1955
Mar. 14, 15, 16, 17
1956
Feb. 2

BETWEEN:

HARVEY LINDSAY and KATHLEEN LINDSAY ..... } SUPPLIANTS;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

Crown — Negligence — Explosives used in demolition exercise — Public attendance permitted — Spectators injured — Crown Liability Act, S. of C. 1952-53, c. 30, s. 1 (a).

The female suppliant while attending a field exercise of a reserve unit of the Royal Canadian Engineers, engaged in the demolition of the steel superstructure of a highway bridge, was injured by a fragment of steel following the detonation of explosives. The public had been permitted to attend the exercise and the spot where injury was suffered was one to which it had been directed by members of the Provost Corps. In an action for damages brought under the *Crown Liability Act*, S. of C. 1952-53, c. 30:

Held: 1. That the officers and men of the unit were at the time servants of the Crown acting within the scope of their duties or employment and the Crown under s. 3 (1) (*a*) of the Act was liable for their acts or omissions to the same extent as a private person of full age and capacity would be;

2. That under the circumstances that existed it was their duty to exercise a degree of diligence and care amounting practically to a guarantee of safety to those who, like the suppliant, were known to be in a position where there was a possibility that injury might result. The evidence established the possibility existed and was known to them and the directing of the public to an area in such close proximity to the demolition and the failure to ensure that warnings to take cover were adequately given and carried out constituted negligence for which the Crown was liable. *Whitby* v. *Brock & Co.* 4 T.L.R. 241; *Holliday* v. *National Telephone Co.* [1899] 2 Q.B. 392, applied;

3. That on the evidence the maxim *volenti non fit injuria* did not apply and, since it was not established the warnings were given in such a way as to be brought to the attention of the suppliant, contributory negligence was not proven;

4. That even if negligence on the part of its servants had not been established, the Crown was still liable under the rule of strict liability as laid down in *Rylands* v. *Fletcher* L.R. 1 Ex. 263; L.R. 3 H.L. 330 applied in *Miles* v. *Forest Rock Granite Co.* 34 T.L.R. 500.

PETITION OF RIGHT to recover from the Crown damages for personal injuries suffered by the female suppliant and special damages by her husband the male suppliant in respect of disbursements made by him for her hospital, medical and other expenses caused by the alleged negligence of servants of the Crown acting within the scope of their duties or employment.

The action was tried before the Honourable Mr. Justice Cameron at London.

Martin Morrissey for the suppliants.

K. E. Eaton and *D. H. Christie* for the respondent.

CAMERON J. now (February 2, 1956) delivered the following judgment:

This is a Petition of Right in which the female suppliant claims damages for personal injuries sustained on May 16, 1953. On that date she was a spectator at a field exercise conducted by the Seventh Field Squadron, a reserve unit of the Royal Canadian Engineers and under the command of Major G. E. Humphries, which exercise included the demolition by explosives of the steel superstructure of the Thorndale bridge over the north branch of the river Thames in the county of Middlesex, province of Ontario. At the time of the explosion she was struck by a fragment of steel and, while there is a formal denial in the statement of defence that the detonation of the explosives caused the fragment of steel to strike her, that ground of defence was not pressed at the trial. On the whole of the evidence it is clear that she was struck by a fragment of steel projected through the air by reason of the detonation of the explosives used by the squadron. Her husband, the first-named suppliant, claims special damages in respect of disbursements made by him for hospital, medical and other expenses on behalf of his wife.

The claim is brought under the provisions of the *Crown Liability Act*, Statutes of Canada 1952-3, c. 30, an Act which received the Royal Assent just two days prior to the

1956

LINDSAY v. THE QUEEN

Cameron J.

accident. By that Act, s. 19(1)(*c*) of the *Exchequer Court Act*, R.S.C. 1927, c. 34, was repealed. S. 3(1) of the new Act was as follows:

> 3. (1) The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable
>
> (*a*) in respect of a tort committed by a servant of the Crown, or
>
> (*b*) in respect of a breach of duty attaching to the ownership, occupation, possession or control of property.

Then by section 4(2) it is provided:

> (2) No proceedings lie against the Crown by virtue of paragraph (*a*) of subsection (1) of section 3 in respect of any act or omission of a servant of the Crown unless the Act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or his personal representative.

Counsel for the Crown submitted that the facts and circumstances of this case were such as to exclude them from the terms of s. 3(1)(*a*) and that, while they might have brought the suppliants within the provisions of s-s. (1)(*b*), that subsection could not assist them as it was not brought into force until November 15, 1954. (See s. 5(1) of the Act.) I have carefully considered this submission and have reached the conclusion that, whatever be the scope of the provisions of s-s. (1)(*b*), they need not here be considered inasmuch as the acts and omissions on which the suppliants rely, if proven, constitute a tort committed by one or more servants of the Crown and are, therefore, within the terms of s-s. (1)(*a*).

The respondent admits that the bridge was demolished and destroyed with explosives by the Seventh Field Squadron and that such demolition was carried out as a demolition exercise under the supervision and direction of officers and personnel of Her Majesty's forces. It is established by the evidence that the demolition was carried out under the direction of Major Humphries who was assisted by the officers and men of his unit and by certain other officers and men of other units, including those from the Provost Corps. I find, therefore, that Major Humphries and those assisting him were at the time servants of Her Majesty and then acting within the scope of their duties or employment.

The suppliants alleged that Major Humphries and the military personnel under his command were negligent in

that (*a*) the detonation of explosives was negligently performed in that it permitted a fragment of steel to fly to the area to which members of the public (including the female suppliant) had been directed; (*b*) the area to which they had been so directed was improperly located and negligently chosen; and (*c*) all proper precautions for the safety of the public were not taken. The suppliants also plead the maxim *res ipsa loquitur*.

The respondent, however, denies all liability, alleging (*a*) that all reasonable care and precautions were taken for the safety of persons and property; (*b*) that persons, including the female suppliant, in the area of the explosion were there voluntarily with knowledge of the danger and accepted the risk attributable thereto; it is submitted that the maxim *volenti non fit injuria* applies. Alternatively, it is alleged that if any officer or servant of the Crown was negligent, the female suppliant was guilty of contributory negligence and that the damages should therefore be apportioned.

The county of Middlesex had decided to replace the old Thorndale bridge by a more modern structure and a contract for the new bridge and the removal of the old bridge had been made with Mowbray & Co. Major Humphries, who was then in command of the Seventh Field Squadron, had knowledge of this contract and thought that it would be good experience for his officers and men to take charge of the demolition of the old bridge as a practice exercise. Authority to do so was secured from the county of Middlesex, the contractor and the military authorities.

The demolition of the steel superstructure of the bridge was planned for Saturday, May 16. Span one was demolished by the squadron in the morning, apparently without members of the public being present.

Mrs. Lindsay, who resides in London, had seen a copy of the London *Free Press* dated May 13, in which there appeared a news item headed, "Old Thorndale Bridge to Go on Saturday". Two paragraphs thereof were as follows:

> Under the command of Maj. G. E. Humphries, the old four-span steel structure will be demolished early in the afternoon, and the piers and abutments will get the same treatment the following Saturday. About 100 pounds of army plastic explosive will be used to blow the four spans, while about 1,000 pounds will be used to blow the abutments and piers.

1956

LINDSAY v. THE QUEEN

Cameron J.

Areas from where the public can watch the exercise are available, Maj. Humphries said. Work on the demolition will start early Saturday morning, and the main blast will be about 3.00 p.m. The bridge is just west of Thorndale village on the Thorndale sideroad.

Major Humphries had seen that article and agrees that it fairly represented the purport of what he had said to the reporter; that, while he had not specifically said anything about "the public", it was part of the plan to permit the public to view the exercises, and that areas from which the public could watch them were available. It is apparent that he fully expected members of the public to be present as there was a meeting with the commander of the Provost Corps "who was to regulate the public". Members of that Corps were actually present for that purpose.

Mrs. Lindsay and her husband thought it would be of interest to their twelve-year-old son to view the demolition. They drove with him and two of his friends to the vicinity of the bridge, parked the car some distance therefrom, and after viewing the bridge were directed by the members of the Provost Corps to move southerly along the east bank of the river on property owned by the Upper Thames River Conservation Authority. She says the instructions were, "Stand south of the shack; everyone move down south of the shack". The shack referred to is a small construction shack marked on the plan Exhibit A. It is a small frame building about 8 feet by 10 feet, about 8 feet high, and situated about 380 feet south of the centre of the bridge.

Obeying these instructions, Mrs. Lindsay moved to the south and took up a position south of the shack about where the initials "K.L." appear on Exhibit A. She was standing there when the easterly two spans were demolished by one explosion; no one was injured by that blast. Then there was an interval of about fifteen minutes before the second explosion, designed to demolish the most westerly span, took place. In the meantime, the spectators were moving about somewhat and Mrs. Lindsay, while conversing with others, had moved about twenty feet further to the south. While standing there, the second explosion occurred and it was then that she received her injuries. Another spectator, Mr. W. R. Brown, was also injured by a flying fragment of steel, his claim for damages being also before me. It is clear from the evidence of Major Humphries that both

Mrs. Lindsay and Mr. Brown were part of a group of public spectators and that they and all members of the group were in the general area where they had been directed by the Provost Corps. The number of public spectators was variously estimated at from 75 to 300, but I think it safe to assume that there were 150 at least. Major Humphries also stated that he considered that the area where they were standing when struck "was a safe place for them to be".

In view of the provisions of the *Crown Liability Act*, it seems to me that under circumstances such as these the Crown is liable for damages for the acts or omissions of its servants, such as members of the Armed Forces, to the same extent as a private person of full age and capacity would be. What then is the duty of care required in the use of dangerous goods such as explosives when members of the public in large numbers are known to be present?

Counsel for the suppliant submits that the rule of *res ipsa loquitur* applies and that, having proven the accident, he is not required to prove anything more than that it devolved upon the respondent to establish that the accident arose through no negligence of the Crown's servants. In this case, however, specific acts of negligence were alleged and, in my opinion, proven, so that the maxim is of little importance. I find it unnecessary; therefore, to decide the point.

The degree of care which a person is bound to use in regard to others is relative and in deciding whether a given act is, or is not, negligent, the particular facts and circumstances of the case must be considered. The following principles are stated in Halsbury's Laws of England, 2nd Ed., Vol. 23:

827. Where there are special circumstances which increase the risk attendant on some act or operation not usually dangerous, or where the act or operation is, from its nature, likely to cause injury to others unless special precautions are taken, the degree of care required is proportionately high. From the failure to use those precautions, which skill, foresight, and experience suggest as being necessary in such circumstances, negligence will be inferred. . . .

Consummate caution, too, is required from those handling dangerous weapons, such as loaded guns, or from those dealing with dangerous articles, such as gas or explosives.

883. The possession or use of articles which are dangerous by nature, such as fireworks, firearms, or dangerous chemicals and explosives, imposes

1956

LINDSAY
v.
THE QUEEN

Cameron J.

on the person possessing or using them the duty to take the highest possible degree of care. The mere fact that an accident results from the possession or use of such articles, where with proper care it should not so result, is *prima facie* evidence of negligence. . . .

884. The employment of dangerous or defective machinery or implements, or the conduct of dangerous operations, also imposes a duty to take the most scrupulous care, and failure to do so will render the person by whom they are employed or conducted liable to an employee or to any injured person who has a right to be where he was when he suffered an injury.

In *Pollock on Torts*, 15th Ed., the principle is stated thus at page 386:

The risk incident to dealing with fire, firearms, explosive or highly inflammable matters, corrosive or otherwise dangerous or noxious fluids, and (it is apprehended) poisons ,is accounted by the common law among those which subject the actor to strict responsibility. Sometimes the term "consummate care" is used to describe the amount of caution required, but it is doubtful whether even this be strong enough. At least, we do not know of any English case of this kind (not falling under some recognised head of exception) where unsuccessful diligence on the defendant's part was held to exonerate him.

It becomes necessary, therefore, to ascertain what care was exercised by Major Humphries and those under his command. He was in command of the Seventh Field Squadron and at the time of the demolition of the bridge was in overall command of that unit and of other service units then participating, including the Regimental Headquarters of the First Field Engineers and a detachment from No. 1 Provost Corps Company (Militia) to a total of about 35 or 40, of whom 25 per cent were officers. About a week earlier a meeting was held with the commanding officer of the Provost Unit "who was to regulate the public". A method was worked out by which the roads approaching the bridge should be controlled, areas where the public was not to be allowed were pointed out "and a certain safe distance was set up closer than which the public were not supposed to go during the demolition". It was decided to place members of the public at a point on the easterly bank of the river, southerly of a point about 400 feet south of the centre of the bridge. At this point there was a portion of a fence running east and west; it was to be used as a marker and no one was to be allowed to go forward of that point; the small contractor's shack was near that point. It was considered that if the public remained south of the marker, they would be safe. It was to that area that the

suppliants and the other members of the public, including many children, were directed by the officers and men. I am satisfied from the evidence that at the time of the demolition all members of the public were to the south of that marker.

The planning of the field exercise was done by or under the supervision of Major Humphries, a consulting engineer. He took his training in mechanical engineering in England and later had experience in construction and mining work in Canada. He was in the Armed Forces from 1940 to 1945 and his engineering training then included demolition work. In France his work included the construction and demolition of bridges. Since joining the Militia in 1946, he has had training in demolition work and eight demolition exercises for various authorities, only one of which included the demolition of steelwork of a bridge. He said it was not normal for steel to be demolished in civilian practice with explosives.

In preparation for the demolition, a plan, Exhibit D, was prepared. It shows the four bridge spans, the amount of explosives to be used on each, and the manner of applying the explosives to the bridge members. On three occasions the personnel of the squadron were briefed in the exercise to be carried out. It was decided to use plastic high explosives, 43 pounds of which in 16 charges would be used on the west span. It was considered that the debris from the explosion should be directed downwards into the water and to the north where there was a swamp and little likelihood of damage being occasioned to persons or property. For that purpose no explosives would be placed on the north or on the underside of the steel members, but rather on the top and south sides. The dots on the span Exhibit D show where the charges were to be placed. The explosives with paper wrapping were to be tied on with cordage and tape and were to be initiated by a detonating fuse. Sand bags were to be draped over the charges to minimize the concussion, to provide a tamping effect and to increase the efficiency of the blasts.

Major Humphries said that the channelling of the debris in the above way had been used in most of the cases in which he had been engaged in demolishing steel bridges;

1956

LINDSAY
v.
THE QUEEN

Cameron J.

that it was found necessary as a rule to prevent the debris from travelling in one direction. In his experience he had never found that debris came back in exactly the opposite direction to which it was intended. He said, "There is an angle of debris, say, which would be approximately 200 degrees from the centre line of the bridge over which considerable debris could be expected, and the amount from there backwards decreases in much the same manner as the discharge from a shotgun or anything like that. There is one point that should have zero or a minimum of debris with any charge if the charges are placed directionally."

Major Humphries said that after the charges were placed he personally inspected about 80 per cent. of them and found them in good order and properly placed according to plan. One of his officers who had charge of placing them reported that all were in order. In preparation for the firing of the charges, Major Humphries took up his position behind a tree about 100 feet north of the construction shack. After taking steps to ensure that there was no one in the area north of the bridge, instructions were given to arm the charges. He then "shouted loudly for people to take cover and get down and some others of my officers and people among the spectators carried the warning through". That was about 30 seconds before orders to fire were given. He was then facing south towards the spectators and in a position to see whether or not they were in the assigned area and had obeyed his warnings. He said, however, that after the first morning he was occupied with the business of getting the blasts fired and was not able to pay too close attention to what the spectators were doing.

He said that his reason for selecting the area near the shack as the place which the spectators could use was that there were a number of trees in that area; that if they were there they could be controlled with the forces available; and that the area was at a high level, somewhat above that of the bridge. He considered that there were enough trees to the south of the shack and running along the bank of the river to provide cover for all spectators present on that day. From his cross-examination it is clear that while Major Humphries may have considered the area to the south of the shack to be a safe place for spectators, he did not consider it to be entirely safe. He was asked to explain

the reason for his order before each explosion that the spectators were to take cover, and said: "because in any explosion or demolition it is normal for people to take cover. There never is a 100 per cent. guarantee of safety. Explosives are explosives and cover is one of the major factors. One of the facts in taking that action was that there was cover there and my reason for warning them was to see that the cover was used to as good advantage as possible."

By "taking cover" he meant getting down on the ground in a place where they were sheltered from the direct line of the bridge, getting behind a tree or timber, or any shack that was there. His order to take cover was "an additional assurance which he felt in duty bound to carry out because something might fly in their direction where they were standing and they could get hurt."

As a check on the efficacy of the directional blast, Major Humphries said that after the centre span was demolished in the morning, men had been sent into the water to search for steel fragments and none had been found more than a few feet south of the bridge.

In the afternoon, certain photographers and engineer personnel who were engaged in carrying out the demolitions, were stationed on the east bank in advance of Major Humphries' position. He explained that they had been provided with sand bag protection as they were closer to the bridge and in an area where it was very likely that debris would fly. When referred to the *Royal Engineers' Supplementary Pocketbook 4 on Demolitions* (which he recognized as one authority on the subject), he agreed with the statement therein that in using cutting charges on steel, 1,000 yards was considered as the proper safety distance for personnel during training, unless splinter-proof covering was available for spectators; he pointed out, however, that that was the safety distance when there was no attempt, as here, to channel the debris in one direction by placing the charges in the way I have outlined. He was unable to give any explanation or to suggest any reason why the steel fragments in this case did, in fact, reach the "safety" area where the spectators were gathered.

I cannot doubt that under circumstances such as here existed, it was the duty of those in charge of the demolition

1956

LINDSAY v. THE QUEEN

Cameron J.

to exercise a degree of diligence and care amounting practically to a guarantee of safety to those who, like the suppliants, were known to be in a position where there was a possibility that injury might result by the shattering of the steel superstructure. That such a possibility existed and was known to Major Humphries and his officers is established by the evidence. It was for that reason that some attempts were made to give warning to the spectators to "lie down" or "take cover". Some of the Army personnel who gave evidence for the Crown and who were in the spectators' area, said that they themselves did lie down or take cover in one way or another, no doubt because they had been instructed to do so, or considered it a proper safety measure under the circumstances. The evidence makes it quite clear that even where steps are taken to channel the effects of the blast away from the given area, such precaution is not in every case completely successful and, "explosives being explosives", an element of uncertainty and risk still remains. That being so, I think it was negligent on the part of those in charge to select an area to which the public were directed which was in such close proximity to the demolition that injuries might possibly result. The need of practical militia training in demolitions —at least in times of peace—cannot over-ride the plain duty to take exceptional care to see that no member of the public is subjected to risk of injury by reason of such operations. If they cannot be conducted in a public place without such risk, they should not be undertaken there at all.

It is suggested by Major Humphries that from the point of view of public relations, it was desirable that the public should have an opportunity of observing the work carried on by the Reserve Forces. That may well be so, although I doubt whether such a policy extends to an exercise involving such risks as here existed. If it is desired to have the public present, they must be kept out of all possible danger.

Counsel for the Crown stresses the fact that warnings were given to "take cover" and to "lie down" before the first and second explosions. Many witnesses on the point were called by both parties, all of whom, I think, endeavoured to tell the true facts as they recalled them. I find it unnecessary to review their evidence in detail. I am satisfied that Major Humphries, from his forward

position, did call out "take cover" or "lie down" or words to that effect; that instructions were given to members of the Provost Corps to go among the spectators and give similar warnings, and that to a limited extent they did so. There is evidence, however, by the suppliants in this case, and by Mr. Brown, the suppliant in the other case, as well as by others (which I accept), that they heard no such warnings given by any one and saw no one—except perhaps the forward members of the Forces—lie down or take cover. Some warnings were undoubtedly given, but they did not reach either of the suppliants or Mr. Brown, as well as others, although there was nothing to prevent their hearing them had they been given in their vicinity. I think it reasonable to suppose that the personnel required to give warnings were either too few in number to warn all the spectators, or too casual in their manner of carrying out their orders. I am satisfied, also, that there was insufficient and inadequate coverage in the assigned area for all the spectators. There were some trees—or shrubs as some of the witnesses called them—of small size and relatively few in number; there was but little coverage behind the shack and little or no ground cover of any sort.

The evidence also establishes beyond question that although warnings were given, it was known to the personnel of the Forces engaged that a great many spectators did not get down or take cover. It may well be the fact that the men in the Forces had no authority to compel any one to obey the warnings; but knowing as they did that they were not obeyed and that the demolition program involved an element of risk, they should and could have communicated the fact to the commanding officer. He himself, in fact, had every opportunity of observing that the warnings he had given were not carried out; he says that if he had looked he could and would have been that such was the fact. Under such circumstances it was his duty to ensure that the warnings were not only given adequately, but that they were carried into effect before firing the charges. He could have delayed the explosion until he knew that the warnings were obeyed and, if they were not obeyed, he could and should have cancelled the exercise entirely. His failure to do so and the failure of his men to report that these warnings were not carried out constituted

1956

LINDSAY
v.
THE QUEEN

Cameron J.

negligence for which the Crown is liable; such conduct falls far short of the consummate caution required of those dealing with inherently dangerous goods such as explosives.

In *Whitby* v. *Brock & Co.* (1), the plaintiffs had gone to the Crystal Palace where a display of fireworks under the direction of the defendants was to take place. They had passed the entrance and were proceeding in the direction of the fireworks when Mrs. Whitby was struck on the leg by a firework, sustaining personal injuries and damage to her clothing. The jury found that the defendant had been negligent in not exercising proper precautions and in admitting the defendants to the Penge gate after dark. The trial Judge, however, gave judgment for the defendant and the plaintiffs' appeal therefrom was allowed. The report of that case states:

> The Master of the Rolls (Lord Esher) said that the defendants were letting off these fireworks for their own benefit in the Crystal Palace grounds. They knew that people would come to see them. They knew that fireworks were a dangerous article. Therefore, there was a duty to manage with care their dealings with the fireworks. They let off the fireworks and struck the plaintiff, who had a perfect right to come into the grounds. The mere fact that the fireworks struck the plaintiff was sufficient *primâ facie* evidence of negligence, because fireworks did not ordinarily strike the spectators and bystanders. It was entirely a question for the jury, and not for the Judge, whether the plaintiffs took any risk on themselves. There was no evidence that the plaintiffs had taken on themselves any such risk. The verdict of the jury was justifiable and must be restored.
>
> Lord Justice Fry agreed that there was *primâ facie* evidence of negligence on the part of the defendants which had not been rebutted by any evidence on their part.
>
> Lord Justice Lopes said that he adhered to what he had said in *Parry* v. *Smith* (4 C.P.D. 325), that under such circumstances the defendants were bound to use care. The fact that Mrs. Whitby was struck was evidence of negligence, and the defendants had called no evidence to rebut that negligence.

In *Holliday* v. *National Telephone Co.* (2), the plaintiff, a passer-by on a highway, was injured when a defective lamp, used by a plumber engaged on the highway in the process of connecting pipe joints, exploded. The Earl of Halsbury L.C., said at page 398:

> There is a further ground for holding that the plaintiff is entitled to succeed. There was here an interference with a public highway, which would have been unlawful but for the fact that it was authorized by the proper authority. The telephone company so authorized to interfere with the public highway are, in my opinion, bound, whether they do the work

(1) (1888) 4 T.L.R. 241.

(2) [1899] 2 Q.B. 392.

themselves or by a contractor, to take care that the public lawfully using the highway are protected against any act of negligence by a person acting for them in the execution of the works. . . . Therefore, works were being executed in proximity to a highway, in which in the ordinary course of things an explosion might take place. It appears to me that the telephone company, by whose authority alone these works were done, were, whether the works were done by the company's servants or by a contractor, under an obligation to the public to take care that persons passing along the highway were not injured by the negligent performance of the work.

In the same case, Smith L.J. said at page 400:

. . . it is the duty of a person who is causing such works to be executed to see that they are properly carried out so as not to occasion any damage to persons passing by on the highway.

Counsel for the Crown, however, submits that the female suppliant voluntarily assumed the risk of injury and that, therefore, notwithstanding the negligence of its servants, the claim must fail under the maxim *volenti non fit injuria*. It may be assumed, I think, that the female suppliant had some knowledge that the detonation of explosives could be a dangerous operation unless proper precautions were taken. That was brought to her attention, also, by the fact that she and the other spectators were directed to move away from the immediate area of the bridge. Such knowledge, however, is insufficient; if this defence is to succeed, it must also be shown that she fully appreciated the danger and voluntarily accepted the risk (Halsbury's Laws of England, 2nd Ed., Vol. 23, p. 716).

I am quite satisfied that when she was in the so-called "safe area"—and it was there that she was struck—she had no appreciation whatever that she was incurring any risk. Such risk was not apparent to her for she had no knowledge of how far or in what direction steel fragments might be projected by the blast. Moreover, she was not made aware of the possible danger by any adequate warning. It is manifest that under the circumstances she relied—and was quite entitled to do so—on the skill, care and special knowledge of those in charge of the operations. When with others she was directed to the "safe area", she was entitled to assume that it was in fact a safe area. If other spectators in the area to her knowledge had been injured by the first explosion, then, had she decided to run the risk involved in observing the second explosion, a different conclusion might be reached on this point, but such was not the fact. In my opinion, the maxim is not here applicable.

1956

LINDSAY
v.
THE QUEEN

Cameron J.

It is submitted, also, that the female suppliant's contributory negligence contributed to her damages and that, therefore, the damages should be apportioned; it is said that she exercised less than a reasonable degree of care for her own safety under the circumstances. This submission is based on the fact that she did not obey the warnings to "lie down" or "take cover" or that, if she did not hear the warnings, she was careless and inattentive and, in any event, for her own safety she should have realized that there was some danger and should have taken steps to secure her own safety by going further to the south or by lying down and taking cover.

I have already found that the warnings were not given in such a way as to be brought to her attention. I am satisfied, also, that this was due to the inefficient and incomplete way in which the warnings were given and not to any inattention or heedlessness on her part. She is an alert and intelligent woman and I unhesitatingly accept her statement that she neither heard the warning nor saw any other of the spectators close to her, either lie down or take cover. Moreover, I am satisfied that when she carried out the only order that came to her attention—namely, to go south of the shack—she, like any other reasonable person, would assume that that area was a safe place, chosen as such by those in charge and that nothing further needed to be done on her part to avoid danger and ensure her safety. I am quite unable to find that in remaining standing in that area —and that is the only negligence alleged against her—she acted other than a reasonable person would do. In my opinion, the defendant has not proven any contributory negligence on the part of Mrs. Lindsay.

Moreover, I think the suppliants are entitled to succeed on another ground even if I am wrong in my conclusions that they have affirmatively established negligence on the part of the Crown's servants, for which the Crown is liable. I agree with counsel for the suppliants that the rule of absolute liability—or, as it is now more frequently called, the rule of strict liability—as laid down in the famous case

of *Rylands* v. *Fletcher* (1), is here applicable. In that case Blackburn J., in delivering the judgment of the Exchequer Chamber, said at page 279:

We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape.

In *Salmond on Torts*, 11 Ed., the author refers to that rule on page 614, as follows:

The rule known as that in *Rylands* v. *Fletcher* is one of the most important cases of absolute or strict liability recognised by our law—one of the chief instances in which a man acts at his peril and is responsible for accidental harm, independently of the existence of either wrongful intent or negligence. The rule may be formulated thus:—

The occupier of land who brings and keeps upon it anything likely to do damage if it escapes is bound at his peril to prevent its escape, and is liable for all the direct consequences of its escape, even if he has been guilty of no negligence.

In *Clerk & Lindsell on Torts*, 11 Ed., the authors, after quoting the above passage of Blackburn J., said at page 616:

This is the liability of an insurer; it is therefore unnecessary for a plaintiff to prove negligence, and it is no defence for a defendant to prove that he has taken all possible precautions to prevent damage.

1052. The principle of *Rylands* v. *Fletcher* has been aptly termed "the wild beast theory". It applies to "anything likely to do mischief if it escapes," and accordingly the thing must, like a wild beast or accumulated water, have the power of escape. This power of escape must be inherent, and the principle therefore applies to things "essentially dangerous in themselves" which are likely to escape and cause damage. It is impossible, as the authorities stand, to define these things more precisely. The principle, however, has been applied to water (including sewage), fire, gas, explosives, electricity, poison, dangerous animals, . . .

In reference to liability under the rule, the authors state at page 619 ff.:

In *Rylands* v. *Fletcher* water from the defendant's reservoir flowed into the plaintiff's mine, and the judgments accordingly deal with things brought or collected on land. The principle of the decision, however, is not "confined to the invasion of a right of property in soil", and is not limited to persons who keep or accumulate dangerous things on their own land. The person liable is the owner or controller of the dangerous thing. If he brings or collects it on land, he is liable although he is not the owner or occupier of the land, but has merely a licence to use or enter upon it. If he brings it on the highway and it escapes and causes damage he is similarly liable. . . .

(1) (1866) L.R. 1 Ex. 265; (1868) L.R. 3 H.L. 330.

1956

LINDSAY
v.
THE QUEEN

Cameron J.

1057. The duty under the rule of absolute liability is owed to the world at large. The person responsible is liable "'For any mischief thereby occasioned,' that is to say, not mischief necessarily occasioned to the owner of the adjoining land, but any mischief thereby occasioned". It has accordingly been held that a water company authorised by statute to carry water under the surface of the highway is liable for water from a broken main which damaged the cables of an electricity supply company also under the highway, and that a gas company, whose mains were under the street, was liable for an escape of gas which caused an explosion in an hotel. A railway company has been held liable for damage to stacks in a field caused by the emission of sparks from a railway engine, and so has the owner of a traction engine driven along the highway for damage similarly caused.

The question was raised in *Read* v. *J. Lyons & Co. Ltd.* [1947] A.C. 156, whether damages for personal injuries can be recovered under the rule in *Rylands* v. *Fletcher*. Until this case, no doubt had ever been expressed that they were recoverable. The Court of Appeal awarded such damages without question in *Miles* v. *Forest Rock Granite Co.* [1918] 34 T.L.R. 500, and in *Hale* v. *Jennings Bros.* [1938] 1 All E.R. 579, and in *Shiffman* v. *Order of St. John* [1936] 1 All E.R. 557. Atkinson J. awarded them on the ground of negligence and also, as an alternative ground of his decision, would have been prepared to award them under *Rylands* v. *Fletcher*. Damages for personal injuries are recoverable both in negligence and in nuisance and for breach of an absolute duty imposed by statute, and no principle has yet been put forward which would limit the damages recoverable to damage to property and not include damages to the person. There is no liability, however, unless the dangerous thing "escapes" from the land on which it is brought. Accordingly, when a worker in a munition factory was injured by the explosion of a shell in the factory, it was held that she could not recover.

1058. The principle of *Rylands* v. *Fletcher* may accordingly be stated to be: A person who owns or controls anything inherently dangerous, which is likely to do damage if it escapes from his land, does so at his peril and is liable for all the consequences of its escape, without any proof of negligence on his part, even if he did not know it to be dangerous.

It is of particular interest to refer to the above cited case of *Miles* v. *Forest Rock Granite Co.* (1), a decision of the Court of Appeal where the rule was applied and in which the facts are similar in many ways to those of the instant case. The headnote is as follows:

The duty of the owner of a quarry who brings explosives on to his premises and explodes them there is to keep all the results of the explosion on his own land, and if they escape from his land and cause damage he is liable whether he has been guilty of negligence or not.

(1) (1918) 34 T.L.R. 500.

There the defendant operated a quarry a short distance from a public highway; the plaintiff while proceeding on the highway to his work at another quarry, and after he had passed a flagstaff on which a warning red flag was hoisted, and a flagman posted to give warning that blasting was in progress, was injured by a piece of stone which had been flung a distance of four or five hundred yards by a blasting operation in the defendant's quarry. In summarising the opinion of the Master of the Rolls (Swinfen Eady), the report states:

It was contended that the verdict was against the weight of the evidence. In his opinion the learned Judge had put the case very fairly before the jury, if anything, too strongly in favour of the defendants. The way in which the case was tried was that it was put to the jury as a case of negligence and the learned Judge told the jury that unless the plaintiff proved that the defendants had been guilty of negligence he was out of court. That mode of putting the case was far too favourable to the defendants. This was a case in which the defendants had brought on their premises a quantity of explosives for their business and fired considerable charges. The charge used in this particular case did not appear to have been excessive, but it must have been considerable in view of its effect, which was to propel stones or a stone a distance of about a quarter of a mile. The duty of the defendants on bringing this foreign and dangerous material on the ground and exploding it there was to keep all the results of the explosion on their own lands, and it escaped from their own lands at their peril. The doctrine of *Fletcher* v. *Rylands* (L.R., 1 Exch., 265) applied to the present case. . . .

* * *

The case was like that of the escape of a dangerous and mischievous animal. In *Cox* v. *Burbidge* (13 C.B., N.S., 430) Mr. Justice Williams said:—

> If I am the owner of an animal in which by law the right of property can exist I am bound to take care that it does not stray into the land of my neighbour; and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence is altogether immaterial.

Fletcher v. *Rylands* (*supra*) was affirmed by the House of Lords (L.R., 3 H.L., 330), and it was pointed out in that case that there was no default or negligence on the part of the defendants whatever. So if the case had been put at the trial, as it might have been put, independently of any question of negligence the plaintiff must have succeeded. The case was not so put, but was based on the negligence of the defendants, while the defendants denied their negligence and also set up the defence of contributory negligence.

1956

LINDSAY v. THE QUEEN

Cameron J.

His Lordship came to the conclusion that the case had been fairly put to the jury and that it was impossible to say that there was no evidence of negligence or that the verdict was against the weight of the evidence, or that the jury could not as reasonable men arrive at the conclusion at which they did. The appeal therefore failed and must be dismissed.

Lord Justice Scrutton and Lord Justice Duke gave judgment to the same effect.

Reference may also be made to *Rainham Chemical Works Ltd.* v. *Belvedere Fish Guano Co.* (1) and to *National Telephone Co.* v. *Baker* (2).

At page 622 of the same text the exceptions to the principle of absolute liability are stated to be: (1) the act of God; (2) the act or default of the plaintiff; (3) the consent of the plaintiff; (4) the independent act of a third party; and (5) statutory authority. Exceptions (1), (4) and (5) are not here applicable and, as I have already found, the defendant has failed to bring the suppliants within exceptions (2) and (3).

Applying the above principles to the facts of this case, it will be seen that the officers and men of the squadron, admittedly servants of the Crown, for their own purposes brought explosives upon the property of the county of Middlesex, where they had a license to go, for the purpose of carrying out an operation which they knew to be dangerous, namely, the demolition by explosives of the steel superstructure; that they had knowledge of the presence of a large group of spectators on another adjacent property where such spectators (including the suppliant) had every right to be; that in the course of carrying out such dangerous operation they permitted the escape of fragments of steel from the property under their control to such other area, thereby causing damage to the suppliant. The defendant is therefore liable under the rule of strict liability laid down in *Rylands* v. *Fletcher*.

I turn now to the question of damages. Mrs. Lindsay is about forty-nine years of age, married, with two children both at home. When struck by the steel fragment she fell down, but was immediately assisted by two nurses who were present and who applied bandages. She was driven

(1) [1921] 2 A.C. 465 at 476. (2) [1893] 2 Ch. 186.

in a car to St. Joseph's Hospital in London where she was given a sedative to relieve the pain. Later that afternoon she was examined by Dr. Murray Simpson, a surgeon of London. He found two penetrating wounds on the inner aspect of her left thigh, a little below halfway between the groin and the knee. The first wound was on the anterior aspect of the thigh, about three inches in length, and appeared to be the point of entry of the fragment of steel; the other wound, about two and one-half inches long, was on the posterior inner aspect of the thigh and was apparently the point of exist of the particle of steel. Between the two was a track through which the steel had passed, torn muscles and injured veins in that region. No bones were damaged. After the haemorrhaging was stopped, anaesthesia was applied, the deeper haemorrhages stopped, the wounds cleaned out, muscle layers were repaired, drains were installed, and the skin repaired. She remained in hospital until June 2 of that year, receiving routine post-operative treatment for a potentially infectious wound. During most of that time she was confined to bed, but was moving about a little just prior to her discharge. Dr. Simpson said that when she left the hospital she could walk in a fashion, but not well; that she had a great amount of pain and some inflammation along the big vein of the inner side of her leg.

She remained under the care of Dr. Simpson until February 1955. He says that she had made a good recovery from the muscle injury but not from the vein injury. She has a recurrent phlebitis involving the vein below the injury; this causes a certain amount of swelling in the lower leg, some backaches, and severely limits her ability to walk very far without pain. The two scars still remain. He said she now has a chronic phlebitic condition which flares up from time to time, that her veinous condition is deteriorating and that she is likely to develop varicose veins. He did not think that her condition would improve further and that in five years she would be able to do much less than she is now doing. In his opinion the particular type of phlebitis was of a recurring nature and would not improve.

1956

LINDSAY v. THE QUEEN

Cameron J.

Dr. D. W. B. Johnstone, a consulting surgeon of London, examined Mrs. Lindsay on behalf of the respondent in August 1954 and in February 1955. In his opinion, she was suffering from mild phlebitis, resulting in swelling of the leg. Her condition was the same on both occasions and she complained of pain in the left thigh and swelling of the left leg and foot. He agreed that her condition would interfere with her housework and that her condition would be made worse if she were required to be on her feet for long periods of time and by going up and down stairs, and that scrubbing floors and the like would be very difficult. In his opinion, her condition had reached the maximum and would neither deteriorate nor improve. He found a deformity of the left leg and agreed with Dr. Simpson that if she had inflammation in other parts of her body, her condition might be aggravated. He agreed, also, that after normal exertion at housework, and after standing for periods of time, the leg would be painful.

Mrs. Lindsay said that she suffered considerable pain after the surgery when her wounds were dressed in the hospital, that she found difficulty in sleeping at nights there, and was given sedatives. When she returned home, she spent most of the first week in bed and was unable to resume her housekeeping duties for about two months, during which period she required the services of a housekeeper, her activities being confined to a few simple chores. For about a month she suffered quite severely when her weight was placed on the left leg. Even now when she walks her leg becomes tired and she experiences pain. She still requires the services of a housekeeper one day each week to perform the heavier household tasks such as polishing floors and ironing; the rest of the household duties she is now able to perform herself. Any lengthy exertion, such as prolonged standing or walking, fatigues her. Prior to the accident she skated, danced and hiked a little, but as any of these activities now result in a swelling of her leg, she can no longer participate in them. After discharge from the hospital, she was attended by Dr. Simpson at frequent intervals, but now attends at his office about once

each month for an examination as to her phlebitic condition. No further treatment is now being received. She is able to drive her car for short distances without tiring. She says her condition has shown no improvement since December 1953. She was not cross-examined as to her injuries or disabilities.

From this evidence it is clear that Mrs. Lindsay suffered a considerable degree of pain while in hospital and will continue to do so from the recurrent attacks of phlebitis. It is also clear that the phlebitic condition is of a permanent nature which will not improve and is likely to become worse and that she has been permanently deprived of the opportunity of engaging in her normal recreational activities. She will always be unable to perform certain of the heavier household duties such as ironing, scrubbing and waxing floors, and the like, and for those services will require to employ help at regular intervals. For general damages, which include pain and suffering, permanent partial disability, possible expenses which she may hereafter incur, and all other damages which she has suffered, I shall award her the sum of $8,000. To her husband, Harvey Lindsay, there will be awarded special damages for his disbursements for hospital, medical accounts and the like, which have been agreed upon at $1,084. There will therefore be judgment declaring that the suppliant, Kathleen Lindsay, is entitled to recover from the respondent the sum of $8,000 and that the suppliant Harvey Lindsay is entitled to recover from the respondent the sum of $1,084. The suppliants are also entitled to their costs after taxation.

Judgment accordingly.