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In the Privy Council.

No. 88 of 1946.

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 (*Defendant*) RESPONDENT

AND BY WAY OF CROSS-APPEAL

BETWEEN

THE OLIVER BLAIS COMPANY LIMITED (*Defendant*) APPELLANT

AND

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

(Consolidated Appeals.)

CASE FOR THE RESPONDENT

1.—This is an Appeal and Cross-Appeal by Special Leave from a Judgment of the Supreme Court of Canada dated the 28th November, 1945, which restored the Judgment of the Trial Judge (Urquhart J.) dated the 29th May, 1944, which the Court of Appeal for Ontario, by Judgment dated the 29th December, 1944, had varied. RECORD p. 159 p. 132 p. 149

2.—The facts found by Urquhart, J., the Trial Judge, may be summarised as follows : p. 133, ll. 7–21

(1) On the 31st July, 1940, at Kirkland Lake where they lived, the infant Appellant, then aged 9, and his brother Victor, then aged 7, conceived the idea of obtaining a small quantity of petrol to apply to bulrushes which they wished to use as torches in imitation of Indians whom they had seen in a motion picture.

RECORD

p. 133, ll. 21–25 (2) Their mother, ill in bed, had given each boy 5 cents to buy chocolate milk and the infant Appellant had so used his 5 cents, but Victor kept his for petrol.

p. 133, l. 36–p. 134, l. 46 (3) The Respondent had a petrol station in Kirkland Lake, which on the 31st July, 1940, was in charge of an adult assistant, and the petrol pumps were being operated by a 15-year-old schoolboy, Black, whom the Judge thought very intelligent, quite able properly to operate the pumps, and thoroughly familiar with the relevant regulations. The manager had instructed Black not to sell petrol either for dry cleaning, since it was unsuited to the purpose, or otherwise than in a proper safety container.

p. 133, ll. 26–35; p. 135, ll. 4–28 (4) After two unsuccessful attempts to buy petrol at another petrol station, the two boys asked Black for petrol. The infant Appellant told Black that he wanted the petrol to put in his mother's car which was stuck down the street. Black asked him if it was for dry cleaning, and explained that the petrol had lead in it and was unsuitable for dry cleaning. The infant Appellant, however, insisted that his mother's car was stuck down the street, and that the petrol was required for the car.

p. 135, ll. 29–46 (5) Black thereupon supplied the boys with about one pint of petrol in a metal lard pail, holding about a quart, which the boys had brought, and upon which Black firmly fitted the cover before handing the pail to the boys, from whom he received the 5 cents.

p. 135, l. 46–p. 136, l. 2 (6) The boys went toward the place where they had indicated that their mother's car was stranded. When out of sight of the station they turned into a lane. The infant Appellant then sent Victor home for the bulrushes and matches, which Victor brought back to the lane.

p. 146, ll. 1–18 (7) The infant Appellant knew the danger of matches, fully appreciated that petrol was a dangerous substance, and had considerable knowledge that it burned in no ordinary manner.

p. 136, ll. 2–15 (8) The boys stood about 4 feet apart with the pail, opened, midway between them. The infant Appellant dipped a bulrush in the petrol and handed it dripping to Victor. The infant Appellant then lighted it. It flared up and Victor, frightened, tried to beat it out on the ground. The petrol in the pail caught fire. Burning petrol splashed on the infant Appellant's long pants and set them on fire. The infant Appellant rolled on the ground to put the flames out, and finally a man and a woman came up and threw water on the pants.

p. 136, l. 15; p. 148, l. 1 (9) The infant Appellant was painfully and seriously burnt, and the Judge assessed his damages at $8,000.

p. 147, l. 7 (10) The adult Appellant as the result of the accident incurred out-of-pocket expenses amounting to $2,712.75.

p. 60, l. 32–p. 61, l. 10 3.—Other evidence showed that another boy, a year older than the infant Appellant, came into the lane before the bulrush was set alight

and said to the infant Appellant " I dare you to light one of those. I bet " you are afraid." Thereupon the infant Appellant dipped the bulrush in the petrol, handed it to Victor and lit it with a match.

RECORD

4.—On these facts the learned Trial Judge held that Black was negligent because he had real and justified doubts about the propriety of his sale, and he might reasonably have anticipated from the circumstances that the boys would use the petrol for a dangerous purpose ; yet without investigation he sold petrol to young boys in a dangerous container. The learned Judge was of opinion that this negligence contributed to the infant Appellant's injuries. He held, however, that the Appellants were not helped by the regulations purporting to be made under Section 12 of the Gasoline Handling Act, R.S.O. 1937, c. 332, upon breach of which the Appellants had also relied.

p. 139, l. 47–p. 141, l. 23
p. 141, l. 15
p. 141, l. 17–p. 145 l. 14

5.—The learned Trial Judge then held that the infant Appellant was guilty of negligence which caused or contributed to his injuries, although it was Victor's beating the bulrush on the ground which really caused the accident. Urquhart J. apportioned the blame at 75 per cent. to the infant Appellant and 25 per cent. to the Respondent. He therefore awarded $678.19 to the adult Appellant and $2,000 to the infant Appellant, and ordered the Respondent to bear the full costs of the action.

p. 145, l. 15–p. 146, l. 34
p. 146, l. 47–p. 147, l. 6
p. 148

6.—The Court of Appeal (Robertson C.J.O., and Roach and McRuer JJ.A.) held that the infant Appellant was not guilty of contributory negligence and varied the Judgment of Urquhart J. by increasing the award to the adult Appellant to $2,712.75 and to the infant Appellant to $8,000.

p. 149

7.—The Court's reasons for Judgment were delivered by McRuer J.A., who agreed with the learned Trial Judge's findings of fact, but considered that he had applied wrong principles in finding the infant Appellant guilty of contributory negligence. McRuer J.A. considered that finding to be inconsistent with the finding that Black was negligent, since if the infant Appellant could be reasonably responsible for the use of petrol there would have been no liability on the Respondent. In his view the danger was not obvious and the infant Appellant's limited knowledge in regard to petrol did not indicate that he knew it would flare up, that the fumes were likely to ignite and set fire to the petrol in the pail, or that Victor would become terror-stricken. Accordingly, McRuer J.A. held that the infant Appellant was not guilty of contributory negligence.

pp. 157–158
p. 155, ll. 14–26
p. 156, ll. 19–39

8.—In the Supreme Court of Canada the Chief Justice and Kerwin, J. were of the opinion that the appeal of the Respondent should be allowed and the action dismissed. Hudson and Estey JJ. were of the opinion that the Judgment of the Trial Judge should be restored. Rand J. was of the opinion that the Judgment of the Court of Appeal for Ontario should be

p. 164, l. 30
p. 172, l. 38
p. 183

p. 159 affirmed. In the result, the Supreme Court of Canada delivered a Judgment allowing the appeal of the Respondent to the extent of restoring the Judgment of the Trial Judge.

pp. 161–163 9.—In his reasons for Judgment Kerwin J., with whom the Chief Justice agreed, stated that he was unable to deduce that Black, as a reasonable man, should have foreseen that what occurred or something similar thereto might take place; and he thought Urquhart J.'s finding that Black had a real doubt about the purpose for which the petrol was p. 163, l. 26–p. 164, l. 29 to be used was based on unsound grounds. He was also of opinion that the Respondent had committed no breach of statutory duty.

pp. 165–172 10.—Hudson J. concurred in the reasons for Judgment of Estey J., who held that the evidence supported the finding of negligence against Black, and the finding that he had a real doubt about the purpose for p. 167, l. 37–p. 169, l. 27 which the petrol was to be used. Estey J. then considered the conduct of the boys and found that the infant Appellant had sufficient knowledge of petrol and appreciation of the danger of his acts to support a finding that he did not exercise the care which a reasonably careful boy of his age, capacity, knowledge and experience would have exercised in the p. 169, l. 28–p. 170, l. 4 circumstances. Estey J. held, however, that the Respondent's negligence had not spent itself and that the damage was in law caused by the negligence p. 171, ll. 1–5 of both parties. He found it unnecessary to deal with the alleged breach p. 171, l. 11–p. 172, l. 37 of statutory duty. Estey J. further held that the damages of the adult Appellant were properly apportioned on the same basis as those of the infant Appellant as determined by the Trial Judge.

p. 173 11.—Rand J. did not doubt that giving the petrol to the boys was a negligent act of which the damage was a foreseeable consequence and that the boys only acted as ordinary children would be expected to act.

12.—No Judge in the Courts below has held the Respondent guilty of breach of statutory duty as alleged against it, and the Respondent submits that, if the regulation upon which the Appellants rely was valid, there had in the circumstances been no breach of the regulation.

13.—The Negligence Act (R.S.O. 1937, c. 115) contains the following provisions:

> 2.—(1) Where damages have been caused or contributed to by the fault or neglect of two or more persons the Court shall determine the degree in which each of such persons is at fault or negligent, and, except as provided by subsections 2 and 3, where two or more persons are found at fault or negligent, they shall be jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each shall be

liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent. 1930, c. 27, s. 3 ; 1931, c. 26, s.2 ; 1935, c. 46, s. 2 (1).

* * * *

3. In any action for damages which is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff which contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively. 1930, c. 27, s. 4.

14.—The Respondent humbly submits :

(1) The evidence establishes that there was no negligence on the part of Black in delivering petrol to the infant Appellant when the infant Appellant had deceitfully represented to Black that the petrol was to be used in his mother's car " which was stuck down the street." It was not within the range of reasonable foresight or anticipation by Black that the infant Appellant would use petrol for the foolhardy and extraordinary purpose of lighting bulrushes.

(2) The act of Black in supplying the petrol was not the effective cause of the accident, which was due to the intervening acts of the infant Appellant, his brother, Victor, and the older boy who dared them to set the bulrush alight.

(3) The evidence established that the infant Appellant well knew that he was doing a dangerous act, and the Trial Judge rightly found him guilty of negligence.

(4) The Appellants' action should therefore have been dismissed with costs.

15.—The Respondent alternatively submits that if Black were in any way negligent, his was an antecedent negligence which would have caused no harm but for the infant Appellant's subsequent negligence, which in law is to be treated as the sole effective cause of the accident.

16.—If contrary to the Respondent's submission Black was guilty of negligence contributing to the accident, the Respondent will contend that the infant Appellant was also negligent, and that Urquhart J. made a proper apportionment of the damage. The Respondent will also contend that in such an event the adult Appellant was not entitled to recover from the Respondent his entire damage but only one-quarter thereof. Alternatively, if the adult Appellant is entitled to recover his entire damage, the Respondent is entitled to recover from the infant Appellant three-quarters of the amount thereof.

17.—The Respondent therefore submits that the Appellants' appeal should be dismissed and that the Respondent's cross-appeal should be allowed for the following amongst other

REASONS

1. BECAUSE the Respondent's servant Black was not negligent.

2. BECAUSE the accident was caused solely by the deliberate act and conduct of the infant Appellant or by his conduct and that of other boys.

3. BECAUSE Black did not break any statutory duty. 10

4. BECAUSE, if, contrary to the Respondent's contention. Black was negligent or broke any statutory duty such negligence or breach of duty was not an effective cause of the accident.

5. BECAUSE the infant Appellant was in any event guilty of contributory negligence, and Urquhart J. correctly apportioned the blame.

6. BECAUSE the adult Appellant cannot recover damage from the Respondent unless the infant Appellant can recover, and in any event can only recover from the Respondent a part 20 of his damage proportionate to the Respondent's responsibility for the accident.

7. BECAUSE of the other reasons given by Kerwin J.

FRANK GAHAN.

In the Privy Council.

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(Consolidated Appeals).

CASE FOR THE RESPONDENT

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