ENGA CHRISTINE CAMPBELL (*Plaintiff*) ..... APPELLANT;

AND

THE ROYAL BANK OF CANADA (*Defendant*) ..... RESPONDENT.

1963

*Oct. 9, 10
Dec. 16

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Negligence—Invitor and invitee—Water accumulation on bank floor result of people entering with snow on footwear—Customer slipping and falling—Unusual danger—Failure to use reasonable care—Defence of volenti non fit injuria.

The plaintiff sustained injuries in a fall occasioned by slipping in some water which had gathered on the floor of the defendant's bank. It was a snowy day and the water had accumulated as the result of people entering the bank with snow on their footwear. The plaintiff, who was not a regular customer of the bank in question, entered the premises for the purpose of cashing a cheque, and after having endorsed the cheque she walked to one of the tellers' cages where she was told that she would have to get the cheque initialled by the accountant or the manager. As she left to attend to this, her feet slipped from under her and she fell heavily to the watery floor and was injured. The plaintiff recovered substantial damages at trial, but, on appeal, the Court of Appeal reversed the judgment of the trial judge by a majority decision.

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

Per Judson, Hall and Spence JJ.: The state of the floor on the afternoon of the accident constituted an "unusual danger". Not even the

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

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exigencies of Western Canadian winter conditions would make usual the presence on the floor of a large bank, in mid-afternoon, of a dangerous glaze of water underfoot near the tellers' wickets. The danger could have been prevented by economical and easy precautions; a member of the public frequenting this bank was entitled to expect such precautions and their absence tended to make the danger an "unusual" one. The bank failed to use reasonable care to prevent damage to its customers.

The defendant failed to establish the defence of *volenti non fit injuria*. As found by the trial judge, the plaintiff was not *sciens* of the danger to be met in the area of the tellers' wickets. Certainly, the defendant had failed to show such knowledge as to leave the inference that the risk had been voluntarily encountered. There was nothing to indicate that the plaintiff consented to absolve the defendant from its duty to take care.

Also, as held by the Courts below, the defence of contributory negligence was not established.

Indermaur v. Dames (1866), L.R. 1 C.P. 274; *London Graving Dock Co. Ltd. v. Horton*, [1951] 2 All E.R. 1; *Lehnert v. Stein*, [1963] S.C.R. 38, applied; *Letang v. Ottawa Electric Railway Co.*, [1926] A.C. 725; *Osborne v. London and North Western Railway Co.* (1888), 2 Q.B.D. 220, referred to.

Per Martland and Ritchie JJ., *dissenting:* Proof of the existence of an unusual danger which caused the damage complained of was an essential ingredient of the plaintiff's case, and in the absence of such proof, it was superfluous to consider any defence based on the plaintiff's having known and appreciated the condition of the floor or having accepted the risk, if any, inherent in encountering it.

Hillman v. MacIntosh, [1959] S.C.R. 384; *Hanes v. Kennedy*, [1941] S.C.R. 384; *Rafuse v. T. Eaton Co. (Maritimes) Ltd.* (1958), 11 D.L.R. (2d) 773, referred to.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], allowing an appeal from a judgment of Maybank J. Appeal allowed, Martland and Ritchie JJ. dissenting.

A. C. Hamilton, for the plaintiff, appellant.

J. N. McLachlan, for the defendant, respondent.

The judgment of Martland and Ritchie JJ. was delivered by

RITCHIE J. (*dissenting*):—This is an appeal from a judgment of the Court of Appeal for Manitoba[1] (Freedman and Monnin JJ.A. dissenting) allowing an appeal by the respondent from the judgment rendered at trial by Mr. Justice Maybank whereby he awarded substantial damages to the appellant for injuries which she sustained in a fall occa-

[1] (1963), 41 W.W.R. 91, 37 D.L.R. (2d) 725.

sioned by slipping in some water which had gathered on the floor of the premises of the Royal Bank of Canada at Brandon, Manitoba, on a snowy day in November, 1959. The appellant, who was not a regular customer of the bank in question, entered the premises for the purpose of cashing a cheque, and after having endorsed the cheque she walked to one of the tellers' cages where she was told that she would have to get the cheque initialled by the accountant or the manager. As she left the wicket to attend to this, her feet slipped from under her and she fell heavily to the watery floor, with the result that she sustained the injuries in respect of which this action is brought.

The source of the water on the floor is explained by the learned trial judge when he says:

> There is no doubt that the numerous persons who entered the bank's lobby that day carried in a certain amount of snow on their boots

and he describes the nature and the condition of the floor itself as follows:

> The floor itself was of *smooth tile of a kind seen in many public places like banks*. It had been oiled on the week-end before the accident. There is no evidence to indicate improper oiling or an accumulation of oil in any particular place. Directly and by itself the oil on the floor did not cause the accident which is the subject of this action. It is possible that the oiled tile and water on top of it made the floor slippery, but I think the point does not necessarily have to be determined.

(The italics are mine).

The learned trial judge proceeds to make the following finding as to the cause of the accident:

> I think there can be no doubt that water on the floor of the bank lobby caused this woman to fall and I find this as a fact. It was, in my opinion, more than mere moisture or dampness; it may have been less than actual puddles; but certainly there was at least a dangerous glaze or film of water underfoot near the tellers' wickets. It may be that the recent oiling contributed to the slipperiness caused by the water, but whether that is so does not, as I have previously said, need to be determined. The place was too slippery for safety.

As will hereafter appear, Mr. Justice Maybank adopted the view that the bank, while not actually an insurer of the appellant's safety on its premises, was, nevertheless, under a duty to her to use reasonable care to keep those

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premises safe, and it appears to me to be clear that it was upon this basis that he fixed the bank with liability saying:

> In the instant case the bank did not take care to have its premises safe for its customers. In the vestibule was a rubber corrugated mat on which people could clean their footwear. It was not adequate as a help towards keeping a fairly dry lobby floor. A cocoa mat someplace about would have been useful. Also, when the weather was such that people carried in wet snow, a few strips of matting to the busy parts of the lobby or even at those busy places would have kept the floor nearly dry. The bank had no system or method for ensuring safe premises.

It is not disputed that the relationship between the bank and the appellant was that of invitor and invitee and the sole question raised by this appeal is whether the bank discharged the duty to which that relationship gives rise.

In defining this duty, the learned trial judge, after referring to a number of cases which had been cited before him, including *Indermaur v. Dames*[1], went on to say:

> Now it is quite clear that while the invitor does not actually insure the safety of his invitee, he must use reasonable care to keep safe the premises into which he has invited that person. If there is a danger for his invitee of which the invitor ought to have known, his responsibility is the same as if he had known of it. All the authorities listed above and many others either express these propositions or are consonant with them.

When this passage is considered in conjunction with the finding that it was a breach of the bank's duty for it to fail to have any "system or method of ensuring safety", it seems to me with the greatest respect to be apparent that the learned trial judge has misconceived the nature of the duty owing by an invitor to an invitee under the law applicable in Manitoba.

The nature of that duty has recently been restated in the case of *Hillman v. MacIntosh*[2], where Mr. Justice Martland, speaking on behalf of the majority of this Court said:

> . . . the relationship between the appellant and the respondent was that of invitor and invitee.
>
> The appellant, therefore, owed to the respondent, in relation to his use of the freight elevators, a duty the classic definition of which is that of Willes J. in *Indermaur v. Dames:*
>
> > And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question

[1] (1866), L.R. 1 C.P. 274 at 288.

[2] [1959] S.C.R. 384 at 391, 17 D.L.R. (2d) 705.

> whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact.

See also *Hanes v. Kennedy*[1], *per* Kerwin J. (as he then was) at p. 387.

I would also adopt the following comment by Professor Fleming in his work on "The Law of Torts" 2nd ed., at p. 412:

> The duty is not to prevent unusual danger but to prevent damage from unusual danger. An invitee cannot claim that the occupier make alterations to his premises to render them safe. He must take them as they are subject to the occupier's duty to use reasonable care to protect him from unusual dangers.

It has been said that the term "unusual danger" as used in this context defies comprehensive definition, but as has been pointed out by MacDonald J. in *Rafuse v. T. Eaton Co. (Maritimes) Ltd.*[2]:

> . . . it clearly has one primary meaning: it means "such danger as is not usually found in carrying out the function which the invitee has in hand"; and "was intended to exclude the common recognizable dangers of every day experience in premises of an ordinary type". See *London Graving Dock Co. Ltd. v. Horton*[3], per Lord Porter at p. 745 and Lord MacDermott at p. 762.

In light of the above authorities, it appears to me to be established that proof of the existence of an unusual danger which caused the damage complained of is an essential ingredient of the plaintiff's case, and in the absence of such proof, it is superfluous to consider any defence based on the appellant's having known and appreciated the condition of the floor or having accepted the risk, if any, inherent in encountering it.

Accordingly, in my view, the first question to be answered in this case is:

> Has it been shown that an accumulation of moisture which had collected on the tile floor in front of the tellers' wickets in a busy bank in Brandon, Manitoba, on a snowy day constituted an unusual danger.

I think it may at least be accepted that it is natural for moisture to accumulate on the tile floor of a building at a point where people have been standing with damp snow on

[1] [1941] S.C.R. 384.
[2] (1958), 11 D.L.R. (2d) 733 at 777.
[3] [1951] A.C. 737.

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their boots, and that in snowy climates, unless some preventative measures are taken, this must happen to some extent in wintertime on the tile floors of all buildings frequented by the public. Mr. Armstrong, the bank manager, refers to the moisture which accumulated in the bank in question as "dampness" rather than "water", and Mr. Edworthy, who was a regular customer of the bank, says that he had never actually noticed water on the floor and did not notice it on the day in question until his foot slipped as he turned to help the appellant up from her fall. The views thus expressed do not satisfy me that it was unusual to find melted snow in varying quantities on the floor of this particular bank "when the weather was such that people carried in wet snow" (to use the trial judge's expression) and particularly that it was unusual for there to be a concentration of such melted snow in front of the tellers' wickets.

It remains to be considered whether it is usual for the occupiers of such a building to take preventative measures against allowing water to accumulate on tile floors, such as having cocoa matting or some other substance on the floor in wintertime, or having somebody circulating amongst the customers with a mop to keep the floor fairly dry.

It is apparent, as the learned trial judge has found, that the respondent did not employ any effective system to control or prevent such conditions as existed in the lobby when the appellant fell, and as there is nothing to indicate that there was anything about the weather or the condition of the floor itself to distinguish the day in question from any other day in winter, it becomes relevant to note that throughout the eight winters during which Mr. Armstrong had been manager there had never been any complaint about anybody falling or slipping in the lobby. This appears to me to support the suggestion that while the fall was unusual, the floor was not dangerous.

The learned trial judge has found that the floor "was of smooth tile of a kind seen in many public places such as banks", but I can find no evidence whatever in the record as to what if any measures it is usual for the occupiers of such public buildings to take in wintertime to prevent water collecting from the snowy boots of their customers.

The danger of attempting to decide this matter by taking judicial notice of floor conditions usually found in such buildings in snowy weather appears to me, with all respect, to be demonstrated by the sharp difference of opinion which existed between the distinguished judges of the Court of Appeal of Manitoba as to whether it was usual or unusual to find water in such quantities on the floor of a bank in Manitoba in wintertime. Three judges of that Court were of opinion that there was nothing "unusual" about the condition of the bank's floor on the day in question, saying that it would be "wholly unrealistic and unreasonable" ". . . to expect anything other than a wet floor on a snowy day in Manitoba in any public place such as a bank . . .", while two judges of the same Court had not the slightest doubt that the presence of water on the floor constituted an unusual danger and expressed the view that: "One does not normally expect that bank premises, to which members of the public customarily resort in large numbers, will be wet and therefore hazardous. Not even under Western Canadian winter conditions would it be usual to expect to encounter such a floor".

Owing no doubt to the view which he took of the law, the learned trial judge made no finding as to whether or not the appellant's injuries were caused by an unusual danger, unless it can be said that the finding that "The place was too slippery for safety" is itself to be considered a finding of unusual danger.

I do not consider the evidence that the appellant slipped and fell in the amount of water which had accumulated on the floor at the tellers' wickets of the respondent's bank and that Mr. Edworthy slipped but did not fall on the same spot as he turned to pick her up, is of itself proof of the presence of an unusual danger or indeed that it proves that on the day in question the floor was too slippery for the safety of persons other than the appellant.

As I am unable to find any evidence in the record before us that it was unusual for such floor conditions to be present in such a building on such a day, I must conclude that the appellant has failed to discharge the burden of proving that her unfortunate fall occurred under circumstances giving rise to liability on the part of the respondent bank.

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I would accordingly dismiss this appeal with costs.

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

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal of Manitoba[1] dated January 3, 1963, which allowed an appeal from the judgment of Maybank J. dated July 4, 1962, in which he awarded the plaintiff judgment against the defendant for $35,889 and costs. The plaintiff's claim against the defendant was for damages sustained in a fall on the premises of the defendant in Brandon, Manitoba, at 2:30 p.m. on Monday, November 23, 1959.

It is not my purpose at the present time to review the facts in detail as I presume they are to be mentioned in another judgment in this Court.

The appeal, however, was argued upon the basis that the plaintiff was an invitee upon the premises. The occupier's liability to an invitee was stated by Willes J. in *Indermaur v. Dames*[2] as follows:

> And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know.

That outline of liability has been accepted universally since the day it was pronounced. Therefore, the first and the most important inquiry before a court considering such a claim is whether, under the circumstances existing at the time and place of the accident, there was present an "unusual danger". "Unusual danger" has been defined in the judgment given in the House of Lords in *London Graving Dock Co. Ltd. v. Horton*[3], by Lord Porter at p. 745, as follows:

> I think "unusual" is used in an objective sense and means such danger as is not usually found in carrying out the task or fulfilling the function which the invitee has in hand, though what is unusual will, of course, vary with the reasons for which the invitee enters the premises. Indeed, I do not think Phillimore, L.J., in *Norman v. Great Western Railway Co.*, [1915] 1 K.B. 584 at 596, is speaking of individuals as individuals but of individuals as members of a type, e.g. that class of persons such as stevedores or seamen who are accustomed to negotiate the difficulties which their occupation presents. A tall chimney is not an unusual difficulty for a steeplejack though it would be for a motor mechanic. But I do not think a lofty chimney presents a danger less unusual for the last-named because he is particularly active or untroubled by dizziness.

[1] (1963), 41 W.W.R. 91, 37 D.L.R. (2d) 725.
[2] (1866), L.R. 1 C.P. 274.
[3] [1951] A.C. 737.

The plaintiff was a widow of 55 years of age who was attending the bank premises in order to obtain payment of a cheque made in her favour. The bank was not the one with which she regularly dealt and she had been in the premises but a few times before. In other words, she was an ordinary member of the public with no special prior knowledge of the conditions in the particular premises.

Lord Normand said at p. 752 of the same case:

> I am of opinion that if the persons invited to the premises are a particular class of tradesman then the test is whether it is unusual danger for that class.

Here, as I have stated, the invitee was an ordinary customer of the bank but of no particular class. We must, therefore, consider the facts in a particular case in the light of these statements of the law which I adopt.

The bank premises were in the City of Brandon, a city with a population not given in evidence but we may take judicial notice that it is a considerable city, second in Manitoba outside the Greater Winnipeg area, with a population of nearly 30,000. The bank premises contained the sole branch of the bank in that city and was no small building as it provided space for 7 tellers' wickets, and the area for the use of the public inside the main vestibule measured 21½ feet by 32 feet. To these bank premises the public resorted in large numbers.

The day of the accident was a Monday but was described by Mrs. Martens, a teller, as "a busy day" and it would seem that on a busy day each one of the 4 savings tellers dealt with between 30 and 35 customers during the day. The bank was at the corner of 8th Avenue and Prosser Street in the City of Brandon. The accident occurred at about 2.30 p.m. on November 23, 1959, and during the previous day 1¼ inches of snow had fallen in Brandon and another 2.8 inches fell throughout the course of the 23rd of November. The temperature on the latter day varied from 23 to 27 degrees so that the condition under foot could be referred to as mildly slushy. Whether or not there had been snow cleaning in the immediate vicinity of the bank, the learned trial judge found that many persons who entered the bank on that day carried in a certain amount of snow on their boots. Entering the bank, a customer passed through a vestibule 10 feet square, the floor of which was

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completely covered with a corrugated rubber mat. No witness at the trial had ever seen anyone stamping snow off their feet on that mat. The customer passing through that vestibule entered the public premises of the bank through a double door. Much of the evidence at trial and consideration in both the Court of Appeal and in this Court was devoted to an examination of the state of the floor in the public premises. That floor was of a rubber composition tile and had been treated with what was described in evidence as "self-polishing non-skid liquid wax" on either the Sunday or the Saturday preceding the accident, both of which, of course, were non-business days. The learned trial judge stated:

> It is possible that the oiled tile and water on top of it made the floor slippery, but I think the point does not necessarily have to be determined.

After that statement, the consideration of the issue of the defendant's liability has proceeded without regard to any possibility that the presence of wax referred to in error by the learned trial judge as "oiled" contributed in any way to the accident. In this case, we are not concerned with the effect of wax on the floor but with the effect of water from melted snow upon the floor. In the Court of Appeal, Guy J.A., entered into a detailed and careful examination of the evidence upon that topic and particularly the plaintiff's knowledge of the condition of the floor.

As to the presence of an "unusual danger" apart from any question of the plaintiff's knowledge and appreciation of it, one might well commence with the finding of fact by the learned trial judge, where he said:

> I think there can be no doubt that water on the floor of the bank lobby caused this woman to fall and I find this as a fact. It was, in my opinion, more than mere moisture or dampness; it may have been less than actual puddles; but certainly there was at least a dangerous glaze or film of water underfoot near the teller's wickets.

And:

> In the first place it should be said I think that the plaintiff's knowledge was not knowledge of the dangerous condition around the tellers' wickets. The condition was worse there. (The underlining is my own.)

These were findings of fact by an experienced trial court judge made after hearing the evidence, often contradictory, in court and coming to the conclusion as to the evidence

which he would accept and the probative value he would attach to that evidence,

> Yet her statement is one I accept unreservedly.

And:

> I have no doubt about the plaintiff's veracity. I would say that any unequivocal statement made by her should be accepted as wholly true.

Freedman J.A., said, in the minority judgment of the Court of Appeal, in reference to this finding, "And I would say that the evidence clearly supports such a finding". And at p. 207, "Once again, I would say that the learned trial Judge's conclusions are supported by the evidence." (The underlining is my own.)

With that statement and with that course in reference to the trial judge's findings of fact upon contradictory evidence, I am in complete agreement.

Watt or Thomas v. Thomas[1], *per* Lord Macmillan at p. 490; *S.S. Hontestroom v. S.S. Sagaporack*[2], *per* Lord Sumner at p. 47; *Powell v. Streatham Manor Nursing Home*[3], *per* Viscount Sankey at pp. 249-50; *Roche v. Marston*[4], *per* Kerwin J. at pp. 495-6; *Prudential Trust Co. Ltd. et al. v. Forseth & Forseth*[5], per Martland J. at pp. 594-5.

Therefore, in the light of these facts as so found, was the condition of the floor at the place where the plaintiff fell on November 23, 1959, a "condition of unusual danger"? Guy J.A., giving the judgment of the majority of the Court of Appeal, said:

> The plaintiff apparently lived in Western Canada all her life and spent the ten years prior to the accident, in the city of Brandon. She knew what the snow conditions were outside, and I think we may take judicial notice of the fact that she must have encountered the same situation in every shop, either city or rural office, department store, school and public building she visited during her lifetime. On at least nine occasions during the giving of her evidence in Court at the trial, she stated that she noticed the floor was wet; that she saw patches of water; that she thought it was wet ("not all over, but in spots"). In addition to this, of course, at least two witnesses testified that the bank floor was wet in spots.
>
> There had been a number of people in the bank during banking hours that day, and, according to the witness Martens, it was a busy day. According to the witness Golding, one of the plaintiff's witnesses, the condi-

[1] [1947] A.C. 484.
[2] [1927] A.C. 37.
[3] [1935] A.C. 243.
[4] [1951] S.C.R. 494.
[5] (1960), 21 D.L.R. (2d) 587.

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tion of the floor was no more than one would expect in a public place on a snowy day. I shall quote her evidence further on in this judgment.

Another witness called by the plaintiff was a Mr. Edworthy, who testified to the same effect; a portion of his evidence appears later in this judgment.

Having regard to the picture presented by all the evidence, I must say that the situation, which confronted the plaintiff in the bank on the day in question, was a situation so commonplace as to take it out of the category of the "unusual". The significance of the word "unusual" as it appears in the basic principle of *Indermaur v. Dames, supra,* seems to me to be this: if the danger is an usual danger, it must be assumed that ordinary reasonable people know and appreciate it fully. Conversely if they know and appreciate it, it ceases to be unusual. In my view, to expect anything other than a wet floor on a snowy day in Manitoba in any public place such as a bank, store, post office, school, office, theatre, restaurant, or any of the hundreds of shops that abound in the Province, is to deny the everyday realities of life, and is wholly unrealistic and unreasonable.

On the other hand, Freedman J.A., in giving the minority judgment of that Court, said:

One does not normally expect that bank premises, to which members of the public customarily resort in large numbers, will be wet and therefore hazardous. Not even under western Canadian winter conditions would it be usual to expect to encounter such a floor. Admittedly snowstorms outside carry with them the prospect of snow being brought within premises, but that very likelihood imposes upon the occupier the obligation to take some effective measures against hazards thereby created. He cannot stand idly by, do nothing to protect invitees from damage arising from a wet floor, and then simply look to the snowstorm to exonerate him. (The underlining is my own.)

The question of "reasonable care" under the rule of *Indermaur v. Dames,* will be described hereinafter.

Again, I find myself in agreement with Freedman J.A. that not even the exigencies of Western Canadian winter conditions would make usual the presence on the floor of a large bank in a city of 30,000, in mid-afternoon, of "a dangerous glaze of water underfoot near the tellers' wickets". I am of opinion that the state of the floor in that bank on that afternoon constituted an "unusual danger".

It is perhaps a test of some value to determine whether a condition is one of unusual danger to investigate the ease by which the occupier might avoid it. In the present case, the learned trial judge said:

A cocoa mat some place about would have been useful. Also when the weather was such that people carried in wet snow a few strips of matting to the busy parts of the lobby or even at those busy places would have kept the floor nearly dry.

If the danger could have been prevented by these economical and easy precautions then surely a member of the public frequenting such a busy place as this bank would have been entitled to expect such precautions or others equally effective, and their absence would tend to make the danger an "unusual" one. For these reasons, I am of the opinion that the condition which confronted the plaintiff as she walked "very gingerly" from the savings wicket towards the ledger wicket was a condition of "unusual danger".

Before considering the defences of *volenti non fit injuria* and of contributory negligence, I turn to the question of whether the defendant on its part did use "reasonable care to prevent damage" to the plaintiff. Throughout the case, in the evidence, and in the judgments of both Courts, reference is made to the defendant's "system" of cleaning the floor. So far as that system affected the accumulation of snow or water from melted snow upon the floor in the public area of the bank's premises, it may be characterized as haphazard at the best. Some of the employees of the bank described as "juniors" seem to have cast upon them the vague duty of both cleaning the snow from the sidewalks outside the bank and mopping up the water which might collect on the floor in the bank premises. The trial judge, upon consideration of the evidence, only could find that the sidewalks "had probably been cleared of snow during the day" but no junior or anyone else had mopped the floor inside the bank at all during the course of the day of November 23rd, despite the fact that nearly 3 inches of snow fell in the city of Brandon during that day. The janitor, Gill, who one might presume might be the employee whose duties had most immediate connection with the cleaning of floors, was not even required to be about the premises during business hours. This course of conduct on the part of the defendant bank I would characterize as failure to use reasonable care to prevent damage to its customers, including the plaintiff whom the bank could expect to frequent its premises. I have come to this conclusion realizing the ease with which the danger could have been prevented by any of the steps referred to by the learned trial judge. Moreover, in my view, such a finding does not cast upon small businesses and shops throughout

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Manitoba any onerous burden. I would adopt the words of Freedman J.A. in the Court of Appeal:

> Counsel for the defendant advanced the argument that to hold the defendant liable in circumstances such as the present would be to impose an unfair and intolerable burden upon occupiers of premises. With respect, I do not share that view. Naturally one does not expect perfection of conduct from an occupier of premises. Moreover, one must make allowances for climatic conditions and the hazards they bring. But if weather conditions bring with them risks, they are no less accompanied by a corresponding duty to take reasonable precautions against damage that might be caused therefrom. "The risk reasonably to be perceived defines the duty to be obeyed" said Cardozo J. (*Palsgraf v. Long Island Railroad Company*, (1928) 248 N.Y. 339), and it is appropriate to recall those words here.

Guy J.A., giving the majority judgment of the Court of Appeal, quoted the learned trial judge as follows: "That she was sciens to a degree is not open to opposing argument". And also:

> In the first place it should be said I think that the plaintiff's knowledge was not knowledge of the dangerous condition around the tellers' wickets. The condition was worse there. So that even if the maxim on which defendants often rely was "scienti non fit injuria" rather than "volenti non fit injuria" it could not be said that the plaintiff was *sciens* of the danger to be met in the area of the tellers' wickets. Even if she were aware of the floor around the tellers' wickets being more slippery than the floor around the endorsement counter, (and I do not see how she could be aware of this in all the circumstances), it seems to me one would still not be able to say that she was *volens*.

and expressed his view that the evidence did not support such statement. The learned justice in appeal then proceeded to quote extensively from the evidence of the plaintiff and concluded:

> With respect, the foregoing evidence of the plaintiff herself does not justify the statement of the learned trial judge that she was not *sciens* of the danger to be met in the area of the tellers' wickets.

And:

> I say this is significant because, if there was an unusual danger and if, as the law states, she must fully appreciate the nature and extent of the risk, the plaintiff alone fully appreciated the nature and extent of the risk, and the other witnesses regarded the condition as common or usual on days such as November 23, 1959.

Again, it is my view, that the learned trial judge heard the evidence and observed not only the plaintiff but all the other witnesses and expressed his finding of fact in the words which I have quoted above.

Freedman J.A. in the Court of Appeal accepted that finding of fact when he said:

> Here, however, the plaintiff had far from a full knowledge of the danger. Beyond sensing or perceiving a condition of moisture in the location of the endorsement counter, she had no actual knowledge of the far more serious condition of wetness around the area of the tellers' cage. On the evidence it cannot be said that the plaintiff was *sciens*.

I am of the opinion that under the circumstances, the finding of the learned trial judge should be accepted. Certainly, the defendant has failed to show such knowledge as to leave the inference that the risk had been voluntarily encountered. See *Letang v. Ottawa Electric Railway Co.*[1], *per* Lord Shaw at p. 730, and *Osborne v. London and North Western Railway Co.*[2], *per* Willes J. at p. 223:

> . . . if the defendants desire to succeed on the ground that the maxim "Volenti non fit injuria" is applicable, they must obtain a finding of fact "that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it".

In *Lehnert v. Stein*[3], Cartwright J., giving judgment for the majority of the Court, said at p. 43:

> The decision of this Court in *Car and General Insurance Corporation Ltd. v. Seymour and Maloney,* [1956] S.C.R. 322, 2 D.L.R. (2d) 369, renders it unnecessary to make any lengthy examination of the authorities, which were fully considered in the judgments delivered in that case, particularly in that of Doull J., in the Supreme Court of Nova Scotia (*in Banco*), (1955) 36 M.P.R. 337. That decision establishes that where a driver of a motor vehicle invokes the maxim *volenti non fit injuria* as a defence to an action for damages for injuries caused by his negligence to a passenger, the burden lies upon the defendant of proving that the plaintiff, expressly or by necessary implication, agreed to exempt the defendant from liability for any damage suffered by the plaintiff occasioned by that negligence, and that, as stated in *Salmond on Torts,* 13th ed., p. 44:
>
> "The true question in every case is: Did the plaintiff give a real consent to the assumption of the risk without compensation; did the consent really absolve the defendant from the duty to take care?"

There is nothing to indicate that the plaintiff consented to absolve the defendant from this duty to take care. Therefore, the defendant has not established the defence of *volens*.

The learned trial judge found that the defence of contributory negligence has not been established. Guy J.A., giving the majority judgment of the Court of Appeal, said

[1] [1926] A.C. 725.
[2] (1888), 21 Q.B.D. 220.
[3] [1963] S.C.R. 38, 36 D.L.R. (2d) 159.

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"It is clear from the evidence, with respect, that the learned trial judge was right". I also concur in this view.

Therefore, in the result, I am of the opinion that the appeal should be allowed with costs and the judgment of the learned trial judge should be restored. The plaintiff is also entitled to the costs of the appeal in the Court of Appeal.

Appeal allowed with costs, MARTLAND *and* RITCHIE JJ. *dissenting.*

Solicitors for the plaintiff, appellant: Honeywell, Baker, Gibson, Wetherspoon, Lawrence & Diplock, Ottawa.

Solicitors for the defendant, respondent: Gowling, MacTavish, Osborne & Henderson, Ottawa.