1947
*Mar. 10, 11.
*Jun. 10.

H. A. BROWN AND MARGARET BROWN (PLAINTIFFS). } APPELLANTS;

AND

B AND F THEATRES LIMITED (DEFENDANT) RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Theatre—Person paying for its privileges—Dangerous premises—Unlocked door leading to basement stairway—Injury resulting from fall—Unusual danger created by owner—Reasonable care to prevent injury—Subsequent negligence of the injured person—Whether ultimate negligence—Relationship arising out of contract between owner and patron—Jury's findings—Construction of—Apportionment of liability.

The female appellant, after passing through a brightly lighted lobby, entered the foyer of the respondent's theatre, intending to go to the ladies room. In the foyer, a narrow corridor, the lights were dimmed, and, proceeding along the wall at her left, she opened an unlocked door, which she thought was leading to the waiting room, but which led to a stairway into the basement. The appellant fell down the stairs and was injured. In an action for damages, the jury found that the injuries were caused by an unusual danger consisting in the unlocked door and that the respondent failed to use reasonable care to prevent injury from that danger because of an inadequate sign on the door and of lack of "facilities to fasten door in a safe and secure manner." The jury further found that the appellant did not use reasonable care for her own safety in that she did not use proper caution in proceeding after opening the door. The degree of contribution to the accident was found to be 90% against the respondent and 10% against the appellant. Judgment was directed accordingly by the trial judge. The appellate court reversed that judgment and dismissed the action, holding that the finding against the appellant established a case of ultimate negligence by reason of which she must be taken to be the author of her own injuries.

Held that the appeal to this Court should be allowed and the judgment at the trial be restored. The doctrine of ultimate negligence does not apply under the circumstances of this case.—There was evidence upon which the finding of the jury against the respondent could have been made.

Per The Chief Justice and Kerwin, Rand and Estey JJ.:—The danger in the door was not because it was unlocked, but because it opened in effect into a pit; and the finding of negligence against the respondent is a finding that the conditions in the theatre were such as to invite a patron using ordinary care to mistake the door into the basement for that into the ladies' room and to draw him into the vortex of danger behind the door. The finding of negligence on the part of the appellant cannot be taken to supersede the negligence on the part of the respondent.

*PRESENT:—Rinfret C.J. and Kerwin, Rand, Kellock and Estey JJ.

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Per The Chief Justice and Kerwin, Rand and Estey JJ.:—The facts in this case raised more than the ordinary question of the duty owed by a proprietor of premises towards an invitee.—The appellant paid a consideration for the privileges of the theatre, including that of making use of the ladies' room. There was a contractual relation between her and the theatre management that exercising prudence herself she might enjoy those privileges without risk of danger so far as reasonable care could make the premises safe.

Per Kellock J.:—The finding of negligence against the respondent was that the thing, which was the effective cause of the appellant getting beyond the door at all, was the invitation created by the surroundings. The force of that invitation, when acted on as it was, continued to operate up to the point of injury although aided by the appellant's own negligence. These two negligences cannot be separated so as to conclude that the negligence of the appellant was of such a character that that of the respondent became mere narrative.

Judgment of the Court of Appeal ([1946] O.R. 454) reversed.

Greisman v. *Gillingham* ([1934] S.C.R. 375) applied.

Francis v. *Cockrell* (L.R. 5 Q.B. 184) approved.

APPEAL from a judgment of the Court of Appeal for Ontario (1), reversing a judgment of Hope J. entered in favour of the appellants on the findings of a jury in an action for damages.

David J. Walker K.C. for the appellants.

G. W. Adams K.C. and *R. B. Burgess* for the respondent.

The judgment of The Chief Justice and of Kerwin, Rand and Estey JJ. was delivered by

RAND J.:—The appellant, Margaret Brown, was injured by falling down a stairway in a theatre in Toronto. After passing through a brightly lighted lobby, she entered the foyer, intending to go to the ladies' room. This was on the left of the entrance and was indicated by a short electric sign 7′ high facing her as she turned. In the foyer, a narrow corridor, the lights were dimmed; and, proceeding along the wall at her left, she opened what she took to be the door to the waiting room. A fire extinguisher 2′ long and 4′ from the floor hung on the wall next to the left side of the door; and at the right side was a post or panel 7″ wide, projecting about 4″ out from the wall; the door, 31″ wide, swinging toward the left, on which the word "Private" was printed in faint letters, was between three

(1) [1946] O.R. 454; [1946] 3 D.L.R. 194.

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and four feet in front of the sign and led to a stairway into the basement. The platform or landing was about 24" deep and the door must have swung somewhat before the edge would be brought into view. Immediately inside on the wall at the right and on a level with her eyes, was a light which, on her story, momentarily blinded her. The entrance to the ladies' room was separated from this door by the post or panel.

On these facts, the jury made two findings (paraphrased):

(1) That the injuries to the plaintiff were caused by an unusual danger on the defendant's premises of which the latter knew or ought to have known, consisting in the unlocked door; and that the defendant failed to use reasonable care to prevent injury from that danger because of an inadequate sign on the door, of lack of additional protection on the unlocked door, and because there were not proper facilities to fasten the door in a safe and secure manner.

(2) That Mrs. Brown did not use reasonable care for her own safety in that she did not use proper caution in proceeding after opening the door.

It was further found that the degree of contribution to the accident of the defendant was 90% and Mrs. Brown 10%.

At the trial, judgment was directed in accordance with these percentages of responsibility. On appeal, it was held that the finding against Mrs. Brown established a case of ultimate negligence by reason of which she must be taken to be the author of her own injuries, and the action was ordered dismissed. Laidlaw J. A. was also of the opinion that no breach of duty was shown on the part of the defendant.

I think the only question in this Court is whether or not the conclusion of ultimate negligence can stand. I have no doubt whatever that there was evidence upon which the finding against the respondent could have been made.

As was pointed out by Roach J.A., the danger in the door was not because it opened, but because it opened in effect into a pit; and the finding that the negligence of the respondent was responsible for the injury is a finding that the conditions in the theatre were such as to invite a patron using ordinary care to mistake the door into

the basement for that into the ladies' room and to draw her into the vortex of danger behind the door.

The finding of negligence on the part of Mrs. Brown was taken to supersede that, and the question is whether it does. What the jury had in mind was this: that the invitation which drew Mrs. Brown into the staircase was one which persisted in its influence upon her to the end; but at the same time, notwithstanding that continuing influence and in spite of it, she should have exercised more caution. They conceived the original negligence of the defendant and that later of the appellant to be operative up to and including the injury; and the small percentage of responsibility attributed to the latter was obviously due to their view that there was little blame to be charged against her because she was at all times under the impulsion of the false invitation; she relied on that invitation and did not look, and the jury thought her slightly to blame because she did not look. *Greisman* v. *Gillingham* (1).

The principle of *Davies and Mann* (2), which the Court below purported to apply, is, I think, this: where a situation of danger to person or property is brought about by the negligence of a person which at a critical moment he is unable in fact to counteract or relieve, then if, at that moment, another party, exercising a care with which he is chargeable, could have avoided that situation, he is held to be the sole cause of the damage resulting from his failure to do so, whether to the one or the other, and it is of no significance whether he became aware or merely should have become aware of the predicament with which he became involved.

But in such a case there is not, in the conduct of the person whose negligence was subsequent in time, any element of inducement or influence by the other; and where that is present, obviously a distinction must be made. The continuing effect on the conduct of the former of the latter's earlier action becomes a circumstance significant to the final result; that conduct becomes in fact a consequence of the prior negligence. In such circumstances, to find that the last act is likewise negligent is simply to say that, in spite of the misleading inducement, acting on it was culpable.

(1) [1934] S.C.R. 375.

(2) [1842] 10 M. & W. 546.

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Rand J.

That conception appears to have been in the mind of Greer L.J. in *The Eurymedon* (1), where he states a rule in these words:

> If the negligent act of one party is such as to cause the other party to make a negligent mistake that he would not have otherwise made, then both are equally to blame.

He treats that as a corollary of another rule:

> But if the negligence of both parties to the litigation continues right up to the moment of collision, whether on land or on sea, each party is to blame for the collision and for the damage which is the result of the continued negligence of both.

I take the words "equally to blame" to import joint contribution to the result and not necessarily the degree of responsibility. These rules embody the notion of the actually and not wholly unreasonably operating elements in the conduct of both parties persisting to the end, as being determinative of responsibility. The same idea is contained in the language of Viscount Birkenhead in his speech in the case of *S. S. Volute* (2), in which he says:

> And while no doubt where a clear line can be drawn, the subsequent negligence is the only one to look at, there are cases in which the two acts come so closely together and the second act of negligence is so mixed up with the state of things brought about by the first act, that the party secondly negligently * * * might * * * invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution.

The case has been treated as raising the ordinary question of the duty owed by a proprietor of premises towards an invitee. I think I should observe, however, that this is not merely a case of such invitation as was present in *Indermaur* v. *Dames* (3). Here, Mrs. Brown paid a consideration for the privileges of the theatre, including that of making use of the ladies' room. There was a contractual relation between her and the theatre management that exercising prudence herself she might enjoy those privileges without risk of danger so far as reasonable care could make the premises safe. Although the difference in the degree of care called for may not, in the circumstances here, be material, I think it desirable that the distinction between the two bases of responsibility be kept

(1) [1938] P. 41, at 50.
(2) [1922] 1 A.C. 129, at 144.
(3) (1867) L.R. 2 C.P. 311.

in mind: *Maclenan* v. *Segar* (1), following *Francis* v. *Cockrell* (2). In *Cox* v. *Coulson* (3), Swinfen Eady L.J. said:

> The defendant must also be taken to have contracted to take due care that the premises should be reasonably safe for persons using them in the customary manner and with reasonable care:

citing *Francis* v. *Cockrell* (2).

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

KELLOCK J.:—The duty owing by the respondent to the female appellant is governed, in my opinion, by the decision in *Francis* v. *Cockrell* (2), discussed by McCardie J. in *Maclenan* v. *Segar* (1).

In my opinion the answers of the jury are not to be construed as a finding of ultimate negligence on the part of the female appellant. The negligence found against each of the parties came so close together as to make applicable the principle expressed by Viscount Birkenhead, L.C., in *The Volute* (4). I see no ground for distinguishing or failing to apply that principle to the facts of this case: *Greisman* v. *Gillingham* (5). This is the principle underlying the decision of Riddell J.A. in *Blair* v. *City of Toronto* (6).

I do not think that the failure of the jury, after having their attention called to it, to make any specific finding with respect to the lighting beyond the door affects the finding of negligence against the respondent that the thing which was the effective cause of the appellant getting beyond the door at all was the invitation created by the surroundings. The force of that invitation, when acted on as it was, continued to operate up to the point of injury although aided by the appellant's own negligence. For my part I do not see how it is possible to so separate the two so as to come to the conclusion that the negligence of the appellant was of such a character that that of the respondent became mere narrative.

(1) [1917] 2 K.B. 325; (1917) 86 L.J. K.B. 1113.
(2) (1870) L.R. 5 Q.B. 184.
(3) [1916] 2 K.B. 177, at 181.
(4) [1922] 1 A.C. 129, at 144.
(5) [1934] S.C.R. 375.
(6) (1927) 32 O.W.N. 167.

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Kellock J.

Leave to appeal having now been granted by the Court of Appeal for Ontario to the appellant's husband, I would allow the appeal of both appellants with costs here and below.

Appeal allowed with costs.

Solicitors for the appellants: *David J. Walker.*

Solicitors for the respondent: *Smily, Shaver, Adams, De Roche and Fraser.*