

GUARANTY TRUST COMPANY OF
CANADA (by suggestion)
Formerly KATHLEEN RAE PEARCE
(*Plaintiff*)

APPELLANT;

1968
*Nov. 7
1969
Jan. 28

AND

MALL MEDICAL GROUP, DOCTOR
DAVID M. BRUSER, and JAMES
VERNON BOYCE (*Defendants*)

RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Negligence—Patient's knee-cap refractured during exercise treatment administered in medical clinic by clinic's employee—Employee acting contrary to written instructions from surgeon not to apply force or pressure—Whether employee negligent in administering treatment.

The plaintiff (P) fractured her right knee-cap when she struck her right knee against a bedpost. Following an operation the knee was healing well and the surgeon (the second defendant) decided that it would be wise to begin active exercises in order to mobilize the knee. He felt that because the patient had an unusual reaction to pain she would be most reluctant to flex her knee against a sensation of pain and, accordingly, he decided she would benefit from assistance by the third defendant in performing the exercises. The third defendant was a remedial gymnast and an employee of the surgeon and of the defendant medical clinic. The surgeon issued written instructions to the said employee that no force was to be used and no pressure applied. While P was undergoing the recommended treatment, her right knee-cap was refractured.

The plaintiff's action was maintained by the trial judge in the amount of \$20,000 general and \$7,085 special damages. On appeal, the Court of Appeal allowed the appeal and dismissed the action. An appeal from the judgment of the Court of Appeal was then brought to this Court.

Held (Judson J. dissenting): The appeal should be allowed and the trial judgment restored.

Per Martland, Ritchie, Hall and Spence JJ.: As it was established that the employee was acting contrary to his instructions in applying passive pressure to the patient's knee and that the injury could reasonably have resulted from that fact, the onus was on the employee to establish that the fracture did, in fact, occur not because he was acting contrary to instructions and applying pressure, but because the plaintiff jerked backwards on the plinth, inducing the muscle contraction that caused the break.

The employee's evidence failed to support the proposition that the plaintiff suddenly pulled her leg back and that the fracture occurred at that moment. This being so, the only reliable theory explaining the injury was that it was caused in accordance with the trial judge's finding that the employee "was negligent on this occasion in applying some

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pressure, contrary to his instructions, to assist movement, and in not exercising as much care as was reasonably necessary under the circumstances, and that his negligence was responsible for the fracture which occurred”.

Per Judson J., *dissenting*: The reason why the Court of Appeal reversed the judgment at trial was that the inferences drawn by the trial judge were not supported by the evidence and the findings of fact as made by him, and that on these findings of fact there was no believable evidence to support an inference of negligence against the physio-therapist. The reasons of the Court of Appeal should be affirmed.

APPEAL from a judgment of the Court of Appeal for Manitoba, allowing an appeal from a judgment of Smith J. Appeal allowed and judgment at trial restored, Judson J. dissenting.

W. C. Newman, Q.C., for the plaintiff, appellant.

Gordon F. Henderson, Q.C., and *E. Peter Newcombe, Q.C.*, for the defendants, respondents.

The judgment of Martland, Ritchie, Hall and Spence JJ. was delivered by

HALL J.:—This is an appeal from a decision of the Court of Appeal for Manitoba which allowed an appeal by the respondents from the judgment of Smith J. who had maintained the appellant's action against the respondents in the amount of \$20,000 general and \$7,085 special damages and costs.

The action arose out of the refracture of Kathleen Rae Pearce's right knee-cap on January 11, 1961, when she was undergoing treatment in the Mall Medical Clinic being administered by the respondent Boyce, a remedial gymnast. Boyce was an employee of the respondents Bruser and Mall Medical Group. No negligence is or was asserted against the respondent Bruser who is a well-known orthopaedic surgeon practising in Winnipeg. The liability, if any, of the respondents Mall Medical Group and Bruser depends entirely on whether their employee Boyce was negligent.

Mrs. Pearce fractured her right knee-cap in an unusual accident in her home in the early morning of December 1, 1960, when she struck her right knee against the bedpost in her bedroom. She consulted her physician, Dr. McKenty, and was referred by him to the respondent Dr. Bruser. Dr. Bruser operated on the knee on December 2, removing fragments of bone which had broken off at the lower end of the patella. He found that higher on the patella there was an

incomplete transverse fracture which did not extend to the articular cartilage. There was no displacement of the bone in the area of the fracture. Being of the opinion that the fracture would become solid and that reconstituting the extensor apparatus in and around the knee would produce an excellent result, he repaired the knee accordingly and the leg was then immobilized in a cast.

Some two weeks later the cast was changed to a lighter one. On December 28 the cast was bivalved so that it could be taken off and replaced readily. X-rays were taken at this time, and Dr. Bruser found that in the X-ray plates the transverse fracture appeared "fuzzy", indicating it was healing very well. He was of opinion that clinical soundness was not yet complete. He prescribed that Mrs. Pearce should continue to wear the cast, but to remove it once a day and sit in a warm bath, and with the water supporting the injured leg she was to try and bend and straighten it for fifteen or twenty minutes each day. Mrs. Pearce returned to the Mall Clinic on January 2, 1961, and her knee was again examined by Dr. Bruser. She was able at this time to raise the leg out of the back half of the cast without pain. She could flex the knee about 20 degrees and straighten it again without pain. In Dr. Bruser's view, the knee looked very well, and he decided that it would be wise to begin active exercises by which term is meant exercises in which the patient's own muscles are used to cause movement in the joint, sometimes directed, guided and encouraged by another person who does not apply any force himself to cause the patient's leg to flex or straighten, but merely supports the leg. He came to this decision, based on his experience with her in hospital. He recognized her as a very nervous patient who complained a great deal, and he was aware that her reaction to drugs for the relief of pain, *e. g.*, morphine, had been most unusual as she seemed to require doses at more frequent intervals than were normal, and he was left with the impression that she had an unusual reaction to pain. For this reason he felt she would be most reluctant to flex her knee against a sensation of pain, but unless exercises were begun she might have a permanently stiff knee. Accordingly, he decided that she would benefit from assistance which the respondent Boyce could give, and he instructed Boyce to start active exercises to mobilize the knee.

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The respondent Boyce was not a qualified physiotherapist, and was required to follow the instructions given him by Dr. Bruser. Those instructions were given by Dr. Bruser to Boyce in writing, and Dr. Bruser was particular in specifying that no physical force was to be used and no pressure applied. Dr. Bruser testified that he instructed Boyce to be careful, and because of Mrs. Pearce's apparent low pain tolerance he had to avoid pressure. Boyce stated that his instructions with regard to Mrs. Pearce were that the exercises to get the knee moving were to be done by Mrs. Pearce "on her own" and that his function was to support the knee and let her work it actively with her own muscle control.

On January 2 Boyce gave Mrs. Pearce some instruction in static contraction of the thigh muscles with no movement of the knee joint, the whole leg resting on a table or plinth. Mrs. Pearce returned for a treatment on January 4 and another treatment on January 6. The third treatment was on January 11 and it was on this occasion that the knee-cap was refractured. On this date Mrs. Pearce was placed on a table in such a position that the injured leg from the knee down projected out from the table. Boyce supported the leg by placing his left hand on the thigh a little above the knee with his right hand gripping behind the heel with his thumb coming around in front of the ankle. This was intended as a new exercise in which the knee was to be flexed and straightened. As of this date Mrs. Pearce had been able to obtain a flexion of 30 degrees in the knee.

Shortly put, the established facts are that when Mrs. Pearce presented herself to Boyce for treatment on January 11 her injured knee-cap was intact. A few minutes later, while being treated by Boyce in the manner just described, the knee-cap fractured with a crack resembling the breaking of a bamboo stick. There was a great deal of medical testimony dealing with fractures of the knee-cap of this kind, but none to the effect that such a fracture would happen spontaneously with the leg at rest. Something had to occur to cause the break.

The appellant's contention is that Boyce was applying pressure contrary to Dr. Bruser's written instructions that no pressure was to be applied, and it was admitted by Boyce that on January 11, while guiding the movement he was applying two pounds' pressure. This was contrary to the instructions he had received from Dr. Bruser. The medical

testimony established that pressure could cause pain and pain could induce an involuntary contraction of the quadriceps muscles and this involuntary contraction of the quadriceps muscles could cause the knee-cap to fracture.

The respondents' contention is that Mrs. Pearce was on the plinth receiving a treatment from Boyce, and being apprehensive of pain pulled her leg back, and in so doing induced a contraction of the quadriceps muscles which fractured the knee-cap.

It is clear that the injury occurred either by the passive pressure applied by Boyce causing pain with the result as stated or by reason of Mrs. Pearce pulling herself back on the plinth with the result as stated.

In view of the fact that it was established that Boyce was acting contrary to his instructions in applying passive pressure and that the injury could reasonably have resulted from that fact, it seems to me that an onus devolved upon Boyce to establish that the fracture did, in fact, occur not because he was acting contrary to instructions and applying pressure, but because Mrs. Pearce jerked backwards on the plinth, inducing the muscle contraction that caused the break.

The evidence fails to establish that Mrs. Pearce suddenly pulled her leg back at the instant of the break. Three persons were then present, Mrs. Pearce, her son Ralph James and Boyce. They testified on this most material point as follows:

RALPH JAMES PEARCE:

Q It doesn't matter, tell it in your own way.

A Well, at first she didn't say too much, but as the exercise progressed she complained about being in pain, and through this she was a little reluctant to go on with the exercise and she tried to pull herself back up, or her leg was back on the bench, and with this Mr. Boyce—I won't quote exactly what he said because I can't remember, it's quite a little while ago now—but with this he was more persistent on helping her with the exercise, and he made her stay where she was doing this exercise.

BY THE COURT:

Q You say she pulled herself back on the plinth, is that it?

A Yes. She was complaining that he was hurting her and she wanted to get back on, as you call it, the plinth.

Q And you say he stopped her?

A Yes—well, he proceeded with the exercise even though she was reluctant to do so, and finally it was just a case of a little bit too much pressure, I guess, and it snapped and all you heard was a loud crack.

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BY MR. NEWMAN:

Q Well, did you observe which way the leg was moving when the snap occurred?

A It was moving in the downward motion.

Q And where was Mr. Boyce's right hand at the time?

A Holding on to the heel of her foot.

Q And the left hand up?

A Up behind the knee.

and on cross-examination:

Q That is she put her hands to the side of her and pulled herself back?

A Yes.

Q How far would you say she moved back?

A Well, she got back to where her leg, except for about the bottom half of her leg itself, was on.

Q Well, that is, her knee would be—

A Her knee would have been on the bench then.

Q On the bench. That is over the edge of the plinth?

A Yes.

Q Which would mean that both legs would be probably straight out?

A That's correct, yes.

BY THE COURT:

Q Would you say only a few inches—

A Well, there was only about, I would say, about eight, maybe ten inches of her leg over the edge of it.

BY MR. MONK:

Q Well, I want to be quite clear about that. That is her leg was only projecting beyond the plinth, say, a little above the ankle?

A Oh, yes, just a little above, not much.

Q There would be, say, six inches of her leg beyond the plinth?

A Yes.

Q I see. And when she was in that position what was Mr. Boyce doing?

A He was talking to her.

Q Talking to her. Did he have his hands touching her at all?

A Well, he still had his hand on her heel.

Q But was he moving the leg at all at that point?

A No, not at that particular time. He was just trying to persuade her to come down to the end of the bench again.

Q I see. And how long did she stay in the position she was that you described?

A Oh, not more than a half a minute.

Q Half a minute, and it was during that half a minute that this occurrence, that crack—

A No, sir.

Q Well, tell us what happened.

A Then Mr. Boyce throughout some of the conversation told her that "you had to be cruel to be kind".

Q I see. That is exactly what he said?

A I'm not quoting, sir, now. It was pertaining to this.

Q But what you believe he said, yes.

A And he held her down to the edge of the plinth again. Even though she was reluctant I guess she was just naturally out to try to help herself as well.

Q I see. And he helped her into what position?

A The same position she was before she pulled herself back.

Q That is sitting with her knee over the edge of the plinth?

A That is correct, yes.

Q I see. And was she attempting to move her leg?

A I don't—I can't say as to whether she was attempting, but I know the leg was being moved.

Q In what motion, up and down?

A That's right, yes, sir.

Q And did Mr. Boyce have his hands as you described previously?

A Yes, sir.

Q And how long had this occurred when the sound which you referred to, or the cracking sound, occurred?

A Possibly a minute and a half to two minutes at the most.

Q At the most. And at the time that the occurrence, that the cracking sound occurred, was your mother attempting to move back onto the plinth?

A I wouldn't say so, but with the pain after the crack—well, I can recall looking at her face and I knew she was in pain.

Q But prior to the crack did she make any other movement to attempt to get back onto the plinth or further back on the plinth?

A No, just conversation, I would say.

Q I see. And what was the conversation, what occurred?

A That she wanted to stop this and go home, he was hurting her. That's all.

Q Did you say that you remembered whether this occurred on the upward or downward movement of the leg?

A It was the downward movement.

Q That is the leg was coming down?

A That's correct.

JAMES VERNON BOYCE:

Q You were giving this treatment to Mrs. Pearce, and how long did you give it to her on this last occasion?

A In the area of about five to ten minutes.

Q Would this be continuously or intermittently?

A It would be intermittently.

Q Tell us what happened.

A The one point I don't remember, in what direction the travel was.

Q When you say "in what direction the travel was" what do you mean?

A Whether on the downward motion or upward motion. I can't say for certain where it was. This is one thing I can't say, but I did hear a tearing sound.

Q What occurred at that moment; what happened?

A I believe that Mrs. Pearce did scream, which was normal reaction.

BY THE COURT:

Q After the tearing sound or before?

A After the tearing sound.

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BY THE COURT:

Q Before the tearing sound had she made any movement?

A *Not to my knowledge.* She was working along fairly well with me.

Q After the tearing sound what did you do and what did she do?

A After the tearing sound I can't say for certain, I am not sure, but she was sitting back on the bench. I think she moved back but I am not sure.

Q Do you know whether she moved back before or after the tearing sound?

A *It was after.* She pulled the leg back for the support of the plinth.

(Emphasis added.)

Mrs. Pearce's evidence was not as clear as that of her son or that of Boyce. That was to be expected in the circumstances. She was quite hysterical following the injury. However, she did testify as follows:

Q And then what happened?

A My knee snapped and it sounded like a bamboo stick.

Q And then what about pain?

A Well, it was worse than the first one I had, the first time I hit my knee on the bedpost.

Q And what was he doing at the time the snap occurred, do you recall? Do you actually recall what he was doing at the time the snap occurred?

A Well, as I say, he had his hand like on the ball of my heel and his other hand on the top of my knee.

Q Do you recall whether he was moving your foot down or up when the snap occurred?

A He was pushing it up or down.

Q But do you recall actually at the time it snapped whether he was pulling it down or pushing it up?

A No, I don't.

It is clear from the son's evidence that Mrs. Pearce moved backwards on the plinth at some time prior to the fracture and was persuaded by Boyce to permit him to resume the up and down movement. She agreed and came forward again and it was at this time, after Boyce had resumed the up and down movement under pressure that the fracture occurred.

Respondents' contention must, I think, stand or fall principally on Boyce's evidence and that evidence just does not support the proposition that Mrs. Pearce suddenly pulled her leg back and that the fracture occurred at that moment. This being so, the only reliable theory explaining the injury is that it was caused in accordance with the learned trial judge's finding as follows:

I find that Boyce was negligent on this occasion in applying some pressure, contrary to his instructions, to assist movement, and in not

exercising as much care as was reasonably necessary under the circumstances, and that his negligence was responsible for the fracture which occurred.

I would, accordingly, allow the appeal with costs here and in the Court of Appeal and restore the judgment of Smith J.

JUDSON J. (*dissenting*):—The reason why the Court of Appeal reversed the judgment at trial was that the inferences drawn by the learned trial judge were not supported by the evidence and the findings of fact as made by him, and that on these findings of fact there was no believable evidence to support an inference of negligence against the physiotherapist.

I will not attempt to paraphrase the comments of the learned trial judge on the evidence of the physiotherapist and the patient. The following are verbatim extracts from his reasons for judgment:

Boyce's evidence that he did not pull the leg down or push it up, but that the movement was due entirely to use of Mrs. Pearce's own muscles with him imposing about two pounds of resistance to the movement; that she was in fairly good spirits that day; that at no time did she complain about being in pain, or that he was being too rough, or that he was hurting her, but worked along fairly well with him within the range of movement; that there was no problem at all until the tearing sound occurred, and that it was after the tearing sound occurred that she pushed herself backward on the plinth: all this gives no credible explanation of the fracture. Even his adoption of the answers to questions put to him when he was examined for discovery, to the effect that he could have moved Mrs. Pearce's leg up and down but did not recall doing so, does not explain the accident. Nor does his admission on cross-examination that though he did not recall any conversation with Mrs. Pearce on January 11 prior to the fracture, she might have asked him if he was an old sergeant-major, she might have told him she was not a Blue Bomber, or that he was being too rough. These admissions raise doubts about the strict accuracy of his evidence, but they do not explain the accident.

Even if all of Mrs. Pearce's evidence is accepted, it does not indicate satisfactorily how the accident occurred. She said she objected to his treatment because of the pain in the knee, that she pushed Boyce back and told him she wasn't coming back for any more treatments and that he was far too rough. Asked twice by the Court if it was very painful, her first answer was that "It was very vigorous that night" and her second was "Yes, it was painful". She did not use the word "very" in this answer. She said she then went to push herself backwards on the plinth because she could see he was going to be too vigorous, and by this time the knee had snapped. On cross-examination she said she didn't push herself away from Boyce but kind of slid back slowly as best she could, and that it wasn't a second after she made this movement that the break occurred. Questioned further, she said the two things were not almost simultaneous, and then that she didn't know whether it was less than a second after her backward movement that the break occurred.

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Nowhere does Mrs. Pearce's evidence suggest a sudden movement on her part or a sharp pain such as would cause a violent or even quick muscular reaction in her quadriceps.

The conclusions of the learned trial judge are set out in the following extracts from his reasons:

Though none of those present said anything to this effect, I have come to the conclusion, on all the evidence, that the immediate cause of the fracture on January 11 was and can only have been a sudden contraction of Mrs. Pearce's quadriceps muscle, which was probably occasioned either by actual pain in the knee or by nervous reaction anticipating such pain. I find that during the exercise she suffered some pain which, because of her nervous condition and low pain tolerance, led her to make some complaint. I do not accept her evidence that Boyce was too rough or too vigorous. Her son said he was persistent in getting her to continue with the exercise, but he said nothing to indicate roughness or excessive vigor.

Boyce's knowledge of Mrs. Pearce's nervous condition and reaction to pain imposed a greater duty than usual upon him to be on guard against sudden movements or muscular contractions on her part. Though he denied it at the trial, his evidence on examination-for-discovery (questions 168 and 169) indicate that he could have been moving Mrs. Pearce's leg up and down. He then said at the trial that the answers to those questions were correct to the best of his knowledge. My conclusion on this point is that he was assisting to some slight extent the upward and downward movement of Mrs. Pearce's leg. The evidence is that during this exercise his right thumb was in front of or above the ankle. If, as Mrs. Pearce's son said, the fracture occurred during the downward movement of the leg, that would be the instant when a spasm or sudden contraction of the quadriceps occurred, the effect of which would be aggravated by any downward pressure then being exerted by the grip of Boyce's right hand or by his right thumb. I consider the balance of probabilities is in favour of this being the true explanation for the accident. The medical evidence indicates that it is possible for the patella to be fractured by sudden muscular contraction alone, but it is more likely to occur if the contraction works against resistance such as I have found was being exerted by Boyce's hand or thumb. Accordingly, I find that Boyce was negligent on this occasion in applying some pressure, contrary to his instructions, to assist movement, and in not exercising as much care as was reasonably necessary under the circumstances, and that his negligence was responsible for the fracture which occurred.

The evidence of the medical experts for the plaintiff indicates that neither of them would go beyond saying that it was possible that the fracture might have happened as a result of the small amount of pressure Boyce was exerting upon the leg. Indeed, Dr. Mills agreed on cross-examination that there were several ways in which the fracture could have happened during the period remedial exercises were being administered, and these were equally as probable as the theory that the injury occurred as a result of Boyce exerting too much pressure. Furthermore, both expert wit-

nesses for the defendants gave testimony which emphatically supported the contention that Boyce had not been negligent in his administration of treatment.

With the evidence left as it was and with the findings of fact made by the learned trial judge, the conclusion of the Court of Appeal is, in my opinion, sound. They said:

The conclusion reached by the learned trial judge was, at most, an inference or theory which *he evolved* to explain the accident. It could only be warranted if, on the balance of probabilities, such inference or theory was justified. I think the plaintiff's case falls far short of presenting evidence adequate in clarity or strength to discharge the onus of proving negligence. The greater part of the judgment of the learned judge is to the same effect. The somewhat surprising conclusion that he reached is, with respect, not based on evidence which he clearly or unreservedly accepts; it is in almost direct contradiction of much of the medical testimony, and runs counter to the weight of the highly competent professional opinion on the record.

I would affirm the reasons of the Court of Appeal and dismiss the appeal.

Appeal allowed with costs, JUDSON J. dissenting.

Solicitors for the plaintiff, appellant: Newman, MacLean & Associates, Winnipeg.

Solicitors for the defendants, respondents: Aikins, MacAulay & Company, Winnipeg.

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