
1947
Oct. 1
Dec. 31

BETWEEN:

ALBERT EDWARD FARTHING.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Crown—Petition of Right—Action against the Crown by employee of Y.M.C.A. engaged to assist in entertainment of His Majesty's Forces—Unusual danger—Invitee—Test to be applied to determine who is employer.

Pursuant to an agreement entered into between respondent and the Y.M.C.A. suppliant was employed by the Y.M.C.A. as an Auxiliary Service Officer to assist in entertainment, recreation and social welfare of the members of His Majesty's Forces during World War II. He worked under and was responsible to the Senior Administrative Officer at the R.C.A.F. station at Patricia Bay, B.C.

The suppliant assisted that officer in producing a play by members of the R.C.A.F. Lieutenant Hardwick, the officer in charge of the Special Service Branch of the Navy at Naden, B.C., arranged with suppliant and his senior officer to stage a performance of the play at Naden, a naval establishment a little distance from Patricia Bay.

The approval and consent of the Commanding Officer at Naden were obtained and the play was produced at the drill hall, the centre of all social activities at the camp.

After the performance the producing company and the suppliant were conducted from the ward room where they had had refreshments to the drill hall by an officer, detailed by Lieutenant Hardwick for that purpose. Suppliant remained in the ward room, a brief moment, then, with his wife, proceeded to join the others but found the door of the drill hall locked against him. They walked along a roadway or platform, used at night by the members of the forces and their friends at the dances and entertainments put on in the drill hall. He wished to reach his car which was parked near the drill hall. He fell off the end of the roadway and was seriously injured.

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In this action for damages the Court found that the end of the roadway constituted an unusual danger which was known to Lieutenant Hardwick and to the Commanding Officer at Naden or should have been known to him, as well as to the officer conducting the party. The Court also found that the officer conducting the party to the drill hall and to their transport was a servant of the Crown, acting within the scope of his duty or employment while so engaged.

Held: That the test to be applied to determine who is the employer of the servant is to decide in whose employment a man was at the time, when the acts complained of, were done; by the term employer is meant the person who has the right at the moment to control the doing of the act.

2. That suppliant was an invitee for he entered the premises by the permission of the respondent, permission granted in a matter in which the respondent had some material interest, namely, the entertainment of His Majesty's Forces.

PETITION OF RIGHT by suppliant to recover damages from respondent for injuries suffered by suppliant due to alleged negligence of officers or servants of the Crown acting within the scope of their duties or employment.

The action was tried before the Honourable Mr. Justice O'Connor at Vancouver.

H. S. Mahon for suppliant.

E. S. Farr for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

O'CONNOR J. now (December 31, 1947) delivered the following judgment:

The suppliant brought his Petition of Right to recover damages, suffered by him and resulting from the alleged negligence of officers or servants of the Crown while acting within the scope of their duties or employment when the suppliant, an Auxiliary Service Officer, was taking part in an entertainment in the course of his duties at H.M.C.S. Naden, a naval shore establishment at Esquimalt, B.C.

Pursuant to an agreement between respondent and the Y.M.C.A. the suppliant was employed by the Y.M.C.A. as an Auxiliary Service Officer to assist in entertainment, recreation and social welfare of the members of His Majesty's Forces. He worked under and was responsible

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to the Senior Administrative Officer at the R.C.A.F. station at Patricia Bay, B.C.: a play had been produced by the members of the R.C.A.F. under the guidance of the Senior Administrative Officer and the suppliant.

The naval establishment of H.M.C.S. Naden is about twenty miles from the R.C.A.F. station at Patricia Bay. At Naden, a naval officer, Lieutenant Hardwick, was in charge of the Special Service Branch of the Navy, assisted by an Auxiliary Service Officer, Ken Waite. Their duties included the arrangements for recreation, entertainment and social welfare of the Navy personnel.

Lieutenant Hardwick arranged with the suppliant and the Senior Administrative Officer of the R.C.A.F. at Patricia Bay to produce the above mentioned play at Naden. Lieutenant Hardwick then obtained the approval and consent of his Commanding Officer at Naden and made all the arrangements necessary. He stated that it was entered in the night orders over the signature of the executive officer which authorized the party to enter and be in the barracks. The guard at the main gate was notified and authorized to permit the entry of the party after a proper search of their transport.

Lieutenant Hardwick instructed Waite to arrange all the details. Waite did so and reported back to Lieutenant Hardwick that all arrangements were in order. On the 19th May, 1944, the party arrived at about 7.30 p.m. and were met at the main gate by Waite. That, according to Hardwick's evidence, was one of Waite's duties. Waite then conducted the party through the camp to the south side of the drill hall. The suppliant and his wife were in his own car and the remainder of the party in R.C.A.F. transport. The car and transport were parked on the south side of the drill hall and the party entered the south door of the drill hall and prepared for the play. Certain furniture and settings were required. Waite, followed by the suppliant, went out the north door of the drill hall across the roadway in question to the Y.M.C.A. hut, which lay north of the drill hall, for the settings and returned with them. They made several trips with Waite leading and the suppliant following.

After the performance of the play Lieutenant Hardwick invited the whole party to the ward room for coffee and

sandwiches. Lieutenant Hardwick stated that this was the usual practice with parties which came to entertain them and that all the necessary arrangements had been made beforehand. The party left their equipment in the drill hall. The naval officers took the party to the ward room. Refreshments were served.

Lieutenant Hardwick stated that the Officer Commanding had given instructions to get the guests out of the ward room about 11.00 p.m. on each occasion so that the barracks would be cleared and everything secured by midnight. He stated the duty officer was responsible for the closing of the drill hall after the entertainment and that normally the duty petty officer who "went around" would lock the drill hall. He stated that it would be the practice to leave the drill hall open until the party had gone with their cars.

Following the usual practice the party left the ward room around 11.00 p.m.

Lieutenant Hardwick said that after the refreshments were over the Y.M.C.A. Supervisor at H.M.C.S. Naden (Ken Waite) conducted the party from the ward room to the drill hall and that Mr. Farthing just stayed a moment thanking "us" for the hospitality in the ward room and then left.

The suppliant and his wife were "a moment" behind the rest of the party. The party conducted by Waite entered the north door of the drill hall.

When the suppliant and his wife reached the north door they found it locked.

It was around 11.00 p.m. and a very dark night. Dim-out regulations were in force and there were no lights near the north side of the drill hall.

The suppliant stated that as his car was parked on the south side of the drill hall he then proceeded west intending to go around the west end of the drill hall to his car.

The drill hall is about 150 feet in length and the north door is in the centre. Parallel to the building on the north side is a paved surface running the full length of the building and at the west end 34 feet 4 inches in width. No evidence was given as to where the east end of this roadway leads but it must be connected to some roadway because evidence was given of motor vehicles being on it.

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The west end of this roadway is higher than the north-south roadway which passes the west end of the drill hall. The south side of the west end is 8 to 9 feet and the north side is 14 feet higher than the north-south roadway. This roadway was termed in the evidence a platform. No explanation was given of this. At the west end of this roadway or platform there are 13 steps 7 feet in width leading down to the north-south road and located in the centre of the roadway. At the extreme edge of the portion of this roadway or platform north and south of the stairs is a cement curb 7½ inches in height and 10 inches in width.

Between the drill hall and the south side of the west end of the roadway a ramp leads down to Gunner Stores. There was a curb on the south edge of the roadway 7½ by 10 inches and a guard rail made of iron pipe about 3 feet in height. There was no guard rail on the curb on the west end of this roadway.

The photographs Exs. "A to F" show a railing on the west end that was erected after the accident. There is also some reference in the evidence to this railing. Evidence as to this is not admissible and I have not considered it in reaching my conclusions.

The suppliant and his wife, proceeding hand in hand, reached the western end of this roadway and at a point about 6 feet south of the south edge of the stairs the suppliant either tripped on the 7½ inch curb or walked over it and fell 8 to 10 feet to the north-south roadway below. He landed on his feet and then fell down. His wife did not fall over. The suppliant instructed her to go to the ward room for help which she did.

The remainder of the party had been conducted through the north door into the drill hall. They picked up their equipment and went out the south door and into their transport. The transport moved from the south side of the drill hall near the west end to the north-south highway. As soon as they turned north their headlights showed the suppliant lying in the roadway.

Squadron Leader Rundle-Woolcock who was in command of the R.C.A.F. party said that not more than 4 to 5 minutes elapsed from the time he entered the north door until the headlights of the transport showed the suppliant lying in the road.

After trying the north door the suppliant and his wife had walked west approximately 75 feet to the point where he fell. The suppliant, in describing the events after he fell, said:

The first thing I knew after Mrs. Farthing had gone for help, was I saw the headlights of one of the transports coming around the corner and I was afraid that they were going to run right over me.

The west end of the road was not guarded with the exception of a curb only $7\frac{1}{2}$ inches in height. The west edge was 8 feet to 14 feet above the north-south roadway.

Part of the evidence of Lieutenant Hardwick was:—

Q. Did it surprise you that Mr. Farthing should fall from the platform, as he did fall?

A. At the moment, yes.

Q. Why?

A. Well, the surprise would be that I didn't realize he had wandered, somehow or other, along that passageway.

Q. You were surprised he was there? From your knowledge of the platform, was there any other occasion for surprise?

A. Of course, I always considered that it was sort of in my mind, a sort of a hazard myself. I used to park my car up there and gingerly back up, because I was afraid I might go too far and go over the curb.

Q. You were afraid you might go too far and go over the curb.

A. Yes.

Q. You wouldn't know the height of the curb, but it is 8 inches high and I think 10 inches across. My thought is of your surprise—how it would be possible for a man in the dark to step over a curb of that sort.

A. I wouldn't be surprised at that.

Q. You think it is quite a reasonable thing.

A. I often wondered why someone didn't fall over it myself.

The roadway or platform was used at night by the members of the forces and their friends at the dances and entertainments that were put on in the drill hall. The drill hall was the centre of all the social activities of the camp.

In the daytime guests were seated there to see the displays put on in the area directly west.

I find that at night without lights the end of this roadway constituted unusual danger.

Lieutenant Hardwick's evidence shows that he knew the west end of this roadway was an unusual danger. The Officer Commanding knew or should have known that there was an unusual danger there. The evidence of Lieutenant LaRose, a witness called by the respondent, was that the Officer Commanding was responsible for taking the safety precautions with regard to buildings which

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he described as "the precautions that a prudent man should take" and he speaks of the Officer Commanding "making rounds".

The Duty Officer and the Petty Duty Officer would be quite familiar with every feature of the camp and knew or should have known this unusual danger. It was the Duty Officer's duty to inspect the camp and report daily to the Officer Commanding.

Waite acted as the guide or conductor of the party and the evidence discloses that he too must have known or should have known of this danger.

I find that all five knew or should have known of this danger.

The Officer Commanding, Lieutenant Hardwick, the Duty Officer and the Petty Duty Officer were all members of the naval forces of His Majesty in right of Canada on the 19th May, 1944, and by reason of s. 50 (*a*) of the Exchequer Court Act, are, for the purposes of determining liability in any action or other proceedings by or against His Majesty, deemed to be at that time servants of the Crown.

In the agreement between the respondent, represented by the Minister of National Defence, and the Y.M.C.A., the preamble sets out that the civilian population through the Y.M.C.A. and other organizations should be afforded an opportunity of making a contribution to the comfort and welfare of the members of the armed forces of Canada. Under the agreement the Y.M.C.A. agreed to provide the necessary personnel for such welfare projects and services at its own expense.

Under the Agreement the Minister of National Defence provided living quarters and rations and in camps, barracks and stations the Y.M.C.A. agreed, with respect to its personnel, to give effect to all orders, directions and instructions issued by the Minister or his representative.

The evidence was that the Y.M.C.A. were delegated certain responsibilities in connection with entertainment and recreation within the barracks to which they were posted. They were responsible to the Officer Commanding the station to which they were attached. They were there with his permission and if they failed to meet with his approval they would be withdrawn at his request.

The evidence shows that an Auxiliary Service Officer was attached to the R.C.A.F. at Patricia Bay and one at Naden.

They assisted in the work of entertainment, recreation and social services under an officer who had charge of those services. In the Navy this was a Special Service Officer of the Special Service Branch of the Navy and under the air force regulation he worked under the Senior Administrative Officer in the R.C.A.F.

The question is, was Waite the servant of the Y.M.C.A. or of the Crown at the time he conducted the party from the ward room to the drill hall?

The test to be applied was stated by Viscount Simon, L.C., in *Century Insurance Co.* v. *Northern Ireland R.T.B.* (1) as:

> in whose employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has a right at the moment to control the doing of the act.

And by Lord Wright at 515 in which he quotes the following language of Bowen L.J., in *Donovan* v. *Laing* (2):

> We have only to consider in whose employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has a right at the moment to control the doing of the act.

And at page 516:

> There are two ways in which a contractor may employ his men and his machines. He may contract to do the work, and, the end being prescribed, the means of arriving at it may be left to him. Or he may contract in a different manner, and, not doing the work himself, may place his servants and plant under the control of another—that is—he may lend them—and in that case he does not retain control over the work.

In this case Waite received his instructions as to the performance from Lieutenant Hardwick. Under his instructions he arranged all the details and reported back to Lieutenant Hardwick. He acted as guide throughout. Hardwick said it was Waite's duty to meet the party at the gate and to guide them in. It is clear that at the time when Waite guided the party from the ward room to the drill hall, he was under the control of Lieutenant Hardwick. The evidence is clear that in so far at least as this part of his work was concerned, he had been placed under the

(1) (1942) A.C. 509; 513. (2) (1893) 1 Q.B. 629; 633.

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control of the Crown,—that is the Y.M.C.A. had loaned him and they did not retain control over his work in respect to this party.

I find Waite was the servant of the Crown acting within the scope of his duty or employment while conducting the party to the drill hall and to their transport.

I find that the suppliant was an invitee. He entered the property by the permission of the respondent granted in a matter in which the respondent had some material interest, i.e., the entertainment of members of His Majesty's forces.

Did the suppliant use reasonable care for his own safety?

Counsel for the respondent contends that he did not do so in that he—

(*a*) did not leave with the others who were conducted by the guide Waite.

But Lieutenant Hardwick's evidence is that he "stayed only a moment" and this is borne out by Squadron-Leader Rundle Woolcock in his evidence as to the time that elapsed between his entry through the north door and his seeing the suppliant on the road. I accept Lieutenant Hardwick's estimate that it was "only a moment" and I find that the suppliant reached the north door just a minute or so after the rest of the party.

(*b*) Failed to return to the ward room when he found the door locked.

(*c*) Walked west on a road, with which he was not familiar, at night when he could not see.

At the north door the suppliant was about 150 feet from his car and about 400 feet from the ward room.

A return trip to the ward room meant 800 feet without lights or with lights that Lieutenant Hardwick described as "very, very limited—very limited" as against 150 feet without lights.

The suppliant had crossed and recrossed this roadway. He knew it was paved and reasonably assumed that it led to the north-south road. There was nothing to warn him that it ended 8 feet to 14 feet above the other road and he had no knowledge of the danger. He had been at Naden once before but it was at night. On the night in question he had driven south on the north-south road but he did not know where they were going and was following the

transport, guided by Waite. There would be nothing, then, that would call his attention to the end of the platform. When he crossed the roadway several times with Waite he did so at a point 75 feet from the end and again there would be nothing to attract his attention to the fact that at one end 75 feet away there was a drop up to 14 feet. He was not wandering about in an obscure place. He was walking on what obviously was a roadway and one, according to the evidence, used by all the guests who attended dances and entertainment. What he did was in my opinion quite reasonable under the circumstances.

I find that the suppliant had no knowledge of the danger which existed and received no warning of its presence, and that, in the circumstances, he used reasonable care for his own safety.

Apart from s. 19 (*c*) of the Exchequer Court Act the Crown is not liable for the tort of negligence.

S. 19 (*c*) provides:—

> Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

The liability under 19 (*c*) is vicarious, based as it is upon a tortious act of negligence committed by a servant while acting within the scope of his employment, and its condition is that the servant shall have drawn upon himself a personal liability to the third person. *King* v. *Anthony* (1). The suppliant to be entitled to the relief claimed must establish that a servant of the Crown has drawn upon himself a personal liability to the suppliant.

Before a liability of a servant can be established three things have to be proved:—

1. That a servant failed to exercise due care: (2) That a servant owed to the suppliant a duty to exercise due care: (3) That the servant's failure was the "cause" of the injury in the proper sense of that term. *Woods* v. *Duncan* (2).

First did any servants of the Crown owe to the suppliant a duty to exercise due care? These officers did not extend the invitation to the suppliant and the others personally as they would to their own guests. The invitation issued with the authority of the Officer Commanding

(1) (1946) S.C.R. 569 at 571. (2) (1945-6) 62 T.L.R. 283-286.

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was that of the Crown and was for the purposes of the Crown. All the acts done or omitted to be done by the Officer Commanding, Lieutenant Hardwick, Duty Officer or the Duty Petty Officer in connection with the party, were done in the course of their naval duty.

In the *Anthony* case (*supra*) it was held that the failure of the Sergeant-Major to stop the firing by those within his command was a neglect of duty only in respect of military law and did not constitute also a breach of private duty towards the suppliant and the rule of *respondeat superior* had no application.

In *Adams and Others* v. *Naylor* (1), two boys on the sand hills near a mine field strayed on to the mine field put there for defence against the enemy. A mine exploded and one boy was killed and the other seriously injured. The boys entered the enclosure at a spot where winds had caused the sand to silt up and form a hillock which covered all but the top strand of the barbed wire fence, and also buried an adjacent notice board. Following the practice that had existed over a long period of years the Government Department concerned nominated the officer who was in charge of the mine field and responsible for its maintenance. It then undertook the defence of the action, and in the defence admitted that the defendant was the person who was at all material times in control and responsible for the maintenance and safe-guarding of the mine field. The House of Lords held that there was no cause of action because it had been taken away by the Personal Injuries (Emergency Powers) Act, 1939. But, having said that, their Lordships all expressed their views on the practice of the Crown giving the name of a nominal defendant to facilitate what could be regarded in the language of Lord Justice Scott in *Royster* v. *Cavey* (2):

> From the moral, as distinct from the legal, point of view, may be regarded as in favour of justice being done, so that if the plaintiff proves that he has suffered an injury in such circumstances as would, if the defendant had been a private person or company, entitled him to recover damages he should not be deprived of that right by the accident of our law that no action of tort lies against the Crown. Their Lordships said that if, but only if, the particular name given is the name of a person who is personally liable for the accident in question, then judgment might be given against him.

(1) (1946) A.C. 543.

(2) (1945-6) 62 T.L.R. 709.

In the *Adams* case (*supra*), Lord Simmonds said at p. 553:

> Nothing could indicate more clearly than the circumstances of this case the desirability of clarifying the position, for I must confess that, had it not been for the fact that the Act under consideration afforded a defence to the action, I should myself have had great difficulty in understanding what was the duty alleged to be due from the defendant, an officer in His Majesty's army, to a member of the public in respect of acts done or omitted to be done in course of his military service.

There is no legislation in England on the subject of proceedings against the Crown and Lord Simmonds' observation was made in a discussion of that position and with reference to the facts in that case. And as Viscount Simons said, "the Crown was not in any sense a party to the action". In Canada, however, we have under s. 19 (*c*) a liability on the Crown for injuries resulting from the negligence of a servant of the Crown while acting within the scope of his duties or employment. And s. 50A provides:

> 50A. For the purpose of determining liability in any action or other proceeding by or against His Majesty, a person who was at any time since the twenty-fourth day of June, one thousand nine hundred and thirty-eight, a member of the naval, military or air forces of His Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown.

If ss. 19 (*c*) and 50A had been applicable in the *Adams* case (*supra*) and the officer who was in charge of the mine had as part of his duty invited members of the public on the premises for the purposes of the Crown, it could not be contended that he owed no duty to them to exercise due care.

In *Shaw, Savill and Albion Co. Ltd.* v. *The Commonwealth* (1), it was held (Head Note):

> An action for negligence brought against the Crown for acts done in the course of active naval or military operations against the enemy must fail: per Rich A. C. J., Dixon, McTiernan and Williams JJ., on the ground that while in the course of actual operations against the enemy the forces of the Crown are under no duty of care to avoid loss or damage to private individuals; per Starke J., on the ground that such acts are not justifiable *durante bello*. No such immunity from action attaches, however, to activities of the combatant forces in time of war other than actual operations against the enemy.

In the *Shaw, Savill* case, Dixon J. said p. 361:

> Outside a theatre of war, a want of care for the safety of merchant ships exposes a naval officer navigating a King's ship to the same civil liability as if he were in the merchant service.

(1) (1942-43) 66 C.L.R. 344.

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And after discussing the position during active operations against the enemy he said p. 362.

> But a real distinction does exist between actual operations against the enemy and other activities of the combatant services in times of war. For instance, a warship proceeding to her anchorage or manoeuvering among other ships in a harbour or acting as a patrol or even as a convoy must be navigated with due regard to the safety of other shipping and no reason is apparent for treating her officers as under no civil duty of care, remembering always that the standard of care is that which is reasonable in the circumstances.

When combined, ss. 19 (*c*) and 50 (A) clearly contemplate a duty owed to the public by a member of the naval forces while acting within the scope of his naval duties. Because there is a liability for negligence and there would be negligence only when there was a breach of a duty owed to the members of the public by a member of the naval forces while acting within the scope of his naval duties.

Here the suppliant entered the premises by permission of the Crown granted in a matter in which the Crown had a material interest.

Under these circumstances I hold that the officers in question then owed him a duty to exercise due care. The duty owed to the suppliant under these circumstances does not differ from the duty which an officer operating a motor vehicle on a highway in the course of his military duty owes to members of the public on the highway or from that which the navigating officer of a warship proceeding to anchorage in a harbour owes to other vessels in the harbour.

I find that when the suppliant entered the premises the Officer Commanding owed a duty of care to him and, when under the division of duty, Lieutenant Hardwick was placed in command of the party he then owed a duty of care to the suppliant. Waite was delegated, and it was part of his duty, to guide the party from the ward room to the drill hall. He assumed and undertook that duty and he owed to the suppliant a duty of care. The Duty Petty Officer knew that the party would return from the ward room to the drill hall and it was his duty to lock the doors after their transport had moved. He owed a duty of care to the suppliant. Did any of these servants fail to exercise due care?

There is no evidence that the Officer Commanding took any part in the matter other than to authorize the invitation. Under the division of duty he knew that Lieutenant Hardwick would have full charge of the party and would make all the necessary arrangements from the time the party entered the main gate until they left. The procedure that was to be followed was a regular routine which had been followed on all prior occasions. The Officer Commanding had nothing personally to do with the party. He was not, in my opinion, negligent and he is not within the rule of *respondeat superior* for the acts of those within his command.

> It is clear that an officer is not within the rule of respondeat superior for the act of one within his command, and it would be extraordinary if liability could be raised indirectly through a responsibility based not on his act but on his authority.

Per Rand J. in the *Anthony case* (*supra*).

While Lieutenant Hardwick had full charge of the party he had made all the necessary arrangements. When the time came for the party to leave the ward room he saw Waite leave for the purpose of conducting them back and he knew that the Duty Petty Officer would be waiting to lock the door. He saw that the regular routine was followed. He stated that the suppliant "stayed only a moment" and then the suppliant and his wife left. The counsel for the suppliant contends that Lieutenant Hardwick should have sent another guide with the suppliant, but if the suppliant "stayed only a moment", that would not be necessary. Lieutenant Hardwick could not reasonably be expected to foresee the accident and I find that he took, in the circumstances, reasonable care and that he was not negligent.

In *Fardon* v. *Harcourt-Rivington* (1), Lord Dunedin said:—

> If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence, but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions.

Having seen Waite leave with the party to conduct them back, the possibility of danger emerging would not be reasonably apparent, but only a mere possibility which would never occur to the mind of a reasonable man. Nor

(1) (1932) 146 L.T.R. 391-392.

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is Lieutenant Hardwick within the rule of *respondeat superior* for the acts of Waite or the Duty Petty Officer.

Waite was to conduct the party back to the drill hall. The Duty Petty Officer was to lock the door after the party entered. These were parts of their respective duties. Waite guided the party through the door of the drill hall but when the suppliant reached the north door it was locked and in attempting to go around the building he fell over the west end of the roadway or platform.

The evidence establishes that neither Waite nor the Duty Petty Officer warned the suppliant of the danger.

In the circumstances they failed to use reasonable care either by warning him or otherwise to prevent damage to the suppliant from this unusual danger of which they knew or ought to have known. And their failure to use reasonable care was the cause of the injury to the suppliant.

It is only fair to them to point out that I reach that conclusion without having heard their evidence.

I assess the suppliant's damages as follows:—

General damages.

The evidence showed that the suppliant was in good health prior to the accident. He had been examined by Dr. Coy at the time of his appointment as an auxiliary war services officer on the 2nd April, 1942, and Exhibit 2 shows that at that time Dr. Coy had certified that he could successfully perform the duties of an auxiliary officer.

His injuries were described by Dr. Burke who specializes in orthopedic surgery as a fractured left tibia and fibia and both oscalsis (heel bones). Dr. Burke stated that as a result of these injuries he has arthritis in both ankles and in the joints below the ankle and in the joints across the middle of the foot. Dr. Burke stated that the left foot is limited in execution of angulation and other motions to about 10 per cent of normal and the right foot to about 50 per cent. His left leg is wasted and is one inch smaller than the right below the knee. Dr. Burke also stated that the suppliant will not be able to carry on business as a manufacturer's agent because this involves walking and the suppliant would be limited to work that does not involve either standing or walking. Dr. Burke stated that the injuries which he described could definitely have been

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caused by a fall of some eight feet from a wall to a hard surface. After receiving these injuries he was taken to the naval hospital at Naden, remained there from the 19th May, 1944 to the 24th December, 1944. When he was taken to hospital on the night in question, an emergency operation was performed and there was another operation at nine o'clock the next morning and another operation the next afternoon. He was taken on the 24th December, 1944, by ambulance to the Patricia Bay hospital of the R.C.A.F. He remained there for approximately two months and then was taken back to Naden hospital for another operation. While in Naden hospital on this occasion he developed pleura pneumonia, pleurisy and pulmonary thrombosis. He is 57 years of age and following his discharge as an auxiliary service officer he became a leathercraft supervisor under the Department of Veterans Affairs, but due to his inability to walk he had to resign from that position.

He has undoubtedly received serious physical injuries, suffered great pain and is partially permanently disabled.

The suppliant stated that before becoming an auxiliary service officer he had been a manufacturer's agent and had been making about $2,000 per year and that he was unable to continue this work due to his inability to stand and walk.

Hospitalization and medical services were supplied by the Department of National Defence.

I assess his general damages at $9,000.

Special damages:

There is no claim for loss of salary.

Special shoes	38.00
Extra medicine	10.00
Damage to clothing	5.00
Watch repair	3.00
	$56.00

I award the suppliant damages of $9,056.00.

The suppliant is also entitled to the costs of the action.

Judgment accordingly.