as follows:—

> 11. No action, prosecution or other proceeding shall lie or be instituted against any person for an act done in pursuance or execution or intended execution of any statutory or other public duty or authority, or in respect of any alleged neglect or default in the execution of any such duty or authority, unless it is commenced within six months next after the act, neglect or default complained of, or, in case of continuance of injury or damage, within six months after the ceasing thereof.

This action by Charles' father as next friend of the infant, for damages for the latter's injuries, and on his own behalf for expenses, was not commenced within six months after June 12, 1947.

In *Levine* v. *Board of Education of Toronto* (1), Sedgewick J. dismissed an action for damages alleged to have been sustained at a public school athletic meet, conducted by the Board, at Exhibition Park in Toronto. He considered that if the Board was of opinion that in the interests of the children games should be arranged, it would be a duty of the Board to do so but that, in any event, the games were authorized and, therefore, the Board was entitled to the protection of the Act. An appeal from that decision was dismissed by the Court of Appeal (2), but without any opinion being expressed as to applicability of the Act.

The Ontario section is in substance the same as s. 1 of the British Public Authorities Protection Act, 1893, which has been considered in numerous cases in England, Scotland and Ireland, all of which, to the end of January, 1934, will be found referred to in The Public Authorities Protection Act, 1893, by Mr. J. J. Sommerville. The House of Lords noticed some of them in *Bradford Corporation* v. *Myers* (3), where it was finally decided that the word "person" must be limited so as to apply only to public authorities. There, the Corporation had power to

(1) [1933] O.W.N. 152. (2) [1933] O.W.N. 238.
(3) [1916] 1 A.C. 242.

carry on a gas undertaking and was bound to supply gas to the inhabitants of the district. In addition, it had statutory authority (which it was not bound to exercise) to sell the coke produced in the manufacture of the gas. It did so and a cart load of coke, in the course of being delivered to a particular purchaser was negligently shot through the window. It was held that the section did not apply because the act of contracting to sell the coke to the purchaser and of supplying it was purely voluntary.

In *Griffiths* v. *Smith* (1), Viscount Simon states that in the Court of Appeal the Master of the Rolls had explained the *Bradford* decision by saying:

> What they were doing in supplying coke was not something incidental to, or part of, the process of carrying on the gas undertaking and supplying gas compulsorily to the inhabitants. It was something that lay outside that altogether.

In the *Griffiths* case it was held that the managers of an elementary school were acting in pursuance of a public duty or authority when they invited the parents of the pupils to attend an exhibition of work held in one of the school buildings. While attending the exhibition, a parent was injured by the collapse of a floor, which was undoubtedly dangerous. Although the managers had acted voluntarily in authorizing the invitations to the school, in the sense that the school could have been carried on without the exhibition, it was held that the true test was: Were the managers, in authorizing the invitations, exercising their function of managing the school? While they had a discretion to authorize it or not, they did in fact approve it and did so in the course of carrying out their statutory powers of managing the school, and there was no ground for saying that the invitations were issued for some extraneous purpose unconnected with the management of the school.

Applying these decisions to the circumstances of the present case, what do we find? The trustees were authorized by *The Public Schools Act,* R.S.O. 1937, as amended, and particularly s. 89, to see that the school was conducted according to *The Public Schools Act* and the regulations. There can be no doubt they are a public authority. For several years cans of soup and cocoa were supplied to the

(1) [1941] A.C. 170.

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school and paid for by the trustees or their predecessors. The trustees and their predecessors had authorized the holder of the teacher's position, from time to time, to serve hot soup and cocoa although no formal resolution to that effect could be found. The Ontario Department of Education repaid to the trustees fifty per cent of the cost of the soup and cocoa. The gasoline stove had been in the possession of the trustees and their predecessors and was listed as part of the school equipment.

The practice was to commence heating the soup or cocoa during the morning recess so that it would be ready at noon. While this occurred generally in the cold weather, the seasons in which it would be done was left to the teacher's discretion, particularly bearing in mind that there might be a small stock on hand as the school term was drawing to a close. On the day in question, June 12th, the teacher did not feel well. She asked the pupils if they wanted soup but no one held up his hand. However, when she said that she was going to have some, and it turned out to be celery soup, then four or five agreed to take it. Therefore, while it was the teacher's illness that prompted the attempt to light the stove, the soup was to be used also for some of the pupils. Although there was no obligation on the part of the trustees to furnish refreshments, I am of opinion that in doing so, and in taking steps to heat them, the trustees through the teacher, within the principle of the *Griffiths* case, were exercising their function of conducting the school.

It has been pointed out in the *Myers* case and the *Griffiths* case that the determination of whether a public authority comes under the Act depends upon an examination of all the circumstances. This is exemplified in the different views taken in *Clarke* v. *St. Helen's Borough Council* (1), and *Edwards* v. *Metropolitan Water Board* (2). While it is unnecessary to decide what would have been the result if the teacher had been the only one who was going to have the soup on June 12th, the use of the stove supplied by the trustees for the purpose of heating soup furnished by them, to be partaken of by pupils as well as the teacher, brings the case, in my view, within the decision in *Griffiths,* and the trustees, therefore, fall

(1) [1916] 85 L.J.K.B. 17. (2) [1922] 1 K.B. 291.

within the protection of s. 11 of the Public Authorities Protection Act. As by s. 103 of the Public Schools Act, the teacher's duty was not only to teach (para. (*a*)) but also to give assiduous attention to the health and comfort of the pupils (para. (*g*)), Mrs. McGonegal is a public authority and is entitled to the same protection.

The appeals should therefore be allowed but only in part. In his reasons for judgment, the trial judge fixed the damages for the injuries to the infant Charles Gray at $8,000 and the expenses incurred by the father Willis Edwin Gray at $1,208.75, but the formal judgment adjudged that the plaintiffs Charles Gray and Willis Edwin Gray recover against the defendants $9,208.75 for damages and directed that $8,000 of that sum be paid into Court by the appellants to the credit of the infant. The action was commenced before the 1949 amendment to the *Supreme Court Act* came into force and, under s. 39 of R.S.C. 1927, c. 35, no appeal lies to this Court in respect of the sum of $1,208.75 since no leave was obtained from the Court of Appeal under s. 41. A similar situation arose in *Dorzek* v. *McColl Frontenac Oil Co.* (1). There, by one judgment an infant plaintiff recovered from the defendant $1,875, which was ordered to be paid into Court; his father recovered $284.25 and his mother $46.87. The mere fact that in the present case there is one judgment for the total of the two sums with a direction that the larger be paid into Court to the credit of the infant does not distinguish it from the case cited.

The father is therefore entitled in his personal capacity to retain his judgment against both appellants for $1,208.75 and costs of the action less any he may have been paid, or is entitled to, under an order of the trial judge whereby, as a term of permitting the trustees to plead *The Public Authorities Protection Act,* they were ordered to pay forthwith the respondents' costs of the action up to and including the preparation for trial. In view of the result and because of the fact that the appellant Mrs. McGonegal pleaded the statute only as a result of leave given her in the Court of Appeal, the respondents are entitled to their costs in that Court as against her. Under the circumstances

(1) [1933] S.C.R. 197.

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there should be no costs in the Court of Appeal to or against the trustees. The appellants are entitled to their costs in this Court if demanded.

The judgment of Taschereau, Rand and Cartwright, JJ. was delivered by:—

RAND J.:—The finding of negligence made by Wells J. at trial was concurred in by the Court of Appeal and was not seriously challenged before us. There remains the question of the applicability of *The Public Authorities Protection Act*, c. 135, R.S.O. 1937.

The evidence is clear both from the testimony of two pupils called by the defence as well as that of the infant plaintiff and the defendant teacher herself, that the latter, who that morning was ill, asked "who wanted soup for dinner and nobody wanted it but herself." Nothing that might have happened afterwards can affect that fact, notwithstanding that several of the children announced they would have some of the soup too "if she were going to". The request or the direction thereupon given the young boy was for an act up to that moment for the purpose of the teacher and of the teacher only.

No regulation of the Department of Education nor any resolution of the School Board authorizing the giving of a course of warm food to the children was shown, and the authority rests upon oral instructions to the teacher from the trustees of the Board. But admittedly the Department has approved the practice over many years and has paid one-half of the expenses incurred. The predecessor Board purchased the stove and the gasoline can, and thereafter both that Board and its successor, the appellant, have borne the balance of the cost. It appears to be a general practice throughout the province, and as it concerns the health and comfort of the students, it would seem to be within the authority of the department, the board and the teachers to follow. At any rate, I would not presume that the moneys of the province have been improperly applied; and both defendants take the position that the practice was authorized by the school law. In the view I take of the case, however, I do not find that fact to be necessary to its determination.

That the teacher should be able to make use of the stove for the purpose of heating food for herself has likewise been assumed; and in the circumstances before us, I should say it was an incident of her employment: *Smith* v. *Martin and Kingston Corporation* (1).

The question, then, is whether the act as I have described it was "done in pursuance or execution or intended execution of any statutory or other public duty or authority" as provided by s. 11 of the statute.

Although the prior statutory background is somewhat different, the provisions of this section are substantially the same as those of the first paragraph of s. 1 of 56-57 Vict. c. 61 of the British Parliament, and the cases which have been decided by the English courts throw considerable light on the interpretation of this general language. Any difference based on the previous law would, I think, indicate a more restrictive interpretation of the Canadian Act. The question came before the House of Lords in *Bradford Corporation* v. *Myers* (2). In that case, a municipal corporation was authorized by statute to carry on the undertaking of a gas company. It was bound to sell gas to the inhabitants of the district and was empowered to sell the coke produced in the manufacture of the gas. In delivering a load of coke, there was negligence which broke a shop window and caused other damage, and in an action brought against the corporation, the Act was pleaded. It was held that the delivery of coke was not in the exercise of a public authority and that the Act afforded no defence. The decision drew the line of the public service in the supplying of gas to exclude the disposal of the coke and the latter was treated as having the aspect of a private as distinguished from a public act. It is pointed out by Buckmaster L.C. that the language of the section implies that some authorized acts of public authorities are not "public", although I do not take that to mean that under no circumstances could the entire authorized activities of a public authority be wholly of a public nature. Viscount Haldane used these words:—

> My Lords, in the case of such a restriction of ordinary rights, I think that the words used must not have more read into them than they express or of necessity imply, and I do not think that they can

(1) [1911] 2 K.B. 775.

(1) [1916] 1 A.C. 242.

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be properly extended so as to embrace an act which is not done in direct pursuance of the provisions of the statute or in the direct execution of the duty or authority.

In *Clarke* v. *St. Helen's Borough Council* (1), the facts were these. The defendants were constituted by statute the water authority for their district. They owned a motor car used for general purposes and particularly for taking about officials employed by them. The car, driven by the chauffeur and carrying the water engineer and a treasury clerk, was taken to visit three pumping stations to enable the engineer to examine the works and the clerk to pay the wages of the persons there employed. After these duties had been finished and while the car was being driven back to the garage, the engineer having left but the clerk still being in it, the driver negligently injured the plaintiff. It was held that the act of returning was not one happening in the course of executing a public authority, and that the statute did not apply: it was an internal act in the exercise of authority conferred with an incidental aspect. Swinfen Eady L.J. at p. 22 says:—

> Such acts as that of this chauffeur in driving this car are merely incidental to the execution of the defendant's statutory duty. They were merely incidental or ancillary acts. It is said that it is difficult to draw the line. In many cases, no doubt, it is; but I see no difficulty here.

Phillimore L.J. put it thus:—

> A man engaged merely to drive a car where he is told to drive it, is not necessarily engaged in the execution of any statutory duty.

Pickford L.J.:—

> He was not performing, as the servant of the corporation, nor was the corporation performing through him, an act in execution of any statutory or public duty, but was simply performing an act for the convenience of the corporation.

In *Edwards* v. *Metropolitan Water Board* (2), the facts were somewhat similar. There the Water Board used lorries driven by steam or petrol to take stores to depots and to bring back receptacles emptied of their oil or other materials. This distribution of stores was necessary for the expeditious repair of the works generally. It was held that injury negligently inflicted in the course of a return journey of the lorry carrying empty casks and drums was an act in the execution of a public duty, and that the

(1) [1916] 85 L.J.K.B. 17. (2) [1922] 1 K.B. 291.

statute applied. The Court of Appeal, consisting of Bankes and Scrutton, L.JJ., Younger L.J. dissenting, took the view that the outward and the return journeys of the lorry were all one and that it was taken directly pursuant to the statute. Younger L.J., on the other hand, after quoting Lord Buckmaster in the *Myers'* case, that the statute "was not intended to cover every act which a local authority had power to perform" viewed the operation of the lorry as the fulfilment of a private contract rather than an act of public obligation or authority. On p. 309 he says:—

> Now if the accident had taken place on the outward journey, I should I think have held, although even then the case would in my judgment have been very near the line, that the respondents were entitled to the protection of the statute. But the second question is much more difficult, (i.e. the return journey)

and held the respondents not entitled to protection.

The question again came under the review of the House of Lords in *Griffiths* v. *Smith* (1). In that case, the managers of a non-provided public elementary school, a statutory body, issued invitations to the plaintiff to attend an exhibition on the school premises of work done by the pupils, one of whom was the plaintiff's son. While the display was in progress the floor of the room collapsed through negligence in maintaining it in proper condition. The House found the statutory body to be a public authority within the statute, that the display was in the course of its authority, that the default was in the course of exercising its public duty, and that the statute was a good defence. In his speech, Viscount Maugham refers to *Edwards* v. *Metropolitan Water Board, supra,* with apparent approval, and Lord Porter similarly mentions *Clarke* v. *St. Helen's Borough, supra.*

I have given the facts of these cases in some detail to indicate the strict application which the courts have from the outset made of this drastic enactment. The distinction made in *Myers* which confined the scope of the public service to those acts in direct performance of it, as contrasted with those of a private interest although incidental to the undertaking and authority as a whole, and in *Clarke* between primary and direct public acts and those which are subordinate or incidental to them, indicates the line of distinction for the purposes here.

(1) [1941] 170.

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The serving of these meals in a public aspect is confined to the pupils, even though such a private concern of the teacher's may be said to have a remote interest for school administration generally. Whether she could properly partake of the supplies furnished by the School Board does not appear; but it is undoubted that this new measure was introduced not as a benefit to her but for the children. But the act which resulted in the injury was not one in the course of executing any direct public purpose for the children: it had not yet reached any public aspect: it was a private act, under a private authority. If it had been stopped before the third match was lighted, and nothing more done, no criticism could have been raised against the teacher, because the pupils had already said "no" to her question. If soup for some of the pupils had been put on the stove to warm, or they had shared in it, that subsequent action would be distinguishable; and if, for instance, in the course of heating it or of carrying it from the stove, a child had been scalded, then, doubtless, the contention would be much stronger that that act was in the execution of a public authority.

For these reasons the appeal must be dismissed with costs.

ESTEY, J. (dissenting in part):—Charles Gray, a pupil twelve years of age at the Legge School, suffered a serious injury on June 12, 1947, when, at the request of his teacher, he attempted, during the morning recess, to light a gasoline stove. In this action his father, Willis Edwin Gray, as his next friend, recovered at trial a judgment for damages caused by said injuries to Charles Gray in the sum of $8,000, and for his personal expenses $1,208.75—a total judgment of $9,208.75 against both appellants, the teacher, Hazel McGonegal, and the trustees of the school. This judgment was affirmed on appeal. Mr. Justice Hogg, dissenting, was of the opinion that the appellant trustees, but not the appellant teacher, should succeed by virtue of s. 11 of *The Public Authorities Protection Act* (R.S.O. 1937, c. 135). Both appellants appeal to this Court.

The trustees, encouraged and assisted by a grant from the Provincial Government, provided equipment and supplies necessary to prepare hot soup and cocoa as a supplement to the pupils' noonday lunches. In 1946 the teacher commenced to supply them about December 1. With the advent of spring they were not provided every day, though it would appear from the evidence that the practice was more or less regularly followed up to June 12, the day in question.

The respondent, Willis Edwin Gray, was the janitor, but his son, Charles Gray, apparently did much of the daily work and was always asked by the teacher to prepare the fire at recess for the heating of the soup and cocoa. As to what happened on June 12, the teacher deposed:

> It was recess and the children were all out, and as I repeat, it was a chilly morning and I was ill. I had suggested soup and as it has been said, no hands were raised, but when I said that I would have some myself at least five children said we will have some too, if it is going to be soup. They thought it was going to be cocoa or vegetable soup, and it happened to be celery soup. Two children said they would like some, and another child said, "If you are going to, I will too", and four or five said they would care for soup when they saw the soup.

This is the only reference the teacher makes to her illness. She does not state that she mentioned it to the pupils and certainly no pupil called as a witness made reference to it. The pupils, so far as they deposed to the foregoing, corroborate the teacher and not one of them contradicts her upon this, though at least some of them do upon other parts of her evidence. The learned trial judge stated:

> On this occasion, it being late in the school year, the defendant, Hazel McGonegal, decided to use up her supplies of soup by heating them and distributing them among her pupils at lunch.

Whether motivated by a desire to exhaust the supplies, as the end of the term approached and warmer weather prevailed, or whether it was her illness that prompted her to propose the soup does not determine the issue. We are concerned with her conduct and, upon the evidence here adduced, it would appear that she followed her usual routine, with no suggestion that a portion for but one should be prepared, but rather that all of the pupils who desired might enjoy a share. It would, therefore, appear that the evidence supports the basis accepted by the learned

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trial judge that what the teacher was doing was within the scope of her employment and in this the learned judges in the Court of Appeal were of the same opinion. Bowlby J.A. states:

> I am in entire accord with the conclusion of the learned trial Judge and am also of the opinion that the negligence of the defendant McGonegal fell within the scope of her employment and that the defendant trustees are liable therefor.

This issue was raised upon the pleadings and I am in agreement with the conclusions of the learned judges that at all times relevant hereto the teacher was acting within the scope of her employment.

The learned trial judge found that the teacher was negligent in that she failed to properly supervise the using of the gasoline stove, more particularly when she ought to have observed the difficulty Charles Gray was experiencing in his endeavours to light it. I am in agreement with the learned judges in the Court of Appeal that the evidence fully supports the finding of the learned trial judge both that she was negligent and that her negligence caused the injury suffered by Charles Gray.

The appellants, however, claim that this action was not brought within a period of six months after the injury suffered by Charles Gray. This action was not commenced until May, 1948, and, therefore, not until after a period of approximately ten months had elapsed since Charles Gray suffered his injury. Their contention is that under s. 11 of the *Public Authorities Protection Act* they are protected from any claim arising out of this injury. S. 11 reads as follows:—(As to which see page 282).

The trustees are a statutory corporate body under s. 63 of the *Public Schools Act* (R.S.O. 1937, c. 357) and their position and duties as set forth in that act constitute them a public authority. The appellant teacher not only assumes public duties by virtue of her employment by the trustees, but also accepts the duties and responsibility imposed upon her by the *Public Schools Act.* In the circumstances it would seem that she also occupies a position such as to constitute her a public authority.

The foregoing s. 11 provides that "No action * * * shall lie or be instituted against any person * * * *" This same phrase "any person" is contained in the act in Great

Britain (Public Authorities Protection Act 1893, 56 & 57 Vict., c. 61, s. 1). In fact, s. 11 corresponds to, and is, in all material respects relevant hereto, to the same effect as s. 1 of the British Act. In referring to the latter, Lord Buckmaster pointed out that " 'any person' must be limited so as to apply only to public authorities." *Bradford Corporation* v. *Myers* (1). Viscount Simon, referring to this statement, said: "On this point the construction of the Act should be regarded as finally settled." *Griffiths* v. *Smith* (2). However this phrase may be finally construed in Canada, I think both the trustees and the teacher are included within the phrase "any person" within the meaning of s. 11.

Throughout the Act, various duties are imposed and powers provided in general terms. It was evidently the intention of the Legislature, in regard to many matters, that the trustees should exercise their discretion, not only as to what ought to be done, but also as to how that which was decided upon might be carried out. Though the regulations were not filed, there is, throughout, no suggestion that the trustees or teacher were exceeding their respective duties. In fact, the contention of the respondents is that the trustees and the teacher were acting in the discharge of their public duties, but, in providing the soup and hot cocoa, they were acting voluntarily rather than under any statutory obligation, their contention being that the provisions of *The Public Authorities Protection Act* apply only where there is a specific duty or obligation to be discharged by a person or body exercising a "statutory or other public duty or authority."

It is not essential that the duty or obligation be specifically stated. The trustees, in the discharge of their statuory or public duty of maintaining and conducting the school, had been encouraged by the Department of Education to accept the Government grant and to provide for the teacher the equipment and supplies. In all this they were exercising their discretion. They were not obligated to do so, but, in so far as they did, they were acting within the discharge of their statutory and public duty in relation to that school. In these circumstances it cannot be said that what was done by the trustees and

(1) [1916] 1 A.C. 242 at 247. (2) [1941] A.C. 170 at 177.

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teacher, acting in their respective capacities and supported by a grant from the Government, was other than "an act done in pursuance or execution or intended execution of any statutory or other public duty or authority," within the meaning of s. 11 of *The Public Authorities Protection Act*.

In *Greenwood* v. *Atherton* (1), a child aged 5, attending a school, was injured in the playground during recreation period. As a consequence, an action was brought against the managers and the teachers, but commenced more than six months after the injury was suffered. It was held that the provisions of the Public Authorities Protection Act were applicable and the action was accordingly dismissed. Lord Goddard, at p. 392, stated:

> These foundation managers are acting in pursuance of a public duty. It seems to me really quite unarguable to say that they are not a public authority and not acting in pursuance of a statutory duty, and, although it may be they could not be compelled to keep the school in existence, so long as they are in receipt of a grant from public funds I do not see how it can be said they are not public authorities, and for that reason I agree that this appeal must fail.

In *Griffiths* v. *Smith, supra,* the plaintiff, mother of a pupil attending the school, was among those invited by the headmaster, with the authority of the managers, to attend, upon the school premises in the evening and, therefore, after school hours, an exhibition of work done by the pupils. While in attendance she suffered an injury due to the negligence of the managers. She did not however, commence her action until long after the period permitted within the meaning of s. 1 of the Public Authorities Protection Act and, therefore, the managers claimed the benefit of the provisions of that section. It was held that they were a public authority and that, notwithstanding there was no specific authorization of such exhibitions in any relative statute, in authorizing the invitations they were exercising their functions of managing the school. It was, therefore, held that they were entitled to the protection of the provisions of the act. In the presentation of the case it was contended that the exhibition was a voluntary

(1) [1939] 1 K.B. 388.

undertaking, because not specifically authorized, and this was dealt with by their Lordships. Viscount Simon stated at p. 179:

> I entirely agree with this view, which has prevailed in both courts below. It would be within the discretion of the managers to decide whether they would approve such a display, or whether they would not.

Viscount Maugham described the finding of the trial judge that the exhibition was "for the purposes of a public elementary school" as a "crucial finding of fact," which had been concurred in by the Court of Appeal. At p. 185 he stated:

> * * * it is not essential that a public authority seeking to rely on the Act of 1893 must show that the particular act or default in question was done or committed in discharge or attempted discharge of a positive duty imposed on the public authority. It is sufficient to establish that the act was in substance done in the course of exercising for the benefit of the public an authority or a power conferred on the public authority not being a mere incidental power, such as a power to carry on a trade. The words in the section are "public duty or authority," and the latter word must be taken to have its ordinary meaning of legal power or right, and does not imply a positive obligation.

Their Lordships deal with and distinguish *Bradford Corporation* v. *Myers, supra.* Lord Maugham, at p. 183, states:

> This House held that the corporation was not entitled to rely upon the Act of 1893 as a defence to an action for negligence brought by a purchaser of coke from the corporation * * * The ground of the decision as given by Lord Buckmaster was that the negligence was not in performance of "the direct execution of a statute, or in the discharge of public duty, or the exercise of a public authority"; and he added that he meant "a duty owed to all the public alike or an authority exercised impartially with regard to all the public." An incidental power to trade with the public was not, he said, within this qualification.

The case at bar, upon its facts, appears to be an even stronger case in favour of the trustees and the teacher than *Griffiths* v. *Smith, supra,* and is quite distinguishable from *Bradford Corporation* v. *Myers, supra.* The trustees and the teacher, in providing the soup and cocoa, were not carrying on a trade or some effort incidental to, but not in the course of, maintaining and conducting the school. On the contrary they were providing that which had proved to be desirable in the interests of the health and welfare of the pupils and the Government had deemed it proper to assist and, therefore, encourage the trustees to

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supplement the pupils' lunch by the provision of heated cocoa and soup, or such similar preparations as might, from time to time, be decided upon.

The judgment in favour of Willis Edwin Gray for his own personal expenses consequent upon his son's injury amounted to $1,208.75 and that in his favour as next friend $8,000. These are separate and distinct judgments. That in favour of Willis Edwin Gray, in his own right, not exceeding $2,000, cannot be appealed to this Court without leave (*Supreme Court Act*, ss. 36 and 41 as amended 1949, c. 37, s. 2). In *Dorzek* v. *McColl Frontenac Oil Company, Limited* (1), judgments awarded in a similar action were all less than $2,000 although in the aggregate they exceeded that amount. It was held that in these circumstances none of the appellants, apart from leave, could appeal to this Court. In the absence of leave this Court has no jurisdiction to entertain an appeal against the judgment in favour of Willis Edwin Gray and, therefore, the judgment in his favour for $1,208.75 must stand.

The appeal must be allowed with respect to the claim of Willis Edwin Gray, suing in his capacity as next friend for Charles Gray, and the judgment varied accordingly. I agree with the disposition of costs made by my brother Kerwin.

LOCKE J.:—The appellant trustees were under s. 89 of the *Public Schools Act* (c. 357, R.S.O. 1937) charged, *inter alia*, with the duties of providing a teacher for the school in question and seeing that the school was conducted according to the Act and the regulations. The appellant McGonegal was the teacher provided and by s. 103 of the Act one of the duties imposed upon her was to give assiduous attention to the health and comfort of the pupils. It was apparently in accordance with these obligations that at the school in question, during the cold months of the year, cocoa and soup were supplied to the children at midday, part of the expense of this being borne by the school district and part by the Department of Education.

There are concurrent findings of fact as to the negligence of the appellant McGonegal. The appellant trustees as her employers are in law responsible for acts of negligence

(1) [1933] S.C.R. 197.

committed by her in the course of her employment. The question to be determined is whether s. 11 of the *Public Authorities Protection Act* (R.S.O. 1937, c. 135) is a defence to the action which was not commenced within six months of the date of the commission of the act complained of.

If in fact the teacher had intended to prepare a meal for the children, in accordance with the practice that had been followed during the previous winter on the instructions and with the approval of the trustees, I think s. 11 would bar the action. It is not, however, in the view that I take of this matter, necessary to decide the point.

The appellant McGonegal's account as to her reason for directing that the soup be heated is expressed thus:—

> It was recess and the children were all out, and as I repeat, it was a chilly morning and I was ill. I had suggested soup and as it has been said, no hands were raised, but when I said that I would have some myself at least five children said we will have some too, if it is going to be soup. They thought it was going to be cocoa or vegetable soup, and it happened to be celery soup. Two children said they would like some and another child said, "If you are going to, I will too", and four or five said they would care for soup when they saw the soup.

The infant plaintiff apparently did not hear the teacher's inquiry as to whether any of the children wanted to have soup. Joyce Galbraith, a fifteen year old girl, said:

> Mrs. McGonegal asked who all wanted soup for dinner, and nobody wanted it but herself.

and when cross-examined she said that the teacher had asked any of the pupils to put up their hands if they wanted to have soup and that no hands were raised, whereupon the teacher had said that she was going to have it and asked young Gray to light the stove. Later she said that she had opened a can of soup for the teacher and, questioned as to a statement she had made before the trial to some unnamed person regarding the matter, said that she had told her about "Mrs. McGonegal wanting soup and not us." A younger child, Wallace Berry aged nine, said that at recess time the teacher had asked who wanted soup and that nobody had put up their hand. The only other evidence as to the occurrence was that of Robert Groves, a boy of thirteen, who said that the teacher had told Gray she wanted some hot lunches and wanted

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to light the gas stove so that she could get some soup ready. This boy also said that there was some soup left in the cupboard and that he guessed "she (the teacher) was cleaning them up."

Wells J. by whom the action was tried did not deal with this exact point but, after stating that it was customary to serve hot food to the children, particularly during cold weather, said:—

> On this occasion, it being late in the school year, the defendant, Hazel McGonegal, decided to use up her supplies of soup by heating them and distributing them among her pupils at lunch.

In my opinion, the proper construction to be placed upon this evidence is that Mrs. McGonegal intended to heat some soup for her own use and not for the purpose of providing hot food for the children and that it was after the soup proposed to be used was produced and was found to be a kind that they liked that some of the children said they would have some of it. It seems to me to be clear from her evidence that it was the fact that it was a chilly morning and that she was feeling ill that caused her to decide to have the soup heated and that, having decided this, she instructed young Gray to light the stove. In heating food for her own use the teacher was not performing or attempting to perform an act of the nature referred to in s. 11 of the *Public Authorities Protection Act* and, in my opinion, the section has no application.

Of the judgment recovered by the respondent at the trial less than $2,000 was awarded to the father and as to this, for the reasons given by my brother Kerwin, I think we are without jurisdiction to entertain the appeal.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant McGonegal: *A. W. S. Greer.*

Solicitor for the appellant Trustees: *C. M. Smith.*

Solicitor for the respondents: *W. M. Nickle.*

REPORTER'S NOTE: On May 26, 1952, a motion was made for an Order permitting the appellant trustees to submit further argument on the ground that the finding of the majority of the Court would exclude the principle of *respondeat superior* and that the appeal should therefore be allowed. K. G. Morden Q.C. for the motion, R. A. Hughes Q.C. for the

respondents and C. F. Scott for the appellant McGonegal. The motion was granted and a re-hearing ordered upon arguments to be submitted in writing. On June 16, 1952 the following judgment was delivered. "Upon motion a re-argument on certain points having been permitted the members of the Court see no reason to alter their respective opinions. The appellants, The Trustees of Leeds and Lansdowne Front Townships School Area, must pay the respondents the costs of the motion and of the argument. There will be no costs to or against the appellant Hazel McGonegal."