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*March 31
*April 1
*Oct. 5

MARGARET PHYLLIS BOOTH, wife of STANLEY BOOTH, and the said STANLEY BOOTH; ARNOLD H. BOWLER; and WILLARD J. McCORMACK (PLAINTIFFS) ..... APPELLANTS;

AND

THE CORPORATION OF THE CITY OF ST. CATHARINES and THE BOARD OF PARK MANAGEMENT OF THE CITY OF ST. CATHARINES, (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Licensee—Peace Celebration spectators in city park injured when boys climbing on flag tower caused its collapse—Duties imposed on licensor.

In response to a notice published by the Mayor of St. Catharines requesting citizens to observe and co-operate in a programme prepared for the observance of "Victory-over-Japan Day", a large crowd gathered in Montebello Park the evening of August 15, 1945. Here, in addition to band concerts and dancing, a display of fireworks was given under the direction of "G", the manager of the city's Board of Park Management. The fireworks were set off in the "Rose

PRESENT: Rinfret C.J., and Kerwin, Rand, Kellock and Estey JJ.

Garden" which had been fenced off for that purpose. Some 25 feet from the fence there was a tower constructed of a light iron framework, some 70 feet high, surmounted by a flagpole. Earlier in the evening "G" had twice ordered small children off this structure. Later, while he was directing the fireworks display, a number of boys climbed upon the tower. Their combined weight caused it to collapse and fall upon the spectators thereby killing the daughter of one of the appellants and injuring two of the other appellants.

Held: The respondents were liable for negligence.

Per Rinfret C.J., Kerwin and Estey JJ.:—The maxim *novus actus interveniens* did not apply because the presence of the boys upon the tower, even though unauthorized, was the very thing that should have been anticipated.

The Court was unanimously of opinion that on the facts of the case it was not necessary in fixing liability to determine whether the members of the public attended the park as invitees. Rinfret C.J. and Kerwin J., agreed with the trial judge that the respondents were liable as licensors whose duty it was to warn a licensee of any concealed danger known to the licensor, and that "G" knew of the danger created by the weight upon the tower. *Baker* v. *Borough of Bethnal Green* [1945] 1 A.E.R. 136 at 140.

Per Estey J.: This was a case of a licensee after entering upon the premises being injured by virtue of the negligence of the licensor within the principle of *Gallagher* v. *Humphrey* (1862) 6 L.T. 684.

Per Rinfret C.J. and Kerwin J.: Having permitted the public to enter the park, the respondents were under a duty not to create or permit others to create a new danger without giving warning of its existence. The presence of the boys on the tower was a danger respondents permitted to be created and to continue. No warning was given and,

Per Rinfret C.J., Kerwin and Estey JJ.: The danger was not apparent to the parties injured.

Per Rand J.: The standard of reasonable foresight was applicable to the circumstances of the demonstration. The city's act in bringing about the gathering was of such a nature as called for reasonable precautions against foreseeable risks and dangers lurking in fact within it, an act which unaccompanied by that degree of prudence, became a misfeasance.

Per Kellock J.: A reasonably prudent man would have anticipated, having seen the fact demonstrated on two occasions, that young people would repeat their attempts to climb the tower and that if too many climbed on it, it was likely to fall, and would have taken means to prevent such use of the tower.

Per Estey J.: The injuries here claimed for were suffered not because of any defect in the condition of the premises but rather that the respondents were negligent in not taking reasonable steps to prevent the boys from climbing upon the flagpole.

Decision of LeBel J. [1946] O.R., 628, affirmed.

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APPEAL from an Order of the Court of Appeal for Ontario (1) whereby the judgment of LeBel J. (2) was reversed.

J. L. S. Keogh K.C. and *S. W. Fullerton* for the appellants.

F. J. Hughes K.C. and *J. R. Cartwright K.C.* for the respondents.

The judgment of the Chief Justice and Kerwin, JJ. was delivered by:

KERWIN J.:—The plaintiffs in this action are Stanley Booth and his wife, Arnold H. Bowler, and Willard J. McCormack. On the 15th of August, 1945, Mrs. Booth and Mr. Bowler were injured, and Grace Ann McCormack was killed, in Montebello park in the City of St. Catharines, Ontario, under circumstances to be mentioned later, and suit was brought by those injured to recover damages, by Stanley Booth for his expenses and loss of consortium, and by Willard J. McCormack for damages under *The Fatal Accidents Act* for the death of his daughter, Grace Ann. The proceedings were brought against the Corporation of the City of St. Catharines and the Board of Park Management of that city and came on for trial before Lebel J., who awarded damages, as to the amount of which there is no question except those awarded Willard J. McCormack. The Court of Appeal for Ontario set aside this judgment and dismissed the action.

The respondents make no point of distinction between the City and the Board, in the latter of which resides the general management, regulation and control of the park by virtue of the provisions of *The Public Parks Act,* R.S.O. 1937, chapter 285, and which park, under section 2 thereof, is open to the public free of all charge. On August 11, 1945, the Mayor of the City published in a local newspaper a notice that on the evening of the day that peace should be declared with Japan, a memorial service would be held on the City Hall lawn, commencing at seven o'clock in the evening; that following the service, there would be a general parade ending at Montebello Park where there

(1) [1947] 1 D.L.R. 917.

(2) [1946] O.R. 628; [1946] 4 D.L.R. 424.

would be band concerts, dancing and other entertainment, concluding with a fireworks display. By the notice, the public was asked for its co-operation and assistance in the program so that the day would be observed in a fitting manner. While counsel for the appellants made this notice the basis of an argument that those who in response thereto entered the park on the evening of August 15th did so as invitees, I find it unnecessary to consider that argument or to pass upon the proposition that, irrespective of the notice, the members of the public attended the park as invitees. I assume that within the well-known division of visitors to premises, they were licencees.

On the evening of August 15th, the parade was held, ending at the park where were gathered a large crowd of people, including Mr. and Mrs. Booth, Mr. Bowler and Grace Ann McCormack. By order of Herbert L. Gray, who was and had been for many years the city parks manager, acting under express instructions of the Mayor, an area in the park, known generally as the Rose Garden, had been segregated by the erection of a snow fence within which it was proposed to set off the fireworks. This fence was about 1,000 feet in length and its nearest point was 25 feet from a steel flag tower which had been constructed and erected in 1907 in another location but which, in 1916, had been moved to, and re-erected in, the park. It was 70 feet high and supported a flagpole on top The tower proper was rectangular in shape, tapering upwards and stood on four posts, bolted to steel anchors imbedded in concrete. There was no horizontal bracing but there was diagonal bracing and there were horizontal struts about five feet apart. The bottom strut was about seven feet from the ground but the diagonal bracing came to within eighteen inches of the ground. The tower fell while the evening celebrations were in progress, with the results noted above, and the question is whether the respondents are liable, as found by the trial judge.

Two volleys of noise making bombs, the first being fired at approximately 7.30 p.m. and the second at about 8 p.m. preceded a display of sky rockets, which were first set off about eight thirty o'clock,—twenty minutes before the fall of the tower. Mr. Gray was on hand and at about 7.20 his attention was called by one of his assistants to the fact

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that several children were on the tower. He went to a spot in the enclosed rose garden nearest to the tower and told them to get down, which they did immediately. The same thing happened again, about 8 p.m., and on each occasion Mr. Gray testified children aged about four to six years were on the first horizontal strut or climbing on to it. From the time of the second occurrence until the disaster, he paid no attention to the tower. He testified that he had never seen children on the tower before and that it had not occurred to him that the children he saw that night, or anyone else, might damage the tower or cause it to fall. From other evidence, which was not contradicted, it appears that at different times on the evening of August 15th there were at least ten boys on the tower and that their ages varied from ten to sixteen years. One had climbed to a point above an electric light bulb, which would put him 35 to 40 feet from the ground. Most of these boys were on the tower ten to fifteen minutes before it fell. They leaned backwards to better follow the course of the rockets through the air and this action caused a swaying of the tower, and according to all the experts, this swaying was the cause of the buckling and fall of the tower.

While Mr. Gray said that his whole concern was merely for the safety of the boys that he saw on the tower, the trial judge was unable to accept that as a complete statement. It is true that the tower was sufficient for the purpose of holding the flagpole but Mr. Gray knew that the tower was not built to bear the weight of a group of people because when the rope attached to the flag had broken on several occasions, he had seen to it that no person was allowed to climb the tower to repair the rope. Instead, an extension ladder of the City Fire Department had been used and the ladder had always been kept clear of the tower.

On these facts I agree with the trial judge that the respondents are liable as licensors. Avoiding any controversial points, an occupier must warn a licensee of any concealed danger of which the occupier knows or, as it is put by Lord Green in *Baker* v. *Borough of Bethnal Green* (1) at 140:—"A licensee must take the premises as he finds

(1) [1945] 1 A.E.R. 135.

them, subject to this important qualification, that, if the licensor knows of a danger which is not apparent, or would not reasonably be apparent to the licensee, it is his duty to take steps to protect the licensee against it." Accepting the findings of the trial judge that, notwithstanding the protestations of Mr. Gray the latter knew of the danger created by weight upon the tower, the respondent must be held responsible.

Mr. Gray saw children on the tower and while it is true that he saw them very near the ground and of a very young age, I cannot accede to the proposition that the appellants fail unless they prove that Gray saw a greater number of children at higher points. The trial judge saw the witness and was entitled to accept part of his testimony and reject part. He was entitled to consider all of the evidence, including that as to the care that had been exercised not to place the fire department ladder against the tower when repairing the flag rope, and to conclude that Gray knew of the danger of the tower's collapse; that is, that from his experience he knew that a number of persons on the tower would cause it to fall; on two occasions he saw children on the tower, whom he warned off, but he failed to take any precaution to ensure that they or others would not climb the tower and bring it down. The maxim *novus actus interveniens* has no application because while the structure was sufficient for its purpose as a flag tower, in view of the great concourse of people and of the fireworks, the presence of boys upon the tower, even though unauthorized, was the very thing that should have been anticipated. Furthermore, having permitted the public to enter the park, the respondents were under a duty not to create or permit others to create a new danger without giving warning of its existence. The presence of the boys on the tower for ten to fifteen minutes before it collapsed was such a danger which the respondents permitted to be created and to continue. Certainly no warning of its existence was given and I agree with the trial judge that the danger was not apparent to the parties injured or to Grace Ann McCormack.

The appellant McCormack by cross-appeal to the Court of Appeal and in the appeal to this Court asked that the damages awarded him for the loss of the life of his daughter

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under *The Fatal Accidents Act* be increased from $1,000 to $3,000. By an amendment of 1943 to that Act, he is entitled to $125 for funeral expenses and it is argued that the sum of $875 for the death of his daughter is not adequate. She was eighteen years of age, living at home but earning by outside employment $17 to $19 per week. She contributed $6 each week to the family budget and gave her mother from time to time an additional $1 to $2 for the same purpose. She also helped with the housework. I cannot say that under these circumstances the amount awarded is so small as to demand an increase.

The appeal should be allowed with costs throughout and the judgment at the trial restored.

RAND J.:—This action was brought to recover damages resulting from the collapse of a steel flag tower standing in Montebello Park, St. Catharines, on the occasion of the celebration on the night of August 15, 1945 of the surrender of Japan. The park was managed and controlled by the Board of Park Management under *The Public Parks Act,* chapter 285 of the Revised Statutes of Ontario of 1937, but it was stated by counsel for the respondents that no question was raised as to any distinction in liability between the City and the Board of Management.

The celebration was officially initiated by a notice published on August 11th in a daily newspaper addressed to the citizens and requesting them to "observe and co-operate in the following program": a memorial service on the City Hall lawn to which military units would parade from the Armories; from there, a parade to the Park where band concerts, dancing and other entertainment would conclude with a fireworks display. Then followed this paragraph:—

> The public is asked for its co-operation and assistance in this program, details of which will be announced through the local press and radio, so that the day will be observed in a fitting manner, in keeping with both victory and sacrifice.

The flag tower had been originally erected on St. Paul Street in July, 1907 and in June, 1916 had been transferred to the Park. It was pyramidal in shape, resting on four legs attached to steel angle bars set in concrete. The base

was 11 feet square; the angles of the legs or corner beams were 2″ x 2″ and 3/16″ thick. They extended to a height of 70 feet and the structure was surmounted by a flag pole about 20 feet high which rested on a casting about six feet below the top of the tower. On each side were angle bar horizontal struts at intervals of about five feet, the first approximately seven feet from the ground, with angles $1\frac{1}{2}$″ x $1\frac{1}{2}$″ and 3/16″ thick up to a height of 30 feet and above that $1\frac{1}{4}$″ x $1\frac{1}{4}$″ x $\frac{1}{8}$″. Up each side were $\frac{3}{8}$″ steel rods forming cross diagonals of two spaces of horizontal struts. The first of these rods reached within a foot or so of the ground. There was no interior bracing. It was found that for flag purposes the structure was adequate and would have lasted indefinitely.

A large crowd of over 10,000 people gathered in the Park. The fireworks were to be set off in the Rose Garden, around which for safety purposes a fence was put up of a somewhat irregular shape and between 200 and 300 feet in diameter. The flag tower was about 25 feet north of the fence. There was a variety of fireworks, consisting of sound bombs, rockets and other display pieces. Five or six men had been detailed to keep the crowd back from the fence.

The Park was under the superintendence of a manager of 23 years' service in the Park who was given charge of the arrangement. Under his direction the fence was erected and guarded. He had been requestd by the Mayor to bring the display on early to enable the younger children to see it. About 7:20 p.m. the first sound bombs were fired off and about that time his attention was called to several children between four and six years of age climbing up the tower. Walking over to the fence, he told the children to get off which they did. About 8:00 o'clock the second discharge of bombs was made and again his attention was called to children on the tower, and again he warned them off and they obeyed. No further attention was paid to the tower. At 8:30 the fireworks commenced. The people were closely crowded around the fence, and between that time and about ten minutes to nine when the tower collapsed from ten to twenty boys up to 15 or more years of age were seen on the tower at different heights. They were probably on the north side where

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they would face the Rose Garden, and it is stated that as the pieces were shot into the air the boys would bend backward to follow their courses. It is stated that at least one was higher up than 30 feet, and towards the end several older boys, dressed in some kind of uniform, joined the climbers. Shortly before the collapse, the tower was noticed to be swaying but no attention was paid to it by any one in authority, and finally one of the legs, probably the northeast corner, buckled, bringing the structure down and causing the injuries complained of. A young lady, the daughter of the plaintiff McCormack, was killed, and the other plaintiffs were injured.

It was the case for the respondents and I think established that the collapse was caused by the bending of one or more of the horizontal struts which drew in the supporting beams and led to the displacement of the thrusts along the latter. This bending in turn was brought about by the weight and movement of the boys or young men on the struts. Once the balanced forces were displaced, the swaying would affect both the bending and the collapse.

The evidence of the engineer witnesses, although not as specifically directed to the point as it might have been, satisfies me that to a person with the intelligence and skill required of a superintendent of such a park or of a person competent to be given charge of arrangements for such a demonstration, and acting reasonably, the presence of four or five boys in their teens on one of these struts either below or above the 30-foot point would threaten the stability of the tower. The lowest strut was only 2″ on each angle and 3/16″ thick, and being 11 feet in length, the strain of such a weight would seem to suggest the question of safety to any ordinary practical judgment. The superintendent admittedly knew all the facts of the structure, its age, dimensions and general strength. He told of two occasions a year or so before the accident when the rope on the pole had been replaced by using the ladder apparatus of the City Fire Department. In using the ladder no part of the tower or pole was touched; but the fact that such an elaborate piece of public equipment would be used to do so small a job furnishes some support for the disbelief by the trial Judge of the superintendent's explanation that he warned the boys off, "so that they

wouldn't hurt themselves". We are not told how in the earlier years replacements of the rope had been made or to what extent, if at all, there had ever been any climbing done on the tower for that or any purpose.

Recovery is resisted on the ground that these 10,000 and more persons came into the Park to witness the public celebration as licensees, that they assumed the risk of any untoward condition of the Park except that of a concealed danger actually appreciated by some responsible person, of which it is said there was none. On the footing of licence the trial Judge found the existance of such a danger of which the superintendent had notice and following *Ellis* v. *Fulham* (1), held the respondents liable. The Court of Appeal allowed the appeal and dismissed the action. Before this Court, Mr. Keogh supported the trial judgment as well as the view that the case was one of invitees.

On the basis of prudent foresight, it must have been anticipated as natural and probable that boys of all ages would climb the tower to get a better view of what was going on; and, coupled with the admitted knowledge of the other facts mentioned, that there would be created a probable danger to persons attending the celebration. If actual appreciation of that fact did not occur to any one in responsibility, is the City to be excused? In *Coates* v. *Rawtenstall* (2); *Ellis* v. *Fulham* (*supra*) and in *Baker* v. *Bethnal Green* (3) the risk was so appreciated; but is that a reasonable requirement toward structures in public places which in certain circumstances can become dangerous to those who are entitled to be in those places?

I find it unnecessary to decide that or any other of the much debated questions arising out of the relation of either licence or invitation, because in another aspect I must hold the standard of reasonable foresight to be applicable to the circumstances of the demonstration. The City, with a public interest and duty, brought about this gathering of thousands of its inhabitants; the developing scene as a whole was its act; it was not a mere neutral suggestion that they betake themselves to the Park to celebrate individually; it was a complex act of such a

(1) [1938] 1 K.B. 212.
(2) [1937] 3 A.E.R. 602.
(3) [1945] 1 A.E.R. 135.

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nature as called for reasonable precautions against foreseeable risks and dangers lurking in fact within it, an act which unaccompanied by that degree of prudence became a misfeasance: *Shrimpton* v. *Hertfordshire* (1). In the words of Scrutton L.J. in *Purkis* v. *Walthamstow* (2) used in commenting on the latter decision, this is "a case of a local authority doing something and doing it badly".

I would, therefore, allow the appeal and restore the judgment at trial with costs both in this Court and in the Court of Appeal.

KELLOCK J.:—Essentially the respondents' contention is that the appellants were licensees and were obliged to accept the premises as they found them. This, according to the respondents, involved acceptance of risk of injury arising from circumstances such as are present in this case. In my opinion this contention must fail. In Charlesworth on Negligence, 2nd Ed., the following appears at page 210:

> Neither the occupier nor any other person is entitled to act negligently towards persons whom he knows or ought reasonably to know will be lawfully on the premises. In this connection there is no difference between liability to invitees and licensees.

In my opinion this is a correct statement of the law.

In *Glasgow Corporation* v. *Muir* (3), Lord Wright at page 460 quoted from Lord Atkin's words in *Donoghue* v. *Stevenson* (4), at 580, as follows:

> You must take reasonable care to avoid acts *or omissions* which you can reasonably foresee would be likely to injure your neighbour.

In answering the question which he put "Who is my neighbour?" Lord Atkin had said:

> The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

In Muir's case Lord Wright said at 460:

> The issue can be stated on the general principles of the law of negligence without any reference to the special rules relating to the position of those who come as invitees upon premises.

In the same case Lord Macmillan, at page 459, said:

> No special point arises from the circumstance that the injured children were invitees on the defenders' premises. They were entitled to rely on not being exposed while on the premises to any risk occasioned by the negligence of the defenders or their servants.

(1) (1911) 104 L.T. 145.
(2) (1934) 151 L.T. 30.
(3) [1943] A.C. 448.
(4) [1932] A.C. 562.

In my opinion in the present case it is not necessary to determine whether the persons injured were invitees or licensees. It is sufficient that they were on the premises with the consent of the respondents.

At page 461 of Muir's case, in referring to *Excelsior Wire Rope Co., Ld.* v. *Callan* (1), Lord Wright also said:

> The House did not consider whether the appellants there were occupiers or whether the children were invitees * * * or bare licensees or trespassers. It was enough that a danger to the children was created by the act of the appellants in that case and that they either knew *or ought to have known* of the danger. That simple principle is enough to decide the present appeal subject to the question of fact whether there was the creation of an obvious danger.

At page 462, in referring to the men who were carrying the tea urn, he said:

> If the tea urn had been upset by the negligence of the appellants' servants, the appellants would have been liable in negligence. Whether or not they would have been liable as invitors in the alternative would depend on other considerations.

The liability to the children injured in such circumstances would therefore have depended merely upon the presence or absence of negligence on the part of the defendant's servants to persons on the premises. Whether such persons were invitees or licensees would make no difference.

In *Thatcher* v. *The Great Western Railway Company* (2), the plaintiff had gone to one of the defendants' stations to see some friends off on the train. While standing on the platform after the train started the plaintiff was struck by the open door of one of the vans, and suffered injury. It was argued that there was no liability upon the defendant, the plaintiff being a mere licensee, but the Court of Appeal held in favour of the plaintiff. The Master of the Rolls, Lord Esher, held that if a person was on the premises of another with that other's consent, the latter had a duty to take reasonable care not to act in such a way as to cause personal injury to the former. Although in his view the defendants in strict logic did not have the same amount of duty to persons in the position of the plaintiff as they had to persons who paid them money in consideration of being carried as passengers, nevertheless, so far as regarded the taking of means for providing for personal safety, it was impossible to measure the difference between the duty

(1) [1930] A.C. 404.

(2) (1893) 10 T.L.R. 13.

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of the railway to the one class of persons and to the other. In short, it was their duty to take reasonable care with regard to both.

This view of Lord Esher received the approval of Lord Shaw in *Mersey Docks* v. *Procter* (1) at 268.

The question in the present case therefore, is, did the respondents take reasonable care to avoid acts or omissions which its servants could reasonably foresee would be likely to injure persons lawfully on its premises at the time and under the circumstances here in question?

According to the evidence of Herbert L. Gray, Manager of the Board of Park Management, the first volley of bombs was fired off just after 7.20 p.m., and the second just before 8.00 p.m. The fireworks commenced just before 8.30 p.m. and the flagpole fell some twenty minutes later. Gray says that his attention was called to some small children on the flagpole tower just after the first volley of bombs was fired. These he told to get off. Again, about 8.00, it was reported to him that there were children on the flagpole and he went down and told them to get off. On each occasion the children were reaching up to the first strut about six feet from the ground. Gray said he told the children to get down because he was afraid they would get hurt and that it did not occur to him that if they proceeded further up they might cause the pole to fall. He also deposed that he did not pay any particular attention to the pole after 8.00 p.m. and gave no instructions and took no precautions to prevent children climbing on the pole.

The learned trial judge found that the collapse of the tower was due to the fact that a number of boys of varying ages had climbed upon it as a point of vantage to better witness the display of fireworks and that the undue weight upon the tower, together with the movement of the boys caused it to collapse. He found that there were more than ten boys on the pole, most of them being on the lower struts, some on the higher and one had climbed as high as 35 or 40 feet from the ground. He was also satisfied that, with the exception of some sea cadets, most of the boys were on the tower from 10 to 15 minutes before it fell. I quote from the reasons of the learned judge:

(1) [1923] A.C. 253.

I am convinced that a real source of danger existed by reason of the boys' presence on the tower, and I find as a fact that Mr. Gray had notice of the danger. Many thousands of people of all ages were expected to join in the celebration and the flag tower was situate but a very short distance from the place in the rose garden where the fireworks were to be set off. What was more natural in the circumstances than that boys or even thoughtless adults would use the tower as a point of vantage from which to witness the display? That is what actually happened, and it was not sufficient to order two groups of children away, especially when the probability was that different groups would be attracted to it.

* * *

I also find as a fact that Mr. Gray's failure to take any reasonable precaution whatever for the protection of the people in the park was negligence for which the defendants are liable. He could very readily have spared someone to act as a guard who could have warned the crowd back if he found it impossible to keep the boys off the tower. Incidentally, there was no evidence to show that the boys would have disobeyed anyone in authority. The only evidence on the point is to the contrary. Mr. Gray should have done that much in my opinion, at the very least, and at the last if he failed to realize until then that the boys were climbing upon the tower; it is idle to suggest, as it was argued, that there was nothing he could have done since he had insufficient time to cause a temporary fence to be erected around the tower after he had been informed that boys were climbing upon it. To ignore the danger created by notice that boys were attracted to the tower, and to go ahead with the fireworks display, without at least posting a guard near the tower, was inexcusable in the circumstances.

* * *

It should also be mentioned that the times at which the boys were seen upon the tower by Mr. Gray coincided fairly well with the times at which the two volleys of noise making bombs were fired. If boys had not been seen upon the tower before, as Mr. Gray seemed to say, what conclusion could any reasonable person reach other than that the boys were attracted to the structure by the display. Furthermore, I am unable to yield to Mr. Hughes' argument that notice of the presence of small boys was not notice of the likelihood of larger boys or even thoughtless adolescents being on the tower. It is well known that the presence of even one boy upon such a structure will attract others, regardless of age; and it seems to be the rule, speaking generally, that the older the boy the more chances he will take.

In my opinion it was open to the learned trial judge to come to the conclusion that the defendants were negligent and I would not interfere with it. Whether Gray's concern was limited to the safety of the boys whom he ordered down off the tower need not be considered. In *Muir's case* Lord Macmillan at page 457 said:

Legal liability is limited to those consequences of our acts which a reasonable man of ordinary intelligence and experience so acting would have in contemplation * * * The standard of foresight of the reasonable man is, in one sense, an impersonal test. It eliminates the personal

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equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. Some persons are by nature unduly timorous and imagine every path beset with lions. Others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free both from over-apprehension and from over-confidence, but there is a sense in which the standard of care of the reasonable man involves in its application a subjective element. It is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have had in contemplation, and what, accordingly, the party sought to be made liable ought to have foreseen.

In the same case Lord Thankerton at page 454 said:

* * * this is essentially a jury question, and in cases such as the present one, it is the duty of the court to approach the question as if it were a jury, and a Court of Appeal should be slow to interfere with the conclusions of the Lord Ordinary.

I do not think it is too much to say that a reasonably prudent man, having the responsibility of Mr. Gray, and knowing that large crowds would be and actually were in Montebello Park close to the flagpole, which was in turn close to the spot set apart for setting off the fireworks, would have anticipated, after having seen the fact demonstrated on two occasions, that younger persons would be likely to repeat their attempts to employ the flagpole tower as a point of vantage and that in that event, as it obviously had never been built for such a purpose, it would, if too many climbed upon it, be likely to fall. Having so anticipated, the reasonably prudent man would have taken means to prevent such a use of the tower. Mr. Gray had means at his disposal to do so. This was the view of the learned trial judge and, as I have said, I think he was entitled to come to that conclusion.

I would allow the appeal with costs here and below. I do not think the evidence is sufficient to disturb the finding of the learned trial judge as to the damages awarded the appellant Willard J. McCormack.

ESTEY J.:—The appellants, Margaret Phyllis Booth and Arnold H. Bowler and the late Grace Ann McCormack, daughter of the appellant Willard J. McCormack, were injured while in attendance at a V-J Day celebration in Montebello Park in the City of St. Catharines on August 15, 1945. Three actions claiming damages for these injuries were commenced and before trial consolidated by order of the Court. The judgment directed at the trial for the plaintiffs was reversed in the Court of Appeal.

Montebello Park is a public park owned by the City of St. Catharines and managed by The Board of Park Management of the City of St. Catharines (hereinafter referred to as the Parks Board) under the authority of *The Public Parks Act* (1937 R.S.O., c. 285, and By-law No. 3451 passed by the City of St. Catharines on January 8, 1923).

The mayor on August 11, 1945, issued a proclamation to the citizens for the "observance of 'Victory-over-Japan Day' ". It set forth that on the day peace was declared a Memorial Service would be held at seven p.m. on the City Hall lawn and a parade therefrom to Montebello Park where "there will be band concerts, dancing and other entertainment, concluding with a fireworks display." Further: "I hereby request the people of this City to observe and co-operate in the following programme" and "The public is asked for its co-operation and assistance in this programme, . . . so that the day will be observed in a fitting manner, in keeping with both victory and sacrifice." All the parties above mentioned were in attendance in response to this request.

Under the supervision of H. L. Gray, Manager of the Parks Board, a portion of Montebello Park was selected as the place from which the bombs and fireworks should be discharged. This portion was fenced "to protect the people from bombs being set off" and "to keep them from crowding in."

In Montebello Park the City had erected in 1916 a steel flagpole, rectangular in shape and tapering upwards. The four "vertical legs" or uprights at each corner were 2″ x 2″ x 3/16″. At the surface of the ground these were about eleven feet apart and extending upwards about seventy feet they converged to a position that permitted of the insertion of a 2½″ pole extending upwards, near the top of which the flag was placed. In addition there were horizontal struts 1½″ x 1½″ x 2/16″ about five feet apart and diagonal steel rods or braces about ⅜″ diameter throughout the panels created by the horizontal struts. The bottom strut was about seven feet above but the diagonal braces came within eighteen inches of the ground. This flagpole was within twenty-five feet of the above-mentioned fence, and as the learned trial Judge found "It was designed as a flagpole tower and as such could have stood indefinitely."

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As the parade left the City Hall five bombs were discharged from within this temporary enclosure in the park and then as the parade entered the park five more bombs were discharged. Shortly after the first five bombs were discharged, or at about 7.20 in the evening, Gray found two or three boys on the first strut of the flagpole "pulling themselves up." Gray asked them to go away and they did so. Again, about 8.00 after the second five bombs were discharged, one of Gray's men told him that "the children were on the flagpole again." He proceeded toward the flagpole and found the boys doing "exactly the same thing." He again asked them to go away and they did so. He thought the boys were from four to six years of age and was concerned lest they might be hurt while climbing the flagpole. He had not seen any need for fencing the flagpole and his evidence would indicate that it never occurred to him that the boys climbing up on the flagpole might injure or cause it to collapse. In any event, no steps were taken after the warning at eight o'clock to keep the boys from climbing thereon.

There were perhaps 10,000 people in the park. Seven policemen were there on duty and eight men of the Parks Board were patrolling inside of the temporary fence to see that the crowd kept back. The fireworks commenced about 8.30 p.m. and under the weight of a number of boys who had climbed thereon the flagpole collapsed about 8.50 p.m. and injured the parties above-mentioned.

The evidence varies as to the exact number of boys on the flagpole at the time it fell. The learned trial Judge found "I am satisfied on the evidence that there were more than ten and that their ages varied from ten to sixteen years." Most of the boys were on the lower part of the flagpole, some higher and one as high as thirty-five or forty feet from the ground. The learned trial Judge further found that "it was clearly established that, with the exception of the sea cadets, most of the boys were on the tower from 10 to 15 minutes before it fell."

The injuries here claimed for were suffered not because of any defect in the condition of the premises but rather that the respondents were negligent in not taking reasonable steps to prevent the boys from climbing upon the flagpole. The injured parties were in the park at the request of

the respondent City and in this position were at least licensees who may recover for injury suffered due to negligent conduct on the part of a licensor, its officers and servants.

A licensee does not, however, take the risk of negligence by the servants of the owner of the property on which he is permitted to go.

The licensee has the right to expect that the natural perils incident to the subject of the licence shall not be increased without warning by the negligent behaviour of the grantor, and, if they are so increased, he can recover for injuries sustained in consequence thereof. A grantor of a licence to come on to his premises, who is aware that a licensee is actually there, is bound to take reasonable care not to do anything to injure him. 28 Halsbury, 2nd ed., para. 860, p. 610.

Gallagher v. *Humphrey* (1), *Barrett* v. *Midland Rly. Co.* (2), *Thatcher* v. *The Great Western Rly. Co.* (3), *Tough* v. *North British Rly. Co.* (4), *The King* v. *Broad* (5).

In our own Courts in *Green* v. *C.P.R.* (6), it was held that a railway must use due care with respect to a licensee at a railway crossing. Martin, J.A., (now Chief Justice) at p. 159 states:

* * * when it is stated that a licensee must accept the premises as he finds them and with their "concomitant conditions and, if may be, perils," acts of negligence on the part of the owner or his servants are not included.

Gray had been manager of respondents' Parks Board for twenty-three years. From time to time he had inspected the flagpole when he "made sure everything was all right." In May of 1945 and in the Fall of 1944 the rope from this flagpole was stolen and he arranged to have it replaced by the Fire Department, for which purpose an aerial ladder was used which did not touch the flagpole. There was an intimation that this rope had disappeared on previous occasions but it is not disclosed how it was then replaced, nor throughout the evidence an intimation that a person had ever climbed up this flagpole for any purpose. It is clear, however, that Gray was familiar with the flagpole and was in the park supervising preparations for this celebration both in the morning and afternoon of August 15, 1945.

The standard of care required of the respondents is that which a reasonable man would have exercised in the management and direction of this celebration. A reason-

(1) (1862) 6 L.T. 684.
(2) (1858) 1 F. & F. 361.
(3) (1893) 10 T.L.R. 12.
(4) 1914 S.C. 291.
(5) [1915] A.C. 1110.
(6) [1937] 2 W.W.R. 145.

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able man making preparations for the programme of bombs and fireworks would have, in addition to the precautions taken to erect the fence and provide the men to keep the crowd back from the fireworks, observed the flagpole, the nature of its construction and its proximity to the fireworks. He would have realized that this flagpole was rather easy to climb and boys seeking a point of vantage from which to view the fireworks would do so. Out of a crowd, such as would be in attendance at such a celebration, would be many boys who, if precautions were not taken to prevent them, would endeavour to climb up this flagpole and in doing so not only might they injure themselves but persons close by and even the pole itself. Their weight and conduct on the pole would impose a burden and create stress and strain it was not constructed to withstand. At some point the number of boys would be such as to cause it to give way in one particular or another and effect a partial or a complete collapse. In fact under the weight of the boys the steel struts bent or bowed, and one of the experts stated that ten boys with an average weight of 125 lbs. would cause just such a collapse of this flagpole as in fact occurred. A reasonable man in the position of manager of this park would not be expected to possess such detailed information but he would know the nature and character of the flagpole and that steel struts of the size in this flagpole would, under sufficient weight, bow or bend, and so reduce the strength of the flagpole that it might fall over or collapse. He would therefore upon an occasion such as this take reasonable precautions to prevent boys, not only of tender years but those in their teens, from climbing thereon. Under such circumstances, therefore, Gray should have foreseen this possibility and taken reasonable precautions earlier. In fact at 7.20 that evening he had actual knowledge that boys were climbing this flagpole and admitted that he realized the possibility of injury resulting therefrom. That in itself should have caused him to take appropriate precautions. However, neither earlier, at that time nor at about eight o'clock when he was again apprised of their doing so did he take any steps to prevent the boys from continuing to climb. In the last group of boys some of them were well up the flagpole for ten to fifteen minutes before it fell. Moreover, that evening Gray had in the

park his own men assisting him in keeping the crowd back and in addition there were policemen on duty. Under these circumstances, Gray's not placing a man at or near the flagpole to warn or prevent the boys from climbing or in not taking some other precautions to attain that end left a dangerous condition which might have been removed had he taken reasonable precautions to do so. His failure in this regard constituted negligence. *Ellis* v. *Fulham Borough Council* (1), at p. 225.

This case is distinguishable from that of *Hambourg* v. *The T. Eaton Co. Ltd.* (2), cited by the respondents. There a licensee while playing a piano was injured by the bursting of a lense in a spotlight. The lens was the same as in other bulbs and nothing to indicate or suggest impending danger. It was held that the licensor did not know of any defect in the lens or reason why it should burst and was under no duty to the licensee with respect thereto. In the present case the injury is not due to any defect in the flagpole but rather because boys in attendance at the celebration were, by the negligent conduct of the respondents, permitted to climb thereon and subject the flagpole to a weight and force it was never intended to support. This is a case of the licensee after entering upon the premises being injured by virtue of the negligence of the licensor and therefore comes within the principle of *Gallagher* v. *Humphrey, supra,* and the other cases mentioned.

The injuries suffered by the parties mentioned followed as a direct result of the negligent conduct of the respondents and therefore the fact that it was not one which was foreseen or anticipated is not material. As stated by Lord Justice Scrutton in *In Re Polemis and Furness, Withy & Co.* (3), at p. 577.

> To determine whether an act is negligent, it is relevant to determine whether any reasonable person would foresee that the act would cause damage; if he would not, the act is not negligent. But if the act would or might probably cause damage, the fact that the damage it in fact causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act, and not due to the operation of independent causes having no con-

(1) [1938] 1 K.B. 212.
(2) [1935] S.C.R. 430.
(3) [1921] 3 K.B. 560.

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nection with the negligent act, except that they could not avoid its results. Once the act is negligent, the fact that its exact operation was not foreseen is immaterial.

The boys in climbing the flagpole exceeded any licence or permission given to them and were as a consequence trespassers thereon. It was this very trespass that a reasonable man would have foreseen and therefore their conduct in this regard cannot constitute a *novus actus interveniens: Haynes* v. *Harwood* (1).

It was contended that, as the presence of the boys was known to all of the injured parties prior to its collapse, their remaining in such close proximity thereof as to be injured in the event of its collapse constituted negligence on their part. The evidence, however, does not warrant such a conclusion. It is true that the boys were seen but it was not established that the parties either knew or had an opportunity to know the nature and character of the flagpole. This flagpole collapsed within about twenty minutes after the fireworks started. Some of the witnesses who were close to it and who had some experience with steel material did realize the danger once they reached a point where they appreciated what was taking place and warned the people nearby. On the other hand, some who were close and saw the struts commence to bend appreciated the danger, but that was just minutes before it collapsed. All this emphasizes that those unfamiliar, as all of the injured parties were, with this type of structure and who had neither time nor opportunity to make such observations as might inform them of the possible consequences could not be reasonably expected to appreciate the danger.

It would appear that respondent Parks Board was, as found by the learned trial Judge, an agent of the respondent City and at the trial judgment was directed against both defendants. No issue was raised in this appeal suggesting that in the event of liability being found judgment was improperly directed against both defendants.

The appellant Willard J. McCormack asked that the damages in the sum of $1,000 awarded for the death of his daughter, who was eighteen years of age, should be increased. The learned trial Judge in determining this

(1) [1935] 1 K.B. 146.

amount does not appear to have overlooked any factor nor acted upon any wrong principle and therefore I think the amount should not be changed.

The appeal should be allowed with costs and the judgment of the learned trial Judge restored.

Appeal allowed and judgment of trial judge restored with costs throughout.

Solicitors for the appellants: *Bench, Keogh, Rogers & Grass.*

Solicitor for the respondents: *Murton A. Seymour.*