1965

*Oct. 13, 14
Dec. 14

WILLIAM GILCHRIST (*Plaintiff*) ..... APPELLANT;

AND

A & R FARMS LTD., DELMER CHARLES PERCY and ANNE MERLE PERCY (*Defendants*) . RESPONDENTS.

WILLIAM GILCHRIST (*Plaintiff*) ..... APPELLANT;

AND

THE TRUSTEE OF THE ESTATE OF A & R FARMS LTD. IN BANKRUPTCY (*Defendant*) ... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

*Negligence—Injury sustained by farm labourer while lifting defective barn door—Duty owed by employer to servant with respect to safety of premises—Whether injury a reasonably foreseeable result of employer's failure to repair door.*

The appellant was employed as a farm labourer by the respondent A & R Farms Ltd. When, from time to time, a defective door on one of the respondent's barns fell to the ground, it was part of the duty of the appellant to raise the door again to an upright position so that it would lean against the barn. While thus attempting to lift the door the appellant suffered a severe injury described as a protruded intervertebral disc between the fourth and fifth lumbar vertebrae. The trial judge dismissed the appellant's action for damages on the ground that the risk of injury resulting from the failure to repair the door was not such as ought reasonably to have been foreseen. The trial judgment was affirmed by a unanimous judgment of the Court of Appeal and from that judgment an appeal was brought to this Court.

*Held* (Martland and Ritchie JJ. dissenting): The appeal should be allowed.

*Per* Cartwright, Judson and Hall JJ.: The employer failed in its duty to the appellant when it allowed the door to remain in the defective

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

condition which had existed for many months. That breach of duty caused the injury of which the appellant complained; that it could do so was not only foreseeable but actually foreseen. In the circumstances of the case the maxim *volenti non fit injuria* had no application. Consequently, the appellant was entitled to judgment against the employer for the amount of damages ($19,010.01) assessed by the trial judge, as to which no question was raised in the argument before this Court. *Glasgow Corporation v. Muir,* [1943] A. C. 448, referred to.

*Per* Martland and Ritchie JJ., *dissenting:* An employer's duty to maintain his plant and property only arose in respect of each employee if the lack of maintenance created a situation of potential danger for him. "Danger" in this sense meant risk of injury to the employee in the carrying out of his duties and "risk" in turn did not mean a mere remote possibility but a potential peril which a reasonable man could foresee as not unlikely to injure the employee in question. In the present case, under all the circumstances as they existed on the evening when the injury was sustained, the broken barn door as it lay on the ground did not constitute any danger whatever and the task of lifting it back into place when it had fallen to the ground did not give rise to any foreseeable risk against which the employer was under a duty to safeguard its employee. *Regal Oil & Refining Co. et al. v. Campbell,* [1936] S.C.R. 309; *Bolton v. Stone,* [1951] A.C. 850; *Qualcast (Wolverhampton) Ltd. v. Haynes,* [1959] A.C. 743, referred to.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], affirming a judgment of Smith J. Appeal as against respondent company and trustee in bankruptcy allowed, Martland and Ritchie JJ. dissenting; appeal as against individual respondents dismissed.

*P. W. Schulman* and *M. M. Schulman,* for the plaintiff, appellant.

*G. H. Lockwood* and *D. Proctor,* for the defendants, respondents.

The judgment of Cartwright, Judson and Hall JJ. was delivered by

CARTWRIGHT J.:—Pursuant to leave granted by my brother Judson, the appellant appeals *in forma pauperis* from a unanimous judgment of the Court of Appeal for Manitoba[1] affirming the judgment of Smith J. dismissing the appellant's action with costs. The learned trial judge assessed the plantiff's damages at the sum of $19,010.01 and in the argument before this Court no question was raised as to this assessment.

In October 1960 the appellant was employed by A & R Farms Ltd., hereinafter referred to as "the employer" as a farm labourer on its farm at Dugald, Manitoba. The feed

[1] (1965), 50 W.W.R. 705.

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barn on this farm was entered by a doorway 8 feet wide with two sliding doors. Each of these doors was 7 feet in height and 4 feet 4 inches in width and was said to weigh between 100 and 125 lbs. Originally the doors were suspended from overhead tracks. The door on the right, as one faces the barn, was still so suspended but from some date before the appellant was employed the overhead track from which the door on the left had been suspended was missing and when it was necessary to open it it had to be lifted or slid sideways. It would then be leaned against the side of the barn in an upright position. From time to time this door would fall or be blown down and would have to be raised up again to its leaning position against the barn. On such occasions it was part of the duty of the appellant to raise the door. This situation was well known to all the parties throughout the period of the appellant's employment.

On May 9, 1961, the door was lying on the ground and the plaintiff proceeded to raise it into an upright position and in so doing suffered a severe injury described as a protruded intervertebral disc between the fourth and fifth lumbar vertebrae.

The learned trial judge was of opinion that the door should have been repaired and that it was surprising that it had been left in the condition described for so long a period but he dismissed the action on the ground that the risk of injury resulting from the failure to repair was not such as ought reasonably to have been foreseen. He said in part:

> This is a case of an employee injured while performing the duties of his employment. The injury occurred while he was in the course of raising a barn door which had been lying on the ground, intending to place it in position to cover the door opening.
>
> It is an employer's duty to keep the premises in which his employees work reasonably safe, and the matter of liability in this case depends upon the answer to the question: Was this door a source of danger, in the condition in which it then was, and was it foreseeable that as a result someone was likely to be injured while lifting it?
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> * * *
>
> There was no reason to think that lifting the door was likely to cause injury. Injury was not reasonably forseeable as a consequence of so doing.

The Court of Appeal agreed with the view of the learned trial judge. Guy J.A. who wrote the unanimous judgment of the Court said in part:

> That being so, we have to consider here whether or not the failure to repair the barn door, and leaving it in such a condition that it had to be

lifted into place from time to time, could, as such be 'reasonably foreseen' as the cause of injury such as the plaintiff sustained here. We think not.

In the circumstances outlined above I think it clear that the employer failed in its duty to take reasonable care to see that the property where its servant was required to work was safe, and that as a result of such failure the appellant was injured. The only question of difficulty is whether the injury to the appellant was a reasonably foreseeable result of the employer's failure. In *Glasgow Corporation v. Muir*[1], at p. 457, Lord Macmillan said:

> Legal liability is limited to those consequences of our acts which a reasonable man of ordinary intelligence and experience so acting would have in contemplation.

This rule is equally applicable whether the fault imputed to the defendant is an act or, as in the case at bar, an omission. In the same case, at p. 457, Lord Macmillan continued:

> The standard of foresight of the reasonable man is, in one sense, an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. Some persons are by nature unduly timorous and imagine every path beset with lions. Others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free both from over-apprehension and from over-confidence, but there is a sense in which the standard of care of the reasonable man involves in its application a subjective element. It is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have had in contemplation, and what, accordingly, the party sought to be made liable ought to have foreseen. Here there is room for diversity of view, as, indeed, is well illustrated in the present case. What to one judge may seem far-fetched may seem to another both natural and probable.

Counsel for the appellant makes two submissions on this branch of the case.

The first is that the learned judges in the Courts below erred in failing to hold that a reasonable man in the position of this employer would have foreseen that the condition of the door was a probable source of injury to persons working in its vicinity, that this is sufficient to impose liability and that it is not necessary to determine whether he would have foreseen injury caused in the precise manner in which the appellant was injured. In support of this, reference is made to such cases as *Winnipeg Electric Railway Co. v. Canadian Northern Railway Co.; Re Bartlett*[2] and *Hughes v. Lord Advocate*[3].

[1] [1943] A.C. 448.
[2] (1919), 59 S.C.R. 352, 50 D.L.R. 194.
[3] [1963] A.C. 837.

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The second submission is that in this case it was unnecessary for the learned trial judge to consider what the reasonable man would have had in contemplation and ought to have foreseen because the evidence shows that the employer contemplated and foresaw that injury of the very sort which the appellant suffered might well be caused by failure to put the door in a safe condition.

I have reached the conclusion that the second of these submissions should be upheld and this renders it unnecessary for me to reach a final conclusion as to the first, although I incline to the view that it should be upheld also.

In the direct examination of the appellant at the trial the following questions and answers appear:

Q. Did you have any conversation with the defendant, Delmer Percy, about the door before the 9th of May, 1961?
A. Oh, yes, after I had hired on there, we were doing some small repairs in different barns, and we had discussed repairing the door several times in case somebody got hurt.
Q. Can you tell us what was said in any of these conversations?
A. Yes, Delmer had discussed fixing the door and the tools were there and the only thing needed was to get the material. Delmer himself said the door should be fixed.
Q. Do you remember any specific conversations with Delmer about the door?
A. Well, after I got hurt—
Q. No, before the 9th of May, 1961?
A. Well, we had discussed repairing the door several times and putting it back where it belonged for fear somebody could get hurt.
Q. Was it specifically said in these conversations that as you have just stated 'For fear somebody could get hurt'? Was there some mention of somebody getting hurt on these conversations?
A. Yes.
Q. Who said it?
A. Well, the both of us had said the same thing. With the children running around the barn the door could fall on them or somebody could get hurt by lifting it.

The transcript of the cross-examination of the appellant at the trial occupies 27 pages of the case but he was not cross-examined as to these conversations.

The defendant Delmer Percy was called as a witness for the defendants but was not asked about the conversation to which the appellant had deposed.

In these circumstances we must take it that the conversation sworn to by the appellant took place. Were it otherwise I cannot think that he would not have been cross-examined as to it and that Delmer Percy would not have denied it.

The situation then is that, before the event, the employer's manager, Percy, and the appellant had both realized, and stated, that the defective condition of the door was a source of danger of injury occurring in the very way in which the appellant was in fact injured. The knowledge of Percy is, in the circumstances, the knowledge of the employer. It is not necessary to debate whether a reasonable man in the position of the employer ought to have foreseen the danger when we know that in fact it was actually foreseen by it.

The learned trial judge did not overlook the evidence which I have quoted above and which appears to me to be of crucial importance. He dealt with it as follows:

> The plaintiff's evidence of a conversation with Mr. Percy about the need to repair the door was clearly inspired by the thought that it might fall and injure a child. Any reference to possible injury in lifting it was I feel sure only incidental and not a matter of real concern.

With the greatest respect I am unable to agree with this view of the importance of the conversation referred to.

In the respondent's argument stress was laid on the evidence in the record that an injury similar to that suffered by the appellant could be caused by lifting a sack of feed or by types of exertion less strenuous than that of raising the door. I am unable to see how the employer is assisted on the question of foreseeability by showing that injury to an employee's back similar to that sustained by the appellant may well result from activities in regard to which no blame attaches to the employer. Such evidence would be relevant to the question whether the omission of the employer did in fact cause the appellant's injury but in the case at bar that question is no longer debatable.

In my opinion, the employer failed in its duty to the appellant when it allowed the door to remain in the defective condition which had existed for many months, that breach of duty caused the injury of which the appellant complains, that it could do so was not only foreseeable but actually foreseen, in the circumstances of this case the maxim *volenti non fit injuria* has no application and consequently the appellant is entitled to judgment against the employer for the amount at which the learned trial judge assessed his damages.

At the conclusion of the argument of counsel for the appellant we told counsel for the respondents that it was unnecessary to hear them in regard to the appeal as to

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Delmer Charles Percy and Anne Merle Percy and the appeal as against those two persons will be dismissed.

By orders made in the Court of Queen's Bench on March 12, 1964, and March 19, 1964, it was directed that the action be continued against A & R Farms Ltd. notwithstanding its bankruptcy and also against the Trustee of A & R Farms Ltd. in bankruptcy.

I would allow the appeal against A & R Farms Ltd. and the Trustee of A & R Farms Ltd. in bankruptcy and direct that judgment be entered against them for $19,010.01 with costs throughout, the costs of the appellant in this Court to be taxed as provided by Rule 142(4). I would dismiss the appeal as against Delmer Charles Percy and Anne Merle Percy but would direct that as to them there be no order as to costs in this Court or in the Courts below.

The judgment of Martland and Ritchie JJ. was delivered by

RITCHIE J. (*dissenting*):—I have had the benefit of reading the reasons for judgment of my brother Cartwright who has outlined the factual background giving rise to this appeal.

The appellant, who was familiar with conditions existing on the turkey farm owned by the respondent A & R Farms Ltd., including the state of disrepair of the sliding door giving access to the feed barn, accepted employment on that farm as a hired man on December 15, 1960, with duties which he describes as follows:

> My normal course of duties were I had to feed the chickens, feed the turkeys, grind feed, bedding the birds, gathering eggs and anything else that came along that needed to be done.

One of the things "that came along that needed to be done" on the farm was to pick up the untracked portion of the feed barn door when it had fallen to the ground, and the appellant says that he had done this a number of times without difficulty during the first five months of his employment, but that on the evening of May 9, 1961, when he was lifting the door he strained his back with the results for which he now claims damages. The injury was sustained when the appellant had lifted the door to approximately shoulder height and in making the extra effort "to put it in a standing position" he says "I took this pain in the back and the next thing I knew I was on the ground with the door laying on top of me".

There is no evidence that the ground was slippery or that the door would have been likely to fall on him if the appellant had not suffered the strain which was later diagnosed as what is now commonly called "a slipped disc", nor indeed was there any suggestion that the injury which the appellant suffered was caused by the door having fallen on him. In fact the appellant's own doctor gave it as his opinion that "The fall backwards was the result of the injury to the back rather than the cause".

The door in question had been broken since the farm property was acquired by A & R Farms Ltd. in December 1957 and between that date and the time of the accident it was lifted from the ground on many occasions by Delmer Percy the farm foreman and president of A & R Farms Ltd. and once by his wife. The condition of the door also made it necessary, when it was standing, to lift it up so as to slide it over in opening or closing the barn and this work had been done by the respondent Percy's sixty-seven year old father and by a hired man then employed on the farm and by others. In all this time there was no suggestion that anyone had any difficulty or suffered any kind of strain or injury through lifting the weight of the door, but the learned trial judge found that it weighed between 100 and 125 pounds and it therefore appears to me to have been a foreseeable possibility that "somebody *could* get hurt by lifting it" to use the words which the appellant attributed to Delmer Percy. (The italics are, of course, my own).

With the greatest respect for those who hold a different view, I do not think that the question of whether "somebody could get hurt by lifting it" is determinative of this appeal. In my view the questions to be determined are whether the door as it lay on the ground created such a likelihood of causing injury to the appellant as to make the premises unsafe and whether it was foreseeable that *the appellant was likely to be hurt* while lifting it.

The learned trial judge stated the problem in these words:

> It is an employer's duty to keep the premises in which his employees work reasonably safe, and the matter of liability in this case depends upon the answer to the question: Was this door a source of danger, in the condition in which it then was, and was it foreseeable that as a result someone was likely to be injured while lifting it?

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This is, in my view, fundamentally a question of fact which was answered in the negative by both of the Courts below and although it is, of course, open to this Court to reach a different conclusion, great respect must be accorded to such a finding and also to the findings of the learned trial judge with respect to the weight to be attached to the evidence.

The duty owed by an employer to his employees under such circumstances was concisely stated by Sir Lyman Duff in this Court in *Regal Oil & Refining Co. Ltd. et al. v. Campbell*[1], at p. 312 where he said:

> By the common law, an employer is under an obligation arising out of the relation of master and servant to take reasonable care to see that the plant and property used in the business in which the servant is employed is safe. That is well settled and well known law. It is equally well settled that he does not warrant the safety of such plant and property.

The employer's duty to maintain his plant and property only arises in respect of each employee if the lack of maintenance has created a situation of potential danger for him.

I venture to say that there are many farms in this country where things which need to be done have been left undone from year to year but this does not mean that every farmer when he engages a hired man to help him comes under a duty to repair all defects in his plant and machinery. It is only when lack of maintenance is such as to expose the new employee to danger that the employer owes him a duty to effect repairs.

"Danger" in this sense, as I understand it, means risk of injury to the employee in the carrying out of his duties and "risk" in turn does not mean a mere remote possibility but a potential peril which a reasonable man could foresee as not unlikely to injure the employee in question. In a different context, Lord Reid was considering the general duty which each man owes to his neighbour in *Bolton v. Stone*[2], and having obviously examined many cases he observed that he found:

> A tendency to base duty rather on the likelihood of the damage resulting than on its foreseeability alone.

It is to be noted, as I have suggested, that the employer's duty of care is owed to each employee as an individual, and in determining whether a foreseeable risk exists which could

[1] [1936] S.C.R. 309. [2] [1951] A.C. 850.

give rise to such a duty, account must be taken of the individual characteristics of each employee. The matter was made plain by Lord Radcliffe in the course of his reasons for judgment in *Qualcast (Wolverhampton) Ltd. v. Haynes*[1], at p. 753 where he said:

> The second point is that, however much attention is concentrated in these cases upon the adequacy of the system of working at the place of work, actions of negligence are concerned with the duty of care as between a particular employer and a particular workman. An experienced workman dealing with a familiar and obvious risk may not reasonably need the same attention or the same precautions as an inexperienced man who is likely to be more receptive of advice or admonition.

In determining whether the event which happened in the present case was reasonably to be foreseen and guarded against by the employer, consideration must be given not only to the fact that for more than three years someone had lifted the door up every time it had fallen down without any strain or difficulty being experienced, but also to the question of whether it was at all likely that a healthy man who was 32 years of age, 5'11" tall, weighed 180 pounds and had been brought up on a farm would injure himself in doing a routine task of lifting which he had been doing without difficulty for the past five months. In my view it was not an injury which a reasonable employer would have been likely to contemplate.

The question of whether or not the broken barn door constituted a danger or hazard against which the employer was under a duty to protect its employee, is in my opinion, to be determined in light of the circumstances as they existed on the evening of May 9, 1961, when the injury was sustained. At this time, as I have said, the door was lying on the ground where it had been all day and I do not think the fact that if it had been standing up it might have been blown or fallen over so as to hit the appellant on the head or back is a circumstance which affects the employer's liability in respect of an injury sustained by lifting it.

There is no evidence to suggest that the door presented any danger to anybody so long as it remained on the ground, and the sole question is whether the appellant was placed in danger against which his employer was under a duty to protect him when he was performing the task of picking it up. It is true that the door was in the position in which the appellant found it because the respondent had failed to have

[1] [1959] A.C. 743.

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it repaired, but this lack of maintenance does not constitute negligence *qua* the appellant unless it can be said that he was thereby exposed to risk. The breach of duty which gives rise to liability in such a case as this is a breach of the employer's duty to safeguard his employee against unnecessary danger and the fact that the failure to maintain a piece of equipment may constitute a risk under one set of circumstances does not fix the employer with any such duty in relation to that equipment under a different set of circumstances in which no danger exists.

It was, however, submitted by the appellant's counsel that the foreseeability of the door injuring the appellant by being blown down formed a ground for liability in respect of the damage which he sustained in picking it up, and in support of this proposition he cited such cases as *Hughes v. Lord Advocate*[1], and *Winnipeg Electric Railway Co. v. Canadian Northern Railway Co.; Re Bartlett*[2]. I can derive no assistance from these cases because they appear to me to be primarily concerned with liability for the unexpected consequences of a breach of duty whereas in my view the primary question in the present case is whether any duty existed to be breached. For the same reason I find it unnecessary to discuss the famous case of *Re Polemis and Furness, Withy & Co.*[3]

Under all the circumstances as they existed on the afternoon and evening of May 9, 1961, I do not think that the broken barn door as it lay on the ground constituted any danger whatever and I am satisfied that the task of lifting it back into place when it had fallen to the ground did not give rise to any foreseeable risk against which his employer was under a duty to safeguard this appellant.

For these reasons as well as for those given by the learned trial judge, I would dismiss this appeal with costs.

*Appeal as against respondent company and trustee in bankruptcy allowed with costs,* MARTLAND *and* RITCHIE JJ. *dissenting; appeal as against individual respondents dismissed.*

*Solicitors for the plaintiff, appellant: Schulman & Schulman, Winnipeg.*

*Solicitors for the defendants, respondents: Pitblado, Hoskin & Company, Winnipeg.*

[1] [1963] A.C. 837. [2] (1919), 59 S.C.R. 352, 50 D.L.R. 194.
[3] [1921] 3 K.B. 560.