EVA KAUFFMAN (*Plaintiff*) .....APPELLANT; 1959 *Dec. 3, 4

AND

TORONTO TRANSIT COMMISSION (*Defendant*) ..... } RESPONDENT. 1960 Jan. 26

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Passenger injured on escalator—Persons preceding victim scuffling and falling back on victim—Whether duty to provide attendant—Whether negligence in having metal-clad hand rail instead of rubber type—Absence of causality.

The plaintiff, who was going up an escalator of the defendant, was preceded by a man and two youths ahead of the man. The two youths started pushing each other and fell on the man. All three fell on the plaintiff who was knocked down and carried up the escalator. The jury found negligence on the part of the defendant in that it (1) had installed an untested hand rail and (2) had failed to supply supervision. This verdict was set aside by the Court of Appeal on the grounds of absence of causality and of a duty to provide attendants. The plaintiff appealed to this Court.

Held (Cartwright J. *dissenting*): The appeal should be dismissed.

Per Kerwin C.J. and Judson J.: While the obligation upon carriers of persons is to use all due, proper and reasonable care and the care required is of a very high degree, such carriers are not insurers of the safety of these persons. On the first ground of negligence, the defendant has met the required standard of care to carry safely as far as reasonable care and forethought can attain that end. The fact that the hand rail used was round, corrugated and metal-clad, while the type in use in escalators in some other cities was oval in shape and made of black rubber, did not contribute to the accident. That hand rail was installed after a thorough investigation.

As to the second ground of negligence, the defendant did not owe the plaintiff a duty to supply supervision. What occurred was not a danger, usual or unusual, which the defendant knew or ought to have known. Moreover, the jury's finding was not justified by the evidence.

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Per Locke and Martland JJ.: There was no evidence in this case upon which a jury might be asked to find that there was a legal duty to preserve order among the passengers so that other passengers might not be injured. Construing the first finding of the jury as saying that the type of hand rail used was inadequate compared to a rubber type, it was apparent from the evidence that the nature of the grip upon the hand rail had nothing whatever to do with the accident.

Construing the jury's finding of lack of supervision as meaning a failure to have an attendant in the immediate vicinity of the escalator who could instantly stop it, the case of the plaintiff was not assisted. It could not be said that a reasonable person would contemplate injury to persons such as occurred in this case, or that the defendant was under a duty of maintaining an attendant at the foot of the escalator to avoid the consequences of disorderly conduct on the part of those using it.

Per Cartwright J., *dissenting*: The second answer of the jury should be construed as a finding that the defendant ought to have maintained such a system of supervision that the escalator could and would be promptly stopped in an emergency. There was evidence that some of the injuries would have been avoided if the escalator had been stopped promptly. There was a considerable body of evidence that in the case of many escalators, including some in several large stores in the city, there are employees in close proximity who are shown how to stop the escalator and instructed to stop it at once if an emergency arises. The jury was entitled to be guided by that evidence and to fix the standard of care accordingly.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a jury's finding on negligence. Appeal dismissed, Cartwright J. dissenting.

J. J. Robinette, Q.C., and *I. W. Outerbridge*, for the plaintiff, appellant.

Hon. R. L. Kellock, Q.C., and *D. J. Wright*, for the defendant, respondent.

The judgment of Kerwin C.J. and of Judson J. was delivered by

THE CHIEF JUSTICE:—This is an appeal against a judgment of the Court of Appeal for Ontario[1] allowing an appeal from the judgment of McLennan J. after the verdict of a jury and dismissing the action of the appellant, Eva Kauffman. About midnight on February 11, 1955, she and a companion, as paying passengers, alighted from a northbound subway train at the St. Clair Avenue station, all of which was part of the transportation system operated by the respondent, Toronto Transit Commission, in the City of Toronto. Together with a number of other people they

[1] [1959] O.R. 197, 18 D.L.R. (2d) 204.

made their way to an escalator upon which the appellant stepped first, followed by her companion. Immediately in front of the appellant was a man and in front of him two young men. The latter began scuffling and fell against the man who, as a result, was knocked back upon the appellant. Either these three or at least two of them rested upon the appellant and from the evidence it is undoubted that a great part of the severe injuries she sustained was as a result of her being in that position.

In the action brought by the appellant against the respondent the statement of claim alleged negligence on the part of the respondent as follows:

(*a*) It failed to provide an attendant who could stop the escalator, or in the alternative if an attendant was provided he failed to stop the escalator when he knew or ought to have known the Plaintiff had fallen.

(*b*) In designing the escalator it failed to take into consideration the danger inherent in its use, namely, that it would be subject to large crowds attempting to ride it at the same time and what might be expected to happen if someone above lost his balance and fell against those below.

(*c*) It failed to design a handrail adequate for the purpose, especially in the event passengers were jostled by those above.

(*d*) It failed to provide adequate supervision of its passengers to prevent them jostling each other while on the escalator.

(*e*) The ascent of the escalator was too steep and the speed too fast.

(*f*) It failed to erect signs showing the location of the emergency buttons so that those in the vicinity of the escalator could stop it readily.

The questions put to the jury and their answers are as follows:

1. Q: Was there any negligence on the part of the defendant which caused or contributed to the accident? Answer "Yes" or "No".
   A: Yes.
2. Q: If your answer to Question 1, is "Yes, of what did such negligence consist?" Answer fully.
   A: That the defendant, in acquiring an escalator of radical departure in handrail design, did not sufficiently test or cause to be tested by qualified experts, the co-efficient of friction and contour of the Peelle Motor Stair handrail.
   That the defendant failed to supply supervision.
3. Q: Irrespective of how you answer the other questions, at what amount do you assess the total damages of the Plaintiff?
   A: $35,000.00.

The allegation contained in (*e*) of the statement of claim was withdrawn at the trial and that in (*f*) must be taken to be negatived by the findings of the jury. As the amount

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claimed in the statement of claim was $25,000, judgment was entered for that sum. No question as to the amount of damages was raised in the Court of Appeal or in this Court.

The Court of Appeal was unanimous in setting aside the judgment. As to the first finding of negligence, the Court was of opinion that there was no evidence to justify a finding that the type of handrail in use at the St. Clair Avenue station was a contributing cause of the appellant's accident, and, as to the second ground, that it was not supported by the evidence and in any event was not part of the duty owing by the respondent to the appellant.

I take it that the respondent was a carrier of the appellant for hire but even on that assumption the appeal in my opinion fails. Construing the first finding of negligence, as did the Court of Appeal, in a manner most favourable to the appellant, I agree that the attack by her upon the handrail was with reference to its design. In the type of escalator upon which the accident occurred, known as the Peelle escalator, the handrail was round, corrugated and metal clad, while the type of handrail in use in escalators in some other cities was oval in shape and made of black rubber. Accepting the proposition that a person could secure with his hand a more secure grip upon the oval rubber rail than on the circular metal rail, evidence was given that accidents had been caused in other places because the hands of riders could not be disengaged as easily from the rubber rail as from the metal one at the point where the rail enters the newel post. Although it appears that a considerable saving was effected by the adoption of the Peelle escalator, that action was taken after a thorough investigation by the respondent and its advisers. The statement in the Privy Council in *Vancouver General Hospital v. McDaniel*[1], followed and applied in *MacLeod v. Roe*[2], that "a defendant charged with negligence can clear his feet if he shows that he acted in accord with general and approved practice" applies to an action by a passenger against the carrier. It should be pointed out, however, that the statement of Lord Dunedin in *Morton v. Dixon*[3], referred to in the reasons for

[1] (1934) 152 L.T. 56 at 57-8. [2] [1947] S.C.R. 420, 3 D.L.R. 241.
[3] [1909] S.C. 807 at 809.

judgment of the Court of Appeal and which, as pointed out in those reasons, was quoted and applied by Lord Normand in *Paris v. Stepney Borough Council*[1], must be read and applied with care. That statement is:

> Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either—to shew that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or—to shew that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it.

The decision of the House of Lords in *Morris v. West Hartlepool Steam Navigation Co. Ltd.*[2], and particularly the remarks of Lord Cohen at p. 578 "that the use of the word 'folly' may lead to misconception of what the law is if it is read in the sense of 'ridiculous' ", indicate the futility of attaching too much importance to the words of an expression used in a judgment rather than to the reasons underlying it.

While the obligation upon carriers of persons is to use all due, proper and reasonable care and the care required is of a very high degree, *Readhead v. Midland Railway Co.*[3], such carriers are not insurers of the safety of the persons whom they carry. The law is correctly set forth in Halsbury, 3rd ed., vol. 4, p. 174, para. 445, that they do not warrant the soundness or sufficiency of their vehicles, but their undertaking is to take all due care and to carry safely as far as reasonable care and forethought can attain that end. Here the respondent has met that standard of care so far as the first ground of negligence found by the jury is concerned.

As to the second ground of negligence found by the jury, I agree with the Court of Appeal that such a finding is not justified by the evidence. Furthermore I find it impossible to say that the respondent owed the appellant the duty of supplying supervision. In view of the charge of the trial judge it may be taken that the jury meant by their second finding that in view of the fact that the respondent was using the Peelle installation at the St. Clair Avenue station,

[1] [1951] A.C. 367 at 382. [2] [1956] A.C. 552.
[3] (1869), L.R. 4 Q.B. 379.

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where crowds might be expected, someone on its behalf should have been on duty at all times to stop the escalator if some unexpected event, like that in question, occurred. To place such a duty upon the respondent is unjustified. What occurred was not a danger, usual or unusual, which the respondent knew or ought to have known.

The appeal should be dismissed with costs, if demanded.

The judgment of Locke and Martland JJ. was delivered by

LOCKE J.:—The direct cause of the fall sustained by the appellant, as is made clear by the evidence, was the wrongful and grossly negligent conduct of two young men named Peters and Auchincloss who were standing ahead of the appellant and who commenced to wrestle on the escalator while it was ascending. In wrestling with each other they apparently fell backward against a third young man described by the appellant as a large man, and he in turn against and upon the appellant. From the scant description in the evidence of these three men whose combined weight was suddenly and without warning projected against the appellant, it may properly be inferred that their weight aggregated not less than 450 lbs.

In an attempt to engage the liability of the transit commission for the wrongful acts of these two men, one of the counts of negligence asserted in the statement of claim was that the respondent had "failed to provide adequate supervision of its passengers to prevent them jostling each other when on the escalator." It was apparently in respect of this head of negligence that the second answer of the jury was made, since it read:

The defendant failed to supply supervision.

The basis of this allegation would appear to be that a carrier of passengers for reward who invites them to use its premises for passing from one of its conveyances to another is under a legal duty to preserve order among them so that other passengers will not be injured. There is no evidence in the present matter upon which a jury might be asked to find that, in the circumstances, any such duty rested upon the respondent. There is nothing to suggest that these two men whose wrongful act resulted in the appellant being

thrown backward on the escalator had theretofore been guilty of any rowdy or disorderly conduct which would suggest that any injury to other passengers might be reasonably apprehended. While the names of these young men were obtained they were not called by either side as witnesses at the trial and they were not made parties to the action.

The liability, if there is such, must be based upon the other grounds and can be supported, if at all, only by the answer made by the jury to the second question which reads:

> The defendant, in acquiring an escalator of radical departure in handrail design did not sufficiently test or cause to be tested by a qualified expert the co-efficient of friction and contour of the Peelle Motorstair handrail.

The jury apparently adopted the expression "co-efficient of friction" from evidence given by some of the experts in the course of the hearing. This refers in its context to the adhesive qualities of the material of which the handrail was made and a great deal of time was taken up at the trial in demonstrating what appears to require no demonstration, that a handrail having a rubber covering is more easily gripped and has greater adhesive qualities than one with a surface of metal. According to some of the witnesses, the difference is slight but, in the view I take of the matter, the point is of no moment.

The language of a jury in explaining the reasons for its verdict ought not to be construed too narrowly: *Pronek v. Winnipeg, Selkirk and Lake Winnipeg Railway Company*[1]. Adopting this view, the answer, giving it the most favourable interpretation from the standpoint of the appellant, may be construed as a finding that the handrail of the Peelle escalator was inadequate for the purpose for which it was intended, in that it was more difficult to grip firmly than the handrail used by the Otis-Fenson Elevator Company and the Westinghouse Company, which were at the time the largest suppliers of such equipment in Canada and the United States.

The appellant is a lady of some sixty years of age and, on the evening of the accident in company with a Mrs. Mathewson, entered the escalator en route from a station

[1] [1933] A.C. 61 at 66, 1 D.L.R. 1, 40 C.R.C. 102.

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of the underground to a street car in the street above, to complete her journey home. She was wearing woollen gloves and says that she gripped the handrail with her right hand as the escalator moved up and that, when it was about one-third way to the top, she heard the noise of a scuffle ahead of her and was immediately thereafter knocked backwards. The person whom she described as the large man fell on top of her and the two young men on top of him.

It is perfectly apparent from the evidence that the nature of the grip upon the handrail had nothing whatever to do with the accident. It is impossible to suggest seriously that when the weight of three men amounting to approximately 450 lbs. was projected suddenly from above against this elderly lady she would not have fallen backwards, whatever the nature of the grip upon the handrail. There is no evidence in this record to suggest otherwise, as is pointed out by Mr. Justice Morden. The case appears to have been presented to the jury as if it were a contest as to whether a passenger upon the escalator would not have a firmer grip upon a handrail covered with rubber than upon the metal handrail of the Peelle escalator, without considering whether in the circumstances described in the evidence it would have made the slightest difference. It is obvious that it would not have.

Unless the nature of the covering of the handrail either caused or contributed to the accident, the material of which it was made is in the present matter of no moment. These considerations are sufficient to dispose of this appeal in so far as it involves the issue of liability for the appellant's fall backwards upon the escalator, since the respondent is not liable for the wrongful act of Peters and Auchincloss.

There is some evidence in this record upon which a jury might properly find that, in addition to the injuries sustained by the appellant when she fell backwards and the three men fell upon her, further injury was occasioned thereafter by reason of the fact that the escalator was not stopped. Though the respondent is not liable for any injuries caused by the fall itself, it might have been contended that a duty rested upon it to instantly stop the escalator when

the fall occurred. Thus, to the extent that the injuries were increased during this interval, it might be said that the respondent was liable.

This aspect of the matter was not put to the jury as a distinct issue, the appellant's position throughout having been that the respondent was liable for the fall itself by reason of the insufficiency of the handrail. Sub-para. (*a*) of para. (4) of the statement of claim, which contained the counts of negligence, alleged that the respondent had "failed to provide an attendant who could stop the escalator, or in the alternative if an attendant was provided he failed to stop the escalator when he knew or ought to have known the plaintiff had fallen."

There was evidence that, in a booth or compartment occupied by a ticket collector some 80 feet distant from the foot of the escalator, there was a button which would enable the collector to bring the escalator to a stop immediately.

The ticket collector had died before the trial and his evidence had not been taken *de bene esse*. This count of negligence was explained to the jury in the judge's charge but nothing was said as to the extent of the liability of the respondent for the appellant's injuries if it was not liable, for such that resulted from the fall itself and the falling of the three men on top of her, and the learned trial judge was not asked to instruct the jury upon this aspect of the matter.

As I have pointed out, one of the counts of negligence alleged in terms the negligence to be a failure to provide adequate supervision, and it is only in this count that the word "supervision" appeared. Accordingly, the answer finding a failure to supply supervision should, in my opinion, be held to refer to the alleged failure to supply adequate supervision of the passengers. If there had been any doubt upon the matter, the jury might have been asked when they returned to clarify this answer but no such request was made on behalf of the appellant and a motion for judgment was made upon the findings as they were made. In the judgment of the Court of Appeal, however, Morden J.A. has treated the matter as if the answer referred to the count made in sub-para. (*a*) of para. 4 above quoted.

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If the matter be thus considered, it is to be noted that the ticket collector was an attendant who could stop the escalator by using the button in the ticket booth and there is no finding of negligence on the part of the ticket collector for failing to do so. Both the specific charges in sub-para. (*a*) are accordingly negatived unless the finding of lack of supervision be construed as meaning a failure to have an attendant in the immediate vicinity of the escalator who could instantly stop it if an accident such as this occurred.

I would not so construe the finding but, if this is to be taken as its meaning, the case of the appellant is not, in my opinion, assisted.

The evidence given on behalf of the respondent at the trial shows that the Peelle escalator was chosen for use in the subways in Toronto on the advice of Charles DeLeuw, a consulting engineer of very wide experience in such matters, and of W. H. Patterson, the chief engineer of the respondent, who investigated the various available escalators before it was decided to install the escalators in question. Escalators of the same kind and employing the same type of handrail had been theretofore installed in the New York bus terminal in considerable numbers and had been found satisfactory, and there is nothing in the evidence to suggest that from a mechanical standpoint the escalator in question had not worked perfectly since its installation and was not operating properly on the night in question. I find nothing in this evidence, therefore, to suggest that, due to any apprehension of anything going wrong mechanically, there was any ground for imposing upon the transit commission any obligation to have an attendant at the place in question other than the collector who had the means at hand to stop the operation instantly. It cannot be said, in my opinion, that a reasonable person would contemplate injury to persons using the escalator such as occurred in the present matter, or that the respondent was under a duty of maintaining an attendant at the foot of the escalator to avoid the consequences of disorderly conduct on the part of those using it.

In *Glasgow Corporation v. Muir*[1], Lord Macmillan said in part:

> The standard of foresight of the reasonable man is, in one sense, an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question . . . The reasonable man is presumed to be free both from over-apprehension and from over-confidence, but there is a sense in which the standard of care of the reasonable man involves in its application a subjective element. It is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have had in contemplation, and what, accordingly, the party sought to be made liable ought to have foreseen.

In my opinion this appeal fails and should be dismissed with costs if they are demanded.

CARTWRIGHT J. (*dissenting*):—The facts out of which this appeal arises are stated in the reasons of other members of the Court and in those of Morden J.A., who delivered the unanimous judgment of the Court of Appeal[2].

In approaching the question whether the jury's verdict was rightly set aside it is necessary to bear in mind certain well settled principles, which are sufficiently stated in the following three quotations:

In *Jamieson v. Harris*[3], Nesbitt J., speaking for the majority of the Court, said:

> We fully recognize the principle that if the verdict could fairly be supported upon any evidence upon which reasonable men might come to a conclusion in its favour that it should not be set aside because the appellate court did not agree with the conclusions reached. We also fully agree that answers by a jury to questions should be given the fullest possible effect, and, if it is possible to support the same by any reasonable construction, they should be supported.

In *C.N.R. v. Muller*[4], Duff C.J.C., speaking for the majority of the Court, said:

> We premise that it is not the function of this Court, as it was not the duty of the Court of Appeal to review the findings of fact at which the jury arrived. Those findings are conclusive unless they are so wholly unreasonable as to show that the jury could not have been acting judicially. In construing the findings, moreover, one must not apply a too rigorous critical method; if, on a fair interpretation of them, they can be supported upon a reasonable view of the evidence adduced, effect should be given to them.

[1] [1943] A.C. 448 at 457.
[2] [1959] O.R. 197, 18 D.L.R. (2d) 204.
[3] (1905), 35 S.C.R. 625 at 631.
[4] [1934] 1 D.L.R. 768 at 769, 41 C.R.C. 329.

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In *Sigurdson v. B.C. Electric Railway Co. Ltd.*[1], Lord Tucker, delivering the reasons of the Judicial Committee, said:

> Before turning to examine the summing-up in the light of these criticisms it may be well to observe that the issues involved in this and other similar cases turn upon questions of fact and that when a jury is the tribunal of fact to which those issues are committed their findings—subject to questions of misdirection or misreception of evidence—cannot be set aside unless they are of such a nature that having regard to the evidence no reasonable men could have arrived thereat. It is not for an appellate court however much it may differ from the conclusions reached by the jury to substitute its own findings for those of the jury.

I, of course, do not suggest that these principles were absent from the minds of the learned Justices of Appeal. It was by virtue of their application that, in dealing with the jury's second finding of negligence, Morden J.A. said:

> The second ground of negligence found by the jury was that "the defendant failed to supply supervision". Counsel for the appellant made a vigorous attack upon this finding. He submitted that if it meant the defendant should have provided attendants whose duty it would be to prevent passengers jostling (as pleaded in paragraph 4(*d*)) then it was not a good finding in law. The respondent's counsel submitted that the jury meant the failure of the defendant to have an attendant immediately beside the escalator whose duty it would have been to stop the escalator at the time the riders fell. (Paragraph 4(*a*)). There was evidence that the plaintiff suffered the greater part of her injuries after her fall and as she was being carried up the escalator lying under the bodies of two or three persons. For the purpose of this appeal, I am prepared to construe liberally this finding of the jury and accept the interpretation the respondent's counsel places on it.

In my view, read in the light of the evidence and of the full and careful charge of the learned trial judge, this answer of the jury should be construed as a finding that the defendant ought to have maintained such a system of supervision of its escalator that it could and would be promptly stopped if an emergency arose calling for such action.

The question then is whether, so construed, the answer of the jury supports the verdict.

I agree with the view implicit in the passage from the reasons of Morden J.A., quoted above, that there was evidence upon which it was open to the jury to find that the greater part of the appellant's injuries would have been avoided if the escalator had been stopped with reasonable promptitude after her fall.

[1] [1953] A.C. 291 at 298-9, [1952] 4 D.L.R. 1, 69 C.R.T.C. 149.

The mechanical means provided for stopping the escalator consisted of a red button at the top and a similar one at the bottom of the escalator and a third in a collector's "cage" situated some 75 or 80 feet from the bottom of the escalator and from which it was said the employee stationed there would have a view of the escalator. The employee who was on duty in this "cage" at the time of the accident died prior to the trial and his evidence had not been taken *de bene esse*. It is undisputed that the escalator was not stopped at any time. When the appellant was knocked down she was about one third of the way up the escalator. The time taken to carry a passenger from the bottom to the top was about twenty seconds.

It is clear that when the three men ahead of her and the appellant herself fell there must have been a visible state of emergency; it is also clear that there were screams from the appellant and her friend; but nothing was done by anyone to stop the escalator. No explanation was forthcoming as to why the employee in the "cage" did nothing. If an explanation was required the onus of furnishing it rested upon the respondent whose employee he was and in whose knowledge the explanation, if any, must have lain.

In these circumstances it was, I think, open to the jury to find that the respondent was on the horns of a dilemma; either it had not instructed its employee to stop the escalator at once if an emergency arose or if it had given adequate instructions its employee had disregarded them.

There was evidence that some escalators in this country and in the United States are operated without attendants, but there was also a considerable body of evidence that others have properly instructed attendants stationed by them. Notably, it was shown that in several large stores in the city of Toronto there are either attendants stationed at the escalators or clerks, in much closer proximity thereto than was the employee of the respondent in this case, who are shown how to stop the escalator and instructed to stop it at once if an emergency arises.

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The following passage from Phipson on Evidence, 9th ed., p. 116, was cited with approval in this Court in *Fagnan v. Ure et al.*[1]:

> On questions involving negligence, reasonableness, and other qualities of conduct, when the criterion to be adopted is not clear, the acts or precautions proper to be taken under the circumstances, and even the general practice of the community, or in some cases of the particular individuals, are admissible as affording a measure by which the conduct in question may be gauged. Such evidence does not, of course, bind the jury as a fixed legal standard; it is merely one, amongst other circumstances, by which they may be guided,

as was also the following statement of Holmes J. in *Texas and Pacific Railway Company v. Behymer*[2]:

> What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.

The duty owed by the respondent to the appellant was, as is pointed out in the reasons of the Chief Justice, to use all due, proper and reasonable care, and the care required is of a very high degree. It is of a higher degree, in my opinion, than that owed to their customers by those storekeepers who were shown in the evidence to have taken the precautions I have described above.

In a case such as this where the precautions to be taken are not prescribed by statute "the standard of duty must be fixed by the verdict of a jury", to use the words of Lord Wright in *Lochgelly Iron and Coal Co. v. M'Mullan*[3].

In my view, the learned trial judge could not properly have withdrawn this issue from the jury; there was evidence, notably that of the established practice in other Toronto buildings, to support their findings.

In *McCannell v. McLean*[4], Duff C.J.C., in delivering the judgment of the Court, said:

> There being some evidence for the jury, that is to say, the evidence being of such a character that the trial judge could not properly have withdrawn the issue from the jury, the question whether, in such circumstances, a jury, considering the evidence as a whole, could not reasonably arrive at a given finding may be, it is obvious, a question of not a little nicety; and the power vested in the court of appeal to set aside a verdict as against the weight of evidence in that sense is one which ought to be

1 [1958] S.C.R. 377 at 381, 13 D.L.R. (2d) 273.
2 (1903), 189 U.S. 468 at 470.
3 [1934] A.C. 1 at 23.
4 [1937] S.C.R. 341 at 345, 2 D.L.R. 639.

exercised with caution; it belongs, moreover, to a class of questions in the determination of which judges will naturally differ, and, as everyone knows, such differences of opinion do frequently appear.

In this case I have the misfortune to differ from the opinion of the learned Justices of Appeal and that of other members of this Court. I do not think it can be affirmed that no jury acting reasonably could have found as they did on the second ground. I do not find it necessary to consider the other ground on which they based their verdict.

I would allow the appeal and restore the judgment at the trial with costs throughout.

Appeal dismissed with costs if demanded, CARTWRIGHT J. *dissenting.*

Solicitors for the plaintiff, appellant: Haines, Thomson, Rogers, Howie & Freeman, Toronto.

Solicitor for the defendant, respondent: J. W. H. Day, Toronto.

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*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright and Martland JJ.