1943

*Nov. 8.
*Dec. 15.

BAY-FRONT GARAGE, LIMITED (DEFENDANT) ..... APPELLANT;

AND

RIKA EVERS AND CORNELIUS JAN EVERS (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Person on leaving garage injured by tripping over sill in doorway—Whether operator of garage liable in damages—Whether sill a concealed danger to a person exercising ordinary care.

Plaintiff was driven (about 1.30 p.m.) into defendant's public garage in a motor car driven by B. who left the car there to be parked. The car entered the garage through a large folding door composed of four sections, which door was opened to admit the car and then closed. In one of the sections there was a small exit door, which had a sill, 10½ inches high, to provide stability for the section, since the large door was suspended from the top and did not quite touch the floor. In leaving the garage, B. opened the small door and stood aside for plaintiff to go through. Plaintiff did not see the sill and tripped on it and was injured. She was wearing spectacles equipped with bi-focal lenses. She sued defendant for damages. The trial Judge, on motion for non-suit, dismissed the action, holding that plaintiff by the exercise of ordinary care could have seen the sill and avoided injury. His judgment was reversed by the Court of Appeal for Ontario ([1943] O.W.N. 179; [1943] 2 D.L.R. 291), which held that the sill constituted a concealed danger. Defendant appealed.

Held (the Chief Justice and Kerwin J. dissenting): The appeal should be allowed and the judgment at trial restored. The sill did not constitute a concealed danger to any person exercising ordinary care.

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario (1), which allowed an appeal by the plaintiffs from the judgment of the trial Judge, Plaxton J., dismissing, on a motion for non-suit, the plaintiffs' action, which was for damages for personal injuries suffered by the plaintiff Rika Evers (wife of the other plaintiff) which the plaintiffs alleged were caused by the defendant's negligence.

Mrs. Evers had been driven into the defendant's public garage in a motor car driven by one, Mr. Baird, who left the car there to be parked. As they were proceeding to leave the garage, through a small exit door in one of the sections of the large door through which the car had entered (and which, after entry of the car, had been

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

(1) [1943] O.W.N. 179; [1943] 2 D.L.R. 291.

closed), Mrs. Evers, in passing through the small door, tripped on a sill, which extended across the bottom of it, and received the injuries complained of. The facts are dealt with in more detail in the reasons for judgment in this Court now reported and in the reasons for judgment in the Court of Appeal for Ontario (1).

At trial, on motion for non-suit, Plaxton J. dismissed the action, holding that Mrs. Evers by the exercise of reasonable care could have seen the sill and avoided her injuries. His judgment was set aside by the Court of Appeal for Ontario (1), which gave judgment for Mrs. Evers for $3,000 and for her husband for $1,002, holding that the sill constituted a concealed danger. The defendant appealed to this Court (special leave to appeal being granted to defendant by the Court of Appeal for Ontario in respect to the judgment recovered by the husband).

Aimé Geoffrion K.C. and *E. L. Haines* for the appellant.

Guy Roach K.C. for the respondents.

The judgment of the Chief Justice and Kerwin J. (dissenting) was delivered by

KERWIN J.—I am not impressed with the suggestion by counsel for the appellant that the judgment of the Court of Appeal is a serious matter for all people engaged in a business such as that of the appellant. It chose to call no evidence and on the record before us I am satisfied that that Court came to the right conclusion.

In dismissing this action, the trial judge proceeded, at least in part, on what he called his own knowledge of the prevalence of doors in garage doors of the kind in question in this action. That, however, is contrary to the evidence given in the witness box. From that evidence it appears that it is common practice to build what are called "escape doors" in larger garage doors but they are not for the use of the public and they are of such a size that, if any members of the public should happen to use them, they would necessarily be on their guard.

The conditions under which the photographs produced by the appellant were taken were not proved and at least one was described by a witness as deceitful. Mrs. Evers was an invitee and on the uncontradicted evidence as to

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the appearance of the door through which she attempted to pass, she should not have been subjected to the danger created by it. The Chief Justice of Ontario has, in my opinion, dealt satisfactorily with the argument that the accident was attributable to the fact that Mrs. Evers was using bifocal glasses.

I would dismiss the appeal with costs. At the argument the cross-appeal was abandoned and it should be dismissed without costs.

The judgment of Davis, Hudson and Rand JJ. (the majority of the Court) was delivered by

DAVIS J.—The appellant operates a large public garage in downtown Toronto near the corner of Front and Bay streets. At the entrance to the garage, some fifteen feet from the sidewalk, a large folding door composed of four sections is opened to admit an automobile and closed afterwards by an attendant in the garage. In one of the sections of the large door there is a small door which may be used to leave the garage after your car has been handed over to the attendant for parking. This small exit door has a baseboard, called a "sill", 10½ inches high, to provide stability for the section, since the large door, with its four sections, is suspended from the top and does not touch the floor by an inch or so.

The female plaintiff had driven into the garage with a friend of hers—the large door had been opened and then closed and the car handed over to the attendant. In the course of leaving the garage her friend had opened the small door (it was daylight outside, 1.30 p.m.), and stood aside for her to go first. Unfortunately she did not see the sill and fell over it through the open doorway and was seriously injured. Her sight was impaired; she was wearing spectacles equipped with bi-focal lenses—the lower lens for reading and the upper for seeing at a distance. Her disability was such that to look down at her feet she would have to lower her head so as to see through the upper lens. She said in evidence that she was "looking straight forward" at the time and to look at the baseboard through the lower lens, standing six feet away, "would not be clear to me".

The section of the large door which contained the small door was, by consent of counsel, set up in the courtroom at the trial and used by the witnesses to illustrate their

evidence. It was not, however, made an exhibit and was not before the Court of Appeal or before this Court. The trial judge had an opportunity to observe the manner in which the female plaintiff walked about the courtroom and he commented that he noticed when she stepped into the witness box she bent her head quite a bit. The trial judge dismissed the action on the ground that a person exercising reasonable care for his or her own safety ought to have seen the sill when the door was open and that the female plaintiff could have avoided her injury by the exercise of reasonable care on her part.

The Court of Appeal reversed the judgment, taking the view that the sill was a concealed danger and that there was a duty of warning upon the defendant. With the greatest respect, I cannot accept that view of the evidence. I do not think the sill constituted a concealed danger to any person exercising ordinary care. The findings of the trial judge should stand.

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

Appeal allowed with costs.

Solicitors for the appellant: *Haines & Haines.*

Solicitors for the respondents: *Roach & Roach.*