BETWEEN:

1954

Oct. 12

Oct. 13

ALBERT E. BURTON ....SUPPLIANT;

AND

HER MAJESTY THE QUEEN ....RESPONDENT.

Crown—Petition of Right—Negligence—Crown Liability Act, S. of C. 1952-53, c. 30, s. 3(1)(a)—The Exchequer Court Act, R.S.C. 1952, c. 98, s. 18(1)(c)—Onus of proof on suppliant—Liability of Crown only vicarious.

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The suppliant claimed damages for severe burns suffered by him while he was a patient in the Department of Veterans' Affairs Hospital near Saskatoon.

Held: That in a claim under section 3(1)(*a*) of the Crown Liability Act for damages for negligence the onus of proof that the claim is within the ambit of the section lies on the suppliant. Since the Crown's liability is purely a statutory one the suppliant must establish that every condition of liability prescribed by the statute has been met. He must, therefore, show that some servant of the Crown was guilty of negligence, that such negligence occurred while the servant was acting within the scope of his duties or employment and that the injury for which he claims resulted from such negligence. If he fails to discharge the onus of proof that the law casts on him in respect of any of these matters his claim falls.

2. That the Crown's liability is not direct but only vicarious. Before it can be engaged it must appear that some servant of the Crown would himself have been personally liable if he had been sued. *The King* v. *Anthony* [1946] S.C.R. 569 at 571 followed.
3. That there was no negligence on the part of any servant of the Crown.
4. That the suppliant came by his injury through his own carelessness.

PETITION OF RIGHT under the Crown Liability Act.

The action was tried before the President of the Court at Saskatoon.

D. E. Gauley for suppliant.

G. H. Yule, Q.C. and *D. S. Maxwell* for respondent.

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

THE PRESIDENT on the conclusion of the trial (October 13, 1954) delivered the following judgment:

The suppliant herein claims damages from the Crown for severe burns suffered by him on October 26, 1953, while he was a patient in the Department of Veterans' Affairs Hospital near Saskatoon in Saskatchewan.

The circumstances under which the suppliant, who is a veteran of the First World War, sustained his injury may be outlined briefly. While he was in the Hospital for treatment of a pensionable disability he decided to have a lump in his left hand removed. This required an operation and pre-surgical treatment. The preparatory treatment consisted of cleaning the suppliant's hand and arm and giving him what is commonly called an "alcohol soak". His arm was bandaged from his finger tips to his shoulder with cotton batting kept in place with gauze and tape and the

bandage was then heavily soaked with alcohol. The suppliant received this alcohol soak twice, first on Monday, October 25, 1953, and again on Tuesday, October 26, 1953, it being intended that the operation would take place on the following day. Both treatments were given by E. R. Gately, the charge orderly of the ward in which the suppliant was a patient. The treatments were in accordance with standard pre-surgery practice. On Tuesday, October 26, 1953, at about 6.45 p.m., the fumes of the alcohol were so strong that the suppliant thought that he would get out of bed. He picked a cigarette out of a package, picked up his lighter, struck a light for his cigarette and, as he said, "all of a sudden there was a ball of fire on my arm". He was then standing alongside his bed and leaning against it. After frantic efforts to put out the fire made by the suppliant and other patients in his cubicle the hospital orderly who was on duty that evening, B. Lesser, finally succeeded in extinguishing the fire and stripping off the bandages. By that time the suppliant's left arm was severely burned and there were also burns on his right hand and on his body. He was taken to the nurse's office where his arm was dressed. Subsequently, he was treated for his burns and finally discharged after about two months.

While the suppliant's arm has healed the skin is still tender and soft and there is no doubt that he suffered great pain and considerable shock. It is for this pain and shock that he now claims damages from the Crown.

If the suppliant has any claim it must be under section 3(1)(*a*) of the Crown Liability Act, Statutes of Canada, 1952-53, Chapter 30, which reads as follows:

> 3. (1) The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable.
>
> (*a*) in respect of a tort committed by a servant of the Crown, . . .

When this enactment came into effect on May 14, 1953, it imposed a liability upon the Crown for the torts of its servants generally whereas previously its liability had been only for the negligence of its officers or servants under section 18(1)(*c*) of the Exchequer Court Act, R.S.C. 1952, Chapter 98, previously section 19(*c*) of the Exchequer Court Act, R.S.C. 1927, Chapter 34, which read as follows:

> 18. (1) The Exchequer Court also has exclusive original jurisdiction to hear and determine the following matters:

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

It was well established that in a claim under section 19(c) of the Exchequer Court Act the onus of proof that the claim was within its ambit lay on the suppliant. The law is the same under section 3(1)(a) of the Crown Liability Act. Since the Crown's liability is purely a statutory one, the suppliant must establish that every condition of liability prescribed by the statute has been met. He must, therefore, show that some servant of the Crown was guilty of negligence, that such negligence occurred while the officer or servant was acting within the scope of his duties or employment and that the injury for which he claims resulted from such negligence. If he fails to discharge the onus of proof that the law casts on him in respect of any of these matters his claim falls.

It is also established that the Crown's liability is not a direct one. It is only a vicarious liability. Before it can be engaged it must appear that some servant of the Crown would himself have been personally liable if he had been sued: *vide The King* v. *Anthony* (1) where Rand J., delivering the judgment of the majority of the Supreme Court of Canada, said with reference to the liability under section 19(c) of the Exchequer Court Act:

> 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.

Consequently, in the present case it must appear, if the suppliant is to succeed, that some employee of the Hospital would have been held personally liable to the suppliant for the burns suffered by him if an action had been brought against such employee.

Counsel for the suppliant conceded, as was plainly apparent, that it would not be possible to establish a case of personal liability against Dr. Scott, the superintendent

(1) [1946] S.C.R. 569 at 571. (2) [1935] S.C.R. 378 at 394 and 398.
(3) [1940] S.C.R. 263 at 272 and 273.

of the Hospital, or Dr. Gill, the physician and surgeon who was looking after the suppliant, or Miss Maber, the nurse who was in charge of the ward on the evening when the suppliant suffered his burns.

The only employee against whom counsel could find any personal fault was Gately, the charge orderly who had administered the alcohol soak treatments to the suppliant. To make out a case against him the suppliant must show not only that Gately was guilty of negligence but also that his burns resulted therefrom.

The negligence charged against Gately is that he failed to give the suppliant adequate warning not to smoke and that he did not check his smoking habits.

Dr. Scott said that the staff of the Hospital was under instructions to tell patients who received pre-surgical alcohol soak treatments not to smoke. These were given because of fear of fire and for the safety of the patient. The instructions were not in writing but formed part of an orderly's teaching.

There was conflicting evidence on whether Gately warned the suppliant not to smoke. The suppliant said that when the orderly had finished soaking the bandages on his arm on Monday he asked him whether there was any danger of smoking or lighting matches and the orderly said "No. I don't think so". There is no confirmation of this statement by any of the suppliant's witnesses. F. A. Gasall, who was in the same cubicle of the ward as the suppliant, said that there was conversation between him and the orderly but he could not say what it was. A. A. H. Thomsen, another patient in the same cubicle, said that on Tuesday he heard the suppliant ask the orderly whether it was alright to smoke but he would not say what the answer was "It might have been Yes. It might have been No".

Gately, on the other hand, denied that he had told the suppliant that he did not think there was any danger in smoking or lighting matches. On the contrary, he was positive that he had warned him not to smoke. It was routine procedure in all cases of pre-surgical alcohol soak treatments to warn patients against smoking and he had followed this procedure in the suppliant's case. After the fire he recalled that he had warned the suppliant. He went on to say that

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in all probability he had told the suppliant why he should not smoke, namely, because of the inflammability of the alcohol, but of this he was not sure.

Even if I were in doubt whether I should believe the suppliant or Gately, the suppliant would fail in his charge of negligence because he would not have discharged the onus of proof that lay on him. But I am not in doubt. I believe Gately's statement that he warned the suppliant not to smoke and I do not believe the suppliant's statement that the orderly told him that he did not think there was any danger in smoking or lighting matches. In my opinion, it is inconceivable that the orderly should have made any such statement. It is significant in this connection that the suppliant never stated to anyone in the Hospital that the orderly had told him that there was no danger in smoking or lighting matches. Indeed, he never complained that there had been any fault on the part of anyone in the Hospital prior to May, 1954. Then he told one Dr. More that if he would put him back on full pension he would not say anything about his arm being burned.

On the facts, I find that there is no foundation for the allegation that Gately failed to warn the suppliant not to smoke. And I am of the view that there was no negligence on his part in failing to check the suppliant's actions. The warning not to smoke which he had given him should have been sufficient.

The fact of the matter is that the suppliant's injury was not the result of any negligence on Gately's part. The suppliant was himself the author of his injury and has only himself to blame for it. In effect, he admitted this immediately after the accident. The evidence of B. Lesser, the orderly who was in charge of the ward when the fire occurred and finally succeeded in stripping off the burning bandages, proves this. After he took the suppliant back to his bed from the nurse's office he asked him how the fire happened and the suppliant said "I was lighting up a smoke and steadied the lighter against my bandaged arm". Lesser made a report to this effect the same evening. Several days later the suppliant told him that he thought he should get a higher pension and he told the suppliant that his report had gone in that his injury was his own fault.

There is also the evidence of Miss M. D. Maber, the nurse who attended the suppliant after the fire. He was taken into her office. The suppliant told her that he had taken the lighter and held it against his shoulder that held the compresses and said "What can happen in one careless moment!" He repeated this remark several times. He never suggested any fault on the part of the orderly. On the contrary, he kept apologizing to her because he had caused her so much trouble. I accept Miss Maber's statement.

Dr. Scott's evidence is to a similar effect. He saw the suppliant in his bed the day after the fire and asked him how he happened to get burned. Dr. Scott could not remember exactly what the suppliant said but he told him that he had been lighting a cigarette when the ignition took place and more or less indicated that it was rather a foolish thing to do. Moreover, it is clear that the suppliant knew that alcohol was being used to soak his bandages and that if he brought fire to it it might ignite.

I, therefore, find that the suppliant came by his unfortunate injury through his own carelessness. He had apparently disregarded Gately's warning not to smoke for, according to the evidence, he had smoked several cigarettes after his arm had been bandaged on Monday and had suffered no injury. It was only when he steadied his lighter against his alcohol soaked bandages and struck a light on it that his arm caught on fire. It was carelessness on his part to bring fire so close to his alcohol soaked bandages. The injury to his arm was wholly the result of this carelessness on his part.

Under the circumstances, it is clear that the suppliant has failed to show any grounds for his claim of damages. The judgment of the Court must, therefore, be that he is not entitled to any of the relief sought by him in his petition of right and that the respondent is entitled to costs.

Judgment accordingly.