1962
*Dec. 3
1963
Jan. 22

EMILY JANE McCORMACK (*Plaintiff*) ..APPELLANT;

AND

T. EATON COMPANY LIMITED (*Defendant*) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Trial—Injuries received in fall on escalator—Action for damages—Questions submitted to jury—Supplementary charges, questions and suggestions—Jurymen confused—New trial directed.

The plaintiff, while shopping in the defendant's department store, stepped on an old-fashioned type of escalator. The heel of her shoe stuck in the tread and while trying to extract it as the escalator was descending, she twisted her body to get her foot from the shoe. She finally succeeded in pulling her foot free but immediately fell backwards to the bottom of the escalator and was injured.

An action was brought and during the trial seven questions as agreed upon were submitted to the jury. The first question, answered in the affirmative, was: "Were the injuries to the plaintiff caused by an unusual danger on the defendant's escalator of which the defendant knew or ought to have known?" In the second question the jury was asked, if the answer to question 1 was "yes", to state fully in what such danger consisted. The answer, based on an exhibit of a sample cleat, stated that it was possible for the cleats to work loose. The trial judge, having asked the jury to retire, said to counsel that the answer to the questions seemed to be inconclusive. The jury was recalled and instructed to return to the jury-room and "if you can, say what the danger was". If they could not, they were to change the answer to the first question to "no", which in the event was done. Subsequently, the jury was reinstructed several times with regard to question 3: "Did the defendant take reasonable care by notice or otherwise to prevent such injury?" It was finally agreed that an answer was not required.

The judgment of the trial judge dismissing the action was affirmed by the Court of Appeal. An appeal *in forma pauperis* was brought to this Court. No question arose as to the amount of damages; the only question raised was one of liability.

Held: (Judson J. dissenting): The appeal should be allowed and a new trial directed limited to the question of liability.

Per Kerwin C.J. and Taschereau, Cartwright and Fauteux JJ.: The jurymen were confused by the various supplementary charges, questions and suggestions put to them by the trial judge. The trial and its result were so unsatisfactory that the verdict could not stand. *Dozois v. Pure Spring Co. Ltd. and Ottawa Gas Co.*, [1935] S.C.R. 319, followed; *Herd v. Terkuc*, [1960] S.C.R. 602, referred to.

Per Judson J., *dissenting:* When the jury answered the first question affirmatively, they supported their finding with a reason which could not be founded on any evidence that they had heard. Their finding

*PRESENT: Kerwin C.J. and Taschereau, Cartwright, Fauteux and Judson JJ.

was not one of fault. In the circumstances, the trial judge, who had already instructed the jury on fact and law, had the power and the duty to instruct the jury to reconsider the answer to question 2. On reconsideration, they found that there was no unusual danger. This was the correct finding on the evidence. Having answered question 1 in the negative, there was no answer required for questions 2 and 3. There was no impropriety in the subsequent discussion of these points in the presence of the jury.

APPEAL *in forma pauperis* from a judgment of the Court of Appeal for Ontario, affirming a judgment of McLennan J. Appeal allowed, Judson J. dissenting.

P. B. C. Pepper, Q.C., for the plaintiff, appellant.

B. J. Thomson, Q.C., for the defendant, respondent.

The judgment of Kerwin C.J. and Taschereau, Cartwright and Fauteux JJ. was delivered by

THE CHIEF JUSTICE:—This is an appeal *in forma pauperis* by the plaintiff in the action, Emily Jane McCormack, from a decision of the Court of Appeal for Ontario which without recorded reasons affirmed the judgment at the trial of the Honourable Mr. Justice McLennan dismissing the action.

The appellant was shopping in the department store of the respondent on August 22, 1956. She stepped on an old-fashioned type of escalator no longer in service to descend to the basement. The heel of her shoe stuck in the tread and while trying to extract it as the escalator was descending, she twisted her body to get her foot from the shoe which had a strap across it. The heel was an ordinary one. She finally succeeded in pulling her foot from the shoe but immediately fell backwards to the bottom of the escalator and was injured. No question arises as to the amount of damages, but, as we are of opinion that a new trial should be had on the question of liability, all reference is omitted to the proceedings at the trial except such as is necessary to indicate the reasons for our conclusion.

The action was tried with a jury and the questions to be submitted had been agreed upon. These questions and the answers, which the jury first brought in, are as follows:

1. Were the injuries to the Plaintiff caused by an unusual danger on the Defendant's escalator of which the Defendant knew or ought to have known?

Answer: "Yes"

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2. If your answer to question No. 1 is "Yes", then state fully in what such danger consisted.

Answer: "On Exhibit 16, the sample of the cleat shown, we find non-slip material on sides and bottom of the cleat which is mortised into the bottom plate, proving in our opinion that it is possible for these cleats to work loose."

3. Did the Defendant take reasonable care by notice or otherwise to prevent such injury?

Answer: "No"

4. Did the Plaintiff use reasonable care for her own safety?

Answer: "Yes"

5. If your answer to question No. 4 is "No" wherein did she fail to use reasonable care?

(No Answer)

6. If your answers to questions 3 and 4 are "No" state in percentages the degree of fault attributable to each.

(No Answer)

7. Irrespective of how you answer the other questions, at what amount do you assess the Plaintiff's damages?

Answer: $10,500.00.

Counsel for neither party desired to have the jury retained but the trial judge nevertheless asked them to retire and he then considered with counsel the answer to Question 2. When the jury had again retired, the trial judge stated to counsel that the answer to the questions seemed to be inconclusive. After some considerable further discussion the jury was recalled and instructed by His Lordship to return to the jury-room and "if you can, say what the danger was". He added:

I am going to return these answers to you and I have put at the bottom of the sheet 'No. 2(a)'. I want you, if you can, to answer that question as to what the danger was and not your reasons for it. If you cannot, then don't answer it and change the answer to the first question to 'No'.

Is that clear?

FOREMAN: Yes, my lord.

Court adjourned for twenty minutes when the jury returned and the following occurred:

REGISTRAR: Gentlemen of the jury, have you agreed upon your verdict?

FOREMAN: We have.

HIS LORDSHIP: Gentlemen, you have changed your answer to Question 1 from 'Yes' to 'No'. So that means that presumably Question 3 remains as 'No'. I should have put that to you before. That is, did the defendant take reasonable care by notice or otherwise to prevent such injury.

FOREMAN: My lord, we decided if you wanted that question changed we agreed that it should be changed to 'Yes'.

A JUROR: No.

FOREMAN: Pardon me. Somebody disagrees with me.

HIS LORDSHIP: I think perhaps then, gentlemen, I must send you back again. I think that is the only right thing to do. On the basis of these questions, if your answer to Question No. 1 is 'Yes', then the next (sic) question: 'Did the defendant take reasonable care by notice or otherwise to prevent such injury?' Your answer to that was 'No.'. But you have changed the answer to Question No. 1 to 'No', so Question No. 3 does not arise, presumably. However, that is the way it is. So I invite you now to retire to your jury room. It must follow logically, gentlemen, that that is the way.

The jury retired and the following discussion occurred between His Lordship and counsel:

HIS LORDSHIP: I think we might wait for a few moments, gentlemen. I wouldn't expect the jury to be long. Did I make it sufficiently clear to them that their answer to No. 1 being 'Yes', their—

MR. THOMSON: If the answer to Question is is 'No'—I beg your pardon. Were the injuries caused by an unusual danger? They have changed that to 'No'.

HIS LORDSHIP: Then 3 does not arise at all.

MR. THOMSON: That's right. I didn't understand that your lordship was telling them that they should perhaps strike out their answer to 3, if that is what your lordship—

HIS LORDSHIP: That is what I intended to say. Perhaps I didn't say it aptly.

MR. THOMSON: I think you said that the answers should be consistent.

HIS LORDSHIP: Perhaps I should call them back once more.

Whereupon the jury was again recalled and the following occurred:

HIS LORDSHIP: Gentlemen, I come back to Question No. 3: 'If your answer to Question 1 is "Yes", then did the defendant take reasonable care by notice or otherwise to prevent such injury?' Now, if your answer to Question No. 1 is now 'No', you need not answer Question 3. So my suggestion would be that you strike out the word 'No' in answer to Question 3. But I think you will have to do it by agreement. Is it all agreed between you?

SOME JURORS: Yes.

HIS LORDSHIP: It is?

A JUROR: It seems logical.

HIS LORDSHIP: You see, you really don't need to answer that question. I wanted the verdict clear. That is your verdict, is it, gentlemen?

SOME JURORS: Yes.

The trial judge thereupon granted the motion of counsel for the respondent that the action be dismissed with costs.

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In *Dozois v. The Pure Spring Company Limited and The Ottawa Gas Company*[1], a new trial was directed by this Court because it was found that the trial and its result were so unsatisfactory that the verdict should not stand and there should be a new trial. In the present case we are of opinion that the jurymen were confused by the various supplementary charges, questions and suggestions put to them by the trial judge and that there was that kind of error referred to in *Dozois*. While in *Herd v. Terkuc*[2] it was held that the course there followed by the trial judge was a proper one, it was pointed out at p. 606 that the power to tell the jury to reconsider their verdict is not one to be used lightly.

The appeal is therefore allowed, the judgment of the Court of Appeal and the judgment at the trial set aside and a new trial directed limited to the question of liability. The appellant is entitled to her costs in the Court of Appeal and also in this Court, but, as to the latter, by our Rule 142(4), she will have only her out-of-pocket expenses and three-eighths of the usual professional charges under the other items of the tariff including the application upon which leave to appeal *in forma pauperis* was granted. The costs of the first trial will be disposed of by the Justice presiding at the new trial.

JUDSON J. (*dissenting*):—In my respectful opinion, which is contrary to that of the majority of the Court, I would not send this case back for a new trial but would dismiss the appeal.

When the jury said that there was an unusual danger of which the defendant knew or ought to have known, they supported their finding with a reason which could not be founded on any evidence that they had heard. They said that it was possible for a cleat to work loose because a particular exhibit had non-slip material at the bottom and on its sides. This exhibit was produced as a specimen cleat and there was no evidence whatever from which they could infer that it had ever been attached to the elevator or any elevator. Their finding was not one of fault.

It is apparent from what took place when the jury returned with these two answers that counsel for the defendant was not going to urge that they be sent back.

[1] [1935] S.C.R. 319, 3 D.L.R. 384.
[2] [1960] S.C.R. 602, 24 D.L.R. (2d) 360.

He was satisfied that their answers did not constitute a finding against his client. Counsel for the plaintiff did not ask to have the jury sent back. He may well have thought that he had the maximum finding in his client's favour. In these circumstances, the trial judge, who had already adequately instructed the jury on fact and law, had the power and the duty to instruct the jury to reconsider the answer to question 2. He was merely telling them to face the issues. He asked them to find whether there was a worn cleat or a loose cleat. It was in this way that the case had been originally put to them. When they were told that they must do one thing or the other, they came back with a clear answer which denied liability. They found that there was no unusual danger which, in my opinion, was the correct finding on the evidence. Having answered the first question in the negative, there was no answer required for questions 2 and 3. There was no impropriety in the subsequent discussion of these points in the presence of the jury. There should not be a new trial on this ground.

Following *Herd v. Terkuc*[1], the power of the learned trial judge is unquestionable. If he had waited for a motion for judgment he might well have dismissed the action on the questions as first answered. I think, with respect, that he followed the better course in sending the jury back.

Appeal allowed with costs and a new trial directed limited to the question of liability, JUDSON J. *dissenting.*

Solicitor for the plaintiff, appellant: Raymond L. Brawley, Toronto.

Solicitors for the defendant, respondent: Haines, Thomson, Rogers, Howie & Freeman, Toronto.

[1] [1960] S.C.R. 602, 24 D.L.R. (2d) 360.