

BETWEEN:

GRACE ELIZABETH (BOWDEN) }
 HARRIS and HOWARD HARRIS } SUPPLIANTS;

1955
 Jan. 20
 Feb. 10

AND

HER MAJESTY THE QUEENRESPONDENT.

Crown—Petition of Right—Damages for injury as result of a fall on stairway in a Customs building—The Exchequer Court Act, R.S.C. 1927, c. 34, s. 19(c)—Statutory conditions of Crown’s liability to be proven—Onus of proof on suppliants—Crown’s liability under s. 19(c) of the Exchequer Court Act a vicarious liability—Act of a Customs officer in granting permission in violation of instructions not an act of negligence in performance of his duties—Failure of a Customs officer to obey instructions not a breach of duty toward suppliants.

Returning to Canada from a motor trip in U.S.A., suppliants reported at the Customs office at Highwater, P.Q. to make the usual declarations. It was then 1 a.m. One B. was the only Customs officer on duty at the time. In the office there was a door and close to the door a poster with the words “for employees only” thereon. Suppliant Mrs. Harris asked B. permission to use the toilet facilities in the building. B. granted the permission, told her that the facilities were in the basement and indicated the door with his hand. Mrs. Harris, who wore glasses at the time, then proceeded to the door, opened it and fell down ten steps to the basement. The defence to an action seeking damages as a result of this accident is that B. was not acting within the scope of his duties when he granted the permission to Mrs. Harris. On the facts the Court found that for the last fifteen years respondent had refused the use of that door to the public; that the employees were aware of this prohibition and had been instructed not to admit the public to the basement. It also found that the stairway was in good condition and lighted at the time of the accident.

Held: That the onus of proof that B. was an officer of the Crown; that he was acting within the scope of his duties when he gave permission to use the toilet facilities; that he was negligent in the performance of his duties and that the injuries to suppliant Mrs. Harris resulted from his negligence, rests upon suppliants. No presumption or assumption can displace this statutory obligation imposed by s. 19(c) of the Exchequer Court Act, R.S.C. 1927, c. 34, as amended. Conjectures, suppositions, speculations or surmise are not sufficient to discharge the duty which lies with suppliant to establish those facts. *Labelle v. The King*, [1937] Ex. C.R. 170; *The King v. Moreau*, [1950] S.C.R. 18; *Ginn et al v. The King*, [1950] Ex. C.R. 208; *Diano v. The Queen*, [1952] Ex. C.R. 209; *Magda v. The Queen*, [1953] Ex. C.R. 22, referred to and followed.

2. That the act of B. in granting the permission to suppliant Mrs. Harris cannot in any way be treated as an act of negligence committed while acting within the scope of his duties. It was his own wilful act, done through kindness perhaps, but outside the range of what may be even considered as part of his duties or incidental thereto. *Anthony v. The King*, [1946] S.C.R. 569, followed.

1955
 HARRIS
 v.
 THE QUEEN

3. That B.'s failure to follow the instructions of his superior officer was not a breach of his private duty toward suppliants. Section 19(c) of the Exchequer Court Act creates a liability against the Crown through negligence of its servants but does not impose duties on the Crown in favour of the subject. *Anthony v. The King*, [1946] S.C.R. 569, followed. Here B. had no duty to care for suppliant Mrs. Harris. There being no duty, he was not negligent when he indicated the door leading to the basement.

PETITION OF RIGHT by suppliants seeking damages for injury as a result of a fall on a stairway in a Customs building owned by the Crown.

The action was tried before the Honourable Mr. Justice Fournier at Montreal.

Pierre Dessaulles for suppliants.

Gaston Lacroix, Q.C. for respondent.

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

FOURNIER J. now (February 10, 1955) delivered the following judgment:

In this petition of right the suppliants seek to recover from the Crown damages for personal injuries and losses sustained by them as the result of the fall of the suppliant Grace Elizabeth (Bowden) Harris, hereinafter called Mrs. Harris, in the stairway leading from the main floor to the basement in a Customs building the property of the respondent at Highwater, Province of Quebec.

This petition is taken in the name of both suppliants, who are married and are separate as to property as it appears from Exhibits 1 and 2 filed at the trial.

The suppliants and members of their family had been travelling by automobile in the United States when at 1 a.m. on August 5, 1951, they entered Canada at Highwater, Province of Quebec, and reported there, as required by law, at the Federal Government Office for Immigration and Customs and Excise. The suppliant Howard Harris and his daughter walked in the office first and went to the counter to make the usual declaration concerning the goods they were bringing into the country. As they were speaking to Cedric Bailey, the only official there at the time and in charge of the office, the suppliant Mrs. Harris came in. According to two witnesses, she asked the aforementioned

officer permission to use the toilet facilities in the establishment. He granted this permission to her and indicated with his hand the door leading to these facilities. In the main, these facts were corroborated by the respondent's witness Cedric Bailey. His only addition to and modification of this evidence were that when Mrs. Harris entered the office she looked at the sign near the door, which indicated that the facilities were not for the public, and then requested her daughter to ask the above permission. When he granted the request he told Mrs. Harris that the toilet was downstairs and showed the door with his hand.

On entering the office, two counters are in view: one to the right and another—a very long counter—facing the door. To the left of this last counter, there is a passage way on the employees' side of the building leading to a door at the rear left side of the room. Close to the door is a poster showing that it is for the use of employees only. This door opens on a stairway going down to the basement where the toilet facilities are located. The stairway has a length of 11 feet 3 inches. There are 10 steps having a tread of 10 inches and a rise of $8\frac{1}{2}$ inches. The sketch filed as Exhibit A gives an accurate description of the main floor of the building.

Mrs. Harris proceeded to this door, presumably opened it and fell down to the basement. In her fall, she was seriously injured, though the injuries were not apparent. A doctor was called who examined her and advised that she could proceed by automobile to her home in Montreal, but would need medical attention on her arrival there.

She received medical treatment from the date of the accident to about April 1953, but with very little result. She was in severe pain nearly all that time and required the continuous use of drugs to relieve her pains. In April 1953, she was operated on by a specialist. The injuries caused by the fall were to her spine and two discs of the vertebrae had to be removed. After the operation and for a certain period the pain in her back and left leg disappeared. But in September 1953 she complained of acute pain in the lower part of her back and was examined by another physician who found that she was suffering from a cancer growth to her left hip. This cancer was not detected by the doctors who

1955
 HARRIS
 v.
 THE QUEEN
 Fournier J

1955
 HARRIS
 v.
 THE QUEEN
 Fournier J.

had treated her previously, nor by the surgeon who had performed the operation in April of the same year. It was stated at the trial by the two medical experts who were heard that Mrs. Harris underwent an operation for cancer in 1946, when her uterus had been removed. From then on to the time of the accident she had been in good physical condition.

Doctor George Hutchison testified on behalf of the suppliants. I believe he was the family doctor. At all events, he treated Mrs. Harris in this instance. He gave a description of her condition from August 5, 1951, to September 1953 when it was found that she was suffering from cancer. From his knowledge of the case and his experience, he concluded that during her stay in the different hospitals for treatment she was totally incapacitated and when at home she suffered a 65 per cent disability and this from the date of the accident to September 1953. After that date, in his opinion, her disability was the result of the cancer growth on her left hip.

Doctor Townsend, who examined the patient at the request of the respondent and perused all the files relating to her different ailments at the various hospitals where she was treated reached conclusions similar to those of Doctor Hutchison. He was of the opinion that the victim suffered a total disability for three months after the accident, followed by a partial disability of 65 per cent up to September 1953. He then went further and expressed the view that her present disability of 65 per cent was due to the extent of 50 per cent to her accident and to the extent of 50 per cent to her cancerous condition.

It is for the injuries sustained by his wife that the suppliant Howard Harris has incurred the following expenses:

doctors' fees	\$428.00
hospital costs	612.96
glasses	18.00
medical prescriptions	150.00
upkeep of his daughter who took care of her mother after leaving her employ- ment	2500.00

total

\$3708.96

If I were of the opinion that the suppliants are entitled to any of the relief sought in their petition of right, I would award the suppliant Howard Harris the sum of \$3,708.96 for the above expenses and the suppliant Mrs. Harris the sum of \$2,500 as compensation for her temporary disability and for her pain and suffering.

1955
 HARRIS
 v.
 THE QUEEN
 Fournier J.

The suppliants' claims are made under section 19(c) of the Exchequer Court Act, R.S.C. 1927, chap. 34, as amended, which reads as follows:

19. The Exchequer Court shall also have exclusive jurisdiction to hear and determine the following matters:

(c) 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 suppliants in order to succeed against the respondent must bring their claims within the ambit of this paragraph 19(c) of the Exchequer Court Act above cited. It must be shown conclusively that Cedric Bailey was an officer of the Crown; that he was acting within the scope of his duties when he gave permission to use the toilet facilities; that he was negligent in the performance of his duties and that the injuries to the suppliant Mrs. Harris resulted from his negligence. The onus of proof of these facts rests upon the suppliants. No presumption or assumption can displace this statutory obligation. Conjectures, suppositions, speculations or surmise are not sufficient to discharge the duty which lies with the suppliants to establish the above matters.

This principle has received application in numerous decisions of this Court and of the Supreme Court of Canada; it will suffice to refer to a few: *The King v. Moreau* (1); *Labelle v. The King* (2); *Ginn et al v. The King* (3); *Diano v. The Queen* (4). The most recent decision dealing therewith is in the case of *Magda v. The Queen* (5). The President of this Court then said (pp. 31 et seq.):

. . . To engage the responsibility of the Crown to a suppliant under section 19(c) it must be shown that an officer or servant of the Crown, while acting within the scope of his duties or employment, was guilty of such negligence as to make himself personally liable to the suppliant, for the Crown's liability under section 19(c), if the term liability is a precise

(1) [1950] S.C.R. 18, 24. (3) [1950] Ex. C.R. 208.
 (2) [1937] Ex. C.R. 170. (4) [1952] Ex. C.R. 209.
 (5) [1953] Ex. C.R. 22.

1955
 HARRIS
 v.
 THE QUEEN
 Fournier J.

one to apply to the Crown, is only a vicarious one. Consequently, the suppliant must allege facts from which negligence on the part of an officer or servant of the Crown may be found, that is to say, facts showing that the officer or servant of the Crown owed a legal duty, whether imposed by statute or arising otherwise, to the suppliant to take care to avoid injury to him, that there was a breach of such duty while the officer or servant was acting within the scope of his duties or employment and that injury to the suppliant resulted therefrom: vide *Lochgelly Iron and Coal Co. v. McMullan*, [1934] A.C. 1; *Hay or Bourhill v. Young*, [1943] A.C. 92; *The King v. Anthony*, [1946] S.C.R. 569.

It was established and admitted that Cedric Bailey was a servant of the Crown on August 5, 1951. He was employed by the Department of National Revenue as a Customs officer, stationed at the port of Highwater, and on the day of the accident he was in charge of the office.

The powers and duties of Customs officers are fully described in the Customs Act, R.S.C. 1927, chap. 42, and amendments, specially under sections 142 to 152 of the Act. After a careful study of the section thereof dealing with these duties and functions, I was unable to find that amongst their duties they had the care of the building in which they performed said duties. The duties are related to the application and enforcement of the provisions of the Act. The administration, maintenance and care of public buildings come under the jurisdiction of other officials or departments.

But let us assume that amongst the duties of a Customs officer there is the care of the building in which he operates and let us consider the evidence. There are no toilet facilities for the public in the Customs building at Highwater. In the basement of the building there is a toilet room for the use of the employees. The door to the basement is on the office floor and there is a sign near this door indicating that the latter is for the use of the employees only. For the last fifteen years the respondent has refused the use of this door to the public. The employees were aware of this prohibition and had been instructed not to allow the public to the basement. If he took on his own to permit the use of the door, stairway, basement and toilet facilities, in so doing he was not acting within the scope of his duties but acting outside the scope of his duties.

The act of Cedric Bailey in granting permission to Mrs. Harris to use the toilet facilities in the basement, in my opinion, cannot in any way be treated as an act of negligence committed while acting within the scope of his duties. It was his own wilful act, done through kindness, if you will, but outside the range of what may be even considered as part of his duties or incidental thereto. His failure to follow the instructions of his superior officer was not a breach of his private duty toward the suppliants. Section 19(c) of the Exchequer Court Act creates a liability against the Crown through negligence of its servants but does not impose duties on the Crown in favour of the subject.

1955
 HARRIS
 v.
 THE QUEEN
 Fournier J

It was argued that if the officer was bound by duty to refuse the permission requested, the granting of the request amounted to negligence in the performance of his duties. This contention does not seem to me tenable. The Statute imposes a vicarious responsibility on the Crown for the damages resulting from the negligence of its servants only when they are acting within the scope of their duties and not for their negligence while acting outside the scope of their duties or doing things not contemplated by the Act or which cannot be reasonably considered as coming within the meaning of its section 19(c). To follow the above contention would have, in my view, the effect of imposing on the Crown a responsibility greater than that contemplated by Parliament.

There is no doubt in my mind that the officer in charge took onto himself to do something which he had been forbidden to do by his superior officer. But it is a well known principle that negligence in law only creates a responsibility or liability when it corresponds to a duty. In the present case, I am of the opinion that the Customs officer had no duty to care for the injured party and I do not believe he was negligent. There being no duty, he could not be considered negligent when indicating the way to the toilet facilities. The stairway was in good condition and offered no danger.

In the case of *Anthony v. The King* (1) Mr. Justice Rand made a clear exposé of the principle that the Crown's liability under Section 19(c) of the Exchequer Court Act was a

(1) [1946] S.C.R. 569.

1955
 HARRIS
 v.
 THE QUEEN
 Fournier J.

vicarious one based on a tortious act of negligence committed by a servant while acting within the scope of his employment.

The head-note in the last-mentioned case reads in part thus (p. 569 et seq.):

M., a soldier, took wrongfully a quantity of live ammunition from the gun stores and had it in his possession, while being transported by truck as part of a draft which was moved to another building. The draft was in charge of two non-commissioned officers, sergeant major W. being in command and lance-corporal H. assisting him. During the trip some soldiers in M.'s truck fired blank ammunition, and M. fired live ammunition at least once before reaching Anthony's barn. The live ammunition was property of the Crown, the soldiers were not to fire except under orders of a superior officer and the orders were that the soldiers should turn in the ammunition at the close of military exercises. When M. passed in front of respondent Anthony's barn, he directed a tracer bullet at a window, and the barn, and its contents belonging to respondent Thompson, were destroyed by fire. In actions against the Crown under section 19(c) of the Exchequer Court Act, the trial judge found that, while M. was not acting within the scope of his employment, there was liability on the Crown because of the negligence of the officers in charge of the draft in failing to stop the firing.

Held, reversing the judgment of the Exchequer Court of Canada ([1946] Ex. C.R. 30), Kerwin and Estey JJ. dissenting, that the Crown was not liable.

The act of M. in shooting the incendiary bullet into the barn cannot, in any way, be treated as an act of negligence committed while acting within the scope of his duties; it was a wilful act done for his own purpose, quite outside of the range of anything that might be called reasonably incidental to them.

The failure of the officers, in charge of the draft, was a neglect of duty only in respect of military law; it did not constitute also a breach of private duty toward the respondents; and the rule of *respondeat superior* has no application.

Paragraph (c) of section 19 of the Exchequer Court Act creates a liability against the Crown through negligence under the rule of *respondeat superior*, and it does not impose duties on the Crown in favour of subjects. The liability 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. If the liability is placed merely on the negligent failure to carry out a duty to the Crown and not on a violation of a duty to the injured person, then there will be imposed on the Crown a greater responsibility in relation to a servant than rests on a private citizen. But the words "while acting" clearly exclude such an interpretation.

I find that Cedric Bailey was an officer of the Crown performing his duties in the respondent's building at High-water, but that he was not acting within the scope of his duties when he indicated to Mrs. Harris the door leading to

the toilet facilities and granted her permission to use the same. This act was not part nor incidental to his duties. If his act resulted in the damages and losses claimed, I must say that I fail to see how the respondent can be held liable.

1955
 HARRIS
 v.
 THE QUEEN
 Fournier J.

The evidence before the Court has convinced me that the injuries complained of were the result of an accident. Mrs. Harris, the suppliant, who wore glasses, did not look carefully or did not see the first step or thought there was a platform at the head of the stairway. She took a step and fell to the bottom of the stairs. The stairway was in good condition and I really believe the light was on at the time of the fall, though no witness was positive one way or the other.

Under the circumstances, since the suppliants did not establish that the injury sustained by the suppliant Grace Elizabeth (Bowden) Harris was due to the negligence of the servant of the Crown while acting within the scope of his duties, the latter is not liable for the damages claimed. There will consequently be judgment declaring that neither of the suppliants is entitled to any of the relief sought by their petition of right.

The respondent is entitled to costs, which are hereby awarded, if the Crown deems fit to claim them.

Judgment accordingly.