

Moss, C.J., Garrow, MacLaren and Meredith, J.J.A.] [June 20.

NEWTON v. CITY OF BRANTFORD.

*Negligence—Unguarded hole in floor of building—Duty of owners to person invited on premises—Knowledge of danger—Evidence—Nonsuit.*

Appeal by the defendants from the order of a Divisional Court, setting aside the judgment of LATCHFORD, J., who dismissed the action at the trial, and directing a new trial. The action was brought to recover damages for injuries sustained by the plaintiff through the alleged negligence of the defendants in leaving unguarded an opening in the floor of a fire hall, used by the firemen to reach the lower floor, into which hole the plaintiff fell and was injured. The plaintiff was in the employment of one Cave, who had contracted with the defendants to paint the fire hall. On the 15th May, 1909, the plaintiff was at work painting on the second floor, and to reach a part of his work was using a stepladder which he placed near the opening, and in coming down from the ladder he inadvertently stepped into the opening and fell to the floor below, a distance of about 16 feet. The trial judge had held that no evidence had been given from which an inference of negligence could be drawn. He also was of the opinion that in any event the plaintiff had, upon the uncontradicted evidence, been guilty of contributory negligence, and accordingly dismissed the action.

The Divisional Court considered that there was some evidence of negligence on the part of the defendants in the failure properly to guard the opening, and it was for the jury to say whether the plaintiff had voluntarily assumed the risk; and a new trial was directed.

GARROW, J.A.:—The measure of duty imposed by law in such a case has, I think, been clearly defined . . . . A leading case appears still to be *Indermaur v. Dames*, L.R. 1 C.P. 274, L.R. 2 C.P. 311, in which the position of such an one as the plaintiff is defined to be that of a person invited upon the premises by the owner for the transaction of business in which both are interested. And the duty owing in such a case is there said to be to take reasonable means to guard the invitee from dangers which are not visible and of which he does not know. But the plaintiff here knew all about the opening. In the course of his examination he was asked these questions: "Q. Had you known about this hole from the time you went to work, nine days before the accident? A. Yes, sir. Q. Knew what it was used for? A. Yes,