HIS MAJESTY THE KING (RESPONDENT)..APPELLANT; 1946

AND *Mar. 13, 14
*Jun. 11

WILLIAM O. ANTHONY (SUPPLIANT)....RESPONDENT.

HIS MAJESTY THE KING (RESPONDENT)..APPELLANT;

AND

TEMAN T. THOMPSON (SUPPLIANT)....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Master and servant—Negligence of officer or servant of the Crown—Soldier wrongfully firing live ammunition—Alleged failure of officer in charge to stop firing—Destruction of barn and contents—Extent of Crown's liability—Whether breach of duty by officer to owner of barn—Neglect of duty in respect of military law—Use of reasonable care by officer in charge—Exchequer Court Act, 1927, c. 34—Section 19 (c) as amended by 1938 (Dom.) c. 28, s. 1—Section 50 A, 1943-44 (Dom.) c. 25.

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.

*PRESENT:—Rinfret C.J. and Kerwin, Hudson, Rand and Estey JJ.

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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.

Per Kerwin and Estey JJ. (dissenting):—W., an officer in charge of the draft, was a servant of the Crown as provided by section 50 A. of the *Exchequer Court Act* and the damages claimed by the respondents resulted from his negligence while acting within the scope of his duties or employment within the meaning of section 19 (c) of that Act.

Per Kerwin J. (dissenting):—W. should have known that the men in M.'s truck were discharging rifles and should have detected the live ammunition fired by M. before the truck reached the barn.—W. owed to the respondents a duty to prevent M. from firing and should have foreseen that damage would occur as a result of his failure to stop him.

Per Estey J. (dissenting):—The failure of W. to use reasonable care to restrain M. was the cause of the destruction of the barn.—W. owed the duty to use care towards the respondents as residents along the highway, and his breach of that duty constituted negligence.

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APPEALS by the Crown from the judgment of the Exchequer Court of Canada, O'Connor J. (1), maintaining their claims, made by way of petitions of right, for damages caused by the alleged negligence of members of the military forces of His Majesty in the right of Canada.

F. P. Varcoe K.C., E. J. Henneberry K.C. and *W. R. Jackett* for the appellant.

C. F. Inches K.C. for the respondents.

The judgment of the Chief Justice and of Hudson and Rand JJ. was delivered by

RAND J.:—The question in this appeal is whether on the facts a claim arises against the Crown under section 19 (*c*) of the *Exchequer Court Act,* which reads:—

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

By section 50 (*a*) of the Act, a member of the Naval, Military or Air Forces of His Majesty is deemed a servant of the Crown for the purposes of that provision.

I think it must be taken that what paragraph (*c*) does is to create a liability against the Crown through negligence under the rule of *respondeat superior,* and not to impose duties on the Crown in favour of subjects: *The King* v. *Dubois* (2); *Salmo Investments Ltd.* v. *The King* (3). It is a vicarious liability based 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

(1) [1946] Ex. C.R. 30.
(2) [1935] S.C.R. 378, at 394 and 398.
(3) [1940] S.C.R. 263, at 272 and 273.

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acting" which envisage positive conduct of the servant taken in conjunction with the consideration just mentioned clearly exclude, in my opinion, such an interpretation.

This raises the distinction between duties and between duty and liability. There may be a direct duty on the master toward the third person, with the servant the instrument for its performance. The failure on the part of the servant constitutes a breach of the master's duty for which he must answer as for his own wrong; but it may also raise a liability on the servant toward the third person by reason of which the master becomes responsible in a new aspect. The latter would result from the rule of *respondeat superior;* the former does not.

Now I think it quite impossible to say that the act of Morin in shooting the incendiary bullet into the barn can 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.

But it is argued by Mr. Inches that both the detachment and the particular truck were in charge of officers with responsibilities that link the Crown with what happened. Although in the case of the lance-corporal it seems doubtful, I will assume a degree of general authority and duty in both non-commissioned officers that would go to the extent of requiring Morin to hand over the live cartridges and on that footing examine this contention.

The evidence shows that at Fort Mispec, the military personnel on duty, because of the nature of their service, were normally furnished with live ammunition, but a careful check of it was kept, and each soldier was held to an accounting for what had been issued to him. Prior to military tests or exercises, it would be called in, as well as when transfers of men were made to another unit as here. On April 21st, a test had commenced, and accordingly all such ammunition had been given over; and when, on the 24th, the detachment started for Partridge Island none was supposed to be outstanding. But Morin had, by a trick, obtained some, which was in his possession when the trucks set out.

Now, this ammunition was property belonging to the Crown, and the soldiers were entitled to make use of it only as they were discharging their duties. The order to turn it in when military exercises were being carried out was primarily a safeguard against its accidental use, for those so engaged and presumably for civilians who might be within the range of the operations.

Morin then was guilty of a breach of discipline in possessing the bullets and in discharging them; and when that fact became evident, the officer's military duty arose. There is some dispute whether the sergeant should have been able to distinguish the firing of live from blank ammunition, but I will take that to be so, and that there was a time before the barn was set afire when either could have acted.

This brings me to the question of the nature of this duty and whether, for its failure, either officer could be held personally responsible for the damage caused by Morin. The conditions under which a duty toward A may give rise to a contemporaneous and independent duty toward B are not clearly settled; but here we have a special situation in which the primary duty arises. In the national organization, military and police agencies are necessary for the preservation of the national life and its order. For this purpose, men must, among other things, be entrusted with instruments of danger, and laws, rules and authority are set up to regulate their behaviour. But the duties so arising are essentially for the public interest. They are created within a structure of general law which postulates as a basic principle to which there are few exceptions, that a person is responsible only for his own act: *Moon* v. *Towers,* (1) * * * Failure in relation to a duty undertaken or assumed directly toward the injured person becomes affirmative action in the obverse of actual conduct modified by the failure, and the actual conduct may be mere persistence in inaction; but where the injured person is not the one with whom the undertaking is made, then it must appear at least that he is within the intended range of benefit: *Bélanger* v. *Montreal Water and Power Co.* (2). In other circumstances, reliance by him on the under-

(1) (1860) 141 E.R. 1306.
(2) (1914) 50 Can. S.C.R. 356.

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taken conduct may be necessary to establish the link of legal duty. I see nothing of those elements in the duty of an officer under military discipline in relation to acts of subordinates. The military law is a body of rules by which, among other objects, the possibilities of illegal and injurious action, whether by means of dangerous weapons entrusted to soldiers or otherwise, may be restricted; but it is a proposition which I am unable to accept that persons bearing that authority must have regard to private interests before they may safely abstain, in any situation, from exercising it. It would introduce fundamental questions of conflicting responsibilities, of excuses for failure to act and of legal causation; and so far as counsel have been able to discover, in generations of experience with military activities and personnel, it has never before been suggested. We enter here the field of executive action and the hierarchy of command. In this case, the sergeant's excuse was that he had to get on with the military movement in which he was engaged. It was in a time of war. Are the courts to sit in judgment on decisions of that sort in a conflict between public and private interests? Citizens have no guarantee that they and their property can or will be kept inviolate against occasional wilfulness. Officers are accountable to military law for failing to exercise authority when exercise is called for; but the penalties prescribed by it for such delinquencies must, I think, be looked upon as the only sanctions intended, and the duties raised as not intended to enure to the private benefit of the citizen. An officer may make an injurious act of a subordinate his own, but in that case he becomes a principal and directly liable: and his act would be no more significant to the liability of the Crown under section 19 (*c*) than that of the subordinate. It is clear that an officer is not within the rule of *respondeat superior* for the act of one within his command, and it would be extraordinary if liability could be raised indirectly through a responsibility based not on his act but on his authority.

The failure of the sergeant or lance-corporal to act towards Morin was then 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.

I would therefore allow the appeal and dismiss the action and if the Crown insists upon them with costs here and in the court below.

KERWIN J. (dissenting):—His Majesty the King appeals from a judgment of the Exchequer Court of Canada awarding the suppliants damages for the destruction by fire of a barn and its contents. The fire was caused by one Gunner Arthur Morin, firing a tracer bullet at the barn under the following circumstances.

At Fort Mispec in the province of New Brunswick, about fifteen miles from the city of Saint John, was stationed the Fourth Coastal Battery, of which Morin was a member. Usually live ammunition was carried by all ranks of the battery but when a test operation or scheme was to take place, each man was obliged to account for the live ammunition issued to him, turn it in, and then receive blank ammunition. A careful record of the live ammunition was kept at all times but it was impossible to check the blank ammunition as the officers were forced to accept the men's statements as to the quantities used in test operations.

On April 23, 1944, the live ammunition on hand was checked and found correct. A scheme had been proceeding since April 21st and was not due to finish until the 26th. Morin, who had been in charge of the gun stores, was on sick leave during part of this period but returned to duty on the morning of the 24th, on which date a draft from the battery was to be transferred to Partridge Island. Morin procured the keys of the gun stores from the man then in charge in order to secure some personal possessions of his own but took the opportunity to purloin a quantity of live ammunition.

The draft left in three trucks, the foremost of which carried the baggage. Although a commissioned officer should have been in command of the draft, Sergeant-Major Williams was sent in charge. He left Fort Mispec in the third truck which, however, passed the second one prac-

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tically at the commencement of the trip when it stopped to permit an occupant to secure something from one of the huts. Morin was in this truck, which accordingly brought up the rear of the cavalcade. To go to Partridge Island, it was necessary, first, to traverse the fifteen miles to Saint John. A number of soldiers on Morin's truck fired blank ammunition and Morin fired live ammunition. He did this at least once before reaching a point opposite Anthony's farm when he fired at a window in the barn and it is that shot that caused the fire in question.

In the truck with Morin was Lance Bombardier Haynes and the trial judge found that both Williams and Haynes were negligent. Without evidence as to the authority of Haynes, I am unable to agree as to the relevancy of any negligence of his but that Williams was negligent I have no doubt. He was a servant of the Crown as provided by section 50 (*a*) of the *Exchequer Court Act* as enacted by chapter 25 of the statutes of 1943-1944, and the damages claimed by the petitions of right resulted from his negligence while acting within the scope of his duties or employment within the meaning of section 19 (*c*) of the *Exchequer Court Act* as enacted by chapter 28 of the 1938 statutes. He was in charge of the draft and knew, or should have known, that the men were not to fire except on an officer's order. He excused himself by stating that when the party left Fort Mispec they were passing through an area in which the scheme was being conducted and that while he heard shots, he assumed they were in connection with that operation. But Morin had fired at least one live shell before reaching Anthony's barn and Williams should have heard the shot and investigated immediately. He was in a hurry to arrive at the dock where the draft was to board a ship for Partridge Island and while he stated, "it sounded to me like blanks", he also said, "I wasn't sure at the time it was blank shots,—I couldn't swear to that,". Under these circumstances it must be held that he should have known that the men in Morin's truck were firing and he should certainly have detected the live ammunition fired by Morin before the trucks reached Anthony's farm.

I am unable to accede to Mr. Varcoe's argument that Williams owed no duty to the suppliants. On the contrary, I am of opinion that he did owe such a duty and that it should be expected that damage would occur as a result of his negligence. Mr. Varcoe also pointed out that the expression in section 19 (*c*) of the *Exchequer Court Act* is "while acting within the scope of his duties or employment" and not that used at common law in master and servant cases, "in the course of his employment." It has already been pointed out in *Lockhart* v. *Canadian Pacific Railway Company* (1), that this is the correct formula at common law and not "acting within the scope of his authority." While the latter and the wording used in section 19 (*c*) might appear linguistically similar, the statute should receive the same interpretation as the expression "in the course of his employment",—particularly when one takes into consideration the wording of the French text,

pendant qu'il agissait dans l'exercice de ses fonctions ou de son emploi.

So treated, the mere fact that Morin's act was deliberate cannot excuse the want of care on Williams' part, and on this ground and without expressing any opinion as to the other questions argued before us, I would dismiss the appeal with costs.

ESTEY J. (dissenting):—The respondent (suppliant) William Anthony's barn was destroyed by fire caused by a bullet discharged from the rifle of Gunner Arthur Morin, a member of the armed services. The respondent (suppliant) Teman T. Thompson had certain chattels stored therein which were also destroyed. The respondents recovered judgments against the Crown in the Exchequer Court of Canada for their respective damages and from these judgments the Crown now appeals.

On April 24, 1944, the military authorities were transporting about 30 men of the 4th Coastal Battery from Fort Mispec, N.B., along the highway to Saint John en route to Partridge Island. Q.M.S. Williams was in charge of the men who left Fort Mispec in three trucks, a baggage truck with seven men and the balance of the men in two

(1) [1941] S.C.R. 278.

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other trucks. When the trucks left Fort Mispec Williams and a number of men were in the third or last, and in the truck preceding Lance Bombardier Haynes and several men, including Gunner Morin. About a quarter of a mile from Fort Mispec the Haynes-Morin truck stopped to pick up a party and the Williams truck passed and remained ahead all the way to Saint John.

While it was customary at Fort Mispec for the men to have an issue of live ammunition, at this time, in preparation for certain manoeuvres, it had been turned in and all accounted for. There was also an order requiring the men to turn in their blank ammunition, but a number had failed to do so. It was therefore contrary to orders for any of the men to have either blank or live ammunition. Each man did, however, carry his rifle, but here again it was contrary to orders to fire it using either live or blank ammunition except under orders of a superior officer.

Immediately after starting from Fort Mispec the men began firing blank ammunition for amusement or pastime. Morin had no blank ammunition but the day before had taken from the gun stores 26 rounds of live ammunition which he began firing. He commenced near the B.O.P. station at Fort Mispec and continued to fire his live ammunition throughout the journey:

I fired all along the road into the air. I fired the last shot in Saint John—by the Marsh bridge. I fired to the sea.

At about six miles from Fort Mispec he aimed at the barn in question, fired a tracer bullet setting the fire that burned it to the ground.

The respondents pleaded negligence on the part of the servant of the Crown and gave in part as the particulars thereof that

the said Arthur Morin was not restrained from discharging live ammunition at or in the direction of the said barn.

In such an action the respondents can succeed only if there be upon the appellant a duty owing to the respondents to use due care, a breach of that duty, and consequent damage. The immediate issue is, did any person owe to the respondents a duty to restrain Morin? Williams, under orders from his superior officer, was in charge of the

transportation of the men into Saint John and for that purpose he was utilizing the highway. Lord Russell of Killowen and Lord Macmillan adopted the statement of Lord Jamieson:

> "No doubt the duty of a driver is to use proper care not to cause injury to persons on the highway, or in premises adjoining the highway, but it appears to me that his duty is limited to persons so placed that they may reasonably be expected to be injured by the omission to take such care." *Hay or Bourhill* v. *Young*, (1). Charlesworth, Law of Negligence, p. 67.

This statement, applied here to a driver of an automobile, is equally applicable to persons generally who make use of our highways.

The duty of Williams may be placed upon another basis. The men began firing immediately they left Fort Mispec. This was contrary to orders in two respects. They were not supposed to have either live or blank ammunition in their possession, nor were they to discharge their rifles. Such orders exist for different reasons, one of which being that persons and property of both those in the services and of the public may not be injured or damaged.

Morin began firing near the B.O.P. at Fort Mispec; whether that was before Williams passed the Haynes-Morin truck is not clear. It is clear that the boys commenced firing at the very outset and that Williams was in the last car as they left Fort Mispec. After proceeding approximately a quarter of a mile this car passed the Haynes-Morin car. Williams, exercising reasonable care would have known, or should have known at the very outset that the men were discharging rifles and that at least one of them was discharging live ammunition, all of which was contrary to orders, and all this was upon a public highway where people travelled and along which people reside. One who is in a position where he ought to know is in the same position in law as one who knows: *White* v. *Steadman*, (2).

In my opinion a man placed in the position of Williams would have foreseen the possibility of damage. Indeed, quite apart from any order, under such circumstances a reasonable man in the position of Williams would have

(1) [1943] A.C. 92, at 102, 104. (2) [1913] 3 K.B. 340, at 348.

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foreseen the probability of damage and therefore in my opinion a duty rested upon Williams, acting in the place and stead of the master, to have exercised reasonable care.

The respondents were residents along the highway and as such those toward whom Williams owed a duty to use due care that neither their person nor property be damaged. Lord Russell of Killowen:

> In considering whether a person owes to another a duty a breach of which will render him liable to that other in damages for negligence, it is material to consider what the defendant ought to have contemplated as a reasonable man. This consideration may play a double rôle. It is relevant in cases of admitted negligence (where the duty and breach are admitted) to the question of remoteness of damage, i.e., to the question of compensation not to culpability, but it is also relevant in testing the existence of a duty as the foundation of the alleged negligence, i.e., to the question of culpability not to compensation * * * In my opinion, such a duty only arises towards those individuals of whom it may be reasonably anticipated that they will be affected by the act which constitutes the alleged breach. *Hay or Bourhill* v. *Young,* (1).

Lord Atkin:

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? 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. *Donoghue* v. *Stevenson,* (2).

And the same learned judge in a later case:

> * * * every person * * * is under a common law obligation to some persons in some circumstances to conduct himself with reasonable care so as not to injure those persons likely to be affected by his want of care. *East Suffolk Rivers Catchment Board* v. *Kent* (3).

And Lord Dunedin:

> If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions. *Fardon* v. *Harcourt-Rivington,* (4).

The conduct of Morin was such as to make the possibility of danger emerging reasonably apparent to those in the position of the respondents who, in the language of Lord Russell of Killowen (above quoted), would be included among

> those individuals of whom it may be reasonably anticipated that they will be affected by the act which constitutes the alleged breach.

(1) [1943] A.C. 92, at 101 and 102.
(2) [1932] A.C. 562, at 580.
(3) [1941] A.C. 74, at 89.
(4) (1932) 146 L.T.R. 391, at 392.

Williams not only owed a duty as the person in charge of this operation upon the highway to use due care, but under the circumstances of this case a reasonable man in his position would have known that live ammunition was being discharged and would have taken reasonable care to prevent a continuation thereof. In my opinion he owed this duty to the respondents.

Williams, however, did not exercise reasonable care. That he heard the firing is clear, but as to the reports he said:

> I wasn't sure at the time it was blank shots,—I couldn't swear to that,—but it sounded to me like blanks.

He did not even know whether it was his men firing the shots but because he heard an alarm before leaving Fort Mispec he assumed that the infantry might be discharging rifles along the road or in the woods. This assumption might have some validity had the firing not started at the very outset when he was nearby and had he been sure only blank ammunition was being fired, as he knew that the men upon manoeuvres used only blank ammunition. He made this assumption without any investigation or any inquiry until he got into Saint John where he "questioned the men and received no response". This in itself indicates that Williams was not satisfied with his own assumption. Upon all the evidence it appears clear that he paid no attention whatever to what the men were doing en route and only sought to excuse himself on the ground that he was in a hurry and had but a limited time to catch the boat. Such excuse does not relieve him of any responsibility.

Reasonable care on the part of Williams would not have prevented Morin discharging the first or perhaps even the second bullet. This, however, is not the case of a servant taking a bullet, concealing it and suddenly and without warning firing it thereby causing damage. This is a case of a man taking live ammunition, using it and continuing to use it, contrary to orders, either in the immediate presence of the party in charge or where that party, in the discharge of his duty, would know that the man was firing live ammunition and yet who on his part made no objection or effort to stop him with the result that after

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at least four or five shots had been fired over a distance of about six miles damage resulted. The evidence clearly establishes that there was considerable firing but Morin alone was firing live ammunition. There is a difference in the report created by live as distinguished from blank ammunition, a difference known to and recognized by all the men, including Williams. All of the firing was contrary to orders. If Williams within the first five miles had discharged his duty he would have stopped the firing and avoided destruction of the barn.

That Morin's conduct was intentional and wrongful even to the point of constituting a criminal offence does not affect the duty or responsibility of Williams.

That the master may be liable for the failure of the servant responsible to use due care, when the immediate cause of the damage was the wrongful act of another employee, is illustrated by *Engelhart* v. *Farrant & Co.*, (1); *Ricketts* v. *Thos. Tilling, Ltd.*, (2). In the latter case the servant immediately responsible was convicted of a criminal offence, as was Morin for wilful damage to property. In the latter case Lord Justice Pickford at p. 650:

> It is admitted that the driver was sitting by the man who was driving and he could see all that was going on—he could control what was going on. It seems to me that the fact that he allowed somebody else to drive does not divest him of the responsibility and duty he has towards his masters to see that the omnibus is carefully, and not negligently, driven.

Counsel for the Crown contended that if Williams failed to perform any duty it constituted a mere breach of military regulations and not negligence within section 19 (*c*) of the *Exchequer Court Act*. It is not his duty under the military regulations that we are here concerned with but rather to determine whether the person in charge of this transportation of the men upon a public highway exercised reasonable care under the circumstances, and if not, did his failure to do so cause the damages here claimed? In determining what here constituted due care we may look at the military regulations, not in the sense of enforcing them, but to determine what standard of care would be reasonable under the circumstances. These army regulations do provide a standard of conduct and for this purpose

(1) [1897] 1 Q.B. 240. (2) [1915] 1 K.B. 644.

are in much the same position as the regulations of the Clyde Trustees in another case where Lord Dunedin spoke as follows:

> There are by-laws and regulations of the Clyde Trustees published to regulate the river traffic, which must be here set forth. The by-laws have not the force of statute, but like the rules of the road they form a rule of conduct, so that an infringement of them would be held to be in law a fault which, if it led to damage, would infer liability. *Anglo-Newfoundland Development Co.* v. *Pacific Steam Navigation Co.*, (1).

When one takes into account the requirements of these regulations which provide that the guns should not be discharged except under instructions of a superior officer, that there is a difference in the report made by live and blank ammunition, a difference known to all of them, and in any event the men were not to discharge their rifles using either live or blank ammunition, it would seem, measured by any standard required by the military regulations, that Williams was remiss in his duty. Quite apart from those regulations, any person in charge of a group of men passing along a public highway who permits the firing of live ammuntion at random or otherwise is endangering the public and disregarding his duty to those who are upon or near the highway and is in law negligent.

Under the circumstances of this case it was the failure of Williams, as the party in charge, to use reasonable care to restrain Morin from discharging live ammunition as he proceeded along the highway; that his failure in this regard was a cause of the destruction of the barn. He owed the duty to use care in this regard towards the respondents as residents along the highway and his breach of that duty constituted negligence.

In this case Williams, a member of the military services, as officer in charge was, under section 50A of the *Exchequer Court Act* (1943-44 Dom. c. 25), a servant of His Majesty and his conduct constituted negligence within section 19 (*c*) of the *Exchequer Court Act*, (1927 R.S.C., c. 34).

The learned trial judge found that Lance Bombardier Haynes was also negligent. With deference I cannot agree with that finding. Apart from the evidence that Williams was in charge of the men, there is no evidence as to the

(1) [1924] A.C. 406, at 413.

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duty, if any, that rested upon any other officers or men. If, therefore, any duties rested upon Lance Bombardier Haynes these are not disclosed in the evidence, and without evidence of his duties there can be no finding as to a breach thereof. This, however, does not affect the result.

In my opinion the judgment of the learned trial judge should be affirmed and this appeal dismissed with costs.

Appeal allowed with costs.

Solicitor for the appellant: *F. P. Varcoe.*

Solicitors for the respondents: *Inches & Hazen.*