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*Oct. 22, 23
Dec. 21

THE BOARD OF EDUCATION FOR THE CITY OF TORONTO AND J. C. HUNT (*Defendants*) ..... APPELLANTS;

AND

WILLIAM HIGGS by his next friend, JOHN CECIL LOWINGS, AND HELEN HIGGS (*Plaintiffs*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Boy injured by another during school recess—Injury aggravated by teacher ordering boy into line and into class—Liability—Finding of failure to have sufficient teachers on duty—Whether liability of Board of Education and teacher—The Public Schools Act, R.S.O. 1950, c. 316, s. 108(g).

During the school recess period, the plaintiff infant was injured when another pupil, known as a boy who indulged in rough play, lift him off his feet and carried him over to a rink where he dropped him on the ice. None of the four teachers who were supervising the recess saw the incident. One was called over by other pupils and ran across the ice. The boy refused help, and another teacher ordered him into line and into class although he was limping and complaining. Ultimately he was sent to see the nurse and then sent home in a taxi. The initial injury was found to have been a hip bone displacement which was aggravated when the boy was required to walk.

The action alleged negligence in (1) failure to provide adequate supervision; (2) permitting rough play which the defendants knew or ought to have known would cause injury; and (3) failure to intervene when they saw or ought to have seen that the rough play was likely to cause serious injury. At trial and in this Court liability for the initial injury was treated separately from liability for the aggravation. The jury found that the initial injury was the result of the failure of the defendants to supervise the activities of the pupils because there was not a sufficient number of teachers on duty, in view of the winter conditions, the number and ages of the children and the fact that ice being on such a large area would limit the access of the teachers to the scene of the accident. On the second branch of the

case, the jury found negligence which had aggravated the injury. The action was accordingly maintained, and this judgment was affirmed by the Court of Appeal.

Held: The appeal should be allowed in part by dismissing the claim for the initial injury.

As to the initial injury. The omission as found by the jury did not constitute the breach of a duty owing to the injured boy by both or either of the defendants. Neither inadequate supervision of the rough boy nor failure to see him pick up and carry the injured boy formed any part of the failure found. The finding of the jury raised the question of the adequacy of the system for supervising the break period used by the school principal, who alone had the authority to control the matter. That system had been employed satisfactorily by the principal for several years, and, in the absence of proof to the contrary, he had no reason to believe that it did not constitute a reasonable safe system having regard to the number and ages of the children, and there were not any unusual circumstances that day which made it reasonably foreseeable that a greater number of teachers would be required. The winter conditions specified by the jury did not constitute such an unusual circumstance. Even if the "failure" as found by the jury had constituted a breach of duty, it had not been shown to be probable that any of the ingredients of that "failure" caused or contributed to the injury. The particulars of the failure found by the jury were such as to negative the other grounds of negligence suggested. Even on the view that the jury's answers included a finding of "inadequate supervision," it is not the duty of school authorities to keep pupils under supervision every moment while they are in attendance at school.

As to the aggravation of injury. Section 108(*g*) of *The Public Schools Act* imposes upon every teacher a duty "to give assiduous attention to the health and comfort of the pupils . . .". There was evidence to support the jury's answers as to the negligence of the two teachers particularly having regard to the requirement of "assiduous attention", and the Board must bear the responsibility for their subsequent actions.

APPEAL from a judgment of the Court of Appeal for Ontario, affirming a judgment given at a jury trial. Appeal allowed in part.

C. L. Yoerger, Q.C., for the defendants, appellants.

P. de C. Cory, for the plaintiffs, respondents.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal by the defendants from a judgement delivered by Laidlaw J.A. on behalf of the Court of Appeal for Ontario dismissing an appeal from the judgment of McLennan J., sitting with a jury. The plaintiff (respondent) in this action was a student in the academic and vocational class of the Maurice Cody School in the City of Toronto and in the month of January 1957 was 15 years

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of age or thereabouts. He was apparently a normal boy and had achieved some distinction as a golfer, and while there is some evidence that he was subjected to ridicule from time to time by other students, there is nothing to suggest that he was in any way markedly different from his fellows or that he required any special attention from the authorities. He had an association with a boy by the name of Taylor who was a fellow student in the same class which involved lunching together and a certain amount of horse play which Higgs himself describes by saying "We used to fall around all the time".

On January 31, 1957, Higgs appears to have spent the greater part of the morning break talking to some girls in the neighbourhood of a large patch of ice generally referred to as the "pleasure rink" which had been cleared away in the school yard for the purpose of sliding and skating and which was played on to some extent during the break. Towards the end of the break, while Higgs was still in conversation with the girls, Taylor appears to have come up from behind, and lifting him off his feet, carried him a distance of about 20 feet and dropped him on the ice.

Taylor was a boy about the same size as Higgs but apparently a good deal stronger. He was known to the school authorities to be a boy who indulged in rough play. He had been warned and disciplined for his behaviour on more than one occasion in the past, and indeed his behaviour on this morning bears out the character of a rough and overbearing youth. After he dropped Higgs on the ice, he proceeded to kick snow in his face from the pile of snow that had been cleared off around the ice-covered area.

Although five students, who had been close to the boys at the time of the incident, gave evidence, none of them was able to testify to seeing Higgs being picked up, although two say that they saw him being carried and two others that they saw him being dropped on the ice.

It is important to note that the school yard consisted of an area of about 250 feet in length and approximately 400 feet in width although the width varied. At the north end of the yard a substantial area consisted of a hockey rink and in approximately the middle of the yard there was the pleasure rink above referred to and at the southern end of the yard there was a concrete area in front of the L-shaped

school building itself. The evidence discloses that there were four teachers out of doors on duty supervising the break period. One of them, Mr. Hunt, was stationed in the northwest portion of the yard and his area of operations ran from the southwest corner of the hockey rink down the western side of the pleasure rink to approximately the point where the concrete surface began. Mr. Herlick fulfilled a similar function on the east side of the yard and there is some evidence to the effect that both these masters were directing their attention more to the students on the hockey rink than to those in the central part of the playground. There were also two female teachers stationed on the concrete surface outside the school who covered the southern area of the playground and one of whom, according to Higgs, was only about 35 feet away from the scene of the accident. None of the teachers saw this happening or knew anything about it until Herlick, who was then standing at the southeast corner of the hockey rink, was alerted by some boys who came across the ice to draw his attention to it. Herlick appears to have acted quickly because he ran across the ice and reached Higgs before he had got up. Higgs' own estimate was that Herlick was there in two or three minutes while other say that it only took him one minute.

Herlick found the boy with tears in his eyes and gained the impression that he was hurt and very much aggrieved, but the boy refused his offer of assistance and Herlick did not insist on taking him in to the school nurse. Shortly after this Mr. Hunt also came to the scene, and although there is some conflict as to exactly how Higgs reached the school it is apparent that when he got there he hung up his coat and hat, and although he was limping quite obviously and complaining, Mr. Hunt ordered him into line and into class. The boy says that Hunt struck him, but in any event he was required to walk into the classroom, and having reached it he appears to have shown very apparent signs of pain and disturbance as a result of which Mr. Hunt ultimately sent him to the nurse. The treatment he received from the nurse was somewhat superficial, although this is no reflection on her, and the upshot of it all was that he was sent home in a taxi and on arrival there was put to bed where the family physician attended him that evening. Upon X-rays

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being taken, it appeared that the boy's hip bone was dislocated and it was the opinion of his doctors that the original injury sustained by being dropped on the ice would probably not have resulted in more than a 20 per cent. displacement which could have been cured by manipulation, but that the fact that he had been required to put his weight on his leg was likely to have caused the more severe condition which required hospitalization.

Higgs, by his next friend, sued the Board of Education and Mr. Hunt claiming general damages and Mrs. Higgs joined in the action asserting her claim for special damages.

The statement of claim alleges that the injuries to the plaintiff were caused by the negligence of the defendant in the manner following:

(*a*) failure to provide reasonable or adequate supervision during the recess period:

(*b*) allowing and permitting rough play of such a nature or kind that they knew or ought to have known that it was likely to cause serious injury to pupils such as the plaintiff entrusted to their care;

(*c*) failure to intervene when they saw or ought to have seen that the actions hereinbefore related were likely to cause serious injury to the plaintiff.

In putting this matter to the jury and indeed to this Court, the question of liability for the initial injury sustained when the boy was dropped on the ice was treated separately from that of liability for the events which succeeded and allegedly aggravated it.

On the first branch of the case the following questions were submitted to the jury and answered in the manner indicated:

1(*a*) Were the injuries suffered by the Infant Plaintiff the result of the failure of the defendants to supervise the activities of the students?
Answer "Yes" or "No" Answer: YES

(*b*) If your answer to Question 1(*a*) is "Yes", then in what respect did the defendants fail to supervise such activities. *Answer fully*
There was not a sufficient number of teachers on duty in the playground, in view of the winter conditions, the number and ages of the children and the fact that ice being on such a large area of the yard would limit the access of teachers to the scene of any accident.

(*c*) Irrespective of how you answer Question 1(*a*), at what amount do you assess the damages
(1) of the adult plaintiff .....$ 1,184.40
(2) of the infant Plaintiff .....$ 13,000.00

It is noteworthy that these answers do not appear to reflect the last two particulars of negligence alleged in the statement of claim, but it was urged in this Court on behalf of the respondent that by reason of his known tendency to rough play the Taylor boy constituted a species of foreseeable danger against which the school authorities were under a duty to guard his fellow pupils, and that it could be assumed that the jury's verdict included a breach of this duty as a part of the "failure" referred to in questions 1(*a*) and 1(*b*), and it would appear that the Court of Appeal for Ontario shared this view.

In this regard it is to be noted that the learned trial judge, in directing the jury to answer question 1(*b*) "fully", had this to say:

> . . . and I should tell you now, when I say "Answer fully", it is not sufficient to say the defendants failed to supervise, but the Court requires you to give the facts on which you say there is no supervision, if that is the conclusion you come to.
>
> These are the submissions of counsel for the plaintiff:
>
> In the circumstances there were not enough teachers supervising;
>
> There was, secondly, an inadequate supervision of Taylor that day;
>
> And thirdly, there was a failure of the particular supervisors to see Taylor pick up Higgs and carry him the twenty feet and dump him on the ice, which could have been stopped by a single word.
>
> Counsel for the defendant, on the other hand, says you should answer Question 1(*a*), "No", and he says that there was adequate supervision—two men teachers over these boys on the north end of the school yard—and that teachers are not bound to watch Taylor every minute; and I think there is undoubtedly something in that submission. If a person is so dangerous a character that he has to be watched every minute, then he should not be in the school at all. Then, as to the defendants' third point, he says there was no time to do anything because it happened so quickly.

When the answers to questions 1(*a*) and 1(*b*) are read together in light of these instructions and of the pleadings, it is my view that neither "inadequate supervision of Taylor" nor "failure of any particular supervisor to see Taylor pick up Higgs and carry him twenty feet and drop him" forms any part of the "failure" which the jury found to have resulted in the respondent's injury, which "failure" is confined to not having "a sufficient number of teachers in the playground in view of:

(1) The winter conditions;
(2) The number and ages of the children;
(3) The fact that ice being on a large area of the yard would limit the access of teachers to the scene of any accident."

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In rendering the decision of the Court of Appeal for Ontario from which this appeal is asserted, Laidlaw J.A., having expressed his opinion to the effect that the jury properly took these three matters into consideration, went on to say, "The omission constituting a breach of duty consisted in not having sufficient teachers on duty in the particular circumstances as found by the jury". With all respect, I have the greatest difficulty in agreeing that the "omission" as so found did indeed constitute the breach of a duty owing to the infant respondent by both or either of the appellants.

The primary responsibility for the manner in which the pupils in this school are to be supervised while at play lies upon the Board of Education for the City of Toronto (hereinafter called the "Board") itself as distinct from its employees, but the regulations which it had promulgated to this end were excluded from the evidence by the learned trial judge and there is, accordingly, no evidence one way or the other respecting the steps, if any, taken by the Board as such in this regard.

At the other end of the chain of responsibility are the teacher-supervisors (including the appellant, Hunt) who were seized with the task of actual supervision but who had neither the power nor the responsibility of controlling or regulating the number of teachers to be on duty in the playground. The law does not contemplate the existence of a duty in an individual who is powerless to discharge it, and it must, therefore, be concluded that these findings cannot apply to the appellant, Hunt, and that the order appealed from should be set aside insofar as it relates to his responsibility for the initial injury to the respondent.

Under the circumstances disclosed by the evidence, the school principal, Mr. Macpherson, was the person and the only person vested with authority to control the matter of "having sufficient teachers on duty in the playground", and it is the nature of the duty resting upon him which must be examined in order to determine whether there was such a failure as to make the Board liable for the injury which resulted from the actions of the Taylor boy.

The duty of supervision which a school authority owes to its pupils while they are at play must of necessity vary from school to school and even from day to day, and it

is, therefore, not possible to elicit from the decided cases any guiding principle for the exact measurement of the degree of care to which any particular set of circumstances may give rise.

In the decision appealed from in the present case, Laidlaw J.A. has this to say on the subject:

> I do not suggest that it is the duty of a school teacher or a supervisor to keep pupils under supervision during every moment while they are in attendance at school. Nor do I suggest that the duty of supervision should be measured or determined by the happening of an extraordinary accident. It has been said that the duty is to take such care as a careful father would take in the particular circumstances. He must guard the pupils against danger that could reasonably be foreseen.

There can be no disagreement with the views of the learned judge in this regard except that it seems to me that the analogy between the duty of a school master to his pupils and that of a parent to his children, while it applies with some force to the duty which the individual master owes to children under his care, cannot be related with the same validity to the responsibilities of organization and administration which rested on Mr. Macpherson as principal of a school with an enrolment of 750 pupils. If the jury had found any "failure" on the part of an individual supervisor, then other considerations might apply, but the jury did not find this and their answers to questions 1(*a*) and 1(*b*) are directed solely to the "failure" to so organize the break period as to have more than four teachers on duty in the playground. It is, therefore, a question of what standard of organization the law requires of a school authority under such circumstances which must be determined.

It is really the "system" employed by Mr. Macpherson for supervising the break period which is in question and it is a factor to be considered, although not a conclusive one, that exactly the same number of teachers had been stationed in the same area of the same playground in both winter and summer ever since Mr. Macpherson came to the school in 1952.

In direct examination Mr. Macpherson gave the following evidence:

> Q. Who allocates the various portions of the playground for supervision?

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A. That is my duty, sir, which I do after consultation with the staff and expressions of their opinion as to the most suitable and effective places for the teachers. That, of course, has been long since established for the grounds of Maurice Cody School and its areas were very specifically specified for the four teachers on full-time duty outside in the yard.

Q. You say the areas of the Maurice Cody School had been established for some time prior to January 31st, 1957?

A. Well, that was my first duty on appointment as principal, to be sure that there was a clear understanding of the locations of the teachers on supervisory duty.

* * *

Q. Did your number of supervisors ever vary at any time?

A. Not throughout the time that I have been in Maurice Cody School, sir, up to the time after the portable was removed, which happened at the end of last year, 1957.

On the face of it there does not appear to be anything unreasonable about the system which was employed, and although no evidence was called to show that it had proved satisfactory over the years there was, on the other hand, no evidence called to the contrary effect except the happening of this one accident, and, as Laidlaw J.A. has said in the decision appealed from, it is not suggested that "the duty of supervision should be measured or determined by the happening of an extraordinary accident." As the burden of proving that the system was defective lay upon the respondents, it can, I think, be taken that Mr. Macpherson had no reason to believe that the four teachers allocated to the various areas of the playground specified by him constituted anything less than a reasonably safe system of supervision having regard to the number and ages of the children at the school unless there existed on the day in question any unusual circumstances which made it reasonably foreseeable that a greater number of teachers would be required.

In my view the winter conditions specified by the jury did not constitute such an unusual circumstance. The evidence in this regard is to the effect that the pupils might be a little more excitable in wintertime and that the attention of the supervisors at the north end of the yard might be somewhat more engaged with the activities on the hockey rink than on the centre of the playground but that there was about the same amount of activity in both areas throughout the year. This does not indicate a condition

which would cause a prudent school principal to anticipate danger to his pupils, and certainly gives no ground for anticipating such an accident as that which occurred.

Nor does the fact that ice, being on a large area of the yard, would limit the access of teachers to the scene of any accident indicate any such condition. The relevant evidence in this connection is that when the accident in question happened one of the pupils ran over and brought Mr. Herlick back across the ice to the scene within one or at most two or three minutes, and in any event before Higgs had got up from the ice.

There was a teacher on duty at each corner of the playground and indeed Higgs himself stated that one of the women teachers was within 35 feet of him. The only evidence to suggest that this number was inadequate was the fact that the accident happened. It is said that this was an event which the principal was under a duty to foresee and guard against, but even if this had been so it was not a duty to which any of the matters specified in the answer to question 1(*b*) gave rise.

Looking at another aspect of these same facts, I have also concluded that even if the "failure" as found by the jury had constituted a breach of duty, it has not been shown to be probable that any one of the ingredients of that "failure" as specified in the answer to question 1(*b*) caused or contributed to the respondent's injury which was occasioned by the sudden and unheralded action of the boy Taylor.

In analyzing the jury's answers to these questions as I have done, I am not unaware of the caution with which any Appellate Court should embark upon too meticulous a criticism of the findings of a jury, but having regard to the pleadings and the very full charge of the learned trial judge I am satisfied that this is a proper case in which to invoke the principle which is embodied in the decision of Taschereau C.J. in *Andreas v. Canadian Pacific Railway*[1], and to hold that the particulars of "failure" as set forth in the jury's answer to question 1(*b*) are such as to negative the other grounds of negligence which have been suggested.

[1] (1905), 37 S.C.R. 1 at 10, 5 C.R.C. 450.

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It would not be proper to leave this branch of the case without taking note of the fact that the decision appealed from is based in large measure on the assumption that the jury's answers were capable of being construed as including a finding that the school authorities were negligent in failing to provide against the foreseeable danger represented by the Taylor boy. It seems to me that even if this element were deemed to form a part of the jury's answers, it would have to be remembered that not only did none of the teachers see the incident but that of the 750 pupils in the playground, some of whom were only 10 feet away, not one of them saw its inception and only two even saw Higgs being carried.

It is true that the rough habits of Taylor made him a pupil to be watched, but with the greatest respect the facts do not seem to me to make it probable that having additional teachers on duty would have resulted in his being seen and stopped before the damage was done, and the fact that the presence of a teacher within 30 or 40 feet at the time of the incident did not deter him strongly suggests that the presence of additional persons in authority would not have affected his conduct.

As Laidlaw J.A. has said, "It is not the duty of school authorities to keep pupils under supervision during every moment while they are in attendance at school" and in my opinion nothing less would have served any effective purpose in the present case.

Speaking of circumstances which were not dissimilar, Denning L.J. said in the Court of Appeal in England in *Clark v. Monmouthshire County Council*[1]:

> It was the sort of scuffle which would pass unnoticed in a playground in the ordinary way. The incident would take place in the fraction of a second which the presence of . . . a master, would not have done anything to prevent at all.

and in the same case Morris L.J., speaking of supervisors in the playground, said at p. 250:

> . . . it is not shown that this accident might not have happened whether they had been there or not. It was the sort of accident which might have happened suddenly and unexpectedly and be all over before anyone could intervene.

[1] [1954] 52 L.G.R. 246 at 248.

Even on the view that the jury's answers included a finding of "inadequate supervision of Taylor" as a cause of the accident, I am still far from satisfied that this accident would not have happened whether additional supervisors had been there or not.

As to the second branch of the case, the following questions were put to the jury and answered in the manner indicated below:

2. (*a*) After the Infant Plaintiff was thrown to the ice, was there any negligence or improper conduct on the part of
   (1) Herlick "Yes"
   (2) Hunt "Yes"
   which aggravated the Plaintiff's original injury?

   (*b*) If your answer to Question 2(*a*) is "Yes", state the particulars with respect to each; *Answer fully*

   (1) Herlick should have taken Higgs, personally and carefully, straight to the nurse, despite the protestations of Higgs. In the alternative, Herlick should have immediately informed Hunt as to the obvious suffering of Higgs. By these omissions we hold him to be partially responsible for the aggravation.

   (2) By ignoring the plea from Higgs that he could not walk and following his admitted observance of Higgs in the playground, he caused further aggravation of the injury by insisting that Higgs walk into the class room.

   (*c*) If your answer to Question 2(*a*) is "Yes", at what amount do you assess the damages caused by the aggravation of the Infant Plaintiff's original injury
   (1) of the adult plaintiff .....$ *510.95*
   (2) of the infant plaintiff .....$ *10,000.00*

As to this phase of the matter, very different considerations apply. Section 108, subs. (*g*) of *The Public Schools Act*, R.S.O. 1950, c. 316, imposes upon every teacher a duty "to give assiduous attention to the health and comfort of the pupils . . . ." The master, Herlick, came promptly to the aid of the respondent as he lay on the ice and his offer of further assistance was refused, but it cannot be said that there was no evidence to support the jury's answer to question 2(*b*)(1) particularly having regard to the requirement of "assiduous attention" which is prescribed in the statute and the Board must bear the responsibility for his actions. These latter considerations apply with even greater force to the conduct of Hunt, and there is no reason to disturb the finding of the jury contained in the answers to questions 2(*a*), (*b*) and (*c*).

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In view of all the above, I am of opinion that the appeal should be allowed insofar as the first branch of this case is concerned and the order of the trial judge should be set aside insofar as it attributes responsibility to either of the appellants for the initial injuries sustained by the respondent, but as to the second branch of the case the appeal is dismissed. In the result the adult respondent will recover $510.95 and the infant respondent $10,000.

In the special circumstances of this case, the respondents will have their costs of this appeal.

Appeal allowed in part.

Solicitor for the defendants, appellants: D. H. Osborne, Toronto.

Solicitors for the plaintiffs, respondents: Horkins & Cory, Toronto.

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*PRESENT: Taschereau, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.