IAN McKAY, an infant, suing by his next friend and father, IVAN McKAY, and the said IVAN McKAY (*Plaintiffs*) .. APPELLANTS;

1968
*Feb. 20, 21, 22
Apr. 29

AND

THE BOARD OF THE GOVAN SCHOOL UNIT NO. 29 of SASKATCHEWAN and DONALD MOLESKY (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Negligence—Standard of care—High school student injured as result of fall from parallel bars while practising for gymnastic display—Breach of duty to guard against risk that boy might fall—Teacher in charge exempted from liability by statute—Liability of school board—Damages.

The infant plaintiff sustained serious injuries, resulting in paraplegia, when he fell between parallel bars while practising for a gymnastic display which was to be staged at the high school, where he was a pupil, at a variety night performance arranged by the school. He was one of a group of 12 to 18 students who had volunteered to put on the gymnastic display under the supervision of a teacher, the second defendant. The action against the latter was dismissed by consent having regard to the provisions of s. 225a (added 1961, c. 29) of *The School Act* of Saskatchewan (now R.S.S. 1965, c. 184, s. 242) which provides that where the principal of a school approves or sponsors activities such as those here in question "the teacher responsible for the conduct of the pupils shall not be liable for damage . . . for personal injury suffered by pupils during such activities".

The jury found that the defendant school board failed in its duty of care to the plaintiff and that such failure resulted in the injuries sustained by him. The acts or omissions which constituted the failure in the duty of care were stated as follows: (i) Lack of competent instruction on parallel bars. (ii) Insufficient care and attention to spotting. (iii) Insufficient demonstration on parallel bars. (iv) Progressive steps on parallel bars rushed. (v) Instructor not sufficiently qualified. (vi) Insufficient safety precautions. The jury further found that the plaintiff had not contributed to his injuries by failure to exercise reasonable precautions for his own safety.

Damages for the infant plaintiff were assessed by the jury at $183,900. The defendant school board appealed to the Court of Appeal and that Court, by a majority judgment, allowed the appeal and ordered a new trial as to both liability and damages. An appeal by the plaintiffs was then brought to this Court.

Held: The appeal should be allowed.

While not satisfied that the principle which was first expressed in *Williams v. Eady* (1893), 10 T.L.R. 41, that a schoolmaster was bound to take such care of his pupils as a careful father would take of his children is

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

1968

McKAY *et al.* *v.* BOARD OF GOVAN SCHOOL UNIT NO. 29 *et al.*

of universal application, particularly in cases where a schoolmaster is required to instruct or supervise the activities of a great number of pupils at one time, the Court was nevertheless of the opinion that a small group, such as that in this case, was one where the principle did apply.

The position here was that the teacher had accepted responsibility for the care and control of the infant plaintiff while he was engaged in the gymnastic practice and whatever analogy was involved in describing the standard by which his duty was to be tested, his supervisory duties required him to guard against forseeable risks to which this inexperienced boy was exposed in the performance of exercises on the parallel bars. There was a real risk that the boy might fall and there was a concomitant duty to guard against that risk eventuating. The jury found that there was a breach of that duty.

Also, it seemed that when Woods J.A., who delivered reasons for judgment on behalf of the majority of the Court of Appeal, held, in effect, that the trial judge was wrong in directing the jury that the defendant owed the boy the duty of "a careful parent" rather than the duty of a "physical training instructor", he was saying that the judge had invited the jury to determine the liability of the defendant school board according to a lower standard of care than that by which it should have been judged. If this were indeed the case, it was difficult to understand how the defendant had any cause for complaint. This appeared to be the ground upon which the majority of the Court of Appeal set aside the jury's verdict as to liability. This Court was of opinion that it could not be supported and accordingly the verdict of the jury should be restored in this regard.

As to the question of damages, R. 39 of the Saskatchewan Court of Appeal Rules meant that even if there was misdirection on the part of the trial judge, the Court of Appeal could not grant a new trial unless it were satisfied that the damage award was so high or so low as to constitute a substantial wrong or miscarriage of justice. Here there could be no doubt that the injuries sustained by the infant plaintiff were of such a massive and crippling character as to justify a substantial award of damages. In his charge to the jury as to the principles by which they should be guided in making the assessment there was no misdirection on the part of the trial judge that would warrant the granting of a new trial.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], setting aside a judgment of MacPherson J. in favour of the present appellants after a trial with a jury in an action for damages for personal injuries and ordering a new trial. Appeal allowed.

K. R. MacLeod and *W. J. Vancise,* for the plaintiffs, appellants.

D. G. McLeod, Q.C., and *R. H. Bertram,* for the defendant, respondent.

[1] (1967), 60 W.W.R. 513, 62 D.L.R. (2d) 503.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal of Saskatchewan[1], Hall J.A. dissenting, setting aside a judgment rendered in favour of the present appellant after a trial with a jury before Mr. Justice MacPherson and ordering a new trial on the issues as to both liability and damages.

This action was brought by Ivan McKay as next friend of his infant son, Ian McKay and personally against the respondent school board and one of its teachers, Donald Molesky, for damages arising out of injuries sustained by Ian McKay when he fell between parallel bars while practising for a gymnastic display which was to be staged by the William Derby High School, where he was a pupil, at a variety night performance arranged by that school. As a result of the fall the boy developed paraplegia and after long hospitalization and treatment, he was, at the time of the trial (two years after the accident) paralyzed from the neck down except for some shoulder and bicep muscles.

The action against Molesky was dismissed by consent having regard to the provisions of s. 225a (added 1961, c. 29) of *The School Act* of Saskatchewan (now R.S.S. 1965, c. 184, s. 242) which provides that where the principal of a school approves or sponsors activities such as those here in question "the teacher responsible for the conduct of the pupils shall not be liable for damage . . . for personal injury suffered by pupils during such activities".

Ian McKay was athletically inclined and was one of a group of 12 to 18 students who had volunteered to put on the gymnastic display under the supervision of Molesky who had had some experience in gymnastics while at teachers' college but who was not a qualified instructor in gymnastic work on the parallel bars. In the early days of practice for this display, the activities of the boys were limited to "tumbling" on mats on the floor, but a few days before the accident some parallel bars were brought from the public school to the scientific laboratory in the high school which was being used as the scene of the gymnastic practice. The evidence does not disclose that McKay had

[1] (1967), 60 W.W.R. 513, 62 D.L.R. (2d) 503.

1968

McKAY *et al.* *v.* BOARD OF GOVAN SCHOOL UNIT No. 29 *et al.*

Ritchie J.

ever done any work on parallel bars before this time, but after a few days practice he assayed, under Molesky's charge and direction, the difficult feat which he describes as swinging his legs back and forth quite a few times with a view to gathering sufficient momentum to do a flip at the end of the bars and he says that his legs "were getting a little bit higher each time and when they were about level with my head, I guess about a foot above the bars, then I fell . . . in between the bars face down with my head turned a little to the left".

There is some difference between the witnesses as to the exact manoeuvre that the boy was trying to perform and Molesky described a simpler movement, but in any event, this untrained youth was in my opinion undoubtedly engaged in an exercise which was dangerous for him and which required close supervision. McKay says that Molesky had described the exercise but had not demonstrated it. Molesky and one of the other boys apparently were acting as what Molesky describes as "spotters" whose function was to help the performer on the parallel bars in his dismount, but it is clear that neither of them was at any time in a position to assist McKay in what he was doing or to prevent a fall in the area where it took place.

The following admissions were formally made by the respondent School Board:

1. That on or about the 12th day of February, A.D. 1963, the defendant, Donald Molesky, was employed by the Defendant, the Board of the Govan School Unit, as a teacher at the William Derby High School and that during the school hours on the said day, the defendant, Donald Molesky was acting in the course of his employment as such.
2. That the Plaintiff, Ian McKay, sustained injury to his person during school hours on the said day during activities then being supervised by the defendant, Donald Molesky, and approved or sponsored by the principal and teachers of the said High School, all duly appointed by the defendant, The Board of the Govan School Unit; and that the supervision of the said activities had been assigned to the defendant, Donald Molesky by the said principal of the said high school.
3. That the said defendant, Donald Molesky, was responsible for the conduct of the pupils, including the plaintiff, Ian McKay, taking part in the said activities, within the meaning of section 225a of The Schools Act.
4. That at the said time the defendant, Donald Molesky had the right of control of the said pupils including the plaintiff, Ian McKay.

After a lengthy trial, the jury gave the following answers to questions submitted by the learned trial judge:

1. Has the plaintiff satisfied you that the defendant failed in his duty of care to the plaintiff and that the said failure in whole or in part resulted in the injury to the plaintiff?

Answer: Yes.

2. If answer number 1 is "Yes" then please state fully the acts or omissions which constituted the failure in duty of care.

Answer:

(i) Lack of competent instruction on parallel bars.
(ii) Insufficient care and attention to spotting.
(iii) Insufficient demonstration on parallel bars.
(iv) Progressive steps on parallel bars rushed.
(v) Instructor not sufficiently qualified.
(vi) Insufficient safety precautions.

3. Has the defendant satisfied you that the injuries of the plaintiff were caused or contributed to by his failure to exercise reasonable precautions for his own safety?

Answer: No.

The jury assessed damages for the infant plaintiff at $183,900.

It appears to me to be desirable before considering the reasons for judgment of the Court of Appeal, for me to state that in my opinion the evidence is capable of supporting the answers which the jury gave to the first three questions which were submitted to them, but they did not necessarily have to reach the conclusion which they did and if, as the majority of the Court of Appeal has found, there was misdirection prejudicial to the respondent in the charge of the learned trial judge respecting the standard of care required of the school authorities, then there should, of course, be a new trial on the question of liability.

In his charge to the jury the learned trial judge repeatedly told them that the duty of care which Molesky owed to young McKay was that which a careful father of a large family owes to his children. This view, which has often been adopted, was first expressed many years ago by Lord Esher in *Williams v. Eady*[2], where he said at p. 42:

> As to the law on the subject there can be no doubt; and it was correctly laid down by the learned Judge, that the schoolmaster was bound to take such care of his boys as a careful father would take of his boys, and there could not be a better definition of the duty of a schoolmaster.

[2] (1893), 10 T.L.R. 41.

1968

McKAY *et al.* *v.* BOARD OF GOVAN SCHOOL UNIT No. 29 *et al.*

Ritchie J.

While I am not satisfied that this definition is of universal application, particularly in cases where a schoolmaster is required to instruct or supervise the activities of a great number of pupils at one time, I am nevertheless of the opinion that a small group, such as that which Molesky had in his charge in the improvised gymnasium, is one to which Lord Esher's words do apply.

Mr. Justice Woods, however, in the course of the reasons for judgment which he delivered on behalf of the majority of the Court of Appeal, expressed the view that while the test of the "careful father" is readily applicable to students taking part in team games such as hockey or baseball, it did not apply to the facts of this case and he continued by saying:

> A physical training instructor in directing or supervising an evolution or exercise is bound to exercise the skill and competence of an ordinarily competent instructor in the field. The standard of the careful parent does not fit a responsibility which demands special training and expertise.

The learned judge later said:

> The standard of the person possessed of special training or expertise may well be higher than that of the careful parent and it may well be that on applying it to the present facts a jury might arrive at the same result. This, however, is conjectural and therefore cannot be assumed. The standard of care put before the jury was inappropriate and confusing. It amounts to misdirection.

I take the view that a reasonably careful parent would have been unlikely to permit his boy, almost totally inexperienced in gymnastics, to execute the manoeuvre which young McKay performed without exercising a great deal more care for his safety or ensuring that someone else did so on his behalf.

The position in the present case is that Molesky had accepted responsibility for the care and control of young McKay while he was engaged in the gymnastic practice and whatever analogy is involved in describing the standard by which Molesky's duty is to be tested, it is clear to me that his supervisory duties required him to guard against forseeable risks to which this inexperienced boy was exposed in the performance of exercises on the parallel bars. There was, in my opinion, a real risk that the boy might fall and there was a concomitant duty to guard

against that risk eventuating. The particulars specified in the jury's answer to question No. 2 constitute a finding that there was a breach of that duty.

With the greatest respect, it seems to me also that when Mr. Justice Woods held, in effect, that the learned trial judge was wrong in directing the jury that the respondent owed the boy the duty of "a careful parent" rather than the duty which would have been owed by a "physical training instructor", he was saying that the judge had invited the jury to determine the liability of the respondent school board according to a lower standard of care than that by which it should have been judged. If this were indeed the case, it is difficult to understand how the respondent has any cause for complaint. This appears to me to be the ground upon which the majority of the Court of Appeal set aside the jury's verdict as to liability, and with all respect, I do not think that it can be supported and I would accordingly restore the verdict of the jury in this regard.

Mr. Justice Woods also concluded that the learned trial judge had so misdirected the jury on the question of damages as to make a new trial necessary on this issue. This conclusion must, of course, be considered in light of the provisions of R. 39 of the Saskatchewan Court of Appeal Rules which read, in part, as follows:

> A new trial shall not be granted on the ground of misdirection . . . unless in the opinion of the Court, some substantial wrong or miscarriage of justice has been thereby occasioned in the trial . . .

When considering the jury's assessment of damages in isolation from the question of liability, it seems to me that this Rule must mean that even if there was misdirection on the part of the trial judge, the Court of Appeal could not grant a new trial unless it were satisfied that the damage award was so high or so low as to constitute a substantial wrong or miscarriage of justice.

There can, I think, be no doubt that the injuries sustained by Ian McKay were of such a massive and crippling character as to justify a very substantial award of damages. There does not appear to be any hope of his recovery and the only evidence of any possible improvement is highly speculative. The task of the jury was to endeavour to express the effect of his almost total physical disability in

1968

et al.
v.
McKAY
BOARD OF
GOVAN
SCHOOL
UNIT No. 29
et al.

Ritchie J.

terms of financial recompense. Involving as it did so many imponderables, this was not an easy problem for the jury who had to make the assessment or for the judge who had to direct them as to the principles by which they should be guided.

In an attempt to provide some yardstick by which to judge the loss, evidence was adduced from a member of the staff of the head office of an insurance company who testified by reference to certain statistical tables that the average life expectancy of a youth of McKay's age would be 53 years, and a doctor who was familiar with his case stated that although some insurance companies were now insuring paraplegics, he did not feel that a normal life expectancy, even of a paraplegic, could be expected in Ian's case.

Young McKay had apparently had some ambitions to become an architect and it was suggested that a figure of $500 per month would be a moderate one to represent his potential future earnings if he had not been injured; his father also gave evidence that without the constant care which he is now getting at his home, it would cost at least $150 to retain someone to look after him.

In the course of his reasons for judgment, Mr. Justice Woods singled out the following quotation from the learned trial judge's charge as constituting "misdirection on a vital factor":

> The damages which you calculate and which you award, gentlemen, as both Counsel have said, cannot be perfect. You heard evidence to the effect that to provide $500 a month for fifty-three years, requires $133,000. That is based upon 4%. But, of course, we have no way of knowing, you have no way of knowing, how long this chap will live, or how long he would have lived if he had not had the injury.

Mr. Justice Woods, in commenting on this statement said:

> The charge, when referring to this 53 years, if it does not in fact do so, comes close to stating that such is the expectation of life of this infant plaintiff, properly to be considered by the jury in its calculation of damages. Considering all that was said on this factor, I cannot but come to the conclusion, that the charge was much too favourable to the infant plaintiff. It failed to adequately place before the jury, the probable life expectancy of the infant plaintiff as the basis of its calculation for this portion of damages suffered. I am of the opinion that this constitutes misdirection on a vital factor.

With the greatest respect, it appears to me that the learned judges who formed the majority of the Court of

Appeal overlooked the fact that almost immediately after the excerpt quoted above from the trial judge's charge, he went on to say:

> I did not consider that Mr. Clark (the insurance man) said that fifty-three years was the life expectancy of an annuitant. It was the life expectancy on the average, established by various insurance companies as far ago as 1938, 1939. It was before the war in any event. You cannot, gentlemen, in calculating this thing, just add up what he might have earned, what he needs to maintain himself—add it all up and say that is what he is entitled to. This is perfect damages. The law says that you cannot make perfect damages. You cannot determine all the—you cannot add up all the income he might have made as an architect because you do not know whether he would have become an architect, whether he would have got through University, whether he would have gone back to his father's farm; . . .

Notwithstanding this language, Mr. Justice Woods also found that the jury had been instructed "that earnings and cost of future care are to be cumulative, in the calculation of damages" and he based this on a passage earlier in the judge's charge where he had said of "the financial loss experienced by this plaintiff"—"I refer not only to prospective earnings for the balance of his life but to the financial loss resulting from constant care for the rest of his life . . ." With the greatest respect, I think that if there was any misdirection in this statement it was fully corrected and that there was no misdirection in this regard.

Mr. Justice Woods also criticized the charge of the learned trial judge on the ground that he had not warned the jury against letting sympathy affect their calculation of damages and in failing to state that the award "should not be punitive, exemplary, nor extravagant and oppressive". In so doing, Mr. Justice Woods discounted the fact that at the beginning of his charge the learned trial judge had said:

> . . . this is a Court of Law, and however profound your sympathy you must in this Court disregard it because sympathy is a poor guide in the search for legal principles.

and that before embarking on the main body of his charge, he had again said: " . . . you will rid yourselves of sympathy". In addition to this, immediately before addressing the jury on the subject of damages, the learned trial judge said:

> I repeat to you, gentlemen, what I said in opening. Sentiment is no guide in the search for legal principles. Do not be governed in your decision on liability by sympathy which undoubtedly you have for the plaintiff.

1968

McKAY *et al.* *v.* BOARD OF GOVAN SCHOOL UNIT No. 29 *et al.*

Ritchie J.

I cannot find that there was any misdirection in this regard.

Mr. Justice Woods further criticized the learned trial judge for failing to instruct the jury that some discount should be made for the present payment of that portion of the damages designed to cover McKay's future requirements. It may be that some direct reference should have been made to this element, but I do not think that it can be said that the absence of such a direction constituted substantial wrong or miscarriage of justice.

In conclusion, Mr. Justice Woods said:

> I am left with the strong conviction that in calculating the award, the jury has taken the annuity cost of $500 per month for 53 years, namely, $133,000 (which is not shown to have any direct relationship to the plaintiff's needs), and has added thereto a substantial sum for other elements of damages, to arrive at the total of $183,900. It cannot have allowed for all the contingencies of life which might have or may now happen. This indicates error, which, in substantial part, may have arisen from the matters referred to.

With the greatest respect, it appears to me that in this passage Mr. Justice Woods entered upon the dangerous field of attempting to delve into the minds of the jury and to interpret their verdict in terms of his own mental processes.

In relation to the last-quoted excerpt from the judgment of the Court of Appeal, it should be pointed out that in my view full instruction was given to the jury in relation to "the contingencies of life". The learned trial judge read to the jury a paragraph from the judgment of Sellers L.J. in *Warren and Another v. King and Others*[3], in which he said, in part:

> . . . damages must take into consideration, in varying degrees according to circumstances, the many contingencies of life, its misfortunes as well as its good fortunes.

With the greatest respect, I am unable to agree with the Court of Appeal that there was any such misdirection in the charge of the learned trial judge as to warrant the granting of a new trial.

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[3] [1963] 3 All E.R. 521 at 527.

For all these reasons I would allow this appeal, set aside the judgment of the Court of Appeal and restore the judgment of the Court of Queen's Bench of Saskatchewan.

The appellant will have the costs of this appeal and of the appeal to the Court of Appeal of Saskatchewan.

Appeal allowed with costs.

Solicitors for the plaintiffs, appellants: Balfour, MacLeod, McDonald, Moss, Laschuk & Kyle, Regina.

Solicitors for the defendants, respondents: Pedersen, Norman, McLeod, Bertram & Todd, Regina.