No. 88 of 1946.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF CANADA.

BETWEEN

WILLIAM YACHUK, an infant under the age of 21 years, by his next friend, TONY YACHUK, and the said TONY YACHUK (Plaintiffs) *Appellants*

AND

THE OLIVER BLAIS COMPANY LIMITED (Defendants) *Respondents*

AND BY WAY OF CROSS APPEAL

BETWEEN

THE OLIVER BLAIS COMPANY LIMITED (Defendants) *Appellants*

AND

WILLIAM YACHUK, an infant under the age of 21 years, by his next friend, TONY YACHUK, and the said TONY YACHUK (Plaintiffs) *Respondents.*

Case

FOR WILLIAM YACHUK, INFANT, AND TONY YACHUK.

RECORD.

1. This is an appeal by special leave from the Order of the Supreme Court of Canada (The Chief Justice of Canada and Kerwin, Hudson, Rand and Estey JJ.) dated the 23rd January, 1946, reversing a Judgment of the Court of Appeal for Ontario (The Chief Justice of Ontario and Roach and McRuer JJ.) dated the 19th December, 1944, by which it was adjudged that the first-named Appellant should recover from the Respondents the sum of $8,000 and that the second-named Appellant should recover from the Respondents the sum of $2,712.75, and restoring the Judgment of the Supreme Court of Ontario (Urquhart J.) dated the 29th May, 1944, by which it was adjudged that the first-named Appellant should recover from the Respondents the sum of $2,000 and that the second-named Appellant should recover from the Respondents the sum of $678.19 respectively. p. 159. p. 149. p. 132.

2. The first-named Appellant (hereinafter called "the infant Appellant") is an infant under the age of 21 years, and the second-named Appellant (hereinafter called "the adult Appellant") who is also the next friend of the infant Appellant, is the father of the infant Appellant.

3. This action was commenced in 1942 in the Supreme Court of Ontario against the Respondents and other defendants who are no longer concerned in these proceedings to recover damages for the negligence of the Respondents in selling and delivering to the infant Appellant, then aged nine years, accompanied by his younger brother, then aged seven years, a quantity of gasoline (petrol) in a small tin pail. The damages claimed by the infant Appellant were in respect of personal injuries sustained by him as the result of burns occasioned after he and his brother had ignited the gasoline; the damages claimed by the adult Appellant were for out of pocket expenses incurred by him for surgical and other treatment for the infant Appellant necessitated by such injuries.

pp. 2, 3. 4. The Appellants alleged in their Statement of Claim that the Defendants through their servant or agent, were negligent in that they—

(A) failed to obey the statutory duties imposed upon them by Regulations passed pursuant to the Gasoline Handling Act (R.S.O. 1937 Ch. 32, Section 39) and did deliver the gasoline to the infant Appellant in breach of the said Act;

(B) had knowledge of the danger inherent in the gasoline and failed to warn the infant Appellant of the said danger or indicate to him in any way the dangerous character of the goods;

(C) had knowledge of the danger inherent in the gasoline and failed to take proper precautions to prevent it causing injury;

(D) had knowledge that the Appellant was an infant, and, in the circumstances, failed to take special care or to take proper precautions to prevent injury arising from the said gasoline; and

(E) ought to have foreseen the probable consequences of their act and ought not to have delivered the gasoline to the infant Appellant;

And further in that they—

(F) put an infant of 15 years of age in charge of the service station and of a dangerous substance, namely—gasoline;

(G) failed to give their servants proper instructions regarding the sale of gasoline; and

(H) failed to provide proper supervision for the sale of gasoline.

p. 4. 5. By their Defence, the Respondents denied negligence or breach of statutory duty, contended that the said regulations were invalid, and alleged that the infant Appellant was the author of his own misfortune and caused or in the alternative contributed to the accident by playing with gasoline when he knew, or ought to have known, the consequences or probable consequences of his act. The Defendants also claimed the benefit of the Negligence Act (R.S.O. 1937 Ch. 115) (which deals with the apportionment of damages caused or contributed to by the fault or neglect of two or more persons) and amendments thereto.

6. The action was tried in the Supreme Court of Ontario by the Honourable Mr. Justice Urquhart, who, within his powers of discretion,

dispensed with the jury which had been empanelled, and assessed the damages caused to the infant Appellant at $8,000, and those caused to the p. 148.
adult Appellant at $2,712.75. The Learned Judge held that the Respon- p. 147.
dents were guilty of negligence in selling the gasoline in a tin pail to the infant Appellant, but that the infant Appellant, although not the adult Appellant, was guilty of contributory negligence. Pursuant to the provisions of the Negligence Act (R.S.O. 1937 Ch. 113) which requires damages for negligence to be apportioned in proportion to the degree of negligence found against the parties respectively, the Learned Judge found the degree
10 of negligence of the infant Appellant to be 75 per cent. and of the
Respondents to be 25 per cent., and ordered Judgment to be entered for the p. 147.
infant Appellant for $2,000 and for the adult Appellant for $678.19, namely 25 per cent. of the actual damage sustained by him notwithstanding that no negligence was found—or even alleged—against the adult Appellant.

7. From such Judgment the Appellants both appealed, and the Respondents cross-appealed to the Court of Appeal for Ontario. Such p. 151 ft.
Court of Appeal (consisting of Robertson C.J.O. and Roach and McRue J.J.A.,) unanimously held that the infant Appellant was not guilty of contributory negligence, and that the Respondents were guilty of
20 negligence. The Appeal was accordingly allowed, and the cross-appeal
dismissed, and Judgment was ordered to be entered for the infant Appellant p. 149.
for $8,000 and for the adult Appellant for $2,712.75.

8. The Respondents appealed from the said Judgment of the Court of Appeal of Ontario to the Supreme Court of Canada (composed of the Chief Justice of Canada and Kerwin, Hudson, Rand and Estey J.J.). These five Justices of the Supreme Court were divided in their opinions. Two (the Chief Justice of Canada and Kerwin J.) held that the Respondents p. 161.
were not guilty of any negligence and were for allowing the Respondents' appeal and dismissing the action with costs throughout. Two (Hudson p. 165.
30 and Estey J.J.) supported the decision of the Hon. Mr. Justice Urquhart and favoured the restoration of his Judgment. The remaining Justice (Rand J.) supported the decision of the Court of Appeal for Ontario and p. 173.
was for dismissing the Appeal with costs. On the 28th November 1945 the Supreme Court of Canada ordered the restoration of the Judgment of the Hon. Mr. Justice Urquhart despite the fact that only two of the said p. 159.
Justices favoured this course by their reasons and Judgment was accordingly entered for the infant Appellant for $2,000 and for the adult Appellant for $678.19. It is against this Judgment of the Supreme Court of Canada that the Appellants and Respondents respectively appeal and cross-appeal.

40 9. The principal questions of law which, amongst others, arise in this case, are :—

(1) Whether, when negligence of which a person is guilty consists of supplying to a child of tender years an article which is inherently dangerous to such a child, the act of the child in putting such article to a dangerous use, can, in law, constitute contributory negligence on the part of the child, although the natural propensity in such a child to do that very act is the foundation of the negligence of the person supplying the dangerous article to the child.

(2) Whether, in the absence of any finding of negligence, or of contributory negligence, on the part of a parent who sues for damages for out of pocket expenses incurred by him for surgical and other treatment for his child, the amount of such damages can, in law, be reduced by reason of the contributory negligence of such child.

(3) Whether the Supreme Court of Canada was entitled in law to order that the Judgment of the trial Judge should be restored when a majority of the Judges of the Supreme Court were of opinion that such Judgment ought not to be restored.

10. There was little dispute about the facts of the case. On
p. 133. 31st July, 1940, the infant Appellant and his younger brother had at their home some bulrushes which they had gathered and conceived the idea of lighting the bulrushes to use as torches in a game of Red Indians. Their mother, who had been confined to bed as a result of an operation, had given each boy five cents for the purpose of buying chocolate milk. One of the boys spent his money for that purpose, but the other kept his five cents, and both decided to spend this five cents on the purchase of a small quantity of gasoline for the purpose of lighting the bulrushes in the game. They first went with a glass container to a gasoline station known as "the British American Oil Station," but were refused by the attendant, who gave the excuse that the container, a glass jar, was unsuitable. They then returned with a tin lard pail, but were refused again, and so went across the street to the gasoline station of the Respondents in order to make the purchase.

11. On the afternoon in question, the Respondents' station was in charge of the Assistant Manager, one Burnside, but at the time when the boys arrived, both he and the other adult employees were engaged, and the
p. 134. gasoline pump was in charge of a boy Bruce Black, who was then just a month short of 15 years of age.

12. The boys asked Black for 5 cents' worth of gasoline. The
p. 60. infant Appellant told Black the false story that they wanted the gasoline in order to put in his mother's car which, he alleged, was stuck down the street. The younger boy swore that he, the younger boy, added a different story of his own, but this the learned Trial Judge found that Black did not
p. 135. hear. Black in fact supplied a quantity of gasoline, namely about a pint, from the pump to the pail which, as the Learned Trial Judge found, had its lid on at the time.

13. It is the Appellants' contention, which is supported by the
p. 140. findings of the Learned Trial Judge, that Black had genuine and substantial doubts and misgivings as to the truth of the story he had been told, and
pp. 60, 98. as to the propriety of the sale. He had apparently twice asked whether the gasoline was required for dry cleaning, and before the boys were out
p. 100. of reach, he asked Burnside whether his sale was all right, and on being asked by the Respondent's Counsel at the trial if he had any doubt in
p. 100. his mind, his reply was—"No, I was just— . . . in a way—I mean it is a small quantity and that I just thought the boys were still nearby and I could have got them then, and Burnside seemed to think everything was all right, so I let it go."

14. The infant Appellant (William) and his younger brother (Victor) took the gasoline in the pail up a lane some distance away from and out of sight of the Respondents' gasoline station. Victor obtained the bulrushes from their home, and then called two other boys who were not at home. The infant Appellant seems to have hesitated whether to go further with p. 69. the game, but another boy, a year older than the infant Appellant, then said to the infant Appellant—"I dare you to light one of those. I bet you p. 61. are afraid." The infant Appellant then dipped a bulrush in the gasoline in the pail and handed the bulrush to Victor. Whilst Victor was holding it, the infant Appellant lit the bulrush with a match which Victor had brought from their home. The remainder of the gasoline was then in the open tin lard pail on the ground between the two brothers, with each about 18 inches away from and either side of the pail.

15. When the bulrush was lit, it flared up, and the younger boy Victor, who was holding it, became panic-stricken and sought to beat out the flame by beating the bulrush on the ground. The result was to ignite the remainder of the gasoline in the pail, which caught fire with a swishing sound, setting fire to the trousers of the infant Appellant and causing his legs to be very severely burned, resulting in damage, which the learned Judge assessed at $8,000, and in special damage to the adult Appellant, which the learned Judge assessed at $2,712.75 cents.

16. The Gasoline Handling Act (R.S.O. 1937 Ch. 332, Section 12) provides *inter alia*, as follows :—

> "12. The Lieutenant Governor in Council may make Regulations . . .
>
> (*j*) prescribing the construction, equipment and operation of conveyances and containers used for the transportation of gasoline, kerosene and distillate, and, by an amendment added by 1938 Ont. Ch. 14, Section 2
>
> (*jj*) prescribing the method, manner and equipment to be used in the handling, storing, selling and disposing of gasoline, kerosene and distillate
>
> (*l*) generally for the better carrying out of the provisions of this Act.

17. By Regulations passed under the Gasoline Handling Act (R.S.O. 1937 Ch. 32, Section 12) (passed, however, before the promulgation of the amendments contained in (*jj*) above), it was provided, *inter alia*, as follows :—

> "39. Portable containers in which Class I liquids are sold or delivered to the public shall be of an approved metal safety type . . ."

and Regulation 39 goes on to make other provisions regarding such containers, and then provides—

> "that this Regulation shall not apply to—
>
> * * * * *
>
> (*b*) delivery of any metal container of gasoline required to refuel a motor vehicle to permit of its being moved."

18. For the Respondents, it was contended that this Regulation was invalid and *ultra vires* as having been passed prior to the amendment of 1938 in the Gasoline Handling Act; that this Statute imposed a penalty and did not afford a civil remedy to any person who may have been injured as a result of the breach of its provision; and that in any event, proviso (*b*) to the Regulations excluded a sale of this character, since, in the context, the word "required" in the proviso meant no more than "requested" and the word "refuel" would cover, amongst other things, the provision of a very small quantity of gasoline for the purpose of priming the carburettor. It was admitted, however, by the Respondents that the container in which the gasoline was in fact delivered was not an approved container within the meaning of Regulation 39.

19. The evidence showed that whether or not the Regulation was in force, the Respondents had adopted it as their own standard of care in the sale of gasoline, and that the sale of even a small quantity of gasoline in the tin pail was, as a matter of fact, a breach of the instructions which had been given to Black.

20. Apart from the alleged breach of statutory duty, the Appellants rested their case upon the breach of the standard of care, which it was submitted was reasonable in the circumstances, involved in placing in the hands of the infant Appellant and his younger brother a quantity of a dangerous substance such as gasoline, when the Respondents knew, or ought to have known, the danger of this being misused and causing damage, and in failing to convey any warning to the boys, or to take any precautions against misuse in spite of the genuine misgivings in the mind of Black, or even to see that a proper container was used.

21. To this argument, the Respondents replied that the sale was not, in the circumstances, negligent, and further alleged that even if there were negligence involved in the sale, that negligence was not the proximate cause of the accident. This accident, it was argued, was caused or contributed to, by the action of the infant Appellant himself, who, it was stated, was old enough and intelligent enough to know the dangerous property of gasoline, or, at least, that it burned in no ordinary manner.

22. The Learned Trial Judge decided in favour of the infant Appellant on the issue of negligence. He found "that the Respondents' agent could reasonably have anticipated when selling the gasoline to the
p. 140. infant Appellant accompanied by his brother, that these would, in all probability, use the same for some dangerous purpose likely to cause them injuries, and particularly might use the same for lighting something and thus run the danger of being injured," and that "Black had real doubts and misgivings which were justified as to the propriety of his sale," both findings which, in the submission of the Appellants, were justified in the light of the evidence above quoted.

pp. 145, 146. 23. However, on the issue of contributory negligence, the Learned Judge found against the Appellants. He said: "he was a mentally alert, bright young fellow, standing well in the grades of his school and extremely intelligent, and I have no hesitation in finding that he would

be quite capable of being guilty of contributory negligence in the abstract and also in respect of the handling of gasoline and gasoline fires. He knew the danger of matches, his father had gasoline in his workshop, which was attached to the house. The Plaintiff admitted that he had before the occurrence watched gasoline in his father's torch and had been with his father on a job or two, and seen his father lighting his torch and knew there was gasoline in it, and had been told by his father to keep away from the torch. His father would not allow the children into the workshop. I have no doubt that the boy fully appreciated that gasoline was a dangerous substance, and had considerable knowledge that it burned in no ordinary manner."

24. The Learned Judge went on to apportion the negligence under the Negligence Act as follows :—

> " My opinion is that the Plaintiff's contribution was ever so much the greater, and I should place it at 75 per cent. and the Defendants at 25 per cent."

He accordingly gave Judgment for each of the Appellants for one-quarter of the damages he assessed.

25. The Court of Appeal for Ontario, whose Judgment was given on 19th December 1944, agreed with the Learned Trial Judge on the issue of negligence. In the Judgment of the Court, which was delivered by McRue J.A., it was said " Applying the language of Lord MacNaughten in *Cooke* v. *Midland Gt. Western Rly. of Ireland* (1919 A.C. 229) to the facts of this case, I would put the question for consideration as follows :— Would not a private individual of common sense and ordinary intelligence, placed in the position in which Black was placed, and possessing the knowledge which must be attributed to him, have seen that there was likelihood of some injury happening to these two small boys in whose hands he had placed a quantity of gasoline in a lard pail, and would he not have thought it his plain duty to refuse to deliver it to them under the circumstances ? "

26. The Court of Appeal refused to accept the contention of the Respondents' that, notwithstanding the negligence of its servant, the chain of causation was broken by the deliberate act of the Plaintiff in lighting the bulrush, and quoted in support of their refusal the language of Hamilton L.J. in *Latham* v. *R. Johnson & Nephew Ltd.* (1913 1 K.B. at p. 413). They went on to hold that the finding of contributory negligence was inconsistent with the prior finding that Black was negligent in supplying the gasoline to the infant Plaintiff and his brother. They said if the infant Plaintiff was a person who could be reasonably responsible for the use of gasoline not only by himself, but in company with his younger brother, there would have been no liability on the Defendant. If, on the other hand, it was negligence on the part of the Defendants to put gasoline in the hands of the two boys, in the circumstances found by the Learned Trial Judge, it could not be an answer to say that the boys used the gasoline for a dangerous purpose in those circumstances and did thereby cause injury to one of them. They went on to cite *Lynch* v. *Nurdin* (1841 1 Q.B. 30 at p. 38) and *Cooke* v. *Midland Gt. Western Rly. of Ireland*

p. 154.
p. 155.

(1909 A.C. at p. 237). They assumed that the infant Plaintiff was an average bright boy, and that he had the limited knowledge in regard to gasoline indicated by the Learned Trial Judge, but stated that there was no evidence to indicate that he knew that gasoline would flare up, that fumes would be likely to ignite and cause the gasoline in the pail to burn, or that the younger boy would be likely to become terror stricken and beat the flaming bulrush on the ground in the neighbourhood of the open gasoline can, and they drew a distinction between a case such as a highway traffic case, where the danger is obvious and apparent even to a child, and a case such as the present, where the danger is not so obvious or apparent, and the knowledge necessary for its true apprehension could not be imputed to a boy. They accordingly ordered Judgment to be entered for the full amount of the damage assessed.

27. The Judgment of the Supreme Court of Canada was delivered on 28th November, 1945. The Judgment of Kerwin J., which was concurred in by the Chief Justice of Canada and which favoured the entry of Judgment for the Respondents throughout, dissented from the finding of the Learned Trial Judge that Black had a genuine doubt in his mind, or should have been put on inquiry by the circumstances of the sale. The Learned Judge said " While Black may have doubted whether he should, in view of the manager's instructions, have sold gasoline in the pail, I am unable to deduce further that Black, as a reasonable man, should have foreseen that what occurred or something similar thereto, might take place. Furthermore, I cannot agree that the smallness of the purchase, and the fact that two boys came together, should have raised, or could have raised, any doubt in Black's mind. My conclusion is that it would be putting too great a burden on the conduct of every-day affairs to hold that under all the circumstances of the case, Black was prohibited from selling the gasoline to the boys ". Kerwin J. accordingly held that there was no negligence on the part of the Respondents and was in favour of dismissing the action against them.

p. 165. 28. The Judgment of Estey J., which was concurred in by Hudson J., agreed with the findings of the Learned Trial Judge, both on the issue of negligence and on the issue of contributory negligence, and considered that the apparent inconsistency, upon which the Court of Appeal for Ontario had founded their Judgment, would only exist where the infant had been held to be an infant of tender years, and could not apply where the Learned Judge had found the child to be beyond tender years. He quoted *Bouvier* v. *Fee* (1932 S.C.R. at p. 120), *Lynch* v. *Nurdin* (1841 1 Q.B. 30 at p. 38), and *Geall* v. *Dominion Creosoting Co.* (55 S.C.R. at p. 611), but rejected the contention of the Respondents that the infant Appellant's own action constituted a *novus actus interveniens* of the authority *inter alia* of Greer L.J. in *Haynes* v. *Harwood* (1935 1 K.B. at p. 156), and accepted the Learned Trial Judge's apportionment of negligence. He held that the adult Appellant's cause of action was " a consequential or dependant action ", and that although the Adult Appellant was not himself guilty of negligence his damages should be apportioned on the same basis as that of the infant.

p. 173. 29. The Judgment of Mr. Justice Rand, which was for dismissing the Respondents' appeal, accepted the Judgment of the Court of Appeal

for Ontario for the same reasons. He thought that the children had acted as ordinary children would be expected to act, a manner in which the natural curiosity and intractable impulse to see what would happen, had, as might be expected, played some part.

30. It is submitted that the evidence at the trial supported the finding of the Learned Judge that the attendant Black did in fact have a doubt as to the propriety of the sale to the infant Appellant, which was not confined to the question whether or not the sale was justified in view of his instructions not to deliver gasoline, except in approved cans, but was aroused by a genuine question as to whether it was prudent to deliver a quantity of gasoline to two small boys, and whether in fact the story they were telling about their mother's car was a true story, or one simply invented for the purpose of obtaining the gasoline. But irrespective of this, it is submitted that upon the undisputed evidence the Learned Judge was not only entitled but was bound to find that the sale of the gasoline to the infant Appellant was an act which an ordinary prudent man would have seen was unwise, precisely because it was likely that a boy of the infant Appellant's age and intelligence would be likely to do himself a mischief with it.

31. On this assumption, it is submitted that a finding against the infant Appellant that he was guilty of contributory negligence is inconsistent with the evidence of the case. There is no such conception as " contributory negligence in the abstract." The question in each case is whether the Plaintiff child has a sufficient degree of understanding and maturity of judgment and volition to be capable of resisting conduct of the particular kind which caused the accident. If it be the case that the nature of the negligence of the Defendants consists of the very fact that he ought to have realised that the Plaintiff child was likely to do the very thing which he did, it is inconsistent with this view to hold that the fact of the child's doing it was negligence or that it contributed to, still less caused, the damage.

32. It is further submitted that whatever be the position as regards the infant Appellant, the adult Appellant is entitled to recover his full damage. The infant Appellant was not, for this purpose, the servant or agent of the adult Appellant, and the adult Appellant is, it is submitted, at the worst, in the position of a person who has been wronged by two or more persons, and who are jointly and severally liable to him in the whole of the amount. The adult Appellant was under a statutory obligation to provide necessaries for his infant child. (See The Criminal Code (Revised Statutes of Canada) 1937, Ch. 6, Section 242 ; The Deserted Wives and Children's Maintenance Act (R.S.O. 1937, Ch. 211, Section 2.))

33. It is further submitted that, inasmuch as a majority of the Supreme Court of Canada was not in favour of the course ultimately adopted by them, it was not open to the Supreme Court to restore the Judgment of the Trial Judge in the absence of such a majority. On the contrary, since the Justices were at variance with one another, the decision of the Court of Appeal for Ontario should have stood, as in the case when, on simpler issues, Judges are equally divided.

34. The Appellants accordingly submit that the Judgment of the Supreme Court should be set aside, and that the Order of the Court of Appeal for Ontario should be restored for the following amongst other

REASONS

(A) BECAUSE gasoline is a dangerous substance, and to deliver the same into the hands of a small boy without adequate inquiries or precautions, even after, and, still more without, delivering warning to the child, is in itself a negligent act.

(B) BECAUSE the Respondents knew or ought to have known in the circumstances that the gasoline was likely to be misused, and because their servant Black actually knew or suspected that it would be so misused.

(C) BECAUSE the delivery of gasoline otherwise than in an approved container was a breach of statutory duty of a kind which would give rise to a civil remedy, and was in any event a negligent act which caused the accident.

(D) BECAUSE there was no evidence on which the infant Appellant could be found guilty of contributory negligence.

(E) BECAUSE the Learned Judge and the Learned Justices of the Supreme Court misdirected themselves upon the principles on which on the appropriate findings it was legitimate for them to find the infant Appellant guilty of contributory negligence.

(F) BECAUSE, in the circumstances, the finding of negligence against the Respondents and of contributory negligence against the infant Appellant are inconsistent.

(G) BECAUSE the adult Appellant can, in no event, be penalised as against the Respondents by reason of any contributory negligence on the part of the infant Appellant.

(H) BECAUSE it was not open to the Supreme Court to set aside the Judgment of the Court of Appeal, or to restore the Order of the Learned Trial Judge, in the absence of a majority of the Justices who concurred in reasons which would support such a course, or in the face of a majority of Justices who did not consider that the conclusions of the Trial Judge were correct.

(I) BECAUSE the Judgment of the Court of Appeal and the opinion of Mr. Justice Rand were right for the reasons stated therein.

KENNETH DIPLOCK.

21/1949

No. 88 of 1946.

In the Privy Council.

ON APPEAL

from the Supreme Court of Canada.

BETWEEN

WILLIAM YACHUK and
TONY YACHUK - - *Appellants*

AND

THE OLIVER BLAIS
COMPANY LIMITED - *Respondents*

Case for the Appellants

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