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AUSTIN J. MACLEOD, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF THE SILVER GLADE ROLLER BOWL, THE SAID AUSTIN J. MACLEOD AND THE SAID SILVER GLADE ROLLER BOWL (DEFENDANTS) ..... APPELLANTS;

AND

DORIS ROE (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Negligence—Person, while skating on roller skating rink, injured by fall caused by skate coming off—Claim for damages against operator of rink—Skates rented from operator and attached by his employee—Negligence alleged because toe straps not used in attaching skates—Extent of operator's duty—Sufficient that he acted in accord with general and approved practice.

Defendant operated a roller skating rink. Plaintiff rented from him, and was fitted by his employee with, a pair of roller skates. After about an hour of skating, a skate came off, causing plaintiff to fall

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

and be injured. She sued defendant for damages. She recovered judgment at trial, [1946] 2 W.W.R. 482, on the finding that the skate came off because of negligence in defendant's employee in not using a toe strap to attach it securely to her shoe. That judgment was affirmed by the Appellate Division, Alta., [1946] 3 W.W.R. 522. Defendant appealed to this Court.

The evidence was (as found in this Court) that the skates kept and supplied by defendant were the product of a well known manufacturer, were standard in the roller skating amusement business, were regularly examined by competent employees of defendant, that the skate in question was examined immediately after the accident and found to be in perfect condition; that the usual method of attaching the skates to the shoes was adopted in this case; that the use of toe straps was not a standard method; defendant supplied toe straps on deposit of 10 cents, which was repaid on return of the straps, and a notice to that effect was above defendant's ticket window.

Held: Defendant's appeal should be allowed and the action dismissed.

Per the Chief Justice and Kerwin and Estey JJ.: Even if by the use of toe straps the skates might (according to certain evidence) have been made safer for skating, it was sufficient for defendant to show, as was done, "that he had acted in accord with general and approved practice" (*Vancouver General Hospital* v. *McDaniel,* 152 L.T. 56, at 57-58). (*Per* Estey J.: In the absence of express provisions in the contract of hiring, the law implied an obligation on defendant to provide skates that at the time of hiring were reasonably safe for the purpose of skating. The fact that defendant made toe straps available did not establish that they were necessary in order to ensure reasonable safety in skating where the shoes, as here, were well adapted for that purpose, and, therefore, did not establish an obligation on defendant to supply them to all patrons; to require toe straps in addition to standard equipment would impose on defendant a greater obligation or a higher standard of care than that which the contract of hiring imposed).

Per Rand and Kellock JJ.: In furnishing and fastening the skates, defendant did not undertake that under no circumstances would they become loose or come off; the obligation assumed, at its highest, did not go beyond furnishing and attaching skates which could be used with reasonable safety if ordinary and usual skill and care were exercised by the skater. There was no evidence that, either in the general experience of roller skating or in the opinion of persons who had closely observed its practice, the absence of toe straps rendered the skates less than reasonably safe for use. Further, assuming a duty to have toe straps used or offered for use, there was no evidence that defendant was responsible for their absence; the question was, not whether plaintiff knew that they could be obtained, but rather, did defendant take reasonable steps to bring the fact of their availability to his patrons' notice; and, considering the necessary mode of carrying on such a business, he had done so. Moreover, there was nothing to make it appear that plaintiff, under any circumstances, would have used toe straps; and the finding at trial in effect required defendant to include them as part of the primary equipment; but

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the only evidence bearing on that was against that conclusion; the skates were complete without toe straps, for which in fact they were not designed, and the wide general use of the skates without them was, in the record of this case, convincing evidence that they were not necessary to any safety in use which a patron had a right to look for.

APPEAL by the defendants from the judgment of the Appellate Division of the Supreme Court of Alberta (1) which (Ford J.A. dissenting) affirmed the judgment of O'Connor J. at trial (2) in favour of the plaintiff for damages for injury suffered by her when she fell while skating on the defendants' roller skating rink. The trial judge found that she fell and was injured because one of her skates came off, and that that happened because of negligence of the defendants' employee, who fitted her with the skates, in not using a toe strap to attach securely the skate to her shoe.

The plaintiff cross-appealed, to the Appellate Division (which dismissed the cross-appeal) and to this Court, for an increase in the amount of general damages awarded.

S. Bruce Smith K.C. for the appellants.

Sydney Wood K.C. for the respondent.

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

KERWIN J.—On Sunday, February 4th, 1945, the respondent, Doris Roe, was roller skating in a rink operated by the appellant, Austin MacLeod, carrying on business under the name of the Silver Glade Roller Bowl, in the city of Edmonton. One of her skates became loose, causing her to fall. Her action to recover damages occasioned by this fall was upheld by the trial judge, Mr. Justice O'Connor, and, on appeal, by the Appellate Division of the Supreme Court of Alberta, with Mr. Justice Ford dissenting.

The facts fall within a narrow compass. The respondent had attended the appellant's rink a number of times previous to the occasion in question but was still a novice at roller skating. On Sunday evenings the respondent

(1) [1946] 3 W.W.R. 522; [1947] 1 D.L.R. 135.

(2) [1946] 2 W.W.R. 482; [1947] 1 D.L.R. 135, at 135-141.

charged no admission fee but rented roller skates for twenty-five cents to those who desired them, and they were thereupon at liberty to make use of the rink. The respondent paid the required fee, and a pair of roller skates, suitable to the size of her shoes, were handed to her and were put on by one of the skate boys employed by the appellant. The skates thus supplied, together with the other skates kept by the appellant, are the product of a well-known manufacturer and are known as Chicago skates. The evidence is clear that these skates are standard in the roller skating amusement business, and that the usual method of attaching the skates to the shoes was adopted in connection with the respondent. William A. Magark, who has had considerable experience in and around roller skating rinks and who, on the night in question, was floor manager for the appellant, so testified, and his evidence was uncontradicted. The sole of the shoe is placed on a flat piece of the metal part of the skate and a clamp at either side is securely fastened and tightened by means of a worm screw. The heel fits snuggly into the back of the skate and is held in position by a leather strap attached to the skate and running through either the first or second crossing of the shoe lace.

While other questions were investigated at the trial, the only fault found by the trial judge and the Court of Appeal against the appellant is that while the usual method was adopted in connection with the respondent, a strap should have been used to hold the toes of each foot tightly against the skate. Toe straps were at one time used by the appellant but, as it was found that many school children took the straps, the practice was adopted of charging ten cents as a deposit for each pair, which deposit would be repaid upon the return of the straps. The use of toe straps is not a standard method. The evidence is that all of the appellant's skates were regularly examined by competent employees of the appellant and that the skates furnished the respondent were examined immediately after the accident and found to be in perfect condition. The skates not being defective, the appellant cannot be made liable for the injuries suffered by the respondent even if, according to the evidence of George

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Wade, called on behalf of the respondent, they might have been made safer for roller skating. To use the words of Lord Alness, speaking for the Judicial Committee, in *Vancouver General Hospital* v. *McDaniel* (1): "A defendant charged with negligence can clear his feet if he shows that he has acted in accord with general and approved practice." This principle was adopted by this Court in a case from the province of Quebec: *The London & Lancashire Guarantee & Accident Company of Canada* v. *La Compagnie F. X. Drolet* (2).

The appeal should be allowed and the action dismissed with costs throughout. The cross-appeal of the respondent as to the quantum of damages should be dismissed without costs.

The judgment of Rand and Kellock JJ., was delivered by

RAND J.—The essential question here is, what did the appellant undertake in furnishing the skates and fastening them to the respondent's shoes? Certainly not that under no circumstances would they become loose or come off; that possibility is too intimately bound up with their use, in which the state or quality of the shoes, combined with the manner in which they are used, depending again upon the skater, might all play a part in loosening them.

I do not think the obligation assumed, at its highest, goes beyond furnishing and attaching skates which can be used with reasonable safety if ordinary and usual skill and care are exercised by the skater; that the management will do for a reasonably careful patron what that patron would do, and in the rink here has the privilege of doing and in some cases does, in the way of equipping himself with skates. Admittedly those furnished are and for years have been standard throughout the United States and Canada and no negligence in screwing down the clamps is suggested.

But O'Connor J., at trial, held that, in addition to the clamps and as a reasonably necessary safeguard, straps should have been used or should have been offered to the respondent. To this I think there are two answers:

(1) (1934) 152 L.T. 56, at 57-58; [1934] 3 W.W.R. 619, at 623.

(2) [1944] S.C.R. 82.

there was no evidence that, either in the general experience of roller skating or in the opinion of persons who have closely observed its practice, the absence of straps rendered these skates less than reasonably safe for use; nor, assuming such a duty, was there evidence that the appellant was responsible for that absence. Right above the ticket window was a notice that straps were available on the deposit of 10 cents, and they were used by a few skaters. The question is not whether this young woman of 23 years of age actually knew or did not know that straps could be obtained; the question is, did the management of the rink take reasonable steps to bring the fact of their availability to the notice of its patrons; and, considering the necessary mode of carrying on a business of this nature, which has not only a financial interest to the proprietor, but meets the wholesome desires of a large proportion of young people of the community, I should say that it had clearly discharged that duty. There is, moreover, nothing whatever to make it appear that the respondent, under any circumstances, would have used straps, and the finding in effect requires the management to include them as part of the primary equipment. But the only evidence bearing on this is against that conclusion. The skates are complete without straps, for which, in fact, they are not designed, and nowhere in the United States or Canada are straps used more than occasionally or otherwise than as a special safeguard. So far as the evidence shows, they might be considered to bind the feet or otherwise lessen the freedom of skating; the fact that the almost universal use of the skates is without them is, in the record of this case, convincing evidence that they are not necessary to any safety in use which the patron has a right to look for. I think in the circumstances we must accept the standard so established rather than the individual opinion of any judge.

The appellant, somewhat of a novice, had attended the rink six or seven times in the course of a month or so, and on the evening in question had been on the floor almost an hour before the accident. A friend, who had skated with her all evening, testified that a few seconds before the accident she had remarked that her skates felt

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"funny" on her, to which it was suggested that the skates be checked, but that she said she would make another round. The respondent admits having written her friend about a statement of the latter to that effect. O'Connor J. was not satisfied the remark was made, not because of untruthfulness in the witness, but because of a tendency to "desire to please counsel" and of a resulting discrepancy in relation to the exact spot on the floor where the words were passed.

But I do not place my conclusion on any action or conduct of the respondent; I put it on the absence of proof of any failure in fulfilling the undertaking of the appellant. The injury was very painful, no doubt, and it calls out the utmost sympathy; but that circumstance cannot justify our placing a responsibility for the misfortune where it does not belong.

I would, therefore, allow the appeal and dismiss the action, with costs throughout. The cross-appeal should be dismissed without costs.

ESTEY J.:—The appellants (defendants) own and operate at Edmonton, Alberta, a roller skating rink known as the Silver Glade Roller Bowl. On February 4th, 1945, the respondent (plaintiff), a young lady twenty-three years of age, rented from and was fitted by the appellants' servants and agents with a pair of roller skates. After about an hour of skating one of the skates came off, causing her to fall and suffer serious injuries, damages for which she asks in this action.

The Appellate Division of the Supreme Court of Alberta, Mr. Justice Ford dissenting, affirmed the judgment of the learned trial judge in favour of the respondent (plaintiff).

The respondent pleaded that the appellants' servants and agents were negligent in several particulars, but at the trial they were in effect reduced to two: (1) The said skates were improperly secured to the shoes of the respondent by the appellants' employees; (2) The appellants failed to attach any adequate apparatus to the toe of the respondent's shoes properly to ensure that the said skates were secure.

The learned trial judge found:

> After the plaintiff had skated about an hour and while she was skating, one of her skates came off and she fell on the floor. No skater was down in front of her or cut in ahead of her. No one bumped or tripped her. Lotawski, who was skating with the plaintiff, felt a kick on her ankle, and heard a clank like a loose skate. Wade, who was skating 12 feet behind the plaintiff, and who picked her up, saw the loose skate.
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> * * *
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> I find the plaintiff fell and was injured because her skate came off while she was skating, and her skate came off because the defendants had negligently failed to securely attach it to her shoe with a toe strap. The plaintiff was injured by the negligence of the defendants.

The appellants' employees affixed the roller skates to the respondent's shoes by using the equipment supplied with the skates as purchased, namely, an ankle strap that passes through a hole for that purpose in the metal part of the skate and then around the ankle of the patron, and toe clamps which are so made as to fit over the sole of the patron's shoe and then tightened by a key. The respondent when asked: "And they were tightly and properly affixed to your shoes that evening, weren't they?" replied: "Yes."

The learned trial judge made no finding of negligence in respect to the use or adjustment of this equipment by the appellants' employees in fitting the roller skates to the respondent's shoes, and the respondent's contention that the learned judge erred in this respect is not supported by the evidence.

The main issue concerns the finding of the learned trial judge that in addition to the ankle straps and toe clamps the appellants failed to use toe straps in affixing the skates to respondent's shoes.

The roller skates equipped with ankle straps and toe clamps supplied by the appellants were purchased from an established and well known manufacturer thereof. So equipped they have been and still are used in many rinks throughout Canada and the United States. They were inspected twice a week by the floor manager and once a week by the boys oiling them. The particular skate that came off on this occasion was inspected immediately after respondent's fall and found to be in good condition. No repair was made thereto and it was apparently put back for immediate use.

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The respondent, after being so fitted, skated for about an hour, when, as she stated: "all of a sudden the skate came off and I fell over". Respondent was then asked: "You do not know why it came off, do you?" and replied: "No". Nor is there any evidence as to why it came off. There is no evidence that the standard equipment, which includes the ankle strap and toe clamps but not the toe straps, was not reasonably sufficient, nor is there evidence that toe straps at any time or place have been regarded as part of the standard equipment.

Magark who had four and a half years' experience, first as assistant manager and later as floor manager in Vancouver and Edmonton, and who was floor manager at appellants' rink on the night in question, but who at the time of the trial had left the appellants' employment and returned to Vancouver, stated that the skates were satisfactory and safe with standard equipment, and further that "it is a very popular skate all through America."

All of the witnesses, including the respondent, knew roller skates came off from time to time and for various reasons. Sometimes the shoes were not adapted for the affixing of roller skates thereto or, if adapted, they were worn to the point that the soles were weakened and would give and thereby work out of the toe clamps, or that the ankle straps became loose for different reasons including that of the skater's foot colliding with the side or wall of the rink or other solid substance with sufficient force to loosen the ankle strap, or that the skater had fallen and in the course of getting up had loosened the ankle strap or worked the sole out of the toe clamps. Magark deposed:

> Q. Do they ever come off while a person is skating regularly without some sort of a knock or a bump?
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> A. It has been known but it is very rare.

He explained in the course of his evidence that there is usually something in the shoe, skate or conduct of the skater which causes the skates to come off. The respondent's shoes were well adapted for roller skating and, as previously intimated, no reason is given as to why respondent's skate came off.

At the rink the appellants supplied toe straps and made that fact known by a sign over or near the skate wicket,

stating that these straps were available without charge upon a deposit of 10 cents to ensure their return. Why they were supplied was left as a matter of inference and upon the whole of the evidence it would seem that they were for patrons whose shoes were not reasonably adapted for roller skating or had become so far worn as to weaken the sole. They were used by several of the patrons, how many or what percentage of those skating at the rink was not indicated. The respondent, who had been at the rink about half a dozen times before, had neither noticed the sign relative to the availability of toe straps nor had she noticed others obtaining, using or returning the toe straps.

Wade, who was called as a witness for the respondent and who had had considerable experience in roller skating, said that it was commonly known that the toe straps were available on a deposit of 10 cents and that many used them. He himself had used them before he obtained his own equipment. If the toe straps were "put on tight", he said, it was practically impossible for the skates to come off. He further deposed:

Q. Have you seen skates come off people's feet as they were skating?

A. Yes.

Q. Could you observe any reason why those skates would come off?

A. It would be a matter of theory if I did. I presume the strap must have come loose.

Mr. Wade here implies that if the skates came off when affixed with standard equipment the ankle strap must have worked loose, presumably for some of the reasons already mentioned. He does not express an opinion here nor elsewhere throughout his evidence that the toe strap is essential for reasonable safety. He goes no further than to say that if the toe straps are put on tight it is quite impossible for skates to come off.

The duties and obligations between the parties hereto are determined by the contract of hiring under which the respondent obtained the skates from the appellants. In this case a fee was paid by the respondent when the appellants made the skates available. There were no express provisions concerning the issues here involved, and in such circumstances the law implies an obligation upon the appellants to provide skates that at the time of

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hiring are reasonably safe for the purpose of skating. Halsbury, 2nd Ed., Vol. 1, p. 757; *Algoma Steel Corporation* v. *Dubé* (1); *Hyman* v. *Nye* (2).

The appellants cited among other authorities *McDaniel* v. *Vancouver General Hospital* (3). A patient at the Vancouver General Hospital claimed damages for having developed small pox within the incubation period after leaving the hospital. It was alleged that this was due to the negligence of the hospital in not segregating the small pox patients, and further in permitting the plaintiff to be treated by nurses who were also treating small pox patients. The Privy Council held that the hospital was not liable because it had followed general and approved practice. Lord Alness, delivering the judgment of the Privy Council, stated at p. 623:

> A defendant charged with negligence can clear his feet if he shows that he has acted in accord with general and approved practice.

That statement appears particularly apt and concludes the case in favour of the appellants because the appellants were not found negligent in the use of the standard equipment but were alleged to be negligent in that they did not add an extra safety precaution in the form of toe straps.

Throughout so much has been made of the failure of the appellants to use the toe straps that it may be appropriate to note the observation of Lord Thankerton in *Glasgow Corporation* v. *Muir* (4).

> The court must be careful to place itself in the position of the person charged with the duty and to consider what he or she should have reasonably anticipated as a natural and probable consequence of neglect, and not to give undue weight to the fact that a distressing accident has happened or that witnesses in the witness box are prone to express regret, ex post facto, that they did not take some step, which it is now realized would definitely have prevented the accident.

The fact that the appellants provided these toe straps, either for the reasons above mentioned or merely for those patrons who desired to take extra precautions, does not establish that they are necessary in order to ensure reasonable safety in skating where the shoes, as here, were well

(1) (1916) 53 Can. S.C.R. 481.
(2) (1881) 6 Q.B.D. 685.
(3) [1934] 3 W.W.R. 619; 152 L.T. 56.
(4) [1943] A.C. 448 at 454.

adapted for that purpose, and, therefore, does not establish an obligation upon appellants to supply them to all patrons.

With the greatest respect for the majority of the judges in the courts below, who hold a contrary opinion, it would appear that to require, in addition to standard equipment, the toe straps, would impose upon the appellants a greater obligation or a higher standard of care than that which the contract of hiring imposed.

The respondent's cross-appeal that the damages awarded at the trial should be increased was dismissed at the hearing of this appeal.

The appeal should be allowed and the respondent's action dismissed, with costs throughout. The cross-appeal should be dismissed without costs.

Appeal allowed and action dismissed, with costs throughout. Cross-appeal dismissed without costs.

Solicitors for the appellants: *Smith, Clement, Parlee & Whittaker.*

Solicitors for the respondent: *Wood, Buchanan & Campbell.*