1964
Oct 5, 6
Oct. 29

BETWEEN:

JEAN MILLAR HENDRY and JOHN HENDRY .... SUPPLIANTS;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT,

AND

NORMAN C. BROWN and W. G. PERREMENT .... THIRD PARTIES.

Crown—Petition of Right—Claim against the Crown for damages for personal injuries—Crown as occupier of premises—Licensees claiming against Crown as occupier—Notice required by s. 4(4) of Crown Liability Act—Failure of suppliants to give notice of claim to Crown—Negligence of licensee—Members of Her Majesty's forces acting in personal capacity—Occupancy and control of Sergeants' Mess—Duty of occupier to licensee at common law—Danger concealed or obvious—Proper lookout—The National Defence Act, R.S.C. 1952, c. 184, s. 39—The Crown Liability Act, S. of C. 1952-53, c. 30, ss. 3(1)(a) and (b), 4(2), (4) and (5)—Exchequer Court Act, R.S.C. 1952, c. 98, s. 50—General Rules and Orders of the Exchequer Court, Rule 138.

The suppliants are husband wife and on February 17, 1962, were attending a social function at the Sergeants' Mess, No. 10 Repair Depot of the R.C.A.F. at Calgary, Alberta as guests of an associate member of the Mess. On the completion of a bingo game the suppliants and the other guests partook of a buffet supper which was laid out on a billiard table in the bililard room in the Mess. When the female suppliant approached the table for a second time to obtain coffee and a roll for her husband and herself she fell and broke her right hip. She was wearing high-heeled shoes with metal clips on the toes and heels at the time she fell.

The evidence established that there was a small amount of cole slaw or cabbage salad on the floor near the billiard table at the place where the suppliant fell.

Held: That the failure to give the notice required by s. 4(4) of the *Crown Liability Act,* or its insufficiency, is not a bar to the proceedings because the respondent in its defence was not prejudiced by such want or insufficiency of notice and to bar the proceedings would be an injustice.

2. That there was no tort committed as envisaged by s. 3(1)(*a*) of the *Crown Liability Act,* by the members of Her Majesty's forces who were present at the material time because they ran this function in their personal capacities and not in their capacities *qua* members of the said forces.

3. That the respondent had occupancy and control of the premises in question at the material time and the Sergeants' Mess, i.e., the third party, were mere licensees of the respondent in respect to these premises and not tenants of the respondent.

4. That the suppliants were licensees at common law on the premises in question and the only duty at common law owed to them by the respondent was to warn them of any concealed danger actually known to the respondent and which was not known to the suppliants or which was not obvious to them.

5. That the fall of the female suppliant was caused by a small amount of cole slaw or cabbage salad on the floor of the billiard room and the steel clips on the high-heeled shoes worn by her, together with inadequate or no lookout by her when she turned from the billiard table.

6. That the presence of the small amount of cole slaw or cabbage salad on the floor by the billiard table was not a concealed danger, nor was it a danger that was not obvious or to be expected by the female suppliant under the circumstances.

7. That the damages complained of by the suppliants were the result of the female suppliant's failure to keep a proper lookout while walking in the billiard room and her failure to take reasonable care for her own safety, especially when she was wearing the shoes as already described.

8. That the suppliants' petition of right is dismissed and the action by the respondent against the third party is also dismissed.

PETITION OF RIGHT for damages for injuries sustained on a public work.

The action was tried by the Honourable Mr. Justice Gibson at Calgary.

A. M. Lutz for suppliants.

H. J. MacDonald, Q.C. and *N. A. Chalmers* for respondent.

W. R. Brennan for third parties.

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

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GIBSON J. now (October 29, 1964) delivered the following judgment:

This is a claim for damages for injuries sustained by the suppliant, Jean Millar Hendry, while on premises alleged to be occupied by the respondent and for damages due to loss of services and consortium of his wife allegedly sustained by the suppliant, John Hendry; and in the third party issue the respondent claims indemnity against the third party in respect of any amounts which the suppliants may be entitled to receive from the respondent or in the alternative judgment in favor of the respondent against the third parties for contribution in respect of any amounts which the suppliants may be entitled to receive from the respondent.

At all material times the respondent owned the premises known as No. 10 Repair Depot in the City of Calgary, Alberta, part of which comprised the Sergeants' Mess of the Royal Canadian Air Force, in the area known as McCall Field.

The Sergeants' Mess is one of the Non-Public Funds Institutes of the R.C.A.F. Station in Calgary and the property of which Non-Public Funds Institutes vested in the third party, Group Captain N. C. Brown, and the management of which Non-Public Funds Institute vested in both third parties by virtue of *The National Defence Act*, R.S.C. 1952, c. 184, and in particular section 39 thereof, and the Queen's Orders and Regulations, and General Orders and Station Orders made pursuant to the said statute.

During the evening of February 17, 1962, the suppliant, Jean Millar Hendry, was a guest of an associate member of this Mess, a Mr. Earl Wilfred Cook, and at or about the hour of 11:30 p.m., she fell on the floor on a part of the premises known as the billiard room where a buffet supper was being served, and she was injured, causing her damages. The allegation is that her fall was caused by a slippery condition of the floor caused by the wax which had been applied to it or by certain cole slaw or salad material which had fallen on the floor, or from a combination of both.

The social evening on this night took the form of a bingo followed by a dance and then a buffet supper, all of which were put on by the expenditure of Non-Public Funds by the Sergeant's Mess at McCall Field.

The premises on which the Sergeants' Mess was located and in which this social evening took place are more particularly shown on the sketch which was filed as Exhibit R-1. It consists of a so-called H hut on the east side of which was a bar and two rooms which were connected by a hall to a large room on the west side which was used on this night for playing bingo and for dancing, and off this large room to the northwest corner of the building was a billiard room in which there was a billiard table, upon which at the material time was set out a buffet supper.

The suppliant with her husband, John Hendry, at the invitation of the said associate member of the Mess, Earl Wilfred Cook, arrived at this Mess shortly after 9:00 p.m. on the evening of February 17, 1962, and each of them paid $1.50 for tickets to defray the costs of the expenses of the evening and they commenced to play bingo at a table in the large room in the west part of the building until about 10:45 p.m. after which they danced until shortly before 11:30 p.m. when the buffet supper commenced to be served.

At that time the door leading to this billiard room was opened and those present lined up to get their food.

The arrangement was that a Mess steward, one Corporal Richard MacRae, served the hot food at a little table south of the billard table and after being served by him those present proceeded in an anti-clockwise fashion around the billiard table serving themselves the rest of the food, which consisted of vegetables and salads, rolls, dessert and coffee.

The suppliant, Jean Millar Hendry, had been in this queue of people and had obtained two platefuls of food, one for herself and the other for her husband, and had returned to the table where prior to this time, bingo had been played by them and others, and this table was located at the southwest corner of this large room. She then returned to the billiard room to obtain a roll and coffee for herself and her husband. By that time the lineup or queue had diminished and there were only a relatively few people still in the process of being served and serving themselves while going around this table. She entered into the billiard room and proceeded in a clockwise fashion around the billiard table and got to the north side of the table. She apparently did not see what she wished in the way of food and turned to the west intending to return to go around the westerly end of the table when she slipped and her feet

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came from under her and she fell on her hip and then lay down on her back, all of which resulted in the injuries which are hereinafter described.

Her husband was called and he came and put his suit jacket under her head; a nurse, Mrs. Irene Helen Smith, came and attended her; and Mr. Arthur Charles Hall, who was a member of the Sergeants' Mess Committee, informed the President of the Mess, and went with the President to call an ambulance and eventually this suppliant was removed to a hospital where she was treated for a broken right hip, and had a plate and pin put in the neck of the right femur bone of her hip.

As part of the evidence there was filed this suppliant's shoes, Exhibit S-3. These are high-heeled shoes and have a metal clip on each of the heels and also a small metal attachment on the sole at the toes of them.

This suppliant, in cross-examination, said she had been at this Mess ten or fifteen times before, was very familiar with the rooms, had been in the billiard room many times, and in the bingo room and other rooms where the crowd gathered. She felt that her status there was the same as in a person's home; she said that the Mess was kept clean and run in an orderly fashion and that at these various functions which she attended there were Mess people looking after the running of the functions; that as far as she knew, no one had any trouble with the dance floor and that she never noticed anything wrong with the floor either in the billiard room or the dance room; that she knew that she had to be more careful as the food was served on paper plates, as every guest would know; that when she went around to the other side of the billiard table at the material time she was about a foot or two from the table when she fell; that she had no trouble seeing her way in the room and she could see any impediment in her way, if there was any, if she had been watching, and she could have seen any food on the floor if it was spilled if she had been looking, and that anyone who watched as one went around the table could see anything which might be on the floor; that no one complained about the condition of the floor that night; that she did not know what made her fall and as far as she was concerned the fall could have been caused by a number of things.

This suppliant was on crutches for nine months and for two or three months after she had to use a cane. She still has pain when arising from a chair causing her to limp for the first few steps and this condition also obtains the first thing in the morning.

It was agreed that the hospital expenses, namely, $36.50, medical expenses $332 and miscellaneous expenses of $15, making a total of $383.50 were incurred.

The suppliant, Mrs. Hendry, also asked $360 for housekeeping services which she said her sister, one Mrs. Petitt, rendered to her during her period of incapacity. She didn't tell her solicitor of this sum which she alleged she paid until a few days before the trial and at the trial her claim was amended to claim for this item. She computed from memory this amount just two days before the trial and she said that the sum was paid by her in cash to her sister.

The suppliant, Mrs. Hendry, also claimed loss of wages in the sum of $4,084.29 gross, being a sum computed by multiplying the sum of $129.66 per month (which she was earning for janitorial services performed for a school board at Calgary) by the number of months since her accident to date. She admitted she went to the school board about a year and half ago to inquire about being re-employed but there was no job available there, but she did not go back to inquire again because of back trouble; and she did not otherwise apply for a job anywhere or apply for unemployment insurance, and was in fact out of the labor market since her accident.

The suppliant, John Hendry, the next day after the accident tried to inquire at the Sergeants' Mess if there was coverage that would help him with the expected expenses of his wife arising out of this accident but got no information; and then he went again the following Monday and with a similar result; and on the following Sunday he received the information that the place to direct his inquiries was Lincoln Park which was the headquarters for the R.C.A.F. for the Calgary area. As a result, he went to his solicitor who wrote a letter addressed to S/L H. C. Hourigan, R.C.A.F. Station, Lincoln Park, Calgary, Alberta, which is dated February 28, 1962, and which is Exhibit R-1. The solicitor, however, did not send any

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notice to the Attorney General of Canada by registered mail as is required by the statute.

There was no evidence tendered by the respondent against the third party in the third party issue.

Counsel for the suppliant argued firstly that although the notice required by section 4(4) of *The Crown Liability Act*, S. of C. 1952-1953, c. 30, was not given, that failure to give or the insufficiency of the notice was not a bar to these proceedings because the Crown in its defence was not prejudiced by such and to bar these proceedings for this reason would be an injustice; that the respondent, Her Majesty the Queen, was the actual occupier of the premises where the suppliant was injured and the Sergeants' Mess was a mere licensee of Her Majesty the Queen; that the duty owed to the suppliant was that duty owed to an invitee or in the alternative was the duty that was owed to a licensee, or in the further alternative, that it did not matter whether the suppliant was an invitee or a licensee because this distinction is only material in regard to static conditions of premises and this was a current operation situation within the meaning of the dictum of the Lord Justice Denning in *Dunster v. Abbott*[1] and there was negligence on the part of the occupier; and that the cole slaw or salad on the floor and/or the wax condition in the billiard room was an unusual danger or trap in law.

Counsel for the respondent submitted the basis of liability in the first instance in this matter is set out in section 3(1)(*a*) of *The Crown Liability Act* which provides that the Crown is liable in tort for damages which, if it were a private person of full age and capacity, it would be liable "in respect of a tort committed by a servant of the Crown"; and in the second instance, under section 3(1)(*b*) of the Act, "in respect of a breach of duty attaching to the ownership, occupation, possession or control of property"; but that by reason of section 4(2) of that Act that no proceedings lie against the Crown in respect of this liability in tort 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 then submitted that any members of Her Majesty's forces at this Sergeants' Mess who are servants

[1] [1953] 2 All E.R. 1572 at 1574.

of the Crown within the meaning of section 50 of the *Exchequer Court Act* were not acting in their capacity *qua* servant of the Crown on the night of this incident but rather in their personal capacity and, therefore, that no liability could arise giving a cause of action to the suppliant by reason of section 3(1)(*a*) of *The Crown Liability Act*.

Counsel for the respondent then submitted that no liability could arise under section 3(1)(*b*) of the Act because the only duty owed to the suppliants in the circumstances disclosed by the evidence was the duty owed by the occupier of these premises and the respondent was not the occupier but instead the third party was the occupier in law.

Counsel for the third party submitted that there was no evidence adduced in the third party issue and so no finding could be made against the third party that in any event the third party was not sued by the suppliant and could not be liable in the main action; and in any event if the respondent was liable in the main action then there was no claim over for indemnity or for contribution against the third parties because the third parties were not occupiers in law of the premises where the injury occurred to the suppliant but instead were merely licensees from the respondent and the respondent was at all material times in law the occupier of the premises.

In this case, therefore, the first question for decision is whether or not failure to give or the insufficiency of the notice barred the proceedings brought by the suppliants by reason of section 4(4) of *The Crown Liability Act*, S. of C. 1952-1953, c. 30, or whether the saving provisions of section 4(5) of that Act apply.

It is my opinion that the failure to give or the insufficiency of the notice in this matter is not a bar to the proceedings because the respondent in its defence was not prejudiced by such want or insufficiency of notice and to bar the proceedings would be an injustice. At the material time the president of the Sergeants' Mess, R.C.A.F. McCall Field, was present at the time this accident occurred and in fact called the ambulance for the suppliant, Mrs. Hendry. He was the person appointed by the Officer Commanding the R.C.A.F. area in Calgary as President of the Mess and was responsible to the Officer Commanding, and any information was immediately available to the respondent

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through its responsible officers and servants so that no prejudice did occur.

The next question for decision is whether this was a tort committed by a servant of the Crown within the meaning of section 3(1)(a) of *The Crown Liability Act*.

In this respect, I am of opinion that there was no such tort committed as envisaged by section 3(1)(*a*) of *The Crown Liability Act*, by the members of Her Majesty's forces who were present at the material time because they ran this function in their personal capacities and not in their capacities *qua* members of the said forces.

The next question for decision is whether the Crown is liable in tort for damages by reason of section 3(1)(*b*) of *The Crown Liability Act* in "respect of a breach of duty attaching to the ownership, occupation, possession or control of property".

The only liability that can arise in this case must be by reason of the legal occupation of these premises by the respondent which on the facts of this case also imports control of the premises.

On the facts of this case, I am of the opinion that the respondent had occupancy and control of these premises at the material time and that the Sergeants' Mess were mere licensees of the respondent in respect to these premises and not tenants of the respondent. The evidence supporting this finding that the relationship between the respondent and the third parties was that of licensor and licensee appears in several places, but one such instance will suffice. Question and answer 114 of the examination for discovery of Frank Karwandy, which was read in by counsel for the suppliant pursuant to Exchequer Court Rule 138, sets this out very clearly:

> 114 Q. Could you tell me what agreement there is between Her Majesty the Queen and these third parties?
>
> A. There was not to my knowledge an express agreement between Her Majesty and the sergeants mess in question. However, there is an implied agreement or understanding that when a sergeants mess occupies a building and operates it as a sergeants mess that it does so in accordance with regulations, and also that it carries public liability insurance.

The next question for decision, therefore, is what was the duty owed by the respondent through the third parties to the suppliants and whether there was any breach of it

which would give rise to liability for damages for injuries sustained by the suppliants.

The right therefore of the suppliants to recover against the respondent the damages they suffered depends on the circumstances under which each of the suppliants, Jean Millar Hendry and her husband, came on these premises; that is whether they were licensees or invitees on those premises at the time and place of the accident.

It is clear from the evidence that such status is the same for both suppliants, and so reference hereunder on this point will be made only to the suppliant, Mrs. Hendry.

On the evidence I find it established that she came on these premises as a guest of an associate member of the Sergeants' Mess. She did not enter on business which concerned the occupier, the respondent, or the Sergeants' Mess represented by the third parties (who used these premises under licence from the respondent). She was only there for social reasons with the permission of the occupier, the respondent, given through the respondent's licensee, the Sergeants' Mess.

The suppliant, therefore, in my opinion, at the material time, was a licensee at common law on these premises.

It follows therefore that the only duty at common law, owed to the suppliant by the respondent, was to warn her of any concealed danger actually known to the respondent and which was not known to the suppliant or which was not obvious to her.

As a licensee the suppliant had to take these premises as she found them.

The combination of a small amount of cole slaw or cabbage salad on the floor of the billiard room and the contact with the floor of the steel clips on the high heel shoes of this suppliant, together with no or inadequate lookout by the suppliant when she turned from the billiard table and walked at the material time, caused her fall, which resulted in her injuries; and the presence of this small amount of cole slaw on the floor in front of the buffet, which had been patronized by a large number of guests who served themselves, all within fifteen (15) minutes before this suppliant fell, was not a danger that was concealed, or not obvious or to be expected by this suppliant under the circumstances; or as it is sometimes

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put shortly, it was not a trap laid by the respondent for this suppliant, or was not exposing her to a danger not obvious nor to be expected at that material time. On the contrary, the danger was obvious and was one that should have been expected and the suppliant in law was obliged to take her own precautions and in this case I find that the suppliant suffered these damages by reason of the fact that she failed to keep a proper lookout while walking in the billiard room of these premises at this material time and did not take reasonable care for her own safety, especially when she was wearing the shoes as described.

As stated, the status of the suppliant, John Hendry, was the same as the suppliant, Jean Millar Hendry, and these findings *qua* liability also apply to his claim.

In the result, the petitions of the suppliants against the respondent are dismissed; and the action by the respondent against the third party is also dismissed.

Notwithstanding the result, I assess the damages as follows. The special damages I find and assess are:

(1) Medical accounts at ..... *$ 337.00*
(2) Hospital expenses at *36.50*
(3) Miscellaneous at *15.00*
(4) Loss of earnings at *1,535.00*

The first three items were agreed to by the parties.

As to the claim for loss of earnings, the suppliant, Jean Millar Hendry, said that about a year and a half ago she went to her former employer the School Board but there was no opening for her, but she never tried again to obtain employment from them nor did she otherwise apply for employment. On the evidence I, therefore, find her loss of earnings to be for a period of 12 months at $129.66 gross, or $1,535.92.

I disallow the claim for housekeeping services allegedly paid to her sister, Mrs. Petitt, in the sum of $360 as not proven.

I accept the evidence of Dr. W. L. Crooks, who stated that the fracture Mrs. Hendry suffered through the neck of the right femur was healed with minimal disability after an uneventful period of convalescence, and who stated that there was now no deformity of her hip, but that it lacked 10% full flexibility and had a little more arthritic change than the uninvolved hip; and that it was difficult to state

what increasing disability she would have in the future, and therefore he declined to say.

On the evidence, I assess this suppliant's general damages at $3,500.

As to the claim of the suppliant, John Hendry, for loss of consortium and servitum, the only evidence adduced was to the effect that he did a little more of the housework after his wife's accident than he did before. I find his claim not proven, and it is therefore dismissed.

The respondent may have costs against the suppliant if demanded; and the third parties shall be entitled to costs in the third party action against the respondent.

Judgment accordingly.