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SUPREME COURT OF VIRGINIA
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VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA

WATSON E. TRIGGER, Appellant

v.

MALCOLM HARRIS LIVICK, et al,
etc., et al, Appellees

RECORD NO. 740747

AMENDED APPENDIX TO BRIEF

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I. AMENDED MOTION FOR JUDGMENT

MOTION is hereby made for judgment and award of execution against you jointly and severally in the amount of FIFTY THOUSAND and NO/100 Dollars ($50,000.00), for damages for personal injuries as a result of your negligence, for this, to-wit:

1. That on or about the 9th day of April 1968 the Plaintiff was a student enrolled in an educational institution operated by the Defendants known as Augusta Military Academy and hereinafter referred to as the "Academy".

2. That at such time and in such capacity he was provided among other facilities, with living accommodations for which Defendants were paid on behalf of the Plaintiff.

3. That among the living accommodations Defendants furnished Plaintiff a balcony with access from his bedroom and which Plaintiff was granted the use of as a part of the general accommodations attendant to his living quarters.

4. That the Defendants had a duty to the Plaintiff to maintain the said balcony in its entirety, including the guard rails attached thereto, in a safe condition, and suitable for the use of the Plaintiff as aforesaid.

5. That in fact the Defendants were negligent in the premises in that they failed to properly maintain the said balcony and other facilities provided as accommodations for the Plaintiff and in particular they allowed the guard rails attached to said balcony to be and remain defective, and to exist in a dangerous condition.

6. That the Defendants failed to inspect this said facility and other facilities furnished by the Defendants to the Plaintiff and others. That Defendants should have inspected these said facilities. That the nature of the facilities required periodic inspections in order to determine whether or not they were being maintained in a safe condition for Plaintiff's use. That, if in fact inspections were made, Defendants failed to take into account the unsafe and dangerous condition of the said facilities which came to their attention or should have come to their attention and failed to make necessary repairs thereto; and the Defendants permitted the dangerous and defective condition complained of to exist before and during the time Plaintiff was injured thereby.

7. That, moreover, the Defendants, their agents, employees and/or servants were notified of the said dangerous and defective condition of the said balcony and its attached guard rails. That due to the nature of these facilities their defects were obvious and had Defendants made proper inspections thereof they would have noticed or they should have noticed the dangerous and defective condition thereof.

8. That the Defendants had a duty to repair the defective condition and make it safe for those who used these facilities were provided. That the Plaintiff was among those for whose use these said facilities were provided.

9. That the Defendants had knowledge or should have known of the said dangerous and defective condition of these facilities.

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in use as living quarters as of April 9, 1968 and the approximate number of students housed in each.

6. State what schedule and procedure of maintenance of living quarters was in effect on April 9, 1968, either while occupied or during the summer.

7. State whether the prescribed procedures set forth in Paragraph 6, if any, were in fact being routinely followed at the date of the injury, April 9, 1968, and in the three years preceding the date of injury.

12. State whether any agent of Augusta Military Academy periodically entered living quarters of the students during the school year 1967-1968 to conduct military-type inspections, and, if so, the frequency of such inspections.

14. State whether the quarters occupied by the Plaintiff at the time of injury were occupied during the summer of 1967.

15. State what inspection and maintenance was performed on the living quarters during the time students were absent, if any, during the summers of 1965, 1966 and 1967, respectively.

19. State what, if any, maintenance was performed on similar guard rails after the date of Plaintiff's injury, such as improvement of the condition of such rails, replacing worn or rusted bolts, replacing missing bolts, changes in the method of attachment or any other changes in the condition of such rails, including a description of any defects noted in other rails which would possibly result in similar dislocations.

III. ACADEMY'S OBJECTION TO INTERROGATORIES (filed December 21, 1972)

1. Defendant objects to interrogatories numbers 1, 2, 6, 7, 8, 9, 10, 11,

12, 13, 14, 15, 19, 20 and 22.

2. The grounds for the objection are that answers to said interrogatories would not disclose evidence relevant or admissible at the trial of this action.

IV. ORDER SUSTAINING ACADEMY'S OBJECTION TO CERTAIN OF TRIGGER'S INTERROGATORIES

ON THE 15th day of May, 1973, came the Plaintiff, by Counsel, and the Defendant, by Counsel, on the Complainant's motion to compel answers to Interrogatories propounded by Plaintiff and to which Defendant filed objections, and argument by Counsel was heard, and

IT APPEARING TO THE COURT that the Defendants should be required to answer certain of the Interrogatories propounded by Plaintiff and that Defendants' objections to others should be sustained,

IT IS THEREFORE ADJUDGED, ORDERED AND DECREED that the Defendants, within 30 days from May 15, 1973, answer Plaintiff's Interrogatories numbered 2, 8, 9, 10, 11, 13, 20, and 22, and Defendants' objections to Interrogatories numbered 1, 6, 7, 12, 14, 15, and 19 are sustained, the objections to #6 and #7 being sustained as to form, with Plaintiff granted leave to rephrase these said Interrogatories.

V. DEPOSITION OF JOHN M. STAPLES

(DEP 8) Q Well, what did you do in connection with checking?
A I went along and seen if I found any bolts .. in each one of the rails on each end there are two bolt holes where bolts go in, fastened to a cement post or column.

*****

(DEP 16) Q Now, how many bolts are there holding that guard rail?
A Four.

*****

(DEP 20) Q And what did you find on the balcony?

A We got up there and we looked and we went back down again and we couldn't find no leg screws at all....that even came out of it.

Q Well, from the ...

A It was four....and we couldn't even find no leg screw that came out of it.

*****

(DEP 22) Q What is it a cast iron rail?

A No, it's an iron rail. You can't weld cast very well.

Q Now, are these welded to something?

A Well, you've got your heavy piece across the top and then you've got a little half round thing to give you the finish on top, that's welded to it, and then you've got these bars that goes down to a bottom rail across, and they are welded in there.

*****

(DEP 30) Q And there were four bolts in each railing?

A Yes sir.

Q How long would it take you to conduct an inspection of the entire balcony area?

A Oh you can walk around and check them in not over five minutes, ten minutes. I just walked around and shake them, if they didn't shake, well it was tight.

Q So that's how you conducted your inspection you grabbed the balcony rail itself?

A I looked for the bolts, and I checked and I also looked for the bolts...

Q So if the bolt was out you would notice that?

A Yes sir.

*****

(DEP 35) Q Did there come a time when you welded the bolts on it?

A Well, when we decided to weld them on, we welded all of them.

Q When did you do that?

A I can't tell you the exact date.

Q Were there several days, weeks, months..

A I can't even tell you that, sir. I know we eventually

went ahead and welded them all. I can't tell you the date.

LOTZ: I object to the witness answering the question.... I will of course at the proper time object to its admissibility.....at the trial of the case.

Q I think as long as we want to get this on the record, our procedure would be to reserve our objections and argue them at a subsequent time.

LOTZ: That's...he's already testified, I think and he's answered the question. And the question will be for the court to pass on that if it's sought to be introduced at the trial.

Q Was there any other thing that you did to these guard rails other than this welding procedure which you've described?

A No sir.

*****

VI. DEPOSITION OF COL. WALES

(DEP 10) Q Are these the same balconies that...and the same barracks and the same railings that existed back in 1945 when you began your duties?

A Yes sir.

Q Are they fastened the same way?

A No sir, not now.

Q How are they fastened now?

A The railing is welded to the bolt, the leg bolt that goes into the pole.

Q When were they so fastened?

A I believe since 1969 or '70....I'm not sure.

*****

(DEP 21) Q All right, you learned that he installed the anchor on the second attempt, is that correct?

A Yes.

Q And that was in the instance of how many bolt holes?

A They were all gone when the railing went over.

Q How many had been gone the prior time?

A Two.

Q Two. Had he installed four new anchors then?

A Yes sir.

*****

(DEP 26) Q Did you inquire at all about where the pieces were that were..

A I was told that they could not find the four bolts.

*****

VII. DIRECT EXAMINATION OF DR. PALUMBO - PORTION OF DEPOSITION HELD INADMISSIBLE AT TRIAL UNDERLINED

(DEP 6) Q Would you tell us what history you obtained?

A Well, at the time of my seeing Mr. Trigger, he stated that he sustained injuries in an accident on April of 1968 when a railing gave way at school in Staunton, Virginia. He stated he injured his left leg at the time and was seen by a physician in the area. The physician aspirated blood from the knee, applied a dressing, and was subsequently seen by Dr. Herman Diamond, who made a diagnosis of a severed nerve.

*****

(DEP 8) And we found that that area had diminished sensitivity.

Q When you find that symptom, Dr. Palumbo, what does that indicate to you?

A It indicates that there is an injury to a nerve, generally.

Q Was your finding consistent with the diagnosis that was reported to you in the history made by Dr. Diamond?

A Yes, because it was distal to the laceration. And the presumption is that he lacerated the cutaneous nerve to that area at the time of the laceration which produced the scar that is now noted.

*****

(TR 16)

and down between it.

Q It was an iron rail?

A Yes sir.

Q Do you know approximately how long the rail was?

A 8 to 10 feet, I'd say.

Q How was the rail fastened to the balcony?

A Two bolts on each end.

Q What were they fastened to?

A The concrete columns.

Q Did there come a time in the spring of 1968 that you had some - that you had an accident, Mr. Trigger?

A Yes.

Q Do you recall when that occurred?

A Yes sir, it was April 9...

Q 1968?

A 1968.

Q Can you describe what happened on that day, April 9, 1968?

A Everyone in the barracks was cleaning rooms for inspection and my roommate and I were doing the same. A ball had rolled out of the room, onto the stoop and had rolled off the stoop down into the courtyard. And we both went out after it, to retrieve it. We got to the guardrail and asked someone in the courtyard, please throw it up, and they did. And it was thrown up, I reached to get it and the balcony give

(TR 17)

way, and I fell down on top of the balcony and had got over in front of it and hit the ground first and the balcony come down on my leg.....the rail.

Q Came down how?

A On top of my leg and pressed my leg down.

Q Now you say that you and your roommate went out, where were you in relation to the balcony guardrail?

A I was right in front.

Q Now was this the guardrail immediately in front of your door to your room?

A Yes sir.

Q In that 8 to 10 foot length rail, where were you standing in terms of which end or the middle of the rail when you ...

A I was standing at the left end of the rail, next to the column.

Q Left end as you were...

A Looking toward the courtyard.

Q Looking toward the rail?

A Yes sir.

Q Were you leaning against it?

A I was leaning against it somewhat, just standing there more or less, not pressing against it, just slightly leaning against it.

Q Now where was your roommate?

* * * * * * *

(TR 19) 1 Q Do you know what part of the rail fell on it?

2 A Just the whole thing. It was laying down flat.

3 Q And what did it do to you?

4 A Well, it straightened my leg out and it mashed it

5 down into the ground and there was a little protrusion of

6 concrete on the ground in the courtyard that the rail had drove

7 my leg down in that and it cut the back of my leg. It bruised

8 and mashed it - the concrete did. And the rail itself as it

9 hit my leg and slid off it cut a gash - I guess about 5 or 6

10 inches in the top of my leg, in my shin bone.

11 Q Now, Mr. Trigger, on that day did you notice anything

12 else around you at the time you were injured, and you were hit

13 with that guard rail?

14 A Yes sir. When I was down on the ground and the rail

15 was on me - the boys that lifted the rail off - I had noticed

16 a piece of a bolt, rusty bolt.

17 Q Can you describe that for us?

18 A It was - I'd say maybe half of a leg bolt, it was

19 rusted and there was about one or two threads left on it.

20 Q And about how long was the piece?

21 A I'd say an inch - inch and a half.

22 Q Mr. Trigger, what then happened?

23 A Miss Canevet come up from the infirmary and one of

24 the cadets carried me to the infirmary.

25 Q Do you remember which one?

(TR 40) 1 Augusta Military Academy when you had this fall?

2 A A few months.

3 Q This is a military school is it not?

4 A Yes sir.

5 Q And you participated in military drills there?

6 A Yes sir.

7 Q You didn't play in sports there?

8 A No.

9 Q You never have played in team sports have you?

10 A No sir.

11 Q At the military academy?

12 A No sir.

13 Q Were there any rules in effect regarding playing

14 on the balconies, or horse play on the balconies?

15 A Yes sir.

16 Q Did they forbid that?

17 A Yes, you weren't allowed to horse play.

18 Q Play ball?

19 A That's right.

20 Q And you knew that?

21 A Yes.

22 Q You were given those rules? Weren't they in the

23 manual that all cadets got?

24 A Yes sir.

25 Q Now, with referenceto this railing around the

(TR 41) 1 stoop there had you ever had occasion to lean against any of
2 those railings before? The one right in front of your
3 room?
4 A Not really, like I say, something had gone off
5 and we wanted somebody else to...
6 Q Well, had you leaned against this particular rail
7 before?
8 A No sir, not that one.
9 Q Sir?
10 A No sir.
11 Q Other railings?
12 A No sir.
13 Q What exactly were you doing at the time you went
14 to the railing?
15 A We were cleaning - my roommate and I was cleaning
16 the room, our room, and he said a ball had gone out the door,
17 so we went out to retrieve it.
18 Q Was it a football?
19 A I really don't remember what kind of ball it was.
20 Q Well, you have a pretty definite recollection of
21 these other things, don't you remember what kind of ball -
22 weren't you playing with a football?
23 A We weren't playing with a football.
24 Q Well, wasn't it a football that you claim went
25 down to the yard?

(TR 42) 1 A Football, tennis ball, I don't remember which it
2 was.
3 Q You don't remember?
4 A Not really, no sir.
5 Q A ...
6 A It could have been a football but I don't -
7 really don't remember.
8 Q A football wouldn't roll underneath that stoop
9 would it?
10 A I don't think so.
11 Q Sir?
12 A I don't think so.
13 Q Well, could it be that you and your roommate were
14 playing football on the stoop?
15 A Oh no sir.
16 Q No way?
17 A No sir.
18 Q According to you. Now when you say - someone told
19 you the ball had gone over and you went to the rail to look?
20 A Yes sir.
21 Q And did McLaughlin go with you?
22 A Yes sir.
23 Q Why was it necessary for two of you to go to get
24 one ball?
25 A I don't know.

(TR 43) 1 Q And did you see the ball down in the courtyard?

2 A Yes I did, it was laying right there.

3 Q What kind of ball was it?

4 A I don't remember what it was, but it was down

5 there.

6 Q A ball of some kind?

7 A Yes sir.

8 Q Tennis, football, baseball, golf ball, some kind of

9 ball, is that right?

10 A I don't think it was a baseball,

11 Q Sir?

12 A I don't think it was a baseball, because we

13 didn't have one in the room.

14 Q You had a football in your room didn't you?

15 A We had a football and a tennis ball and a golf

16 ball.

17 Q Now exactly what were you doing when the railing

18 gave way?

19 A At that moment we were trying to catch the ball,

20 it had been thrown back up.

21 Q Had somebody thrown it back up to you?

22 A Yes sir.

23 Q Were you leaning your chest against the rail like

24 so, leaning over?

25 A No sir, not like that.

(TR 44) 1 Q How were you, can you demonstrate how you were
2 on this court railing here?
3 A We were leaning - like he had thrown the ball
4 way out there and we couldn't get it, leaning like this.
5 The ball had come up just about like this.
6 Q All right. Did you put any pressure against the
7 rail?
8 A Yes, a little.
9 Q How much would you say, how hard were you pressing
10 against it? Barely pressing it or what?
11 A No, more or less just to balance yourself while
12 you reach out to catch the ball.
13 Q And then you say the railing suddenly let go?
14 A Yes sir.
15 Q Now you testified here today that the railing went
16 over gradually and you went across it; do you recall when you
17 were examined about this case on May 15 of 1973?
18 A Yes sir.
19 STEPHENSON: Objection, I don't think he stated it
20 went over gradually. He said it tipped over and he went after
21 it.
22 Q Let me read your question and answer here.
23 You asked him what happened when you reached for it and the
24 answer was, I went down and the rail went and I went too.
25 And then another place you said the rail just went. Do you remember

(TR 50)

Q Now after you came back then in the fall of 1968, how long did you stay at the Augusta Military Academy?

A A couple of months.

Q You stayed there until sometime in November of 1968?

A Yes sir.

Q Were you expelled at that time?

A Yes sir.

Q It had nothing to do with this instance we are talking about here today did it?

A No sir.

Q No connection with this injury you had?

A No.

Q Now when you left there in November of 1968, where did you go to school?

A Washington Lee High School.

Q And where is that located?

A Arlington, Virginia.

Q What year were you in at that time?

A 11th grade.

Q And did you graduate from Arlington High School?

A From Washington Lee High School?

Q Washington Lee High School?

A Yes.

Q And you have made normal progress through your high

(TR 69)

A Yes sir.

Q That's all.

STEPHENSON: I have nothing further.

COURT: That's all, thank you sir. Mr. Stephenson how long will your next witness take?

STEPHENSON: If Your Honor please, I would say that it could depend in part on Mr. Lotz, if we are talking about cross examination, but I would expect it could take some time - if you think that this would be an appropriate time to adjourn for lunch, I would certainly welcome that. There's one other thing that I would like to mention at this time, Your Honor, I believe that it would be helpful for the jury to request a view of the premises, and I would make that request and I think it might be an appropriate time to ask for that just around the noon hour so that if Your Honor thought that it were appropriate for the jury to be allowed to view the premises that it might be the time to adjourn to do that.

COURT: Mr. LOTZ.

LOTZ: I think it's a matter generally made in chambers, to discuss with the Court, and usually done maybe at the conclusion of the trial and not in the middle of it. I have never heard of a jury going to the scene before the case was over, and heard what the facts are.

COURT: Gentlemen, its been our custom here that when a view is taken to take it at the conclusion of the evidence,

(TR 70)

unless there's some peculiar circumstances which would make it more valuable to the jury to take it earlier. So I would take your motion under advisement and then at the conclusion of the evidence we'll consider the matter.

STEPHENSON: All right, I have no preference as to time, Your Honor.

COURT: All right, sir.

STEPHENSON: That's perfectly agreeable..

COURT: What would be the views of counsel as to whether this would be an appropriate time to take lunch? Any objection to taking a lunch break at this time?

LOTZ: We have none, Your Honor.

COURT: I would expect some of the members of the jury normally eat at this time of day. So if there's no objection we'll adjourn for lunch at this time and we'll come back at 1:30, members of the jury. Will that give you sufficient time to get your lunch, that will give you an hour and seven minutes. We'll adjourn until 1:30.

(Lunch Recess.)

MRS. ETTA M. CANEVET, having been duly sworn, testified as follows:

DIRECT EXAMINATION

(TR 75)

Q Mrs. Canevet, you referred to your records, do you have some medical records with you?

A I have some, Colonel Livick has them at the moment.

Q I show you this document, Mr. Lotz - and ask if you can identify those?

A That's a copy of my nursing notes.

Q And does that - is that a copy of the entire nursing notes or medical records that you have pertaining to..

A Pertaining to the injury, yes. This is just sort of a jog memory thing...

Q I'd like that marked for identification.

COURT: Any objections?

LOTZ: No sir.

COURT: All right, it will be identified as exhibit 4.

Q And offer it in evidence if I may as an exhibit.

The nursing notes were marked and received into evidence as Plaintiff's exhibit number 4.

Q Now, Mrs. Canevet, would you tell me please the method that you used of compiling this record, who makes the entries?

(TR 76)

A I do.

Q Did you make all of these?

A Uh-huh.

Q And what are your entries based on?

A What I see, what the doctor says to me in the course of his examinations or his orders to me for treatment as far as - if there's medication to be given, he gives me an order and then I make a note of what is given or what was done.

Q But these are your records that you compiled...

A They are just something for me to have a basis to try and recall some of the things that have happened, yes.

Q Well, Mrs. Canevet, would you tell us then please after Mr. Trigger was transported to the infirmary what - well, first of all would you tell us what examination was made at the scene before he was removed ...

A Well, he had some abrasions - in other words scraped places on the legs and what have you - on the leg that I cleaned up so that I could see how extensive the underlying damage under the blood would be, and dressing s were applied, and then I felt it wise to have him seen by the doctor - the doctor saw...

Q No, at the scene...

A At the scene...

Q Did you clean and apply...

A Not at the scene, no, I just looked to see as best

(TR 95) And when dry sterile dressing daily would be dry sterile dressing daily. It would be done each day, but not with my writing it down since I'm the only one. In the hospital situation, you make a note every time you do anything because you are there eight hours and somebody else comes in and wants to know what you have done, but at A.M.A, I'm the only one that does it and so I make a note this was done, so that I know that I have done what have you or this is to be done daily.

Q In fact Mrs. Canevet are these your notes...

A These are my notes, yes.

Q They were not made under the direction of Doctor Painter?

A No, they are not made under the direction of Doctor Painter. They are made for me to know - to have some idea of what is going on for the person but it's not supposed to be an hour by hour record of anything.

Q And these are the only medical records that were kept to your knowledge at that time...

A That's right.

Q Involving not only Mr. Trigger, but anyone else that may have been in the infirmary?

A That's right.

Q Your witness, Mr. Lotz.

CROSS EXAMINATION

(TR 97) 1 medicine was prescribed by and directed by whom?

2 A Verbal order from Doctor Painter.

3 Q And you made a note of it?

4 A Yes sir.

5 Q And you also testified that you also made notes

6 of what Doctor Painter said to you during his examination?

7 A Yes, occasionally.

8 Q And rather than the doctor sit there and write it

9 down, he would make a comment and you would make notes?

10 A He makes a comment and then....to me, yes.

11 Q And did you ever, other than your initial first

12 day as I recall, which was more perhaps since you were a nurse,

13 when Doctor Painter was called, from that time on was he in

14 complete charge?

15 A He ...

16 Q ...of the case of Mr. Trigger?

17 A He was in charge, yes.

18 Q Now I notice on your nurse's notes and what you've

19 testified to you did not find any injury to Mr. Trigger's

20 knee?

21 A No, I would presume not.

22 Q There's nothing in your notes about that?

23 A No.

24 Q There was no injury to his ankle?

25 A No. The X-ray report I seem to recollect in the

(TR 152). 1 of maintenance at Augusta Military Academy and is a properly
2 concerned adverse witness.
3 COURT: All right, sir.
4
5 JOHN MINOR STAPLES, having been duly sworn, testified
6 as follows:
7 DIRECT EXAMINATION
8 BY: Mr. Stephenson
9 Q Mr. Staples, would you please state your name
10 please?
11 A John Minor Staples.
12 Q What is your address, Mr. Staples?
13 A Box 43, Verona.
14 Q And where are you employed at this time?
15 A State Board of Education at Blue Ridge College.
16 Q Were you formerly employed at Augusta Military
17 Academy?
18 A Yes sir.
19 Q And when were you there?
20 A I went there in '57 and stayed there until March
21 of '73.
22 Q March of 1973?
23 A I left in February, the last day of February,
24 '73.
25 Q What was your capacity at Augusta Military Academy?

(TR 153) 1 A Maintenance.

2 Q General maintenance?

3 A General maintenance, yes sir.

4 Q What were your duties in that connection?

5 A Well, it would be carpentry, sometimes some

6 plumbing, put in glass or just anything around the building.

7 Q Just anything generally that was around there to

8 do?

9 A Yes sir.

10 Q What do you consider your field of expertise, if

11 you have one? Carpentry?

12 A Well, it would be carpentry or most any general

13 construction, because I've been on it ever since I was 16

14 years old.

15 Q That's been your work?

16 A Yes sir. I've been a carpenter, I've been a brick

17 layer and I've had a master plumber card.

18 Q Who was your superior at Augusta Military Academy or

19 was your superior when you were there?

20 A Colonel Wales.

21 Q Is that who you looked to for your orders?

22 A Well, a lot of times Colonel Livick and I have a

23 box - we called it kind of a mailbox, but a lot of times they

24 would put the orders in there, it wouldn't go through Colonel

25 Wales. Colonel Livick might have something and he would just

(TR 154) 1 drop it in my box.

2 Q Now where was your place of work at the Academy

3 in relation to ...

4 A I had a shop down back of the gymnasium beside of

5 the swimming pool or underneath what we called the big room,

6 next to the boiler house, where my shop was.

7 Q The boiler house, the housing for the boilers

8 that provide the various buildings around?

9 A Yes sir.

10 Q Where is that in relation to the barracks?

11 A Oh, it was completely north of the barracks.

12 Q How far away say in terms of walking distance?

13 A 250 yards....200 yards.

14 Q Did you maintain the barracks as part of your

15 duties?

16 A Yes sir.

17 Q And did you walk from your shop to the barracks

18 when you engaged in the maintenance?

19 A Yes sir.

20 Q Did it come to your attention that, Mr. Staples,

21 Watson Trigger the plaintiff in this case was involved in an

22 accident in 19 - the spring of 1968 at Augusta Military

23 Academy?

24 A Oh it come to my attention that somebody had fell.

25 The name had no bearing to me.

(TR 155) 1 Q Did you know the plaintiff as a student?

2 A I may have, I don't know - there's so many boys

3 down there, I won't say I did and I won't say I didn't.

4 Some I knew and some I didn't.

5 Q It came to your attention that someone had fallen,

6 was it more than one person who had fallen or...

7 A I was told that a person fell - that a rail gave

8 way and somebody fell off the second stoop.

9 Q Well, do you know what rail it was that gave way,

10 that caused this student to fall?

11 A I know what rail was down when I got up there.

12 Q Can you tell us?

13 A It was on the second stoop on the side of the

14 tennis court. You can either call that the west side or the

15 south side, but it was the side that the tennis courts are

16 on.

17 Q Well, in terms of walking into the entrance to

18 the quadrangle, where would it be located?

19 A Well, the left side.

20 Q Now are there several different railings attached

21 along that left side?

22 A Yes sir.

23 Q Can you tell us where that would be located in

24 terms of the end or if you would walk in to your left, working

25 forward?

(TR 156) 1 A It would be the third stoop down, the third rail
2 down.
3 Q The third rail down from the end?
4 A Yes.
5 Q Mr. Staples, what did you observe when you arrived
6 on the scene?
7 A Well, the rail was laying on the ground, that
8 was all.
9 Q Can you describe what you saw in terms of the
10 rail or anything that came to your attention - anything
11 particular about it?
12 A Well, my orders were to come and put it back up
13 and I looked around and I got one of the janitors to help me
14 set it up and I looked for bolts and I couldn't find any
15 bolts. And we carried it up on the second stoop and I looked
16 up there for bolts and we couldn't find any bolts up there.
17 So we sat it against the rail while I went down to the shop
18 and got some bolts.
19 Q Were there people around there at the time you
20 came on the scene?
21 A Oh, maybe a few - there's always a few people
22 around there, always. You take four or five hundred boys,
23 there's bound to be a few around at this time of the evening.
24 Q What time of the evening was it?
25 A It was somewhere between 3:30 and 4, because I hadn't

(TR 157) 1 gone home from work yet.

2 Q Well, was Mr. Trigger at the scene when you

3 arrived?

4 A No sir.

5 Q He had been taken away?

6 A Yes sir.

7 Q Do you know any knowledge of how long it had been

8 since this had happened before you arrived?

9 A No sir.

10 Q Who brought you on the scene?

11 A Well, we have guards there - one of the cadets,

12 they have guards that are on duty during the day and he came

13 down with a note from Colonel Livick that the railing had fell,

14 for me to come up and fix it.

15 Q And you received a note from Colonel Livick that

16 day?

17 A Anyway the boy told me that Colonel Livick told me

18 to come up and fix the....I can't say whether it was a note

19 or not or he had just told the boy to tell me. Sometimes...

20 Q I take it that you did receive notes from time

21 to time of - that was the basis of your instructions to do

22 something or not do something?

23 A That's right.

24 Q And you received those by delivery to a box that

25 you had?

(TR 158) 1 A Sometimes - sometimes if it was an emergency he
2 would send a guard down and he would give it to me. Sometimes
3 Colonel Wales would run into me and give it to me, different
4 ways.
5 Q Where was your box located?
6 A As you go in the main entrance on the right there
7 it was - I believe there's a private office - I forget the
8 name right now, but right beside the commandant's office, they
9 have about - all the boxes of all the teachers and lot of
10 them that work there - not everybody, but they have a box with
11 your name on it and that's where mine was most of the time.
12 Q So your box was in place with a number of other
13 boxes, other people who also received different messages?
14 A Yes sir.
15 Q And where was that located in relation to your
16 shop?
17 A Oh, it was - this was up at the main barracks,
18 at the main office, and my shop was at the other end of the
19 campus.
20 Q Now I take it that you made some periodic check
21 of the box for any messages that it might contain?
22 A I went in there first thing in the mornings and the
23 first thing after lunch.
24 Q The first thing after lunch?
25 A Yes sir.

(TR 159) 1 Q Were there any other times that you checked the
2 boxes?
3 A Sometimes I was up there doing the work and I
4 would walk through and see if there was anything in there.
5 Q But you wouldn't have any regular visit...
6 A No sir.
7 Q Except the first thing in the morning and after
8 lunch?
9 A Yes.
10 Q What did you find, Mr. Staples, to be the condition
11 of the premises on the balcony where the guard rail had been
12 fastened, that you found on the ground?
13 A Well, as I said I found a rail and it was nothing
14 damaged except the bolts had been removed.
15 Q How many bolts are there that fasten these guard
16 rails?
17 A Four, two on each end.
18 Q Is there one on each side at the top?
19 A That's right.
20 Q And one on each side at the bottom?
21 A Yes sir.
22 Q What do they fasten to?
23 A Well, they are cement piers and they have holes
24 bored in - some have lead anchors in and some have wood anchors.
25 Q What determines whether you have wood or lead

(TR 160) 1 anchors?

2 A Originally it was wood anchors. Most of the time
3 if we had a railing that - one would come loose we would put
4 in lead. Sometimes we couldn't put in lead because there might
5 be iron or something back in the hole and you couldn't get a
6 lead anchor in and you would put wood anchors back.

7 Q Well, now was this something that made the bolt
8 hole shorter than ...

9 A No sir....no sir.

10 Q Well, what was it that prevented the lead anchor...

11 A They wasn't quite big.....to use a certain
12 type of lead anchors you have to have a certain type hole
13 and if you put your anchor in there and damage it,
14 you couldn't get your bolt in. So it may be enough that you
15 couldn't get your anchor in yet you could get your wood
16 in and still get plenty of hole for your bolt.

17 Q Were the lead and wooden anchors of different size.

18 A No sir. The lead anchors were the same size.

19 Q Were they different....

20 A It would take a 7/8 anchor to fit a 5/8 bolt and
21 we used - I mean ½ inch bolt and we used ½ inch bolts.

22 Q And how long were they?

23 A 2½ to 3 inches.

24 Q Did you sometimes use 2½ inch bolts and sometimes
25 a 3 inch bolt?

(TR 161) 1 A Yes sir.

2 Q Now, did you use the different size bolts in

3 the same length anchor?

4 A No sir we used ½ inch altogether.

5 Q Well, now how long were the anchors?

6 A The anchors was 2 inches, and a half....two and

7 a half was the shortest anchor.

8 Q Let me see if I'm understanding you correctly,Mr.

9 Staples. Are you telling me that you had some anchors that

10 were 2 inches and some that were 2½?

11 A You like for your bolt to be as long as your

12 anchor or a little longer. So it would spread and give good

13 tight.....you always use a bolt as long as your anchor, a little

14 longer helps because it gives you more shoulder and more

15 hold.

16 Q Now your anchor, as I understand it, needs to be

17 longer than the bolt that is inserted?

18 A No sir, you want your bolts longer than your

19 anchors.

20 Q All right.....now.....now, did you in fact have

21 in supply the different anchors that you mentioned, the lead

22 and wooden anchors?

23 A Say that again, sir?

24 Q Did you maintain a supply of the lead and wooden

25 anchors?

(TR 162) 1 A Well, we generally kept them on hand because
2 that wasn't the only place they was used. You used lead
3 anchors around over the school at different places.
4 Q Where did you obtain your supply of anchors and
5 bolts?
6 A Sometimes at Verona Hardware and sometimes at
7 Worthington Hardware here in Staunton.
8 Q Now what determined what size bolts and anchors...
9 A We always used a half inch bolt, sir, but we always
10 used a half inch in size, but I would measure the depth,
11 whether I could use a 2½ or 3 inch before I ever put it in.
12 Q Did you maintain both in stock?
13 A Oh, most of the time. If we didn't and we run
14 out we'd get them, because they was used at different places.
15 Q Well, did you happen to have this one size bolt
16 in supply and you used that even though you may have used a
17 different size bolt if you had that one in stock?
18 A No sir, I never used but the right size, sir.
19 Q What factors, Mr. Staples, did you employ to deter-
20 mine what was the right size bolt to use, between the 2½ inch
21 and 3 inch bolt that you used, to fasten the balconies?
22 A Well, before I engaged a bolt I would take my
23 rule and push in there and measure and see how far it would go.
24 If it was long enough to get a longer bolt in, I did, otherwise
25 I used a short bolt.....2½.

(TR 163)

Q What size hole did you say ...

A Half inch.

Q Half inch hole?

A Yes sir.

Q And the bolt was a half inch bolt?

A Well, the hole that the anchors went in was bigger sir, but we used a half inch bolt with a half hole in the rail.

Q What kind of rule did you use to measure the length of the bolt?

A Regular six foot folding rule with extension on it. The little extension was about 1/8 of an inch, about a quarter of an inch wide and ...I know you've seen rules, folding rules with extensions on the end.

Q Now is the extension then not as wide as the rule itself?

A That's right.

Q And Mr. Staples, what was the condition of the anchor in the columns where this railing had fallen from when you went back to make the repair?

A They was all right, because all I had to put back in was bolts.

Q Pardon?

A The anchors was all right, all I had to put back in was bolts.

(TR 164) 1 Q And what kind of anchors were in place?

2 A I can't tell you that, sir.

3 Q You didn't...

4 A They was tight.

5 Q Pardon?

6 A They were tight, I can't tell you what anchors -

7 whether they was wood or lead, but when I got through they

8 was good and tight.

9 Q Now this was making repairs after the accident,

10 you are talking about?

11 A Yes sir.

12 Q Had there been some other time prior to this

13 incident that you had made some repairs to the guard rails?

14 A That particular guard rail?

15 Q Well, let's take that particular one.

16 A Yes sir, the day before.

17 Q Can you detail for us what repair that you had

18 made the day before to that particular guard rail?

19 A I replaced two bolts that had - that was missing.

20 Q Where were they missing from?

21 A The top - on each side of the rail.

22 Q Were the bolts out all together?

23 A Yes sir.

24 Q How did it come to your attention that the bolts

25 were out?

(TR 165) 1 A Someone give me a note that the - it was in my
2 box, I can't remember now.
3 Q When you say the day before do you remember what
4 calendar day that was?
5 A What calendar?
6 Q Yes.
7 A No sir, the only reason I remember it was the day
8 before was because the first thing I said when I walked around
9 that evening, god, I just put them bolts in yesterday.
10 Q Did you keep any log of...
11 A No sir.
12 Q ...of putting in bolts?
13 A No sir.
14 Q Or any...
15 A No sir. Didn't put in that many.
16 Q You didn't have any record of the maintenance on
17 these?
18 A No sir.
19 Q Balconies?
20 A No sir.
21 Q Do you recall doing anything with the anchors
22 the day before?
23 A No sir. All I did was put the bolts in.
24 Q Now did you also work with other bolts on those
25 balconies the day before?

(TR 166) 1 A Yes sir.

2 Q And how many all together, Mr. Staples?

3 A There was two more on the second stoop and one

4 on the third stoop, there was five all together. At no one

5 time that I was there in 16½ years was bolts removed like

6 that.

7 Q I'm sorry I didn't...

8 A At no time was any bolts removed - I've never

9 replaced bolts before but - maybe I replaced one bolt at a

10 time in all my 16 years there, but that day it was 5.

11 Q Well, now was there anyone else that was engaged in

12 maintenance other than yourself that was involved...

13 A Not ...

14 Q ...with replacing bolts?

15 A No sir.

16 Q Who assisted you, if anyone did, on the day before

17 when you put in these five bolts?

18 A One of the janitors.

19 Q One of the janitors?

20 A Yes sir, he helped me to carry the rail up . Now

21 he didn't assist on the bolts any, he just helped me carry the

22 rail up.

23 Q Now we are talking about at this moment, after the

24 railing had fallen?

25 A Right.

(TR 167) 1 Q Helped put it back in place?

2 A Right.

3 Q One of the janitors helped?

4 A Yes sir, but no ...he didn't help me before.

5 Q All right, he didn't help you the day before?

6 A No sir.

7 Q When you replaced bolts?

8 A No sir.

9 Q Did anyone else help you?

10 A No sir.

11 Q Did Mr. Wales help you?

12 A No sir.

13 Q Did he come around while you were doing it?

14 A I can't remember whether he did, sir, or not.

15 I don't-can't remember.

16 Q How did you find where the bolts were missing

17 the day before that you said you made these repairs?

18 A I just went around and checked them and found

19 they was out. My note said to check the rails for some loose

20 bolts.

21 Q You received a note directing you to the balcony

22 to check loose bolts?

23 A Check the rails.

24 Q Who gave you that note?

25 A I say, I don't remember now, sir, whether it was

(TR 168) 1 Colonel Wales or whether it was in my box. I don't remember.

2 Q I take/this is a note that you did pull from your

3 box?

4 A I'm not saying that sir. I'm not saying I pulled

5 it from the box or whether he gave it to me.

6 Q Did the note designate how many bolts you were

7 to look for to replace?

8 A I don't think so, it just said to check them.

9 Q Check the bolts - it didn't tell you where they

10 were?

11 A No sir.

12 Q And you don't remember whether you went by your

13 box and got this note? Or whether you got it some other way?

14 A No sir.

15 Q How did you get your notes other than in the

16 box?

17 A As I said a while ago, sometimes a guard would bring

18 it down, sometimes Colonel Wales would bring it to me or I

19 might run into Colonel Livick and he would have something.

20 Q Do you recall what the source was of this one?

21 A What the source...

22 Q Whether it was Colonel Livick that gave you the

23 note?

24 A I just said I do not know who gave me that note

25 that day.

(TR 169) 1 Q Where were the other two bolts on the second
2 stoop you replaced?
3 A Well, if you take the tennis court as west side
4 it would be on the north side and east side.
5 Q Well, in relation to the one that we have been
6 talking about here...
7 A All right, one would be straight up to the right
8 of the stairway on the back side and the other one would be on
9 the right, on the second stoop as you go in and the third one
10 would be on the right on the third stoop as you go in the
11 front arch.
12 Q Now were the other 2 bolts in the same railing that
13 you replaced?
14 A No, there was two in the same railing replaced and
15 then there was 1 in one and one in another one and the 1 in
16 the one upstairs.
17 Q So in the railing that you are talking about
18 first, you replaced two bolts?
19 A Yes sir.
20 Q And there were one each in two other railings
21 on the second stoop?
22 A Yes sir.
23 Q And then one bolt replaced in the railing on the
24 third stoop?
25 A Yes sir.

(TR 170) 1 Q Now how did you discover all of the bolts, was
2 it your own personal inspection of the guard railings pursuant
3 to this note, directing you to the site?
4 A The note said check guard rails and on my way
5 around to check them I seen the other bolts were out, sir.
6 Q And in all instances were the bolts missing...
7 A Yes sir.
8 Q That you replaced?
9 A Yes sir.
10 Q Did you take any bolts with you from the shop
11 when you initially went over to check them out?
12 A No sir, so I took the extension out of my rule
13 and measured them to see what depth bolts I could put in and
14 went back to the shop and got them, sir.
15 Q Did you have a supply of bolts in your shop that
16 you used that day?
17 A Yes sir.
18 Q What size bolts did you use?
19 A Half inch by 3 on that particular time, all five
20 of them took three inch bolts.
21 Q Now did you replace any anchors on that day?
22 A No sir.
23 Q Subsequent to the incident of the falling rail,
24 and in connection with your putting that back in place, did you
25 go back tothe railings in which you had inserted the other bolts

(TR 174) 1 on the day before and recheck them?

2 A I walked around the barracks and rechecked them
3 all that evening before I left.

4 Q The evening of...

5 A After I replaced that one - that rail, I went
6 around and checked them all.

7 Q Now, Mr. Staples on other occasions were you aware
8 of bolts being loose or coming out of the guard railing?

9 A Oh, once in a great while, it wasn't no big
10 problem. It wasn't no problem at all.

11 Q What do you mean by once in a great while and
12 what would happen on once in a great while?

13 A Oh, once - one may come loose and I may have to -
14 most of the time when it was loose the anchor - the wood anchor
15 had come loose and would have to take it out and put a lead
16 anchor in, but it very seldom happened.

17 Q Well, now what determined your - let me ask you
18 this, do you know what the initial anchor was as these balcony
19 rails were constructed? Were they wooden or lead?

20 A I would say wooden.

21 Q What makes you say that?

22 A The majority of them was wood.

23 Q The majority of the anchors in the guard rails
24 were wood? Now what determined the use of a lead anchor?

25 A Well, when we replaced them if we could get the lead

(TR 172) 1 in we put lead in because lead has a tendency to last longer.

2 Q And did you tell me earlier that you did have

3 a supply on hand of wood and lead anchors?

4 A Yes sir, because we use anchors on other jobs

5 too, sir, not only that job.

6 Q Where did you use the wood and lead anchors on

7 other jobs?

8 A Well, a lot of times they put up some - hang some

9 pipe or in a plumber deal or put some mirrors or different

10 things, put up a handrail somewheres, we would use the anchors.

11 Q Well, did you maintain your supply of anchors

12 for the servicing of the guard rail?

13 A Yes sir, I kept all supplies in my shop, screws

14 and anchors and...

15 Q And you had had occasion to reinsert anchors

16 previously into the guard rails when they needed that kind of

17 service?

18 A When a bolt would come loose and I would check it

19 and it seemed like the wood anchor wasn't good and I would take

20 it out and put in a lead anchor.

21 Q Now what was it that caused the wood anchor not

22 to be good? That required its being replaced? What was its

23 condition?

24 A Well, it would be kind of soft, or maybe by a little

25 vibration or shaking it made the hole a little bigger and it

(TR 173) 1 wouldn't get tight.

2 Q So the - say that the wood anchor had in some

3 way deteriorated?

4 A I wouldn't say exactly deteriorated. It could be

5 by a little shaking on that rail could make the hole a little

6 bigger in the wood and it wouldn't hold as good. I wouldn't

7 say exactly deteriorated.

8 Q But there were times when the wooden anchors

9 no longer were servicable?

10 A Well, it wouldn't get tight enough to suit me,

11 it might be tight enough to suit some people but it wouldn't

12 me.

13 Q Can you tell me how many balcony rails in all

14 were around this particular barracks?

15 A Oh, I don't know maybe 40 - 45 - neighborhood.

16 I didn't count them.

17 Q 48 to 45?

18 A 40 to 45 and...

19 Q 40 to 45?

20 A That neighborhood.

21 Q Now that's how many levels?

22 A Two levels, sir. We didn't have them on the first

23 level.

24 Q So the second and third level contained the

25 balcony rails?

(TR 174) 1 A Yes.

2 Q Now of those I take it each had four attaching

3 bolts?

4 A Yes sir.

5 Q How many of those would you estimate at the time

6 that we are talking about in April 1968, were wood - had

7 wooden anchors and how many had the lead anchors?

8 A I would say it might be - of all the bolts, it may

9 be a dozen that had lead anchors, the rest of them had the

10 wood anchors.

11 Q Now, have you...

12 A Because it wasn't no big problem and we didn't

13 take them out unless it was a problem and it wasn't a big

14 problem. So the majority of them still had the wood anchors

15 in them.

16 Q Well, when you characterize this as a big problem,

17 I guess you considered it a little problem?

18 A What big problem, I didn't say no big problem.

19 Q You said you didn't have a big problem with

20 them.....did you consider you had a little problem?

21 A It wasn't no problem at all.

22 Q Well, I take it that you did have to perform some

23 maintenance from time to time?

24 A Well, you have to do that to most anything. You

25 do that on your automobile, but it's still not a big problem.

(TR 175) 1 Q These were not maintenance free?

2 A No, you put a bunch of boys around there ain't

3 nothing maintenance free hardly.

4 Q Well, Mr. Staples, do you know how long these

5 balcony rails had been there?

6 A No sir. I imagine from all indications they was put on when it was

7 built.

8 Q So that it had been some number of years that

9 these had been in place, is that correct?

10 A From all indications it was, yes sir. I wasn't

11 there when it was built.

12 Q And is it fair to say that there had been a

13 significant wear and use of the facilities?

14 A Well, these are back in a concrete post and I

15 can't say that that's the only wood. Wood will last a long

16 time when it's not exposed to weather and these rails fit

17 pretty tight.

18 Q Were you the person that was charged with inspec-

19 tion of the b alcony rails to determine if they needed service?

20 A I didn't know it was anybody in charge of it,

21 sir.

22 Q You didn't think you were?

23 A Well, the guard rails were no more problem than

24 anything else.

25 Q Pardon?

(TR 176)

A The guard rails were no problem than any other maintenance around the school, so I didn't know anybody was in charge of inspecting the guard rails.

Q Did you have any maintenance procedure which you followed with ...

A As I walked...

Q To determine if the guard rails were being maintained?

A As I walked around very often I would look at them because when General Roller was living, he always said, that could be a problem. So when you walk around sometimes notice the rails to see if any bolts were loose or anything, before it would develop to a problem.

Q Now you say when General Roller was living, was he your boss at some time previously?

A Yes sir, he hired me, when I went to A.M.A....

Q You came there in the days of General Roller?

A Yes sir.

Q And do you know how long General Roller has been deceased?

A '63 I believe it was. March or April of '63.

Q So prior to that time there was an indication in your communications with General Roller that there could be a problem .....

A It wasn't no problem, but he said just watch it so

(TR 177) it wouldn't be no problem. It never had been a problem when I was there, sir.

Q And he is the one that directed you to watch so that it would not be a problem?

A Yes sir.

Q Did you have any immediate superior in 1968 who directed you to watch it so that it wouldn't be a problem?

A No, just when I walked around I did watch it. I walked around the stoops sometimes five or six times a day.

Q Now Mr. Staples, what happened - could you tell me, I believe you told us that all four bolts were out of this guard rail on the day that you found it fallen to the ground?

A Yes sir.

Q Did you find any pieces in relation to it?

A No no bolts, no sir.

Q Did you find any anchor pieces?

A No sir, because when I put the rail back up I put the bolts back in and they tightened up. I used about a 12 inch crescent wrench or thumb wrench as you might call it.... to tighten them.

Q Now was that your normal procedure of fastening bolts into the rail?

A Yes sir.

Q Do you remember any other notes directing you to

(TR 178)

check guard rails? Other than the one you say that you received the day ...

A Over the years I have received a couple.

Q And did you follow the same procedure when you received notes over the years that you told us you followed this time?

A Yes sir.

Q When you received a note did it tell you to look for specific ones or just check them generally?

A Just said check them generally.

Q Was this on the basis of someone discovering that a bolt was loose or missing?

A It evidently must be, because it just said check the rails.

Q On the other occasions when you checked did you find the bolts loose or missing?

A Over the years I may have found them missing - oh, once or twice, the rest of the time they was loose.

Q Had you ever seen anyone loosen the bolts?

A No sir.

Q I'm sorry in the statement prior to that - did you tell me that you sometimes found a loose bolt or did you always find the bolts missing? On the occasions of their being some problems.

A I don't remember only once or twice finding a bolt

(TR 179) 1 missing, sir.

2 Q Directing your attention, Mr. Staples, to your
3 deposition taken on May 15 of 1973, on page 9 of that deposi-
4 tion. The question to you - now when you say kind of loose or
5 disappear, have you found any that have fallen out at any
6 time? Your answer, no sir, they fell and disappeared.
7 They never were on the floor that they could be found.
8 Now, is that a statement that is consistent with this statement
9 that you've just made?

10 A I was speaking of the day the rail fell sir.

11 Q This is addressed to all the times that you found
12 bolts defective ...

13 A I would say you'd have to read further than that,
14 because I don't believe I made that statement, sir.

15 Q Well, let's read further then. Go back to page
16 8. Now prior to receiving this notice to go and look at those,
17 had you made any other independent inspections? Answer - yes
18 sir, every, periodically we would check the rails because at
19 times the boys had had a tendency - I say boys, I don't know,
20 I never seen no boys take them loose but at times we had a
21 tendency for them to come loose and disappear - the bolts.
22 Now when you say come loose and disappear have you found any
23 that have fallen out at any time? No sir, no sir, they fell
24 and disappeared and they never was on the floor that they could
25 be found. Well, now how did the bolts.....

(TR 180) 1 LOTZ: If it please the Court, there's nothing
2 inconsistent with that statement and what Mr. Staples said...
3 A Because I said I only found one or two that was
4 missing and they wasn't there when I found this one.
5 Q Well, I just understood you to say, Mr. Staples,
6 that usually what you found were loose bolts, and that you
7 didn't find the missing bolts. I think that's the inconsistency
8 we are talking about.
9 A I can't agree with you, sir, because if they was
10 loose they would still be in the hole, but if they wasn't
11 in the hole they was gone. When they wasn't in the hole
12 they was gone.
13 Q Mr. Staples, did it occur to you when this
14 railing fell on the 9th of April that perhaps that was one
15 that you had not given attention to?
16 A No sir....no thought in my mind, sir.
17 Q Well, when was it that you were aware that this
18 was the same railing that you had worked on the day before?
19 A The night I walked up there and saw it was missing.
20 Q Was it the moment that you heard about it?
21 A No, I didn't know which it was until I got up
22 there, sir.
23 Q Can you tell us what was the exact location of
24 the other railing that you had worked on that same day, the
25 other three railings that you had worked on that day?

(TR 181) A One was - directly as you come in the courtyard on the second stoop, one was on the second stoop to your right as you come in. The other was on the third stoop to your right as you come in the archway.

Q Well, now let me see if I can get from you how many places forward they were on the right, on the second stoop. You said it was the immediate one at the end was the first one?

A No sir, it was the third rail again on the right.

Q All right, now which one is this we are talking about, is this where the rail fell?

A No sir.

Q All right, that's the rail...

A The one of the three that you are asking about, sir.

Q All right, I'm trying to get that....that was the third one on the right on the second stoop?

A Yes sir.

Q And where was the next one?

A One as you go up the stairway on the back side, the first rail beside the stairway on the second stoop....we do have a stairway up the back.

Q All right, this would have been next to the back?

A Yes sir.

Q And the third one was located where?

(TR 182) A It was on the fourth rail from the front back on the third - on the right side, on the third stoop.

Q Now in every instance - it's your statement that the bolts were missing?

A Yes sir.

Q Now, Mr. Wales came out there and said he found some of the bolts loose and called it to your attention - would you disagree with it?

A That particular day it was five bolts missing, sir.

Q So if he had said that there were bolts loose that you were called upon to work on, he's likely talking about a different day?

A Yes sir.

Q Is that fair?

A Yes sir.

Q Mr. Lotz, you may examine.

LOTZ: No questions.

COURT: Thank you, Mr. Staples.

LOTZ: Mr. Staples would like to be excused.

COURT: Any objection to excusing Mr. Staples, gentlemen?

STEPHENSON: I don't think I have any objection, Your Honor, but it would be a possibility that I might want to recall him in rebuttal, but I don't foresee that that would

(TR 195) 1 Q You learned that there was ...

2 A One missing on the third floor.

3 Q One missing on the third floor, how did you

4 learn that?

5 A Sir?

6 Q How did you learn that?

7 A I went around looking at some more of them.

8 Q You inspected it yourself?

9 A Yes.

10 Q Discovered it?

11 A Yes sir.

12 Q Now when you found one on the third floor, was

13 the bolt missing or loose?

14 A It was gone.

15 Q Colonel Wales, did you investigate or inspect all of

16 guard rails at that time?

17 A On that particular date I did, yes sir.

18 Q And did you find any others that had missing or

19 loose bolts?

20 A I did not, no sir.

21 Q Pardon?

22 A I did not, no sir.

23 Q Had you investigated whether Mr. Staples had

24 made any repairs to any others?

25 A Did he make any other repairs?

(TR 196) 1 Q Did you investigate...

2 A Not to my knowledge.....other than the two on the
3 second and the one on the third. If he did I didn't know it,
4 sir.

5 Q To your knowledge you had the two bolts which you
6 knew about that you sent him on and the one that you discovered
7 on the third stoop?

8 A Yes sir.

9 Q Did you inspect Mr. Staples' work in making
10 the repairs?

11 A I was there part of the time while he was working
12 on them, talked with him, watched him.

13 Q Did you assist him?

14 A I did not, no sir.

15 Q Had this sort of thing occurred previously that
16 you had gotten a note directing to your attention that there
17 were bolts loose or missing on the railing?

18 A Yes, it has happened on different occasions, yes
19 sir.

20 Q And did you follow the same procedure previously
21 that you followed this time?

22 A Yes sir.

23 Q Was there any occasion that you recall that a guard
24 rail had become detached all together from the...

25 A No sir.

(TR 197) 1 Q ....balcony?

2 A No sir.

3 Q This was the first instance of that?

4 A That I know of, yes sir.

5 Q But it was not the first instance of the bolts

6 being displaced?

7 A Not the first time one bolt would be gone, no

8 sir.

9 Q Now how were the bolts fastened?

10 A Into the pole you mean?

11 Q Yes.

12 A Lag bolts.

13 Q Well, were they fastened into some receptacle or

14 anchor or directly into the concrete?

15 A They were into a wooden anchor or lead anchor.

16 Q What determined whether you would have them fasten-

17 ed into a lead or wooden anchor?

18 A In some cases the lead anchor would not be suffi-

19 cient, we had to use a wooden anchor.

20 Q What determined, Colonel Wales, that it was in-

21 sufficient so that you used the lead anchor,was that a policy

22 decision that you made as the superintendent of buildings and

23 grounds?

24 A Well, it had been going on for a good while before

25 I can remember being superintendent of buildings and grounds.

(TR 1991)

A Well, if I was not there and I instructed him to go ahead and repair the guard rail, he could use his own judgment.

Q Now when you learned of these missing bolts did it occur to you that that sort of thing had danger for people who were using the balconies, Colonel Wales?

A I couldn't answer that...

Q Did it occur to you that there was any danger?

A I don't know how they got missing.

Q Now, who in fact was using the premises, the stoops?

A Yes...

Q That contained the guard rails?

A Yes sir, the cadets.

Q Pardon?

A The cadets.

Q The cadets, the students who were enrolled in Augusta Military Academy?

A Using the building, yes sir.

Q Were there any warnings given to them that concerned bolts being out of the guard rails and any danger to them as a result of their not being safe?

LOTZ: Your Honor, I object, there's no reason to issue warnings when proper maintenance is made as indicated here in this case The bolts were put in the same day and perfectly solid anchors so no reason to issue a warning.

(TR 200) 1 There's no reason he should have to issue a warning.

2 STEPHENSON: If Your Honor please, I think that
3 here is the very heart of this case....this is the issue,
4 whether or not they were being properly maintained and they
5 were reinserted in the solid anchors. I think we have enough
6 testimony already coming from these witnesses about the nature
7 of the anchor, the deteriorated wooden ones and the replace-
8 ment of leaden - lead anchors from time to time to let us think
9 that we have a real question on the satisfactory maintenance of
10 this equipment and I think it goes to the very heartof it.

11 COURT: I think you may ask the witness what was done,
12 Mr. Stephenson, I think as to what the duty was is something
13 that it's up to someone else to determine. I think you might
14 ask him what was done.

15 Q I think that's what I've asked him, Your Honor.
16 I've asked him if he gave any warnings. Did you give any
17 warnings to the students that were using those balconies?

18 A I did not, no sir.

19 Q Do you know of any other warning that was given
20 at any time to them?

21 A I don't know of any warnings that were given to them,
22 but not from me or my people.

23 Q Did you examine, yourself, these anchors in the
24 bolts,that housed the bolts that had come loose, that came to
25 your attention?

(TR 202) 1 Q What about on the following day, when this broken
2 rail that had fallen down to the ground with all four bolts
3 missing was reinserted, do you know what method was used to
4 reattach it?
5 A The railing was reinstalled when I learned of the
6 incident.
7 Q Did you investigate to determine how it had been
8 reinstalled?
9 A I did not go in and look to see what the anchors
10 were, no sir.
11 Q Was it your job as superintendent of buildings
12 and grounds to be on top of those things?
13 A I was there while he was working on it and when he
14 got through with it I would say it was secured.
15 Q And is this because you assumed that he had done
16 it correctly?
17 A I would say so, yes.
18 Q Now Colonel Wales, knowing that you had problems
19 that you have told us about from time to time of bolts coming
20 loose or being missing from these guard rails, did you at any
21 time consider any better method of attachment than what had
22 been used through the years?
23 LOTZ: Your Honor, I believe we should hear this
24 in chambers. This is the same procedure we are usually
25 heard.

(TR 204) 1 LOTZ: Well, he's started to read a discovery
2 deposition - he can ask the witness if he wants to and we
3 don't feel it's particularly relevant, what's happened ...
4 COURT: I think that's the direct approach, ask him
5 what the problem has been in the past and then if the answer
6 is contrary to the former statement...
7 Q I thought I had, Your Honor, but if I haven't,
8 let me...
9 COURT: All right.
10 Q ...proceed to do that.
11 COURT: All right, sir.
12 Q Colonel Wales, would you tell us please as you
13 have been at Augusta Military Academy through the years in the
14 capacities that you have told us you had there, have you
15 from time to time experienced problems with the guard rails?
16 A Yes sir.
17 Q And what is the nature of those problems?
18 A Bolts would be missing or loose.
19 Q And what else? Have you found a railing loose?
20 Railings loose?
21 A Well, the railing would be loose if the bolts
22 were loose, sir....two bolts or one.
23 Q And sometimes would the bolts be gone?
24 A On occasions, yes.
25 Q And sometimes they would be loose?

(TR 205)-1 A Yes sir.

2 Q And how long has that sort of thing gone on?

3 A A Number of years you mean - I would say from

4 1938- '39 = '44,'45 I know of.

5 Q Way back that long?

6 A Yes sir.

7 Q And even when you were a student there you knew

8 about those problems?

9 A Yes sir.

10 Q Now there came a time I gather and we are talking

11 about the same balconies, the same guard rails?

12 A Yes sir.

13 Q That were in place when you were a student?

14 A Yes sir.

15 Q And that was in the 1930's?

16 A Yes sir.

17 Q Now there came a time when you left the ranks of

18 a student and you became associated with the Augusta Military

19 Academy in an employment capacity as you have told us?

20 Is that correct?

21 A That's correct.

22 Q And there came a time when the maintenance of these

23 same facilities came under your jurisdiction in your capacity

24 of superintendent of buildings and grounds, isn't that correct?

25 A Yes sir.

(TR 206) 1 Q And I take it that you knew about the same
2 problems that you recall that you had known about prior to
3 assuming that position, in your capacity as superintendent of
4 buildings and grounds?
5 A Yes sir.
6 Q Now Colonel Wales, recognizing that you have just
7 told us that this has been a problem of longstanding from
8 early - from in the 30's when you were a student and continuing
9 through the years, including the time that you have been in
10 your capacity as superintendent of buildings and grounds,
11 have you considered when you were in this capacity a better
12 method of maintenance of those facilities or any different
13 methods of maintenance...
14 LOTZ: Your Honor, we object to the question.
15 Q Except what we have talked about here today?
16 COURT: I'll save your point on that, Mr. Lotz.
17 LOTZ: He hasn't ask him how often - every five
18 years or three years.
19
20 COURT: I'd really like to know the extent of this
21 problem, whether this was a problem - he said it had been a
22 problem for a long time, but I don't know whether it happened
23 once a year or once every five years or what. I'd like to know
24 a little more about it.
25 Q Well, how often would you find loose bolts, Colonel

(TR 207) 1 Wales?

2 A I couldn't give you any specific period or
3 lapse of times, no sir. It may be one or two years that I
4 never heard of any.

5 Q But sometimes it would be several times a year?

6 A Then it may be two or three a year maybe.

7 Q But there had been a good many years in which
8 there had been several instances that you know of?

9 A I can't say a good number of years, no sir.
10 I'd say some years.

11 Q But there had been some of the years that..

12 A Some years not any...

13 Q ....there were several instances?

14 A Some years there had been none.

15 Q Well, prior to this incident in April of 1968,
16 had you given any consideration to any different maintenance
17 procedure than had been followed?

18 LOTZ: Mr. Stephenson, I'd like the Court to rule on
19 that.

20 COURT: I think I'm going to let him ask the
21 question now.

22 LOTZ: Note exceptions...

23 COURT: All right, sir....all right, go ahead.

24 Q Had you given any ...

25 A I have not no sir. I did not go over any other

(TR 208) 1 procedure.

2 Q You did not know of any other procedure?

3 A No sir.

4 Q Have you subsequently learned of any other

5 procedure?

6 LOTZ: Objection, Your Honor.

7 A Yes sir.

8 COURT: I'm not sure gentlemen you can go into some-

9 thing that's come about more recently. I'm not sure we can

10 go into that, now.

11 Q The Court will respectfully note my exceptions.

12 Colonel Wales, did you investigate the method used for reaffixing

13 the balcony employed by Mr. Staples when he reattached it after

14 it had fallen down on April 9?

15 LOTZ: I thought he asked that once, Your Honor. He

16 said he saw Mr. Staples do it and was there.

17 Q I believe on April 9 he said he was away.

18 COURT: He said he was there and watched him as I

19 understood it.

20 Q Well, tell us again if you would whether you

21 were there on April 9?

22 A I was not there the day of the accident, the

23 afternoon of the accident. I was there the morning following,

24 after he had installed the railing. I was not there when he

25 started to work on it.

(TR 238) 1 to determine.

2 COURT: Gentlemen, I would rule that it is at this
3 point a jury issue, so I'll overrule the motion, and save the
4 point.

5 STEPHENSON: If Your Honor please, I would like at
6 this juncture as - you know, as we were taking up some matters
7 in chambers yesterday without the reporter with the understanding
8 that later on, we would note on the record...

9 COURT: Yes.

10 STEPHENSON: Some exceptions to the rulings made in
11 chambers when we were taking these matters up.

12 COURT: Yes.

13 STEPHENSON: One of them was the - my objection to
14 injecting into the case any evidence concerning Mr. Trigger's
15 subsequent dismissal from school that had no relation to the
16 incident involved in this suit. And, the Court then ruled that
17 it could be brought out by the defendant that the plaintiff
18 was expelled from school subsequently, but limit it to that.
19 To which I indicated I wanted to note my exceptions, as this
20 being a prejudicial thing and incompetent, immaterial, and
21 irrelevant to the issues in this case.

22 COURT: Any other matters?

23 LOTZ: Yes, Your Honor, at the opening of the case
24 yesterday we raised the point that the plaintiff had not proved
25 his medical expense . . .

(TR 239) 1 COURT: Mr. Lotz, you may want to reply to this...
2 excuse me, you may want to reply to this. I think it might
3 be well if you give the reason that you gave the Court...
4 LOTZ: All right sir, in reply to the comment of
5 counsel for the plaintiff, the question - the only reason
6 this was used and the Court ruled we could not show the reason,
7 although we thought that was inadmissible to show
8 in as much as it would show that the - he was absent from the
9 campus, the defendant had committed a crime. The second point
10 we made was that it was to show the bias or prejudice of
11 the plaintiff against the Augusta Military Academy, that found
12 it necessary to require him to leave. Second thing I wanted to
13 bring for the record, Your Honor, we were assured yesterday
14 by counsel for the plaintiff that the question of damages,
15 medical expenses being proven by the plaintiff was no problem,
16 and we had suggested at that time that the proper way to do
17 this was with the plaintiff's mother to sign a written waiver
18 and file it with the records of the Court, which the Court of
19 Appeals said is a proper way to do it. We were not advised
20 at that time that Mrs. Trigger was not even here. And I
21 think we must have a commitment from counsel for the plaintiff
22 that he is her attorney and that he is authorized to act for
23 her and state for the record that she waives any claim at a
24 later date to prove the medical expenses incurred by her son.
25 For this reason, Your Honor, that this is still not barred by

(TR 240) 1 the statute of limitations.

2 STEPHENSON: I will so stipulate....for the record.

3 COURT: Very well. Any other matters?

4 STEPHENSON: Yes sir, I just want to make one

5 comment in response to Mr. Lotz's answer that he put on the

6 record, as I heard it he made some reference to a crime on

7 the outside. I want the record to show that there is no

8 evidence of any prosecution of any crime nor any conviction

9 thereof...of the plaintiff.

10 LOTZ: Your Honor the defendant would have admitted

11 - - the plaintiff would have admitted it in discovery depositions but didn't.

12 STEPHENSON: I want to say that any information that

13 you obtained was over my objections, there. So that any

14 admission was going on as we do in discovery over my objection

15 and should not have been allowed when you consider the

16 ruling.

17 COURT: In any event gentlemen the record should clearly

18 show the jury, that no information has gone into the record in

19 this case, which was available to the jury that he may have

20 committed a crime and that may have had some bearing on his

21 dismissal.

22 LOTZ: The plaintiff intends to offer the testimony

23 of Doctor W. T. Painter, taken as evidence in this case and

24 we would like to have ...

25 COURT: The plaintiff?

(TR 241) 1 LOTZ: Defendant. In view of the fact that after
2 Doctor Painter was served with a subpoena he indicated he
3 had long-time plans to be out of the State of Virginia at the
4 time this case would be tried, and by agreement of counsel
5 his deposition was taken to be read in evidence. The Court
6 in considering the objections to this made by plaintiff,
7 indicated that on page 7, beginning with line 2 and through
8 line 25 and through line 1, page 8, that the Court would not
9 permit this to go into evidence in this case. My point is
10 that there was no objection as to this evidence at the time
11 of the taking and we feel that we should be permitted to read
12 the entire transcript to the jury. Parts intimated - referred
13 to by Doctor Painter have also been testified to by Mrs.
14 Canevet.
15 COURT: Do you have any response to that, Mr.
16 Stephenson?
17 STEPHENSON: I thought we had already made those
18 arguments ...
19 COURT: Yes, but not in the record.
20 STEPHENSON: Oh, I'm sorry - I'm sorry that - I
21 thought this was addressed to asking you to change your ruling...
22 COURT: No.
23 STEPHENSON: I'm sorry.
24 COURT: I don't think so.
25 LOTZ: No sir.

(TR 242) 1 COURT: Just putting it in the record.

2 STEPHENSON: The response that we made to that,
3 is that the objection was raised based on a review of this
4 transcript and the determination that Doctor Painter's
5 testimony at this juncture as far as the deposition was
6 based on hearsay. In that he testified that he kept no
7 records himself and that he was referring to the nurse's
8 records and that he had no independent knowledge of this
9 matter. So that what he was doing in his testimony there was
10 basing it on only hearsay. That was our position.

11 BALTHROP: Your Honor, I would like to add to that
12 that we were not aware, he had led us to believe in earlier
13 statements, saying such things as I have no record of this,
14 that or the other, what have you, that these were his records,
15 and it was only at a later point in his deposition that we
16 were able to determine that these in fact were not his
17 records and they were the nurse's records. And I believe I
18 did make an objection to the question that elicited all this
19 testimony, that I indicated to you earlier here.

20 COURT: Yes sir, and gentlemen in that connection, I
21 think possibly we should also omit page 6, lines 21 through
22 25, ...

23 LOTZ: What page Your Honor?

24 COURT: On page 6, lines 21 through 25, and that's
25 simply the question which brought about this answer, which I

(TR 243) 1 feel is improper. Anything else gentlemen?

2 STEPHENSON: We want to put all these things on

3 the record, Your Honor. There was the matter of Doctor

4 Palumbo's medical deposition, which he was in terms of giving

5 the history, he stated that he saw a diagnosis of Doctor

6 Diamant and that he agreed with Doctor Diamant's diagnosis of

7 a nerve impairment and that was excluded by the Court as

8 hearsay. To which I objected in as much as there was no

9 objection raised at the time the question was put to Doctor

10 Palumbo and this came later. Objection was not raised at the

11 deposition and in addition to that, Doctor Palumbo was giving,

12 was taken this as a part of the overall history in making his

13 own diagnosis.

14 COURT: Do you gentlemen care to make any reply to

15 that?

16 LOTZ: No sir.

17 STEPHENSON: To which ruling I excepted.

18 COURT: All right, gentlemen, anything else?

19 LOTZ: Yes sir. Your Honor, the plaintiff yesterday

20 sought in the presence of the jury to move that a view be

21 taken and we pointed out to the Court in chambers that we

22 didn't think this was proper, because about two years - a year

23 and a half or two years later, they used a different method of

24 fixing bolts - adopted it, which themselves according to the

25 information . . . . . We do have and be glad to

(TR 244) 1 put in the record today a photograph, which I think Colonel
2 Livick has taken, to show how these things are - just an
3 overall view of some of the facilities. And another thing,
4 Your Honor, this is over five years and I'll be glad to
5 put one of these in.
6 STEPHENSON: I think the time would have to do
7 with whether there has been any change in the conditions,
8 which they are assuming. . .
9 LOTZ: The bolts are different. . .
10 STEPHENSON: I would say that, you know, my response
11 to the pictures, Your Honor, that when they are proffered
12 in evidence you know we would have the right to investigate
13 the authenticity and the normal things that you would inquire
14 into. . . .about any exhibits that are offered.
15 COURT: Gentlemen, I would be at this point unless
16 there is some evidence which is brought in by the defendant,
17 I would be inclined to deny the motion for a view. For the
18 reason that I don't believe that a view would be of assistance
19 to the jury in making the factual determinations as I see them.
20 Now often-times I'll as the jury whether they feel that a view
21 would be of assistance to them, because they've got to determine
22 the matters of fact, but I think in this case I would not at
23 this point - unless there's some evidence which would come in
24 that would change my mind - I would not feel that I would put
25 that question to the jury in this case. But I will continue

(TR 245) 1 this motion under advisement until all the evidence is in.

2 LOTZ: Your Honor, I can't vouch for the authenticity

3 of the snap-shot. I think Colonel Livick and Wales could

4 identify this as one that was taken several years ago. It is a

5 snap-shot showing some of the railings. It doesn't purport

6 to show. . .

7 BALTEROP: Do all of these pictures purport to be

8 recent or. . .

9 LOTZ: One of them was taken since the trial

10 yesterday. The other one was taken, as I understand it, in

11 1970.

12 COURT: All right, sir. Are you gentlemen ready

13 to proceed?

14 LOTZ: Do I understand that the plaintiff objects

15 to a view of these?

16 STEPHENSON: I wouldn't know until they are proffered.

17 BALTEROP: I think we should have some - either a

18 view or snap-shots entered to show the jury.

19 COURT: All right, gentlemen we'll cross that bridge

20 when we get to it and . . .Sheriff, will you get the jury

21 please.

22

23 (Jury returns to courtroom)

24 COURT: Good morning members of the jury. Members of

25 the jury we started on our motions at 8:30 this morning and it

(TR 248) 1 Q Well, tell the Judge and the jury what you know
2 about that?
3 A I was getting ready to leave the school grounds
4 in the afternoon....I'm not sure exactly of the time, when a
5 faculty member and again I'm not positive whether it was the
6 officer in charge or just one of the faculty members who was
7 at school, told me that two boys had fallen from the second
8 stoop. I parked the car, went into the courtyard and
9 to the best of my memory at that time Watson and Bill McLaughlin
10 had both been taken to the infirmary by the time I got into
11 the courtyard, but I did see the rail was gone from the second
12 stoop and I remained there until Mr. Staples took the railing
13 back up and started replacing it.
14 Q Were you able to determine what the problem
15 with the rail was?
16 A I was told that the bolts had been taken out...
17 now this was...
18 STEPHENSON: Your Honor, I do not express any objection
19 to the hearsay coming in, but I think we are, you know, in the
20 critical area of what happened. I think he's soliciting from
21 this witness what he knows of his own knowledge and not what
22 he was told and I think we should confine the testimony about
23 this subject to that.
24 Q Just confine your remarks to what you yourself
25 actually know about it.....what you observed there at the time.

(TR 249) 1 A All right the railing was - had fallen from the
2 second stoop and in checking and - we could find no bolts in
3 the courtyard, which led me to believe that the bolts had
4 been loosened and taken, though this was subsequently not
5 proved.
6 Q Do you have any....
7 STEPHENSON: Objection to this, this is conjecture
8 on the part of the witness. I think not responsive to the
9 question.
10 COURT: I think I would have to agree that that's
11 correct and I think conjecture - I think Colonel that we'll
12 just have to tell the jury what you actually found and leave
13 the inferences to them.
14 A All right, sir.
15 Q Did you have any notice at any time prior to
16 then that there had been any loose bolts before you found
17 out about this accident?
18 A I'm not positive in my memory whether I was told
19 about loose bolts following the accident or if I knew about
20 some just prior to. I'm vague in my memory about this now.
21 I was told at some time, again I don't know whether this was
22 just before or following, that there had been reported that
23 there were loose bolts. I was told that these bolts in this
24 same railing had been found loosened the day before and that
25 they had been fixed.

(TR 252) 1 corrections to the guard rails?

2 A To make the corrections themselves?

3 Q Yes.

4 A Mr. Staples.

5 Q All right. Colonel Livick, I want to show you this

6 photograph and ask you if you can identify it?

7 A Yes, this is a picture of a portion of the

8 - it's the south side the side towards the tennis courts of

9 the main barracks.

10 Q So were you present when that picture was taken?

11 A Yes I was.

12 Q When was this picture taken?

13 A It was taken last night.

14 Q And does it accurately depict the side of the A.M.A.

15 dormitory that it was taken of?

16 A Yes.

17 Q Now how many, have you had occasion to determine

18 how many of these guard rails there are?

19 A Yes.

20 Q How many are there?

21 A 67, not counting the metal stairway on the back.

22 There is some railing there but it's a different type railing.

23 Q I'd like to offer this as...

24 COURT: Any objection, Mr. Stephenson? Any objection

25 to the admissibility of this photograph?

(TR 253) STEPHENSON: I think not, Your Honor. I trust that on cross examination I'll be able to examine on it.

COURT: All right, sir.

The picture was marked and received into evidence as Defendant's exhibit number A.

STEPHENSON: I do think Your Honor, that subject to my examination on it, I may you know have an objection if it doesn't fairly represent the condition that existed at the time.....

Q Well, we could be....I'll be glad to have him cross on that particular purpose right now.

COURT: Suppose you proceed to ask Colonel Livick any questions you may care to ask on that subject at this time.

XVII. CROSS EXAMINATION

BY: Mr. Stephenson

Q Colonel Livick, I take it this photograph shows basically some six railings in their entirety with a little piece of the 7th and 8th is that...

A Right, I did not have an expert photographer.

Q Now and you state that this is a photograph of the south ...

(TR 254) 1 A A portion of the south...

2 Q Side.....

3 A Yes sir.

4 Q And where is it in relation to the end of the

5 south side in terms of its proximity to the entrance?

6 A Where we meet another stoop?

7 Q Yes sir.

8 A Or balcony. The front of the main barracks

9 would come in at this end - in other words this balcony would

10 run into it.

11 Q Well, is the left side of this photograph at the

12 end of the rooms on the southside in the closest proximity

13 to the entrance? Or is this somewhere in the middle?

14 A No, this would be the closest right here.

15 Q Closest?

16 A Right.

17 Q Now can you locate on this photograph the room

18 that was occupied by the defendant and the railing that would

19 be in front of the room which he occupied?

20 A Only through ...

21 Q I'm sorry, the plaintiff, Mr. Trigger...

22 A Only through what I heard in the courtroom yester-

23 day. In my deposition in May I stated that I didn't know

24 exactly which room Mr. Trigger lived in at that time.

25 Q Well, assuming that his testimony is correct and he

(TR 255) 1 lived as he said in the room that was the second from the
2 end of the court or the end of the - of the place in the
3 closest proximity on the south side to the entrance..
4 A If it were..
5 Q And on the second floor, which would that be
6 if it is shown in your photograph?
7 A If it were the second, it would be this right
8 here.
9 Q Did your picture not get the first one in?
10 A It did not get the first one, and it was stated
11 here yesterday that he lived in 215 I believe - I'm not sure,
12 but...
13 Q And that would be the second one?
14 A It would not be, this is the second one right here...
15 from the end.
16 Q Well, is that room 215?
17 A No, I don't believe it is - I think this would be
18 215.
19 Q Now would you tell me if these railings that are
20 shown in this photograph, taken yesterday, are of the same con-
21 dition that they were in when they - on April 8 and 9 of 1968?
22 A The railings are in the same condition, that's
23 right.
24 Q Have there been any other things that maybe shown
25 on the photograph that have not...

(TR 256) 1 LOTZ: The Court has ruled in chambers that this was
2 not admissible and I don't know how counsel can possibly
3 pursue it.
4 COURT: Uh...
5 STEPHENSON: I think Your Honor that this has been
6 proferred by the defendant and that I'm entitled to ascertain
7 whether or not there are anythings in this photograph - any
8 matters in this photograph that were not there....if this has
9 been presented to the Court to represent to the jury what the
10 picture is, I think we are entitled to know.
11 LOTZ: This was proferred we said before out of
12 the presence of the jury and is merely to show what the railings
13 look like.
14 COURT: Gentlemen, maybe I'd better discuss this
15 matter with you in chambers. Let's take a minute.
16
17 (Counsel and Court confer in chambers.)
18
19 COURT: Gentlemen, we can put these matters in the
20 record at a later time.
21 Q Colonel Livick, can you tell us if this photograph
22 that you've taken last evening is representative of the condi-
23 tion of the balcony rails as they existed on April 8...
24 COURT: That's not quite the question that the Court
25 approved, Mr. Stephenson. The Court approved the proposition of

(TR 257) 1 whether or not this picture portrayed the situation...

2 Q All right, portrayed the situation ...

3 COURT: As it existed at the time of the accident.

4 Q As it existed at the time of the accident?

5 A If I understand your question properly.....

6 Q If I recall that's the only question I'm permitted

7 to ask, Your Honor, so....

8 COURT: Well, I think there are some restrictions on

9 you, yes sir.

10 STEPHENSON: I would...

11 COURT: In other words the question is whether this

12 photograph shows the railing as it appeared at the time of

13 the accident?

14 A It does yes.

15 Q There are some other questions...

16 COURT: Yes sir.

17 Q That counsel would desire to...

18 COURT: Yes sir.

19 Q ...ask about this photograph, Your Honor, and

20 if there is a ruling that I'm not permitted to, I would like to

21 respectfully note my exceptions.

22 COURT: All right. Members of the jury I know this

23 might seem a little unusual to you, but from time to time

24 during this trial and during every trial counsel on one side

25 or counsel on the other side object to certain questions and it's

(TR 258) not that they are trying to keep anything from the members of the jury. We have certain rules of evidence which we have to follow and they are just trying to make very sure that only proper evidence goes to the jury. So these objections that these gentlemen make on both sides, you shouldn't assume that they are trying to keep anything from you. They are simply trying to try this case according to the proper rules of evidence. I just want to say that to you.

COLEMAN: If it please the Court, I'd like to tender this as an exhibit for the defendant and show it to the jury.

COURT: Any objection Mr. Stephenson ?

STEPHENSON: Well, in view of my not being permitted to inquire further into it Your Honor, I would interpose objections, because I think there are some matters to me that would come before the court if I could inquire further. Now on that basis you may rule its admissibility...

COURT: Wait a minute gentlemen, I think if there is an objection, I think I'm going to not enter it, Mr. Coleman.

COLEMAN: All right sir.

LOTZ: We respectfully note our exceptions, Your Honor.

COURT: Yes sir.

XVIII. REDIRECT EXAMINATION

BY: Mr. Coleman

Q I'll ask you Colonel Livick how many guard railings

(TR 259) there are at A.M.A. that were at the time of this accident?

A 67 guard rails on the stoops, on the two stoops.

Q Now could you tell the jury what the condition Of the courtyard below where Watson Trigger fell is like? What is its composition?

A Well, the barracks is built, of course, on a quadrangle with a courtyard in the middle and the center of the courtyard we have crosswalks and a - what we call a bell tower. In the very middle. The rest of it is grass.

Q Is there any - or was there at the time of the accident any concrete in the courtyard below the guard rail where Mr. Trigger fell?

A Of a permanent nature? No.

Q Did you notice any there when you arrived on the scene in 1968?

A No I did not.

Q No further questions.

XIX. RECROSS EXAMINATION

BY: Mr. Stephenson

Q Colonel Livick, let's go back to what you did notice at the scene. Do you have a recollection of what the composition was immediately at the point where Mr. ....where you believe Mr. Trigger fell? You didn't see him on the ground itself?

(TR 260) 1 A I do not recall, sir, seeing him on the ground,
2 no.
3 Q Did you - do you have a recollection of having
4 examined the ground around that place at the time?
5 A No I did not make an examination except to look
6 around and say where are the bolts.
7 Q You didn't make a thorough inspection you could
8 say of the particular area?
9 A I think thorough inspection would need some interpre-
10 tation, I didn't get on my hands and knees, no.
11 Q Well, at that point was the railing lying on the
12 ground?
13 A Yes.
14 Q And where was that located?
15 A As far as I can remember it was down in front
16 of where it had fallen. It was on the grass.
17 Q Well, now, knowing of the injury sustained by
18 Mr. Trigger at the time and being familiar with his confinement
19 in the infirmary for over a month and his out-patient treatment
20 subsequently, and your having been here through the entire
21 testimony, how do you account for the injury that occurred to
22 this leg, as he described it, on the other side, do you have
23 any...
24 COLEMAN: I object to that, Your Honor, as asking
25 for a conclusion. He can just testify as to what he saw and

(TR 279) 1 A Lateral part - the lower part of the lower
2 leg posterior-laterally. Now let the record say that
3 posterior, that's the back part of the lower two-thirds
4 of the leg.
5 Q Was there any apparent injury to the knee?
6 A I have no record of there being any injury to
7 the knee.
8 Q All right, and what treatment did you conduct
9 or prescribe after you had examined Mr. Trigger?
10 A Well, he was put to bed and the extremity elevat-
11 ed and cold applications applied.
12 Q Was there any resultant surgery to the leg?
13 A Only for the incision and drainage of the accumulat-
14 ed blood under the skin. This was done several days after
15 the injury when it became apparent that this accumulation
16 of blood wouldn't resolve itself. And before that he was
17 treated with enzymes, that is, or enzyme. It's a preparation
18 that's supposed to help facilitate the absorption of such
19 injuries at least it was in popular use at that time.
20 Q Was this an incision of the skin that you describ-
21 ed?
22 A Yes, only the skin.
23 Q All right, was there any apparent injury to the
24 Achilles tendon?
25 A If there was- I have no record of there being any

(TR 280) 1 injury to the Achilles tendon.

2 Q Did you describe limitation of his activities?

3 A He was confined to the infirmary and to the bed

4 for that matter as a means of observation until it can be

5 better determined as to whether he did have any more extensive

6 injuries than was apparent ...

7 Q When did you last treat Mr. Trigger?

8 A Well, he was maintained under surveillance

9 right up to the time he left the school. And when he left

10 school in the latter part of May, according to records, he

11 still had some - was having some drainage from this sacular

12 area that underlayed this abrasion.

13 Q When you released him or when you last saw him

14 did you detect at that time or any time prior to that that there

15 had been injury to the knee, that you hadn't detected earlier?

16 A I have no notation of any appreciable damage to

17 his knee. Apparently this was not a complaint that was pre-

18 sented to us even after ambulation, that is after he was up

19 and about. Now I assume that this would have been mentioned

20 of course in treatment thereof.

21 Q I have no further questions.

22

23 XXI. CROSS EXAMINATION

24 BY: Mr. Balthrop

25 Q Doctor Painter, what is your basic association with

(TR 281) 1 Augusta Military Academy?

2 A I am the school physician.

3 Q Do you have any other interests in the Academy

4 other than medical practice?

5 A That's all.

6 Q Approximately how much of your time do you

7 devote - what percent of your day let's say on the average

8 would be devoted towards students at A.M.A.?

9 A Whatever fraction of the day is necessary. This

10 averages sometimes 15 minutes, sometimes half hour, maybe

11 an hour, depending upon the amount of sickness.

12 Q And when you first examined the plaintiff, Watson

13 Trigger, you say on the day that he had the accident, on the

14 date of the occurrence?

15 A According to the record that's when ...

16 Q When you say records, what records do you

17 actually keep?

18 A These records are kept by the nurse.

19 Q You yourself keep no records of your treatments?

20 A No, she keeps the records.

21 Q So the only records then of the treatment rendered

22 to a student at Augusta Military Academy would be the nurse's

23 records you keep no record yourself?

24 A She doesn't keep her own spontaneous records. She

25 keeps records of what I do.

(TR 282) 1 Q Now when you say that you have no record of injury
2 to the knee or no record of any injury to the Achilles tendon,
3 do you mean that you yourself have no such record or do you
4 mean that the nurse has none? You don't have it in the
5 nurse's records?
6 A That would be so. She would write the notes
7 that I so directed her. I recall no injury to the Achilles
8 tendon, let me say that.
9 Q Now when did you first diagnose - excuse me, when
10 did you first prescribe walking for therapeutic purposes?
11 A This wasn't for therapeutic purposes, this was
12 permitted walking.
13 Q I was under the impression from Mrs. Canevet's
14 notes that walking was prescribed for strengthening the
15 leg for a certain period of time?
16 A I wouldn't know how you would come about that,
17 particularly while he was allowed to walk.
18 Q Mrs. Canevet's notes state that on May 6, 1968,
19 they say precisely - returned from leave to walk on grounds
20 each p.m. for exercise. The next day, on walk today while
21 watching track practice, struck right upper arm by shot put,
22 contusion and discomfort, sling. Then on May 11, '68 - some
23 five days later, apparently he was authorized to walk - excuse
24 me, then on May 11, 1968, some five days after apparently he
25 was authorized to walk on the grounds, receiving notation,

(TR 286) 1 did you examine him some time in the fall of '68?

2 A Now I don't - as far as I know I don't have any
3 records of this myself, but it could very well have been.
4 He was not re-evaluated to my knowledge as far as this was
5 concerned. I have no record if he were.

6 Q On any occasion did you examine the stability of
7 his left knee versus the stability of his right knee?

8 A I have no record of having done this, no.

9 Q Do you have any independent knowledge of this
10 other than what appears in the nurse's records, in other
11 words if someone had come to you saying I want to know some-
12 thing about an injury to Watson E. Trigger in 1968, and they
13 had not showed you the nurse's record, would you have any
14 independent recollection at this point of your own?

15 A No, I couldn't have any independent precise
16 recollection of this except by the process of elimination,
17 as we have no record of X-ray of his knee as far as I see.
18 He presented no complaint apparently in this regard.

19 Q I believe the nurse's records show that on the
20 evening of the accident he was in fact taken by car to
21 King's Daughters Hospital here in Staunton for X-rays?

22 A Right.

23 Q So they would have the X-ray records, injury
24 records?

25 A They have sir. No other subsequent X-rays or

(TR 291) 1 A Now this is the extent of my - as far as I have
2 knowledge - what I have to my knowledge, the injury to this
3 boy's leg, this I can say would be a likely conclusion as far
4 as I can go.
5 Q Did you in fact examine any cartilage injury,
6 did you inspect for any injury to the knee as far as collateral
7 cartilage is concerned?
8 A But the knee wasn't injured. I have no evidence
9 that the knee was injured. I didn't examine his arm either,
10 as far as injury because there was no mention of injury...had
11 no evidence of injury.
12 Q Well, I'm not trying to browbeat you Doctor, but
13 I just want to ask - I asked you to establish some type of
14 probability, in light of the history that you took from Watson
15 Trigger, is it in your opinion possible with such injuries to
16 the knee that I have described could have resulted from that
17 fall?
18 A No, the knowledge that I have at hand at the
19 present time, no. In other words there would have had to have
20 been some manifestations of the injury, extensive injury to
21 result in this, which you are describing an injury that occurs
22 frequently in football or any other type of injury. You can
23 sustain such an injury by twisting your knee. You could have
24 a weakened knee before. You could have slipped and twisted
25 the knee and sustain weakness in these areas.

(TR 292) 1 Q Well, don't you believe that falling 10 feet
2 and having a 10 foot railing fall on top of you might be
3 sufficient impact to produce this type of..
4 A Yes, but it hit his leg - lower leg and not
5 his knee.
6 Q Well, what is the affect if your knee is flexed
7 and something strikes your lower leg, does this not in fact
8 exert some force on the knee joint?
9 A It wouldn't necessarily.
10 Q The same as being hit from the side by a blocker
11 in football, right on the knee? In other words...
12 A The knee wasn't struck.
13 Q No, but I'm saying that if something strikes
14 the lower leg in a seated position it can exert force on that
15 knee in a twisting...
16 A It seems more to me that he would have sustained
17 an injury to the ankle than to the knee itself.
18 Q But you would concede that it is possible that it
19 could injure either one?
20 A Well, certainly.
21 Q By this force exerted on the joint?
22 A Yes but there's no evidence that such was sustained
23 at the time.
24 Q That's all I have.
25 COLEMAN: The defendant rests.

(TR 293) STEPHENSON: Your Honor, may we discuss a motion in chambers or...

COURT: Yes sir - members of the jury suppose we take a short break and after you take your break, I'm going to ask that you.....are there any witnesses in the jury room?

STEPHENSON: No sir.

COURT: If there are, I'll ask you to clear them out of the jury room, but after you take a short break please go to the jury room, members of the jury, and I'll notify you when we are ready.

(Jury leaves courtroom.)

STEPHENSON: If Your Honor please I think the issue of contributory negligence was raised in our pleadings as a defense and I have heard no evidence in this proceeding that would in any way allow the jury to make any finding of contributory negligence on the part of the plaintiff. There is no evidence at all and it is clear. . . . . that the railing was there and you know can be leaned upon. There is no evidence on which the jury could find in any way that they've been contributorily negligent and I ask that that defense be stricken.

LOTZ: Your Honor, the plaintiff in this case - he knew that there was a regulation which he was thoroughly

(TR 294) 1 familiar with - no horseplay or playing ball permitted on
2 the stoop. Now he attempts to say that the ball which he
3 claims out of his room by some unexplained method and rolled
4 out of the room and rolled across the level of the stoop and
5 onto the ground, and that they were trying to get the ball
6 back. Two of them rushed to get the ball, trying to get the
7 ball back and run into it. . . . . Now the jury can
8 accept or not accept that in view of the fact that the plaintiff
9 didn't know if it was a football, didn't know if it was a
10 baseball or lacrosse ball or tennis ball. The jury might
11 very well conclude that there was horseplay going on and
12 that the issue of contributory negligence would be the case.
13 COURT: Mr. Stephenson.
14 STEPHENSON: If Your Honor please, I think admitting
15 that he knows there were regulations is not evidence of
16 negligence on his part in violating the regulations. I think
17 that if a boy is not permitted to walk across that balcony
18 and lean as he testified that he did against the guard rail,
19 I mean taking everything that he said against him - I mean
20 there is just no evidence of any negligence there on his part.
21 I think, you know, that's what they were provided for ...I
22 read the Court this morning from the case of Dominick v.
23 United States, what the purposes of guard rails are, and that
24 the Court there clearly stated that the rail is intended to
25 be grasped, leaned on, and otherwise used in a reasonable manner

(TR 295) 1 for the aid and protection of those on a porch or entering
2 or exiting therefrom. I think all of his testimony is that
3 he was using it in that manner.
4 COURT: Do you have any further evidence, Mr.
5 Stephenson?
6 STEPHENSON: No Your Honor.
7 COURT: Gentlemen, let's look over the instructions
8 and I'll rule on your motion when I get to that particular
9 instruction.
10 LOTZ: Your Honor, we move the Court most strongly
11 to strike the evidence and find for the defendant . Mr.
12 Coleman argued the motion on behalf of the defendant earlier.
13 Now that the evidence is complete there's certainly no evidence
14 to show lack of reasonable care on behalf of the AUgusta
15 Military Academy. Two factors being involved that they knew
16 or in the exercise of reasonable care should have known of
17 the defective condition of the railing and we renew the
18 motion.
19 COURT: Mr. Stephenson.
20 STEPHENSON: Your Honor, I think you know we have
21 the same evidence before the Court and a jury question and I
22 don't need to say anything further about it.
23 COURT: Gentlemen I think this is a jury question
24 and I'm going to permit this case to go to the jury. So
25 I'll overrule your motion, Mr. Lotz, and note your exceptions

(TR 296) and save your point. I think I'll also overrule your motion, Mr. Stephenson, on the contributory negligence aspect of it. And let the jury determine to what extent this boy was leaning against the rail and that type thing. I'll get the. . .before we proceed - consider the instructions in here, I think it will probably be easier with the machinery we have set up here to record it.

LOTZ: Do you think we could take a break before . . .

COURT: Yes indeed. . .let's take a break.

STEPHENSON: Your Honor, I trust that when you have mentioned at any time in the trial that we may save our points without our indicating that we take exceptions that. . .

COURT: Of yes. . .

STEPHENSON: . . .that permits us to have on the record that we have so excepted.

COURT: Yes indeed. . .yes indeed.

(RECESS).

LOTZ: Your Honor, we object to the item number 4, this puts a burden on the defendant to warn the plaintiff of any defect. . .in the exercise of ordinary care, and which defective condition was unknown to the plaintiff. The evidence of course won't recount that as to what was found on the day before. . . .what was done to correct

(TR 299) 1 School.

2 STEPHENSON: I think if there were any negligent
3 acts they had to be by the employees, Your Honor, that's
4 who was entrusted with full maintenance. They were doing it,
5 they are all employees or agents.

6 LOTZ: There is no evidence in this case that there
7 was any negligent act committed, that was done by an employee
8 or agent, acting in the scope of their authority in the
9 employment of the Augusta Military School. All the evidence,
10 Your Honor, indicates to the contrary, that everything was
11 done.

12 STEPHENSON: I think. . .

13 LOTZ: You've defined negligence in another instruc-
14 tion, Your Honor.

15 STEPHENSON: The whole case is about the exercise
16 of ordinary care by the employees and agents of Augusta
17 Military Academy.

18 COURT: Number 10.

19 COLEMAN: We object to that for several reasons.
20 First is the fact that this is not an unexplained accident.
21 We know what caused it, the bolts were not in place. Also
22 the rule never applies when the accident could have been
23 attributed to one of two causes, one of which - the defendant
24 is not responsible. In other words, this only applies when you
25 don't know what happened, and the citation on this is Beer

(TR 300) 1 distributors against Winfrey, 190 Virginia, 521, which sets
2 that forth and has never been overruled. One further aspect,
3 Judge, because there are so many parts to the thing because
4 it's of limited application. Another one of course would be
5 also that the instrumentality which produces injury has to
6 be in the exclusive control of the plaintiff or the defendant
7 and the accident is of the character that does not occur
8 if due care is used. And of course that's not true in this
9 case either. So this wouldn't be applicable to the case.
10 COURT: Mr. Balthrop.
11 BALTHROP: My position on that is Your Honor that
12 by the nature of this institution its facilities were under
13 its exclusive care and control in terms of who was in use
14 of it, that they maintained in a military establishment a
15 control over their students and military discipline where
16 they were. There is no evidence of any other cause that
17 removed these bolts except conjecture from the defendants'
18 witnesses and this is - these are the facilities within the
19 control and within the continuing control, daily control of
20 the defendants. And the testimony that we have is that all
21 of their employees, you know, were instructed to be on the
22 watch and look-out for defective things in relation to these
23 facilities. And they have identified a number of employees,
24 janitors, maintenance people and everyone that were on the
25 scene, daily, continuously.

(TR 301) 1 COURT: I refuse that one...number 11?

2 COLEMAN: No objection.

3 COURT: Number 12.

4 LOTZ: No objection.

5 COURT: 13.

6 LOTZ: No objection. Your Honor, we object to number
7 14. This permits the jury to speculate on some intervening
8 cause, which would thereby impose negligence on the defendant,
9 the owner of the Augusta Military Academy. There's no way
10 Your Honor on the evidence in this case - common sense of
11 the facts of this case, that it could be foreseen or reasonably
12 might have been foreseen by the Augusta Military Academy
13 that between April 8, 1968 and the next day in the afternoon
14 that the bolts would disappear from the railing which was involv-
15 ed in this case.

16 STEPHENSON: In that - I'm sorry...

17 LOTZ: Such intervening cause as put in operation
18 by the defendants....

19 STEPHENSON: If Your Honor please, the case may well
20 turn on whether or not the defendants should have from their
21 experience as in the evidence of these bolts coming loose,
22 without their having any ready explanation of how it came
23 about, except their speculation and conjecture, that they have
24 students around the railings and thereby they may have access
25 sufficient to datach them as an intervening cause. And it may

(TR 302) been with the notice of these five bolts the prior day by Mr. Staples, that they were on notice that there may be some intervening cause, that should have been taken into account and some method employed to prevent that and this I maintain is a forseeable risk, and a violation of a duty in preventing that from happening is - could be what the case turns on.

LOTZ: This really attempts in one sense to make the Augusta Military Academy an insurer of the plaintiff.

STEPHENSON: I don't think that's what the instruction says.

LOTZ: Well, ...Here we have a situation where Mr. Staples says in all of his 16 years of experience at that school, this was the first time that there had ever been any number of things reported to him as missing the day before - five - two in the particular one that fell, two in another one, and one in a third. He there upon proceeded to not only fix those but to check all the rest of them and found all were tight. Now what this is attempting to tell the jury and allowing the plaintiff to argue that some cadet that night and the school can't guard against all the devilishness of the minds of 15 to 18 year old boys - might dream up - loosed those bolts that night or some time the next day. So they were loose when the plaintiff fell. That is negligence - permitted to argue that is a negligent act on the operation of the - in the operation of the Augusta Military Academy.....

(TR 303) 1 BALTHROP: I'm saying if the act should have
2 been anticipated by Augusta Military Academy or the persons
3 in responsibility there, even though it is intervening they
4 should be responsible. If it should have reasonably been
5 anticipated if there were measures that could have been taken to
6 avoid intervening.....
7 STEPHENSON: And there was testimony
8 that they had incidents of bolts being loose but this time
9 there were five, which I considered unusual, and instead of
10 going back the next day to see if this continuing thing
11 may have been going on - we have no indication, no evidence of
12 any further inspection, only acting on the direction and notice
13 that he received on the day before to affect ...
14 COURT: Gentlemen, I'm not going to give the
15 instruction, but I'm not going to preclude your argument.
16 I think that is a proper argument, if you gentlemen care to
17 do it. 15.
18 LOTZ: Your Honor, I think it's a standard instruc-
19 tion, except I don't think we have any humiliation or embarrass-
20 ment involved in this case as set forth in paragraph 4.
21 We object to that language.
22 STEPHENSON: We certainly have disfigurement and
23 deformity Your Honor.
24 LOTZ: No nursing expenses and no hospital expenses.
25 STEPHENSON: I don't know whether the orthopedic clinic

(TR 308) STEPHENSON: I think that this would give us another proximate cause instruction.

LOTZ: One deals with the. . . . and the other one deals with the facts of the case.

STEPHENSON: I have a little trouble here with number 3, Your Honor.

COURT: Number 3...

STEPHENSON: Number 3 in instruction G. The defendants knew or in the exercise of reasonable care should have known of the unsafe condition in time to correct it. I think that that represents the condition . . . . . because I believe they have a further duty in there beyond what this expresses. And it's to correct the condition or to warn and/or to warn the plaintiff of its nature...

COLEMAN: (sic, Balthrop) The nature of the defect is not such that it can be corrected immediately or within sufficient time to prevent injury then the duty is to warn, and I don't believe it's fair to eliminate the duty to warn here.

COURT: You are proposing that you add to 3 - or warning the defendant of the defective condition, is that your point?

STEPHENSON: Yes.

COURT: Mr. Lotz.

LOTZ: That's not the rule the courts have laid down. The rule

(TR 309) 1 should have known of unsafe conditions in time to correct it
2 before the injury occurred. That I think is taken from the
3 case that Mr. Coleman cited in our motion to strike, pointing
4 out that we had complied with that.
5 STEPHENSON: I also think Your Honor that they may
6 have a duty to prevent the occurrence of something with the
7 evidence that we have in the record - it's not just letting
8 it continue to be done that way, that they may also have a
9 duty to prevent - if they were on notice that there were
10 some other cause of this condition. I think that instead of
11 just correcting it each time that it went bad, that their
12 duty was to correct something that's done in a continuing
13 condition.
14 DALTHROP: I believe it's stated in Number 3
15 that that would allow someone to dig a ditch across the
16 road and not put up any warning at all because they can't
17 fill it in before the next car comes along.
18 LOTZ: Your Honor, could I read the quotes from this case.
19 . .the Court, citing a 4th Circuit case, this is a Virginia opinion.
20 It is well settled that a proprietor of a store is not an insurer
21 of the safety of his customer; and is, therefore, not liable to a
22 customer for injuries caused by some defect or unsafe condition in
23 the premises in the absence of any evidence tending to show that
24 the proprietor or his servants or agents knew, or should have known
25 by the exercise of reasonable diligence, of the defect or unsafe condition.

(TR 310) 1 STEPHENSON: Your Honor, we have a situation in
2 which - when you are narrowing it down to the unsafe condition and
3 we are talking about the loose guard rail that came off and
4 caused a boy to be injured, and we have evidence of a repair
5 of that. Then the question arises as to whether the entire
6 condition is some known condition that has some indication -
7 to it that preventive measures should be taken, and just to
8 have another loose bolt occur and say, well, we didn't know
9 about that one and so therefore we didn't have time to repair
10 it before it happened - I don't think is the proper law to
11 sell this jury. I think that they have to take into account
12 whether there are other measures to be taken other than the
13 making of a specific repair of a particular guard rail that
14 had loose bolts. I think it goes well beyond that.
15 COURT: All right gentlemen, let's go on to the next
16 one - H.
17 STEPHENSON: I have an objection to that, Your Honor.
18 I don't think that the plaintiff assumed the risk of this
19 guard rail being defective. There is no evidence first of
20 all that he was playing ball on the walkway, none at all.
21 No testimony whatsoever in the record that he was playing
22 ball along the way and I maintain even if he were playing
23 ball, and even if it violated some rule that he did not assume
24 the risk that this guard rail would be allowed by the defendants,
25 if the defendant knew about it to be in that state of disrepair,

(TR 316) of the defendant, who knew anything about and didn't do anything about is one thing. If the railing gave way for some other reason, for some activity of some person unknown to the defendant, then that would be a second reason for the accident, and we think the jury - this is a standard instruction given when a case is taken from the red book. If the jury is unable to determine which then the burden falls in their favor - I mean the result falls in the favor of the defendants.

BALTHROP: The only problem I think with the instruction from the red book, you've got to fit the circumstances to the case...

COURT: How about M, gentlemen?

STEPHENSON: All right.

COURT: Now let's go back to some of the others... I'm looking at G, H, and I.....Anything further to be said about any of those three?

LOTZ: Your Honor, we can I suppose only reiterate that the - this is the law given within that case and I think the leading case is the Safeway Stores v. Tolson, and the evidence in that case, the defendants - employees were mopping Saturday night with non-slip wax, swept during the day if it became necessary - no sweeping compound was used. The floor was normally free of foreign substance and the plaintiff was asked by counsel, did the substance cause you to slip and she said it did, and no proof that the store

(TR 317) 1 management had placed any sawdust or any other substance on
2 the floor. . .the basis of the suit was negligence and the
3 burden of proving negligence was on the plaintiff. The duty
4 owed the plaintiff by the defendant was one of reasonable case;
5 it was not an injurer of the plaintiff's safety. Then it went
6 on to say that it is well settled and I repeat again for the
7 record that the proprietorof the store is not an insurer
8 of the safety of his customer; and is, therefore, not liable
9 to a customer for injuries caused by some defect or unsafe
10 condition in the premises in the absence of any evidence
11 tending to show that the proprietor or his servants or agents
12 knew,or should have known by the exercise of reasonable diligence,
13 of the defect or unsafe condition.. .I'm quoting from page 16.
14 Then it went on to say there wasn't any evidence of any actual
15 knowledge of presence of the substance on the floor, and that
16 there was no showing it had been there long enough to charge
17 the defendant with any obstruction. This is of course a heart
18 and soul defendant's incident case. Knowledge or in the
19 exercise of reasonable case should have had knowledge.
20 BAUTHROP: I don't believe that made any mention of
21 any time to correct - it's talking about notice. It's saying
22 the defendant either knew, was either to have known or have
constructed knowing, that is he should have known. . .of the un-
23 safe condition. If you put a period there. . .
STEPHENSON: If Your Honor please, in addition to
24 that, I discussed one California case with you this morning,
25 the Stockwell case of 148 Pacific 2nd., 405, in which there had

(TR 318) been some evidence of prior notice of the use of BB guns on a college campus. And in that case the issue was whether the college administration should have been on sufficient notice to provide security guards, additional police protection or other methods to make the campus safe for its invitees to use. In the second case, California case, of Sample v. Eaton 302 Pacific, 2nd, 431....in that case the plaintiff was hit by a coke bottle at a wrestling event by one of the patrons. And there was evidence that there had been some kind of rowdiness on the part of patrons at the event and the issue was whether this was enough to put the establishment on notice so that they would take steps to guard against the danger and subsequent injury of the nature that occurred in that case from happening. And I think that we have a situation here that places an issue before this jury of whether or not the administration of Augusta Military Academy was negligent in not taking into account the bolts coming loose to the degree that is expressed that they knew about the day before and taken some other steps to do something about controlling that. To say nothing of their designing the facilities differently.

COURT: I say I'm certainly not going to conclude you from arguing Mr. Stephenson. Gentlemen, I'm going to ..... All right, gentlemen....

LOTZ: Judge, would you - let's go through them as we go this time and identify them....mark ours...

(TR 319) COURT: Yes sir, I'll certainly do that....right now. Instructions 10, 14 and 18 offered by the plaintiff were refused. 18 was redrafted and will be given.....in redrafted form. Instructions A and D are withdrawn, as I understand it. And Instructions H, I and L are refused. H, I and L are refused and all others given. You note your exceptions in the record.

STEPHENSON: Would you kindly note my exceptions to the giving of instructions of the plaintiff....

LOTZ: The defendants except to the Court's ruling in the instructions granted on behalf of the plaintiff for the reasons heretofore cited. And further reason that we have indicated throughout the trial of this case that there is no issue to submit to the jury in this proceeding. We object to the refusal of the Court to grant instruction H on the grounds that this is the law in Virginia....I'm sorry instruction - correction, instruction L, on the grounds this is the law in Virginia. We suggested to the Court in considering this instruction the word injury in line 2 be changed to accident....and this case, based on the evidence in the case, if giving way of the railing was due to one of two causes, one of which A.M.A. authorities were responsible, then of course, that's one matter. On the other hand, if it were something that was beyond their control, that they were not responsible, then that is a second part of the instruction, and

XXVII. INSTRUCTION 1

The defendant who reserved balconies or approaches and provided them for the common use of its enrolled students in residence at Augusta Military Academy owed the plaintiff as one such student, the duty to exercise ordinary care:

1. To keep such balconies or approaches including attached or supporting guard rails in a reasonably safe condition for the plaintiff's use;

2. To correct or repair within a reasonable time, any defective or unsafe condition in or on such balconies or approaches, including the attached or supporting guard rails which was known to the defendant, or in the exercise of ordinary care should have been known to the defendant;

3. To make such corrections or repairs of any such defective or unsafe conditions whether or not they were caused by persons other than the defendant or its employees or agents, if the defendant knew, or in the exercise of ordinary care should have known, that the condition existed;

4. To warn the plaintiff of any defective condition in or on such balconies or approaches which was known to the defendant, or which should have been known by the defendant in the exercise of ordinary care, and which defective condition was unknown to the plaintiff in the exercise of ordinary care.

Tendered by plaintiff

XXVIII. INSTRUCTION 4

Where the defendant relies upon contributory negligence of the plaintiff as a defense, such contributory negligence is not presumed but the burden is upon the defendant to prove by a preponderance of the evidence that the plaintiff was guilty of such negligence and that any such negligence proximately contributed to cause the occurrence; and unless the defendant thus proves the existence of such negligence or unless any such negligence appears from the plaintiff's own evidence or can be fairly inferred from all the circumstances of the case, then you cannot find the plaintiff guilty of contributory negligence.

And if the jury are uncertain as to whether the plaintiff was guilty of contributory negligence, or if you believe that it is just as probable that the plaintiff was not guilty of any such negligence as it is that he was, then you cannot find the plaintiff guilty of contributory negligence.

Tendered by plaintiff

XXIX. JURY INSTRUCTIONS NUMBER 10

Where an accident occurs from some means or instrumentality in the exclusive control of the defendant which does not ordinarily occur where reasonable care is used by the defendant, and under such circumstances that the defendant should have the means of determining how it occurs, and the plaintiff does not have this information, then the jury may infer that the accident was due to some negligence of the defendant. The jury are not obliged to draw such an inference but they may do so. In such a situation a prima facie presumption is raised that the defendant was negligent, and in the absence of evidence showing the defendant to be free from negligence, the jury may find a verdict in favor of the plaintiff, but this does not shift the burden which is on the plaintiff to prove by a preponderance of the evidence that the defendant was negligent. If on the whole case the jury believe from a preponderance of the evidence that the defendant was negligent and that such negligence was a proximate cause of the accident, then, unless you further believe from the evidence that the plaintiff was guilty of negligence which proximately contributed to cause the accident, you shall return your verdict in favor of the plaintiff.

Virginia Jury Instructions 18.01, Virginia Transit Co. v. Durham, 190 Va. 979,988, 59 S.E.2d 58,60.

XXX. JURY INSTRUCTION NUMBER 14

If you believe from a preponderance of the evidence that the defendant was negligent, then an intervening cause does not operate to exempt him from liability if such intervening cause was either put into operation by his negligence or if it was foreseen or reasonably might have been foreseen by him. Inorder to excuse any such negligence of the defendant, such intervening cause must so entirely supersede the operation of the defendant's negligence, if any, that it alone caused the occurrence without any such negligence of the defendant contributing thereto in the slightest degree.

Virginia Jury Instructions 12.10, Savage Truck Line v. Traylor, 193 Va. 579,585, 69 S.E.2d 478,482.

XXXI. INSTRUCTION B

The Court instructs the jury that the proximate cause of an event is a cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the event, and without which the event would not have occurred.

Tendered by defendant

XXXII. INSTRUCTION G

The Court instructs the jury that the burden rests upon the plaintiff to prove the following facts by a preponderance of the evidence:

1. That the railing along the walkway was unsafe.

2. That the unsafe condition of the railing was the proximate cause of plaintiff's fall and injuries.

3. That the defendants knew or in the exercise of reasonable care should have known of the unsafe condition in time to correct it.

The Court further instructs the jury that unless the plaintiff has established these facts by a preponderance of the evidence, then their verdict should be for the defendants.

Tendered by defendant

XXXIII. INSTRUCTION J

The Court instructs the jury that even though they may believe from the evidence that the defendants were negligent and that such negligence was the proximate cause of the injuries to the plaintiff but further believe from the evidence that the plaintiff was also negligent and that such negligence proximately contributed to cause the injuries, then their verdict should be in favor of the defendants.

The law does not undertake to apportion or balance the negligence of the parties where both are at fault in order to ascertain which one is most at fault, but the plaintiff is barred from recovery if he was guilty of any negligence which proximately contributed to cause the injuries.

Tendered by defendant

(TR 363)

COURT: Gentlemen, would you get the instructions together and Mr. Clerk would you show these two form verdicts to the jury and see if they have any objections to it. Members of the jury, I am going to suggest that you take your lunch break at this time and come back. Come back in one hour and when you do come back immediately retire to your jury room and to first elect your foreman then proceed to consider this case. I will not be here when you come back, I will be attending a funeral during the lunch hour but I anticipate that I will be back before you reach your verdict. Mrs. Wood will be here with the instructions and with these form verdicts and when you return from your lunch hour please go to your jury room and first elect your foreman and start your liberations.

Court recessed for lunch.

Court reconvened at 2:40 P.M.

COURT: Members of jury, have you arrived at your verdict?

FOREMAN: No sir. We had a question Your Honor about the railing and without seeing the picture or without inspecting the premises it is hard for us to determine whether the railing would have stayed in place if four bolts were missing?

COURT: Does counsel want to discuss this matter in chambers?

(TR 364) 1 Court and counsel in Chambers

( ) 2

3 COURT: Members of the jury, we have certain
4 procedural guidelines we have to follow in the trying of these
5 cases and you have come up with, what appears to me as a per-
6 fectly logical question, but I am going to have to advise you
7 that because of these guidelines that we have to follow there is
8 not anyway that any of us can suggest, which would permit us to
9 answer your question. That does not make much logic but that
10 seems to be the way it is. By the same token, these same guide-
11 lines I think would prevent us from taking a view of the premises.
12 I suppose what I would have to ask you to do is take the evidence
13 that you have and return to your jury room and proceed with your
14 deliberations. I am sorry to have to give you that answer.
15 Jury retired to Jury room at 4:25 P.m.
16 COURT: Now gentlemen, if you desire to place some
17 statement on the record.
18 LOTZ: If it please the Court, on behalf of the
19 defendant, following the question presented by the jury indicated
20 by the jury two things....they had no picture and they wanted
21 to take a view. I think the court correctly ruled that they
22 could not take a view because as indicated there has been two
23 changes, the evidence in the case indicated the change and the
24 discussing of changes subsequently to the fall of the year, maybe
25 two years later that the bolts were....that held the railing

(TR 365)

beforehand were welded. With regard to the picture the Colonel Livick , one of the defendants produced a book referred to as as I recall, Augusta Military Academy, 1960, which between pages 139 and....immediately following page 139 and shows the photograph of cadets in the court yard and shows three railings and a portion of another. The photograph shows that there were two extensions of bars below the bottom of the resting railing, which rested on floor of stoop at the Augusta Military Academy. Colonel Livick stated to the court that, if permitted to testify, he would have stated that there were two footings that rested on the floor in small groves and that each end of the railing were attached to a post, it would have in fact touched the post if the bolts were removed and that it would therefore, because of a portion of the bottom, because of the fact that it touched the wall on either side remain in position without falling of its own, unless it was some pressure against it. He further stated that any pressure against the railing would have caused it to fall. Counsel for defendant's therefore requested the court to show this photograph in the book to the jury and let Colonel Livick explain it and being a further statement by him that the conditions were not changed between the picture in 1960 and that the time of the plaintiff's injury and that the railings entire barracks were uniform, all erected in the same manner.

STEPHENSON: The statement of the plaintiff is that in going back into trial after the case is submitted to the jury

(TR 366) this is a departure from procedure. That during the course of the trial a picture wasproffered in evidence by the defendant. The plaintiff sought in cross examination to inquire into the picture in terms of how the view, represented in the picture, may have differed from the conditions existing at the time of the occurrence. The right to pursue this was denied by the court to which exceptions were reserved, at the time. To depart now from this procedure would get us back into a partial trial, as I understood the proposal would have some limiting effect and therefore I consider it objectionable. Moreover, it appared, in as much as this picture had cadets, other items that are very prominent in it, the balcony rail in the background, with no indication from the witness, that would be identifying it, that he knew which side the picture represented, I considered it further objection. It appeared to counsel for the plaintiff that the best position would be to allow the jury to view the guardrails themselves and therefore a view was requested during the course of the trial and the request of plaintiff was denied by the court. A request, at this juncture, for a view of the premises was removed as the desire of the plaintiff to accommodate the request of the jury.

LOTZ: If it please the Court, counsel for the plaintiff overlooked the fact that it wanted to explain something about the railings be secured in a different manner now and that the....he claimed that he had seen it recently and there were

(TR 367)

some bolts attached to the floor but the two that went down weren't attached to the floor. I should also point our, Your Honor, that we suggested that the plaintiff himself take the stand and give his opinion that if the bolts were removed the railing would fall. I think Your Honor, we would like to tender this year book as an exhibit on behalf of the defendant.

COURT: Gentlemen, I would like to say for the record that I discussed this matter with counsel, along with their clients for some fifteen or twenty minutes in an effort to try someway that everybody concerned would agree on some logical plan to answer this jury's question. The inquiries that were made of counsel were met with opposition at every side and it just seemed to me to be no way to answer this question so that all parties concerned would agree to it and the court felt that in absence of an agreement on all parties concerned, that we could not open up this case again and present any evidence or consider taking a view. With that, the jury advised that...as record will show that we would not answer their question and they have now resumed their deliberations.

LOTZ: We except to the courts ruling. In not letting Colonel Livick and the plaintiff both to take the stand and comment on the question raised by the jury.

COURT: All right. Mr. Stephenson, do you have anything else you wish to comment on.

STEPHENSON: My understanding of the courts ruling

(TR 368)

is that if we couldn't stipulate, the court would not rule that we do anything.

COURT: The feeling of the court was, that unless we could agree on some method of answering this question, the court would not open it up, it's just that simple. Right much effort was made to find some avenue of agreement and we were without success.

STEPHENSON: My position for record is, if the court is only acting on stipulation, the parties couldn't agree to a stipulation, then we don't have any ruling that affects the parties one way or the other, except the courts decision not to reopen the case.

COURT: It was not a stipulation Mr. Stephenson. It was a method of answering a question whether it would be by evidence or taking....one or two parties taking the stand. It was not a matter of stipulation.

STEPHENSON: I understood Your Honor's taking the position of whatever method you approved would only be if the counsel stipulated that it would be an acceptable method.

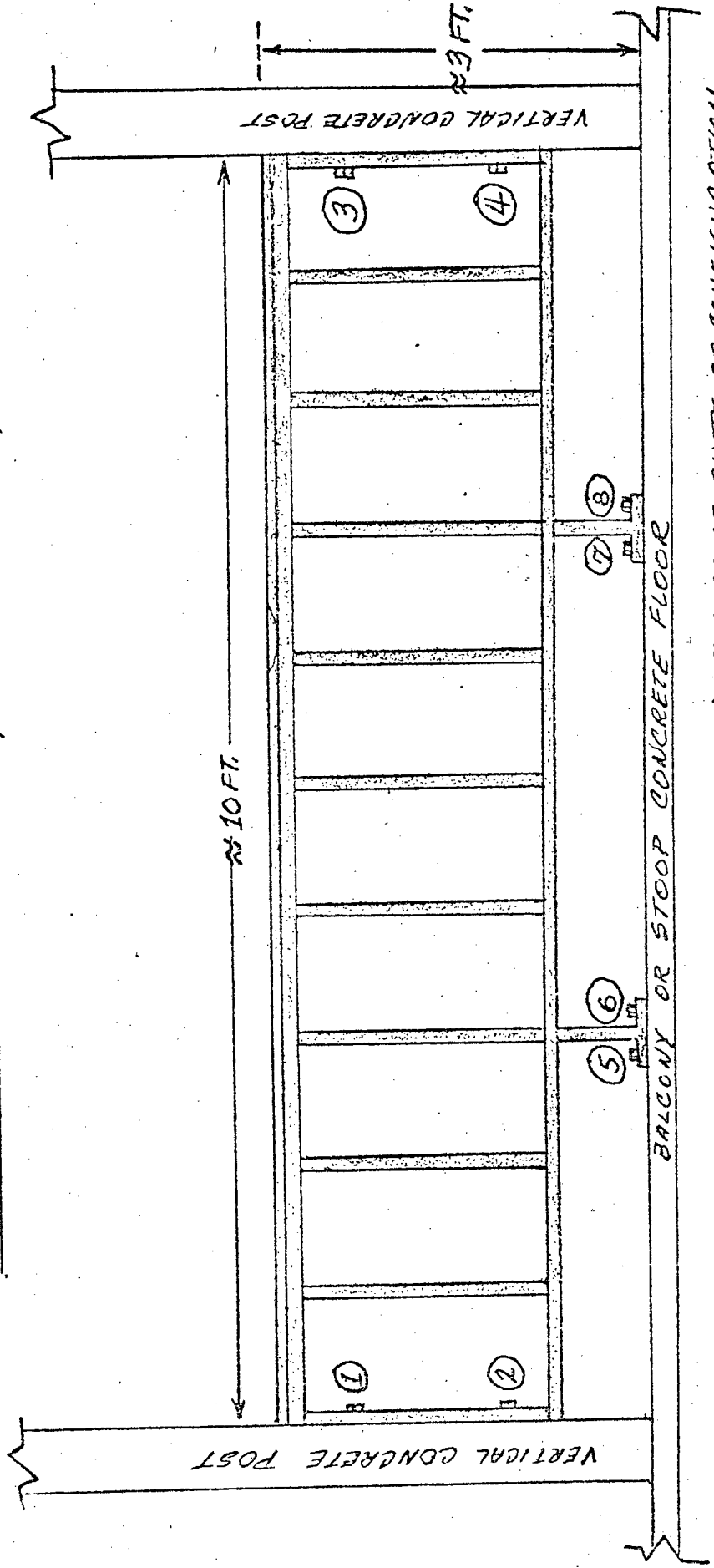
COURT: I think I made my position clear gentlemen. I don't have any more to say about it.

LOTZ: Could the court mark this as rejected so we can take it.

COURT: Yes sir. Members of the jury, have you arrived at your verdict?

XXXV. DIAGRAM OF RAILING AND AFFIDAVIT, PREPARED BY COUNSEL FOR TRIGGER

REPRESENTATIVE RAILING ON SECOND STOOP OF "BIG BARRACKS", AUGUSTA MILITARY ACADEMY, OCTOBER 6, 1973.



THIS DRAWING IS NOT PROFESSED TO SHOW THE EXACT SHAPE OR CONFIGURATION OF THE RAILING TO SCALE. IT DOES DEPICT THE MODE OF ATTACHMENT OF RAILINGS ON THE SECOND STOOP OF AUGUSTA MILITARY ACADEMY'S "BIG BARRACKS" AS OF OCTOBER 6, 1973 AND THE APPROXIMATE DIMENSIONS AND CONFIGURATION OF SUCH RAILINGS. THE RAILING, GREEN IN COLOR WHEN OBSERVED ON THE SAID DATE, IS SHOWN IN RED FOR PURPOSE OF CLARITY. THE SQUARE HEADED LAG BOLTS, (1) (2) (3) (4) ARE THOSE TESTIFIED TO BY AGENTS OF DEFENDANTS, AND ARE WELDED AND PAINTED OVER WITH GREEN PAINT. THE ATTACHMENTS (5), (6), (7), (8) WERE NEVER MENTIONED BY DEFENDANTS OR THEIR AGENTS, AND THE EXISTENCE OF SUCH WAS DENIED BY DEFENDANT LINICK, IN CHAMBERS, OCTOBER 25, 1973. /s/ George N. Bellinger, November 2, 1973.

XXXV. DIAGRAM OF RAILING AND AFFIDAVIT, PREPARED BY COUNSEL FOR TRIGGER

WATSON E. TRIGGER)

Plaintiff)

vs.) AT LAW NO. 1804

MALCOLM HARRIS LIVICK, et al.,)

Defendants)

AFFIDAVIT

STATE OF VIRGINIA

COUNTY OF ARLINGTON, to-wit:

Personally appeared before me, the undersigned Notary Public, George H. Balthrop, who first being duly sworn, deposes and says that he is associated with Counsel for Plaintiff in the above-styled suit, and that on October 6, 1973, at approximately 5:30 p.m., he entered upon the premises at Augusta Military Academy, being escorted by a student of said institution, and did inspect the railings on the second stoop of Big Barracks; that to the best of his knowledge and belief, the said railings were at that time affixedby eight bolts, two on either side of each railing, which bolts were welded to the rails, and four bolts or studs securing the feet of each said railing to the floor of the stoop; that there existed at that time a certain railing upon the second stoop from which the attachment to the floor of the stoop had been dislocated and that there was no indentation, receptacle or recess of any type into the concrete floor of the said stoop to hold the foot of such railing other than a housing for a bolt or stud used to secure such foot to the flat, horizontal balcony surface; and that the attached drawing depicts the mode of attachment of such railings on the date aforesaid.

George H. Balthrop

George H. Balthrop

Subscribed and sworn to before me this 2nd day of November, 1973.

My Commission expires:

Suzanne C. Hicks

Notary Public

XXXVI. FINAL ORDER (Entered April 8, 1974)

This day again came the parties to the above-entitled action, by counsel, and the motion made to set aside the verdict of the jury in this case, returned on the 25th day of October, 1973, and a written grounds in support thereof, heretofore filed on the 2nd day of November, 1973, and which are hereby made a part of the record in this case, having been argued and submitted to the Court for its decision, the Court is of the opinion to and doth hereby overrule said motion, to which action of the Court in overruling said motion to set aside said veridct and grant him a new trial, plaintiff, by counsel, objects and excepts.

It is, therefore, ADJUDGED and ORDERED, pursuant to the aforesaid verdict of the jury, in this case, that plaintiff recover nothing of said defendants about his action herein, but that the said defendants recover and have judgment against the said plaintiff for their costs by them about their defense herein expended.

Entered this 8th day of April, 1974.

XXXVII. NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR (filed April 25, 1974)

PLEASE TAKE NOTICE that the Plaintiff, will petition the Supreme Court of Virginia for appeal in the above-styled case, and file a transcript of the proceedings at the trial of his cause, and assigns as error the following rulings of this Court:

1. The Court entered an order sustaining Defendants' objections to certain Interrogatories propounded by Plaintiff, more particularly, Interrogatories

numbered 1, 6, 7, 12, 14, 15, 19, which interrogatories sought information either admissible as evidence or likely to lead to discovery of admissible evidence;

2. The Court allowed the introduction of testimony of Plaintiff's expulsion from Augusta Military Academy, over the objection of Plaintiff that such testimony was incompetent, irrelevant and immaterial, and sought merely for the purpose of prejudicing the Plaintiff;

3. The Court ruled that no testimony be offered by Plaintiff of the condition or configuration of the guard rails as they existed at the date of trial, and sustained Defendants' objection to any testimony offered by Plaintiff of subsequent changes in the mode of attachment of the guard rails subsequent to Plaintiff's fall, which testimony was sought by Plaintiff to show the feasibility of preventing the hazardous condition which caused Plaintiff's fall, to impeach the testimony of agents of Defendants, and to establish the configuration of the instrumentality within the sole possession and control of Defendants as of the date of Plaintiff's fall;

4. The Court refused repeated requests by Plaintiff and a request by the jury for a view by the jury of the railing in question;

5. The Court refused to allow Plaintiff to cross-examine Defendant Livick upon a photograph proffered by Defendants during Defendant Livick's direct testimony on Defendants' behalf, which photograph was offered as evidence of the good condition of the premises within their control, and as evidence of the mode of attachment of the subject railing at the time of

Plaintiff's fall;

6. The Court admitted as evidence the deposition of William Painter, M.D., which evidence was objected to by Plaintiff as hearsay;

7. The Court sustained Defendants' objection to a portion of the deposition of P. M. Palumbo, Jr., M.D., concerning history obtained from Plaintiff by Dr. Palumbo for the purpose of treatment of the Plaintiff, which history constituted an exception to the general hearsay rule;

8. The Court denied Plaintiff's motion to strike Defendants' evidence on the issue of contributory negligence even though there was no evidence, either direct or circumstantial from which the jury might have found Plaintiff negligent;

9. The Court refused Plaintiff's jury instruction numbered 14 pertaining to the legal effect of a possible intervening cause, in the face of Defendants' allegations from the outset of litigation that Plaintiff's fall was due to acts of other students or third parties;

10. The Court refused Plaintiff's jury instruction numbered 10 pertaining to res ipsa loquitur, even though the instrumentality causing injury to the Plaintiff was within the sole possession and control of Defendants;

11. The Court allowed Defendants' jury instruction lettered G, which required Plaintiff to prove that Defendants knew or should have known of the unsafe condition of the railing in time to correct it;

12. The Court restricted the time allowed Counsel for Plaintiff in his final rebuttal;

Each of the errors herein assigned being more particularly described in Plaintiff's Motion to Set Aside Jury Verdict, filed November 2, 1973.