1950
Feb. 2, 3, 6, 7
Feb. 7

BETWEEN:

ROBERT JOHN GINN, by his next friend FLORENCE GINN, and FLORENCE GINN....... } SUPPLIANTS;

AND

HIS MAJESTY THE KING............RESPONDENT.

Crown—Petition of Right—Damage for injury to infant suppliant from picking up a No. 69 close action grenade—Exchequer Court Act, R.S.C. 1927, c. 34, s. 19(c), 50A—Crown not responsible unless statutory conditions of liability proved to have been present—Onus of proof on suppliant—Liability of Crown not to be determined on basis of conjecture—No duty on Crown to explain presence of bomb—Negligence of officer or servant of Crown not to be presumed.

On March 30, 1945, the infant suppliant, a boy of 13, while walking along part of the river bed of the Rideau River, the water being low and leaving a considerable distance between the river bank and the water's edge, picked up a No. 69 close action grenade thinking it was a bottle. While he was holding it in his right hand and jumping from stone to stone to keep out of the mud it exploded with the result that he was seriously hurt and lost his right hand and right eye.

Held: That unless there is evidence of negligence of an officer or servant of the Crown while acting within the scope of his duties or employment the Crown cannot be held responsible for the suppliant's injury under section 19(c) of the Exchequer Court Act and there is no liability apart from it. The Crown's liability is a statutory one and cannot arise until all the conditions of liability fixed by the statute have been proved to have been present.

2. That there was no evidence of how or when the grenade came to be where the suppliant found it or who had thrown it there. There was no proof that it was thrown there by any officer or servant of the crown while acting within the scope of his duties or employment. The opinion of a witness that it was thrown as a demonstration to troops or in the course of a tactical scheme is no more than speculation or surmise and cannot take the place of the evidence of fact that must be given to discharge the onus of proof that lies on the suppliant.

3. That it is not permissible to determine the liability of the Crown under section 19(c) of the Exchequer Court Act on the basis of conjecture that the conditions of liability fixed by it were present.

4. That there was no duty on the part of the Crown to explain how the grenade came to be where the suppliant found it and that negligence on the part of an officer or servant of the Crown should not be presumed from the absence of such explanation. In a claim under section 19(c) of the Exchequer Court Act the suppliant must prove not only that his injury resulted from the negligence of an officer or servant of the Crown but also that such officer or servant was negligent while acting within the scope of his duties or employment. *The King* v. *Moreau* (1950) S.C.R. 18 followed.

5. That no No. 69 grenades were issued to the Ottawa area depot prior to May 21, 1945. Consequently, whoever threw the grenade must have brought it into the area from outside. If he did so it could not have been thrown in the course of duty.
6. That there was no evidence of lack of care in the issue or handling of the grenades on the part of the military authorities.

PETITION OF RIGHT by the suppliants seeking damages for injury to infant suppliant from picking up a No. 69 close action grenade.

The action was tried before the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

A. Macdonald, K.C. and *G. J. Gorman* for suppliants.

E. G. Gowling, K.C. and *A. H. Laidlaw* for respondent.

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

THE PRESIDENT on the conclusion of the trial (February 7, 1950) delivered the following judgment:

In the afternoon of March 30, 1945, the suppliant Robert John Ginn, then 13 years of age, and two companions, Jack Calderwood and Junior Cameron, aged 12 and 11 years respectively, were on the Bowesville Road south of Ottawa. When they were near Mooney's Bay on the Rideau River they left the road and went down to the Bay. The water was low and there was a considerable distance between the river bank and the water's edge. The boys walked along this part of the river bed. One of them found a crab and then they looked for something in which to put it. The suppliant Robert John Ginn found what he thought was a bottle lying in the mud and picked it up. He shook it and heard a rattling noise inside. He tried to open the bottom, which had a base plug in it. He held the object in his left hand and tried to unscrew the plug with his right but was unable to do so. He called the other boys over and showed them what he had found. They looked at it and then turned towards the water to continue their search for a container. The suppliant then jumped from stone to stone to keep out of the mud, holding the object in his right hand. He had taken only a few steps when it exploded.

1950
GINN ET AL.
v.
THE KING
Thorson P.

The suppliant was very seriously hurt as the result of the explosion. His right arm was badly mangled and his hand and part of his forearm above the wrist had to be amputated. Fragments of the exploded object had penetrated his right eye and it had to be removed. There were also abrasions and lacerations about his face and forehead, which have left some scars, and some abrasions on his left leg at the knee and ankle. He suffered severe pain and nervous shock. While he was not rendered unconscious by the explosion, there was some concussion. Although the X-rays did not show any skull fracture Dr. Pennock, who attended him, thought that the outer table of his skull had been fractured. The suppliant was in the Ottawa Civic Hospital for about six weeks and then confined to his home for about another month. Apart from being somewhat underweight he is now, except for his permanent injuries, in fairly good health but still has some pain in the head and leg and is easily upset. He wears an artificial eye and an artificial arm but neither of these is satisfactory and both will have to be replaced. He is now a student in his third year at the Ottawa Technical High School taking a course in Commercial Art. He must adjust himself to his disabilities. He had intended to be a photographer but this is no longer possible. He has also had to give up his music in which he showed promise. He was right-handed and has had to learn to draw with his left hand. He is under a very serious handicap by reason of the loss of his eye and hand.

The suppliant Florence Ginn has incurred hospital and medical expenses as follows:

Dr. Pennock	$200.00
Ottawa Civic Hospital	219.60
Dr. C. C. Smart	37.00

making a total of $456.60.

It is for the injuries thus suffered that this petition of right is brought by the suppliant Robert John Ginn by his widowed mother Florence Ginn as his next friend and by the suppliant Florence Ginn for the hospital and medical expenses incurred by her.

If I were of the opinion that the suppliants are entitled to any of the relief sought in the petition of right I would

award the suppliant Robert John Ginn the sum of $12,000 as general damages and the suppliant Florence Ginn the sum of $456.60 for hospital and medical expenses.

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

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

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

To succeed in their claims the suppliants must prove not only that the injuries suffered by the suppliant Robert John Ginn resulted from the negligence of an officer or servant of the Crown but also that such negligence occurred while the officer or servant was acting within the scope of his duties or employment. The onus of proof of these matters lies on the suppliants. The onus is not a light one.

The suppliant Robert John Ginn did not know what the object he picked up was or what it was made of and no pieces of it were produced. He had never seen a similar object before and did not suspect that it was dangerous. He was shown an object, filed as Exhibit 3, which counsel for the respondent admitted was a No. 69 close action grenade and said that it resembled the object he picked up. It was black and shiny like Exhibit 3 but he could not say whether there was a safety or protective tape on what he picked up such as there was on Exhibit 3. It could have been without a cap and tape. The evidence of Jack Calderwood was that there was no tape on what he saw when the suppliant called him over. It looked exactly like Exhibit 3 without the cap and tape. I am satisfied that what the suppliant picked up, thinking it was a bottle, was a No. 69 close action grenade without the safety cap and protective tape.

The No. 69 close action grenade was originated and made in Great Britain for use as an infantry close action combat weapon. Towards the end of the war, as will appear later, it was also made in Canada for the use of the Canadian army. It contains several kinds of explosives. The main charge is baratol, a high explosive consisting of 80 per cent

1950
GINN ET AL.
v.
THE KING
Thorson P.

trinitrotoluene and 20 per cent barium nitrate inserted in powder form into the body of the grenade by a vacuum process. The baratol is an inert compound and cannot be set off without a detonator. The detonator, a very sensitive one, contains a base charge of tetrol and a primary charge of a mixture of lead azide and lead styphnete. This is set off by a flash from an ignition cap which contains a mixture of mercury fulminate and potassium chlorate. The ignition cap has to be struck by a striker, a steel firing pin. The substances referred to are not affected by freezing and thawing and while the permeation of water in them may reduce their explosive effect and cause a misfire it cannot wholly destroy it. The casing of the grenade is made of black bakelite, a plastic substance that retains its glossy appearance.

The structure and mechanism of the No. 69 grenade, illustrated by a chart, Exhibit 6, was explained by Captain A. Piper, pensions officer of the Canadian Legion and a war veteran, who was an experienced instructor in the use of various small arms, including the No. 69 grenade, both overseas and in Canada. The grenade has a safety cap on top. When it is issued for immediate use there is a strip of adhesive tape around this cap. It screws on and covers the neck of the grenade. Around this a protective tape is wound. This has a leaden weight at its outer end and a metal pin at its inner one. This goes through a hole in the neck of the grenade and a hole in the striker and holds it up. The striker is also held in place by a creep spring. Above the striker there is a round metal ball and below it the ignition cap and below the cap the detonator. The detonator is inserted into the centre of the grenade through a hole in the bottom into which a base plug is screwed. The bottom of the detonator rests on a rubber plug inserted into the top of the base plug and the top is open towards the ignition cap. The detonators are packed separately and are inserted in the grenades out on the range before their issue for use. When the grenade is to be thrown the adhesive tape around the safety cap is removed and the safety cap unscrewed. The grenade is then thrown with the index finger curled around the protective tape so that it will not unravel until it is in flight. When it is flight the lead weight

causes the tape to unravel and pull out the pin that holds up the striker. The grenade normally explodes on impact with a hard surface. The striker with the added weight of the metal ball overcomes the resistance of the creep spring and hits the ignition cap. The flash from it is directed into the detonator and sets it off. The detonation waves travel down through the detonator and set off the main charge and it explodes. The casing breaks up into very small fragments and the metal parts also break up but not into such small pieces. The explosion made by the grenade is a loud one. The grenade is dangerous only at close quarters, its danger area being 30 yards. If the grenade does not explode through landing on soft ground or for any other reason it is called a blind, but this does not mean that it has ceased to be a source of danger to some one who picks it up. The grenade cannot explode so long as the protective tape is around its neck with the pin holding up the striker. The fact that the grenade exploded while the suppliant held it in his hand while jumping from stone to stone indicates that the protective tape was not on it and that it had been thrown but was a blind. That is also indicated by the fact that the grenade rattled when the suppliant shook it for it cannot rattle if the tape is on it and the safety pin holds up the striker.

It is important to describe the place where the suppliant found the grenade. It was west of the Bowesville Road and a short distance north of the intersection of the Walkley Road. A plan of the locality was filed as Exhibit 1. On this the suppliant Robert John Ginn marked with an X the spot where he found the object that caused his hurt. The evidence is that immediately west of the Bowesville Road highway there is a narrow level strip of land and then a steep slope of from ten to fifteen feet down to the river bank. Along part of this bank there was a low stone wall about 200 feet long and from two and a half to three feet high that had been built as a retaining wall or breakwater to protect the bank. It served as part of the river bank. The usual summer water level of the river was about six feet higher than at the date of the accident. The river bed comes right up to the stone wall. After heavy rains the water comes almost up to the top of it. It was in the mud

1950
GINN ET AL.
v.
THE KING
Thorson P.

of the river bed west of this stone wall that the suppliant found the grenade. He remembered the spot because it was near the stone wall. It was lying on its side in the mud about three-quarters of an inch deep. The spot was approximately 20 feet from the water's edge. The mud of the river bed was soft. Mr. Currie, to whose evidence further reference will be made, said that he saw a small hole where the bomb had been dug up. He placed it on Exhibit 1 farther away from the stone wall than the suppliant did. The evidence also shows that a short distance south of the stone wall there is a swimming beach to which many people come in the summer.

There was no evidence of how or when the grenade came to be where the suppliant found it or who had thrown it there.

Counsel for the suppliants adduced evidence to show that military manoeuvres had taken place not far from the scene of the accident and that members of the armed forces of Canada, deemed to be servants of the Crown by section 50A of the Exchequer Court Act, had frequently been in the district. Mr. George Otterson, a dairy farmer on land south of the Walkley Road and west of the Concession Road, shown on a plan of the district filed as Exhibit 2, said that land in the area had been quite extensively used for military manoeuvres and referred particularly to a manoeuvre on the farm to the north of his land owned by Mr. Bebek. This was in the spring of 1943 or 1944. He remembered a number of trucks and that the soldiers carried rifles and that he had heard rifle shots. On other occasions he had heard loud explosions like those of dynamite. He could tell the difference between the sound of dummy cartridges and live ammunition but could not state and did not suggest that live ammunition had been used at any time. He had often seen troops marching on the Walkley Road and convoys on the Bowesville Road. In the winter he had seen ski troops on the river coming south from Hog's Back. He also remembered seeing tracks in the snow about 100 feet from the stone wall which he thought were those of Bren gun carriers but had never seen any such vehicles there. In nice weather soldiers often sat on the stone wall while eating their lunch. Mr. Alex Bebek, a farmer owning land immediatelv north of Mr. Otterson's, said that one spring, the

year of which he did not remember, an officer had asked permission to go on his land and that soldiers had come and been there all day engaged in war games. They carried rifles and he heard the sounds of rifle fire but didn't pay any attention. He had often seen troops on the Concession Road carrying rifles but did not notice any other weapons. He had also seen tanks there. The manoeuvre on his land was a long time before the date of the accident. Mr. William C. Graham, another dairy farmer, who lived right at the intersection of the Bowesville Road and the Walkley Road said that in 1943 and 1944 he had frequently seen troops in the area, in trucks or on foot, and had seen ski troops in the winter time. He saw the troops in the manoeuvre on Mr. Bebek's property but did not hear or see anything unusual. He had heard shots in the locality but did not know where they came from and did not hear any explosion that did not sound like a rifle shot. And Mr. G. F. Currie, a retired civil servant, who lived a short distance south of the junction of the Bowesville Road and the Walkley Road and had heard the explosion and rushed over to help the suppliant Robert John Ginn after he had been hurt, had frequently seen troops in the area, marching or in trucks, going up the Walkley Road or up the Bowesville Road to the Airport. He had also seen Bren gun carriers and amphibious ducks practising in the water. In the winter there were ski troops crossing the ice from the Prescott Road side of the river. There had been practice manoeuvres in the area east of the railway tracks. He had heard rifle fire that sounded like blank ammunition and other sounds like those of Mills bombs with a small charge. The manoeuvres he had heard were about a year before the accident. Mr. K. J. Matheson, formerly a general staff officer in the Directorate of Staff Duties (Weapons), also gave evidence that in the autumn of 1944 or in the spring of 1945 he had seen a demonstration at Mooney's Bay of two vehicles, one an amphibious truck, dukw, commonly known as a duck, and the other an amphibious jeep, given for the benefit of a number of staff officers who had not seen such vehicles. This was right near the junction of the Bowesville Road and the Walkley Road. There was no evidence that any ammunition was used or carried in connection with this demonstration.

1950
GINN ET AL.
v.
THE KING
Thorson P.

There is nothing in the evidence of any of these witnesses that could fasten any negligence on any officer or servant of the Crown while acting within the scope of his duties or employment. But unless there is evidence of such negligence the Crown cannot be held responsible in law under section 19(c) of the Exchequer Court Act for the suppliant's regrettable misfortune and there is no liability apart from it. The Crown's liability is a statutory one and cannot arise until all the conditions of liability fixed by the statute have been proved to have been present.

Counsel for the suppliants relied strongly on the evidence of Captain Piper. He gave evidence of the mechanism and operation of the bomb, his experience with it and the practice and regulations relating to its use for training purposes, and expressed the opinion that the grenade which the suppliant picked up was thrown there as a demonstration to troops or in the course of a tactical scheme. There is no evidence at all that it was so thrown. And Captain Piper's opinion cannot take the place of the evidence of fact that must be given to discharge the onus of proof that lies on the suppliants. It is no more than speculation or surmise. It is not permissible to determine the liability of the Crown under section 19(c) of the Exchequer Court Act on the basis of conjecture that the conditions of liability fixed by it were present. This was decided recently by the Supreme Court of Canada in *The King* v. *Moreau* (1). There a young boy had picked up a fuse in a ditch beside a road and was later hurt by it. While the facts of that case are distinguishable from those of this one I refer to it because of the remarks of Michaud C.J., then Deputy Judge of this Court, who held the Crown liable for the injury to the boy and awarded substantial damages, and the reversal of his decision by the Supreme Court of Canada. Michaud C.J. assumed that there was a duty of explanation of how the fuse came to be in the ditch and that in the absence of any such explanation negligence could be presumed. He said:

> In the absence of any excuse or explanation from the army officers charged with the custody of such dangerous explosives, one is driven to the conclusion that someone along the line from Ordnance Headquarters down to some commissioned or non-commissioned officer in charge of target or mortar firing practices did not keep a proper check of these

(1) (1950) S.C.R. 18.

bombs entrusted to his care. Such failure on the part of an officer or servant of the Crown is negligence while acting within the scope of his duties or employment.

The Supreme Court of Canada unanimously took a different view. Rinfret C.J., delivering the judgment of the Court, said, at page 23:

je ne puis m'accorder avec l'honorable juge à l'égard du principe qu'il pose qu'il appartenait aux officiers du camp d'expliquer la présence de la fusée dans le fossé du chemin conduisant de Rimouski au camp d'entraînement et que, en l'absence de cette explication, la conséquence irrésistible était qu'il y avait eu négligence de la part des officiers en charge dans l'exercice de leurs fonctions. Je crois que par là la Cour est entrée plutôt dans le domaine des conjectures que dans celui des présomptions qu'un tribunal est justifié de tirer des faits prouvés.

La doctrine et la jurisprudence sont bien arrêtées sur ce point et ne souffrent plus de discussion. Elles exigent que les présomptions sur lesquelles peut valablement se fonder une conclusion de ce genre soient graves, précises et concordantes.

And at page 24, the Chief Justice put the principles to be followed in a claim under section 19(c) of the Exchequer Court Act as follows:

Or, le raisonnement du juge de première instance, en posant le principe qu'il incombait aux officiers militaires en charge de fournir une explication ou une excuse pour la présence de la fusée dans le fossé, pèche donc, à mon humble avis, par deux côtés essentiels: premiérement, il suppose que la Couronne avait le fardeau de la preuve et qu'elle devait se disculper, alors que l'article 19(c) ne permet le maintien d'une réclamation contre la Couronne, à raison de la mort ou du dommage causé à la personne ou à la propriété, que dans le cas où elle résulte de la négligence de l'officier ou du serviteur de la Couronne. Il faut évidemment, dès lors, que le pétitionnaire, ou le réclamant, prouve cette négligence. Cette preuve ne peut résulter de conjectures ou de suppositions comme celles que nous avons ici. Je ne trouve aucun fait qui puisse donner lieu à des présomptions; et, en plus, il faudrait que telles présomptions fussent graves, précises et concordantes. Il n'y a rien de tel dans l'espèce actuelle.

Deuxièmement, toujours en vertu de l'article 19(c), il ne suffisait pas à l'intimé de prouver la négligence d'un officier ou d'un serviteur de la Couronne, mais il fallait, en plus, qu'il prouvât que cet officier, ou ce serviteur négligent, agissait dans les limites de ses devoirs ou de ses fonctions.

These remarks might well be applicable in this case. The adoption of Captain Piper's opinion of how the grenade came to be in the bed of the river would thus be a venture into the realm of conjecture which the law does not permit.

Moreover, I am of the view, even if his opinion were admissible as proof, that there is no sound basis for it. I am unable to believe that the grenade came to be where it was in either of the ways suggested by Captain Piper.

1950
GINN ET AL.
v.
THE KING
Thorson P.

The evidence adduced for the respondent proves that the first No. 69 grenades made in Canada came to the Ordnance Depot at Petawawa on August 3, 1944. They had been in common use in England before then but were not used in Canada. Petawawa received their shipment from the first month's production of the grenades in Canada. Then on August 12, 1944, the Chief of the General Staff of the Canadian Army issued Canadian Army Routine Order 4769, applicable to active formations, units and personnel of the Canadian Army. This reads as follows:

4769—GRENADES No. 69—USE OF FOR TRAINING PURPOSES—4769

1. The following safety rules for use of the No. 69 grenades for training purposes will be strictly adhered to:—

(*a*) All ranks concerned must be well acquainted with the details of this grenade as laid down in Small Arms Training, Vol. I, Pam. No. 13 (1942) Lesson 5.

(*b*) The No. 69 grenade will only be used for training purposes as follows:—

(i) During weapon training periods when men are actually being trained in throwing live grenades.

(ii) During exercises when live ammunition is being used, e.g. battle practices and field firing.

(iii) During properly supervised assault courses.

(iv) During exercises with troops when live ammunition is not being used, No. 69 grenades will not be thrown except by instructors or umpires and then only if no thunder-flashes are available.

(*c*) When used in place of thunderflashes during exercises the grenades will, whenever possible, be thrown behind banks and into ditches. They will be thrown behind rather than in front of troops, to minimize the risk of eye injuries from flying fragments.

(*d*) No. 69 grenades will never be thrown at advancing troops.

(*e*) The grenades will be regarded as having a danger area of 30 yards.

(*f*) They will never be used at night for training purposes.

(*g*) These grenades will be thrown only on such ground as will ensure their being readily found if a blind occurs. All blinds are dangerous and must invariably be destroyed where they lie in the same way as other types of grenades. For this reason grenades must not in any circumstances be thrown into water.

2. Serious accidents have recently occurred during training through ignorance of the capabilities of the No. 69 Bakelite grenade and from non-adherence to safety rules.

3. Commanding Officers of units carrying out training with the No. 69 grenade will, therefore, ensure that the safety rulees as detailed above are strictly adhered to, and that all ranks are informed that this grenade is a lethal weapon and must not be moved once it has been thrown and is in an armed condition.

4. Attention is drawn to R.O. 4768 covering removal of detonators from No. 69 grenades.

(H.Q. 54-27-35-301)

This order was widely circulated and would reach the attention of all persons concerned with training in the use of the grenade. Certainly, instructors in its use would be made familiar with it. Under the circumstances, it would be unreasonable to assume that any instructor would throw a grenade into Mooney's Bay as a demonstration to troops. Certainly, Captain Piper would not have done so. It was a most unlikely place for such a demonstration. The Bowesville Road is a well travelled highway just a few feet from the Bay and there are houses not far away. And Order No. 4769 expressly says that the grenades must not in any circumstances be thrown into water. Moreover, it would not have been possible for an instructor to throw the grenade in the course of duty, for the evidence for the respondent shows that there were no No. 69 grenades issued to No. 26 Central Ordnance Depot, the Ottawa area depot, prior to May 21, 1945, almost two months after the accident. Consequently, no instructor in Ottawa could have obtained any grenades in the Ottawa area prior to the date of the accident. The suggestion that an instructor threw the grenade into the river as a demonstration to troops is, in my view, a preposterous one. It is equally preposterous to suggest that he would throw it into the soft mud, if the water was low, and leave it there without taking any steps to destroy it.

The suggestion that the grenade landed in the spot where the suppliant picked it up in the course of a tactical scheme is equally untenable. There was no evidence of any tactical scheme at Mooney's Bay, let alone a scheme involving the use of live ammunition. It is quite unreasonable to think that any tactical scheme involving the use of live ammunition would be ordered at such a place, adjacent to a busy highway and with houses nearby. Moreover, if any tactical scheme had been ordered for that area no No. 69 grenades could have been available for it from the Ottawa area prior to the date of the accident for there were no grenades in store in the area at that time. And no tactical scheme involving the use of No. 69 grenades would be held at any place other than an official range, such as for example, the Connaught ranges at South March.

1950
GINN ET AL.
v.
THE KING
Thorson P.

There is no substance in the submission that the grenade came to be where it was through having been thrown there as Captain Piper suggested.

While no grenades were issued to No. 26 Central Ordnance Depot until May 21, 1945, there were issues to the District Ordnance Depot at Kingston prior to the date of the accident and to other depots. It would, therefore, seem clear that whoever threw the grenade must have brought it into the Ottawa area from outside. If he did so it could not have been thrown in the course of duty. But who that person is and when and why he threw the grenade where he did remain unanswered questions, and speculation as to possible answers is idle.

In any event, there is no proof that the grenade was thrown there by any officer or servant of the Crown while acting within the scope of his duties or employment. This distinguishes the present case from that of *The King* v. *Laperriere* (1).

Nor is there any evidence of lack of care in the issue or handling of the grenades on the part of the military authorities. On the contrary, the evidence shows that great care was taken to see that they were properly issued and accounted for and that reasonable efforts were made to ensure that grenades that did not explode when thrown were destroyed. Unfortunately, notwithstanding such care this accident happened.

Under the circumstances, since the suppliants have not been able to satisfy the requirements of section 19(*c*) of the Exchequer Court Act the Court has no alternative other than to find that the Crown is not liable in law for the injury suffered by the suppliant Robert John Ginn and judgment must be given that neither of the suppliants is entitled to any of the relief sought by them. The respondent is entitled to costs.

Judgment accordingly.

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(1) (1946) S.C.R. 415.