

In the view which I take, it is not necessary to determine whether the locus in quo was a "boulevard," within the meaning sought to be assigned to it by the defendants, namely, a place from which the public were excluded.

In *Lowery v. Walker*, in the Divisional Court and in appeal, it was held that the fact of the defendants' knowledge that the public habitually crossed the defendants' land imposed no duty upon them to take any care for their protection, and that they were not liable to the plaintiff for injury sustained while so trespassing. Following that decision, the learned trial Judge dismissed this action. Since then the decision in *Lowery v. Walker* has been reversed in the House of Lords, 27 Times L.R. 83.

The facts in this case bring it, I think, within *Lowery v. Walker*. The foot-path in question was caused by the public making a short diagonal cut across the boulevard between Richmond street and Farley avenue, a street running westerly from Spadina avenue, but lying a short distance north of Richmond street produced. The defendants, by their foreman and servants, scattered blocks of stone along the boulevard in the way of any one following this path, thus creating a trap into which, in the darkness, one might fall and be injured. Whilst some warning lights were placed in the vicinity, none were near enough to disclose the danger of the situation. Further, the shade of the trees helped to shut out the light, and made it more incumbent upon the defendants to adopt such precautions as would make known to any one proceeding along the path the presence of the stones on the boulevard. The work was being carried on by the foreman of the defendants under the direction of their engineer. He was present directing the work and must have seen the path in question. Nevertheless, at the close of the day's work, he permitted these scattered stones to remain in the way of any one taking the path in question. This path having resulted from the habit of the public making the short cut in question, knowledge of its habitual user by the public must be imputed to the defendants. Further, they had such knowledge through their foreman. In these circumstances, the defendants, without notice to the public, made it dangerous for them to continue to use the path. As said by Lord Halsbury in *Lowery v. Walker*, "People who habitually went by this route were entitled to notice of any probable danger." In the circumstances, the defendants, I think, failed in their duty towards the public by creating, without notice, the dangerous condition which caused the accident in question; and I therefore think that this appeal should be allowed.