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*April 26.

THE GOVERNOR AND COMPANY OF ADVENTURERS OF ENGLAND TRADING INTO HUDSON'S BAY (DEFENDANT) ..... APPELLANT;

AND

CONRAD LESLIE WYRZYKOWSKI, AN INFANT UNDER THE AGE OF 21 YEARS, SUING BY HIS FATHER AND NEXT FRIEND, CASIMIR T. WYRZYKOWSKI, AND THE SAID CASIMIR T. WYRZYKOWSKI (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Negligence—Evidence—Injury to young child on escalator in defendant's store—Claim for damages—Alleged negligence in construction and maintenance of escalator—Questions for jury—Application of Elevator and Hoist Act, Man., 1919, c. 31—Admissibility in evidence of Government permits and Government inspector's report—Evidence Act, Man., 1933, c. 11, s. 31—Manitoba Factories Act, R.S.M., 1913, c. 70 (as amended), ss. 5 (a), 50A—Misdirection in charge to jury.

The action was for damages by reason of injuries suffered by the infant plaintiff, a boy four years of age, while descending (along with his mother and infant brother) in an escalator in defendant's depart-

*PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

mental store in Winnipeg, Manitoba. During the descent, the infant plaintiff fell and caught his hand between the side of the moving steps and the unmoving side wall of the escalator, the hand remaining caught while he was carried to the bottom of the escalator and until after the escalator was stopped. Plaintiffs alleged (*inter alia*) that the escalator was negligently constructed and maintained.

Evidence was given at the trial of inspections of the escalator by Government inspectors and of the granting of permits to operate it, under the provisions of the *Elevator and Hoist Act,* Man., 1919, c. 31, and regulations thereunder. Certain permits issued, with certificates thereon of re-inspection, were, against objection by plaintiffs' counsel, admitted in evidence. It was further shown that on the morning after the accident a government inspector had made a further inspection, and a statement in his report thereon, that "the escalator was in good order and in perfect control" was, against objection by plaintiffs' counsel, read to the jury. After the evidence at the trial had been completed, the judge and jury went to the store and took a view of the escalator both at rest and in operation. It was admitted that it was then in the same condition as at the time of the accident. Following the Judge's charge the jury brought in a verdict denying negligence in defendant, and the action was dismissed. On appeal, the Court of Appeal for Manitoba (44 Man. R. 256) ordered a new trial, on the ground that the permits, and the inspector's report after the accident, had been improperly admitted in evidence, and further that part of the Judge's charge to the jury amounted to misdirection in law. Defendant appealed to this Court.

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

Per curiam: The escalator was within the provisions of said *Elevator and Hoist Act,* and the said permits put in evidence were relevant and admissible.

Per Duff C.J., Davis, Kerwin and Hudson JJ.: The statement read to the jury from the inspector's report after the accident was not admissible; its use was not justified under s. 31 of the *Manitoba Evidence Act* (Man., 1933, c. 11). Further, there was misdirection in the trial Judge's charge to the jury, in that he did not sufficiently differentiate the defendant's duty to a small child from its duty towards an adult, and, on the contrary, led the jury to believe that there was some duty to take care incumbent upon the child.

Per Duff C.J. and Davis J.: Having regard to the facts that, upon the evidence and the law, the child was not a trespasser, he was permitted to use the escalator, and on account of his age was incapable of negligence, the trial Judge's charge to the jury beclouded the child's legal position. Further, there should have been put clearly and fully to the jury the question as to the defendant's reasonable care, in permitting the child to use the escalator, in permitting such use without an attendant of defendant being present and without some means of immediately stopping the escalator when the child fell and got his hand caught. The real problem in the case was not put to the jury.

Per Duff C.J.: On the issue raised by the allegation of negligence in construction and maintenance of the escalator, defendant was entitled to show compliance with the government regulations; and it is impossible to say that the facts of inspection and the issue of permits in the usual way had not some relevancy to that issue; further, even if the government department charged with the administration of the

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Elevator and Hoist Act had been in error in proceeding upon the footing that escalators are within the contemplation of the Act, nevertheless the facts of inspection and issue of permits by the department, in accordance with the duty imposed upon it under the departmental construction of the Act, would be equally relevant to the said issue. As to the inspector's report on inspection after the accident: It is plainly not a public document within Lord Blackburn's exposition in *Sturla* v. *Freccia*, 5 App. Cas. 623; and it is not made evidence by s. 31 of the *Manitoba Evidence Act*. No copy of entry should be received in evidence under s. 31 unless the proof offered identifies the book or other record in which the entry appears in such a manner as to enable the court to see clearly that the entry is one within the purview of the enactment. Further, only by a forced and non-natural reading of s. 31 can it be made to comprehend such a document as that in question; to admit the document as evidence of the facts of which it speaks, would give to s. 31 such a scope as to accomplish, in respect of documents on file in offices connected with any of the public services of the country, a fundamental change in the rules and principles of evidence. Enactments of the character of s. 31, which introduce a general exception to the rules of evidence, depriving the parties to legal proceedings of the usual safeguards in respect of evidence, should be strictly limited in their application to cases which are unmistakeably within their real intendment as well as within the literal meaning of the words employed.

Per Crocket J. (dissenting): From the evidence, the only possible ground upon which the jury could have attributed the child's injury to negligence charged against defendant was that the clearance between its moving steps and its stationary skirting was too wide. The crucial issue for decision, as the case was tried, was whether or not that clearance created a danger for young children of which defendant knew or ought to have known and have guarded against. The trial Judge made this issue clear to the jury. The jury having, after hearing the evidence, inspected the escalator and seen it in operation—it being then in the same condition as at the time of the accident—and having specifically found defendant not guilty of any negligence which caused the injury, it cannot be said that in the circumstances any substantial wrong or miscarriage was or could have been occasioned by any of the grounds complained of by respondents. Though, in view of the provisions of ss. 5 (*a*) and 50A of the *Manitoba Factories Act* (R.S.M., 1913, c. 70, as amended), the extract from the inspector's report made after the accident might not be competent, it could not be said that its admission could have occasioned any substantial wrong or miscarriage within the meaning of s. 28 (1) of the *Court of Appeal Act* (Man., 1933, c. 6). As to the complaint that the trial Judge did not sufficiently differentiate defendant's duty to a small child from its duty towards an adult, the trial Judge made it clear to the jury that no negligence on the part of the mother could affect the child's right of recovery, and nothing that he said in reference to the child's own conduct, independently of his mother, could have had any influence upon the jury in relation to the crucial issue for decision above mentioned. Therefore a new trial on the alleged ground of misdirection would be barred by said s. 28 (1) of the *Court of Appeal Act*. The judgment at trial should be restored.

APPEAL by the defendant from the judgment of the Court of Appeal for Manitoba (1), which allowed the plaintiffs' appeal from and against the jury's verdict at trial (which denied negligence in defendant) and the judgment directed to be entered pursuant thereto by the trial Judge (Dysart J.), and set aside the said judgment at trial and ordered a new trial.

The action was to recover damages because of injuries suffered by the infant plaintiff (then four years and one month old) on April 19, 1933, when, along with his mother and a younger brother, he was on an escalator proceeding from the main floor to the basement floor of the defendant's departmental store in Winnipeg, Manitoba. The infant plaintiff fell and his hand got caught in the narrow space between the moving steps or treads of the escalator and its stationary side wall, and in that situation he was carried on down to the foot of the structure where the hand came in contact with the floor, and before he was released he was severely injured. The plaintiffs alleged that the injuries were caused as a result of the negligence of the defendant in (*inter alia*) the escalator being negligently constructed and maintained, and, as stated in the judgments now reported, the real question for decision at the trial, upon the pleadings and as the evidence developed, was whether or not the space between the wall and the moving part of the escalator created a danger for young children, of which danger the defendant either knew or ought to have known and have guarded against more effectively.

The grounds for the said judgment of the Court of Appeal (ordering a new trial) were, that there was improper admission in evidence of certain government permits, and certificates indorsed thereon, with respect to the escalator, based upon government inspection, and of a report made upon inspection by a government inspector on the morning of the next day after the day of the accident; and that there was misdirection in the trial Judge's charge to the jury.

By the judgment now reported, the appeal to this Court was dismissed with costs, Crocket J. dissenting.

T. N. Phelan K.C. and *B. O'Brien* for the appellant.

E. K. Williams K.C. for the respondent.

(1) 44 Man. R. 256; [1936] 2 W.W.R. 650; [1936] 4 D.L.R. 208.

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THE CHIEF JUSTICE.—I concur in the conclusion as well as in the reasoning of my brother Hudson as well as those of my brother Davis, but I desire to add one or two observations upon the points raised as to the admissibility of the permits and of the report of the inspector of the 24th of April, 1933.

First then, as to the admissibility of the permits. Agreeing, as I do, with the views of my brother Hudson, that the provisions of the statute include within their purview hoisting apparatus of the type (escalator) that was in question here, nevertheless, I think the admissibility of the permits does not necessarily depend upon that.

On the strictly limited issue raised by the statement of claim that the escalator was negligently constructed and maintained; in other words, that the appellants failed to use reasonable care in respect of the construction and maintenance of it, the defendants were entitled to show that they had complied with the Government Regulations. It is impossible to say that the facts of inspection and the issue of permits in the usual way had not some relevancy to that issue. It appears to me, however, that if the Government department charged with the administration of the statute had been in error in proceeding upon the footing that escalators are within the contemplation of the statute, nevertheless, the facts of inspection and issue of permits by the department, in accordance with the duty imposed upon it under the departmental construction of the statute, would be equally relevant to this issue of reasonable care.

Then, as to the inspector's report. It is plainly not a public document within Lord Blackburn's exposition in *Sturla* v. *Freccia* (1) and its admissibility could only be sustained on the ground that it is made evidence by section 31 of the *Manitoba Evidence Act* (Stats. of Man. 1933, ch. 11). By that statute a copy of any entry in any book, record, document or writing kept in any department of the Government of Canada or of the Province of Manitoba, or any other province of Canada, or in the office of any commission, board or other branch of the public service of Canada, or any such province, is receivable as evidence, not only of the entry itself, but

(1) (1880) 5 App. Cas. 623.

also of the matters, transactions and accounts therein recorded, upon condition of proof (*inter alia*) that, at the time of the making of the entry, such book, record, document or writing in which the entry was made was one of the ordinary books, documents or records kept in such department or office. It is quite obvious from inspection that the affidavit does not comply with the statutory requirements; and in my opinion no such copy should be received in evidence unless the proof offered identifies the book or other record in which the entry appears in such a manner as to enable the court to see clearly that the entry is one within the purview of the enactment.

Since there is to be a new trial, however, it is necessary to decide upon the admissibility of this copy of the inspector's report. It professes to give an account of the accident and of the condition of the escalator on the day on which the accident occurred. Obviously, the inspector is not speaking of matters within his own knowledge. The safeguards by which the law protects litigants in respect of evidence adduced in legal proceedings, the oath or its equivalent with the attendant criminal sanctions, the rule against hearsay evidence, the right of cross-examination, are all absent when a document such as this is admitted as evidence of the facts of which it speaks. Moreover, if this report is receivable as evidence of such facts under the statute, then the statute is obviously of such a scope as to accomplish, in respect of documents on file in offices connected with any of the public services of the country, a fundamental change in the rules and principles of evidence. A report by a provincial constable to his superior officer, for example, preserved on file in some office where such documents are kept would appear to be admissible as evidence of the facts stated in any action between private individuals. Even a letter on file written by some official giving an account of some matter of departmental interest could be adduced as proof of the statements it contained in any civil proceeding between any parties.

Such, in my opinion, is not the proper view of the effect of the statute. Only by a forced and non-natural reading can it be made to comprehend such documents. Enactments of this character which introduce a general exception to the rules of evidence, depriving the parties to legal

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proceedings of the usual safeguards in respect of evidence, should be strictly limited in their application to cases which are unmistakably within their real intendment as well as within the literal meaning of the words employed.

CROCKET J. (dissenting).—There is no doubt, I think, from the evidence that the only possible ground upon which the jury could have attributed the infant plaintiff's injury to the negligence of the defendant on account of the construction and maintenance of the escalator—the principal negligence charged in the action—was that the clearance between its moving steps or treads and its stationary skirting was too wide. No guard or attendant and no such stop buttons as were suggested, whereby the motion of the escalator might have been more speedily stopped, would have prevented the unfortunate accident to the child. The learned trial Judge pointed this out clearly and, I think, quite correctly to the jury.

The crucial issue for decision as the case was tried, therefore, was, as pointed out by my brother Hudson, whether or not the clearance between the skirting and the moving steps created a danger for young children, of which the defendant either knew or ought to have known and have guarded against. In my opinion, the learned trial Judge made this issue clear to the jury. The jury, after hearing the evidence, themselves inspected the escalator and saw it in operation. There seems to be no question but that at the time the jury inspected it the escalator was in precisely the same condition as at the time of the accident. A specific question having been left to the jury by the learned trial Judge as to whether the defendant was guilty of any negligence which caused the injury to the infant plaintiff, and the jury having answered it "not guilty," I am not at all satisfied, in such circumstances, that any substantial wrong or miscarriage was or could have been occasioned by any of the grounds complained of in behalf of the respondent.

I agree with my brother Hudson that the escalator in question falls within the provisions of the Manitoba *Elevator and Hoist Act,* and that the permits which were admitted in evidence in relation to its inspection under the provisions of that Act up to the time of the occurrence of the accident were relevant and admissible.

As to the extract from the report made by the government inspector after the occurrence of the accident, I am inclined to think that in view of the provisions of ss. 5 (*a*) and 50A of the *Manitoba Factories Act,* R.S.M., 1913, ch. 70 (as amended—see Consolidated Amendments, 1924), this report was not competent, but, as I have already indicated, I am not satisfied that its admission could have occasioned any substantial wrong or miscarriage within the meaning of s. 28 (1) of the Manitoba *Court of Appeal Act,* 1933, ch. 6. All the extract complained of stated was that the escalator was in good order and in perfect control, which the jury on their own examination and test apparently saw for themselves.

With regard to the complaint that the learned trial Judge did not sufficiently differentiate the defendant's duty to a small child from their duty towards an adult, it seems to me that His Lordship made it perfectly clear that no negligence on the part of the mother could affect the infant plaintiff's right of recovery, and that nothing that he said in reference to the infant's own conduct, independently of his mother, could have had any influence upon the jury in relation to the crucial issue as to whether the child's injuries were caused by any negligence on the part of the defendant in relation to the construction and maintenence of the escalator. For this reason I think that a new trial would be barred on the alleged ground of misdirection by the said s. 28 (1) of the *Court of Appeal Act.*

In my opinion, the finding of the jury is unexceptionable, and the learned trial Judge had no other recourse than to enter a verdict for the defendant on the finding or to dismiss the action.

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

DAVIS J.—I agree with the judgment of my brother Hudson, but I would add a few observations of my own upon the question of the sufficiency of the learned trial Judge's charge to the jury.

That the staircase was in good working condition was only one of the essential facts in issue. That being proved, the question was then whether or not the defendant company had exercised reasonable care in relation to the infant

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plaintiff. The child of four years of age was not a trespasser—that is important—but was permitted to use the moving stairs, made on the endless chain principle, to go from one floor of the building to another. Was that a reasonable thing for the defendant to permit? The child, on account of its age, was incapable of negligence on its part. That was the position of the child in the problem for the jury. Instead of so directing the jury, the trial Judge, I fear, beclouded the child's legal position by telling the jury:—

> The mother was not holding the child. The child was not holding on to the mother. Those appliances are expected even for adults to require a little steadying at times, so they have a moving rail that adults rest on and therefore steady themselves. But you cannot have a moving rail for infants too small to reach up to it, and a child probably ought to hold on to its mother's skirts or have been guided or supported by the mother.

And further in the charge:—

> Supposing this child had fallen forward and tumbled down the escalator, head over heels to the bottom, and bumped its head, would there have been any action? There could not be. A child is supposed to walk standing up going down stairs. If he had bumped his head on some projection which was necessary there, there could be no action.

The jury would undoubtedly be led to believe that there was some degree of care incumbent upon the child when, as a matter of law, there was none. It is clear to me that the position of the child was not put to the jury.

Then the position of the defendant as occupier of the premises, permitting a child of four years lawfully upon the premises to use the moving staircase, ought to have been put clearly and fully to the jury. What is a reasonable amount of care in one set of circumstances may not be so in another set of circumstances and reasonable care is the sole test of negligence. Professor Winfield in his new text-book on the Law of Torts (1937) says at pp. 581-582:—

> Very few people who enter a shop, ship, factory, house or vehicle, or who go upon appliances connected with them, like a lift or gangway, have or can have full knowledge or control of the possible dangers that lurk in them. They must trust themselves mainly to the occupier even when they exercise reasonable care on their own behalf. Modern civilization has greatly increased the risks they run. Indeed this accounts, to some extent, for the comparatively recent evolution of the law on this subject, although another equally important factor has been the inroad made by the development of the law of negligence on the older idea that an owner can do what he likes with his land so far as visitors to it are concerned. (cf. Bohlen, Studies in the Law of Torts (1926) 162-163.) Machinery and appliances which are the commonplace fittings

of modern dwelling-houses, to say nothing of factories and railways, were unknown little more than a century ago. The Common Law has rightly taken account of the increased perils which have resulted from this and has screwed the duty of the occupier to a proportionately higher pitch. The escalator was maintained and operated by the defendants upon the premises for the use of the public. What may be reasonably safe for an adult may not be reasonably safe for a child of four years. Was it a structure of such a kind that the occupiers reasonably permitted a little child to make use of it? That was a question for the jury. Should the defendants have had an attendant present? So far as an attendant is concerned, the jury might conclude that the presence of the mother with the child removed the storekeeper from such duty; on the other hand, the jury might recognize what must be a fact that many parents shopping in the big cities are not really responsible persons having regard to the protection even of their own little children. Should there have been some means capable of stopping the moving stairs when the child fell and got his little hand caught in the narrow space between the stairs and the wall? Did the defendants act reasonably in permitting the child to use this apparatus in the absence of some such safeguard for the child's protection? That is a real problem that should have been put squarely before the jury. The presence of the mother would have nothing to do with the absence of some automatic means to bring the moving structure to a sudden stop when such an accident occurs. The moving staircase was likened, during the argument, to an elevator, but an elevator is in charge of a competent person who can bring it to a stop in a moment. The serious injury to the child does not appear to have been due to the fact that his little hand got caught in the apparatus but to the fact that the child was thereafter carried on down the staircase to the foot of the structure where the hand came in contact with the floor, almost pulling the hand off the child. The crying of the child arrested the attention of those present but no one was there to stop the motion. Was that negligence on the part of the defendants to the little child? Or was that something beyond the field of reasonable care? Or was the accident the sort of accident that a storekeeper operating these moving stairs would not be expected reasonably

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to foresee as likely to happen to a little child? Was it the consequence of an extremely rare and obscure accident which the jury think a storekeeper cannot, in a business sense, be reasonably expected to anticipate? All those questions were matters for the jury to consider. The real problem in the case was not put to the jury.

Accordingly I would dismiss with costs the appeal from the judgment of the Court of Appeal that directed a new trial.

The judgment of Kerwin and Hudson JJ. was delivered by

HUDSON, J.—The infant plaintiff, a boy of four years of age, was seriously injured while descending in an escalator in the defendant's departmental store in Winnipeg. This action was brought for damages in respect of such injuries.

The statement of claim alleges:—

5. The defendant maintains in the said store and invites persons in the said store to use a moving staircase or escalator operated by electrical power and furnishing a means of proceeding from the main floor to the basement floor of the said store, which will hereinafter be referred to as "the escalator," and the said Wilhelmina Wyrzykowski with the infant plaintiff and her other infant son got on to the said escalator and were proceeding from the main floor to the basement when the said infant plaintiff on account of the construction and operation of said escalator fell or was knocked or thrown so that he fell on the platform or steps of the said escalator, which was so negligently constructed and maintained that his right hand and lower arm was caught between the side of the moving steps or treads or platform of the escalator and the unmoving side of the said escalator and/or caught in the machinery of the same and/or pulled into the said machinery where it was held and he was carried to the bottom of the said escalator with his said hand and arm so caught and held, and so remained until the said escalator was stopped and until the same was dismantled in part so as to release the hand and arm.

and sets out particulars of negligence.

The statement of defence denied all the charges of negligence and set up:—

16. The defendant says further that in the said escalator it maintains the most modern and up to date equipment obtainable, in perfect condition and regularly inspected, and that the same was in good working condition and order and is so constructed that it is impossible for the said escalator to jerk in its operation and to throw anyone off their balance, and that the defendant has thereby discharged its duty, if any, to the plaintiff or plaintiffs or anyone in charge of the infant plaintiff.

It was further alleged that the infant plaintiff was in charge of its mother, that she was familiar with the esca-

lator and the use thereof and herself responsible for his falling.

At the opening of the trial, the defendants were permitted to amend by setting up as a further defence that they had been authorized to operate the escalator under the provisions of the *Elevator and Hoist Act* (Manitoba), and that pursuant to such Act the same had been inspected from time to time and all requirements thereunder fulfilled.

The action was tried before Mr. Justice Dysart and a jury. Evidence was given of the accident and the injuries to the infant plaintiff, the character, condition and operation of the escalator, the inspection of same from time to time by employees of the defendants and by governmental inspectors under the provisions of the above Act. Some of the permits to operate were admitted in evidence, notwithstanding objections by the plaintiff's counsel. It was further shown that on the morning after the accident a government inspector had made a further inspection and report. Over objections by plaintiff's counsel, there was read to the jury a portion of this report as follows:—

> The escalator was in good order and in perfect control.

After the oral and documentary evidence had been completed, the trial Judge and jury went to the store and took a view of the escalator, both at rest and in operation. It was admitted that the escalator was then in the same condition as at the time of the accident.

Following the judge's charge to the jury, a verdict was brought in exonerating the company from any charge of negligence and, on this, judgment was entered for them.

From this judgment, the plaintiffs appealed to the Court of Appeal on the ground of improper admission of evidence and misdirection.

The Court of Appeal allowed the appeal and ordered a new trial, upon the ground that the report of the inspector and the permits had been improperly admitted, and, further, that a portion of the judge's charge to the jury amounted to misdirection in law.

The defendants now appeal to this Court on the ground that the documents referred to were properly admitted, that in any event they did not occasion any substantial wrong or miscarriage and that there was no misdirection.

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The respondents here relied on the reasons given by the Court of Appeal and further submitted that the charge to the jury, when read as a whole, did not present the real points of the respondents' case, that the learned trial Judge had misdirected the jury in regard to the negligence, if any, of the mother of the infant respondent, that he had wrongfully refused to charge the jury that the infant respondent was an invitee and that the appellant owed the highest duty to him, and that he had erred in refusing to direct the jury that the principle of *res ipsa loquitur* applied.

The *Court of Appeal Act*, 1933, ch. 6, sec. 28 (1), provides:—

> A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, or of the omission to take the verdict of the jury upon a question which the judge at the trial was not asked to leave to the jury, or of any omission or irregularity in the course of the trial, unless some substantial wrong or miscarriage has been thereby occasioned.

Dealing first with the admissibility of the documents, these consisted of: (1) a form of permit which read as follows:—

> IMPORTANT—Must be posted in elevator.
>
> Duplicates will be charged for.
>
> MANITOBA ELEVATOR PERMIT No. /1121 861
>
> In accordance with The Elevator and Hoist Act elevator located .....Hudson's Bay Company, ...Portage Avenue, ... Winnipeg, has been inspected and may be used until ..... December 1st, ... 1934, provided this permit is endorsed quarterly by an Inspector of the Bureau of Labor.
>
> I certify that re-inspection has been made and elevator passed. — #2 Escalator
>
> | | | |
> |---|---|---|
> | Thos. Horn
Inspector | Feb. 3, 1934
Date | W. R. CLUBB,
Minister of Public Works |
> | Thos. Horn
Inspector | May 22, 1934
Date | Countersigned:
E. McGRATH |
> | Thos. Horn
Inspector | Oct. 13, 1934
Date | Secretary, Bureau of Labour |

Evidence was given that a similar form had been obtained in preceding years but had been lost; (2) an inspector's report relating to the same matter, the material part of which read:—

Dear Sir(s):

As a result of Inspection of your premises as above the following improvements are recommended. Please have effected and advise so that re-inspection may be made.

Remarks: ..... # 2 Escalator.....
..... Permit # 1121 .....
..... O.K. for renewal .....
..... of permit .....
Signature of Inspector.....Thos. Horn.....

The third document was a report made by the inspector as to a visit by him on the morning after the accident, only a portion of which was read to the jury. That portion was, after referring to the date:—

The escalator was in good order and in perfect control.

Thos. Horn, Inspector.

It was first objected by counsel for the respondents that the Manitoba *Elevator and Hoist Act* did not apply to the escalator in question. Section 2 of the Act provides for the appointment of a board, and section 3 provides that the Board shall have power to adopt rules and regulations respecting the construction, operation, maintenance and carrying capacity of elevators, hoists, dumb-waiters and all other hoisting appliances installed in buildings in Manitoba.

Although the word "escalator" is not specifically mentioned, it seems to me that it is an appliance of the character covered by this Act. The Act itself is part of a group of Acts such as *The Manitoba Factories Act, The Shops Regulation Act* and *The Public Buildings Act,* making general provision for the safety of persons rightly resorting to places where large numbers of the public are likely to be, and I think that, as such, the Act in question is entitled to a liberal construction. For this reason, in my opinion, the escalator in question does fall within the provisions of the Act, and it was competent for the Board to make regulations thereunder.

Pursuant to the provisions of the Act, the Board made regulations, Rule No. 3 being:—

No elevator * * * shall be operated until a certificate of permit therefor has been issued by the Bureau of Labor and operation may be continued only as long as such certificate of permit remains in force. * * *

Rule 15 provides:—

Before new elevators, escalators, or other hoisting apparatus are installed, or extensive alterations made, plans and detailed information shall be submitted to the Bureau of Labor.

The Rules also made general provision as to inspection and enforcement.

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The respondents, in their statement of claim, alleged that the escalator was negligently constructed and maintained. The defendants pleaded that the escalator had been subjected to governmental inspection and that authority had been duly given to operate the same.

Moreover, the fact that these permits had been granted was established by oral evidence without objection before the permits themselves were put in. In my opinion, these permits were relevant and admissible.

With regard to the third document, however, which is an extract from a report made as to a visit on the day after the accident, the situation is somewhat different. The inspection leading up to this report was not of a routine character but was doubtless made in consequence of the accident and the jury must have known this. The inspector who made the report was not available for cross-examination because of the provision in the *Manitoba Factories Act* applicable to this inspector, providing that such inspector shall during his tenure of office not be competent to give testimony in any civil case with regard to anything which he has seen or done, or with regard to any information he has obtained, opinion he has formed (*The Manitoba Factories Act*, R.S.M., 1913, chapter 70, as amended, sections 5 (*a*) and 50A). While section 31 of the *Manitoba Evidence Act* provides that a copy of any entry or statement in any book, record, etc., kept in any department of the Government, shall be received as evidence, etc., it does not justify the use of a report under the circumstances existing here and, in my opinion, neither report nor the extract therefrom read to the jury was admissible.

Before dealing with the question of misdirection in this case, it might be well to set out the general principles which should guide a judge in charging a jury, and reference may be made to two cases in the House of Lords. The first is *Jones* v. *Spencer* (1). Lord Herschell at p. 538:—

> My Lords: I am of the same opinion. I think that the hesitation of a court to set aside the verdict of a jury is very natural, and that it is expedient that verdicts of juries, when that is the tribunal to determine the question between the parties, should not be set aside, except where one is satisfied that there has been a miscarriage, because a verdict has been found that could not reasonably have been found if the attention

(1) (1897) 77 Law Times, 536.

of the jury had been directed to the whole of the facts of the case, and to the question in issue which they had to determine. But it seems to me to be a condition of any such rule that the question which had to be determined should have been so left to them that one is satisfied that it was before their minds, that their minds were applied to it, and that they did really on the determination of that question give their verdict. If we think the verdict wrong in this sense, that one would not have given the verdict one's self, still if one sees that the question was properly submitted to the jury, that is not enough ground for granting a new trial. But if one comes to the conclusion that the verdict is not one which one would have given, and is wrong in that sense, I think that one is perfectly justified in saying that there shall be a new trial if one sees that the real question that had to be determined was not so put before the jury as to reasonably satisfy the tribunal that has to determine the question whether there shall be a new trial or not that the mind of the jury was so applied to the question to be determined that they did determine the case upon the answer to that question.

In *Swadling* v. *Cooper* (1), Viscount Hailsham said:—

These plain principles have been discussed and elaborated in a long series of cases, but I do not think that those discussions have in any way qualified or lessened the authority of the earlier decisions. It is manifest that a full discussion of these cases and of the judgments delivered in them would be wholly inappropriate in a summing up and would inevitably tend to confuse and bewilder the jury. In a summing up it is essential that the law should be correctly and fully stated; but it is hardly of less importance that it should be stated in simple and plain terms so that a jury unskilled in the niceties of legal phraseology may appreciate the direction which is being given to them. Such direction should be adapted to the special circumstances of the case. It is not the whole law of negligence that needs exposition in every case, but only that part of it which is essential to a clear understanding of the issue which the jury has to determine. The question here is whether having regard to the facts of this case the law was sufficiently stated to the jury.

The general principles applicable to the issues in this case are fairly well settled, and in the case of *Indermaur* v. *Dames* (2), Mr. Justice Willes made what has become the classical statement:—

The common case is that of a customer in a shop: but it is obvious that this is only one of a class; for, whether the customer is actually chaffering at the time, or actually buys or not, he is, according to an undoubted course of authority and practice, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger, of which the occupier knows or ought to know, such as a trap-door left open, unfenced, and unlighted * * * This protection does not depend upon the fact of a contract being entered into in the way of the shopkeeper's business during the stay of the customer, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper, with a view to business which concerns himself. And, if a customer were, after buying goods, to go back to the shop in order to complain of the quality, or that the change was not right, he would be just as much there upon business which concerned the shopkeeper, and as much entitled to protection during this accessory visit,

(1) [1931] A.C. 4, at 10. (2) (1866) 1 C.P. 274, at 287.

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though it might not be for the shopkeeper's benefit, as during the principal visit, which was. And if, instead of going himself, the customer were to send his servant, the servant would be entitled to the same consideration as the master.

The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied.

And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact.

In the case of *T. Eaton Co.* v. *Sangster* (1), the principles above stated were held to apply to the case of a small child accompanying its mother in a departmental store.

It must be kept in mind further that a child of four years of age could not be held guilty of contributory negligence: *Gardner* v. *Grace* (2), and further, that if the mother in charge of the child is herself guilty of negligence this would provide no defence once it was established that there was negligence on the part of the defendants contributing to the accident—see *Oliver* v. *Birmingham and Midland Motor Omnibus Co. Ltd.* (3).

The real question for decision upon the pleadings here and as the evidence developed was whether or not the space between the wall and the moving part of the escalator created a danger for young children, of which danger the defendant either knew or ought to have known and have guarded against in some more effective way, as, for example, by a lower railing or some other device for the protection of such small children. The statements of the learned trial Judge bearing on this question here were as follows:—

The first aspect of that duty is, did the infant plaintiff in this case exercise reasonable care on its own part for its own safety? That applies of course generally to adults. Children are not expected to take and do not take the same degree of care, but I will touch upon that later.

(1) (1895) 24 S.C.R. 708. (2) (1858) 1 F. & F. 359.
(3) [1933] 1 K.B. 35.

Then later on:—

The mother was not holding the child. The child was not holding on to the mother. Those appliances are expected even for adults to require a little steadying at times, so they have a moving rail that adults rest on and therefore steady themselves. But you cannot have a moving rail for infants too small to reach up to it, and a child probably ought to hold on to its mother's skirts or have been guided or supported by the mother. While I do not say it is a fact, apparently the child, with very little physical provocation, fell, and it was of such an age that a little assistance might have been required there.

Further:—

The duty is on the storekeeper to keep his premises reasonably safe. What is "safe"? That step was safe for those who would stand on it. The stairway is safe for those who walk on it. Sleeping car berths are perfectly safe, but people fall out of them and sometimes injure themselves, and actions are brought as to why they are not better guarded. These things are measured by the use to which they are put. Supposing this child had fallen forward and tumbled down the escalator, head over heels to the bottom, and bumped its head, would there have been any action? There could not be. A child is supposed to walk standing up going down stairs. If he had bumped his head on some projection which was necessary there, there could be no action. Outside of the extra clearance and the insufficient skirting the thing was as safe as human ingenuity could make it.

* * *

I also want to refer to the child being attended by its mother and the possible effect upon an attendant at the stairway. You should not assume that the child is to be confined to the mother's conduct. Even though the mother was neglectful in her care of the child, that does not affect the right of the child. The child is not restricted by the want of due care on the part of its mother, but it has this effect, that the defendant or its attendant would not be expected to give the same degree of care or watchfulness of the child going down the escalator in the company of its mother that it would of a child going down alone.

This, I think, covers all the references to the fact of the special duty arising by reason of the tender years of the infant plaintiff. With respect, I am of the opinion that the learned judge did not sufficiently differentiate the defendants' duty to a small child from their duty towards an adult, and, on the contrary, led the jury to believe that there was some duty to take care incumbent upon the child.

It is with reluctance that I have felt that a new trial should be granted, because of the fact that the jury had made a personal inspection of the escalator at rest and in motion, and because the facts of the case were of such a character as to arouse the strongest sympathies of a jury in favour of the person against whom they finally felt obliged to decide.

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The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Guy, Chappell, DuVal & McCrea.*

Solicitors for the respondents: *Aikins, Loftus & Company.*

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* Oct. 19, 20.
* Dec. 1.

ODESSA JARRY AND ALBERT JARRY (DEFENDANTS) ..... } APPELLANTS;

AND

GEORGES PELLETIER (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Master and servant—Automobile dealers—Sales agent—Motor car given possession to employee by owner for purpose of his work—Employee invested by employer with full discretion as to the use of the car—Sale by agent of a car not belonging to employer—Accident when employee driving employer's car during working hours for purpose of obtaining licence for car sold—Whether employee acted as agent and servant of the owners—Employer's liability—Art. 1054 C.C.

The appellants are automobile dealers in both new and second-hand cars, and, some time prior to the accident, employed by verbal contract one Beauchamp on commission as salesman. In order to facilitate the execution of his work, the appellants allowed Beauchamp to have possession of one of their cars, with full discretion as to its use, though the latter was to pay for the gas and oil. Some time prior to the date of the accident, Beauchamp caused an announcement to be inscribed in a newspaper advertising a motor car for sale, and, in answer to this, one Théberge communicated with Beauchamp. The latter tried to interest Théberge in the purchase of one of the cars belonging to his employers, the appellants, but Théberge refused to buy, expressing his desire to have a car from a private individual. Then Beauchamp remembered that one Désormeaux had a second-hand car for sale; and, after some negotiations, that car was sold through Beauchmap to Théberge. The morning following the sale Beauchamp drove Théberge in the appellants' car to the provincial licence bureau in order to obtain a licence for the operation of the car; and they were driving back to Désormeaux's house to put on the new plates on the car when the accident occurred. Beauchamp had to apply the brakes of the car to reduce its speed; the street was slippery, and this caused the car to skid up over the sidewalk and to strike the respondent, thus causing him serious injuries. The appellants' ground of appeal was that their employee at the time of the accident was not acting in the performance of the work for which he had been employed by them.

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* PRESENT:—Duff C.J. and Cannon, Crocket, Davis and Kerwin JJ.