MARY ISOBEL THIESSEN (*Plaintiff*) ....APPELLANT;

AND

THE WINNIPEG SCHOOL DIVISION No. 1 (*Defendant*) ..... RESPONDENT.

1967

*Mar. 22,23

May 23

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Negligence—Failure of caretaker to remove piece of apple from class room floor—Teacher injured by fall—Whether liability on part of employer.

On returning to her class room after lunch a teacher slipped as she entered the door. Looking down, she observed that the floor was wet and she looked further into the room and noted that there were pieces of apple on the floor which had been crushed as if stepped on. The teacher did not then enter the room but went to the principal's office and informed a secretary of what she described as the "mess" in the room. The secretary informed her that a caretaker would be sent to clean it up. The teacher returned to the class room and just before classes began a caretaker came into the room and asked her what was wrong. The teacher told him to "look at the mess on the floor", and the caretaker, although he did nothing in the teacher's presence before leaving the room, said he would clean it up. The bell then rang and the teacher proceeded to another room.

The plaintiff, who was taking the first class after the lunch hour break in the room in question and who entered the class room just ahead of her students, noticed one piece of apple on the floor and put it to one side by the blackboard. She noticed nothing else unusual in the room and proceeded with her teaching duties. There was, however, a small piece of apple near one of the front desks which was observed by one of the students just before the plaintiff stepped on it and fell.

In an action for damages for the injuries she sustained as a result of the accident, the plaintiff's claim was dismissed by the trial judge and his judgment was affirmed, on appeal, by a majority of the Court of Appeal. A further appeal was then brought to this Court. From the evidence an inference was drawn by the trial judge and the majority of the Court of Appeal that the caretaker, prior to the plaintiff's entry into the room, had returned to clean up the debris. The question raised was whether the failure of the caretaker to have removed the small morsel of apple from the floor constituted negligence giving rise to liability on the part of the defendant School Division.

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

Per Cartwright, Martland, Judson and Ritchie JJ.: The plaintiff had failed to discharge the burden of proving that at the time of the accident the class room was in an unsafe and dangerous condition and that the defendant through its officers or employees knew or ought to have known of such a condition. To place a common law duty upon the defendant of ensuring that every morsel of apple was cleaned from every floor of the class rooms used by pupils during the lunch hour was too strict an interpretation of the duty owed by an employer to its employees.

*PRESENT: Cartwright, Martland, Judson, Ritchie and Spence JJ.

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Per Spence J., *dissenting*: The defendant, through notice of the secretary to the principal, had knowledge of the lack of safety. The caretaker attending in the class room as a result of such notice was not informed that certain specific pieces of debris lay on the floor but was told to observe the debris that was there, did so and undertook to clean up that debris as was his duty. He failed to carry out his duty and a piece of apple was left lying there so that the plaintiff slipped and fell.

[*Naismith v. London Film Productions Ltd.*, [1939] 1 All E.R. 794; *Wilsons & Clyde Coal Co. Ltd. v. English*, [1937] 3 All E.R. 628, distinguished; *Regal Oil & Refining Co. Ltd. et al. v. Campbell*, [1936] S.C.R. 309, applied.]

APPEAL from a judgment of the Court of Appeal for Manitoba[1], dismissing an appeal from a judgment of Tritschler C.J.Q.B. Appeal dismissed, Spence J. dissenting.

H. G. H. Smith, Q.C., and *Leon Mitchell*, for the plaintiff, appellant.

C. Gordon Dilts and *R. S. Cook*, for the defendant, respondent.

The judgment of Cartwright, Martland, Judson and Ritchie JJ. was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal for Manitoba[1] (Freedman J.A. dissenting) affirming the judgment rendered at trial by Tritschler C.J.Q.B., whereby he dismissed the appellant's claim for damages arising out of an accident which occurred on January 9, 1962, when the appellant, who had been a school teacher for twelve years and was at the time employed by the defendant School Division, slipped on a small piece of apple which was on the floor of class room 21 at the Grant Park School in the City of Winnipeg.

On the day of the accident, Margaret McRitchie, who was a substitute teacher of only one year's experience and who appears to have been in charge of the class room in question, returned to "her room" after lunch and slipped as she entered the door. Her evidence in this regard reads as follows:

> I didn't fall but my foot slipped a bit, and when I looked down it was wet, *and I looked further into the room and I noticed there*

[1] (1966), 57 W.W.R. 193.

was apple on the floor—pieces of apple, and pieces that had been crushed as if they had been stepped on, and I didn't go into the room at all. I just turned right around and went into the next room, which is Mrs. Joyce Cartwright's room, and she was there and I told her I found a mess on the floor in my room, and I was going to report it to the office and she thought I had better do that.

(The italics are my own.)

Q. What did you do?
A. I went to the office right away.
Q. Yes?
A. And I reported it to one of the secretaries there.
Q. What did you say to the secretary as near as you can remember?
A. Well, I told her there was a mess on the floor in my room, and she said she would send one of the caretakers down to clean it up.
Q. What happened?
A. I went back to my room and just before classes began the caretaker—one of the caretakers came into the room and he asked me what was wrong, and I told him to look at the mess on the floor, and he said he would clean it up.
Q. Was this before classes started in the afternoon?
A. Yes, it was before classes started. I can't remember whether it was before the bell rang or whether it was after the bell rang, but I think it was before the bell rang.
Q. You spoke to the caretaker and he said he would clean it up?
A. Yes.
Q. Did he do anything in your presence?
A. No, he didn't do a thing. He just left.
Q. And then the bell rang and what did you do?
A. Well, I had to go into the typing room to teach...

The appellant, who was taking the first class after the lunch hour break in room 21 and who entered the class room just ahead of her students, noticed one piece of apple on the floor and put it to one side by the blackboard but she says: "There was nothing else that was there that I saw." It is a fair inference from the evidence, and one which was drawn by the learned trial judge and the majority of the Court of Appeal, that "the caretaker had returned and had attended to the mess which Mrs. McRitchie had brought to his attention". There was, however, one small piece of apple about an inch in diameter near one of the front desks which was observed by one of the students just before the appellant slipped on it and the question raised by this appeal is whether the failure of the caretaker to

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have removed this small morsel of apple from the floor constituted negligence giving rise to liability on the part of the respondent School Division.

It was the practice at the Grant Park School for certain of the class rooms to be used as lunch rooms for the students who had brought their lunch and the arrangement in this regard was that the students themselves "were not to leave crumbs or papers or anything remaining from their lunch on the desks or on the floor". They were asked to put it in the waste basket during the lunch hour and the caretaking staff was required to go into these lunch rooms after the lunch period and before class reconvened in order to empty the waste paper baskets and if there was anything in the vicinity of the waste baskets to pick it up. The rooms were swept by the caretaking staff after the close of school at night and before opening in the morning.

The appellant had been a teacher at Grant Park School for three years and must be taken to have been aware of the system that was followed in this regard and it is a factor to be considered, although not a conclusive one, that there was no evidence of any other accident having occurred as a result of the condition of the class rooms after the lunch period.

In the course of the dissenting opinion rendered by Freedman J.A. in the Court of Appeal, he referred to the cases of *Naismith v. London Film Productions Ltd.*[1] and *Wilsons & Clyde Coal Co. Ltd. v. English*[2], as recognizing the existence of a duty resting upon employers to make the place of employment as safe as the exercise of reasonable skill and care will permit. It is pointed out that in both these cases the Courts were dealing with conditions of dangerous employment. In the *Wilsons & Clyde Coal Co.* case a haulage plant was put in motion in a mine underground at a time when an employee was in an exposed position where he was caught by a rake and crushed. In the *Naismith* case a film "extra" whom the employer had provided with inflammable material which covered her costume, was seriously burned. In both cases a high duty was found to rest upon the employer to ensure the safety of the employees concerned.

[1] [1939] 1 All E.R. 794.

[2] [1937] 3 All E.R. 628.

It is to be observed that Viscount Simonds in *Davie v. New Merton Board Mills Ltd.*[1], at p. 620, after referring to the case of *Wilsons & Clyde Coal Co. Ltd. v. English, supra,* went on to say:

> My Lords, I would begin, as did Parker L.J., with a reference to the familiar words of Lord Hershchell in *Smith v. Charles Baker & Sons* in which he describes the duty of a master at common law as 'the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk', words that are important both in prescribing the positive obligation and in negativing by implication anything higher. The content of the duty at common law, thus described by Lord Hershchell, must vary according to the circumstances of each case. Its measure remains the same: it is to take reasonable care, and the subject-matter may be such that the taking of reasonable care may fall little short of absolute obligation.

The case of a man working underground under conditions of potential danger and the case of an actor clothed by an employer in inflammable material are cases in which the subject-matter was found to have created a duty falling little short of absolute obligation but no such conditions, in my opinion, apply in the present circumstances and I am satisfied that the duty owed by the respondent to the appellant in the present case is that which was concisely stated by Sir Lyman Duff in *Regal Oil & Refining Co. Ltd. et al. v. Campbell*[2], at p. 312, where he said:

> By the common law, an employer is under an obligation arising out of the relation of master and servant to take reasonable care to see that the plant and property used in the business in which the servant is employed is safe. That is well settled and well known law. It is equally well settled that he does not warrant the safety of such plant and property.

I do not think that the appellant in the present case has discharged the burden which she assumed by her pleadings, of proving that at the time of the accident:

> ...class room 21 was in an unsafe and dangerous condition in that parts of the floor thereof were strewn with slippery substances and the Defendant, through its officers and employees knew or ought to have known of the said dangerous and unsafe condition of the said floor of which the Plaintiff was ignorant.

There is no doubt that the appellant's unfortunate accident occurred in the course of her employment and if this case were covered by *The Workmen's Compensation Act,* R.S.M. 1954, c. 297, she could no doubt recover compensation, but to place a common law duty upon the respondent

[1] [1959] A.C. 604.

[2] [1936] S.C.R. 309.

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School Division of ensuring that every morsel of apple was cleaned from every floor of the class rooms used by pupils during the lunch hour is, in my opinion, too strict an interpretation of the duty which an employer owes to its employees and with the greatest respect for the view expressed by Mr. Justice Freedman, I do not think that such an interpretation is justified by the decided cases.

For these reasons I would dismiss this appeal with costs.

SPENCE J. (*dissenting*):—I have had the opportunity of reading the reasons of my brother Ritchie. I shall adopt his statement of facts although for the purpose of these reasons I shall have to extend them. I regret I am unable to concur in my learned brother's conclusion.

As Freedman J.A. pointed out in his dissenting reasons in the Court of Appeal for Manitoba, in the absence of direct testimony as to how and when the piece of apple came upon the floor, the Court is left with the task of resolving the matter on the basis of inference, and the determination of the issue is made less complex by reason of the fact that there is substantially no contradiction of testimony. Therefore, the issue of credibility does not arise.

Firstly, in reference to whether the general cleaning had been carried out after 1:00 p.m. on the day of the accident in accordance with the practice outlined by Ritchie J., the learned trial judge, Tritschler C.J.Q.B., found:

> I am satisfied that in the course of the system prevailing, room No. 21 had, after lunch, received the usual treatment of removal of the contents of the wastebasket, at which time the caretaker would have picked up any loose debris near the basket;

I cannot be satisfied that this is a proper inference from the evidence. The only factual evidence on the subject was given by Harold Sly, who was the head janitor of the Grant Park School at the time in question. He, as did the principal Mr. R. W. Welwood, described the system but, in my view, he could not give any evidence as to whether that system had been complied with as to room 21 on the day of the accident. It is true that in answer to the question:

> Q. Do you know whether or not room 21 was cleaned at the noon hour on January 19th, 1962; do you know that?

he replied:

> A. That is a large question. Yes, it was cleaned. To my knowledge, it was cleaned.

But it should be noted that in answer to the following question:

> Q. You did not actually clean it yourself?

Sly replied:

> A. Not that I know. That is a long time ago.

And in cross-examination, the witness described the procedure in answer to the question:

> Q. You don't know if one of them did not do what he was supposed to do?

as follows:

> I don't think that was the case because we went down the halls, you know, like a gang, and I took this side and you took that side and so on, and I don't think there was anything missed.

And in answer to the question:

> Q. Do you remember whether you saw room 21 or not?

he answered:

> A. No, I don't remember if I saw room 21.

In fact, in examination-in-chief, Sly had testified that he only knew the plaintiff slipped in one of the rooms two or three weeks after the accident occurred.

I am, therefore, of the opinion that the head janitor's evidence was simply that the system called for he and the other janitors walking down the hall and one after the other entering the class rooms, removing the wastepaper baskets and picking up anything that happened to be lying nearby, and that he has no memory whatsoever of the date of January 21st; no memory that he was ever in room 21 and no positive knowledge that any fellow janitor was in room 21.

It should be pointed out that according to the report made by the principal of the school to the Superintendent of the School Division dated February 8, 1962, and produced at trial and marked as ex. 7, the principal had knowledge that the accident occurred about five minutes before the end of the first period in the afternoon of January 19th. In his evidence, Mr. Welwood testified that his assistant, Mr. Lee, was called by the plaintiff and informed of the accident and at that time Mr. Lee reported to Mr. Welwood that it was approximately five minutes before the end of the first period. Therefore, Mr. Welwood had on the very

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day of the accident full information of the time the accident occurred and his letter (ex. 7) describes that accident as one which occurred when the plaintiff:

> Slipped on a small piece of potato chip which had been left after someone's lunch on the floor of room 21.

Therefore, he not only knew the exact time and date of the accident but that it had been ascribed to the result of a part of lunch left on the floor. It matters not whether that part were a potato chip or a piece of apple. He was able to investigate at once whether the wastebasket had been collected and that the floor had been cleaned in the fashion which the system required at between 1:15 and 1:30 p.m., and the defendant should have been able to adduce exact evidence upon that subject at the trial. Such evidence was not called. Therefore, were it necessary to make a finding of fact upon the evidence which I have outlined, I would have inferred that this general clean-up had skipped room 21 that day. I can see no other explanation for the general mess of apples which Mrs. McRitchie saw when she went to enter the room.

It is not necessary, however, to make any finding in reference to that general clean-up.

Mrs. McRitchie was a substitute teacher who had in charge room 21 as her "home room", and she testified that after she left the staff room to return to room 21 "to assemble classes" she was just about to enter the said room 21 when her foot slipped. Looking down, she observed that the floor was wet and she looked further into the room and noted that there were pieces of apple on the floor which had been crushed as if stepped on. Mrs. McRitchie did not then enter the room but went to the principal's office and informed a secretary of what she described as the "mess" in the room. The secretary informed her that a caretaker would be sent down to clean it up. Mrs. McRitchie then returned to room 21 and just before the classes began, *i.e.*, just before 1:30 p.m., a caretaker came into the room and asked her what was wrong. Mrs. McRitchie told him to "look at the mess on the floor", and the janitor said he could clean it up.

Mrs. McRitchie's memory was that that was just before the bell rang. The caretaker said that he would clean up the

mess but he did nothing in Mrs. McRitchie's presence—"he just left", and then when the bell rang, Mrs. McRitchie left room 21 to cross the corridor to another room and commence her teaching duties.

The plaintiff was in her own home room, room 24, and her home room class was in that room. At the commencement of the first class, she left room 24 and entered room 21 followed by the members of the class who occupied her own home room to whom she was to deliver a lesson in room 21. Room 24, her home room, was a typewriting room and full of typewriters, and it was used frequently for typing classes. The plaintiff's students followed her into the room. As the plaintiff entered the room she noticed a piece of apple on the floor, and with her foot she pushed the apple over to one side close to the blackboard so that it would not be stepped on by either her or others. She saw nothing else unusual in the room and proceeded with her teaching duties until almost at the end of the class. After she had been going up and down the aisles checking the students' work she commenced to walk from the aisle closest to the window to her desk at the front of the room. She stepped on a piece of apple which was lying evidently opposite the end of the aisle closest to the window and about three feet in front of the front desk. That piece of apple had been observed by no one until just the moment the plaintiff's foot descended on it when the pupil sitting at the front desk, Susan Kathryn Read, happened to look down and see it, unfortunately too late to warn the teacher. The resulting fall caused the plaintiff the injuries for which she seeks damages in this action.

Tritschler C.J.Q.B. held that under these circumstances the plaintiff had not discharged the onus upon her which she must discharge in order to succeed against the defendant School Division. The inference he drew from the evidence which has been outlined in greater detail by my brother Ritchie and which I have very shortly summarized was that this piece of apple on which the plaintiff slipped was either deposited on the floor in the school room after the janitor, following Mrs. McRitchie's notice to him, had attended and cleaned up "the mess" which was then present, or, still later, during the time when the plaintiff was

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carrying out her teaching duties in the room. I am of the opinion that the evidence cannot support either such inference.

In the first place, there is not one word of evidence to show that any pupil was present in that room from the moment when Mrs. McRitchie first went to enter it and then retired going to complain as to "the mess", and the moment when the plaintiff entered followed by her pupils. One would believe that it would be very unlikely to have carried on the examination and cross-examination of Mrs. McRitchie without making reference to the presence of pupils if pupils were present. I am of the opinion that the inference from the evidence is exactly opposite, *i.e.*, that Mrs. McRitchie went to enter an empty room, found the debris on the floor, went to complain to the secretary in the principal's office, returned to an empty room, pointed out the debris to the janitor when he arrived, and then left that empty room at 1:30 to carry on her teaching duties. The very short lapse of time would seem to make any rowdiness in which apples could be thrown during that period impossible. Mrs. McRitchie is not sure whether the janitor arrived in answer to her complaint before or after the bell rang at 1:30 p.m. If it was before, it must have been only moments before. Mrs. McRitchie did not leave the room until the bell rang. The plaintiff entered the room to teach a class for that first period commencing at 1:30 p.m. and there must have been only a very few moments between Mrs. McRitchie's departure and the plaintiff's arrival, so that there simply was no time for the spread of this debris to occur even if there were some evidence that there were pupils who were able to do so.

I am further of the opinion that the second or alternative inference drawn by Tritschler C.J.Q.B. also is not feasible. That inference would imply that during the time the plaintiff was teaching the class the pupils were tossing apples or an apple or a piece of apple around the class room. It should be noted that the plaintiff was the regular teacher of this class. She had been a teacher for twelve years and she had been a teacher in that school for three years. This was no raw recruit teaching the class and the class would realize full well that any such conduct when their regular teacher was in charge would result in immediate and severe disci-

pline. Moreover, the girl in front of whose desk the piece of apple was lying gave evidence and no question was addressed to her in examination or cross-examination to even infer that the piece of apple could have landed in the position in which it lay at the time of the accident during the course of the class.

I am, on the other hand, of the opinion that the only possible inference from all of the evidence is as follows: The janitor having had the debris pointed out to him by Mrs. McRitchie departed to obtain his cleaning equipment returning when Mrs. McRitchie had left the room and in the few brief moments or even seconds prior the plaintiff's entry attempted to clean up the debris in a rough and ready fashion. One could understand that he would not wish to delay the commencement of the first class but, of course, it being his duty to remove what was quite evidently a source of danger he should have done so even if it had meant the delaying of the commencement of the class for a few moments. That such a piece of apple on the floor was dangerous was demonstrated by the fact that Mrs. McRitchie slipped without injury to herself as she was about to enter the room and later the plaintiff slipped on another such piece of apple and suffered serious injury.

If the proper inference is the one which I have just outlined then I think the liability of the defendant is clear.

I adopt Ritchie J.'s quotation from *Regal Oil Refining Co. Ltd. et al. v. Campbell*[1], a decision of this Court in which the duty of the master as to the servant was set out as "to take reasonable care and to see that the plant and the property used in the business in which the servant is employed is safe. That is well settled and well known law. It is equally well settled that he does not warrant the safety of such plant and property."

We are not here concerned with a situation where without the master's knowledge the plant became unsafe nor with the question of whether or not the master should have known of the lack of safety. Here, the master, through the notice of the secretary to the principal, had knowledge of the lack of safety. The caretaker attending Mrs. McRitchie as a result of such notice was not informed that certain specific pieces of debris lay on the floor but was told to

[1] [1936] S.C.R. 309.

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observe the debris that was there, did so and undertook to clean up that debris as was his duty. He failed to carry out his duty and a piece of apple, not hidden but in the open part of the room, was left lying there so that the plaintiff slipped and fell. It might easily be true that that piece of apple, if it fell close to the windows, would be in more of a shadow than if it had landed closer to the front of the room, but it was the duty of the caretaker to look for pieces of debris despite the fact that they might have been in the more shaded part caused by the light from the windows.

Freedman J.A., in his dissenting judgment for the Court of Appeal for Manitoba, dealt also with a paragraph from the judgment of the learned Chief Justice of the Queen's Bench, which he quoted and which I shall quote:

> From the time she entered the room plaintiff was the only means defendant had for learning about the condition of the room. She was the eyes of defendant School Division. What she saw she judged reasonably safe. I agree with her judgment. Even if the second piece of apple had been on the floor when the caretaker was there (and there is not evidence to support this) he was not negligent in failing, during the short time he was in the room, to see what was not apparent to plaintiff herself during her comparatively long stay in the room. I do not find fault with her failure to see it; nor would I fault the caretaker.

I am in complete agreement with Freedman J.A. when he differs with the view there expressed. On the particular facts in this case, the eyes of the employer were the eyes of that janitor who was called in to the room, had the debris pointed out to him, and undertook to clean up the debris.

I am of the opinion, as was indeed the learned Chief Justice of the Queen's Bench and all the members of the Court of Appeal, that no contributory negligence can be charged against the plaintiff.

For these reasons, I would allow the appeal and give judgment in favour of the plaintiff for $15,000 general damages, special damages as agreed, and costs throughout.

Appeal dismissed with costs, SPENCE J. *dissenting.*

Solicitors for the plaintiff, appellant: Mitchell, Green & Minuk, Winnipeg.

Solicitors for the defendant, respondent: Thompson, Dilts & Co., Winnipeg.