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UNIVERSITY OF LONDON
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INSTITUTE OF ADVANCED
LEGAL STUDIES

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,

(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;

Record of Proceedings

RIDSDALE & SON,
131 Victoria Street,
London, S. W. 1,
England. *for the Appellants.*

LAWRENCE JONES & CO.,
Lloyd's Building, Leadenhall St.,
London, E. C. 3,
England. *for the Respondent.*

ST. CATHARINES
LEE PRINTING COMPANY, LIMITED
1947

INSTITUTE OF ADVANCED
LEGAL STUDIES,
25, RUSSELL SQUARE,
LONDON,
W.C.1.

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LEGAL STUDIES

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In the Supreme Court of Ontario

In the Supreme Court of Ontario No. 1 Notice of Discontinuance 18th Nov., 1942

BETWEEN:

WILLIAM YACHUK, an infant under the age of 21 years, by his next friend Tony Yachuk, and the said TONY YACHUK,

Plaintiffs,

—AND—

THE OLIVER BLAIS COMPANY LIMITED and TECK IMPERIAL SERVICE STATION, and CLARENCE MacDONALD,

10

Defendants.

NOTICE OF DISCONTINUANCE

TAKE NOTICE that the Plaintiffs hereby wholly discontinue this action as against the Defendant, Teck Imperial Service Station.

DATED at the City of St. Catharines, in the County of Lincoln this 18th day of November, A.D. 1942, by BENCH, KEOGH & CAVERS, 3 James Street, St. Catharines, Ontario, Solicitors for the Plaintiffs.

In the Supreme Court of Ontario No. 2 Statement of Claim 12th Jan., 1943

In the Supreme Court of Ontario

BETWEEN:

WILLIAM YACHUK, an infant under the age of 21 years, by his next friend Tony Yachuk, and the said TONY YACHUK,

Plaintiffs,

—AND—

THE OLIVER BLAIS COMPANY LIMITED and TECK IMPERIAL SERVICE STATION, and CLARENCE MacDONALD,

10 Defendants.

STATEMENT OF CLAIM

1. The Plaintiff William Yachuk is an infant under the age of 21 years and is suing by his next friend, his father, Tony Yachuk. The Plaintiff, Tony Yachuk, is suing both as the next friend of the Plaintiff William Yachuk and in his personal capacity. Both Plaintiffs reside in the City of St. Catharines in the County of Lincoln.

2. The Defendant, Clarence MacDonald, is a service station operator, residing in the Town of Kirkland Lake and employed by the Defendant, The Oliver Blais Company Limited, which is a limited company, incor-
20 porated under the laws of the Province of Ontario and has its head office at the Town of Kirkland Lake.

3. This action has been discontinued as against the Defendant, Teck Imperial Service Station.

4. On July 31st, 1940, the Defendant Oliver Blais Company Limited owned and operated a Service Station in the town of Kirkland Lake known as the Teck Imperial Service Station and did employ the Defendant, Clarence MacDonald, as its servant, giving him full charge of this service station.

5. On July 31st, 1940, the Defendants through their servant did sell
30 to the infant Plaintiff, William Yachuk, then aged nine years, five cents worth of gasoline and did deliver the said gasoline to the said Plaintiff in an open 5-lb. lard tin.

6. The Defendants did deliver the said gasoline to the said infant Plaintiff in an open tin, contrary to section 39 of regulations passed pursuant to the Gasoline Handling Act, R.S.O. 1937, chapter 332, and did not warn the infant Plaintiff as to the inherent dangers of the said gasoline.

7. The infant Plaintiff in company with various other infants proceeded to play with the gasoline, suddenly the gasoline caught fire and

exploded and the infant Plaintiff sustained and is still suffering from major burns about the legs.

In the Supreme Court of Ontario No. 2 Statement of Claim 12th Jan., 1943 Continued

8. The Plaintiffs allege that the Defendants through their servant were negligent in that:

(a) They failed to obey the statutory duties imposed upon them by The Regulations passed pursuant to the Gasoline Handling Act, R.S.O. 1937, ch. 332, sec. 39, and did deliver the gasoline to the infant Plaintiff as aforesaid, in breach of the said Act.

(b) They had knowledge of the danger inherent in the gasoline and failed to warn the infant Plaintiff of the said danger or indicate to him in any way the dangerous character of the goods.

(c) They had knowledge of the danger inherent in the gasoline and did fail to take proper precautions to prevent it causing injury.

(d) The Defendants had knowledge that the Plaintiff was an infant and under the circumstances failed to take special care or failed to take proper precautions to prevent injury arising from the said gasoline.

(e) The Defendants ought to have foreseen the probable consequences of their act and ought not to have delivered the gasoline to the infant Plaintiff.

9. The Defendant Oliver Blais Company Limited was further negligent in that:

(a) It put an infant of fifteen years of age in charge of the service station and a dangerous substance, namely, gasoline.

(b) It failed to give its servants proper instructions regarding the vending of gasoline.

(c) It failed to provide proper supervision for the sale of the said gasoline.

10. As a result of the negligence of the Defendants as aforesaid the infant Plaintiff sustained major burns to his legs. He has been confined and still is confined to the hospital. The Plaintiffs incurred medical, surgical and nursing, travelling and other expenses as a result of this said negligence and the particulars of the said expenses incurred by the Plaintiffs up to the present time are as follows: $2,692.75.

11. The Plaintiffs therefore claim from the Defendants:

(a) $25,000 damage.

(b) their cost of this Action.

(c) such further and other relief as this Honourable Court shall deem just and proper.

12. The Plaintiffs propose that this Action be tried in the City of Toronto, in the County of York.

DELIVERED at the City of St. Catharines, in the County of Lincoln, this 12th day of January, A.D. 1943, by BENCH, KEOGH & CAVERS, 3 James St., St. Catharines, Ontario, Solicitors for the Plaintiffs.

In the Supreme Court of Ontario

In the Supreme Court of Ontario
No. 3
Statement of Defence
29th Jan., 1943

BETWEEN:

WILLIAM YACHUK, an infant under the age of 21 years, by his next friend Tony Yachuk, and the said TONY YACHUK,

Plaintiffs,

—AND—

THE OLIVER BLAIS COMPANY LIMITED and TECK IMPERIAL SERVICE STATION, and CLARENCE MacDONALD,

10 Defendants.

STATEMENT OF DEFENCE

1. The Defendants admit the allegations contained in paragraphs 1 to 4 of the Plaintiffs' Statement of Claim but, save as hereinafter expressly admitted, deny all other allegations contained therein.

2. The Defendants allege that if the Plaintiffs sustained any damage through negligence, such negligence was on the part of some party or parties other than the Defendants, their servants, agents and workmen.

3. The Infant Plaintiff was the author of his own misfortune and any injury sustained by him was caused by his own negligence in playing
20 with gasoline when he knew, or ought to have known and foreseen, the consequences or probable consequences of his act.

4. In the alternative, the Defendants plead that if the Plaintiffs sustained damages by reason of the injury of the Infant Plaintiff, as alleged in the Statement of Claim, such damages were contributed to by the negligence of the said Infant Plaintiff who was negligent in playing with gasoline when he knew, or ought to have known and foreseen, the consequences or probable consequences of his act.

5. The Defendants deny that they failed to obey the statutory duties imposed upon them by the Regulations passed pursuant to the Gasoline
30 Handling Act, R.S.O. 1937, ch. 332, sec. 39, and say that they fully complied with the said Regulations.

6. In the alternative the Defendants plead that section 39 of the Regulations passed pursuant to the Gasoline Handling Act, R.S.O. 1937, ch. 332, and any amendments thereto, is invalid and is not binding upon the Defendants, and that in any event the said Act and breach of the Regulations passed pursuant thereto do not give any cause of action.

7. The Defendants plead The Negligence Act, R.S.O. 1937, ch. 115, and amendments thereto.

8. The Defendants allege that the amount claimed by the Plaintiffs
40 for damages is excessive.

The Defendants submit that this action be dismissed with costs.

DELIVERED this 29th day of January, A.D. 1943, by Messrs. O'Meara & Burns, 14 Government Road West, Kirkland Lake, Ontario, Solicitors for the Defendants.

In the Supreme Court of Ontario

In the Supreme Court of Ontario No. 4 Joinder of Issue 3rd Feb., 1943

BETWEEN:

WILLIAM YACHUK, an infant under the age of 21 years, by his next friend Tony Yachuk, and the said TONY YACHUK,

Plaintiffs,

—AND—

THE OLIVER BLAIS COMPANY LIMITED and TECK IMPERIAL SERVICE STATION, and CLARENCE MacDONALD,

10 Defendants.

JOINDER OF ISSUE

1. The Plaintiffs hereby join issue upon the allegations in the Defendants' Statement of Defence herein.

DELIVERED at the City of St. Catharines, in the County of Lincoln, this 3rd day of February, A.D. 1943, by Bench, Keogh & Cavers, 3 James Street, St. Catharines, Ontario, Solicitors for the Plaintiffs.

In the Supreme Court of Ontario No. 5 Jury Notice 3rd Feb., 1943

In the Supreme Court of Ontario

BETWEEN:

WILLIAM YACHUK, an infant under the age of 21 years, by his next friend Tony Yachuk, and the said TONY YACHUK,

Plaintiffs,

—AND—

THE OLIVER BLAIS COMPANY LIMITED and TECK IMPERIAL SERVICE STATION, and CLARENCE MacDONALD,

10 Defendants.

JURY NOTICE

TAKE NOTICE that the Plaintiffs require that this action be tried with a Jury.

DATED at St. Catharines, Ontario, this 3rd day of February, 1943, by Bench, Keogh & Cavers, 3 James Street, St. Catharines, Ontario, Solicitors for the Plaintiffs.

In the Supreme Court of Ontario

In the Supreme Court of Ontario No. 6 Plaintiffs' Notice of Appeal to Court of Appeal 8th June, 1944

BETWEEN:

WILLIAM YACHUK, an infant under the age of 21 years, by his next friend Tony Yachuk, and the said TONY YACHUK,
Plaintiffs,

—AND—

THE OLIVER BLAIS COMPANY LIMITED and TECK IMPERIAL SERVICE STATION, and CLARENCE MacDONALD,

10 Defendants.

NOTICE OF APPEAL

TAKE NOTICE that the Plaintiffs' Appeal to the Court of Appeal for Ontario from the Judgment pronounced by the Honourable Mr. Justice Urquhart on the 29th day of May, 1944 and ask that the said Judgment may be reversed and that judgment should be entered in favour of the Plaintiffs for $25,000.00 damages and costs, or for such other amount as the Court of Appeal shall deem proper, or that a new trial may be had with a jury, upon the following grounds, that the Trial Judge erred

1. In considering the evidence and the Jury's findings at the first
20 trial and in adopting the same apportionment of negligence and assessment of damages as found by the Jury at the first trial;

2. In holding that the infant plaintiff appreciated the danger of gasoline and was capable of and guilty of negligence;

3. In holding that the act of the infant plaintiff in lighting the bulrush caused or contributed to his injuries;

4. In his apportionment of 75 per cent. negligence against the infant plaintiff and 25 per cent. negligence against the defendant Company;

5. In assessing the infant plaintiff's damages at $8,000.00 which, it is submitted, was an unreasonably small and inadequate amount;

30 6. In holding that there was no breach by the defendants of the Regulations passed under the Gasoline Handling Act, R.S.O. 1937, ch. 332, as amended by Statutes of Ontario, 1938, ch. 14, sec. 2;

7. In reducing the adult plaintiff's admitted damages;

8. In taking the case from the Jury after the evidence was in;

9. In excluding evidence tendered by the plaintiffs;

In the Supreme Court of Ontario No. 6 Plaintiffs' Notice of Appeal to Court of Appeal 8th June, 1944 Continued

10. In granting the defendants' Motion for a non-suit in favour of the Defendant MacDonald at the conclusion of the Plaintiffs' case.

DATED at the City of St. Catharines, in the County of Lincoln, this 8th day of June, A.D. 1944.

BENCH, KEOGH, GRASS & CAVERS,
3 James Street,
St. Catharines, Ontario,
Solicitors for the Plaintiffs.

To:
10 The Defendants, The Oliver Blais Company Limited
and Clarence MacDonald;

And to:
Messrs. O'Meara & Burns,
Kirkland Lake, Ontario,
Solicitors for the Defendants.

And to:
Messrs. Rowan & Robinette,
320 Bay Street, Toronto, Ontario,
their Toronto agents herein.

In the Supreme Court of Ontario

In the Supreme Court of Ontario No. 7 Defendant's Notice of Cross-Appeal 10th June, 1944

BETWEEN:

WILLIAM YACHUK, an infant under the age of 21 years, by his next friend Tony Yachuk, and the said TONY YACHUK,

Plaintiffs,

—AND—

THE OLIVER BLAIS COMPANY LIMITED and TECK IMPERIAL SERVICE STATION, and CLARENCE MacDONALD,

10 Defendants.

NOTICE OF CROSS-APPEAL

TAKE NOTICE THAT the defendant The Oliver Blais Company Limited cross-appeals to the Court of Appeal for Ontario from the judgment pronounced by the Honourable Mr. Justice Urquhart on the 29th day of May, 1944, and asks that the said judgment may be reversed and that this action be dismissed with costs upon the following grounds:

1. That the learned trial Judge erred in finding that Bruce Black, an employee of The Oliver Blais Company Limited, was negligent in selling gasoline to the infant plaintiff under the circumstances of the case.

20 2. That the learned trial Judge erred in finding that any negligence of Bruce Black was the cause of the accident.

3. That the learned trial Judge erred in not holding that the damages suffered by the infant plaintiff were too remote.

4. That the learned trial Judge erred in not finding that the infant plaintiff's negligence was the sole effective cause of the accident.

5. That the learned trial Judge erred in not finding that the chain of causation between any negligence of Bruce Black and the injury sustained by the infant plaintiff was broken by novus actus interveniens of the infant plaintiff or his brother.

30 6. That the learned trial Judge erred in not holding that the infant plaintiff was guilty of ultimate negligence.

7. That the learned trial Judge erred in assessing the infant plaintiff's damages at $8,000.00 which it is submitted was an unreasonably large amount.

In the Supreme Court of Ontario
No. 7
Defendant's Notice of Cross-Appeal
10th June, 1944
Continued

DATED at Kirklind Lake in the District of Temiskaming this 10th day of June, 1944.

Messrs. O'Meara & Burns,
Kirkland Lake, Ontario,
Solicitors for the Defendant,
The Oliver Blais Company Limited.

To:
Bench, Keogh, Grass & Cavers,
3 James Street, St. Catharines, Ontario,
10 Solicitors for the Plaintiffs.

And to:
Messrs. Hughes, Agar, Thompson & Amys,
357 Bay Street, Toronto, Ontario,
their Toronto agents herein.

Law Stamps $1.40.

In the Supreme Court of Ontario

In the Supreme Court of Ontario No. 8 Order of The Honourable The Chief Justice of Ontario allowing security 15th Feb., 1945

THE HONOURABLE
THE CHIEF JUSTICE OF ONTARIO
IN CHAMBERS

THURSDAY, THE 15TH DAY
OF FEBRUARY, 1945.

BETWEEN:

WILLIAM YACHUK, an infant under the age of 21 years, by his next friend Tony Yachuk, and the said TONY YACHUK,

Plaintiffs,

10

—AND—

(SEAL)

THE OLIVER BLAIS COMPANY LIMITED and TECK IMPERIAL SERVICE STATION, and CLARENCE MacDONALD,

Defendants.

UPON the application of the defendant The Oliver Blais Company Limited and upon hearing read the bonds hereinafter referred to and upon hearing what was alleged by counsel for the parties;

1. IT IS ORDERED THAT the bond in the sum of $500.00 of the
20 Pearl Assurance Company Limited duly filed, that The Oliver Blais Company Limited will effectually prosecute its appeal to the Supreme Court of Canada from the judgment of the Court of Appeal for Ontario, dated the 19th day of December, 1944, and will pay such costs as may be awarded against it by the Supreme Court of Canada, be and the same is hereby allowed as good and sufficient security on the said appeal.

2. AND IT IS FURTHER ORDERED THAT the execution of the plaintiffs' judgment against The Oliver Blais Company Limited be and the same is hereby stayed until the appeal of The Oliver Blais Company Limited to the Supreme Court of Canada has been disposed of and that
30 the bond in the sum of $13,212.75 of the Pearl Assurance Company Limited, duly filed, is hereby allowed as good and sufficient security, that if the judgment, or any part thereof is affirmed, The Oliver Blais Company Limited will pay the amount thereby directed to be paid or the part thereof as to which the judgment is affirmed if it is affirmed only as to part.

3. AND IT IS FURTHER ORDERED THAT costs of this application be costs in the cause.

CHAS. W. SMITH,
Registrar S.C.O.

Entered O.B. 189, page 249-50.
40 February 15th, 1945.
IV.

In the Supreme Court of Ontario No. 9 Plaintiffs' Opening to Jury 10th May, 1944

EVIDENCE AT THE TRIAL

In the Supreme Court of Ontario

BETWEEN:

WILLIAM YACHUK, an infant under the age of 21 years, by his next friend Tony Yachuk, and the said TONY YACHUK,

Plaintiffs,

—AND—

THE OLIVER BLAIS COMPANY LIMITED and TECK IMPERIAL SERVICE STATION, and
10 CLARENCE MacDONALD,

Defendants.

TRIAL

Before THE HONOURABLE MR. JUSTICE URQUHART and a Jury at Toronto on May 10th and 11th, 1944.

MR. J. L. G. KEOGH	Counsel for Plaintiffs.
MR. J. J. ROBINETTE	Counsel for Defendants.

——The jury was impaneled and sworn.

HIS LORDSHIP: All right. Who is the plaintiff?

MR. KEOGH: I appear for the plaintiffs, my lord; my friend Mr.
20 Robinette appears for the defendants.

HIS LORDSHIP: Very well. You may open to the jury then.

MR. KEOGH: Thank you, my lord.

PLAINTIFFS' OPENING TO JURY

MR. KEOGH: May it please your lordship and gentlemen of the jury, this is a type of action that is a little unusual and which fortunately does not happen very often. Under our system the lawyer for the plaintiff is supposed to make an opening address to the jury for the purpose of telling the jury the facts which are involved in the case and the issues which are involved so that it will make it easier for you gentlemen to
30 follow the evidence and fit in the different pieces of evidence as they come into the picture as a whole. In other words you have at the start

In the Supreme Court of Ontario
No. 9
Plaintiffs' Opening to Jury 10th May, 1944.
Continued

a rough idea of what the whole thing is about and it will enable you to better understand the evidence as you go along. This action results from an accident which occurred at the town of Kirkland Lake on the 31st July, 1940. I should say here that the defendant has no chance to reply and anything that I tell you is subject to being proved in evidence before you in this case and if it is not proved then you will disregard it and put it out of your minds. The accident occurred almost four years ago, on July 31st, 1940, at Kirkland Lake. The action is brought by William Yachuk, an infant, and his father as next friend and the father
10 also in his personal capacity. The "next friend" is a term we use in law because an infant is anyone under twenty-one and cannot sue himself and has to sue by a next friend. They are the plaintiffs, and the defendants are the Oliver Blais Company Limited, which operated a gasoline service station in Kirkland Lake Ontario, known as Teck Imperial Service Station, and the manager of that station, Mr. Clarence MacDonald. The action arises out of five cents' worth of gasoline which was sold to two little boys at Kirkland Lake almost years ago. The infant plaintiff, William Yachuk, the one who was injured, was then nine years of age and was accompanied by his little brother Victor, who was then seven years of age.
20 The evidence will show you that they had been at a movie earlier, a week or so earlier, and in this moving picture they had seen Indians dipping torches into a pot of some kind and lighting them in the fire and then dancing around and riding around with them, and from some queer kink of childish nature they conceived the idea that they would do the same thing with some bulrushes that they had at home. Their mother had given each of them five cents for a bottle of chocolate milk. One little boy spent his and drank his milk and the other little boy saved his and got the idea of buying five cents' worth of gasoline. They got a glass bottle, got a jar at home, and started out with their nickel to another
30 service station, the B-A station, not the station in this action but just across the road from the Teck Imperial Service Station. The attendant there refused to sell them any gasoline, giving as an ostensible reason because they had a glass bottle. They went, with the resourcefulness of childhood, back home and got a tin lard pail, a small tin Domestic Shortening pail, and went back again to the B-A station and were again refused. They went then from there across the road to the Teck Imperial station, the one in this case, and there was a peculiar combination of circumstances there on that day. On that day, the gasoline pumps at the Teck Imperial Service Station at that time in the afternoon were in charge of a young
40 high school student by the name of Bruce Black, just under fifteen years of age who was then on his high school holidays. It just happened that day Mr. MacDonald, who was the manager of the service station, was moving from one house to another in the town of Kirkland Lake and was away looking after the moving; he had engaged Bruce Black, this young man, about two or three weeks before to help out in the summer. They were a busy station, they had a large staff of some eleven men and they were very busy. In the first two or three weeks that he had engaged

In the Supreme Court of Ontario No. 9 Plaintiffs' Opening to Jury 10th May, 1944 Continued

Black he wouldn't let him work on the pumps but he had given certain instructions to Black, which will be gone into in detail at the trial, and having given those instructions and being shorthanded this day he told Black that he might sell gasoline this day. I am not sure whether this was his first day or the second or third day but it was just shortly after he had been put on the pumps. These two little boys came up with their five cents and their tin lard pail—we say there was no cover on it, Black says there was a cover on; that will be gone into—and one little boy said that he wanted it for the outboard motor for their motor boat; that was
10 the younger, Victor, age seven. The other little boy said he wanted it for his mother's car which was stuck down the road. Black asked them "Are you sure you don't want it for dry cleaning?" and they said "No." So he took the hose from the pump and he put into the lard pail, about three inches of gasoline, the young lad gave him the five cents and he rang it up in the till. They went off and up a lane, I think they went a couple of blocks up that lane which ran up to a point about a block away from their house. When the two young lads got up the lane with the gasoline the elder fellow, the injured boy, William, said to his brother "I will wait here and you go home and get the bulrushes." So the young
20 lad went home and got the bulrushes and came back with a match or two that he had gotten from a top shelf in the bathroom and handed a bulrush to his older brother in the lane. The older brother dipped it into the gasoline and he handed him a match. He handed back the bulrush to the younger brother. The elder brother lit a match and lit the bulrush and when they did that they were standing, the lard pail with the rest of the gasoline in it was on the ground in the lane. Young Victor, the young fellow, who was holding a bulrush after it had been soaked, was standing about two feet on one side of the pail and Billy, the boy who was subsequently burned, was standing about two feet on
30 the other side of the pail. When Billy lit the bulrush which was then being held by the young fellow, Victor, it flared up with apparently a bigger flame than they expected and young Victor got scared and went to put it out on the ground within two feet of this open pail with the rest of the gasoline in it. In some way or other, we don't know how, the rest of the gasoline in the open pail—we say it was open—caught fire and flared up; one of the young lads will describe it as with a swish; it flared up and practically burnt the pants off the other young lad who was standing about two feet on the other side of the pail. He was burnt, I think about all that was left of his pants were the cuffs on the
40 bottom and a part of the belt across the top; both legs were very badly burnt, practically all the skin was burnt off them. He was in the hospital at Kirkland Lake for two or three months and then he was taken to the Sick Children's Hospital at Toronto and he was there for about two and a half years. They did a wonderful job on him at the Sick Children's; he is lucky to be alive; he had while he was there sixteen skin grafts, practically the whole of his chest and back were scarred as donor areas for skin that they took off to put on his legs. He had five blood trans-

fusions. As a result of all this treatment and the pulling of the skin and being so long in bed the bones of his ankles grew together and the bones of his legs grew together and the doctors performed a bone dividing operation on each leg but they couldn't do anything for the ankles and they are still grown together and permanently stiff. He was on crutches for a long time and now he has to sort of shuffle and hobble along. The both feet are badly deformed and he has to wear special shoes and will be crippled for the rest of his life. I think those are the facts. You would be told in evidence the expenses but my friend has told me
10 that he is prepared to admit the expenses, and they were $2,712.75, which will save some time; those are what the father personally is claiming as his damages, for which he is liable; he paid a large part of them but he has not paid them all. In addition to that we are claiming damages for the pain and suffering and disability suffered by this boy who was then nine but who is now almost thirteen. You gentlemen may say to yourselves "Why is this case so long in coming to trial before us?" and you might perhaps draw some inference from that which might not be correct. The boy, as I think I told you, was two and a half years in hospitals. The case was tried last May, it was appealed and a new trial granted
20 and we are here again now on the second trial. We are claiming altogether $25,000.00 including the expenses for this boy who is crippled for the rest of his life. Those are the main facts and I think with that you will be able to follow it.

HIS LORDSHIP: It is not very good form to mention the amount you are claiming, Mr. Keogh.

MR. KEOGH: Yes, my lord, I have a case on that.

HIS LORDSHIP: I know there is a case on that, but it is not considered good form and I don't like it and I am going to express my opinion as not liking it.

30 MR. KEOGH: In any event the Court of Appeal in that case said it was all right, my lord.

HIS LORDSHIP: It is not done in England or here either, as far as I am concerned.

MR. KEOGH: Well it was done in a case that I had about two months ago before Mr. Justice MacKay.

HIS LORDSHIP: It may be done, and that is the last word as far as I am concerned.

MR. KEOGH: That isn't the last word, my lord, because the Supreme Court has the last word.

40 HIS LORDSHIP: All right, take it to the Court of Appeal.

MR. KEOGH: It was mentioned in a case against me, the same thing, about three months ago.

In the Supreme Court of Ontario No. 9 Plaintiffs' Opening to Jury 10th May, 1944

HIS LORDSHIP: All right; it may be legal but it isn't done.

MR. KEOGH: I am saying it is done.

HIS LORDSHIP: I say it is not.

MR. KEOGH: I say so with respect.

HIS LORDSHIP: All right, go on in your own way. It is a question of what is good etiquette and what is not, and I don't believe it is.

Is there anything that can be admitted in this case?

MR. ROBINETTE: May I say—my friend said that I was admitting the out-of-pocket expenses—I don't want the jury to form the idea I am admitting liability at all.

HIS LORDSHIP: No.

MR. ROBINETTE: I am admitting the quantum to save time.

HIS LORDSHIP: Well put them in as exhibit one.

MR. KEOGH: Exhibit one is a list of the expenses—I have given my friend a copy—which is $2,712.75.

——EXHIBIT 1. Statement of expenses.

HIS LORDSHIP: Are there any other facts—it is very tiring to go over the same thing again and again—that you can admit?

How does Mr. MacDonald come into this?

MR. KEOGH: He was the manager of the service station, my lord, who instructed, I say improperly instructed, the young lad of fifteen who was in charge of the pumps; he left him in charge of the station.

HIS LORDSHIP: All right.

MR. KEOGH: Dr. King, please.

With that exhibit one I would like to attach the bills filed at the first trial and which are the same except for one item of $20.00. Will you be kind enough to attach this to exhibit one, Mr. Registrar.

In the Supreme Court of Ontario No. 10 Plaintiffs' Evidence Dr. Kenneth Chisholm King Examination-in-Chief 10th May, 1944

PLAINTIFFS' CASE

(DR.) KENNETH CHISHOLM KING: sworn.

EXAMINED:
By Mr. Keogh.

Q. Dr. King, at the time of the last trial last May you were a house surgeon on the staff of the Sick Children's Hospital—is that right? A. I was.

In the Supreme Court of Ontario
No. 10
Plaintiffs' Evidence
Dr. Kenneth Chisholm King
Examination-in-Chief
10th May, 1944
Continued

Q. And you then produced and filed with the court the five files of the Sick Children's Hospital dealing with the treatment given to Billy Yachuk in that hospital? A. I did.

HIS LORDSHIP: How are those files going in? They are not going in as far as I am concerned.

MR. KEOGH: The witness had the custody of them.

HIS LORDSHIP: He didn't make the entries in them.

MR. KEOGH: No, my lord, he didn't.

HIS LORDSHIP: He wants to refer to them to refresh his memory?

10 MR. KEOGH: No, I am just having the files produced for Dr. LeMesurier when I call him to-morrow.

HIS LORDSHIP: Did Dr. LeMesurier make the entries?

MR. KEOGH: He did some of the operations.

HIS LORDSHIP: Why isn't he here to-day?

MR. KEOGH: Because he is awfully tied up to-day.

HIS LORDSHIP: I know, but cases must go on, you know, whether doctors are tied up or not. I am not taking them. They may be left here, and they are not evidence and not going in as far as I am concerned.

MR. KEOGH: Well I am tendering them, my lord. They were felt to
20 be evidence at the last trial and I am only asking the witness to identify them as the files of the Sick Children's Hospital of this case and I am not going to refer to them with the witness at all.

HIS LORDSHIP: We will just mark them "A" for identification, that is all.

MR. KEOGH: Q. These are the files of the Sick Children's Hospital on the Billy Yachuk case that you produced at the time of the last trial? A. Correct.

Q. And you didn't personally treat Billy Yachuk? A. No.

MR. KEOGH: All right, thank you, doctor.

30 That is Exhibit A.

HIS LORDSHIP: It isn't Exhibit A, it is not going to be exhibited until it is introduced by the person who made it. It is filed for identification; it is marked "A" for proof and identification.

MR. KEOGH: All right, thank you, Doctor.

MR. ROBINETTE: I have no questions.

HIS LORDSHIP: Just keep those where they won't be lost.

In the Supreme Court of Ontario
Plaintiffs' Evidence
No. 11
Hugh James Menagh
Examination-in-Chief
10th May, 1944

HUGH JAMES MENAGH: sworn.

EXAMINED:

By Mr. Keogh.

Q. Mr. Menagh, what is your occupation? A. I am a clinical photographer for the Sick Children's Hospital.

Q. Did you photograph Billy Yachuk's legs in September, 1940, and February, 1941? A. Yes, I did.

HIS LORDSHIP: What dates?

MR. KEOGH: September, 1940, and February, 1941.

10 HIS LORDSHIP: Any objection to this, Mr. Robinette?

MR. ROBINETTE: No, my lord. The only objection I have, I don't think they should be shown to the jury unless Dr. LeMesurier requires them.

HIS LORDSHIP: No.

MR. KEOGH: Well I can't agree with this objection.

HIS LORDSHIP: I don't like that sort of proof at all, Mr. Keogh.

MR. KEOGH: A photograph of a damaged car is admissible in evidence.

HIS LORDSHIP: I know, and photographs of a damaged leg I have
20 my own ideas about too. However we will take them for identification now.

MR. KEOGH: I object to that, my lord. I submit photographs are evidence when properly proven. I want to show the witness these photographs and ask him if he took them.

HIS LORDSHIP: As I said before, have it your own way.

MR. KEOGH: Well it is not that, my lord; I have clients that I am acting for and they have rights.

HIS LORDSHIP: All right. You needn't elaborate on it. Now let us not waste time on this case, let us get on with it.

MR. KEOGH: I am not wasting time.

30 HIS LORDSHIP: You are wasting time.

MR. KEOGH: At least I am not trying to.

HIS LORDSHIP: You are wasting time.

MR. KEOGH: Q. Mr. Menagh, I show you seven photographs which appear in book number one of what I tendered as an exhibit but that his lordship has directed be marked "A", namely of the Sick Children's Hospital—

HIS LORDSHIP: We are past "A"; we are at "B" now.

MR. KEOGH: Yes.

Q. And I ask you to look at those photographs and to tell me first of all if you took those photographs on the dates shown on each of them? A. I took all these photographs myself.

Q. You did? A. Yes.

Q. And you took them of Billy Yachuk's legs, didn't you? A. These are actual photographs of Billy Yachuk's legs.

Q. Taken in the Sick Children's Hospital on the dates shown? A. Taken in the Sick Children's Hospital and the dates I am sure are correct.

10 Q. On the dates shown? A. Yes.

Q. Are they true and correct photographs of Billy Yachuk's legs on these dates? A. These are actual photographs taken on these dates.

Q. And those are true and correct photographs? A. True and correct.

HIS LORDSHIP: How many are there?

MR. KEOGH: Six I think, my lord. Six photographs.

WITNESS: There are more altogether.

MR. KEOGH: Q. How many are there there? A. Seven altogether.

MR. KEOGH: I am sorry—there are seven.

20 HIS LORDSHIP: All right. We will mark them "B" for the present, and the dates are on them, are they?

MR. KEOGH: The dates are on each, my lord, and I would like your lordship to look at them.

HIS LORDSHIP: I am not going to look at them till they be proved later on.

MR. KEOGH: I do submit to you, my lord, these photographs are proved and I may show them to the jury.

HIS LORDSHIP: I rule against you on that. They will be put in later when I have an opportunity of looking up the law on that.

30 MR. KEOGH: In fairness to—

HIS LORDSHIP: It won't hurt to wait till to-morrow when Dr. LeMesurier is here, Mr. Keogh, and don't be so persistent about these things.

MR. KEOGH: I am sorry. I didn't understand that your lordship was reserving the point; I thought you were finally ruling them out now.

HIS LORDSHIP: All right.

MR. KEOGH: That is all, thanks.

HIS LORDSHIP: Any questions?

MR. ROBINETTE: No questions.

In the Supreme Court of Ontario Discussion by Counsel 10th May, 1944

MR. KEOGH: William Yachuk.

HIS LORDSHIP: This boy, it seems rather extraordinary he is in short pants, Mr. Keogh. Does he not wear long pants?

MR. KEOGH: He does from time to time, my lord, but the scar at the back of the right knee has broken down and he told me that it runs and he gets pus and dirt in it.

HIS LORDSHIP: Have you any objection?

MR. ROBINETTE: Yes.

HIS LORDSHIP: I think the objection is properly taken.

10 MR. KEOGH: With the greatest respect, I entirely disagree.

HIS LORDSHIP: Let the jury go out now while we talk. All right, gentlemen, you go outside. Oh, there is another jury in there; you will have to go to another room I guess.

——The jury retired.

HIS LORDSHIP: Mr. Keogh, this boy could only have been brought in this way for one purpose so far as I can see, and that is to show his scars to the jury, which I think has been frowned on in a number of cases if I recall rightly.

MR. KEOGH: Well, my lord, your lordship has not heard any of my 20 evidence yet, and it will be explained.

HIS LORDSHIP: Well but I have something to do with it.

MR. KEOGH: It will be explained in the evidence.

HIS LORDSHIP: What is your objection, Mr. Robinette?

MR. ROBINETTE: My objection is an injured member should not be shown to the jury unless it is necessary for the doctor in explaining his medical testimony to show it to the jury.

HIS LORDSHIP: There is authority for that.

MR. ROBINETTE: Yes.

HIS LORDSHIP: What is it?

30 MR. ROBINETTE: Well I cannot cite it at the moment.

HIS LORDSHIP: I mean it was decided very recently.

MR. ROBINETTE: Yes. I had a trial before His Lordship Mr. Justice Roach involving a happening where quite a young child fell in a lime box; he tried that alone and he declined to look at the injured member himself.

HIS LORDSHIP: I have had it lots of times; I know there is authority on the subject.

MR. ROBINETTE: I am sorry, I didn't think this question was going to arise quite so soon.

MR. KEOGH: I remember in a case with Mr. Agar at Hamilton some two or three years ago where the late M. J. O'Reilly had a girl who was a dancer up on a table and had her take her stockings off and show the jury that her right leg was all right but her left leg had been crooked since the accident, and that case went twice to the Court of Appeal and there was no—

HIS LORDSHIP: But here the case has been once to the Court of
10 Appeal and it looks as though it is already on the way to go there now.

MR. ROBINETTE: In view of the fact my friend mentioned the amount he is claiming to the jury, in view of the fact this boy has already walked in front of the jury in this way, I am asking your lordship to discharge this jury; I am afraid we are set for a mistrial.

HIS LORDSHIP: That is what I think too.

MR. ROBINETTE: I don't want to go through a third trial.

MR. KEOGH: When we explain in evidence the scar at the back of his right knee has broken down and is a raw sore that your lordship can see—

HIS LORDSHIP: Can't he wear a skirt?

20 MR. KEOGH: He has got a piece of court plaster on it, but he told me he had trouble with long pants, that they got into that open sore. This is a scar that Dr. LeMesurier said at the last trial might break down. I have no objection to him, if he has got a pair of long pants here, putting them on, if that is all that my friend is worried about. I purposely didn't have him sit beside me at the table, I had him sit back in the back of the court with his father and I submit that my friend is going out of his way to make a mountain out of a molehill.

HIS LORDSHIP: I don't think it is at all. I think it is most objectionable, and I have an idea that the photographs are most objectionable too.

30 MR. KEOGH: This boy had all these injuries.

HIS LORDSHIP: I know, but a doctor is supposed to go into the box and describe what it is and a jury is supposed to take that description.

MR. KEOGH: We are in difficulty in this case because one of the men who had charge of the case before, Dr. Robertson, is dead. There were three doctors. The other doctor who had joint charge of the case, Dr. Farmer, is away in the Air Force and we had only the third doctor, Dr. LeMesurier, who didn't see him until after he had been in the hospital for over a year and I am asking for that permission.

HIS LORDSHIP: Yes, but Dr. LeMesurier is quite capable—I know
40 nobody better—of describing orally everything that is wrong with him and everything that has been wrong with him, and why a boy should be

In the Supreme Court of Ontario Discussion by Counsel 10th May, 1944 Continued

paraded before a jury for the obvious intention and no other that I can see of arousing their sympathies is—

MR. KEOGH: I cannot agree with that, my lord. At the last trial he had long pants on; this scar hadn't then broken down.

HIS LORDSHIP: Why can't he wear a skirt?

MR. KEOGH: He could wear a skirt or a gown—dressing gown.

HIS LORDSHIP: A dressing gown, anything; I don't care if he appears with a dressing gown.

MR. KEOGH: Well if he has a dressing gown. I will see if he has one here.

10

HIS LORDSHIP: A raincoat or anything.

MR. KEOGH: They came over from St. Catharines; I will see. What time is it now? A quarter to five now; if your lordship wants to adjourn the case—?

HIIS LORDSHIP: I don't want to adjourn; I want to go on till about six o'clock; I am here to try cases.

MR. KEOGH: I might call the other little boy first.

HIS LORDSHIP: All right.

MR. KEOGH: And I can send this young lad away home with his mother to get a dressing gown or another pair of pants or something.

20

HIS LORDSHIP: All right. That will be all right.

MR. KEOGH: (To witness) Will you step down.

HIS LORDSHIP: The other little boy will take how long?

MR. KEOGH: Oh, he will take the rest of the day.
You go out and see your mother. You had better take him out with you, Mr. Yachuk.

HIS LORDSHIP: Bring back the jury.
He can wear a raincoat or something like that and if the doctor wants to describe to the jury the injuries, all right.

——The jury returned.

MR. KEOGH: Will you call Victor Yachuk—he should be in the next room.

In the Supreme Court of Ontario Plaintiffs' Evidence No. 12 Victor Yachuk Examination-in-Chief 10th May, 1944

VICTOR YACHUK CALLED

HIS LORDSHIP: Q. How old are you, Victor? A. Seven years old.
Q. How old? A. Eleven.
Q. Is your brother older or younger? A. Older.

Q. How old is he? A. Twelve.
Q. Do you go to church? A. No.
Q. Don't go to church? Does your father go to church? A. Yes.
Q. How long have you been wearing long trousers? A. Oh, since I was nine.
Q. Your brother wore long trousers too? A. Well—
Q. I mean before the accident? A. Yes.
Q. Do you know what it is to tell the truth? A. Yes.
Q. What happens to little boys that don't tell the truth? A. They
10 won't go to heaven.
Q. And you never go to church though? A. No.
Q. What are you, a Catholic? A. No.
Q. You are not a Catholic? What church did your father go to? A. The United Church.
Q. However, you understand it is necessary to tell what is true, do you? A. Yes.
Q. Do you go to school? A. Yes.
Q. What book are you in? A. I beg your pardon?
Q. What book are you in—what form or grade? A. Fifth.
20 Q. Eight grades are there? A. Yes, there is eight, yes.
Q. And that would be equal to the junior third when I went to school I guess. Is that right? A. I don't know.

HIS LORDSHIP: He may be sworn all right.

MR. KEOGH: He was sworn at the last trial, my lord.

HIS LORDSHIP: I see.

VICTOR YACHUK: sworn.

EXAMINED:
By Mr. Keogh:

MR. KEOGH: Q. Victor, are you a brother of Billy Yachuk. A. Yes.
30 Q. Do you remember this accident to your brother Billy? A. Yes.
Q. Do you remember when it occurred? A. July 31st.
Q. Do you remember what year it occurred? A. 1940.
Q. Before that day had you had some bulrushes at the house? A. Yes.
Q. Just start in and tell us everything that happened on the day that your brother had the accident, from the very beginning? A. At the start well we asked our mother for some money to get something to eat; she gave us a nickel a piece and—
Q. Just take your time and go slowly and speak up as loud as you
40 can so that his lordship and these twelve gentlemen over here will hear? A. And I had got some chocolate milk and spent it and then I told my

In the Supreme Court of Ontario Plaintiffs' Evidence No. 12 Victor Yachuk Examination-in-Chief 10th May, 1944

brother about a picture I saw, and it was about Indians, they had these bulrushes and they lit them and then—

HIS LORDSHIP: Q. Not so fast. I can't keep up to you. You saw a moving picture with Indians in it, did you? A. Yes.

Q. What did they do? A. Well they had some bulrushes and they lit them.

Q. So you thought it was a good idea to get bulrushes yourself and light them, is that it? A. Yes.

MR. KEOGH: Q. Just to interrupt for a minute, at the time of this 10 accident how old were you? A. Seven.

Q. Then you told your brother about the Indians and the movies and then as the result of that what did you and he do? A. Well we were going—we got some gasoline and we lit some bulrushes.

Q. I want you to start at the beginning. What was the very first thing that you did after talking about the bulrushes? A. We got a glass coffee jar and we went to the B-A station and asked them to give us a nickel's worth of gasoline.

Q. And did you get any gasoline there? A. No.

Q. Then what did you do next? What was the very next thing that 20 you did? A. Well we went back home and got a tin pail.

Q. Why did you go back to get the tin pail? A. Because the man in the B-A station said you couldn't get any gas unless you had a tin container—unless you have a container not glass.

Q. You got the tin pail where? A. In the cupboard.

Q. In the cupboard of your house? A. Yes.

Q. Was your mother around at that time on the day of this accident? A. Well she was sick in bed.

Q. Where had she come from the day before? A. The hospital.

Q. So you got the tin pail in the cupboard of your house. What kind 30 of pail was it? A. It was a Domestic Shortening pail.

Q. Can you show his lordship and the jury with your hands about the size of that pail? A. It was about this high and about that wide (illustrating).

HIS LORDSHIP: Q. Square or round? A. Round.

Q. About four inches high and about four inches in diameter—is that right? A. I guess so.

MR. KEOGH: Q. Was there a cover on the pail. A. No. I distinctly remember trying to find one.

Q. You remember trying to find one? A. Yes.

40 Q. And did you find one? A. No.

Q. Well then you got this pail and then where did you and your brother go first? A. Well we went to the B-A station again.

Q. Just a minute now. You went to the B-A station in the first place with the tin pail? A. Yes.

In the Supreme Court of Ontario Plaintiffs' Evidence No. 12 Victor Yachuk Examination-in-Chief 10th May, 1944 Continued

Q. And why did you go to the B-A station again—for what purpose? A. To get the gasoline.

Q. Did you get any gasoline at the B-A station when you went there the second time with the tin pail? A. No, we didn't.

Q. Then where did you go? A. We went to the Teck Imperial gas station.

Q. With the pail? A. Yes, with the pail.

Q. And when you say "we" I assume you mean you and your brother Billy? A. Yes.

10 Q. Where is the Teck Imperial gas station situated with reference to the B-A station? A. Across the road.

Q. When you went across the road to the Teck Imperial station what was the very first thing that you or Billy did? A. Well there was like a long tube running from the edge of the sidewalk to the office.

HIS LORDSHIP: Q. There was what? A long what? A. Tube.

MR. KEOGH: Q. Running from the edge of the sidewalk to the office. What was that for? A. Well whenever a car run over it well a bell rang in the office.

Q. And when you and your brother got there what did you do? A. Well we jumped on the tube and the bell rang in the office and a boy came out.

20 Q. When you jumped on the tube a bell rang in the office and a boy came out of the office—is that right? A. Yes sir.

Q. And when the boy came out of the office what did you and your brother say to him? A. We asked him for a nickel's worth—

Q. Don't say "we". First of all tell us what you said and then tell us what your brother Billy said to this boy? A. Well I said that I wanted some gasoline for an outboard motor.

Q. For an outboard motor? And what if anything did Billy say to this boy? A. He said that we wanted it for a car, my mothers' car.

Q. For your mother's car? A. Yes.

30 Q. Did he say anything more about it? A. He said "Are you sure—"

Q. I haven't got that far yet. Just take your time. I am asking if Billy said any more to the boy about your mother's car? A. No.

Q. And then what did the boy say? A. The boy said "Are you sure it isn't for dry cleaning?"

Q. "Are you sure it isn't for dry cleaning?" And what did your brother Billy say to that? A. We said it wasn't.

HIS LORDSHIP: Q. Now which one said, you or Billy, or both? A. I can't remember which one.

Q. One or both said—"we said it isn't?" A. Yes.

40 MR. KEOGH: Q. What did the boy from the gas station do with the pail? A. Well he told us to put it beside the pump.

In the Supreme Court of Ontario Plaintiffs' Evidence No. 12 Victor Yachuk Examination-in-Chief 10th May, 1944 Continued

Q. He told you to put it beside the pump, and was it put beside the pump? A. Yes.

Q. And then what did the boy of the station do with it? A. Well he got the hose and put the nozzle of it in the can and put in a nickel's worth of gasoline.

Q. Did you see how much gasoline he put in the pail? Could you see how deep it was? Can you say what colour it was?

HIS LORDSHIP: He said half full.

WITNESS: No.

10 HIS LORDSHIP: Not half full.

MR. KEOGH: Q. Can you show with your hands or your fingers how deep the gasoline was in that pail? A. Yes. It was around that full (indicating).

HIS LORDSHIP: Q. About two or two and a half inches deep—is that right? A. Yes.

MR. KEOGH: Q. And then what did you and Billy do with the pail with the gasoline in it? A. And then we both—well first we gave the nickel to the boy.

Q. Who gave the nickel? A. I did.

20 Q. And what did the boy do with the nickel? A. Went into the office and put the nickel in the cash register.

Q. And then what did you do with the pail? A. We both picked up the pail and started going up the street towards our home.

Q. Yes? And did you go along the street or did you go along a lane? A. Well first we went along the street and then we kept on going until we came to a lane.

Q. And then where did you go? A. Went into the lane.

Q. And then you went up the lane a piece, did you? A. Yes.

Q. And then what happened? A. Well then my brother said "Look

30 how shiny the gas is in the pail."

Q. Your brother said "Look how shiny the gas is in the pail"? A. Yes.

Q. What was the next thing that happened? A. Then my brother told me to go home and get the bulrushes.

Q. And then did you go home and get the bulrushes? A. Yes, I did.

Q. And you came back, I take it, with the bulrushes? A. Yes.

Q. And then when you came back with the bulrushes what did you and your brother do then? A. Well then my brother dipped the bulrush into the pail.

40 Q. Your brother dipped the bulrush into the pail, and what did he do with it after he dipped it? A. He gave it to me.

Q. To do what with it? A. Well he gave it to me and then I gave him a match to light it.

In the Supreme Court of Ontario
Plaintiffs' Evidence
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Victor Yachuk
Examination-in-Chief
10th May, 1944
Continued

Q. And you gave him a match to light it? A. Yes.

Q. And did he light it? A. Yes.

Q. And if I may stop there for a moment: Where, by the way, did you get the match? A. I got it from one of the shelves in the back of the—

HIS LORDSHIP: Are all these many details important? I don't think it is. It is filling up the notes.

MR. KEOGH: Quite so, my lord. I think that is right. I am trying to shorten it up.

10 Q. Well then Billy lit the bulrush and you were holding it when he lit it? A. Yes.

Q. And then what happened? A. Well then the bulrush flared up.

Q. What did you do with it then? A. And then I was trying to beat it out.

HIS LORDSHIP: Q. You had the bulrush in your hand, had you? A. Yes.

MR. KEOGH: Billy dipped it in, my lord, and gave it to this young lad to hold and then Billy lit it.

HIS LORDSHIP: Q. It flared up in your hand.

20 MR. KEOGH: Q. And what did you try to do with it? A. Tried to beat it out.

Q. On what? A. On the ground.

Q. And where was the pail or can at this time? A. Oh, around two feet away from me.

HIS LORDSHIP: Q. Did Billy still have the pail in his hand? A. No, the pail was on the ground.

Q. About two feet away from you? A. Yes. Maybe a little less.

MR. KEOGH: Q. Did you say "Maybe a little less"? Is that what you said? A. Yes.

30 Q. I didn't hear you. Speak up as loud as you can. And then you tried to beat the bulrush on the ground and where was Billy standing at that time? A. Billy was standing on the other side of the pail.

Q. On the other side of the pail from you? A. Yes.

Q. How close was he to the other side of the pail? A. Well he was around the same distance.

Q. About the same distance that you were, about two feet? A. Yes.

HIS LORDSHIP: Q. The pail was midway between the two of you then, was it? A. Yes.

MR. KEOGH: Q. And you were trying to beat the bulrush out on 40 the ground and what is the next thing that happened? A. Well when I was trying to beat it out the gas caught fire in the pail.

In the Supreme Court of Ontario Plaintiffs' Evidence No. 12 Victor Yachuk Examination-in-Chief 10th May, 1944 Continued

Q. Do you know what made it catch fire? A. Why the bulrush made it catch fire.

HIS LORDSHIP: Q. How? When you beat it on the ground did sparks come up? A. No.

Q. No sparks?

MR. KEOGH: Q. Do you really know, I mean, or are you just guessing when you say the bulrushes? A. Well I didn't see any.

Q. At any rate the gasoline in the pail caught fire? A. Yes.

Q. And what happened to Billy? A. Well then when the gasoline
10 got caught on fire some gasoline must of splashed on his pants and his pants got caught on fire.

Q. And did his pants get caught on fire from the gasoline in the pail or from the bulrush? A. From the gasoline in the pail.

Q. And when his pants caught on fire what did Billy do? A. He began to roll on the ground.

Q. Rolled on the ground. And did anybody come? A. Well a man came and a lady.

Q. And did he try to put the fire out or do anything? A. Yes.

Q. What did he do? A. And then he got some water and started
20 throwing on my brother's pants.

Q. Then what did you do? A. Then I went home.

Q. Why? A. To tell my mother.

Q. And when you went to the gasoline station, besides this tin lard pail that you mentioned were you or Billy carrying anything else? A. No, we weren't carrying anything else.

MR. KEOGH: Excuse me a minute, my lord; I just want to see if there is anything else.

Q. Oh, I forgot to ask you: Was there any noise when the gasoline in the pail caught fire? A. Yes, a sort of swishing sound.

30 MR. KEOGH: Thank you.

In the Supreme Court of Ontario Plaintiffs' Evidence No. 12 Victor Yachuk Cross-Examination 10th May, 1944

CROSS-EXAMINED:

By Mr. Robinette.

Q. Victor, when you obtained the gasoline from the Teck service station you and your brother William did not take the bulrushes with you? A. No.

Q. But before you went to the gasoline station you and your brother had discussed between the two of you that you would light bulrushes like Indians? A. Yes.

Q. You knew when you went to the gasoline station that that is what
40 you wanted the gasoline for? A. Yes.

Q. So that when you told as you say the gasoline station operator that you wanted the gasoline for a motor boat you were telling a lie, weren't you? A. Yes.

Q. And when your brother Billy told the gasoline service operator that the gasoline was for his mother's car Billy was telling a lie? A. Yes.

Q. Now didn't Billy say to the gasoline operator "I want some gasoline for my mother's car which is stuck down the street"? Is that what he said? A. Yes.

Q. Yes? A. Something like that.

10 Q. He did mention a car being stuck down the street, didn't he? A. I am not sure of that.

HIS LORDSHIP: Well something like that.

MR. ROBINETTE: Q. Well something like that? A. Yes.

Q. And when you left the service station which way did you go? A. Well we went up the street leading towards our house.

Q. I understand this service station is on the north side of the road —do you know whether that is true or not? A. Yes.

Q. When you left the service station did you go to the east or the west? A. Sort of an east direction.

20 Q. In an easterly direction. Is it not right, Victor, that the easterly direction leads to the downtown part of Kirkland Lake? A. Yes; but we only went a little way down east.

Q. You went a little ways east. How far east did you go? A. Oh, until—we kept on until we came to the first street.

Q. And then you turned down a lane? A. No, we turned up this street and kept on going, there was a couple of streets before we got to the lane.

Q. Wherever this lane may be, you cannot see the lane from the gasoline service station? A. No.

30 Q. Do you say, Victor, that neither you nor your brother had a funnel with you in addition to the pail on this occasion? A. We didn't have no funnel.

Q. You are sure of that? A. Yes.

Q. Are you quite certain in your mind that there was no top on the tin? A. I am quite certain.

MR. ROBINETTE: All right, Victor, thank you.

MR. KEOGH: Mr. William Yachuk. Tony Yachuk—I am sorry.

HIS LORDSHIP: Well stop the next witness coming in. Don't let William come in.

40 MR. KEOGH: No no, that is right, my lord; I beg your pardon.

HIS LORDSHIP: This is the father, is it?

MR. KEOGH: Yes.

In the Supreme Court of Ontario
Plaintiffs' Evidence
No. 13
Anton Yachuk
Examination-in-Chief
10th May, 1944

ANTON YACHUK: sworn.

EXAMINED:

By Mr. Keogh.

Q. You are the father of the infant plaintiff William Yachuk? A. Yes sir.

Q. What is his birthday? A. 25th of June.

Q. How old was he at the time of this accident in July 31st, 1940? A. Past one month after. 1940, 25th July, 31st July, would be nine years and one month.

10 Q. Nine years and one month at the time of the accident? A. Yes.

Q. Are you also the father of Victor Yachuk, the last witness? A. Yes.

Q. When is his birthday? A. 23rd February.

Q. How old was he at the time of the accident? A. Seven years 23rd February.

Q. Seven years 23rd February, 1940? A. 1940.

Q. What nationality are you? A. Russian-Ukrainian.

Q. How long have you been in this country? A. Since 1927.

Q. Are you naturalized? A. Yes.

20 Q. What is your occupation? A. Plumber.

Q. At the time of this accident what was your occupation? A. Plumber.

Q. Plumber, at Kirkland Lake? A. Yes.

Q. Where are you living now? A. I live St. Catharines.

Q. Did you see this accident yourself? A. No.

Q. What were you doing at the time the accident happened? A. I came home five o'clock and my boys sat on the steps in the front of the house.

HIS LORDSHIP: Q. Just a minute. What time did you have the time
30 of the accident?

MR. KEOGH: I am sorry, I forgot to ask the little boy, but I think I can establish it within an hour from the father.

Q. You came home first of all at five o'clock? A. Yes.

Q. And you said your two boys were sitting on the front steps? A. Yes.

Q. Were they all right then? A. Yes, then.

Q. What did you do? A. I told my boys as soon as I come to the shop I had a call.

Q. By the way, is your shop in the same building as your house?
40 A. Yes, in the same building, in the back part of the building.

Q. The back part upstairs or downstairs, is your shop? A. Downstairs.

Q. The back part downstairs was your shop? A. Yes.

Q. And you lived upstairs? A. Yes, and in the front.

In the Supreme Court of Ontario Plaintiffs' Evidence No. 13 Anton Yachuk Examination-in-Chief 10th May, 1944 Continued

Q. You got a call from the shop and what did you tell the boys? A. I told the boys "You wait here now and I will be six o'clock home and we going to get supper."

Q. "You wait here an hour or so I will be six o'clock home and we going to get supper??' A. Yes.

Q. And then at that time did you go on that call? A. Yes.

Q. And when you came home around what time was it? A. I came home again around twelve minutes after six.

Q. And was the accident over then? A. I came home, I came up-
10 stairs, my wife was sick in the bed, she came from hospital like to-day and to-morrow it happened the accident.

Q. She came from the hospital the day before the accident? A. Yes.

Q. And she was in bed? A. Yes.

Q. Was your boy Billy there when you got there at six o'clock. A. No.

Q. He had gone to the hospital? A. Yes, about twenty minutes before I came.

Q. So the accident happened somewhere between five and six? A. Yes, between five and six.

20 Q. After this accident did you have a conversation with the defendant Clarence MacDonald? A. Yes. On the next day I go down to the gas station.

Q. The next day you went to the gas station? A. And I saw the Mr. MacDonald, I asked him "Why did you sell the gas for a little boy?"

Q. Just a minute. You asked him "Why did you sell the gas to my little boy?" A. To my little boy.

Q. What did he say? A. Well he said "We sold the gas because we can sell the gas to anybody."

HIS LORDSHIP: Q. What is that? A. He said "We can sell the gas
30 to anybody."

MR. KEOGH: Q. What else did he say? A. Well I said "Pretty bad. My boy is in the hospital with a bad burn."

Q. You said what? A. I said "My boy is in the hospital, it is pretty bad burn."

Q. What did MacDonald say to that? A. He said "It is bad luck."

Q. Did he say anything else? A. He said "I am hire the boys—

HIS LORDSHIP: Q. What is that? A. He said "I hire a high school boy who sold the gas. Then he sell him."

MR. KEOGH: Q. "I hired a high school boy to sell the gas"—what
40 was after that? A. "And then he sell it."

HIS LORDSHIP: Q. Did you say something about "all right"? A. No, don't mention about all right.

Q. "And he sell to him, a boy", is that what you said? A. Yes.

In the Supreme Court of Ontario Plaintiffs' Evidence No. 13 Anton Yachuk Examination-in-Chief 10th May, 1944 Continued

HIS LORDSHIP: I suppose it is not disputed that they did sell the gas, is it?

MR. KEOGH: It is not formally admitted.

MR. ROBINETTE: It is not disputed that they sold the gas.

HIS LORDSHIP: This official, whoever was in charge of the gas station at the time, sold the gas?

MR. ROBINETTE: Yes.

HIS LORDSHIP: There is no use labouring that point then.

MR. KEOGH: It was not admitted up to this time, it was denied by
10 the defendant.
Then we won't have to go into the expenses because a statement has been filed, my friend was kind enough to admit it.

HIS LORDSHIP: Possibly you could go roughly into how long he was in the hospital and all that sort of thing.

MR. KEOGH: Oh yes, my lord. Thank you, my lord.

Q. First of all, what hospital was your boy taken to in Kirkland Lake? A. Taken to Kirkland Lake Red Cross, Kirkland Lake Hospital.

Q. How long was he there. A. Well stayed in that three months, about two and a half months.

20 Q. Did you see your boy in that hospital? A. Oh yes.

Q. Can you tell us anything about the—. Don't answer this question until his lordship rules on it: Did you see his legs or were they covered up? A. Well I saw them.

HIS LORDSHIP: He can describe the boy's legs to his heart's content as far as I am concerned. There is no objection to that.

MR. KEOGH: Thank you, my lord.

Q. What did they look like in the Kirkland Lake Hospital when you saw his legs first?

HIS LORDSHIP: Q. What date did you see them first? A. I see
30 them first on the same day.

Q. Saw his legs the same day? A. Same day at eleven o'clock.

MR. KEOGH: Q. What did they look like? A. The legs all black above the ankle about four inches.

HIS LORDSHIP: Q. What is that? A. About four inches above the ankle.

MR. KEOGH: Q. You are indicating about four inches above the left knee? A. Of both legs.

Q. On both legs from that point down to where? A. Down to the toes.

Q. Both legs? A. Yes.
Q. And were they both black in spots? A. Black all over.
Q. Well then you tell us that he was in the Kirkland Lake Hospital for two or three months, and after that where did they take him? A. They take him to Toronto Sick Children's Hospital.
Q. And how long was he in the Toronto Sick Children's Hospital? A. Sick Children's Hospital stayed two and a half years.

HIS LORDSHIP: Q. You have all these bills? A. Yes.

MR. KEOGH: I had the Registrar attach them, my lord, to the statement. They were filed at the last trial with the exception of two receipts which my friend hadn't admitted, $20.00 more.
Q. Did you have a car at the time of this accident? A. Yes, I had.
Q. Who drove it? A. Only myself.
Q. You drove it yourself? A. Yes.
Q. Did Mrs. Yachuk drive it? A. No.
Q. Could she drive it? A. No, she can't drive.
Q. Don't answer this question until his lordship rules on it: Prior to this accident did you attempt to buy gasoline in a paint can at this same service station, the Teck Imperial?

HIS LORDSHIP: I don't think that is admissible.

MR. KEOGH: One of our grounds of negligence—

HIS LORDSHIP: Well then the jury will have to go out while we discuss it.
All right, gentlemen, you have to go out again I guess, but don't go very far away.
Probably the jury could just remain in the hall. It won't take us very long to discuss this.

——The jury retired.

MR. KEOGH: My lord, I wish to refer to paragraph nine of the statement of claim. One of our grounds of negligence, paragraph nine (a), my lord, is that the defendant company put an infant of fifteen years of age in charge of the station and a dangerous substance, namely gasoline. This man's evidence, I may tell your lordship because the jury are not here, would be on this point to the effect that approximately two months before the accident he went to the same station when his car was stalled to get some gasoline.

HIS LORDSHIP: I will tell you, I will let you ask the questions, having the jury go out, and we will see what effect it has, and then you will have it as a matter of record.

MR. KEOGH: Thank you, my lord.
Q. Did you attempt to get gasoline from this same station, the Teck Imperial station, in a paint can prior to this accident? A. Yes, I will:

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Continued

About two or two and a half months I came from Timmins and he was quite a bit late, I came by Timmins around eleven or twelve o'clock.

HIS LORDSHIP: You may understand it, but I don't.

MR. KEOGH: Q. You came from Timmins, but don't go into that—your car was stuck? A. Yes.

Q. And you went to this station with a paint can to get some gasoline? A. I went to the station with an ordinary paint can.

Q. And they refused to sell it? A. And they refused to sell it, they won't sell it because that an ordinary can; I have to buy container, a
10 real tight container government approved.

HIS LORDSHIP: Q. Who was in charge on that day? A. Well I don't know that, who was in charge. He is boy there all the time.

Q. This boy? A. No. He got four or five boys in charge.

MR. KEOGH: Q. His lordship wants to know if this young Black was there then or was it somebody else? A. I couldn't tell you.

HIS LORDSHIP: Q. Was it a young boy or the regular attendant? A. A regular attendant, middle-age fellow.

MR. ROBINETTE: I submit, my lord, it is not admissible, what hap-
20 pened on a prior occasion. A man may be negligent or not negligent on some prior occasion. The test is whether or not there was any negligence on this occasion. The fact that they should have refused on previous occasions to sell gasoline—I don't think that advances my friend's case at all. I don't think it is relevant.

HIS LORDSHIP: Why do you say it is, Mr. Keogh?

MR. KEOGH: Well it is some evidence to show that if they had put an adult or a regular man in charge of the pump instead of this young high school lad, in accordance with their previous practice he would have refused to sell the gasoline to these young lads at all, and therefore I
30 submit it was not proper to put this young high school lad in charge.

HIS LORDSHIP: Was it admitted in the last trial?

MR. KEOGH: No; I didn't ask it. I didn't know about it, it only came out since.

HIS LORDSHIP: I will have to rule it out, I am afraid, Mr. Keogh. I will have to take the responsibility of that, but you are tendering it.

MR. KEOGH: Well I am tendering it and your lordship is ruling it out.

HIS LORDSHIP: Yes, I think I will rule that out.

MR. KEOGH: That is all the questions I have to ask the father, my
40 lord.

HIS LORDSHIP: But you haven't the child home and what condition he is in.

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MR. KEOGH: Oh yes; thanks.

——The jury returned.

MR. KEOGH: Q. You have told us, I think we have, that Billy was in the Sick Children's about two and a half years? A. Yes.

Q. And when he finally came home were you living in St. Catharines or Kirkland Lake? A. I live in St. Catharines.

Q. And he came home there? A. Came home to St. Catharines.

Q. What was his condition when he came home, first in the way of walking or getting around on his legs, and so on? A. He came home, he was in a wheel-chair.

Q. He came home in a wheel-chair? He came home in a wheel-chair for about two months in a wheel-chair.

Q. And then after that? A. After, he start walk with the crutches.

Q. And how long did he use the crutches? A. Used the crutches about five months. About five months he used the crutches. About five months.

Q. And since then has he been able to get around without using the crutches? A. Yes. And now he is start to walk without the crutches.

Q. How long ago was that? A. Oh, around six months.

Q. About six months? A. About six months.

Q. What kind of shoes does he wear? A. He wears special shoes.

Q. What is the cost of them? A. One pair I am paying $19.00, first pair of shoes. He has got second pair.

Q. The second pair of special shoes, what do they cost? A. $20.00.

Q. What is special about them? A. Well his ankle—any place he can't wear—His foot out of position.

Q. His foot is out of position? A. And he can't walk without special shoes.

HIS LORDSHIP: I suppose the doctor can tell us better. I was really interested in what his general appearance was when he came back.

MR. KEOGH: Yes. Thank you, my lord.

HIS LORDSHIP: And his schooling and that sort of thing.

MR. KEOGH: His schooling, did your lordship say?

HIS LORDSHIP: Yes. That is important.

MR. KEOGH: Q. What was his, Billy's general appearance, when he came home from the hospital finally? A. He was pretty sick and he lost one year's schooling in the hospital.

Q. What was the appearance of his body and his legs when he came home? A. Body and legs pretty sick, doctor all the time giving treatments.

Q. What is that? A. The doctor come, he says to rub the legs with olive oil, give them massages, and the body. The scar so no, don't heal so fast, the skin, and have to keep on rubbing now with olive oil.

In the Supreme Court of Ontario Plaintiffs' Evidence No. 13 Anton Yachuk Examination-in-Chief 10th May, 1944 Continued

Q. Even now you rub it with the oil? A. With the olive oil.

Q. When he came home finally were the legs completely healed up, that is were all the scars healed? A. No, not quite healed.

Q. Are they all healed yet? A. Not yet. Scars on his one leg yet in the back.

Q. Scars on his one leg yet in the back not healed, is that what you say? A. Yes.

Q. And that is which leg? A. The right leg.

Q. Have you examined his chest and back? A. Well the doctor examined him.

10

Q. Can you tell us what his chest and back look like? A. All full of scar; take the skin graft from his chest, from his back.

Q. All full of scar and take the skin graft from his chest and from his back? A. Yes.

MR. KEOGH: I think that is all I have to ask. Your witness.

In the Supreme Court of Ontario Plaintiffs' Evidence No. 13 Anton Yachuk Cross-Examination 10th May, 1944

CROSS-EXAMINED:

By Mr. Robinette.

Q. Mr. Yachuk, your boy Billy at the time of the accident was a pretty bright boy, wasn't he? A. Well I don't know.

Q. Did he go to school? A. Yes sir.

Q. What grade was he in? A. Grade five—grade four.

Q. And did he do well at school? A. Well he got a report, the report is not so bad.

Q. Where did he stand in his class, do you know? A. No, I couldn't tell you.

Q. Would you say that he was bright and alert? A. Well he is a healthy kid, healthy and strong, and jumping and playing, skating.

Q. What about his— Did he read? A. Yes.

Q. Apparently went to movies? A. Went to movies.

30

Q. Did he talk intelligently? A. Yes, he talked.

Q. What school did he go to? A. He go to Victoria School. We call it South School, Kirkland Lake.

Q. South School in Kirkland Lake? A. Yes.

Q. You use gasoline in your business, don't you, Mr. Yachuk? A. Yes.

Q. Had you ever warned your boys about gasoline? A. No, because I don't think the boy can buy the gasoline.

Q. What about matches? Did you ever warn them about matches? A. Yes, same as any father and mother you see matches.

40

Q. I don't care about any father or mother. All I am asking you, Mr. Yachuk, is whether you warned your son Billy Yachuk about using matches? A. Yes. As soon as I see matches in his hand I slap him "Don't use the matches."

Q. So that he knew matches were dangerous to play with?

In the Supreme Court of Ontario Plaintiffs' Evidence No. 12 Victor Yachuk Cross-Examination 10th May, 1944 Continued

HIS LORDSHIP: Did he say he did or didn't warn him about gasoline?

MR. ROBINETTE: No.

Q. You did not warn him about gasoline? A. No.

Q. You had gasoline in your pots? A. Yes, I use that for plumbing; I have a special metal container I have a gallon and use in that firepot and use in the shop.

Q. Did you know the boys had bulrushes? A. No, I didn't know.

Q. Can your boy Billy skate now? A. No.

10 Q. Does he walk? A. Walk.

Q. He doesn't need a cane? A. Well he must keep away in school from the—

Q. That is not my question: Does he need a cane to assist him in walking? A. Part of the time. Not now.

Q. In other words he can walk without a cane? A. Yes, without, now.

Q. And without crutches? A. Yes.

Q. Was Billy on this particular day—did Billy wear long pants? A. Yes, wear long pants.

20 Q. How long had he been wearing long pants before that? A. Before that must have been about a year wearing long pants.

HIS LORDSHIP: There is something else I want to ask this gentleman.

Well, never mind.

MR. KEOGH: Just a couple of questions, my lord.

RE-EXAMINED:

In the Supreme Court of Ontario Plaintiffs' Evidence No. 13 Anton Yachuk Re-Examination 10th May, 1944

By Mr. Keogh.

Q. Was Victor, the other little boy, past seven, was he wearing long pants too at the time? A. I am not quite sure. Up where it is kind of 30 colder they wear the short pants in the summer time but in the fall or spring or winter they don't.

Q. At the time of this accident on July 31, 1940, was Victor wearing long pants? A. I not remember that. I can't explain that.

Q. Your plumbing shop was in the bottom at the back? A. At the back.

Q. The rest of your house was in front and upstairs? A. Yes.

Q. Did you allow the boys in your plumbing shop? A. No. I must chase them out of the shop.

Q. And when you were out at plumbing jobs was the shop locked up 40 or left open? A. Oh yes, the shop locked up.

Q. You told my friend that you had some gasoline in your shop for the plumbing pots in a special oil container? A. Yes, I have it in the pots sometimes left.

In the Supreme Court of Ontario Plaintiffs' Evidence No. 13 Anton Yachuk Re-Examination 10th May, 1944 Continued

Q. Yes, but it is the container I am talking about. I took down these words "a special metal container." What kind of container did you have the gasoline in in your shop? A. I had a special container cost $2.50 with a spring on it.

Q. What is the name of it? A. Approved by the government for handling gas, on it.

Q. It is a government approved safety can? A. Safety can, yes, and just buy the gas and put in the pot and most of the time I have empty can in the shop. I just use how much I need a gallon to put in my fire pot.
10 I use explosive high test gas too in my fire pot.

Q. At any rate the shop was locked when you were not there and when you were there the boys were not in it? A. No. I lock the shop.

HIS LORDSHIP: There was something you were going to ask the little boy, wasn't there?

MR. ROBINETTE: No.

HIS LORDSHIP: Is there another?

MR. KEOGH: I can call Mrs. Yachuk; I think that she is a short witness.

20 HIS LORDSHIP: You had better call her.

MR. KEOGH: Mrs. Yachuk.

HIS LORDSHIP: Have you the questions I put?

MR. KEOGH: I hadn't really read them.

HIS LORDSHIP: They seem to be stock questions.

MR. KEOGH: Yes.

MR. ROBINETTE: I have a couple of suggestions to make as to questions.

HIS LORDSHIP: I see. All right. I can see some improvement I could make in them too.

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30 (MRS.) ANNA YACHUK: sworn.

In the Supreme Court of Ontario Plaintiffs' Evidence No. 14 Anna Yachuk Examination-in-Chief 10th May, 1944

EXAMINED:

By Mr. Keogh.

Q. Mrs. Yachuk, you are the mother of Billy and Victor Yachuk, are you? A. Yes.

Q. And you are the wife of Tony Yachuk? A. Yes.

Q. Do you remember July 31, 1940, the day this accident happened to Billy? A. Yes.

Q. What was your condition that day? A. I was sick in bed; I just come in from hospital day before accident.

In the Supreme Court of Ontario
Plaintiffs' Evidence No. 14
Anna Yachuk Examination-in-Chief 10th May, 1944 Continued

Q. You were sick in bed, you just got in from hospital the day before the accident? A. Yes.

Q. If you don't mind, speak up so that his lordship and all these men here can hear you? A. All right.

Q. As loud as you can. Did you know anything about Billy and Victor getting a coffee jar or the lard pail or going for gasoline this day? A. No.

Q. Did you see them do any of that? A. No.

Q. Did they tell you anything about it? A. No, they didn't.

10 Q. Victor said he had five cents. Where did he get that? A. I gave it to them for chocolate milk.

Q. You gave it to them for chocolate milk? A. Yes.

Q. When you say you gave it to them do you mean you gave them each five cents? A. Yes.

Q. That was from your bed, was it? A. Yes. I was in the bed, when they come in and said they hungry.

Q. Were the boys Victor and Billy ever allowed in your husband's plumbing shop downstairs? A. No.

Q. Your husband had a car at the time of this accident, had he not?
20 A. Yes.

Q. Did you drive it? A. No. I never drive it car.

Q. Were you able to drive it at that time? A. No.

Q. What was the first you knew of this accident to Billy? A. What?

Q. What was the first you knew about the accident? A. When a woman come across the road and start to cry and they said Billy is in a fire.

Q. That is the first you knew, somebody told you? A. Yes.

Q. And then did they bring Billy home? A. Yes, they bring him home and put him in my bed beside me.

Q. Can you describe briefly his condition at that time? A. Well he
30 was pretty bad, the skin coming off.

Q. Whereabouts? A. Just you know from the legs down in the bottom, that was below the line.

Q. From his legs down to the bottom? A. Yes.

HIS LORDSHIP: Q. From the knees to the bottom? A. Yes.

MR. KEOGH: Q. Then when they took Billy from the Kirkland Lake Hospital to the Sick Children's Hospital did you come with him. A. Yes, I go, and nurse.

Q. That is a nurse also went with him? A. Yes, with me.

Q. How did you go? A. By the train.

40 MR. KEOGH: Your witness.

In the Supreme Court of Ontario Plaintiffs' Evidence No. 14 Anna Yachuk Cross-Examination 10th May, 1944

CROSS-EXAMINED:

By Mr. Robinette.

Q. Mrs. Yachuk, how old was Billy at the time of the accident? A. Nine year.

Q. And I think your husband said that he was in the fifth grade? A. No, he is in the fourth grade.

Q. I beg your pardon. And your boy was a bright boy? A. Yes.

Q. He did well at school? A. I thought so, because he brings the report card. I didn't have any trouble.

10 Q. Never had any trouble with him at school? A. No.

Q. And he brought in the report card? A. Yes.

Q. And his report card was quite good, wasn't it? A. Just you know not bad—nice.

Q. Did he read? A. Yes, he read.

Q. Did you ever, Mrs. Yachuk, mention to Billy about playing with gasoline? A. No.

Q. Did you ever mention to him about playing with matches? A. I did mention the matches but not with gasoline.

Q. You mentioned about playing with matches, that would be before 20 the accident? A. Yes.

Q. What did you tell him about playing with matches? A. Well sometimes I saw they grab the matches, you know the men come smoke, because we not got matches in the house.

Q. It is quite obvious your car wasn't stuck on the street outside? A. No.

Q. So that if Billy told the gasoline station servant that he wanted the gasoline for his mother's car which was stuck down the street he was telling an untruth, what wasn't true? A. Well I don't know how he tell of course, because I am in bed.

30 Q. I am saying to you if he did say that he was telling an untruth, a lie, to the service station operator wasn't he? A. Well I didn't know if he say or not because I didn't hear that.

HIS LORDSHIP: No. but if he did say that? Isn't that obvious?

MR. ROBINETTE: Yes.

WITNESS: It is not right because I didn't drive the car that day.

MR. ROBINETTE: Q. Your car was not stuck down the street that day? A. No.

HIS LORDSHIP: She didn't have a car and didn't drive it.

MR. KEOGH: She said she didn't drive it; her husband had one.

40 WITNESS: My husband had a car; I didn't drive one.

HIS LORDSHIP: I think that is just about enough for the jury. You might go on for another couple of hours of course. All right.

Well, gentlemen, I am sorry to keep you so long but I want to get as far as I can because we have only till Friday afternoon to hear this case. This case, as I have said to other juries, is of great importance to both sides and you have to decide it on the evidence, that is on evidence which is admissible in court, and not on hearsay evidence or gossip or any other kind of evidence. It may be that there has been something in the paper about this case, I confess I haven't read anything about it
10 myself, or you may have heard some gossip about the case. If that is so I want you to put out of your mind everything you have read or heard about the case. The newspapers, as I have said before, are very accurate, but they are dependent upon a lot of things, on hearsay evidence in particular, to get the stories, and it is quite often a newspaperman tries to make a good story out of it too, and therefore if you have read anything you can put that out of your mind. Also, I must warn you not to have anything to do with or to speak to anybody connected with the case. It may be quite innocent, or a man might make some kind of remark in your presence; don't pay any attention to those. It is hard to keep outside
20 influences out of the case. I don't know if anything will turn on the question of credibility in this case, but if it does you should now be observing as the witnesses come into the box their demeanour, their appearance, the way they give their evidence, and try to size it up whether they are truthful or otherwise. Just a little by the way about the importance of being free from anybody that is connected with the case: I had a case over at Welland not long ago, it was a libel case against a newspaper, and one of the jurymen, very innocently, I am sure, went off to lunch with a man who had a great deal of influence in the town, it was a case of a libel about a municipality, that is it cost him politically a lot of money,
30 or something like that, and the man was being sued for libel, and this was the town clerk or some big financier, and when I came back I found both lawyers with an attack of the jitters, a juryman had gone to lunch with one who was known to be a big man in the municipality—probably they talked about the war, baseball or curling or whatever it was, and never talked of the case, but both lawyers were afraid they had talked about the case and they absolutely refused to go on. It is costing a lot of money to try a case of this kind and that is why I am particular that you don't lay yourselves open to some suspicion on the part of somebody that somebody is trying to say something about the case to you. I want
40 to feel that it is only the evidence that you hear and your inferences from it that affect you in this case. I have an idea that it is better not to discuss the case amongst yourselves, although I don't forbid you to do so, while the case is going on. I would rather you let yourselves have an open mind right to the very end. Once two men get into a wrangle about something they get set in their opinions and it is pretty hard to change them. Another thing: I think it is a good idea not to talk over this case at home. I know of no place where a man's mind is made up for him

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quicker than at home. There are all those things. You have to do the deciding. It is not what I decide or what I think or anything about it, it is you gentlemen who are the sole judges of the case and you want to try and let both sides of the case be heard as far as we can consistent with the laws of evidence and if it should happen in the course of the case I have to exclude something that is only because I feel bound to do so and not because I have any prejudice at all.

I would ask you to be back here at ten o'clock to-morrow morning. I think you may go now.

10 I want to speak to the lawyers just for a minute about the questions.

——The jury retired.

HIS LORDSHIP: The questions, gentlemen, if you wouldn't mind taking just a minute or two:

Was the defendant guilty of any negligence that caused or contributed to the plaintiff's injury?

If your answer to the first question is "Yes" then of what did that negligence consist? (Answer fully).

Was the infant plaintiff guilty of any negligence which contributed to his own injury? I like "caused or contributed."

20 If your answer is "Yes", of what did that consist?

That is stock. And then there is the usual:

If you find in the result negligence of both the defendant and plaintiff, what was the respective degree of blame of each, the plaintiff and defendant? I generally reverse that but I don't see any objection either way.

MR. KEOGH: I would like to have them reversed, my lord, it is usually the defendant first and then the plaintiff.

HIS LORDSHIP: You had better confer with your brother Shaver there who was arguing most strenuously the other way yesterday.

MR. KEOGH: I know what happened to me in this case, I was found

30 seventy-five per cent.

MR. ROBINETTE: And quite properly.

HIS LORDSHIP: I don't see a thing in that and rather than disturb the symmetry of these questions I wouldn't change that unless there was some good reason.

MR. ROBINETTE: I asked His Lordship Mr. Justice Kelly at the first trial to put a question as to ultimate negligence.

HIS LORDSHIP: How could it be ultimate? Two very strong members of the Court of Appeal say there is not such an animal.

MR. ROBINETTE: If it is not ultimate negligence, I submit a ques-

40 tion ought to be put as to volens. He went to their service station deliberately by his own conscious act and volition.

HIS LORDSHIP: Mercer and something, I had a case at Guelph where the question of volens came up. I didn't think you would bring that up to the jury.

MR. ROBINETTE: These stock questions I think hardly suit this case.

HIS LORDSHIP: I agree they are to be adapted to a special case, but how can you say to a jury, especially with a nine year old boy, anything about volens.

MR. ROBINETTE: It is either volens or ultimate negligence and it may be a question of the break in the chain of causation, that may be the answer. If your lordship will fully explain to the jury that the only negligence for which a person can be held responsible is the negligence
10 which actually caused the damage. I would contend in this case that the infant plaintiff's own negligence was the sole effective cause of the accident and his own conscious act in any event at some later date after the sale of the gasoline to him.

HIS LORDSHIP: That is to say the Chief Justice and Mr. Justice Henderson have come out flatfooted as I see it, and said that under the peculiar wording of the present Negligence Act there is now no such thing as ultimate negligence. I don't agree with that at all but I am bound to follow it. I believe in ultimate negligence just as firmly, I would say, as I ever did, and I think I can picture a set of circumstances, if not many
20 sets of circumstances, in which ultimate negligence is as good as it ever was, and I cannot see that the change in the Act makes any difference, and that opinion is shared by other judges of the Court of Appeal and until somebody has the nerve to go to the Supreme Court of Canada on that I am afraid I will have to decline to submit ultimate negligence.

MR. KEOGH: It is not pleaded.

HIS LORDSHIP: Volens is a very important and tricky one and in this case—I cannot think of the name just now—this man knew that he was in a position of danger and went in to rescue a friend who was in a place of danger and while he was thus engaged he became entangled, at
30 least the danger developed and engulfed him, and the Court of Appeal dismissed the action on the ground of volens. I found split negligence. But how that could apply in the case of a child is more than I can see.

MR. ROBINETTE: I suggest that for your lordship's consideration.

HIS LORDSHIP: Have you your questions framed?

MR. ROBINETTE: No, my lord; I didn't think we were going to frame the questions so early in the trial.

HIS LORDSHIP: Yes; I like to get after them right away.

MR. ROBINETTE: We have done well to-day to get through practically the whole plaintiffs' case by six o'clock.

40 HIS LORDSHIP: No, there are doctors yet.

MR. KEOGH: I have two and two other witnesses.

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HIS LORDSHIP: Lest we have any other argument about the hospital reports to-morrow, we might as well get them out of the way. Have you any objection to them going in, Mr. Robinette?

MR. ROBINETTE: I don't think the jury should be shown the pictures. I have no objection to the hospital records going in.

HIS LORDSHIP: I don't think they are evidence.

MR. ROBINETTE: They don't do me any harm It isn't worth—

HIS LORDSHIP: But the pictures you object to.

MR. ROBINETTE: To the pictures.

10 HIS LORDSHIP: On the same ground as to the exhibition of the legs.

MR. ROBINETTE: Quite so. It is just intended to prejudice and arouse the jury.

HIS LORDSHIP: That is my view of that.

MR. KEOGH: Two doctors who did all the early work are not available. I only have a doctor at the tail end of the case. The little boy was under the anaesthetic so much, he had sixteen skin grafts and he cannot give any explanation of his injuries at the start. The father says the legs were black but he cannot give any real explanation of the injuries and the photographs do show clearly the full extent of his injuries at the start. 20 They also show how it was healed up until he was discharged; they cut both ways; though your lordship will see they look gruesome at the start, they did a good job of fixing it up. Instead of asking the boy who was suffering for a couple of years.

HIS LORDSHIP: I am very much against it.

MR. KEOGH: I will look to-night, my lord.

HIS LORDSHIP: I had one case, I didn't like it very much but I didn't say anything because nobody objected, a man had his face cut up and a picture laid in front of his eyes and everything and I think it distorted everything, but nobody objected; I thought there was far too much dam- 30 ages and afterwards I regretted very much that I hadn't said anything.

MR. KEOGH: If I had the medical attendants who handled this case from the beginning and did a marvellous job it would be a different proposition.

HIS LORDSHIP: But you have Dr. LeMesurier.

MR. KEOGH: But he did only one operation.

HIS LORDSHIP: But he can look at these injuries and describe them and tell what they must have been like at a certain time.

MR. KEOGH: If I can ask Dr. LeMesurier to tell in detail about the scars and just how they must have been when he was admitted then that 40 is good enough for me, I don't need the photos.

HIS LORDSHIP: There is no objection to that, is there?

MR. ROBINETTE: No.

HIS LORDSHIP: I don't like these pictures going to the jury because if it should happen they gave you an extraordinary amount of damages there would only be a new trial.

MR. KEOGH: I don't think there is much danger of that; in the net result we didn't even get the out-of-pocket expenses. The assessment was very low.

10

HIS LORDSHIP: I am going to reword the last question: Regardless of who you think is responsible or in what proportion, at what amount do you assess the plaintiffs' damages?

MR. KEOGH: One other thing I set out to Judge Kelly at the last trial but he wouldn't do it, I asked him to assess the damages separately: At what amount do you assess the plaintiffs' damages (a) of the infant plaintiff? (b) of the adult?

HIS LORDSHIP: That is correct too; I would do that.

20

MR. KEOGH: In the result he had to go and take up two or three pages telling them to separate them.

HIS LORDSHIP: I will do that.

Why was it the Court of Appeal sent this back? Were there any reasons for judgment?

MR. ROBINETTE: That the Court of Appeal couldn't interpret the answers of the jury regarding the specific acts of negligence.

MR. KEOGH: That was one reason, and I think the real reason was

30

this: That I read to them about six or eight pages from the evidence in which the jury came in—I said to Mr. Justice Fisher this was a compromise verdict, this jury was hopelessly deadlocked, it was a compromise and he said "How do you say that? What right have you?" And I said "It is on page so and so of the evidence," the foreman came in after they were out six hours and he said "My lord, we are in hopeless deadlock, we can never agree," so the judge started to discharge them and then there was some discussion about partial negligence, the foreman said "we are stuck as to whether there can be partial negligence or not" and Mr. Justice Kelly explained that to them and the foreman said "We will try again."

40

HIS LORDSHIP: Partial negligence?

MR. ROBINETTE: They didn't appreciate they could apportion it; the jury came in and said they were disagreed and his lordship said "You are discharged," and then his lordship said "Well, maybe you can agree."

MR. KEOGH: I don't think he used the word "discharged", but next thing to it.

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HIS LORDSHIP: I should have thought some of these were negligence, surely, because jurymen are not expected to be draughtsmen.

MR. ROBINETTE: That is what I contended before the Court of Appeal but then that point my friend mentioned really turned the decision that there should be a new trial.

HIS LORDSHIP: Well. If you can draft and submit a question and it meets with your approval, as the chances are it won't, during the course of the evening on that question of volens—you have to put it in simple language—I would be glad to consider it.

10 MR. KEOGH: Of course your lordship is not forgetting that the defendants don't plead that as a defence and I object to it.

HIS LORDSHIP: No, and they didn't do it in this late case in Guelph either.

MR. KEOGH: I may be wrong but I thought that was always a special kind of defence which had to be specifically pleaded.

HIS LORDSHIP: They promptly reversed me anyway, in this particular case; I don't think it has been reported; in fact I think it is just an oral judgment of Mr. Justice Riddell who was very strong on the question of volens.

20 MR. KEOGH: That may have been with an adult but I say it is ridiculous to say that a nine year old boy who had never been warned of gasoline could fully and appreciatively agree to run the risk.

HIS LORDSHIP: I don't see much in that now, Mr. Keogh, but if Mr. Robinette can frame a question that will fill the bill I will be glad to consider it and we can get it down in the notes either one way or the other. I don't think there is much chance of getting more than a stock question on that because I can't see there is volens.

MR. ROBINETTE: This is either volens or, if you find any negligence on the part of the service station operator, the chain of causation 30 was broken by the child's own deliberate act. What the child did was not negligence; he deliberately put the bulrush in the gasoline and deliberately lit a match to it.

HIS LORDSHIP: Have you pleaded that?

MR. KEOGH: Yes, they have pleaded that he was the author of his own misfortune.

MR. ROBINETTE: What I am really contending is novus actus interveniens.

HIS LORDSHIP: I admit the question of volens hadn't occurred to me in this other trial, though as you think about it the force of it hits you.

40 MR. ROBINETTE: What the child did was not an involuntary act, it was an intentional, deliberate act.

MR. KEOGH: I gave your lordship *Dainio* v. *Russell Timber*, 27 O.W.N. 235, where a boy picked up a detonator and it exploded; he didn't appreciate the danger and therefore it was not a voluntary act, therefore it couldn't be a novus act.

HIS LORDSHIP: Of course I can put to the jury, as I have been in the habit of doing, when there has been a suggestion of ultimate negligence, that if they find a certain state of things that they can find ninety-five and five or something like that, or three-quarters to a quarter. There must be a split on it. However, see what you can do.

10 MR. KEOGH: The nearest case I have about a gasoline flame is *Fergus* v. *Toronto*, [1932] O.R. 257, where a boy put a firecracker in a drum containing some gasoline that was thought to be empty and was blown up and he recovered. I haven't got his age here, I didn't make a note of his age. I just mention this in answer to the statement that this was a deliberate act of this nine year old boy.

HIS LORDSHIP: It is deliberate in this sense, that it is an act which he didn't do by accident, he did it by his own motion.

MR. KEOGH: But naturally that is not deliberate unless he appreciated the danger, in my submission.

20 HIS LORDSHIP: Maybe I will have to try this myself after all.

——6.05 p.m., the further hearing of this case adjourned till 10.00 a.m., Thursday, May 11, 1944.

Thursday, May 11, 1944,
10.00 a.m.

——The Registrar called the names of the jurors and reported twelve present.

HIS LORDSHIP: I spent several hours last night, I have read three textbooks and about fifteen cases on the subject and I have drawn a suggested list of questions here. I think Mr. Robinette is quite right, and you
30 might look these over at noon. There may be elaborations or variations of them.

MR. ROBINETTE: Thank you, my lord.

HIS LORDSHIP: Let me know what you think about them. I haven't any preconceived idea on the subject, but, subject to what you can say about them, I would suggest questions along that line and in that order for certain reasons. All right.

MR. KEOGH: Thank you, my lord. Mr. Caskay, please.

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Plaintiffs' Evidence
No. 15
Carl W. Caskay
Examination-in-Chief
11th May, 1944

CARL W. CASKAY: sworn.

EXAMINED:
By Mr. Keogh.

Q. Mr. Caskay, you are the Deputy Fire Marshal of the Province of Ontario? A. Yes, that is correct.

Q. Have you in your department, jointly with the Highways Department, charge of administering the regulations under the Gasoline Handling Act?

MR. ROBINETTE: Well, my lord, I don't know what my friend is
10 aiming at through this witness but if he is going to refer to the Gasoline Handling Act and the regulations under the Gasoline Handling Act I definitely object.

HIS LORDSHIP: Was this evidence tendered at the last trial?

MR. ROBINETTE: No, my lord, it was not.

HIS LORDSHIP: Gentlemen, you might go out while we discuss this.

MR. KEOGH: I suppose you might stand there for a minute.

——The jury retired.

HIS LORDSHIP: There has been already more damage done to this case and in about one minute I am going to take it away from the jury.

20 MR. ROBINETTE: I was going to ask your lordship to try the case yourself without a jury. I think enough has already happened.

HIS LORDSHIP: The jury sees a man coming up with a red tin can with a bright label on it in his hand a spout and everything like that.

MR. KEOGH: I take the responsibility for that and I hope to be able to convince your lordship—

HIS LORDSHIP: Yes, but you might lose the jury.

MR. KEOGH: —to convince your lordship that it is quite proper.

HIS LORDSHIP: I think the man could have had the spout in his pocket and not come in in this particular way. First you have a boy
30 parading up in a manner that I am very much annoyed at and then we have a man comes up, where I don't know whether the evidence is going to be admitted or not, and he is dragging a little bit of a thing that he could have easily slipped under his coat or in his pocket.

MR. ROBINETTE: Apparently my learned friend is going to contend first that the gasoline service station in selling this gasoline violated a regulation made under the Gasoline Handling Act.

HIS LORDSHIP: That is obvious I suppose.

MR. ROBINETTE: And my submission is, as to that, twofold; first of all, that a breach of the Gasoline Handling Act or the regulations made thereunder although it may create the imposition of a penalty does not give the plaintiff any civil cause of action.

HIS LORDSHIP: It may or may not, you know; I mean that is a question of law. That is a very tricky one.

MR. ROBINETTE: Quite so.

HIS LORDSHIP: And I can't say.

MR. ROBINETTE: My second point, my lord, is that this particular
10 regulation on which my friend relies is ultra vires of the Lieutenant-Governor in Council.

HIS LORDSHIP: But neither one of those affect evidence.

MR. ROBINETTE: Well, my lord—

HIS LORDSHIP: They are questions of law and you cannot consider ultra vires unless the two Attorney-Generals are present.

MR. ROBINETTE: Well I think you can. I am not suggesting the legislation, the Act, is ultra vires, but I am suggesting the Lieutenant-Governor in Council making the regulations went beyond the powers conferred on him by the Act. At the last trial Mr. Justice Kelly disagreed with me on
20 that point but did agree with me on the point that it created only a penalty.

MR. KEOGH: I cannot agree with my friend on that.

HIS LORDSHIP: It might easily involve more than a penalty.

MR. ROBINETTE: That is something I will have to argue.

HIS LORDSHIP: I can see that.

MR. ROBINETTE: But naturally I don't know what this witness proposes to prove.

HIS LORDSHIP: I suppose he is going to prove his tin can and he wants to have the jury see and contrast it with another kind of can that
30 they bought the gasoline in.

MR. ROBINETTE: This regulation does not apply.

HIS LORDSHIP: What does the regulation say?

MR. ROBINETTE: The regulation says:

"39. Portable containers in which Class 1 liquids are sold or delivered to the public shall be of an approved metal safety type and a label shall be attached by the vendor in each case on which shall be printed in bold type a warning that the contents are dangerous and should not be exposed to fire or flame and should not be used for

In the Supreme Court of Ontario Plaintiffs' Evidence No. 15 Carl W. Caskay Examination-in-Chief 11th May, 1944 Continued

cleaning purposes in any building, provided that this regulation shall not apply to,— . . . "—(a) is inapplicable—"(b) the delivery in a metal container of gasoline required to refuel a motor vehicle to permit of its being moved."

HIS LORDSHIP: I don't see how, Mr. Robinette, you can object to that evidence. That is, they will have to prove the regulations I suppose. I suppose the King's Printer has some. And then they would have to establish that there is power to make regulations under the Act, and that power is section twelve what?

10 MR. KEOGH: (j) and (l).

HIS LORDSHIP: (j) is:

"prescribing the construction, equipment and operation of conveyances and containers used for the transportation and storage of gasoline, kerosene and distillate;"

"and storage", that doesn't apply.

MR. KEOGH: It deals with containers.

HIS LORDSHIP: "Equipment used in the handling, storing, selling and disposing of gasoline." That was passed in 1938. When were the regulations passed?

20 MR. ROBINETTE: That is my point, my lord. That amendment was in 1938. The regulations were passed in 1937 and the regulations were never to my knowledge repassed on this important point. The question came up before a magistrate at— Not that I am citing magistrates' decisions—

HIS LORDSHIP: Have I got to follow magistrates now?

MR. ROBINETTE: A man was arrested at North Bay and the magistrate gave effect to this section.

HIS LORDSHIP: I think I will admit the evidence subject to your objection, Mr. Robinette.

30 MR. ROBINETTE: Thank you, my lord.

MR. KEOGH: I might say that my friend very quickly said that this evidence was not tendered at the last trial. Technically that statement is correct, but what was gone into at the last trial, this regulation was fully gone into and my friend's own client MacDonald described at length an approved safety can under that regulation and there was a big discussion both before and after the charge as to what effect the safety can would have had on the case. All I am seeking to adduce in this case is to prove first of all what is a government approved safety can because I don't think the jury know that.

HIS LORDSHIP: While the jury is out, and to save them going out again, the leading case on the subject of exposure of legs is *Laughlin* v. *Harvey*, by the Court of Appeal and it just about agrees with what I said yesterday although that was not the case I had in mind. It was held, the plaintiff might show the injury of limb or body for the purpose of being examined by a physician. The jury were told they were not to look at the limb or draw any conclusion with respect to the nature of the injury from its appearance, and so on. This seems to me to be your objection, but it is not what was done in the case before us. If a man comes in with
10 a scar on his face and the jury see it, that is all right. And then it follows, Mr. Keogh, on similar grounds, that the pictures must be excluded. They can be looked at by the doctor for his purposes, they are proved to that extent, but they must not be shown to the jury.

MR. KEOGH: I see, my lord. It seems a very severe rule.

HIS LORDSHIP: Oh no.

MR. KEOGH: I don't see how the jury could be possibly inflamed by having the true—and I know that I have seen it often done though apparently there is no known case except—

HIS LORDSHIP: It has been ruled out for a long time and I have
20 steadfastly and until I am reversed I am going to steadfastly prescribe that sort of thing because I think there is something revolting about the appearance of this leg particularly, and that cannot be helped. If it was a judge trying the case then it wouldn't matter if he saw a dozen legs, but I believe with a jury a lot of things might happen.

MR. KEOGH: It is awfully hard to describe a condition such as this.

HIS LORDSHIP: I know, but your doctor, who is bright enough, none brighter, he can look at these pictures, they are exhibited for that purpose, he can examine these pictures and you can ask him to do it. I think that is right, Mr. Robinette.

30 MR. ROBINETTE: Yes, my lord.

HIS LORDSHIP: And then he can examine the leg, take the leg outside and look at it now, and he can say what he observes as a contrast as between the pictures and the leg and be given the greatest scope as far as that is concerned. I think I must do that. I must make that ruling anyway.

MR. KEOGH: Very well, my lord. I take it now I may call Mr. Caskay.

HIS LORDSHIP: Yes; subject to Mr. Robinette's objection. If Mr. Keogh wishes a description of the particular can and that sort of thing no great harm is done.

40 All right, bring the jury back.

——The jury returned.

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Continued

MR. KEOGH: Q. Now, Mr. Caskay, just go back a bit to when we were interrupted: You are the Deputy Fire Marshal for the Province of Ontario? A. That is correct.

Q. And you are also I believe a barrister and a solicitor. A. Yes, that is so.

Q. And has your department, that is the Fire Marshal's department, jointly with the Highways Department charge of administering the regulations made by the Lieutenant-Governor in Council under the Gasoline Handling Act? A. Practically so. The authority with reference to it is contained in regulation 45 which I understand means that we may enforce certain parts of the regulations under the Gasoline Handling Act.

Q. And one of the parts that you are given the right to enforce under regulation 45 is Part IV which contains regulation 39? A. That is correct.

Q. And regulations 39 prescribes, without going into details, the government requirements for the manner in which gasoline may be sold, speaking generally?

HIS LORDSHIP: Have you got a clean copy of these regulations?

MR. KEOGH: No, I haven't my lord; unless my friend's copy is clean. Mine unfortunately isn't.

20 HIS LORDSHIP: They ought to be put in, oughtn't they?

MR. KEOGH: Under the Interpretation Act, section seven, the court is required to take judicial notice of all Acts.

HIS LORDSHIP: I understand that, but it would be advisable to have them in. Perhaps you could put in the sections.

MR. KEOGH: I will be glad to have them typed out and put in.

HIS LORDSHIP: All right. The sections to which you refer.

MR. KEOGH: Yes. This is regulation 39, section 12.

HIS LORDSHIP: Q. You haven't a spare copy with you, have you? A. I regret, my lord, that I didn't bring one.

30 MR. KEOGH: Q. Anyway, regulation 39 prescribes the manner in which gasoline may be sold, speaking generally? A. Yes.

Q. And it refers to sale in an approved metal container? A. That is the retail sale.

Q. Retail sale in an approved metal container? A. Yes.

Q. You were subpoenaed to produce to this court and this jury an approved type of metal container or safety can which has been approved by the government for the sale of small quantities or retail quantities of gasoline under this regulation — you were subpoenaed to produce that, weren't you? A. That is the way my subpoena reads.

40 HIS LORDSHIP: No doubt you have it and then you are here with the can, so let us have it.

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Continued

MR. KEOGH: Q. To shorten it up, you have produced such can, have you not? A. Yes.

Q. Will you produce it, please? A. (Produced).

Q. What do you call that can, or has it any particular name? A. Call it a safety can.

Q. And that is approved by the department under these regulations?

HIS LORDSHIP: Where is the approval? It means one thing to say it is approved, but let us see it in black and white.

MR. KEOGH: I don't know that it would be practicable to produce an
10 approval of each can.

HIS LORDSHIP: No no, but this gentleman must have some authority; I mean he cannot come down here and say that is an approved can.

WITNESS: Any can, my lord, which bears the approval label of the Underwriters Laboratories, Incorporated is an approved can.

Q. Are those things, that is what you mean (indicating)? A. No, that is the warning, my lord. The label is given here (indicating).

Q. I am from Missouri, so to speak, I want to see where this has been approved and how, that particular can. Supposing the can were twice the size and low-lying? Are there thousands of approved cans? A. Yes.

20 Q. Might be any shape or any size? A. There are specifications, my lord.

Q. Where are they? A. I have a copy here.

Q. All right, I want to see it? A. It may be so, my lord, that there may be cans approved other than those bearing the Underwriters' label. The approval is given by the Minister of Highways.

Q. Can the Minister of Highways just say, if I took up a can to him "That is approved" without anything else? A. He could say so, sir.

Q. And the Fire Marshal do the same thing? A. No sir. We have no power to give approvals; the only power rests with the Minister of
30 Highways.

HIS LORDSHIP: Well all right.

MR. KEOGH: Q. And this particular can that you have produced here to-day, does that comply with the specifications?

HIS LORDSHIP: In the first place let us find out what the specifications are, who makes them and what they have to do with this particular can.

MR. KEOGH: Q. By whom are those specifications for safety cans written up? A. By the Underwriters Laboratories, Incorporated of Chicago.

40 Q. Then, putting it as briefly as you can, what are the main features of the specifications?

HIS LORDSHIP: Then to follow that up, any can bearing the stamp of this company complies with the specifications? A. That is quite so, my lord, but there may be others besides those that we apply.

In the Supreme Court of Ontario Plaintiffs' Evidence No. 15 Carl W. Caskay Examination-in-Chief 11th May, 1944 Continued

MR. KEOGH: Q. And the specifications that were drawn up by the Underwriters Laboratories, have they been approved by your department and the Department of Highways? A. Yes. Any can that is approved under the specifications of the Underwriters Laboratories, Incorporated is an approved can for our purposes in administering the Act.

Q. How many pages are there in the specifications? A. About four and a half or five.

HIS LORDSHIP: We will take that subject to the general objection.

MR. KEOGH: I ask to file the specification.

10 HIS LORDSHIP: Yes. That will be exhibit what?

MR. KEOGH: I would like for the can to be marked exhibit 2, I think it is, and the specification exhibit three.

HIS LORDSHIP: All right.

——EXHIBIT 2: Can produced by Mr. Caskay.

——EXHIBIT 3: Specifications of Underwriters Laboratories, Incorporated.

HIS LORDSHIP: Q. What is the general feature of this can that—take a coffee can, Maxwell House coffee or Chase & Sanborn that we hear so much about—what is it distinguishes that as to selling gasoline? A. The
20 most important features, my lord, are that the can is of substantial construction, there are definite specifications for the thickness of the metal and the method of attaching any of the containers, it must have a secure handle, it must have a spout from which the contents may be discharged with care, and there must be an automatic device for closing the can which will operate regardless of any circumstance with reference to the operation of the can, in case it is dropped or—

Q. It jumps shut by a spring? A. Yes, that is quite so.

Q. And then does that have to bear a warning? A. It must bear a warning.

30 Q. That warning of contents dangerous? A. Yes. And it must not be used for cleaning in any building.

MR. KEOGH: Q. Would you just take hold of that handle and show the jury how you open and close that safety can? A. (Witness illustrates).

Q. Is that a strong spring or a soft spring? A. Very very strong.

Q. And it remains closed when one's hands are away from it? A. At all times.

Q. Is there more than one opening or only one opening in that can? A. There is a small vent on the top of the opening. In this particular size it is not necessary to have an auxiliary opening for filling or other
40 purposes. That is the one quart size.

Q. You are speaking of some little air hole? A. Yes.

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Examination-in-Chief
11th May, 1944
Continued

Q. But I was speaking of a substantial opening. The only substantial opening is the spout? A. That is right, sir.

HIS LORDSHIP: Q. I suppose if you go around the country you would find dozens of springs that couldn't be used? A. I have never found one yet, my lord.

Q. With constant compression getting weaker and weaker.

MR. KEOGH: Q. Then there is the lid which closes that spout. Is there a lining inside that lid, a substance inside of it? A. There is a particular type of washer required but that is set out in the specifications.

10 Q. There is a washer inside of that? A. Yes.

Q. And what is the purpose of that? A. To seal the can tight.

Q. Are these cans put through any tests by your department before they are approved? A. No, they are not.

Q. Are they put through any tests by this Underwriters Laboratories before they are approved? A. Oh yes.

Q. What sort of tests? A. Well there is a series of tests to test every specification and then each can must be tested individually by the manufacturer before it is sent out.

Q. I am interested only in this point, are they tested with fire, either 20 adjoining or surrounding fire? A. That is part of the test.

Q. What specification do these safety cans have to meet in that respect? A. Well the contents of the can will not be endangered by a fire which happens around the can.

Q. The contents of the can will not be endangered by a fire that happens around the can? A. Yes, except a fire of long duration or extreme severity.

Q. By "contents" do you mean contents of gasoline? A. Gasoline and gasoline vapours that would be within the can.

Q. You said something about a fire of severity; I didn't catch what 30 you said? A. Well a can of this kind would pass through an ordinary fire without the contents being affected. The heat might cause the vapours to create pressure in there but that pressure would be relieved by the valve opening, that is opening against the pressure of the spring to allow that out but not let fire into the can.

HIS LORDSHIP: Q. You don't think the little vent in the top of it if there was a fire nearby would catch fire? A. No, it couldn't, my lord.

MR. KEOGH: Q. Then you have been investigating fires and the causes of fires in the Fire Marshal's department for how long? A. Nine years.

40 Q. And during that time you have investigated approximately how many fires? A. I would say about three hundred.

Q. Were some of them caused by gasoline? A. Yes.

Q. Can you give me an approximate idea of about what percentage of them were caused by gasoline?

HIS LORDSHIP: Has this anything to do with a boy getting hurt?

In the Supreme Court of Ontario Plaintiffs' Evidence No. 15 Carl W. Caskay Examination-in-Chief 11th May, 1944 Continued

MR. KEOGH: I am going to ask him an opinion question and I am just trying to qualify him. I was going to submit a question to your lordship in a minute or two. A. About fifteen or twenty I would say.

HIS LORDSHIP: Q. Percent? A. No, fifteen or twenty fires. Q. Out of the three hundred? A. Yes.

MR. KEOGH: Q. We were told in evidence by the young boy Victor yesterday that they had, I think he said about two and a half inches of gasoline in a small open tin lard pail and that his brother had lit a bulrush soaked in gasoline and he was beating out this bulrush on the ground
10 about two feet away from the rest of the gasoline in the open lard pail. Having regard to your experience with safety cans and investigating fires —and, by the way, don't answer this question until his lordship rules on it —if this gasoline had been sold to these two little boys in an approved metal safety can of the type that you have produced as exhibit two could the rest of the gasoline have caught on fire as the little boy said yesterday it did?

HIS LORDSHIP: I suppose there is no objection to that, is there, Mr. Robinette?

MR. ROBINETTE: Of course not, my lord.

20 HIS LORDSHIP: All right.

WITNESS: I would say no.

MR. KEOGH: Q. In other words, in your opinion could you have a safety can of the type of exhibit two filled with gasoline and beat out a flaming bulrush two feet away from it on the ground and not be likely to have a fire in the rest of the gasoline in the safety can? A. Any gasoline that was in the safety can with the spout shut would not be affected.

Q. By the way, there is no gasoline in this, is there? A. There was gasoline in it.

HIS LORDSHIP: Q. I thought it smelt as though there was, that is
30 why I opened it? A. There is always a residue.

MR. KEOGH: We will say there isn't any in it.

MR. ROBINETTE: Don't light it.

MR. KEOGH: Q. I see that there is a warning on this safety can exhibit two headed: "Warning . . . Contents dangerous . . . Should not be exposed to fire or flame or used for cleaning purposes in any building." That is the warning approved by the government in accordance with regulation 39 which speaks of the can containing a warning? A. Yes.

Q. And it says "Contents dangerous." In your opinion is gasoline a dangerous commodity? A. It is if it is not handled properly.

40 MR. KEOGH: Thank you. That is all. Your witness, Mr. Robinette.

CROSS-EXAMINED:
By Mr. Robinette.

Q. Mr. Caskay, you say that if gasoline is not handled properly it is a dangerous substance? A. That is so.

Q. I suppose, since my friend has asked you for an opinion, it would be a highly dangerous thing for a lad to dip a bulrush in gasoline and then apply a match to it? A. It certainly would.

Q. That would be a foolhardy thing? A. Yes.

Q. Would you agree? A. Yes.

10 Q. You have told his lordship and the gentlemen of the jury that this is an approved safety can. What size is this? A. One quart.

Q. Are there larger sizes? A. Up to about nine imperial gallons.

Q. Do you know the various sizes? A. They may be manufactured in any size, but they are usually in multiples of a gallon once you reach two gallons.

Q. And if a larger type of safety can were used would there be anything to obstruct the immersion of a bulrush into the can? A. In the large sizes there are not. Not in the small size.

Q. In other words if this can were used it would be easy to put the 20 bulrush into the liquid? A. If the bulrush was not too big for the spout.

Q. This is a fairly new can, is it not? A. I would say about four years old.

Q. Has it been used extensively? A. No, it has not.

Q. Where have you had it, in your department? A. No, it was in the Department of Highways.

Q. This particular can has not seen constant use in a service station? A. No.

HIS LORDSHIP: Q. If a little boy comes in and asks for five or ten cents' worth of gasoline has every service station a lot of those cans in 30 order to sell? A. No. Quite a number of service stations have them.

Q. Have cans? A. Have cans.

Q. That is, they would have six or seven cans lying around, would they? A. Well they have got maybe one or two cans, my lord.

MR. ROBINETTE: Q. Mr. Caskay, your regulation does not apply as I understand it—I am not asking for an interpretation but I want the gentlemen of the jury to understand it as my friend has referred to the regulation: If a gasoline station is selling gasoline for the purpose of refueling a motor vehicle it is not necessary under the regulation to use the approved safety can? A. That is so.

40 Q. I am right in that, am I not; in other words, it is not necessary? A. Quite so.

Q. So that if in this particular case the gasoline was sold for the purpose of refueling a motor vehicle there is no objection under your regulations to the sale of the gasoline in a lard pail? A. That is so.

Q. I am right as to that? A. You are right as to that.

In the Supreme Court of Ontario Plaintiffs' Evidence No. 15 Carl W. Caskay Cross-Examination 11th May, 1944 Continued

MR. ROBINETTE: All right. Thank you.

HIS LORDSHIP: Q. That is to say if my car breaks down half a mile from a gas station and I am too lazy to go to it and I say to my little boy aged nine "Here is a tin of coffee that I don't need" and dump out the coffee and I say "Run down to the gasoline station and get me some gas in that to start this car up to take it back to the gas station" it would be quite in order for the gasoline man to supply that in that can? A. So far as these regulations are concerned.

Q. So far as these regulations are concerned? A. Quite so, my lord.

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10 MR. KEOGH: Dr. LeMesurier hasn't come yet, has he?

HIS LORDSHIP: Doctors are uncertain quantities so we had better go on with someone else.

In the Supreme Court of Ontario Plaintiffs' Evidence No. 16 William Yachuk Examination-in-Chief 11th May, 1944

WILLIAM YACHUK: sworn.

HIS LORDSHIP: Gentlemen, there was something that happened yesterday that I think I ought to explain to you in justice to everybody, and that is it has been the law for many years that a jury must not see the injured leg, and unfortunately yesterday this boy came in with short pants on though he had been wearing long pants for a long time, and obviously a number of you gentlemen I suppose saw the injured leg the same as I did. 20 The law is that he can show his leg to a doctor and we will have a doctor here and he can go outside and show his leg to him and then the doctor can describe to you his injuries. I must tell you that if you have looked at the leg you must not draw any conclusion from its appearance. That is, you must take the evidence as it is given to you. It is only the evidence, so that I just thought I ought to warn you now that you are not to draw any conclusion from its appearance, you must take it from the evidence. I regret that that took place yesterday. It is different from if a man has cut his face, that you can see, the parts that are usually exposed, then you may look at them because that can't be helped, but I just wanted to 30 warn you in regard to that. Sometimes these things are shocking looking and maybe for all we know, worse than it looks, it may look better than it is, so that we have just to pay attention to the doctor. And on the same theory I am taking the responsibility of excluding the photographs. I think the doctor can look at the photographs, and he can tell you, describe in any way he can, and he is a very clever doctor, I may say, and he can tell you what his conclusions are from those photographs, they are in for that purpose, but unfortunately I cannot allow you to see them. You understand that that is something over which in justice to both parties I have to rule that way. All right.

In the Supreme Court of Ontario
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No. 16
William Yachuk
Examination-in-Chief
11th May, 1944
Continued

EXAMINED:

By Mr. Keogh.

Q. Billy, do you remember the time of this accident to yourself at Kirkland Lake? A. Yes.

Q. And it was on what day of the month, do you remember? A. July 31st.

Q. And in what year? A. 1940.

Q. You were how old at that time?

HIS LORDSHIP: That is all beyond dispute, isn't it? Why do we need go over it again?

MR. KEOGH: Q. Just tell us what happened that day anyway leading up to the accident. Start at the very beginning and tell us everything that you and your brother did? A. Well after I came back from a friend of mine house I got home and my brother told me about to get the gasoline and the bulrushes and my brother went upstairs and he got a coffee jar and we went to the B-A station and we asked the man there if we could have some gasoline and he said No, and we went back home. My brother got a—

Q. He said No? I don't want you to tell me what he said, but was there a reason?

MR. ROBINETTE: Well—

HIS LORDSHIP: No no, not what he said, though I am not so sure that is not evidence—it is a fact. However, he gave a reason for refusing.

MR. KEOGH: Q. He gave you a reason for refusing when you had the glass jar, didn't he, at the B-A? A. Yes.

Q. And then you started to say you went home again? A. And my brother got a tin lard pail and we went back to the gas station again and my brother asked him.

Q. Went back to what gas station? A. The B-A gas station, and he asked him for gasoline and they refused.

Q. You were refused again? A. Yes, and then we went across the street to the Imperial gas station.

Q. What was the name of it? A. Teck Imperial.

Q. And what took place there? A. And there was a tube running across on an angle from the pump into the office and we jumped on the tube and a bell rang in the office and a boy came out and my brother asked the boy for some gasoline, five cents' worth, and the boy—

Q. Did your brother say what he wanted it for? A. My brother said it was for the motor boat and I said it was for the car down the street.

HIS LORDSHIP: Q. Your brother—?

MR. KEOGH: Q. Your brother said it was for the motor boat? A. Yes, and I said it was for the car down the street.

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Continued

Q. You are not talking very loud. Can the gentlemen of the jury hear all right?

JURORS: Yes, we can hear all right.

MR. KEOGH: Q. And then what did the boy from the gas station say if anything to that? A. He says "Are you sure it isn't for dry cleaning?"

Q. What did you say to that? A. I said "No."

Q. You said that your brother asked for five cents' worth of gasoline. Who had this money? A. My brother had the money.

10 Q. And I suppose there is no dispute about how he got it, that was covered already.

HIS LORDSHIP: Oh no.

MR. KEOGH: Q. And then the boy did what with the pail, the boy from the station? A. He took the pail and put it down on the ground that the pump was fixed in and took the hose from the pump and put about three inches of gasoline in the pail.

Q. From the hose at the pump? A. Yes.

Q. And then with regard to the money? A. My brother gave him the money.

20 Q. And was there any other conversation? A. No.

Q. Then where did you and your brother go with the pail? A. We went up the street to a lane.

Q. Now if I might interrupt there: About what size was this pail, or what kind of pail was it, first of all? A. It was a lard pail—Domestic Shortening.

Q. Was there any cover on it? A. No.

Q. Did you and your brother have anything else in your hands besides the lard pail when you went to the station? A. No.

Q. Then you tell us you went to a lane and when you got up in the
30 lane what did you do? A. I told my brother to go back home and get the bulrushes.

Q. And you waited in the lane, did you? A. Yes.

Q. And then your brother came back with the bulrushes? A. Yes.

Q. And when he came back with the bulrushes what did you do? A. I went and called on two of my boy friends, Max and John, and they weren't in.

Q. And then what did you do? A. I went up there and a boy came up the lane and he prompted us into lighting a bulrush.

HIS LORDSHIP: Q. A boy came out? A. Yes.

40 Q. And he prompted you—that is a big word for a little boy to use. What do you mean by that? A. Well he just dared us like to light one.

MR. KEOGH: Q. What did he say? A. Well he said—I can't remember the exact words but I think he said "I dare you to light one of those, I bet you are afraid."

HIS LORDSHIP: Q. "I dare you to light one of those, I bet you are afraid", is that about what he said? A. Yes.

MR. KEOGH: Q. Was he a bigger boy than you were or smaller? A. Oh, about a year older.

Q. Then did he stay there at the time this accident happened or did he go away, this other boy? A. No, after I dipped the bulrush into the gasoline.

Q. Well you tell us first of all what you did and then I will let you answer that other question? A. After I dipped the bulrush into the
10 gasoline I handed the bulrush to my brother. After I lit it he went away.

Q. After you lit it this other boy went away? A. Yes.

Q. He went away before the actual accident? A. Yes.

Q. Well then you lit the bulrush and when you lit it who was holding it? A. My brother.

Q. Where did you get the matches? A. My brother gave me a match.

Q. Then what happened, after you lit the bulrush? A. It flared up and my brother started to beat it out.

Q. To beat it out on what or against what? A. On the ground.

20 Q. When he was beating it out where was the lard pail? A. About a foot and a half away from my brother where he was beating it out.

Q. And where was the lard pail with reference to where you were standing? A. About a foot and a half from me.

Q. That is, were you on the other side of the lard pail from your brother or on the same side? A. On the other side.

HIS LORDSHIP: Q. It lay between you, really, did it? A. Yes sir.

MR. KEOGH: Q. Now we have got to the point where your brother is beating out this bulrush on the ground. By the way, was this the first bulrush you lit? A. Yes.

30 Q. Was this the first one? Did you light any others, or was this the only one? A. The only one.

Q. He was beating it out on the ground and then what happened? A. And then the gas in the pail started a fire.

Q. And what did that do to you if anything? A. The fire caught my pants and burnt my legs.

Q. How much of your legs were burnt? A. About three or four inches above my knees.

Q. From that point down to where? A. Down to my toes.

HIS LORDSHIP: Q. Did you have shoes on? A. Yes.

40 Q. Stockings? A. Yes, I had stockings.

Q. And long pants? A. Yes.

Q. That is what burnt, the long pants, wasn't it? A. Yes.

MR. KEOGH: Q. What kind of shoes did you have? A. Camp shoes.

Q. Are they those soft leather, rubber soled things? A. Yes.

In the Supreme Court of Ontario Plaintiffs' Evidence No. 16 William Yachuk Examination-in-Chief 11th May, 1944 Continued

Q. Were there holes around the toes in them? A. There was holes in like right on top of the toes, like air holes.

Q. How much of your pants burnt, do you know? How much of your pants was left after the burning was over? A. Yes, about four inches of the legs.

Q. You mean the upper or lower part of the legs. A. The upper.

Q. And any of the lower part of the legs of the pants left? A. No.

Q. Well then when you were burning like this what did you do if anything about it? A. I started to roll on the ground.

Q. And did anybody come to help you? A. Yes, there was a man in the yard where I was going to call on the boys, he was locking up a door and he saw me and called the lady and the lady came out and threw some water on me.

Q. The man called the lady and the lady came out and threw some water on you. Then were you taken home? A. Yes. While I was rolling on the ground my brother went home and he got a man that was helping my father, he was working with my father, and he came down and got me and took me home.

Q. After that you were taken to the hospital in Kirkland Lake, were you? A. Yes.

20

Q. The same day I think? A. Yes.

Q. And then you were there how long? A. Two or three months.

Q. And from the Kirkland Lake hospital you were taken to what hospital? A. The Hospital for Sick Children.

Q. In Toronto? A. Yes.

Q. And you were in the Sick Children's Hospital here how long? A. Two and a half years.

Q. Without going into all the details, in the course of your stay in the Sick Children's Hospital did you have any skin grafts? A. Yes, I had sixteen.

30

Q. And where was the skin applied in those grafts—where was it put on? A. Donor areas were my back and the skin taken from my chest and back and put on my feet and legs.

Q. On what leg, or both? A. Both.

Q. When you arrived at the Sick Children's Hospital how much skin if any was left on your legs between the knees and the toes? A. Well on my feet there was little wee patches of skin.

Q. That is on the feet themselves? A. Yes.

Q. Little patches?

40

HIS LORDSHIP: Q. That is where the boots would protect you I suppose? A. Yes.

MR. KEOGH: The shoes.

HIS LORDSHIP: The shoes.

MR. KEOGH: Q. Between the ankle and your knee on each leg was there any skin? A. No.

In the Supreme Court of Ontario Plaintiffs' Evidence No. 16 William Yachuk Examination-in-Chief 11th May, 1944 Continued

Q. All off. And that is where they put the sixteen skin grafts, is it? A. Yes.

Q. And then you said that they took the skin from your back and your chest. Did they take it from any other parts? A. Took it from my stomach.

Q. And from any other parts did they take it? A. No.

Q. In what part of the hospital—where did you have these skin graft operations performed? A. The fifth floor operating room.

Q. And you had to go under an anaesthetic, did you, each time?
10 A. Yes sir.

HIS LORDSHIP: Q. Local or general? A. Hospital for Sick Children.

Q. But I mean a local—did the anaesthetic put you to sleep? A. Yes.

MR. KEOGH: Q. Did you have any transfusions during the two and a half years you were in the Sick Children's Hospital? A. Yes; I had five.

Q. Without going into all of the details, of which you don't know, following out these sixteen skin graft operations were you given any sedatives or drugs to put you to sleep or anything like that? A. Yes. I had hypodermic needles.

20 Q. Then besides those things did you have any other operations? A. Yes, I had operations on my feet to try to straighten my feet out.

Q. That is on each foot, was it? A. Yes.

Q. On each leg. And who was the doctor on those? A. Dr. LeMesurier.

Q. The first doctor who attended you in the Sick Children's Hospital was who? A. Dr. Farmer.

Q. And the second doctor who attended you in the Sick Children's was who? A. Dr. Robertson.

Q. Was that Dr. D. E. Robertson, the surgeon? A. Yes.

30 Q. Who just died a few months ago? A. Yes.

MR. KEOGH: Q. And the third doctor who treated you in the Sick Children's Hospital was who? A. Dr. LeMesurier.

Q. Will you describe to his lordship and the jury briefly the condition of each leg at the present time, we will get the detail from the doctor, but just briefly? A. On the right leg I got a big sore behind the knee.

Q. You have a big sore behind the knee on the right leg? A. Yes.

Q. How long have you had that? A. It is not healed up since I got the burns.

Q. Do you mean by that that there is a break in the scar there?
40 A. Yes.

Q. Did you have that last year when you were here before? A. Yes.

Q. Is it wores now or better? A. It is worse.

Q. Then outside of that particular situation how would you briefly describe the general appearance or condition of your right leg? A. Well all the rest of my leg is all scarred, and my ankle joint, I haven't got any movement in my ankle joints.

In the Supreme Court of Ontario Plaintiffs' Evidence No. 16 William Yachuk Examination-in-Chief 11th May, 1944 Continued

Q. No movement in your ankle joints and your legs are all scarred? A. Yes.

Q. And when you say "all scarred" you mean from where to where? A. Three or four inches above my knees down to my toes.

Q. From three or four inches above your knees down to your toes? A. Yes sir.

Q. Have you any feeling in your feet? A. Well down by my ankle I haven't any feeling.

Q. Down by your ankle you haven't any feeling? A. No.

10 Q. Does that apply to one foot or to two? A. Both.

Q. What about your toes—have you any feeling in your toes? A. Well I can't move my toes very well and I have got feeling in them.

Q. Are you able to stand? Can you stand for as long as you like? A. No, I can't stand very long, only about half an hour.

Q. Why? A. Because if I stand too long I get sort of pins and needles in my feet.

Q. Does that apply to one or to both? A. Both.

Q. How do you go about walking, or can you walk? A. I can't walk very well.

20 Q. Why is that? A. My ankle joints are all out of position and I can't move my—

Q. Tell us how they are out of position? A. Well on the left leg the ankle is away out and the right leg the ankle—

Q. On the left leg the ankle is away out, you mean turned out? A. Yes.

Q. And what about the right ankle? A. The right ankle is sort of turned away in.

Q. How do you have to walk, that is different from the way you walked before the accident? A. Well I have to put my foot down on the
30 heels.

Q. What kind of boots are you wearing? A. Special shoes.

Q. What about the heels on them? A. On the right leg there is a half-inch lift.

Q. Is that inside the boot or outside? A. Inside.

Q. In other words your right heel is lifted up half an inch? A. Yes.

Q. So that as far as your right foot is concerned you are sort of partly walking on your toes all the time? A. Yes.

Q. And is your left foot level—no lift in it? A. No lift in it.

Q. Are you able to balance all right, keep your balance? A. Well
40 when I go on the street and try to pass people I sometimes lose my balance.

Q. Do you mean in a crowd or something like that when you are going in and out? A. Yes.

Q. But ordinarily your balance is all right, is it? A. Yes.

Q. Without being in a crowd. Then you told us that the grafts were taken from donor areas in your chest and back. Will you describe to his

lordship and the jury the present appearance of your chest and back? A. The chest and back were all scarred.

Q. You said something about your stomach. What about it? A. It is all scarred too.

Q. Do any changes in weather have any effect on you? A. When it is cold my feet start to freeze and get cold around the knees.

Q. When it is cold your feet start to freeze? A. Yes.

Q. And get cold around the knees. Did you swim before this accident? A. Yes.

10 Q. Are you able to swim now? A. No.

Q. Did you skate before the accident? A. I used to skate pretty well but I can't skate now.

Q. Are you able to play any games, like, for instance, baseball? A. I play baseball, I hit the ball and my brother has to run for me.

Q. Can you run, with your feet? A. No.

Q. Can you jump? A. No.

Q. When you came home from the hospital your father told us you came in a wheel chair? A. Yes.

Q. And you were in the wheel chair for how long? A. About three 20 or four months.

Q. After that what did you use to get around. A. I had to get on crutches for about six months.

Q. And since then you have been getting along without the crutches? A. Yes.

HIS LORDSHIP: Q. What do you wear in the winter on your legs? A. Well I have a heavy pair of pants.

Q. What do you wear under them? A. On the sores I have bandages.

Q. Yes, but don't you wear any underwear? A. Yes.

Q. What kind? A. Long underwear, heavy underwear.

30 MR. KEOGH: Q. These scars on your chest and back, does the weather have any effect on them? A. No.

Q. Do they interfere with the bending or movement of your back or chest? A. Yes, when I bend over this side there is like a big scar over here.

HIS LORDSHIP: Q. When you bend to the left? A. Yes, there is a big scar over here.

MR. KEOGH: Q. "Over here" means your right side? A. Yes. And it tightens up and hurts right there, pulls.

Q. Then take for instance your knees, what about, first of all say 40 your left knee. You have told us something about behind the right knee, but not about the left knee? A. Well the left knee, behind the left knee it isn't sore at all; just the scars.

Q. It is not sore behind the left one? A. No.

In the Supreme Court of Ontario Plaintiffs' Evidence No. 16 William Yachuk Examination-in-Chief 11th May, 1944 Continued

Q. But the knee itself, is there anything? A. Yes, there is like a dimple when I straighten my knee up like that, above the knee there is a big dimple.

Q. Of course there is nothing about a dimple, you call it a dimple, but how would you describe it? A. There is no fat over the kneecap.

Q. And when you bend your knee what happens? A. I can't bend my knee back very far and the dimple straightens out.

Q. And when you straighten up your knee and stand straight— A. Well the dimple goes back.

Q. The dimple—it is a sort of little crevice, is it, in the scar that goes in there? A. Yes.

Q. And is there anything else about the left knee? A. No.

Q. Is that all about the left knee? A. That is all.

Q. What about the right knee, have you any other complaints about the right knee, or is it that broken down scar behind? A. There is just a broken down scar behind.

Q. How much time did you lose from school as the result of this accident? A. One year.

HIS LORDSHIP: Q. You had school at the hospital? A. Yes, two
20 hours a day.

MR. KEOGH: Q. And in spite of that you lost one year from school, did you? A. Yes.

HIS LORDSHIP: Q. What form are you in now? A. Six.

Q. What were you in at the time of the accident? A. I got promoted and I was going to grade four.

MR. KEOGH: Thank you. Your witness.

HIS LORDSHIP: Q. It takes a year for each grade, doesn't it? A. Yes.

CROSS-EXAMINED:

30 By Mr. Robinette.

In the Supreme Court of Ontario Plaintiffs' Evidence No. 16 William Yachuk Cross-Examination 11th May, 1944

Q. Billy, was your teacher at school at Kirkland Lake a lady by the name of Miss MacKenzie? A. Yes, she was my teacher in grade three.

Q. I am told that you did pretty well at school? A. Yes.

Q. You did well at school, the summer that the accident happened you were promoted into the next grade? A. Yes.

Q. Is that right? A. Yes.

Q. Do you remember what your report said, whether you were good, excellent or bad, or what? A. Well I wasn't excellent, I was just in the middle.

Q. You were just about the middle? A. Yes.

Q. I am told that your rank was good—do you know whether that is true or not? A. I don't know.

In the Supreme Court of Ontario Plaintiffs' Evidence No. 16 William Yachuk Cross-Examination 11th May, 1944 Continued

Q. Did you go to Sunday School? A. Yes, sometimes.

Q. And you read books? A. Yes.

Q. What kind of books did you read? A. Story books about adventure stories and comic books.

Q. And you went to the movies? A. Yes.

Q. Now had either one of your parents ever told you, Billy, to be careful with gasoline? A. No.

Q. Are you sure of that? Just think what you are saying, now, I am asking you this: Had either one of your parents before the accident
10 warned you or told you to be careful with gasoline? A. I am pretty sure they never.

Q. Do you remember, Billy, when I examined you for discovery in Mr. Stonehouse's office some two years ago now I guess it was—do you remember that? A. Yes.

Q. Do you remember me putting this question to you and you making this answer: Question 103: "Had your father or mother ever told you to be careful with gasoline? Answer: I think they did once." Do you remember me putting that question to you and you making that answer? A. I don't remember whether it was in Mr. Stonehouse's office but I re-
20 member it was in the next courtroom.

Q. Do you remember the office we were in in the office building, not in the courtroom, but in the office building two years ago? Do you remember that? A. I am not sure I remember that man, sir, but I do remember the courtroom.

HIS LORDSHIP: An office building down on Richmond Street, on the 17th February, 1943, that would be in the winter.

MR. ROBINETTE: Last winter.

HIS LORDSHIP: A year ago last winter.

MR. ROBINETTE: Q. A year ago last winter—do you remember
30 that? A. I remember where the place is but I don't remember the question very well.

Q. Well now, Billy, are you in some doubt to-day whether your parents did or did not warn you? A. A little bit, not much.

Q. You wouldn't be sure of that? A. Not too sure.

Q. So that if you told me on a prior occasion that they warned you you were probably right, weren't you, when you told me that they had warned you to be careful with gasoline? A. Repeat the question?

Q. I say you were probably right when you told me in Mr. Stonehouse's office that either your father or mother had warned you to be
40 careful with gasoline? A. I am not so— Like right that they did now but I am pretty sure they never.

Q. What is that again? You are pretty sure they never did—that is since the last trial? A. Yes.

In the Supreme Court of Ontario Plaintiffs' Evidence No. 16 William Yachuk Cross-Examination 11th May, 1944 Continued

Q. And since you have gone through this, and I want you to be frank with me, Billy, I know you will be, didn't one of your parents warn you? A. No, I don't think so.

Q. Well, Billy, this day that you burnt yourself you and your brother had talked between the two of you about getting some gasoline to burn bulrushes? A. No, my brother talked to me about it.

Q. All right, your brother talked to you, he put the idea in your head didn't he? A. Yes.

Q. And that was in your home? A. Not in the house, sir; outside
10 the house.

Q. And the two of you went to the Teck Imperial station? A. Yes.

Q. Did you have the bulrushes with you when you obtained the gasoline from the Teck Imperial station? A. No, not when we were going there.

Q. Not when you were there. As I understand it you told the lad in the service station that you wanted some gasoline for your mother's car which was stuck down the street—is that correct? A. I said—my brother said he wanted it from the motor boat.

Q. I am asking what you said, Billy. Am I right that you said
20 "I want some gasoline for my mother's car that is stuck down the street" —that is right, isn't it? A. Yes.

Q. You are sure of that? A. I said that.

Q. And you knew, Billy, of course, that that was untrue? A. Yes, at that— Now I do.

Q. You knew then it was untrue? A. Yes.

Q. In other words, Billy, you told a lie to get that gasoline, didn't you? A. Yes.

Q. And then having got the gasoline you left the service station? A. Yes.

30 Q. Which way did you go? A. Up Kirkland Street.

Q. Is that to the east or to the west? A. To the east.

Q. And is that towards the downtown portion of Kirkland Lake? A. No, it is, east is up, like going— Government Road goes east and Kirkland Street goes east-south.

Q. Government Road goes east and Kirkland Street goes east-south? A. Yes.

Q. This service station is on the north side of Government Street, is it not? A. Yes.

Q. When you left the premises of the service station you turned east
40 along Government Street? A. No, we turned east-south on Kirkland Street.

Q. But you had to walk along Government Street before you came to Kirkland Street? A. No, you just go straight across Government Road.

Q. And you went to a lane? A. Yes.

Q. Could that lane be seen from the service station? A. No.

Q. Having gone to the lane one of you went back to the house for bulrushes? A. Yes.

Q. Which one? A. Victor.

Q. And you stayed in the lane with the gasoline? A. Yes.

Q. Then Victor came back with the bulrushes? A. Yes.

Q. And you say there was some bigger boy that prompted you on? A. Yes.

Q. But, Billy, you didn't need any prompting because you had already decided that you were going to do that? A. I said to my brother that
10 "If John and Max are not home I don't think we should light them."

Q. What is that? A. "If John and Max are not at home I don't think we should light them", and then the boy came up the lane and dared us to.

HIS LORDSHIP: Q. Who said you didn't think you should light them? A. I did.

Q. To whom? A. To my brother.

MR. ROBINETTE: Q. And despite that you dipped the bulrush in the gasoline, didn't you? A. Yes.

Q. You did that yourself. You asked your brother to hold the bul-
20 rush? A. Yes.

Q. You lit the match to the bulrush? A. Yes.

Q. Didn't you, Billy. A. Yes.

Q. Now that was all your own act, wasn't it? A. Yes.

Q. You don't blame anybody else for that, do you? A. No.

Q. Now, Billy, was there a lid on this pail? A. No.

Q. Are you absolutely sure of that? A. Yes.

Q. Coming back to the examination before Mr. Stonehouse, question seventy-four, I put this question to you: Do you remember this question and this answer: "Might there have been a lid on the pail?", that was
30 my question; your answer then was "Well, I can't remember. I am not sure." Do you remember me putting that question to you and you making that answer? A. Yes.

Q. Well how is it that you weren't sure then whether there was a lid on the pail or not and yet you are so definite to-day, Billy, that there was no lid on the pail? A. I remember now when I was going up the lane I told my brother "Lookit how the gasoline shines in the pail."

Q. Did you tell us about that at the last trial? A. No, I never remembered it. I was thinking more about it now.

Q. At the last trial, Billy, I asked you about the pail and the lid
40 on it at page forty-five, line twenty-two. I said "Do you remember when I examined you for discovery and put this question to you: Question seventy-five, "Might there have been a lid on the pail?" and your answer then was "Well, I can't remember. I am not sure"? Answer: My brother said—" I stopped you and said, "Just a moment, Billy, please. It is your memory I am asking you about and not what your brother told you. You

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told me in February of this year that you couldn't remember, you were not sure: is that what you say to-day? Answer: My brother was looking for it and there was no cover on the can, but I am not too sure of that, though." So I put the next question to you: "We will leave it that way: you are not too sure whether there was a cover on the can or not; is that it?" And your answer, Billy, was "Yes sir."

MR. KEOGH: I submit my friend should also read from page 102.

HIS LORDSHIP: That seems to end that witness.

MR. KEOGH: Yes, but he was called in reply and there are three
10 questions and answers on page 102 on the same point. He was examined and cross-examined again by my friend there.

HIS LORDSHIP: Well he said there he was pretty sure there was no cover on.

MR. KEOGH: Pretty sure there was no cover on, that is the final result, yes, I submit.

MR. ROBINETTE: That wasn't the final result. The final result, my lord, is at page 103, line three.

HIS LORDSHIP: "Q. "But you say you are not sure about the lid? Answer: Yes sir." Does that clear it up?

20 MR. ROBINETTE: Yes.

Q. Billy, why on the examination for discovery and why on the previous trial did you tell me you weren't sure whether there was a lid on the tin or not and yet you say to-day after you have had lots of chance to think about this that you are sure there was no lid on it? What is your explanation? A. Well I was talking that over with my brother and—

Q. Oh, you have been talking this over with your brother, have you? A. Yes.

Q. Talking it over with your father? A. No.

Q. You are relying on what your brother has told you, is that it?
30 A. No, I just asked my brother and he was sure and he said he was looking for it, and that is the only thing I asked him.

Q. That is what you base your conclusion on? A. No.

Q. Billy, as to your injuries, you are greatly improved over a year ago? I say you are greatly improved over a year ago? A. Yes, I can walk without the crutches.

Q. Last year you weren't able to walk without the assistance of crutches? A. No.

Q. Now you get along without crutches—is that correct? A. Yes.

Q. You don't even need the use of a cane, do you? A. No.

40 Q. Billy, before this accident you knew that gasoline was something to be careful with, didn't you? A. I knew it would burn.

Q. You knew it would burn, because you were going to get it to burn the bulrushes? A. Yes.

Q. You knew it would burn pretty vigorously, didn't you? A. No, I just knew it would burn like a match.

HIS LORDSHIP: Q. You knew it would burn like a match—you mean that it would flare up? A. Yes, after you strike it.

MR. ROBINETTE: All right then.

HIS LORDSHIP: Q. In your reading do you ever read the encyclopaedia? A. No.

10 Q. Or the Book of Knowledge or any of those books? Had you ever read anything about gasoline? A. No.

Q. As to gasoline starting fires.

I had several questions to ask him, but go ahead if you want to.

MR. ROBINETTE: I just wanted to ask him:

Q. Your father uses gasoline in the premises? A. Yes.

Q. I suggest you had watched your father use gasoline and he said for you to be careful of it? A. Sometimes I would go on a job with him and he has a gasoline torch and I saw him.

Q. You knew there was gasoline in that torch. I suggest to you your 20 father told you to always be careful with gasoline when he was using this torch? A. He just told me to keep away from the torch.

HIS LORDSHIP: Q. Was it a gasoline torch? A. Yes.

Q. You knew then that gasoline was a pretty dangerous thing, did you? A. I just knew it would burn, you know, I just forget—

Q. Speak up, please? A. I knew it would burn.

Q. You seem to be a pretty bright boy, Billy; you have used three pretty big words here. In the first place you spoke about prompting and then you said "donor areas"—where did you get that word from? A. I got all that from the hospital.

30 Q. And then there is another, that that leg had a certain lift. Those are words not many people use. Where did you learn that? A. In the hospital.

Q. How long have you been wearing long trousers? A. I never wore them in the hospital.

Q. No, but I mean before that? A. Since I was about seven years old.

Q. And that was what you wore all the time, was it, before that? A. Yes.

Q. Winter and summer? A. Yes.

40 Q. Did you come over from St. Catharines yesterday? A. Yes.

Q. How did you come over? A. In a car.

Q. Whose car? A. My dad's.

Q. And what trousers did you wear on the way over? A. I wore shorts.

In the Supreme Court of Ontario Plaintiffs' Evidence No. 16 William Yachuk Cross-Examination 11th May, 1944 Continued

Q. Short trousers? Are you sure of that? A. Yes.
Q. Did you have a pair of long trousers in the car? A. Yes.
Q. You didn't wear them on the way over? A. No.
Q. You started out with short trousers? A. Yes.
Q. What did you bring the long trousers for? A. In case it started raining or got cold.
Q. What time did you leave home in the morning? A. About ten.
Q. And it was a nice day then I suppose? A. Yes.
Q. Nice and warm over at St. Catharines? A. Yes.

10 HIS LORDSHIP: All right. Any other questions, Mr. Keogh?

MR. KEOGH: No, thanks.

HIS LORDSHIP: A recess for ten minutes now. The doctor had better look at the pictures and the legs in the meantime.

——Recess.

(DR.) ARTHUR B. LeMESURIER: sworn.

In the Supreme Court of Ontario Plaintiffs' Evidence No. 17 Dr. Arthur B. Le Mesurier Examination-in-Chief 11th May, 1944

EXAMINED:
By Mr. Keogh.

Q. Doctor, you are now the Chief Surgeon at the Sick Children's Hospital, Toronto,—is that right? A. Yes sir.
Q. And you took over the case of Billy Yachuk from Dr. Farmer about August 1942—is that right? A. August or September, yes.
Q. What was the condition of Billy Yachuk when you took over his case? A. All his burns had been made to heal by skin graft, both his legs and feet were badly deformed; at that time they were pointing straight down, he couldn't get his heels to the ground, he couldn't stand at all, but his burnt areas were all healed up then.
Q. This new skin had been grafted over the burnt area? A. Yes.
Q. And the legs, each foot was pointed downwards? A. Yes, and pointed sideways too.
30 Q. The ankles were twisted as well as the— A. And the ankles were completely stiff, there was no movement at all in the ankle.
Q. That stiffness, was it a bone condition or skin? A. That was a bone condition, an ankylosis.
Q. That is, the bones had grown together in each ankle? A. That is right.
Q. I believe you performed two operations on him? A. Yes.
Q. Will you tell us just what these operations were and the purpose of them? A. The purpose of them was to get him so his heels could go to the ground. Both bones of the leg were divided just above the ankle
40 and bent almost to a right angle. The reason that was done above the

ankle and not in the ankle itself was that he was too badly scarred around the ankle; in doing any operation like that we have to go through tissue that is not badly scarred.

Q. So you had to do it above the ankle? A. Above the ankle.

Q. And if the ankle hadn't been scarred would it have been preferable to do it in the ankle? A. Much better.

Q. And did you say that was a bone dividing operation? A. Yes. And a wedge was taken out of the bone so that the thing could be bent at a right angle.

10 Q. In other words a piece was cut out of the bone in each leg? A. Yes.

Q. So that you could bend the bone at that cut? A. Yes.

Q. Did you do both legs at the same time or were those two different operations? A. Two different operations.

Q. One on each leg, several weeks apart? A. Yes. They were both pretty serious operations.

Q. And total anaesthetic and so on, taking some time? A. Oh yes.

Q. After those operations were casts applied to his legs? A. Yes.

Q. Was there any special name for the kind of casts that were ap-
20 plied? A. Well the first cast was an ordinary cast but he came back later on and had a walking cast in which he was able to walk; he had things like skates on the bottom.

Q. By which he could drag the leg along the floor? A. Yes. He couldn't walk much but he could walk a bit.

Q. And the casts would be divided in the crotch, I suppose, to enable him? A. No, the casts never had to go past the crotch; they were two separate ones, on each leg.

Q. What effect have those operations had on the purpose of getting his heels to the ground? A. He can get his left heel to the ground now
30 in an ordinary shoe; the right one he can't quite, he has to wear a shoe with a heel a bit raised.

Q. He spoke of a lift yesterday? A. Well that is what he meant.

Q. In other words with that raised lift or heel, but in the right foot he was partly walking on his toes all the time? A. Well he has to wear a heel on his shoe raised or it wouldn't be taking any weight at all.

Q. And there is some weight on his heel? A. With the raised heel, yes.

Q. And then the rest of his weight is, with his right foot, on his toes? A. That is right.

40 Q. Then you saw him at my request and examined him on Monday last? A. Yes.

Q. Will you tell us now the present condition so far as the deformity of the ankles and the feet at present which you mentioned previously? A. Well there is no movement at all in either ankle, it is completely stiffened. The front part of his foot can be moved up and down a little but at no place on the smaller joints of the foot and he cannot control that

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movement very well. For instance, he cannot walk up on his toes or anything like that, he has to take his weight in full on the stiffened foot every step he takes.

Q. He told us here in evidence this morning he has to put the heel of his foot down to the ground first? A. Yes.

Q. Would you expect that? A. Yes. There is no movement in the ankle at all. He can't get his toe up, he can't spring in the ball of his foot, he walks like a wooden foot.

Q. He also tells us that one ankle was turned in and the other one was turned out. Do you agree with that? A. Yes, a little. They have a peculiar look about them. The reason for that is that both bones were divided just above the ankle and the thing was tipped that way, and one was tipped in and one tipped out deliberately to make the sole of his foot level with the ground.

Q. Having regard to his condition as you saw him on Monday and the accident having occurred almost four years ago, on July 31, 1940, will he have any further improvement in his condition from what he is now? A. He has not had any improvement since I saw him in St. Catharines some time last summer, I forget the date, but if anything he is a little worse—he has an area that is now unhealed, that has broken down.

Q. Oh yes, he mentioned that; I intended to and forgot to bring that out. He said behind his right knee that the scar has broken? A. Yes.

Q. And was still unhealed? A. Yes. It is worse than that. He has a heavy band of scar behind his right knee that limits the getting it out straight, and what happens when he walks on it, he tears it apart and he has quite big open wound on the back that won't heal.

Q. Yes? A. And something will have to be done; that will have to be excised and grafted again.

Q. Excised—cut out? A. Yes. And another graft put on.

Q. Is that an easy place to put a skin graft, right behind the knee where it bends all the time? A. Well it is subjected to more stretching and strain than it is anywhere else.

Q. Do you think there is a fair possibility of that broken condition behind the right knee being cleared up by another skin graft? A. Well it won't be cured but it might—it won't be anything like normal but it may be so that it won't tear every time he starts doing much walking.

Q. In other words if you put a loose enough piece of skin on there to allow for the bending it may work that way? A. Yes.

Q. Then, doctor, he told us I believe that he didn't have any feeling in his heels? A. Yes.

Q. And around his toes? A. Yes.

Q. When you examined him on Monday did you find anything about that or can you tell anything about that? A. Yes. His anaesthesia is nowhere complete but he has a good deal of diminution of sensation over the foot.

Q. Diminution of sensation? A. Yes.

Q. And does that apply to both feet? A. Yes, but more to one than to the other—more to the right.

Q. More to the right, that is the one with the break behind the knee? A. That is right.

Q. Then he told us that if he stands for any great length of time he gets pins and needles feelings in each foot. Would you expect that with these conditions? A. Yes. The circulation of his feet is very poor. What happens is that both feet swell if he is on them too much. They were swollen when I saw him on Friday—on Monday.

10 Q. They swell and the circulation is poor? A. Yes. I can't feel any pulse in either foot, and the reason for that is that the scar around the leg is pretty well contracted and tightened. He is apt to get into trouble if he gets exposed to cold.

Q. He said that he was sensitive to cold? A. Well he has been warned about that too because he may get a frostbite when a normal foot wouldn't be affected at all.

Q. And chilblains, the same thing with it? A. Well the difference lies in between those grafted areas he has; some are fairly good and flexible and the others are very firmly bound down to the underlying tissues

20 and I would say that the outlook is that he is frequently going to have some of that scar break down and it will be slow in healing.

Q. At the tight points? A. Yes, some of which are bad. His burn was deeper than the skin, in most places; it went down to the bone in some places.

Q. Is there a name for that kind of burn? A. Well we talk about it as different degrees, and the fashion varies very much, though at present it is called a third degree burn.

HIS LORDSHIP: Q. Is that the greatest degree? A. Now it is, yes.

Q. I suppose it is a miracle he is alive, is it? A. Well I didn't see

30 him, sir.

Q. No, but you have seen the injuries? A. Yes. An extensive burn, but it wasn't—the burnt part of the body was limited; it was limited to his legs.

Q. I suppose even a little burn could do that? A. Yes, but it is the big burns as a rule that don't get better.

MR. KEOGH: Q. Then you told us that these sixteen skin grafts were taken from his chest and back? A. And thigh too.

Q. And you examined him on Monday and examined his chest and back? A. Yes.

40 Q. Will you describe to the jury the present condition and appearance of his chest and back? A. Well he has about two-thirds of the normal skin missing over the front of the top of his chest and about a third missing over the back. That is replaced by skin that varies, in places it is thin scar tissue, in other cases it is skin that is almost normal, that is where

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the grafts were cut all over the front and back and all over the thighs, and in some places the whole skin was cut away, the whole thickness of skin.

Q. Would you call that three layers? A. Well the whole thickness.

Q. Would it be fair to say, doctor, that his chest and stomach and back and the upper parts of each thigh were all scarred? A. Yes, they all show some signs of scarring.

HIS LORDSHIP: Q. Will those scars disappear gradually? A. No, they won't sir. They are complete thickness scars. Some of the grafting areas will look almost normal, and now look almost normal, some of the thinner areas, but most of them do not and won't.

MR. KEOGH: Q. So that is it fair to say that most of his chest and back is scarred at the present time? A. Yes. I am not sure that most of it, that applies; at any rate pretty nearly half of his chest and back. It is very obvious.

Q. And those are as you have told his lordship permanent scars; there will be no improvement in that half of them? A. At this time, no, there won't be any improvement in those.

HIS LORDSHIP: Q. I am not saying this flippantly, doctor, or anything, but does that prevent hair on the chest? A. No, but the scarring
20 won't grow hair, that is what I mean. But the places that look almost normal if left to time would. The grafted areas won't grow any hair, the graft is not thick enough for that.

MR. KEOGH: Q. He will have no hair on his legs in any event? A. No.

Q. Then he told us or he said that when he bent over to the left there was a tightening and pull on a scar on the right side of his chest. Was that consistent with what you saw? A. Well there was no scar thick enough and shortened enough to limit his movement to any great extent in his trunk.

30 Q. Then the operation that you told us to get his feet flat to the ground that he is able to arrive at now, does that mean that he will always have to walk flat-footed? A. More or less flat-footed; that is, he goes down more or less on his heel and goes up on his toe.

Q. Is that apt to have any effect on his arches, or is it not? A. Well his arches are pretty stiff but they are both very flat now; it won't make it any worse, I don't think.

HIS LORDSHIP: Q. I don't see how you tie up this ankle business with the burn? A. Well, sir, that surprised me when I took him over because the burn apparently didn't go into the ankle joint but now both
40 ankle joints are completely ankylosed by bone and they were quite deformed when I took it over too.

Q. But can you say definitely that that was caused as a result of this burn? A. Or by the prolonged treatment. You see he was grafted over a period of about fourteen or fifteen months and all that time he was unhealed.

Q. You are sure of that, are you? A. Yes, I am sure—at least my information comes from Dr. Farmer and from the hospital records; I was away at the time.

Q. From what you observe on everything that is your opinion? A. Yes. And there is no doubt about it being solid now, finally fixed in that position away down and there is no question about that.

MR. KEOGH: Q. Doctor, he told us that he couldn't run or jump. Would you expect that from his present condition? A. Oh yes.

HIS LORDSHIP: Q. Will he ever be able to run or jump. A. No sir.
10 He has no spring in his feet at all.

MR. KEOGH: Q. He told us that he couldn't skate or swim now although he did both before the accident? A. Well he could swim.

Q. What about skating? A. Not very well.

HIS LORDSHIP: Q. Will he improve in that? A. He won't get any movement back in his ankle.

Q. No improvement in the ankle? A. No.

MR. KEOGH: Q. Will the way in which he is obliged to walk at the present time ever improve? A. I don't think it will.

HIS LORDSHIP: Q. I gathered from something you let drop that in
20 the course of time he won't need these inch high shoes—am I right in that —one of them will go back? A. I don't think it will, sir, because his ankle joint is absolutely stiff in that ankle.

Q. So he will have to have always— A. One heel a little bit higher.

MR. KEOGH: Thank you, Doctor.

CROSS-EXAMINED:

In the Supreme Court of Ontario Plaintiffs' Evidence No. 17 Dr. Arthur B. Le Mesurier Cross-Examination 11th May, 1944

By Mr. Robinette.

Q. Doctor, I just didn't catch one expression that you used: You spoke of anaesthesia, said it was by no means complete. I assume that you were referring to the fact that the boy had said that he had no feeling in
30 his feet? A. Yes.

HIS LORDSHIP: Q. Anaesthesia I suppose is the lack of feeling? A. Yes, that is what it means.

MR. ROBINETTE: Q. You meam there is no feeling? A. Yes, if I prick it with a pin he would know I was pricking him, but a light touch he couldn't appreciate at all.

Q. You said that there was a third degree burn and it apparently penetrated the entire skin tissue? A. It went all through it and into the deeper tissue. That is a recent classification of burns. But it was the most severe burn.

In the Supreme Court of Ontario Plaintiffs' Evidence No. 17 Dr. Arthur B. Le Mesurier Cross-Examination 11th May, 1944 Continued

Q. But the burn didn't go so far as the bone, the ankle bone? A. Yes, it did in some places, up the shin.

Q. But I am speaking of the ankles? A. No.

Q. Of course it might very well in the shin because the shin is closer the surface? A. Yes.

HIS LORDSHIP: Q. Was there any burning of bone at all? A. I think there was some.

Q. You couldn't tell that? A. No.

MR. ROBINETTE: Q. Was there any burning of the ankle bones?
10 A. I don't think so, except that the skin grafts are very firmly adherent to the tibia in some places, you can't move them.

Q. What is the tibia? A. The large bone, the shin bone; right down as far as the ankle.

Q. It would appear from your evidence, Doctor, that the principal defect that you find to-day is a failure of his ankles to move? A. Well he has bad circulation in the whole legs from just above his knees, and I don't know whether he was asked how much he could walk, but he can't walk very far and he can't stand very long.

Q. Do you remember I asked you at the last trial—hindsight is easier
20 than foresight but I did ask you at that time whether you thought he would be able to walk without crutches and you told us on that occasion that you didn't think he would and now he is in court without crutches? A. Yes, and he walks a bit without crutches, but he still can't walk very far.

Q. He told us in the witness box that he doesn't use crutches at all, he doesn't need to use a cane even? A. Well—

Q. Apparently he is doing a lot better than you anticipated, with great respect to you, Doctor? A. Well that is always good news.

Q. What I am suggesting is, again with respect, that you are taking an unduly pessimistic view of this lad's future? A. Well he is a bit better
30 now than I ever thought he would be when I first saw him but, as I say, I don't think he is any better now than he was when I saw him last summer in St. Catharines.

Q. Was he walking on crutches last summer at St. Catharines? A. No, he wasn't.

Q. You recall he was at the trial here a year ago June and then he was on crutches.

HIS LORDSHIP: Q. Are we to conclude that that improvement may go on and on? A. Not much, sir.

Q. When was the last trial? A. I have seen him since then.

40 MR. KEOGH: May 3rd.

MR. ROBINETTE: Q. And you thought then that he would not ever be off crutches in his life? A. Well I thought he would prefer to take the crutches possibly; I knew that he could walk without crutches but not, I didn't think, for very long; he has got a bad pair of legs.

HIS LORDSHIP: Q. Will he ever be able to drive a car? A. Oh, I think so.

Q. He will be able to do that? A. Yes.

Q. Be able to lift things? A. Yes.

Q. Thinking about earning his living? A. No prolonged work on his feet, that is what would affect him.

Q. He could do office work? A. I think so.

Q. Any kind of office work? A. Oh yes, any kind of office work.

MR. ROBINETTE: Q. There is no movement of his upper portion—

10 HIS LORDSHIP: Q. He could drive a car? A. Yes.

Q. Couldn't walk long distances? A. No.

Q. He seems to be an intelligent boy? A. Yes; I think he is.

Q. He couldn't be a miner I suppose? A. He couldn't do any underground work. They wouldn't look at him.

MR. ROBINETTE: Of course he doesn't live at Kirkland Lake now.

HIS LORDSHIP: Q. Could he pick fruit? A. Climbing ladders? No.

Q. Couldn't climb ladders? A. Might get up them but not—

Q. Could he pick strawberries and raspberries? A. Well the pro-
20 longed standing.

Q. Put in plumbing? A. I would say no.

Q. He is really confined to office work? A. He should stick to that.

Q. Could he drive a taxi? A. Yes, I fancy so, but he would be handicapped a bit.

Q. They would pass him for a car, would they? Supposing three years from now when he is old enough to drive a car, the inspector would pass him all right? A. Yes, but they would have to put him through his test; I would think they would pass him.

MR. ROBINETTE: Q. He could do any bench work that didn't require standing for any length of time? A. Yes.

30 Q. In other words his principal disability as far as earning his living is concerned seems to be the restriction of the movement of his ankle? A. And the restriction of the standing on his legs; he can't do much in the way of prolonged standing.

Q. I am still interested in your opinion that the condition of the ankles was caused by the burn when you say that the burn did not go through to the ankle bones? A. When I first saw him the whole ankle was pulled sideways and as I say pointing away down like that (illustrating) and some of the surfaces of the adjacent bones were more or less compressed on each other; it looked like a fracture. I think what had
40 happened is that the scar had pulled at a time when the bone was very soft and had actually compressed the bone.

Q. Would you say, Doctor, that the condition of the ankle bones was the result of the burn or the result of the treatment? A. That was a result of the burn, it was indirectly a result.

In the Supreme Court of Ontario
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Continued

Q. I suppose you can say it wouldn't have happened unless he had the burn? A. Yes. But it couldn't have been avoided as far as I can see by any change in the treatment.

Q. As far as this lad's appearance is concerned, if he wore the normal clothing no scars would appear to the naked eye? A. No, he has got no scars above his neck, or his hands.

Q. The only thing you can see looking at him, if he were clothed normally, would be the slight lift in one foot? A. Yes. His gait is pretty obvious to me.

10 MR. ROBINETTE: His gait, yes. All right, Doctor.

HIS LORDSHIP: Q. Just a minute: Doctor, I suppose you see a great many accident cases? A. Yes.

Q. You have testified before me a great number of times, and other judges I suppose as many if not more, and you agree with me there are all sorts of accidents, aren't there? A. Yes.

Q. From the smallest up to the largest. Would you regard this as seriously as if he had lost a leg? A. Well, sir, he would be better off with both legs off if it could be done below the knee, he would be better off.

Q. That is with artificial legs? A. Below the knees. That couldn't 20 be done in his case. And both legs above the knees are no good.

Q. It wouldn't be as serious as a man losing an eye, would it? A. Well a man could do pretty well with one eye. You can get on pretty well with one eye.

Q. There are many accidents that exceed this boy's in seriousness, I suppose? A. Yes. Of course one of the most serious things about this was that he was in hospital with an unhealed wound which was a constant source of pain and poisoning for a long time.

Q. You have to take that into account? A. Yes. That is the bad part about burns.

30 HIS LORDSHIP: Well.

MR. ROBINETTE: Q. His lordship was asking more as to the present condition rather than the treatment or the length of time that he had been in the hospital? A. Well he doesn't have any pain now.

MR. ROBINETTE: All right, thank you, Doctor.

MR. KEOGH: Thank you, Doctor.

MR. KEOGH: Now I propose to read from the examination for discovery of the defendant Clarence MacDonald the following questions:

HIS LORDSHIP: Wait a minute now. You see there is a danger in that. You are pursuing a very dangerous course in this event, Mr. Keogh. 40 I mean that is not evidence against the company.

MR. KEOGH: Quite so.

HIS LORDSHIP: I know, but it is very hard to distinguish, very hard for a jury to distinguish between what is evidence and it is very hard for me to explain to them what is evidence against a company. I assume this man is going to be called, isn't he?

MR. ROBINETTE: Mr. MacDonald? Oh yes, I am going to call him as a witness, my lord.

MR. KEOGH: But at the last trial my friend made a motion for a nonsuit because I didn't read the examination, in deference to the request
10 of Mr. Justice Kelly, and this time—I am entitled to read it, under the rules it is evidence only against the defendant MacDonald.

HIS LORDSHIP: I don't like the course very much, Mr. Keogh.

MR. KEOGH: In view of what happened at the last trial I think I have to in justice to my clients because if a nonsuit is granted—

HIS LORDSHIP: Subject to Mr. Robinette's objection, but don't object if something happens to you now.

MR. KEOGH: I will have to take that chance. I will give your lordship the numbers and then I won't have to interrupt and I will read them. The numbers of the questions that I propose to read from the examination
20 of the defendant Clarence MacDonald are as follows:

Question 3; questions—

HIS LORDSHIP: Don't you want question 1?

MR. KEOGH: No.

HIS LORDSHIP: I don't know how you can get along without it.

MR. KEOGH: Perhaps I should read questions 1 and 2 then to give the full position. Questions 1 to 3 then, my lord, that is.

HIS LORDSHIP: Gentlemen, it is very difficult to explain this to you, but this is evidence not against the Oliver Blais Company, it cannot be used against them and cannot be considered against them, it is evidence only
30 against young MacDonald who was in charge or may or may not have been in charge, we don't know yet, of the gasoline station. What I object to in these particular procedures is that it is hard for you gentlemen and it is hard for anybody to put that out of your mind—you cannot—as against the Oliver Blais Company while considering it against the defendant MacDonald. You see there is the difficulty. And while I have to admit it I want you to understand that in hearing this that it is only against MacDonald and it is not against the company who employed him, that is the station company. Do you think you can get that distinction in your minds? I can hardly do it myself, but there it is. All right. Questions 1, 2 and 3.

40 MR. KEOGH: 1, 2 and 3; 6 to 14; 16 to 21; 24 to 32; 34 to 35.

In the Supreme Court of Ontario Discussion by Counsel 11th May, 1944 Continued.

HIS LORDSHIP: It sounds like the whole examination.

MR. KEOGH: Oh no. 38 to 43; 47 to 55; 58 to 63.

HIS LORDSHIP: You have only omitted about five questions so far.

MR. KEOGH: I am skipping some now. The next one after 63 is 85. 87 to 89 and 92 to 94.

HIS LORDSHIP: You see, gentlemen, the law allows Mr. Keogh to read such questions as he likes against Mr. MacDonald.

MR. KEOGH: It is only evidence against Mr. MacDonald, you can forget about it as far as the company is concerned.

10 HIS LORDSHIP: Yes.

MR. KEOGH: Questions 1 to 3:
"1. Q. You are the defendant Clarence MacDonald? A. Yes.
2. Q. And you reside at Kirkland Lake? A. Yes.
3. Q. On the 31st July, 1940, were you employed by the defendant the Oliver Blais Company, Limited, as manager of its service station at Kirkland Lake known as Teck Imperial Service Station? A. I was."

HIS LORDSHIP: Wait a minute. I thought he was a boy but perhaps he is a man.

MR. KEOGH: The boy's name is Black. This is the manager.
20 Then 6 to 14.
HIS LORDSHIP: Wait a minute, now; I didn't follow this, 6. You can't read that against Mr. MacDonald.

MR. KEOGH: I submit I can.

HIS LORDSHIP: No, you can't. That is something that is not against him. You are reading against him on the ground of his negligence. You are not going into anything of that sort.

MR. KEOGH: One of the grounds of negligence we allege against MacDonald is that he failed to properly instruct this young boy in the sale of gasoline before he put him in charge and my submission is that this
30 number—

HIS LORDSHIP: No no, you can't read that, that this boy was employed by the company, because that is the reason, something that is not against MacDonald but against Blais.

MR. KEOGH: I have to first of all show a duty on the part of MacDonald to properly instruct Black, namely, that he was under his supervision and control.

HIS LORDSHIP: You should have framed your question in such a way as to get that. I rule this one out and I rule— I rule 6 out anyway, I don't know about 7. That is the trouble with these things. Just a minute.
40 Gentlemen, would you go outside, please. I don't know.

——The jury retired.

MR. KEOGH: You see, my lord—

HIS LORDSHIP: The trouble is it is hard to distinguish what is good and what is bad, and that is definitely bad, number 6.

MR. KEOGH: Just let me make a short submission of what my position is as I see it.

HIS LORDSHIP: Very well.

Mr. Robinette, all this nonsense could be done away with by admitting that this boy was employed by the company. I mean it is perfectly silly
10 in a civil case to stand on any ceremony on it.

MR. ROBINETTE: Who said I was, my lord?

MR. KEOGH: I have to have enough to make it conclusive.

HIS LORDSHIP: Certainly. Then what are you worrying about now?

MR. KEOGH: I am worrying about the lack of instructions that were given by MacDonald to this boy before he was put in charge of a dangerous substance.

HIS LORDSHIP: If it should be necessary later on I will allow you to read this evidence. Is that fair enough?

20 MR. ROBINETTE: Yes, my lord.

MR. KEOGH: I will accept that if my friend will undertake not to make a motion for a nonsuit.

HIS LORDSHIP: He won't succeed at it anyway so I can tell him that right now.

MR. KEOGH: And secondly will undertake to call Mr. MacDonald as a witness.

HIS LORDSHIP: If he doesn't call him I will let you do that.

MR. KEOGH: As part of my case.

HIS LORDSHIP: Yes.

30 MR. KEOGH: I am satisfied with that.

HIS LORDSHIP: I am taking it for the present it is admitted that MacDonald is the manager of the company and that you had in your employ that day a boy named Black.

MR. ROBINETTE: That is all right.

HIS LORDSHIP: And if MacDonald is not called it is understood that Mr. Keogh can read that against MacDonald.

MR. ROBINETTE: But I am not undertaking not to make a motion for a nonsuit.

In the Supreme Court of Ontario
Discussion by Counsel 11th May, 1944
Continued

HIS LORDSHIP: I will tell you you haven't any chance in that.

MR. ROBINETTE: There is no evidence against MacDonald at all.

HIS LORDSHIP: If there is anything like that I am going to allow him to read it.

MR. ROBINETTE: I am admitting MacDonald was manager and I am admitting that Bruce Black is a servant of the company, not a servant of MacDonald.

HIS LORDSHIP: Do you admit that MacDonald didn't give Black instructions?

10 MR. ROBINETTE: Oh, not at all. Of course not.

HIS LORDSHIP: Then I will allow you to prove that he didn't give him instructions.

MR. ROBINETTE: We will say that he did give instructions.

MR. KEOGH: At the last trial, in deference to Mr. Justice Kelly I didn't read it and the minute I closed my case my friend moved for a nonsuit and got a nonsuit in favour of MacDonald, chiefly because I didn't read MacDonald's examination for discovery.

MR. ROBINETTE: The court considered there was no evidence of negligence against MacDonald.

20 HIS LORDSHIP: Do we have to read all this? I haven't followed this very closely—

MR. KEOGH: My position is, MacDonald is liable in tort both as a servant and as a person, and the reason he is liable personally is that he had a man under his control and supervision whom he didn't properly instruct or give proper instructions. That is my position in a nutshell. Therefore I have to show how he engaged Black and what instructions he gave him and what he said to Black after the accident.

HIS LORDSHIP: I am not going to allow you to read things that are against the company against MacDonald.

30 MR. KEOGH: Suppose I do this, when I come to a group of questions I wait and your lordship look at all these questions before I read them.

HIS LORDSHIP: We are getting in a little too deep on this thing.

MR. KEOGH: Apparently my friend is going to make the same motion he did at the last trial and I don't want to be caught again.

HIS LORDSHIP: You say there is something in this that shows lack of proper instructions and instruction of Black, it is right in here?

MR. ROBINETTE: I don't think it is.

MR. KEOGH: He says he pointed to a placard on the wall and told him to read it. My submission is that that is not enough.

HIS LORDSHIP: All right. Bring back the jury. I suppose 6 is innocuous. It is not strong evidence but perhaps for the context I will let that go.

MR. ROBINETTE: I have no objection to 6, my lord.

——The jury returned.

HIS LORDSHIP: I am allowing question 6 in, gentlemen, because of the context, just to preserve the context, and it is not evidence against MacDonald as I can see.

MR. KEOGH: Then 6:

10 "Q. Then on the 31st July, 1940, was there in the employ of that Company a young man named Black? A. Yes."

7. Is that all right, 7?

HIS LORDSHIP: Go ahead. I thought I might stop you reading that, but go ahead.

MR. KEOGH: (Reads):

"7. Q. Did you engage Black on behalf of the Company? A. That is right.

8. Q. When did you engage him? A. Well, I believe he started, I think it was the 8th or 9th July. It was just about the end of the first

20 week in July.

9. Q. Was he a High School student on vacation? A. That is correct.

10. Q. And you engaged him to perform what duties at that service station? A. We took him on as a helper with another High School boy.

11. Q. Was it part of his work to sell gasoline? A. Not when he started but later on it was.

12. Q. When did that become part of his work? A. Well, he was engaged helping for two weeks before we permitted him to handle

30 gasoline.

13. Q. So he started to handle gasoline about the 23rd of July? A. Well, approximately. He has been a little longer he says himself but it was definitely two weeks.

14. Q. How old was he? A. He told me when I engaged him that he was fifteen."

And the next group of questions are 16 to 21, my lord.

HIS LORDSHIP: Surely 16 must be only the company and 17 must be only the company. And 18 is to the company I think. And 19, 20 and 21 are against the company. I don't think they affect him. I rule those out.

40 MR. KEOGH: And I am tendering them.

HIS LORDSHIP: For the present I would rule them out.

MR. KEOGH: Then the next group of questions is 24 to 32.

HIS LORDSHIP: I will allow 24.

In the Supreme Court of Ontario Discussion by Counsel 11th May, 1944 Continued

MR. KEOGH: (Reads):
"24. Q. Were you in that service station on the 31st July, 1940, when Black sold the gasoline to the infant plaintiff William Yachuk and his brother? A. No."

HIS LORDSHIP: 25 is all right.

MR. KEOGH: (Reads):
"25. Q. Where were you at that time? A. I was at home at that time, I believe."

HIS LORDSHIP: 26 is unnecessary. 27, 28, 29, and did you go to 32?

10 MR. KEOGH: Yes, my lord.

HIS LORDSHIP: 30 and 31 are not all right. 32 is not all right. I will rule those out.

MR. KEOGH: Your lordship is ruling out 32, about the questioning and the answers?

HIS LORDSHIP: Yes, I think so.

MR. KEOGH: Then the next group is 34, 35.

HIS LORDSHIP: I think that is the same objection.

MR. KEOGH: Then the next group is 38 to 43.

HIS LORDSHIP: As far as I can see they are all against the company. I think they are out. 20

MR. KEOGH: 47 to 55 are the next group.

HIS LORDSHIP: No, I will start from 51—you may start from 51.

MR. KEOGH: (Reads):
"51. Q. When you engaged Black what instructions, if any, did you give him about the selling and handling of gasoline? A. I simply told him not to touch the gasoline. My first instructions were not to dispense gasoline until I told him to and to get familiar with the gasoline regulations or read the card on the wall. Those were my first instructions, and I immediately turned him over to my assistant to start him to work, any work he would naturally do in starting. 30
52. Q. Do you know whether your assistant gave him any further instructions on the selling and handling of gasoline? A. Yes, I would say we both gave him further instructions.
53. Q. What further instructions did you give Black? A. Well, one very definite rule that we had was that gasoline was not to leave our property unless it was in a safety can.
54. Q. You say you had a rule to that effect. Did you communicate that to Black? A. Oh yes.
55. Q. When? A. Oh well, some time during that first week he was on there. It is quite possible it was the day he started. I couldn't tell you the day but he was aware of it." 40
The next group is 58 to 63.

HIS LORDSHIP: All right; 58.

MR. KEOGH: (Reads):
"58. Q. On or prior to the 23rd July, 1940, did you give any further instructions to Black about the sale and handling of gasoline? A. After the 23rd?
59. Q. On or prior or after, up to the time of this accident? A. Yes. I would say yes to that.
60. Q. What were those further instructions? A. The further instructions would be to be careful to make sure, in addition to my rule
10 about gasoline not leaving the property in anything but a safety can, to watch for people who might come in wanting gas for dry cleaning or cigarette lighters and purposes like that.
61. Q. Well, the instructions you gave about those purposes, what did you tell Black? A. Well I can't recollect my exact words.
62. Q. Can you give me the effect of your instructions? A. Well, I would say, Bruce,—I might even say make damn sure if anybody comes in wanting gasoline in bottles for dry cleaning or purposes of that nature that it doesn't go out; it has got to be in a safety can.
63. Q. Where those all the instructions you gave Black prior to the
20 31st July, or did you give him any others? A. I can't recall any others."
The next one is 85, my lord.

HIS LORDSHIP: Yes, that will be all right.

MR. KEOGH: (Reads):
"85. Q. Well, you have been handling gasoline for years. Do you consider it a dangerous article? A. If improperly handled it is possibly very dangerous."
And the next is 87 to 89, my lord.

HIS LORDSHIP: I think those are purely against the company, any-
30 way they are not necessary for you just now.

MR. KEOGH: Then the last group is 92 to 94.

HIS LORDSHIP: Well they are really against you aren't they?

MR. KEOGH: No, I submit that they—

HIS LORDSHIP: I will let you read 92 and 93 if you wish.

MR. KEOGH: (Reads):
"92. Q. What sort of metal containers do you use to refuel motor vehicles? A. Approved safety cans.
93. Q. Do you use any other type of metal container for that business? A. No."

40 HIS LORDSHIP: Is that the case?

MR. KEOGH: That is the case, my lord.

HIS LORDSHIP: Well, defence.

MR. ROBINETTE: I would like to make a motion.

HIS LORDSHIP: Well you will have to go out again, gentlemen. You are getting lots of exercise to-day.

——The jury retired.

HIS LORDSHIP: Personally I don't see much chance for you but perhaps you can convince me.

MR. ROBINETTE: No, it is always worth trying.

MOTION FOR NONSUIT

In the Supreme Court of Ontario Motion for Non-Suit No. 18 11th May, 1944

My motion is with respect to the defendant MacDonald, on the very
10 clear ground that there is absolutely no evidence against MacDonald at all. Bruce Black, the defendants allege, sold the gasoline as an employee of Oliver Blais Company, and so is MacDonald; they are both employees. My friend's reading from the examination for discovery has established that MacDonald was not present when the gasoline was sold; he has also established that MacDonald warned the boy not to sell gasoline in anything other than safety containers. There is absolutely no evidence of negligence against MacDonald. My friend has proven that for me by reading the examination for discovery. Mr. Justice Kelly at the first trial—

HIS LORDSHIP: I don't know what happened there and I don't
20 know yet what the grounds of the Court of Appeal judgment were. Did they send it back for trial against everybody?

MR. KEOGH: Yes.

HIS LORDSHIP: Therefore they must have disagreed with Mr. Justice Kelly's nonsuit.

MR. ROBINETTE: The dismissal as against MacDonald was not even discussed in the Court of Appeal, the claim was not considered of any importance, the judgment at the trial was set aside and I don't think—

HIS LORDSHIP: Were there any reasons?

MR. ROBINETTE: No reasons, my lord; they more or less forced it
30 on us. I had asked at the trial that the jury be discharged and the Court of Appeal said "You both seem to want a new trial. You had better have it."
I say, my lord, there is no evidence at all of any negligence on the part of MacDonald. There is nothing.

HIS LORDSHIP: This Oliver Blais Company is a corporation, they have put MacDonald in charge evidently and he has hired a man, he has hired him without—

MR ROBINETTE: Where is the evidence of that?

HIS LORDSHIP: That he has hired a man?

MR. ROBINETTE: Hired a boy, yes.

HIS LORDSHIP: He hired a boy and he didn't give the boy adequate instructions.

MR. ROBINETTE: But he did according to what Mr. Keogh read, he did give him instructions.

HIS LORDSHIP: I think I will let the jury go till two o'clock and then they can be on their way now.

Bring the jury in then.

——The jury returned.

HIS LORDSHIP: Gentlemen, what I am discussing will take me fif-
10 teen or twenty minutes probably and I think now it might be a good idea for you to go and be back here at two o'clock. We will adjourn till two o'clock after I am through with this but you might as well get on your way.

——The jury retired.

MR. ROBINETTE: I don't want to burden your lordship unduly with the matter but I do submit there is no evidence at all that there was a failure to instruct. MacDonald's evidence on the examination for discovery was that he had instructed the boy and that he had shown him a red placard on the wall which stated the sections under the Gasoline Handling Act. There is no evidence he knew or ought to have known that Black would be
20 careless. I am not suggesting that Black was careless. Far from it. I am speaking merely at the moment from MacDonald's standpoint.

HIS LORDSHIP: If Mr. Keogh can win against the company on the same grounds that he now alleges against MacDonald I presume—I hadn't thought very much of it but I would think that if their manager hired an incompetent boy and didn't instruct him—

MR. ROBINETTE: There is no evidence of that.

HIS LORDSHIP: But the evidence will probably develop.

MR. ROBINETTE: But I am moving for a nonsuit.

HIS LORDSHIP: What is the object of getting MacDonald in this,
30 Mr. Keogh? You are more sure of your money out of Oliver Blais than you are from MacDonald.

MR. KEOGH: It isn't a question of money altogether. The jury at the first trial had this to say of MacDonald on the same evidence: The manager of the station, Mr. MacDonald, did not make sure or coach the boy Black properly in the vending of gasoline. He gave the boy Black the regulations and told him to read them. The evidence at the first trial was that a red placard was—

HIS LORDSHIP: Did MacDonald give evidence at that time?

MR. KEOGH: Yes. There is a whole lot of fine print in this and in-
40 stead of instructing him on what he was to do he said "There it is over there; read it," and the jury found that was negligence.

In the Supreme Court of Ontario Discussion by Counsel 11th May, 1944 Continued

MR. ROBINETTE: That was a compromise. That is what my friend argued in the Court of Appeal.

HIS LORDSHIP: If it is negligence against MacDonald wouldn't it be negligence against the company?

MR. KEOGH: Yes.

HIS LORDSHIP: Personally I cannot see any point in suing MacDonald. He is not his employee.

MR. KEOGH: I don't know how strong this company is, my lord; they only rent this service station from the Imperial Oil, they don't even own it.

10 HIS LORDSHIP: Do you know how strong MacDonald is?

MR. KEOGH: I want to have two strings to my bow.

MR. ROBINETTE: My friend is anticipating a great deal.

MR. KEOGH: I am entitled to have the two strings if I prove my case.

HIS LORDSHIP: What did Mr. Justice Kelly do?

MR. KEOGH: He nonsuited me, chiefly because I hadn't read MacDonald's discovery.

HIS LORDSHIP: That doesn't give me anything; how will it help you very much?

MR. KEOGH: I was able to convince the jury at the last trial that
20 instead of him taking this young boy and sitting down with him and telling him the things he should and shouldn't do about selling gasoline he said—

HIS LORDSHIP: I can only take the evidence before me now and that evidence quite clearly in what you read says that he instructed him not to sell except with a safety can.

MR. KEOGH: But he should have explained it. If your lordship had five drivers working for you would you give them the Highway Traffic Act instead of instructing them what they were to do? He says "Here are the regulations on the wall; read them", and the jury found that was a negligent way of instructing the boy.

30 HIS LORDSHIP: As part of your case you have read questions and all these other things that I told you are more or less against the company, and conversations after the accident. Questions 58 to 63, now if you take them:

"58. Q. On or prior to the 23rd July, 1940, did you give any further instructions to Black about the sale and handling of gasoline? A. After the 23rd?

59. Q. On or prior or after, up to the time of this accident? A. Yes, I would say yes to that.

60. Q. What were those further instructions? A. The further in-
40 structions would be to be careful to make sure, in addition to my rule

about gasoline not leaving the property in anything but a safety can, to watch for people who might come in wanting gas for dry cleaning or cigarette lighters and purposes like that.
61. Q. Well, the instructions you gave about those purposes, what did you tell Black? A. Well, I can't recollect my exact words.
62. Q. Can you give me the effect of your instructions? A. Well, I would say, Bruce,—I might even say make damn sure if anybody comes in wanting gasoline in bottles for dry cleaning or purposes of that nature that it doesn't go out; it has got to be in a safety can."

10 MR. KEOGH: But he didn't state really—at the bottom of page 8, 51, which was read:

"51. Q. When you engaged Black what instructions, if any, did you give him about the selling and handling of gasoline? A. I simply told him not to touch the gasoline. My first instructions were not to dispense gasoline until I told him to and to get familiar with the gasoline regulations or read the card on the wall."

The jury at the first trial found that that was a negligent way of instructing him.

HIS LORDSHIP: That is qualified here: For a week or two he wasn't 20 allowed to touch gasoline and he was to familiarize himself with the instructions. Then he said "I immediately turned him over to my assistant."

"52. Q. Do you know whether your assistant gave him any further instructions on the selling and handling of gasoline? A. Yes, I would say we both gave him further instructions.
53. Q. What further instructions did you give Black? A. Well, one very definite rule that we had was that gasoline was not to leave our property unless it was in a safety can."

MR. KEOGH: Doesn't that all boil down to this: My friend says there is no evidence against MacDonald; the jury in the first trial found there 30 was evidence.

HIS LORDSHIP: Yes, but they heard MacDonald.

MR. KEOGH: I think it should help, what they say in their sixth answer: "the manager of the station, Mr. MacDonald, did not make sure or properly coach the boy Black in the vending of gasoline but gave the boy Black the regulations and told him to read them."

HIS LORDSHIP: The jury are obviously wrong by this evidence that you have put in yourself; he gave two instructions; one, he wasn't to touch the gasoline but to familiarize himself with the regulations; later he says he gave further instructions the boy was not to let gasoline go out of the 40 place unless it was in a safety can.

MR. KEOGH: I submit the first instructions were a negligent way of giving instructions.

HIS LORDSHIP: They were instructions that he must follow till and when MacDonald told him to touch gasoline.

In the Supreme Court of Ontario Discussion by Counsel 11th May, 1944

MR. KEOGH: And the only thing he added to that was there must be a safety can. I submit if the manager of a transport company with forty drivers, instead of instructing his drivers with regard to the proper rules of the road he says to them "You will find the Ontario Highway Traffic Act nailed up on the wall"—

HIS LORDSHIP: And if he says that the day he employs them and says "You fellows keep around the yard and get familiar with the trucks without taking them out into the street", and the day they start out "No man is to go over forty miles an hour" and they go fifty and they kill some-
10 one, where are you? That is the chance.

MR. KEOGH: It gets down to the question—

HIS LORDSHIP: It seems to me the Court of Appeal must have thought there should be a new trial against MacDonald or they wouldn't have ordered it.

MR. ROBINETTE: I explained about that.

MR. KEOGH: They ordered it against all parties.

HIS LORDSHIP: What do they say?

MR. KEOGH: " . . . be and same is hereby allowed" and so on. "This court doth further order that a new trial be had between the parties
20 to this action."

MR. ROBINETTE: They didn't think anything was wrong.

HIS LORDSHIP: Surely no Court of Appeal will send back a trial, and all this expense, if they don't think something is wrong.

MR. ROBINETTE: It was a compromise verdict.

MR. KEOGH: I say that in the circumstances of this case it was negligent to sell five cents' worth of gasoline, at common law it was negligent, to two young lads.

HIS LORDSHIP: Even that is subject to some reservation as I read the cases.

30 MR. KEOGH: And MacDonald put this young lad in the place without, I submit, adequate instructions where he could do that negligent act, without having proper experience. The evidence at the first trial was he had some eleven other employees on duty at the time and he could have very easily have got an adult and put him in there and the adult might have turned them down just like the adult turned them down across the road at the B-A. I submit that was negligence on MacDonald's part to be absent himself and be away from the station whether he was moving or not.

HIS LORDSHIP: Can a man stay at his job all the time?

MR. KEOGH: When he is in charge of a station and selling a danger-
40 ous commodity like gasoline he should be either in charge or have an adequate substitute in his absence.

HIS LORDSHIP: Is that an allegation in the pleadings?

In the Supreme Court of Ontario
Discussion by Counsel 11th May, 1944
Continued

MR. KEOGH: There is some allegation about him being too young: "9. The Defendant Oliver Blais Company Limited was further negligent in that:
"(a) It put an infant of fifteen years of age in charge of the service station and a dangerous substance, namely, gasoline.
'(b) It failed to give its servants proper instructions regarding the vending of gasoline.
'(c) It failed to provide proper supervision for the sale of the said
10 gasoline."
And MacDonald took part in all these things and that is evidence of negligence and if this case were to stop now I submit I would be entitled to judgment against both the company and MacDonald, and the jury backed me up on that at the first trial.

HIS LORDSHIP: I know, but they heard more than I have; they heard MacDonald and probably thought they wouldn't believe him anyway.

MR. KEOGH: It is for my friend to show there is absolutely no evidence of negligence against MacDonald. I respectfully submit there is some, and all I have to have is some, no matter how weak.

20 HIS LORDSHIP: That he was absent from the place and leaving a boy in charge may be negligent. I don't know.

MR. KEOGH: Leaving a boy who was not properly instructed.

MR. ROBINETTE: There is no evidence he had left the boy in charge. The boy was not in charge. He was working on the pumps.

MR. KEOGH: He was in charge of the pumps, that is the only part we are worried about.

MR. ROBINETTE: And there is no evidence of that.

HIS LORDSHIP: I think I will have to dismiss the action and grant the motion for nonsuit—of course you have to take all the risk, Mr.
30 Robinette—on the ground that I cannot see any evidence of negligence against Mr. MacDonald that makes him personally responsible for the accident. It may or may not be true, but the evidence on which the plaintiff relies principally was 51 to 63, showing that he, insofar as anything we have, gave what I think are adequate instructions to the boy. It may develop that he did not, but I think at present I will have to dismiss it against him. I will reserve the question of costs until I dispose of the whole matter.

——12.50 p.m., adjourned till 2 p.m.

Thursday, May 11, 1944;
2 p.m.

——The Registrar called the names of the jurors and reported twelve present.

HIS LORDSHIP: All right, Mr. Robinette.

MR. KEOGH: My lord, if I may intervene for a moment, before the lunch hour I agreed to have regulation 39, section twelve typed out and your lordship suggested filing it.

HIS LORDSHIP: Yes. Well file that as exhibit three.

10 MR. KEOGH: I had it typed by one of the girls up in the Division Court and they say that they have compared it.

HIS LORDSHIP: Well that is all right.

——EXHIBIT 4—Copy Section 39 The Gasoline Handling Act and of regulation 12 thereunder.

DEFENCE

In the Supreme Court of Ontario Defendant's Evidence No. 19 Mary Helen McKenzie Examination-in-Chief 11th May, 1944

MR. ROBINETTE: My lord, my first witness is Mary Helen McKenzie and I have agreed with my friend to read her evidence from the transcript at the first trial, which is very short. She is in Ottawa and my friend very kindly agreed that he would consent to having that evidence read to the jury.

HIS LORDSHIP: All right.

MR. KEOGH: That is right.

MR. ROBINETTE: Page 74, my lord. So I will read Miss McKenzie's evidence to your lordship and the gentlemen of the jury. (Reads):

"MARY HELEN McKENZIE: sworn.

DIRECT EXAMINATION:
By Mr. Robinette.

Q. Miss McKenzie, will you just try to speak so that the gentlemen of the jury can hear you? I understand you live in Ottawa at the present time. A. Yes sir.

30 Q. You are a school teacher? A. Yes, sir.

Q. And in the year 1940 you were a teacher in the Queen Elizabeth School at Kirkland Lake? A. From January to June of 1940.

Q. Did you have as one of the pupils in your class the infant plaintiff Billy Yachuk? A. Yes, sir.

HIS LORDSHIP: That is at Kirkland Lake?

MR. ROBINETTE: Yes, my lord, at Queen Elizabeth School in Kirkland Lake.

In the Supreme Court of Ontario Defendant's Evidence No. 19 Mary Helen McKenzie Examination-in-Chief 11th May, 1944 Continued

Q. You taught there for some six months? A. Yes, sir.

Q. During that period what would you have to say concerning Billy's mental alertness? A. I considered William a good average pupil, mentally alert.

Q. Did you say he was mentally alert? A. Yes.

Q. How did you in that school rank or grade your pupils? A. We divided our class into A, B and C groups but for reports and
10 that sort there is failures, poor, average, good and excellent, and William was in the good class.

Q. You had excellent, good,— A. Average, poor and failures.

Q. And you say you considered Billy as good? A. Yes.

HIS LORDSHIP: That is, four classes: excellent, good, poor and failure.

MR. ROBINETTE: They start off with excellent, good, average, poor and failure.

Q. Is that it? A. Yes sir.

HIS LORDSHIP: That makes five.

20 MR. ROBINETTE: Q. So Billy was put in the good class? A. Yes sir.

Q. That is all, thank you.

MR. ROBINETTE: Your witness, Mr. Keogh.

MR. KEOGH: No questions, my lord.

MR. ROBINETTE: Thank you, Miss McKenzie."

MALCOLM BRUCE BLACK: sworn.
EXAMINED:

In the Supreme Court of Ontario Defendant's Evidence No. 20 Malcolm Bruce Black Examination-in-Chief 11th May, 1944

30 By Mr. Robinette.

Q. Bruce, where do you live? A. At Lake Shore Apartments, Kirkland Lake.

Q. Do you attend school? A. Yes sir.

Q. What school do you attend? A. The Kirkland Lake Collegiate.

Q. How old are you now, Bruce? A. Eighteen.

Q. And, Bruce, were you employed by the Oliver Blais Company in their service station in Kirkland Lake in the summer of 1940? A. Yes sir.

Q. Were you going to school at that time or were you on vacation? A. I was on the summer holiday vacation.

Q. The evidence has been given to the effect that something occurred
40 on the 31st July, 1940. When you were first employed at the service station

In the Supreme Court of Ontario Defendant's Evidence No. 20 Malcolm Bruce Black Examination-in-Chief 11th May, 1944

what was the nature of the work that you did? A. Well I washed windows, washed cars and generally helped around the service station, changing tires and wiped windshields of cars.

Q. When you were first employed were you permitted to sell gasoline? A. No; I had nothing to do with the pumps.

Q. How long after you were there were you permitted to sell gasoline? A. Oh, it was a good two weeks before I was permitted to have anything to do with it.

Q. So that you say that at the conclusion of two weeks you were permitted to sell gasoline? A. Yes.

Q. Is that correct? A. Yes sir.

Q. Who was the manager of this station? A. Mr. MacDonald.

Q. Was there an assistant manager? A. Yes. Mr. Frank Burnside was the assistant manager.

Q. When you took on your job there did either Mr. MacDonald or Mr. Burnside give you any instructions as to the manner in which you were to sell gasoline? A. This was just when I started.

Q. All right, when you started, yes? A. Well when I started I wasn't to have anything to do with the pumps but I was to read over the

20 regulations and just generally see how it was done and be sure that I understood all the regulations concerning the gasoline.

Q. You speak of regulations. Where were those regulations situate? A. They were posted in the office in the service station.

Q. On what? A. On that red card.

Q. I am showing to you, Bruce, a Department of Highways red placard headed "Warning re Gasoline." Is this the red placard to which you refer and which you said was on the wall of the service station? A. Yes sir.

MR. ROBINETTE: That will be exhibit five.

30 ——EXHIBIT 5: Red placard of Department of Highways "Warning re Gasoline".

Q. Did you as instructed by Mr. MacDonald read over the red placard? A. Oh yes, sir, I read that over many times.

Q. You read it what? A. Many times.

Q. Did you observe in paragraph nine that paragraph nine provides for certain requirements but that " . . . this regulation shall not apply to—the delivery in a metal container of gasoline required to refuel a motor vehicle to permit of its being moved"? A. Yes.

Q. Had you read that? A. Yes.

40 MR. KEOGH: I submit, my lord, if my learned friend reads the last part of it he should also read the first part of it so that the jury will know the whole regulation.

MR. ROBINETTE: I am not going to read the whole fourteen points.

Q. Had you read the whole of the placard? A. Yes sir.

Q. And had you read the requirement that "Portable containers in which Class 1 liquids are sold or delivered to the public shall be of an approved metal safety type"? A. Yes sir.

Q. " . . . and a label shall be attached by the vendor in each case on which shall be printed in bold type a warning that the contents are dangerous"—had you read that? A. Yes.

HIS LORDSHIP: Q. Did you have any of those containers at your place? A. Yes sir, there was one anyway I know.

MR. ROBINETTE: Q. But more specifically had you read that "this
10 regulation shall not apply to—the delivery in a metal container of gasoline required to refuel a motor vehicle"? A. Yes sir.

HIS LORDSHIP: Let me see that.

MR. ROBINETTE: Q. Now then having been instructed by Mr. MacDonald to read the placard, did Mr. MacDonald or Mr. Burnside give you any other instructions? A. You mean—about the—?

Q. About the selling of gasoline? A. They gave instructions like there was to be no smoking around the pumps and turn the engine off—see that the engine is not running of a car getting gasoline, and that in this service station especially there was to be no selling gasoline for dry
20 cleaning.

Q. No gasoline for dry cleaning? A. No gasoline for dry cleaning.

Q. That was emphasized? A. That was emphasized.

HIS LORDSHIP: Q. Did he draw any of these regulations specially to your attention? A. Yes sir.

Q. What ones? A. What do you mean, any special—?

Q. Any special one he laid emphasis on? A. Well on the type of containers.

Q. What did he tell you about that? About selling— A. He gave me the general idea what they were all about.

30 MR. ROBINETTE: Q. In addition to telling you to read them, his lordship means, did either Mr. MacDonald or Mr. Burnside discuss them with you and tell you what they meant? A. Well as points would come they would explain the different regulations.

Q. They did explain? A. Yes.

Q. After you had worked there for two weeks you were permitted to sell gasoline, you say, at the pumps? A. Yes.

Q. Can you recall the occasion of July 31, 1940, when two boys whom you have seen to-day in the witness box, to-day and yesterday, came to your service station? A. Yes sir.

40 Q. You can recall that. Were there two boys? A. Yes sir.

Q. What did they have with them when they came? A. Well the older boy Billy he had a metal lard pail with a cover on it and the younger boy I believe was carrying a funnel.

In the Supreme Court of Ontario Defendant's Evidence No. 20 Malcolm Bruce Black Examination-in-Chief 11th May, 1944 Continued

Q. A funnel? A. Yes sir.

Q. Victor says there was no top on the tin pail; Billy says one time that there wasn't, another time he said he couldn't be sure. What is your evidence as to that, was there or was there not? A. Well I distinctly remember a top on because I had trouble getting it off, I couldn't pull it off, it was stiff and pretty tight, so I turned to walk towards the service station to get a screwdriver to pry it off and as I turned it came off, I was pulling on it, and after I had put the gasoline in the pail I put it on and it was on there I know.

Q. You remember going to get a screwdriver to get the top off? A. Yes. I didn't need it, when I got just about in the garage it came off in my hands.

Q. Did you put the top on the pail after you put the gasoline in? A. Yes.

Q. Now, Bruce, did you have any conversation at all with the younger boy? Did the younger boy say anything to you? A. Well I didn't pay any attention to him, I was selling gasoline to the older boy, and that was the only conversation that took place between me and him. All the business was between the older boy, I don't remember anything the younger
20 boy said, I didn't have anything to say to him.

Q. It was the older boy had the tin pail? A. Yes.

Q. And you say your conversations were entirely with the older boy? A. Yes.

MR. KEOGH: He said "I don't remember anything the younger boy said".

WITNESS: Well I didn't pay any attention to him.

MR. ROBINETTE: Q. You were making the deal with the older boy? A. Yes.

Q. What did the older boy say to you? A. He asked me for a
30 nickel's worth of gasoline to put in his mother's car that was stuck down the street.

Q. What did you say? A. Well I thought for a minute and then I asked him "Did you want it for dry cleaning?" That was our question that we always put to anything like that. And he said No, he didn't. So I got the pump going and then I asked him again if he wanted it for dry cleaning and he said "No." And then I explained to him that if he did it was of no use as it contained lead and that there was another substance in the service station which I could give him for dry cleaning if he wanted it for that so there was no need for gasoline, but he insisted it was not
40 for gasoline—his mother's car was stuck down the street and that is what he wanted it for.

Q. How did it seem to you that five cents' worth of gasoline would be sufficient to start his mother's car?

MR. KEOGH: That is a leading question. I object.

In the Supreme Court of Ontario
Defendant's Evidence
No. 20
Malcolm Bruce Black
Examination-in-Chief
11th May, 1944
Continued

HIS LORDSHIP: What is leading about it?

MR. KEOGH: "How did it seem to you that five cents' worth of gasoline would be sufficient to start?"

HIS LORDSHIP: I don't see anything leading about that. He can make a variety of answers—no, yes or no or anything like that.

MR. KEOGH: But he should first of all ask the young man what was his explanation, or something like that.

HIS LORDSHIP: That is really what he is asking him.

MR. KEOGH: No, he is putting a suggestion in.

10 HIS LORDSHIP: No no. No suggestion about that.

HIS LORDSHIP: Q. Did you think anything about this small quantity of gasoline which was being bought? What was your idea on the subject? A. Your lordship, it is fairly common practice when a car runs out of gasoline that sometimes if there is gasoline in the tank there is none in the engine to draw the rest through and it is common practice to pour out a little into the carburetor and have the fuel pump working.

MR. ROBINETTE: Q. Just turn this way. What was in your mind, please? A. When a car is out of gasoline, sometimes it won't draw, if there is any put in the tank it won't draw it through.

20 HIS LORDSHIP: Q. It is something like there is water in the bottom of a well but you have to prime the pump before you start off? A. Yes. You pour a little in the carburetor, that will set the engine going; that is fairly common if a car is out of gasoline.

MR. ROBINETTE: Q. When these fellows were at your service station did they have any bulrushes in their hands? A. No, nothing like that.

Q. Did you have any idea they wanted this gasoline for the purpose of burning bulrushes? A. It never occurred to me that anybody would go out and light gasoline like that. They looked old enough to know what gasoline is used for.

30 Q. Which way did the boys leave? A. They were on the inner side of the pumps at the service station and they left and walked down towards the easterly direction. Where they went from there I don't know.

Q. Is that service station on the north side of Government Road? A. Yes sir.

Q. Are the pumps set back from the sidewalk line? A. Yes, quite a little piece. About the width—

Q. And immediately to the east of the service station is there a building? A. Yes. Comes right out to the edge of the sidewalk.

Q. Which way did the boys go? A. They left in an easterly direc-
40 tion.

Q. Is that downtown? A. Yes sir, it is downtown.

In the Supreme Court of Ontario Defendant's Evidence No. 20 Malcolm Bruce Black Examination-in-Chief 11th May, 1944 Continued

Q. Is the ground level at the pavement in front of the service station? A. Just in front?

Q. Yes? A. Yes, just in front.

Q. To the east does it continue to be level? A. No, there is quite a steep hill three hundred feet or so down from the service station going an easterly direction, you can't see anything past there.

Q. Well, Bruce, after you sold the boys the gasoline what did you do? A. Well I had their money and I turned out and I was walking towards the office and I met the assistant manager.

Q. That is Burnside? A. That is Burnside, and I handed him the money and he asked me what it was for and I said a couple of boys had come and obtained a small quantity of gasoline. And I says "That is all right, isn't it?" and he said "Yes" as far as he knew. So that was all I thought about it then.

Q. Did you have any doubt in your mind? A. No, I was just—in a way—I mean it is a small quantity and that and I just thought the boys were still nearby and I could have got them then, and he seemed to think everything was all right so I let it go.

Q. Did I ask you if the younger boy had anything in his hand?
20 A. Yes sir.

HIS LORDSHIP: He said he had a funnel in his hand.

MR. ROBINETTE: Yes.

Q. Is that all you know about this matter? A. As much as I know, sir.

HIS LORDSHIP: Q. Didn't the father come to see you afterwards? A. No, he didn't see me, sir.

In the Supreme Court of Ontario Defendant's Evidence No. 20 Malcolm Bruce Black Cross-Examination 11th May, 1944

CROSS-EXAMINED:

By Mr. Keogh.

Q. Well, Mr. Black, when you were engaged I take it you told Mr. MacDonald how old you were? A. Yes.

Q. You were then just under fifteen? A. Just under fifteen.

Q. And he was the manager of the Teck Imperial service station who engaged you? A. Yes sir.

Q. When he told you not to touch the pumps or have anything to do with the pumps for the first two weeks did he say anything to you about you being too young or anything like that? A. No, sir.

Q. Did he tell you that no gas was to leave the property unless it was in a safety can? A. How do you mean like?

Q. Pardon? A. How do you mean?

40 Q. Just what I say, did MacDonald tell you that no gas was to leave the property unless it was in a safety can? A. Yes.

HIS LORDSHIP: Q. Some leaves in automobiles? A. Oh yes.

MR. KEOGH: Q. I mean except in an automobile? A. Yes.

HIS LORDSHIP: Q. Other sales? A. Yes.

Q. Loose sales apart from automobiles were not to leave the premises except in safety cans? A. Yes; right.

MR. KEOGH: Q. And you had a safety can there this day, hadn't you? A. Well I don't know if it was there at the time, sir; it was kept on the truck.

Q. I thought you told my learned friend that there was at least one there this day? A. I didn't say this day; at the service station he asked
10 me.

Q. Oh? Was there not at least one safety can at this service station at the time these boys came with the pail? A. I don't know. I never looked.

Q. It never occurred to you to look? A. I didn't look. They had a clean sealed can and that was—it came under the regulations.

Q. You didn't look to see if there was a safety can? A. No.

Q. Although you had been told by MacDonald about two weeks before that no gasoline on a sale of this kind was to leave the premises except in a safety can, you nevertheless didn't look to see if you had a safety can
20 —isn't that right? A. Well the truck wasn't there and I knew it would be on the truck.

Q. You knew it would be on the truck? A. Yes, it was kept on the truck.

Q. Is it not a fact there were three or four or five safety cans around this service station? A. Not that I knew of.

Q. The two little boys said, both said, that Victor told you that he wanted the gasoline for an outboard motor or something like that? A. There was nothing like that said to me that I know of.

Q. Well, that you know of.

30 HIS LORDSHIP: Q. Victor is the little boy? A. Yes sir.

MR. KEOGH: Q. You have told my friend that you didn't pay much attention to the younger boy, you don't remember anything the younger boy said; now I am suggesting to you that the younger boy said that and that you have forgotten it? A. No, he didn't say anything to me—I had no dealings with him.

Q. He must have said something or you wouldn't have told my learned friend "I don't remember anything that the younger boy said"? A. Well if he did say anything I don't know anything about it.

Q. So that what you say is, if he did say that he wanted it for the
40 outboard motor you don't know anything about it? A. That is right.

MR. ROBINETTE: It never came to his hearing.

Q. And if he says himself he said that and his brother also says that he, Victor, said that you wouldn't however be prepared to deny it? A. Well I didn't hear him say anything so I can't deny it or anything.

In the Supreme Court of Ontario Defendant's Evidence No. 20 Malcolm Bruce Black Cross-Examination 11th May, 1944 Continued

Q. Are you saying now that the younger boy said nothing at all to you? A. Not that—I didn't hear him say anything.

Q. You didn't hear him say anything at any time? Didn't he say to you that they wanted five cents' worth? A. No, the older boy said that.

Q. But it was the younger boy who had the nickel, wasn't it? A. I don't think so.

Q. The younger boy told us after you had put the gasoline in the pail he gave you the nickel and stood and watched and saw you go in and ring it up in the cash register? A. Well I didn't do anything like that; my whole dealings were done with the older boy.

Q. You say that you got the nickel from him? A. Yes.

Q. Did you go in and ring it up in the cash register? A. No; I gave it to the assistant manager who I met on the way out.

Q. Mr. Burnside? A. Yes.

Q. So that what you say is, that the young lad was there but all the time so far as you know he didn't utter a word or say anything? A. As far as I know.

Q. Do you know who jumped on the tube to ring the bell? A. As far as I can say nobody did, sir, because I was at the pumps at the time.

20 Q. You were out in front of the pumps at the time? A. I was out at the pumps, I had just been servicing some cars; that is how I happened to be on it.

Q. You say you didn't come out of the office when the bell rang? A. Some cars were there, I had just finished filling some cars.

Q. Do you think you didn't come out of the office to wait on them? A. They came along when I was down there.

Q. You say you were out in front all the time—is that right? A. Yes.

Q. The night of this accident you were called in to Mr. MacDonald's office on your way home from a picture show, weren't you? A. Yes.

30 Q. And there was a policeman there? A. Yes.

Q. Is that right? A. Yes.

Q. And Mr. MacDonald asked you why you had sold this gasoline in something other than a safety can? A. Yes, and I—

Q. What were your answers? A. I told him that it was according to the regulations, that it was to permit of a vehicle being moved, that that was all right according to the regulations as far as I understood.

Q. In other words your excuse was, the way you understood the regulations it was all right to do it? A. Yes sir.

Q. And that was your excuse notwithstanding that you had been

40 previously told by Mr. MacDonald that all sales of this kind had to leave in a safety can? A. Yes sir.

Q. Was Mr. MacDonald pleased or displeased with that excuse? A. Oh, he didn't seem to see anything wrong with it.

Q. How long did you work for Mr. MacDonald after that? A. I worked for a week or so, just about a week, then I left my job and took a holiday.

Q. You left, did you? A. Yes.

Q. Quit of your own accord? A. Quit of my own accord.

Q. Then you say that the only statement made to you by the boys was that the older boy said he wanted it for his mother's car down the street? A. Yes sir.

Q. And I think you said that it was stuck down the street? A. Yes, stuck down the street.

Q. You told my learned friend that this particular type of gasoline was of no use for dry cleaning, didn't you? A. Yes.

10 Q. And if that is the case why did you ask the boys if they wanted it for dry cleaning? A. Well that was just a question that we had at the service station and—everybody knows it is not any good for dry cleaning.

Q. But if you really believed that this little boy of nine wanted it for his mother's car that was stuck down the street you wouldn't ask them about dry cleaning, would you? A. Yes.

Q. You would? A. Yes.

Q. If you really believed that? A. Sure, because that is a question that was covered by our regulations in the service station.

20 Q. But if he told you he wanted it for his car, and you say he had a funnel in his hand, and you actually believed that he wanted it for the car you would still ask him nevertheless "Are you sure you don't want it for dry cleaning?" A. Yes. That was a customary question that we had covering sales such as that.

Q. Are you supposed to ask every sale like that whether they want it for dry cleaning regardless of what they tell you? A. In a small quantity like that, yes.

Q. You say that you were instructed to ask when selling a small quantity, regardless of what they told you, "Do you want this for dry 30 cleaning?" A. That was our question that we asked.

Q. Who gave you those instructions? A. I don't know whether Mr. Burnside or Mr. MacDonald, they both said. Mr. MacDonald had told me a couple of times, I know, that gasoline was not to be sold and we were to ask that.

Q. Yes, I know. All I am asking you, who told you that you were to ask every sale in small quantities "Do you want it for dry cleaning?" A. Well it wasn't made to specify every sale, it was just a question that on the small sales like that, a question you asked.

Q. Do you say they told you in every small sale, regardless of the 40 reason given to you by the person getting it, that you were told by either Mr. MacDonald or Mr. Burnside "You are to ask that person Do you want it for dry cleaning?" A. Yes.

Q. You say that? A. Yes.

Q. Which one of the two told you that, Mr. MacDonald or Mr. Burnside? A. I guess it was Mr. MacDonald. He usually.

In the Supreme Court of Ontario Defendant's Evidence No. 20 Malcolm Bruce Black Cross-Examination 11th May, 1944 Continued

Q. When did he tell you that? A. Oh, before I started working on the pumps I guess.

Q. How long after you had started working at the station did he tell you that? A. Oh, I don't know; it was in the first week I guess.

Q. In the first week. You weren't then working on the pumps at all, were you? A. No.

Q. And you weren't then selling any gasoline, and how did Mr. MacDonald come to mention that to you that day? A. I don't know. Somebody came in and wanted something to clean some clothes or something and he mentioned it that we had some of this Isosol they called it and he turned to me then and said "If ever anybody wants anything for dry cleaning or anything of that you ask them, if they want a small quantity of gasoline, that we have some of this."

Q. If anybody wants gasoline for dry cleaning? A. Or asked for small quantities.

Q. But he didn't tell you regardless of what they wanted the gasoline for you were to ask everybody if they wanted it for dry cleaning? A. Not exactly in those words.

Q. Not in the words either exactly or otherwise, and I suggest to you
20 if you had some idea in your mind as to what these two little boys wanted the gasoline for otherwise you wouldn't have asked them "Do you want it for dry cleaning?" A. No, that was a question we always asked—we were supposed to ask them, and so I asked them that and they denied that they wanted it for that and so that was all there was to it.

Q. You say that you asked them because it was a sort of parrot question that you were to ask everybody, and do you deny that there was doubt in your mind as to what they wanted this for? A. Yes; I believed strongly that is what they wanted it for at the time.

Q. If in fact one of these boys had a funnel wouldn't that induce you
30 not to ask them if they wanted it for dry cleaning? A. No, having a funnel didn't mean anything as far as I was concerned.

Q. I think you told my learned friend as points came up they would explain the regulation to you? A. Yes.

Q. Was the part of regulation 39 that you could sell in approved metal containers and the exception about required to refuel a motor vehicle—did that point ever come up and was that explained to you in detail? A. I knew what it meant.

Q. Yes, you know what it meant; I understand that you had read it, I think you told my friend, many times on the wall; but I am asking you,
40 did that point come up and was it explained to you by Mr. MacDonald or Mr. Burnside, that particular paragraph on the red placard? Isn't it a fact that the sum and substance of Mr. MacDonald's instructions to you as far as the regulations are concerned was "They are there on the wall, you read them and make yourself familiar with them"? A. No, he asked me that if I didn't understand anything on it he would tell me.

Q. "Read them and make yourself familiar with them", he told you that or words to that effect, didn't he? A. Yes.

Q. And he said also "If you don't understand them let me know" or something like that? A. Well if I didn't understand anything I was to ask him, and as things came along they gave me general instructions.

Q. But I am suggesting to you he did not give you any detailed explanation of this regulation 39 at any time? A. Well you mean all at once. Well then—

Q. Sit down with you and tell you what that says and what it means
10 and what you are to do about it? A. He told me how to handle the gasoline.

Q. Yes, he told you to handle the gasoline according to the regulations that were on the wall, but I am suggesting to you that he did not sit down with you at any time and give you any detailed explanation of this regulation 39, did he? A. He told me what to do as each—

Q. Would you mind answering the question?

HIS LORDSHIP: Why not put it in a sensible way, Mr. Keogh? No man sits down with anybody, and putting it in that way really puts the boy in a position he can't answer it.

20 MR. KEOGH: Perhaps I should put it another way.

HIS LORDSHIP: Q. Did he explain the thing? A. Yes sir, he explained to me what they meant, what to do.

MR. KEOGH: Did he explain 39 to you? A. What do you mean, the whole section or placard there?

Q. Not the whole placard, just the one section 39 about the sale in approved metal containers with the exception of being required to refuel a motor car? A. Yes.

Q. What did he tell you about that? A. It was not to be put in bottles and if they had a safety can there that was to be used and natural-
30 ly there was to be tops on cans and things like that. If anything supplied by you like that naturally there was to be a top on the can.

Q. Naturally there would be a top on the can? Is that all he told you about 39? A. It is difficult to answer.

Q. But I just want you to tell me, take as much time as you like and tell me what Mr. MacDonald told you about that regulation? Do you remember anything else that he told you about it or did he tell you anything else about it? A. About that regulation?

Q. Yes? A. He explained how it was to be covered, and I suppose there was labels to be put on that and so forth, and any quantities, motor
40 boats and things like that.

Q. And that is as far as he went?

HIS LORDSHIP: Q. Did you understand the regulation when you read it? A. Yes sir, I knew what it was supposed to mean.

In the ***Supreme*** *Court of Ontario Defendant's Evidence No. 20* ***Malcolm Bruce Black*** *Cross-Examination 11th May, 1944* ***Continued***

Q. You are an intelligent lad. Were you in the high school then? A. Yes.

Q. What form? A. Then?

Q. Yes? A. I had just my first year.

Q. You were able to study latin and algebra and English and all that sort of thing? A. Yes sir.

MR. KEOGH: Q. When the older boy told you that he wanted the gasoline for his mother's car that was stuck down the street did you ask him where it was? A. Well I took it to be down—he said down the street and pointed to the direction of Government Road, so I took it it was down there.

Q. He pointed to you in the direction it was? A. He turned and indicated which direction.

Q. Which direction did he point or turn? A. Well he turned east and he said "It is away down the street."

Q. And looked over that way. And did you look that way to see if you could see it? A. You mean walk up that way?

Q. Did you look, that is what I asked you? A. You can't see from where we were at the pumps.

Q. You can't see from there? A. No.

Q. Did you walk out to the front? A. No.

Q. When you put this five cents' worth of gasoline in the bottom of this tin pail how many inches of it would there be in the pail? A. Oh, between two and three inches.

Q. Do you say that that was sufficient to refuel a motor vehicle? A. For the purpose that I believed it to be for.

Q. You say that you thought it was for the purpose of putting in the carbureter to prime it? A. To prime the carbureter, yes.

Q. I am suggesting to you that that is not refueling a motor vehicle.

HIS LORDSHIP: That is a question of law, I am afraid, for me.

MR. KEOGH: Q. Now if you were asking the boy did he want that for dry cleaning when at the same time you really believed or guessed that he wanted it to put in the carbureter why didn't you ask him "Do you want this to prime the carbureter?" A. He probably wouldn't know anything about that anyway.

Q. Wouldn't it seem to you that two or three inches of gasoline in a little pail couldn't enable his mother's car to be moved unless it was for the carbureter and she already had enough in her tank? A. Well I took it to be for that and that was all—

Q. You say you took it for that but it didn't occur to you to ask the boy? A. No.

Q. You didn't ask him. And the boy said nothing about carbureter to you, did he? A. No.

Q. Or priming? A. Well there is only two things you can use it for as far as I understand.

In the Supreme Court of Ontario
Defendant's Evidence No. 20
Malcolm Bruce Black
Cross-Examination 11th May, 1944
Continued

Q. But he said nothing to you about carbureter or priming, that was an idea that you had of your own? A. That is right.

Q. And you say that it was a common thing. You had only been at this pump for how many days before this accident? A. On the pump?

Q. Yes? A. Oh, about a week.

Q. And had you any case in that week of somebody coming in and wanting gas to prime their carbureter? A. No, but I had seen that done.

Q. Have you a real definite recollection that one of the boys had a funnel in his hand? A. Yes sir.

10 Q. Which boy? A. Victor, the younger boy.

Q. How big a funnel was it? A. Oh, just a little one (illustrating).

Q. A little one; you are indicating about three or four inches wide? A. I mean the length of it, would be about that long; about that big around the top (indicating).

Q. About how big around the top? A. Oh, about that big (indicating).

Q. You are indicating about a diameter of about three inches; and how long would the funnel be? A. It wasn't quite three inches—about two inches.

20 Q. A diameter of about two inches?

HIS LORDSHIP: Q. The spout, you mean? A. Across the top.

Q. Across the top about three inches? A. No, about two inches. He had it in his hand, you couldn't just see what it was.

MR. KEOGH: Q. How long was the funnel from top to bottom?

HIS LORDSHIP: What do you call the end of a funnel?

MR. KEOGH: The spout I suppose.

WITNESS: I guess it would be—

HIS LORDSHIP: Q. How long was the spout, we will call it? A. He had that in his hand, I couldn't see all of it very well; it would be about

30 so long (indicating).

MR. KEOGH: Q. You are indicating three or three and a half inches? A. Yes.

Q. And what colour was it? A. It was a tin-plated one.

Q. Was it shiny or was it rusty? A. Oh, it was fairly clean.

Q. I think you told my learned friend, if I took your words down correctly, that the younger boy "I believe" was carrying a funnel? That is what you told Mr. Robinette, the way I took it down, you used the words "I believe"—is that right? A. I guess I did.

Q. You guess you did. But you told me before that you didn't pay

40 any attention to the younger boy and that you didn't have any conversation with him? A. That is right, I didn't have anything to say to him.

In the Supreme Court of Ontario
Defendant's Evidence No. 20
Malcolm Bruce Black
Cross-Examination 11th May, 1944
Continued

Q. Although you weren't paying any attention to him you can tell us all about this funnel that he had partly covered up by one hand? A. Well he was standing in front of me.

Q. But still you weren't paying attention? A. As far as any dealing with him, I had none.

Q. Then if I took you down correctly I think you said to my friend "I thought for a minute and then I asked him if he wanted it for dry cleaning"—you said that? A. It occurred to me that he might want it.

Q. You said that to my friend? A. Yes.

10 Q. What were you thinking about when you thought for a minute? A. Well I don't know what, I just thought well they might want it for dry cleaning, so I asked them.

Q. You thought that he might want it for dry cleaning? A. It is possible that he did.

Q. Possible, yes. I was trying to find out just what you did, not what is possible, but you say that you thought he might want it for dry cleaning? A. Yes. That is why I asked him.

Q. That is the thinking you did when you thought for the minute as you told my friend, is it? A. Yes.

20 Q. After the thing was all over and the boys had gone away you then asked Mr. Burnside if this sale was all right, didn't you? A. Yes.

Q. You must have had some idea in your mind then as to whether it was all right or not, didn't you? A. I didn't put it to him exactly as a question. I was saying it is all right.

Q. You asked him if it was all right though, didn't you? A. Well I didn't mean it exactly as a question to him.

Q. Whether you meant it as a question or a statement or what, you did ask Mr. Burnside if this sale was all right, didn't you? A. I said "It's all right, isn't it?"

30 Q. We will call that a question. Why didn't you ask Mr. Burnside before you did it? A. Well he was busy.

Q. If he hadn't been busy you might have asked him before, is that it? A. I might have.

Q. In other words you had some little doubt in your mind even before you made the sale but Mr. Burnside was busy, is that right? A. No, I didn't have any.

Q. What were you thinking about asking Mr. Burnside whether it was all right or not though unless you had some doubt in your mind? A. Well when I handed it to him he looked at me surprised and wondered
40 what it was for and I told him and just said that.

Q. And you didn't get a chance to ask Mr. Burnside before you made it because he was busy. What was he doing? A. I don't know.

Q. You don't know? A. No.

HIS LORDSHIP: Q. It is a pretty big gas station? A. Oh, it is—we were doing a pretty fair business then.

Q. Cars running in and out all the time getting gas, that was before the restriction, wasn't it? A. Yes—1940.

MR. KEOGH: Q. There were eleven or twelve employees there, were there not, at this time? A. Yes.

Q. And how many of them were young men and how many of them were older men? I mean were there any young lads besides yourself? A. Yes, there was one other high school boy then.

Q. And then the other ten were grown men, were they? A. Well they were young fellows, one about nineteen or twenty.

10 Q. Were they all that? A. Not all of them, no. Mr. Burnside, I don't know how old he was.

Q. How many of them would you class as men, of these other ten? A. Well what age?

Q. Well say over twenty-one? A. I guess six or eight anyway.

Q. If I took you down correctly, in explaining to my friend about speaking to Burnside you said "I could have got them in if everything wasn't all right"? A. They weren't very far away.

Q. In other words you could have got the boys back if Mr. Burnside hadn't told you that was all right? A. That is if he had had any 20 objections.

Q. And I suggest to you that that is another indication that you had some doubt in your mind about the propriety of this sale? A. No. They were still on the lot.

Q. If you thought it was perfectly O.K. why were you thinking that you could get them back if Burnside told you it wasn't O.K.? A. Well I knew they were right there, they were easily within call.

Q. You knew you could get them back if Burnside told you it wasn't O.K.? A. Yes.

Q. And I am suggesting to you you did have some doubt? A. No.

30 Q. In your mind about it? A. I was perfectly believing them what they wanted it for.

Q. Did it not occur to you that it was a dangerous thing to sell five cents' worth of gasoline to two little boys? A. Well I thought that by their age they should know what it was for anyway.

Q. You thought they were old enough to know what it was for? A. It is not dangerous if it is used properly.

Q. And the thought that they might play some little childish prank with it or play with it didn't occur to you? A. No sir.

Q. Never entered your head? A. No.

40 Q. You have often heard of children playing with matches, have you not? A. Yes.

Q. Even boys of seven and nine, haven't you? A. Yes.

MR. KEOGH: All right.

MR. ROBINETTE: That is all, thank you Mr. Black.

In the Supreme Court of Ontario
Defendant's Evidence
No. 21
Clarence MacDonald
Examination-in-Chief
11th May, 1944

CLARENCE MacDONALD: sworn.

EXAMINED:

By Mr. Robinette.

Q. Mr. MacDonald, you live at Kirkland Lake? A. Yes.
Q. Are you the manager of the service station operated by the Oliver Blais Company on Governor's Road? A. I am—Government Road.
Q. Were you the manager of the service station in the year 1940? A. I was.

HIS LORDSHIP: On the date in question. Why ask about five ques-
10 tions to get one place? Why not—?

MR. ROBINETTE: I beg your lordship's pardon.

HIS LORDSHIP: Why ask about five questions to get one answer?

MR. ROBINETTE: I certainly haven't wasted time in this trial, my lord.

HIS LORDSHIP: You are doing it now.

MR. ROBINETTE: I am not doing it now.

HIS LORDSHIP: You could have said: You were the manager at such and such a time at such and such a place and all that; that would have been sufficient; nobody could have objected, especially not me anyway.

20 MR. ROBINETTE: Q. You were the manager—

HIS LORDSHIP: We have all that; we have he was the manager.

MR. ROBINETTE: Q. You were the manager of the Oliver Blais service station in Kirkland Lake in 1940? A. That is correct.
Q. Did you employ the last witness, Bruce Black? A. I did.
Q. What was he employed to do? A. Well I took him on on the summer vacation. When I took him on I employed him as a helper around the service station.
Q. Did you know the boy before? A. Oh yes, very well.
Q. What did you know of him? A. Well I knew his father, the
30 electrical superintendent of the Lake Shore, better than I knew him, and he had talked to me a couple of months before the summer vacation rolled around if I could find a spot for him, so I did.
Q. The boy wanted to earn some money during the summer months, is that it? A. I usually made provision for a couple of high school boys during the summer.
Q. How old was the boy when you employed him? A. He told me he was fifteen.
Q. When you first employed him what work did you give him to do? A. Oh, it was mostly helping around, which you have to owing to the
40 nature of our business, cleaning windshields, and cleaning around, helping to blow up tires and fixing the odd tire and learning, because he really didn't know much about fixing tires.

Q. Did you permit him to sell gasoline on the pumps? A. Oh no, definitely not.

Q. I beg your pardon? A. I say definitely not.

Q. How long was he there before you permitted him to work on the pumps? A. A little over two weeks.

Q. Before permitting him to work on the pumps did you give him any instructions as to the method in which he should vend gasoline? A. Well when he started, to begin with when he came in, of course I had a little talk with him about the nature of our business and how service
10 enters our business and just the policy of service, I gave him a little talk on that and I told him before he could get out on the front, that is dispensing gasoline, to become familiar with the regulations, and I showed him this red card on the wall, and to familiarize himself with it, and whether I told him that same day, a little later or that same day, I gave him some further instructions about it, I pointed out that our local Deputy Fire Marshal there, Chief Neilson, had asked me to co-operate on a couple of occasions about gasoline sold in bottles and for dry cleaning and so on, and we did, so I pointed that out to him and then I turned him over to Frank Burnside, my assistant, and told him to put Bruce to work, which
20 he did.

Q. Who is your assistant? A. Frank Burnside.

Q. Do you know whether or not Bruce did read the regulations? A. Oh yes. As a matter of fact I saw him spending manys a minute, or I was going to say an hour—but I had seen him in front of the regulations there reading them quite often.

Q. Did you ever discuss the regulations with him? A. Yes. Not all at once, I don't think I covered all the regulations; as a matter of fact on that card you will notice most of the regulations apply to the wholesaling of gasoline, but helpful to the retailing there are only two or three
30 clauses; and I did, from time to time think he would ask me the odd question, for me to say definitely what day it would be difficult for me to say that, but I did from time to time talk to him on the regulations and I pointed out to him—I know that I did mention on gasoline we were co-operating with the local fire chief there and that gasoline didn't leave our property in anything but a safety can, bottles was a thing that was out.

Q. Did you discuss with him or did he discuss with you the exception in the regulations that gasoline may be sold in a metal container for the purpose of refueling a motor vehicle? Was that ever discussed? A. I wouldn't like to say that he ever discussed those with me, I don't just
40 recollect that definitely, no.

Q. But you do say that you had seen him reading the regulations from time to time? A. Oh yes.

Q. How did you call the boy, this boy Bruce Black—would you say he was a bright boy? A. Oh, he is a very intelligent young man.

Q. Very intelligent? A. Oh yes, certainly.

In the Supreme Court of Ontario
Defendant's Evidence No. 21 Clarence MacDonald Examination-in-Chief 11th May, 1944 Continued

Q. Were you present at the service station on this occasion of July 31, 1940, when Bruce Black apparently sold the gasoline to the boy? A. No, I wasn't there.

Q. Had you left your assistant in charge? A. Yes, Frank Burnside was there.

Q. Are you at the service station all the time or do you sometimes leave your assistant in charge? A. Oh well, I am away sometimes. I may have happened to go away the odd half hour, you know, or on vacation you have to have someone to leave in charge.

10 HIS LORDSHIP: I suppose you eat once in a while, do you?

MR. ROBINETTE: Q. In fact what were you doing on this day? A. As a matter of fact on this day I was moving from an apartment to my present location.

Q. You were moving your home. Mr. Yachuk says that after the accident he came to you and had some conversation with you. Do you recall Mr. Yachuk coming to see you? A. Yes, I think the following day about, it was after lunch, I think it was, about one o'clock the following day or the second day, I can't be too sure, he called in and we had a little talk there.

20 Q. And he says that you said to him that you could sell gasoline to anyone? A. No, I don't recollect saying that exactly.

Q. What was the conversation, can you recall, between you and Mr. Yachuk? A. Well the first part of it, and then there actually wasn't very much, he naturally was quite depressed I presume, he was in difficulty, and he didn't say very much, but I thought that he was trying to find out definitely that possibly, that I knew about the sale of it; he mentioned it, and I agreed that we had investigated it and I knew about it and I mentioned it was most unfortunate all right and I think he did say something, he wanted to find out who had sold the gasoline and I told him that it was 30 this chap that was a high school student and I had two of them on the job.

Q. You deny that you said that you could sell gasoline to anyone? A. Oh, I don't think I said that. I took him over, as a matter of fact, to the regulations on the wall and pointed that clause out to him that I thought the lad was quite within his rights in delivering it providing that he understood it was for his mother's car.

Q. You took Mr. Yachuk over? A. I took him over but I don't think he read it, he looked at it there.

Q. Was that the full extent of the conversation? A. Well not altogether, no.

40 Q. Was there anything else said? A. He made some little statement about this boy, I kind of gathered he had had some little difficulty with him before.

Q. That is all right? A. I didn't want to mention it.

Q. Is that the only conversation you had with— A. Just at that time. I don't recollect any other conversation at that time. As the months

rolled around I met him on the street occasionally and asked him how his son was getting along.

MR. ROBINETTE: All right.

CROSS-EXAMINED:

By Mr. Keogh.

In the Supreme Court of Ontario
Defendant's Evidence
No. 21
Clarence MacDonald
Cross-Examination
11th May, 1944

Q. You thought the lad was quite within his rights in delivering it, as you told my friend? A. Pardon?

Q. You say you thought the lad was quite within his rights in delivering it as you have told my friend? A. He was quite within his rights
10 according to the Department of Highways.

Q. That was your thought you say at the time you were speaking to Mr. Yachuk? A. Yes, that is what I told him.

Q. The night of the accident after the police officer came you brought in young Black and asked him why he had delivered it in this pail, didn't you? A. That is correct.

Q. And why he didn't deliver it in a safety can? A. I did.

Q. So you were questioning him about it the night of the accident but two or three days later when you spoke to Yachuk about it you thought it was quite all right? A. That is right.

20 Q. Did you ever tell Bruce Black that he was to ask everyone who came for a small quantity of gasoline if they wanted it for dry cleaning? A. I don't recollect saying that. I think he gathered that as he worked with us; we asked almost everybody that came in. It was a catch question as a matter of fact.

Q. But you didn't tell him to ask everybody? A. I don't recollect telling him. He having intelligence enough I believe he picked it up.

Q. But you did in the course of your instructions to him point out the regulations to him on the wall and tell him to read them and make himself familiar with them—you did that, didn't you? A. Yes.

30 Q. And you did tell him in addition to that that except for sales in a car tank that in small retail sales gas was not to leave your property except in a metal safety can? A. I told him that gasoline was not to leave the property except in a safety can, that is right.

Q. Did you give him any warning as to the possibility of young children coming around for gasoline? A. I actually don't recollect bringing up the subject of children; it hadn't been a problem at any time, I don't think I did; I don't remember mentioning it at any rate.

Q. Did you sell gasoline at that station at that time to young children of this age, nine and seven? A. Definitely, it wasn't a common practice,
40 there is no doubt about that.

Q. Do you personally know of a case of such a sale? A. I have myself; I personally have made a few sales that way.

In the Supreme Court of Ontario Defendant's Evidence No. 21 Clarence MacDonald Cross-Examination 11th May, 1944 Continued

Q. When was the last one before this accident? A. Well as I mentioned at the last trial I remember very definitely one case when a gentleman from the Lake Shore Mine calling me up on Sunday sending his son over, that he was out of gas, but he might be a year older than this boy, or a couple of years, I wouldn't recollect definitely, but I fixed him up with enough to get his dad's car going.

Q. And you had had prior to the young lad coming a message from his father that he was sending him over? A. That is right.

Q. And he wanted it for the car. But you don't remember selling gasoline yourself or anyone at the station selling it to boys of this age who came without a prior message? A. We did sell it to children but it would be most unusual to sell it to children as young as that, yes. There are lots of children driving cars that come in and get gasoline.

Q. Seven and nine? A. No, I say there are lots of children driving cars, but not that age, naturally.

Q. They are boys of sixteen? A. Fifteen, yes.

Q. Not seven and nine. You yourself wouldn't sell it to a little boy of seven and nine unless you had got a previous message from their parents, would you? A. Well I would—it would depend entirely on how the young lad impressed me. If I thought he was telling the truth I might try to help his mother out. It was a common occurrence you know, almost every day—

Q. I thought you said the only one that you could remember was when the parent phoned you? A. I didn't say that I had sold it to anybody, I said I had never had the occasion or I don't know of a lad of nine except the one I have told you.

Q. If you never had the occasion yourself then it wasn't a common occurrence? A. Oh, definitely not, no, it wasn't a common occurrence.

Q. If a little boy of nine came in to you and wanted five cents' worth of gasoline your first reaction would be you would be a little suspicious, wouldn't you? Your first reaction I presume? A. No, our first reaction is to get somebody going as well as you can and your first reaction would be to help out his mother, I suppose, that is the first thought the lad had, to help out the mother or get her car moving.

Q. Did you know this family at all? A. I knew the father.

Q. Had you seen the father around in his car? A. I never knew him to own a car, personally.

Q. You didn't know him to own a car? A. I didn't know him to own a car, yes; a little truck.

Q. Pardon?

MR. ROBINETTE: He said he had a car.

MR. KEOGH: Q. Shall we call it truck—I am calling it car? A. Well I guess that is it.

HIS LORDSHIP: They have a car now.

WITNESS: It is quite possible.

MR. KEOGH: Q. We will call it a truck then? A. All right.

Q. You had seen him around in the truck? A. Yes.

Q. As a matter of fact had he not come to your station himself with a tin paint can about two months before and try to get gasoline for his car that was stuck down the road and was refused by your station, the father? A. If it ever happened we definitely never heard about it, not at our place; I certainly didn't know. It wasn't brought up at the last trial, I don't think.

10 Q. You were in court this morning and heard the little boy say that they went first of all with a bottle and secondly with a tin lard pail to the B-A station across the road and they refused to sell it? You heard the boys say that? A. I did. Was that the first time or the second time?

Q. Well they went twice, first with a glass jar and secondly with a can, and were refused each time? A. They told a different story the second time when they went.

Q. What do you mean? A. Well when they went for the gas the second time, of course that hasn't come out, I shouldn't really mention that because it hasn't come out in evidence—

20 Q. We have nothing to hide. You have mentioned it, so get it out? A. I won't mention it; I am sorry that I have mentioned it if it makes any difference.

Q. The jury are entitled to know everything about this case; you had better tell it whether it helps me or hurts me.

HIS LORDSHIP: Q. Is it hearsay evidence? A. Part.

HIS LORDSHIP: If so I am not going to admit it.

MR. ROBINETTE: Through the service station operated by the B-A.

WITNESS: I went over and saw the man.

30 HIS LORDSHIP: Well that it not admissible.

MR. KEOGH: It casts a reflection on the boys.

HIS LORDSHIP: It doesn't cast a reflection on anybody. He was or somebody is attempting to get out evidence that is not admissible. That is out as far as I am concerned.

MR. KEOGH: Not of my starting. I didn't start it. But he did say that they told a different story the second time and that is my only interest in it. If your lordship rules it is not admissible why I will drop it.

HIS LORDSHIP: You may disregard that, gentlemen. That has nothing to do with the case.

40 MR. KEOGH: Q. Of course there is no question that the tin lard pail that these boys had is not an approved metal safety can within the mean-

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Continued

doubt about that.

HIS LORDSHIP: There has been a lot of talk wasted in my opinion on whether there was a top on it or not. I can't see any possible reason for —I suppose somebody will argue to the jury there was or there wasn't but it looks the same to me whether it was sold with or without a top.

MR. KEOGH: Well there is something to be said for that, my lord.

Q. But this can that was produced by Mr. Caskay as exhibit two, you agree that this is a government approved safety can? A. That is one type, yes.

10 Q. That is a common type, isn't it? A. There is another type almost as common.

Q. I am talking about cars now, not talking about motor boats; is this not the common type for cars? A. Yes, that is a common type.

HIS LORDSHIP: Q. Does that hold—what? A. A quart.

Q. What would be the minimum amount of gas that would start a car supposing it was bone dry? A. That would depend a lot on the make of car I presume.

Q. Take a car that people in these circumstances would likely have? A. The normal amount that we took out if we got a telephone call to 20 somebody was out of gas was took a two gallon can at that time; to-day we take one gallon.

Q. That was because you wanted to sell as much as you could, I suppose, but what is the bare minimum on which you could start say a little Ford or Chevrolet or a Plymouth or any of the little cars—bone dry? A. I presume half a cupful to do what the young man was talking about, Bruce Black. When you run dry in the gas tank in the back of the car there is a copper pipe leads down which is closer to the bottom, not quite to the bottom of the tank, so that when you run dry naturally the gas must be just about flush of the pipe so that if it was on the level and you 30 put a quart of gas in there it would possibly start the car although naturally you would usually put in a gallon.

Q. Two and a half inches in a lard pail which would be six inches in diameter I suppose wouldn't start a car if it were dry? A. It is possible; it might not. It is quite possible it would. That is a question that is open to —of the type of car.

MR. KEOGH: Q. The probability is, if as his lordship says the car was bone dry the probability is it wouldn't?

HIS LORDSHIP: Q. A car is never bone dry, is it? A. There is always some in the bottom of the tank unless it has been standing a long 40 time.

Q. But the copper pipe doesn't reach down to it? A. That is right.

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MR. KEOGH: Q. The gas in the bottom, you can't get at that? A. It is easy to understand if you run dry, if the moment before you run dry if there was a pint in there you wouldn't run dry.

Q. It is like the old story of the crow putting the stones in the pitcher to bring the water up to the top. You put in a quart or something like that and you bring it up to where the pipe can draw it up? A. It is similar.

Q. You say that you took out a gallon or so but you might possibly do it with a quart? A. It is common practice to-day to take more than you need, naturally.

10 Q. You might possibly do it with a quart? A. It is possible, yes.

Q. Do you think that three inches in this lard pail would be any more than a pint at the most? A. It is a little over a pint, I think that is about all.

Q. And then when you asked Black why he had sold this gas in the lard pail instead of a safety can, he pointed to the regulations and said he thought that that was perfectly within the regulations? A. Yes, he went right over and pointed out the regulations, that is correct.

HIS LORDSHIP: Q. Therefore he understood that or thought he understood that anyway? A. Apparently.

20 MR. KEOGH: Q. Was Black's first report to you that the tin pail had no cover on it? A. His first report was to the officer who investigated; I don't think he told me first, I didn't have a chance to talk to him when he first came in; the local police officer investigated.

MR. ROBINETTE: Don't say what he said.

HIS LORDSHIP: Q. Did he say to you that the tin had no cover on? A. Oh no, definitely he told me there was a cover on on any conversation I had with him.

MR. KEOGH: Q. Were you present when Mr. Rowe, the secretary-treasurer of your company—don't answer this question till his lordship 30 rules on it—were you present when Mr. Rowe, the secretary-treasurer of your company, was being examined for discovery in this case? A. I think I was. One of us left before the other was finished and I believe they heard me first.

MR. KEOGH: I would like in the absence of the jury to make this question for your lordship first.

HIS LORDSHIP: All right; you may go out, gentlemen. Everybody seems to want to get in more than they—

——The jury retired.

HIS LORDSHIP: You may ask him the question and we will take his 40 answer and then I will rule on it and we will ask it over again.

In the Supreme Court of Ontario Defendant's Evidence No. 21 Clarence MacDonald Cross-Examination 11th May, 1944 Continued

MR. KEOGH: Q. Did you hear Mr. Rowe say in his examination for discovery that the lard pail was uncovered? A. Mr. Rowe?

Q. Rowe?

MR. ROBINETTE: Q. Were you there?

HIS LORDSHIP: Yes, that is the point, was he there?

MR. ROBINETTE: Anyway, would he interrupt on examination for discovery?

MR. KEOGH: My recollection is they were both there.

WITNESS: One of us left ahead; now I don't know which one, if it
10 was Mr. Rowe or myself went out before the examination was finished. As soon as the examination had finished we left and I don't know which one was finished.

Q. Mr. Rowe was the first one who was examined, you were examined after Mr. Rowe. And this is—

HIS LORDSHIP: Q. Is that right? A. I believe that is correct.

MR. KEOGH: They appear that way in the book, my lord.

MR. ROBINETTE: Was he in the room at the time?

WITNESS: Yes, I believe I was there. I am not too sure but—

HIS LORDSHIP: This is a way of getting in evidence that I don't
20 think is permissible.

MR. ROBINETTE: No.

MR. KEOGH: I was merely leading up to this question and this was one question that I wanted to ask the witness from my point of view, had this witness told Mr. Rowe that the lard pail was uncovered, that is all.

MR. ROBINETTE: Did Mr. MacDonald tell to Mr. Rowe that the lard pail was uncovered.

MR. KEOGH: Yes.

HIS LORDSHIP: Is Mr. Rowe going to be called?

MR. ROBINETTE: No.

30 HIS LORDSHIP: Well you may ask that.

MR. ROBINETTE: He can ask that without referring to the examination for discovery.

HIS LORDSHIP: Yes. That is all right. But where is it going to get you if Mr. Rowe isn't going to be here? Where did Mr. Rowe say that?

MR. KEOGH: 58, my lord—57 and 58.

HIS LORDSHIP: He doesn't say he got it from—

In the Supreme Court of Ontario Defendant's Evidence No. 21 Clarence MacDonald Cross-Examination 11th May, 1944 Continued

MR. KEOGH: He doesn't say whom he got it from.

HIS LORDSHIP: What is there in this uncovering? What difference does it make whether it is covered or uncovered? It seems to me as reprehensible one way as the other.

MR. KEOGH: In one sense that is quite right, my lord, and as far as the regulations are concerned it doesn't make any difference, but it did seem to me it was a little more dangerous to sell it in an open pail.

HIS LORDSHIP: I wouldn't think it would be the slightest bit because if a boy could get a cover off it would be far more dangerous with a
10 cover on I would think.

MR. KEOGH: Well if your lordship doesn't think—

HIS LORDSHIP: You may ask that, but where is it going to lead you to?

MR. KEOGH: Well I won't press it then.

HIS LORDSHIP: Well all right. Get the jury back. It seems to me there is a lot of pressure being put on to get a lot of things in that don't matter very much.

——The jury returned.

MR. KEOGH: That is all.

20 MR. ROBINETTE: That is all, Mr. MacDonald.
That is the defence, my lord.

HIS LORDSHIP: Reply.

REPLY

In the Supreme Court of Ontario Reply: No. 22 Victor Yachuk 11th May, 1944

MR. KEOGH: I wish to call Victor Yachuk.

VICTOR YACHUK: recalled.

HIS LORDSHIP: Q. You are sworn, are you? A. Yes.

HIS LORDSHIP: All right.

EXAMINED:
By Mr. Keogh.

30 Q. Victor, Bruce Black says that when you were at the Teck Imperial service station you were carrying a funnel in your hand?

MR. ROBINETTE: I object, my lord. That has already been put in. My friend asked the little boy that in examination in chief.

MR. KEOGH: I asked him if he was carrying anything.

In the Supreme Court of Ontario Reply: No. 22 Victor Yachuk 11th May, 1944

HIS LORDSHIP: Anything, yes. I think that is all right. I have got to give you one break.

MR. KEOGH: Q. He says you were carrying a funnel in your hand. What do you say about that? A. I wasn't carrying anything in my hand.

HIS LORDSHIP: Q. Were you carrying a funnel, that is what we want? A. No, I wasn't carrying a funnel.

Q. Did you have a funnel at home? A. Yes—I am not sure.

Q. "Yes, you are not sure", eh?

MR. KEOGH: Q. Did you have a funnel anywhere around you that
10 day when you went to Bruce Black's station? A. No.

Q. Then Bruce Black says that he didn't pay any attention to you and that you didn't have any conversation with him. Do you know what "conversation" means—talk?

HIS LORDSHIP: I don't think Bruce really meant that exactly. He said if the boy did say anything his mind was concentrated on the sale and he paid no attention to it. He doesn't say the boy didn't say anything I think. He said he had no conversation with him.

MR. KEOGH: Q. Then who had the five cents when you went to the Teck station?

20 HIS LORDSHIP: Hasn't he already testified to that?

MR. ROBINETTE: Yes.

MR. KEOGH: He has testified.

HIS LORDSHIP: Q. All right, you had the five cents. A. Yes.

MR. KEOGH: Q. How did you come to have the five cents and not your brother? A. Well my mother gave us a nickel apiece to get some chocolate milk and my brother got some chocolate milk and I didn't.

Q. In other words your brother drank his five cents and you kept yours? A. Yes.

MR. KEOGH: It might have been better if you had done the same.
30 All right.

MR. ROBINETTE: No questions.

HIS LORDSHIP: Any other reply?

MR. KEOGH: No, that is the only reply.

HIS LORDSHIP: We still have those questions unsettled.

MR. ROBINETTE: Yes, my lord.

MR. KEOGH: I wish to say something about that.

In the Supreme Court of Ontario
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HIS LORDSHIP: Mr. Robinette, you speak to the jury first, do you?

MR. ROBINETTE: Yes, my lord.

HIS LORDSHIP: Do you want to do so?

MR. ROBINETTE: I want the questions settled first.

HIS LORDSHIP: I know, but what do you want to do about the rest of the afternoon? Do you want to go on after we settle the questions?

MR. ROBINETTE: I would rather like to get the addresses of counsel in to-night.

HIS LORDSHIP: I think I will give you a recess for ten minutes or
10 so. The questions are a little hard to settle, as I see it, and perhaps fifteen minutes, if you will just go out.

——The jury retired.

HIS LORDSHIP: Well now give me that draft of the questions; it is very rough.

MR. KEOGH: Your lordship, I wish to refer to the regulations in what I shall have to say, and I have filed a typed copy.

HIS LORDSHIP: Yes; give me the typed copy, will you?

MR. ROBINETTE: I want, my lord, to make a submission on the regulations, that no reference should be made to the regulations in counsel's
20 addresses or in your lordship's charge.

HIS LORDSHIP: Why?

MR. ROBINETTE: The regulation upon which my friend relies refers to containers in which Class 1 liquids are sold. Regulation 39 reads "Portable containers in which Class 1 liquids are sold . . . "; it applies only to Class 1 liquids. Class 1 liquids are defined in a prior regulation as "All petroleum products having a flash point at or below 80 degrees Fahrenheit according to the Tagliabue Open Tester." There is not a tittle of evidence that what was sold had a flash point at or below 80 degrees Fahrenheit according to the Tagliabue Open Tester.

30 MR. KEOGH: There couldn't be, because it was all burnt up.

MR. ROBINETTE: There is no evidence what they were selling in their pipeline had a flash point of that much. My friend files the regulation here to help him; he hasn't established that.

HIS LORDSHIP: Apart from the regulations, anyway?

MR. KEOGH: I wish to say something on that point if your lordship wishes to hear from me on it.

HIS LORDSHIP: What about it?

In the Supreme Court of Ontario Discussion by Counsel 11th May, 1944 Continued

MR. KEOGH: The regulation itself refers to the sale or delivery of gasoline required to refuel a motor vehicle, and the theory of the defence is that this was gasoline that was required to refuel a motor vehicle.

MR. ROBINETTE: There are types and types of gasoline.

HIS LORDSHIP: I think I will have to rule against you on that.

MR. ROBINETTE: My submission is perfectly obvious, that the regulation applies only to that type of gasoline which has a flash point of so much, that is what the regulations say.

MR. KEOGH: The other thing is crude oil and things like that.

10 HIS LORDSHIP: If they find that and I am wrong that will be a case for appeal and I suppose you don't mind earning a counsel fee.

MR. ROBINETTE: I certainly do; I don't want to go through a third trial in this case, and I say the regulations shouldn't be mentioned.

HIS LORDSHIP: I think they should.

MR. ROBINETTE: And I submit they are ultra vires. Is your lordship not going to hear anything on that? I am saying your lordship should tell the jury to disregard the regulations because my friend has not proven that the particular gasoline comes within the category of Class 1, and the regulations are ultra vires.

20 HIS LORDSHIP: Why are they ultra vires? I cannot see that.

MR. ROBINETTE: Because, my lord, the section of the Act that authorized these regulations to be made was enacted in 1938.

HIS LORDSHIP: There is no proof of that; so far as I know they are all the law now. The man wasn't asked that when he was in the box.

MR. ROBINETTE: Mr. Caskay doesn't prove the regulations, the regulations prove themselves, and they are expressed to come into force in 1937.

HIS LORDSHIP: Oh, I cannot rule them out, Mr. Robinette; if they find there was a breach of the regulations and the breach caused the accident then of course I will have to deal with the matter later on on the question of the meaning of the verdict.

30

MR. ROBINETTE: I just wanted to make my position clear.

HIS LORDSHIP: It seems to me the first thing we have got to ask is, whether the defendants or their agent Black—I have filled it in "the company or its agent Black" could have reasonably anticipated when selling the gasoline to the infant plaintiff that the infants would use same in the way that they did.

MR. KEOGH: On that point might I make a submission and suggest, because we are all trying to work out something that won't result in another—

40

HIS LORDSHIP: That is the sine qua non of negligence, as I see it. It is a little different from the ordinary case. In the ordinary case that question wouldn't arise, but the question comes because I think that is the basis of negligence, and that has been recently decided by the Privy Council in *Bourhill* v. *Young* (1942), H.L. 401, when Lord Russell of Killowen says:

> "In considering whether a person owes to another a duty a breach of which will render him liable to that other in damages for negligence, it is material to consider what the defendant ought to have contemplated as a reasonable man. This consideration may play a double role. It is relevant in cases of admitted negligence (where the duty and breach are admitted) to the question of remoteness of damages, i.e., to the question of compensation not to culpability; but it is also relevant in testing the existence of a duty as the foundation of the alleged negligence, i.e., to the question of culpability not to that of compensation."

That puts the thing exactly in a nutshell.

MR. KEOGH: There is a lot to be said for that in a case where there was nothing to indicate this thing was negligence in itself, or not, but here we have a number of other circumstances which I submit makes this act negligence at common law in the first place, and secondly negligence under the statute. I wish to refer just briefly to those: I submit that it was negligence at common law to sell five cents' worth of gasoline in a lard pail to a boy of nine.

HIS LORDSHIP: It was negligence at common law in this case.

MR. KEOGH: May I make my submission and then I will be through: Whether or not they could have anticipated what the boys were going to do with it, I submit that it was negligence because gasoline is a dangerous commodity which requires special care, and is so described in section 39 as dangerous; the word "dangerous" is used; and no good whatever, I submit, could possibly come to the children from having this dangerous substance; it is not like candy or something of that sort. The circumstances were suspicious. That is shown by Black's evidence and also by the evidence of the boys, whether you believe that they told two different stories or not. Black asked them about dry cleaning and he asked the assistant manager if it was all right. He says he had no doubt, but I submit his evidence shows he had some doubt. And the practice of the other station across the street and the general practice of this station, I submit, from a fair reading of Mr. MacDonald's evidence, is, that they generally refuse these unless the parent calls up or something.

HIS LORDSHIP: I doubt if that evidence of what happened across the street would be admissible.

MR. KEOGH: Leave that out. The only case he can recall of a sale of gasoline to a young child, and there he thought it was a boy of ten or eleven, was where the father called him up and told him he was sending the boy over.

In the Supreme Court of Ontario Discussion by Counsel 11th May, 1944 Continued

HIS LORDSHIP: You see that new act has intervened here altogether.

MR. KEOGH: If they are responsible agents, yes.

HIS LORDSHIP: There is scarcely any question about that, a boy nine years old.

MR. KEOGH: I submit with the greatest respect that the big question in this case is whether this was to be considered as an involuntary act by reason of the fact that the boy didn't appreciate the danger.

HIS LORDSHIP: That is all the more reason I think I should take it away from the jury, because this is getting pretty deep for a jury.

10 MR. KEOGH: Your lordship will have to do what you wish to do on that.

HIS LORDSHIP: It is pretty hard for me to explain all these things to the jury.

MR. KEOGH: The Court of Appeal in the *Mercer* case, in which your lordship's judgment was affirmed—

HIS LORDSHIP: No, it was reversed, as a matter of fact.

MR. KEOGH: No, your charge was approved, and they sent it back for a new trial.

HIS LORDSHIP: No, my charge was not approved; it was found 20 fault with.

MR. KEOGH: At this point I am addressing my remarks to claim that a jury are the proper parties to decide whether a boy is capable of such negligence or not.

HIS LORDSHIP: I would not take it away from the jury on that point only.

MR. KEOGH: Mr. Justice McTague said in [1941] O.R. at p. 128:

> "Generally speaking, however, the weight of authority in England rather supports the view that in each case it is a matter for the jury from the evidence and not the Court to pass upon the question of 30 capability, so long as the jury is instructed that the same degree of care does not apply in the case of an infant of tender years as in the case of an adult. The learned trial Judge took this view and so charged the jury.
>
> "I am unable to see that the charge on this branch is open to criticism."

In other words, your charge on that was approved, and that is, I think, the most serious question in this case, whether this boy—

HIS LORDSHIP: Then we might ask a question on that.

MR. KEOGH: I think that it will have to be explained by your lord- 40 ship in your charge to the jury that in deciding whether or not Billy Yachuk

was guilty of any negligence they will have to first of all decide whether or not in their opinion, having regard to his age and intelligence, he was capable of fully appreciating the danger and so capable of being guilty of negligence. And of course if they say that he wasn't that makes his act an involuntary act in the eye of the law and not negligence at all.

HIS LORDSHIP: We are getting far afield. We are on the first question. I cannot see any question but that I will have to ask that.

MR. KEOGH: May I make two more submissions: This first question says to the jury in effect: The defendants could not be negligent in this
10 case unless they could foretell what was going to happen.

HIS LORDSHIP: That is practically what I am going to say to the jury.

MR. KEOGH: With the greatest respect I humbly disagree with that.

HIS LORDSHIP: But wiser men than I am have already said that.

MR. KEOGH: But that ignores other grounds of negligence which are pleaded in the statement of claim, namely, that this boy was too young to be put in charge of the pumps, that he was not properly instructed by being told to read the regulations on the wall, and it ignores the standard of care.

20 HIS LORDSHIP: I don't think it does at all, because the next question—I asked the general question if there were negligence.

MR. KEOGH: But you first ask, at the outset, could they have anticipated.

HIS LORDSHIP: I am going to ask it some place, and I think in view of this decision which I have read here and in view of all the decisions, a number of which I have read in the last twenty-four hours, that there are the twofold features of novus actus interveniens, and that is applicable to negligence or an act of God or anything else, that it plays a double role; first, it is relevant in cases of remoteness of damage, as to compensation,
30 and then as to culpability as the foundation of an action of alleged negligence. If the defendants could not reasonably have foreseen that this would happen, then that ends the action, in my opinion. The jury may say that they could have reasonably foreseen it.

MR. KEOGH: I agree with it on that point.

HIS LORDSHIP: Isn't that your proposition?

MR. ROBINETTE: Yes, that includes my point of yesterday; that gives effect to it; I think very clearly, too.

MR. KEOGH: I will agree with your lordship's proposition only in this way: if you have an act which is of a neutral character and there are
40 not any circumstances to tell you whether it is negligence or not negligence, then the question of foreseeability or anticipation helps you to determine whether it is negligence; but where you have an act which in itself from surrounding circumstances is a negligent act independent of foreseeability

or anticipation, then you don't have to use the anticipation test; and that I take it is what Lord Justice Scrutton said in the *Polemis* case.

HIS LORDSHIP: Polemis is not considered good law, apparently. It says in one of these cases I have just been reading it is not now considered to be good law.

MR. KEOGH: That is a new one on me. It has been used in the courts for many years. I am surprised the House of Lords said that, and if the House of Lords said that, it is not binding on our courts, because we are only bound by decisions of the Court of Appeal. Of course I wouldn't 10 blame your Lordship for following the House of Lords in preference to anything I might say on the subject, but I am only just trying to raise that point.

Lord Justice Scrutton says at 577:

> "To determine whether an act is negligent,"—and this I submit is the difference in the two cases—"it is relevant to determine whether any reasonable person would foresee that the act would cause damage; if he would not, the act is not negligent. But if the act would or might probably cause damage, the fact that the damage it in fact causes is not the exact kind of damage one would expect is immaterial, so long 20 as damage is in fact directly traceable to the negligent act, and not due to the operation of independent causes having no connection with the negligent act, except that they could not avoid its results. Once the act is negligent, the fact that its exact operation was not foreseen is immaterial."

That was a very unusual case.

HIS LORDSHIP: Yes, I know; I have read it.

MR. KEOGH: My submission is that the standard of care which this company set up for itself, by its own manager MacDonald shows that the act was negligent, because MacDonald instructed this young lad Black 30 that sales of this kind of gasoline were not to leave the premises except in a safety can.

HIS LORDSHIP: He was just making a general rule and I don't see myself very much—

MR. KEOGH: It is relevant on the standard of care.

HIS LORDSHIP: No, it is not. It is an ultra standard of care; it is not the standard of care that a reasonable man gives. That standard of care wouldn't allow the regulations to be carried out. So there is nothing in that.

But there is one of the cases, I think it is this particular case I have with me, that has put it that *re Polemis* is not considered good law.

40 MR. KEOGH: Then there is another point, that hasn't been mentioned, and that is, that the question ignores entirely the breach of the statutory duty, which is independent of anticipation altogether.

HIS LORDSHIP: Yes, here it is here:

"On the second point it was argued that once an act is properly characterized as negligent, that is to say, as a breach of a duty of care owed to a particular person, then the party at fault is liable to that person for everything that directly follows from the negligent act whether or not it could have been foreseen as a natural and probable result of the negligent act. For this *In re Polemis and Furness Withy & Co., Ltd.*, was cited. Whether the law there laid down is consonant with the law of England it will be for this House to pronounce when 10 the occasion arises. As at present advised, I doubt if it is the law of Scotland, and I could cite ample authority to the contrary, but, again, this is not a point which I deem it necessary to discuss now."

That is Lord Macmillan.

MR. KEOGH: That seems to throw some doubt on it. Of course we have the *Colfax* case that was—

HIS LORDSHIP: I think I am going to ask this question.

MR. KEOGH: I have another point, and I think it is a most important one, and that is this: If your lordship suggested a thing which in effect, I submit, tells the jury—doesn't say so, but in effect—they have got to find 20 anticipation before they can find negligence, what happens to my statutory liability for a breach of the regulations if there is one?

HIS LORDSHIP: They have not broken the regulation. They gave this boy for a car. And anyway, what has a breach of the statutory regulations got to do with it? They could have put a bulrush down and lit it or poured it out.

MR. KEOGH: We wouldn't have had the second fire.

HIS LORDSHIP: Or done a lot of other things.

MR. KEOGH: This accident wouldn't have happened if this gasoline had been sold—

30 HIS LORDSHIP: That is perfect nonsense. If it remained in the can, yes, but once it is out of their hands can they control it?

MR. KEOGH: But your lordship is asking me what did the breach of regulations have to do with it and I am trying to answer your lordship's question. If this gasoline had been sold in a safety can there wouldn't have been any second fire in the can, and it was the second fire in the can that burnt the pants and it wasn't the fire on the bulrush at all.

HIS LORDSHIP: That is far too—

MR. KEOGH: That is a direct link in the chain of causation.

HIS LORDSHIP: I think, Mr. Keogh, we have got to get on with this.

40 MR. KEOGH: Please don't misunderstand me, my lord; I am not trying to waste time, I am trying to work the thing out. May I read a para-

In the Supreme Court of Ontario Discussion by Counsel 11th May, 1944 Continued

graph from the judgment of Mr. Justice Masten of our own Court of Appeal in the case of *Direct Transport* v. *Cornell*, [1938] O.R. He says at page 366 and the top of 367:

"I am of the opinion that the effect of the above section . . . " that was prohibiting cattle running at large on the highway" . . . is to prohibit the owner of cattle from suffering or permitting them to run at large on the King's Highway and that making it an offence involves a prohibition. If I am right in that view then the failure to fulfil the duty so imposed on the defendant founds an action of negli-
10 gence for breach of the absolute duty imposed by the statute. Such an action differs from negligence at common law in that the jury or the Court cannot (as they do at common law) prescribe and fix the standard of duty owed by the defendant, because that duty is peremptorily fixed by the statute. All that remains in such a case for the Court or a jury to do is to determine, (1) whether the defendant has failed to observe the duty imposed on him by the statute; (2) whether such failure was the direct cause of the injury of which the plaintiff complains; and (3) the damages which the plaintiff is entitled to recover:"

20 HIS LORDSHIP: Can't we put all these questions?

MR. KEOGH: I am not talking about those, but when your lordship puts some such question: Could the defendants have anticipated—I forget the exact words—that is not only telling the jury if they find they could not have anticipated they are not guilty of negligence, but that ignores the prohibition of the statute and the regulations.

HIS LORDSHIP: I don't see that it does at all. We can ask all sorts of questions and then we can figure out from the answers what they thought. I think, Mr. Keogh, on this basis, I have seen enough of it to know that this case ought not to go to a jury and I think I will have to de-
30 cide it myself.

MR. KEOGH: Wasn't that your lordship's thought a number of times? I am asking to retain my jury. This is a negligence action and I have a perfect right.

HIS LORDSHIP: There are a great many complicated things that will be very difficult to explain to a jury.

MR. KEOGH: I would have thought that on the difficult question as to whether this little boy, having regard to his age and intelligence, was capable of appreciating this danger so as to make him negligent, your lordship would be glad to have the assistance of a jury.

40 HIS LORDSHIP: Quite.

MR. KEOGH: Within the *Mercer and Gray* case.

HIS LORDSHIP: But the principles are quite clear, I have to decide it. No, I think I will make up my mind to take it away from the jury and decide this myself as I see it is going to be quite a case.

In the Supreme Court of Ontario
Discussion by Counsel 11th May, 1944
Continued

MR. KEOGH: My position is recorded that I am objecting to that.

HIS LORDSHIP: Yes. I think I will have to do that. Not that I want to particularly, but one thing is, that the two cases which were referred to me last night, both were decided by a judge without a jury. I think that for three reasons; one is, that the amount of damages was mentioned to the jury in opening, which is a minor thing and is only a makeweight as far as this is concerned; secondly, because the jury did see the limb; thirdly, because there are very very complicated questions of law which I think it would be difficult to explain adequately to the jury; that I will have to
10 consider the matter myself. So therefore I have decided to take it away from the jury and decide it. I will have to reserve judgment after hearing argument and I haven't any preconceived opinion on the matter at all.

All right, bring back the jury.

——The jury returned.

Gentlemen, I am afraid that this is a case that I will have to decide myself. I have had you in and out of your room half a dozen times, and there are several difficult points of law to be decided. These, it would be very difficult for a judge to bring out to a jury in a way that—I suppose it could be done—but to bring that to a jury it would be hard to convey
20 just what the intricacies of the law are. Counsel are unable to agree on what the law is; I spent several hours last night looking it up from several angles which are very complicated, and I am afraid just for the moment I could not say one way or the other what the law is. I think under all the circumstances I will have to finish this case myself, and so as far as this case is concerned you will be discharged.

——4.00 p.m. court adjourned.

Certified:
R. L. BALDWIN,
Chartered Shorthand
30 Reporter.

In the Supreme Court of Ontario Formal Judgment Judgments and Reasons 5th May, 1943

In the Supreme Court of Ontario

The Honourable Mr. Justice D. P. J. Kelly { Wednesday, the 5th day of May, A.D. 1943.

Law Stamps $2.30

BETWEEN:

WILLIAM YACHUK, an infant under the age of 21 years, by his next friend, Tony Yachuk, and the said TONY YACHUK,

Plaintiffs,

10 (Seal)

—AND—

THE OLIVER BLAIS COMPANY LIMITED and TECK IMPERIAL SERVICE STATION and CLARENCE MacDONALD,

Defendants.

Vacated.

JUDGMENT

This Action coming on for trial on the 3rd, 4th and 5th days of May, 1943, at the Sittings holden at Toronto for the trial of Actions with a Jury; in the presence of counsel for all parties; upon hearing read the Pleadings and hearing the evidence adduced; and upon hearing what was alleged by counsel aforesaid and the Jury having returned a verdict that the Defendant, the Oliver Blais Company Limited, was 25 per cent. negligent and that the Plaintiff, William Yachuk, was 75 per cent. negligent, and the Jury having assessed the Plaintiffs total damages at $8,000.00;

1. THIS COURT DOTH ORDER AND ADJUDGE that the Plaintiffs do recover from the Defendant, the Oliver Blais Company Limited, $2,000.00 damages.

2. AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that this Action be and the same is hereby dismissed without Costs as against the Defendant, Clarence MacDonald.

3. AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the Defendant, the Oliver Blais Company Limited(do pay to the Plaintiffs their Costs of this Action forthwith after taxation thereof.

JUDGMENT signed this 26th day of October, 1943.

"Rose Marie Shrive".
Deputy Local Registrar, S.C.O. at St. Catharines.

Approved as to form,
"John J. Robinette".

Vacated, See Order—18 Nov., 1943.
"Rose Marie Shrive".
Deputy Local Registrar S.C.O. at St. Catharines.

Law Stamps $2.30

In the Court of Appeal of Ontario Formal Judgment 18th Nov., 1943

In the Supreme Court of Ontario

The Honourable The Chief Justice of Ontario The Honourable Mr. Justice Fisher The Honourable Mr. Justice Gillanders	Thursday the 18th day of November, A.D. 1943.

BETWEEN:

WILLIAM YACHUK, an infant under the age of 21 years, by his next friend, Tony Yachuk, and the said TONY YACHUK,

Plaintiffs,

10 (Seal)

—AND—

THE OLIVER BLAIS COMPANY LIMITED and TECK IMPERIAL SERVICE STATION and CLARENCE MacDONALD,

Defendants.

1. UPON MOTION made on the 17th day of November, 1943, and again this day unto this Court by counsel on behalf of the Plaintiffs by way of appeal from the judgment pronounced by the Honourable Mr. Justice Kelly on the 5th day of May, 1943, herein, in the presence of counsel 20 for all parties, upon hearing read the pleadings, the evidence adduced at the trial and the judgment aforesaid, and upon hearing what was alleged by counsel aforesaid;

2. THIS COURT DOTH ORDER that this appeal be and the same is hereby allowed and that the said judgment be and the same is hereby vacated and set aside.

3. AND THIS COURT DOTH FURTHER ORDER that a new trial be had between the parties to this action.

4. AND THIS COURT DOTH FURTHER ORDER that the costs of the said former trial and of this appeal be costs in the cause in the said 30 new trial.

"Chas. W. Smyth",
REGISTRAR, S.C.O.

Entered O.B. 185 page 556,
December 20, 1943,
M.B.

In the Supreme Court of Ontario Formal Judgment at second trial 29th May, 1944

(Law Stamps $2.40)

In the Supreme Court of Ontario

The Honourable Mr. Justice Urquhart { Monday, the 29th day of May, 1944.

BETWEEN:

WILLIAM YACHUK, an infant under the age of 21 years, by his next friend, Tony Yachuk, and the said TONY YACHUK,

Plaintiffs,

—AND—

10 THE OLIVER BLAIS COMPANY LIMITED and TECK IMPERIAL SERVICE STATION and CLARENCE MacDONALD,

Defendants.

THIS ACTION coming on for trial on the 10th, 11th and 18th days of May, 1944, at the sittings holden at Toronto, for the trial of actions with a Jury in the presence of Counsel for all parties, upon hearing read the pleadings and hearing the evidence adduced and what was alleged by Counsel aforesaid, this Court was pleased to direct this action to stand over for Judgment and the same coming on this day for Judgment;

20 1. THIS COURT DOTH ORDER AND ADJUDGE that the adult Plaintiff, Tony Yachuk, do recover from the Defendant, The Oliver Blais Company Limited, Six Hundred and Seventy-eight Dollars and nineteen cents ($678.19) damages.

2. AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the infant Plaintiff William Yachuk do recover from the Defendant, The Oliver Blais Company Limited, Two Thousand Dollars ($2,000.00) damages, which said sum is to be paid into this Court by the said Defendant to the credit of the said infant Plaintiff, William Yachuk, who was born on the 25th day of June, 1931.

30 3. AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the Defendant, The Oliver Blais Company Limited do pay to the Plaintiffs their costs of this action forthwith after taxation thereof.

4. AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that this action be and the same is hereby dismissed without costs as against the Defendant, Clarence MacDonald.

JUDGMENT signed this 10th day of June, 1944.

Settled June 9, 1944.
"Chas. W. Smyth",
Registrar, S.C.O.

40 "Rose Marie Shrive",
Deputy Local Registrar, Supreme Court of Ontario.

TORONTO JURY

H.C.J.

YACHUK
v.
OLIVER BLAIS COMPANY LIMITED, ET AL.

Copy of Reasons for Judgment of Urquhart, J., delivered 29th May, 1944.

J. L. G. KEOGH, for plaintiffs.
J. J. ROBINETTE, for defendants.

Action brought by a boy (now fourteen years old) and his father for injuries received by the boy, which the boy alleges were due to the negligence of the defendant company and/or its servant in selling to the boy, then nine years and one month old, accompanied by his young brother aged seven at the time a quantity of gasoline under the circumstances set forth below.

The facts, as I find them, are as follows: On the 31st day of July, 1940, the infant plaintiff and his younger brother had at their home some bulrushes which they had gathered. Having seen in a moving picture some days before, Indians manoevring with lighted torches, they conceived the idea of playing Indians and lighting the bulrushes to use as torches. They were both aware that to secure this end, it was necessary to apply some inflammable substance to the bulrushes in order to get them to burn, so they conceived the idea of getting a small quantity of gasoline for that purpose. Their mother, who was confined to her bed as the result of an operation, I presume to get them out of the way, had given them each five cents for the purpose of buying chocolate milk and one of the boys spent his money for that purpose, the other boy retaining his five cents for the purpose above set forth.

Certain evidence given without objection but about which I have some doubts, shows that they went first with a glass container to a gasoline station operated by a lessee of the British American Oil Company and when they were refused gasoline by its attendant, on the ground as I infer that a glass container was unsuitable, they went home and got an empty lard pail about five or six inches high and with about the same diameter and took it to the British American Oil station. For some reason, probably because they told a different story on this occasion, they were again refused, and so they went across the street to the gasoline station of the defendant company to make the purchase.

The defendant company has, I believe, a number of gasoline stations. The one involved in this action, in Kirkland Lake, was under the management of one Clarence MacDonald. MacDonald was sued jointly with the defendant company but for reasons which I need not re-state, I could see no ground of liability against him, and at the trial I dismissed the action against him, reserving the question of costs until the whole matter was disposed of.

On the afternoon in question MacDonald was absent from the station, leaving it in charge of his assistant, a grown-up man named Burnside.

In the Supreme Court of Ontario Reasons for Judgment at second trial 29th May, 1944 Continued

At the time that the boys came to the station, the assistant and the other men employed there were busy and the gasoline pump was in charge of a boy, who was then just a month short of fifteen. This boy was a high school boy and I would say was and is extremely intelligent and quite able to operate the gasoline pumps properly. He had been employed for the summer and had been at the station since school had closed. For the first two weeks he was employed only in washing windows and cars, blowing up or changing tires, and general handy work around the garage. In the meantime he was told to study the regulations governing the sale of gaso-
10 line, which were posted on the walls, and during the two weeks in which he was employed at the minor work before he graduated into selling gasoline, he had thoroughly familiarized himself with the regulations, I am convinced.

I am satisfied that on the day in question he was thoroughly familiar with those parts of the regulations (the smaller part) which deal with the vending of gasoline by retail. I find also that before he went on the gasoline pumps, he had been instructed by Mr. MacDonald in the regulations and was given several other instructions which in my opinion were adequate for a boy of his intelligence to enable him to sell gasoline safely.

20 Up to the day in question he had been on the pumps helping out off and on for about ten days or two weeks. Mr. MacDonald had given him two specific instructions, one was to be very careful about not selling the gasoline for dry cleaning. Apparently the gasoline sold at the pumps was unsuitable for that purpose and there was another reason for MacDonald's impressing on him to ask people if it was for dry cleaning, and that was that the company had a product of its own, the sales of which it was anxious to push, for that purpose.

The other instruction was that on no account was he to sell gasoline unless it was put in a certified safety container, such as was authorized
30 by the regulations hereafter referred to. It is apparent from the regulations, however, that these instructions by Mr. MacDonald were ex abundanti cautela because the regulations, if there were such in force at the time, clearly permitted the sale of gasoline in any kind of metal container for the purpose of refueling (whatever is meant by that) a car which had run out of gasoline. The exact words of the exception are as follows:

"(b) The delivery in a metal container of gasoline required to refuel a motor vehicle to permit of its being moved."

Such gasoline might be sold to any one in any kind of metal container without violation of the regulations requiring delivery to be in safety
40 metal type cans.

I will come to the question of regulations later because the defendant strongly argued the prohibitory section was not in force at the time.

It is therefore my opinion that the instructions given by MacDonald to this boy were adequate. In fact they were over-cautious. The boy, in my judgment, was thoroughly competent and thoroughly well posted on the regulations to sell gas to the public on the day in question.

I see nothing in the allegation that either the company or MacDonald was negligent in entrusting the sale of gasoline to a boy just short of

fifteen years of age, or that either failed to give him proper instructions as to how to sell gasoline with safety. So if the company is liable it will be liable merely because of the negligence, if any, of its servant Black.

To continue the story, after having been refused gasoline at the British American station the boys proceeded across the street, as I have said, to the station of the defendant Company. They say that there was nobody in attendance at the pumps and that they jumped on a tube which caused a bell to ring in the service station. I must find, believing Black on the point, which probably does not matter very much, that Black was already at the pumps and had been serving customers up to the moment at which the boys arrived.

The younger of the two boys alleges that he told Black that they wanted some gas for an outboard motor. I am unable to find that as a fact. The boy was then a very young boy and nearly four years have elapsed since the day of the sale. If such was said, I believe Black when he said that he did not hear any such remark and I believe that although the little boy might have said something, Black did not pay any attention to that boy as the transaction was with the larger boy and therefore he paid attention to what the larger boy was saying, and not to the smaller boy as would be quite natural. The larger boy, I find, said twice to Black that he wanted the gasoline to put in his mother's car which he alleged was stuck down the street.

I also find that Black asked him after the first time if he wanted it for dry cleaning, as he had been instructed to do by MacDonald, and he explained to the boy that if he did, the gasoline had lead in it and was unsuitable for dry cleaning. The infant plaintiff, however, insisted for the second time that his mother's car was down the street and that was what he wanted the gasoline for.

I am unable to say which of the boys was the one who paid over the five cents, but it is probable that the boys would remember, better than Black, who had it and therefore it is more likely that the five cents was paid by the younger boy.

I also find, believing Black on this point, that the lard pail had a cover on it. I think Black would be more likely to remember about that, particularly as he said that he had trouble getting the cover off, and I believe that after this sale of the gasoline the cover was firmly put down by Black and the pail given to the boys with the cover on.

In making the above findings, and favouring the version of Black in most of them, it is not that I have any complaint about the intelligence of either of the little boys but I have doubt as to their recollection, and also it will be noted that both these boys displayed considerable ingenuity to get the gas and also lied in getting it. Black strikes me as being a truthful and reliable boy.

The result was that Black filled the can about half-full with gasoline —about a pint in all—and took the five cents and the boys took the pail of gasoline with which they started out in the general direction in which they had indicated that their mother's car was stranded. Then went to a lane, out of sight of the gas station and some distance away from it.

In the Supreme Court of Ontario Reasons for Judgment at second trial 29th May, 1944 Continued

The infant plaintiff then sent his brother to the house for the bulrushes and some matches and when the brother returned, the infant plaintiff dipped one of the bulrushes in the pail of gasoline and handed the dripping bulrush to the smaller brother and then lighted it. The bulrush in the brother's hand flared up and he, being frightened, tried to beat it out on the ground. At that time, the boys were standing about four feet apart with the pail of gasoline open, midway between them. The gasoline in the pail, the boys say, caught fire from the bulrush with a swishing sound, although they say that when the bulrush was beaten on the ground there
10 were no sparks.

The burning gasoline splashed on the long pants which the infant plaintiff was wearing, and these caught fire. The infant plaintiff had the presence of mind and intelligence to roll on the ground in an effort to put the flames out and finally a man and a woman came with water and threw it on the infant plaintiff's pants. The infant plaintiff was most painfully and seriously burned.

The trial took place with a jury but after the evidence was in and I had started to discuss the form of the questions to the jury, I came to the conclusion that I should dispense with the jury. Mr. Keogh who had asked
20 for the jury made some objection. Mr. Robinette, who had already asked me to take the case away from the jury, made none.

My reasons for taking the case away from the jury were briefly as follows:

(1) In his opening address counsel for the plaintiffs said that they were asking for $25,000 damages for the boy. In my opinion this was a highly ridiculous sum. When I checked him up for it counsel was rather belligerent about the matter.

I am aware that there is no law against mentioning the amount claimed to a jury. In *Bradenburg* v. *Ottawa Electric R.W. Co.*, 19 O.L.R. 43, at
30 38 Moss, C.J.O., referred to the practice in the following words:

"It is not easy to see how the bare mention of something that is fully set out in a pleading can be supposed unduly to affect the mind of a jury. One can scarcely believe that twelve intelligent men could be misled or influenced by a mere statement of that kind. In this Province it has not been considered objectionable to inform the jury as to the amount of damages claimed: see *Misner* v. *Toronto and York Radial R.W. Co.* (1908), 11 O.W.R. at p. 1068. And it is questionable whether to-day the Courts of England would regard the incident so seriously as in the instance referred to by Lord Halsbury in *Watt* v. *Watt*, [1905] A.C. 115, at 118, though they
40 may still discountenance the practice." (In *Watt* v. *Watt* the Lord Chancellor said "I remember a new trial granted because the learned counsel for the plaintiff read to the jury the amount of damages claimed in the declaration").

It is my opinion that although it is not illegal for counsel to mention the amount, it is not good form for him to do so. I am sure that in England it is not done. In fact in *Misner* v. *Toronto and York Radial Co.* (supra), Osler, J.A., said although he saw no harm in it, "The practice is however now supposed to be discontinued and disapproved of by high authority."

In the Supreme Court of Ontario Reasons for Judgment at second trial 29th May, 1944 Continued

In this particular case, it is hard to see why it was done, except in the light of what afterwards transpired.

May I point out that the presiding Judge has the matter in his own hands and can, if the breach is flagrant, discharge the jury and proceed to try the case alone—a course suggested by Riddell, J.A., in *Dale* v. *Toronto Railway Co.*, 34 O.L.R. 104, at 109, when inflammatory remarks are made by counsel to the jury. While this may not come within that category, under the circumstances it comes very close thereto. If that had been the only thing I would have been inclined to let it pass, feeling
10 myself competent to counteract any bad effect such might have on the jury but combined with the circumstances I am about to mention, the combination becomes to my mind a valid reason for my taking the case away from the jury.

The second thing is that although the infant plaintiff has been wearing long pants regularly since he was seven years old, and was wearing them at the time of the accident as we know, he appeared in court to give his evidence in a very abbreviated pair of short pants. He is a tall boy and he cut in my opinion a very grotesque figure in the box. He was in the witness box within a yard of the jury and in full sight of them before
20 I became aware of the fact. He had thus exposed his legs to the greatest extent and they were a most horrible and revolting sight.

It was my opinion—although it may not be so—that he had so dressed deliberately to expose his legs to the jury. I asked him if he was used to wearing long pants and he said "yes". I asked him why he had appeared thus and he said that his leg at the back of the knee had broken out with a sore and that he had not worn long trousers for the purpose of avoiding irritating his leg.

I ordered him out of the box but in my opinion the damage had already been done. He said that his sore leg had been carefully bandaged by
30 adhesive tape and it was well covered as I observed and I could see no reason why the boy should not have appeared in long trousers. Subsequent questioning next day revealed that he had brought with him from St. Catharines in his father's car long trousers as well as short, although he said he wore the short all the way over and the long trousers were brought along just in case the day should be cold. It was not a warm but rather a cold day,—a gloomy spring day. It was my fear that after the mention of the huge sum of $25,000 claimed and the revolting sight of the legs of the infant plaintiff while in the witness box, the minds of the members of the jury might be inflamed to give damages beyond what in my opinion
40 they could reasonably give.

In *Laughlin* v. *Harvey*, 24 O.A.R. 438, the Court of Appeal laid down the rule that the parts of the body which are not naturally exposed, should not be exposed to the jury in a case of this sort. The Court pointed out that the jury could not help seeing a scarred face but that they should not be permitted to look at other parts of the body which were usually covered.

I read the passage from the above judgment to which I have referred to the jury and explained to them that they were not to take into con-

In the Supreme Court of Ontario Reasons for Judgment at second trial 29th May, 1944 Continued

sideration what they saw but I was still in great doubt as to the efficacy of my injunction in that regard.

On the same principle I rejected photographs of the legs taken at different stages in the boy's healing. These also exhibited the most horrible and revolting appearance, the boy having been burned in many places right to the bones of his legs.

The third consideration which caused me also to take the case away from the jury arose from several legal difficulties: (a) whether the regulations as to sale of gasoline were applicable; (b) The interpretation thereof; (c) The question as to whether a breach of the regulations, if there was one, rendered the defendant company liable for damages under the circumstances or merely imposed a penalty; (d) There also emerged in the case the very difficult question of novus actus interveniens, the defendant maintaining that even if the boy had been sold the gasoline negligently that a new act had intervened, namely, the act of the boy in lighting the bulrushes and of his brother in beating out the flames so near a tin of gasoline, and that the defendant company's negligence, if any, was not the determining cause of the accident because of the intervention of the new acts on the part of the infant plaintiff and his younger brother. This presents a very difficult and puzzling problem of law and one that would have required a great deal more study than I was able to put upon same in the short time I had while the case was in progress before it could be put adequately to a jury.

Considerable discussion arose when we went over the proposed questions for the jury and the discussion practically broke down on the first question which was submitted by me for consideration of counsel.

The question that I suggested ran somewhat like this in draft: Could the defendant or its agent Black have reasonably anticipated when selling the gasoline to the plaintiff (or the two infants) that the Plaintiff (or the two infants) would use the same in the manner that they did (or in a manner dangerous to them)? That question was just in draft form and was proposed by me having in mind the words of Lord Russell of Killowen, in *Bourhill* v. *Young*, [1942] A.E.R. 396, at 401. In discussing this important problem, Lord Russell says:

"In considering whether a person owes to another a duty, a breach of which will render him liable to that other in damages for negligence, it is material to consider what the defendant ought to have contemplated as a reasonable man. This consideration may play a double role. It is relevant in cases of admitted negligence (where the duty and breach are admitted) to the question of remoteness of damages, i.e., to the question of compensation not to culpability; but it is quite relevant in testing the existence of a duty as the foundation of the alleged negligence, i.e., to the question of culpability not to that of compensation."

As the result of the above quotation which I found in the course of reading four text books and a dozen or more cases on the subject of novus actus interveniens on the first night of the trial, I came to the conclusion that a question somewhat along the lines I had drafted should be put.

The doubt in my mind was whether it should be put first (which was my impression) or whether it should follow questions of negligence.

In his submission on the question, counsel for the plaintiff relied on the case of *Re Polemis*, [1921] 3 K.B. 560. That case had always been referred to by the text books with approval and is well remembered as the case where the leaking gasoline was shipped in a boat and a stevedore employed by the defendant when the boat was being unloaded had placed a plank which had slipped and created a spark which ignited the leaking gasoline. In the *Bourhill* case Lord McMillan in referring to the *Polemis*
10 case at 403, says:

"On the second point it was argued that once an act is properly characterized as negligent, that is to say, as a breach of a duty of care owed to a particular person, then the party at fault is liable to that person for everything that directly follows from the negligent act whether or not it could have been foreseen as a natural and probable result of the negligent act. For this reason *Re Polemis and Furness, Withy & Co.* was cited. Whether the law there laid down is consonant with the law of England it will be for this House to pronounce when the occasion arises. As at present advised, I doubt if it is the law of Scotland. I could cite ample
20 authority to the contrary; but again this is not a point which I deem it necessary to discuss now."

The facts of that case also are quite different from those of the present. In that case the defendant or its servants had control of the situation at the time of the accident. In the present the dangerous object had passed from its control.

It will be seen therefore that the matter involved a most difficult point of law and one which with the time at my disposal, I would have found the greatest difficulty in instructing the jury properly if it is a case at all suitable for trial by jury.

30 Counsel for the plaintiff at one time in his argument referred me to the folowing cases: *Dainio* v. *Russell Timber Company*, 27 O.L.R. 235, the case of a boy finding a detonator and applying fire to it, and *Fergus* v. *Toronto*, [1932] O.R. 257, where a boy let off a fire cracker in a supposedly empty gasoline can left carelessly around with a residue of gasoline in it. It will be noted that both these cases were tried by a judge without a jury.

It seems to me that in this class of case it should be tried by a judge and not with a jury, the matter being in my opinion too complicated and too difficult of explanation for jury trial.

Also, although I did not take this into consideration at the time, this
40 case has been tried before with a jury. The jury found the greatest difficulty in making up its mind and found what was obviously a compromise verdict which was set aside by the Court of Appeal.

It seems to me that at one stage or another, whether as a basis of a charge of negligence on the part of the defendant or on the question of remoteness of damage, I have to answer a question of that sort, so it is well to get it out of the way at once.

My answer to such a question is undoubtedly "yes". I am firmly convinced and I so find that the defendant's agent Black could reasonably

In the Supreme Court of Ontario Reasons for Judgment at second trial 29th May, 1944 Continued

have anticipated, when selling the gasoline to the infant plaintiff 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.

As I have said, Black was, at the time, and is an intelligent and bright boy. Although he says, and I believe it, that the representation which he had made to him by the injured boy was that it was to be used to start his mother's car, or something to that effect, and although he says he did
10 not doubt that statement, I am of the opinion and I so find that Black had real doubts and misgivings (which were justified) as to the propriety of his sale. In the first place the sale was contrary to the express instructions of the manager of the defendants, who in instructing the boy and probably considering his youth, had given him instructions that he was to sell gasoline only in a standard safety container. Secondly, it must or should have been a suspicious matter to him when two small boys with five cents came with an ordinary tin for the purpose of getting gas. If one boy had come alone it might have appeared to have been an errand but why would a mother send a large boy accompanied by a small brother for that
20 purpose. That circumstance should have put Black on his guard. Black was only six years older than the oldest boy and he would undoubtedly have recollections of his own childhood and of the danger of playing with matches and the propensity of children to play with them and the general recklessness of children. In my opinion both the extraordinary nature of the transaction and the age of the boys involved, and the fact that he was putting in their hands a dangerous commodity which would cause damage if not handled with great care is such a circumstance that he might reasonably have anticipated that it would be used for an unauthorized and dangerous purpose.

30 It is true that the infant plaintiff did say to him that it was to be used to start his mother's car. Now five cents worth of gasoline, in other words about one pint, would hardly start a car that was dry. However, we know that cars do not run completely dry and in some cases, as Black pointed out, gasoline is sold in small quantities for the priming of cars and he may have thought it was to be used for that purpose, but generally gasoline for starting stalled cars was sold in lots of a gallon or more as he knew.

However, there is much in the evidence to show that he had a real doubt about what the gas was going to be used for. In the first place,
40 when he turned in the money to the assistant manager, Mr. Burnside, he told him about the sale and then said "that's all right, isn't it?" He said that he said that, meaning that the boys had not gone too far to be recalled. Secondly, he asked the plaintiff twice if they were not going to use the gasoline for dry cleaning. The way he put it as I recall was "I thought for a moment and asked if he wanted it for dry cleaning." This would indicate to me also that he had some doubt in his mind as to the propriety of selling to boys of that age, otherwise he would not have asked the question twice and would not have thought about the matter at all.

In the Supreme Court of Ontario Reasons for Judgment at second trial 29th May, 1944 Continued

In spite of the general truthfulness of Black, I do not know that I can find that the smaller boy was carrying a funnel. It is true that he attempts a description of the funnel but that is an article common around a service station. It seems to me quite unlikely that either boy would be carrying a funnel. It would be of no use in filling the can and if it was to be used in a stalled car it would probably be left there pending the return of the messenger. Furthermore, if Black is right, the presence of a funnel should have served to add to his suspicions, if he had them, of the regularity of the transaction.

10 I think I must find on the whole that under all the circumstances of the case, Black should have reasonably anticipated that the gas might be used for a dangerous purpose by these two young lads.

That being so, a duty was owed to these two boys by Black.

I have no doubt that the defendant, therefore, by the act of its agent, was negligent in selling the gas to the boys and that such negligence caused or contributed to the injuries the plaintiff sustained.

Apart from the Gasoline Handling Act, R.S.O. 1937, ch. 332, sec. 12, and the Regulations purporting to have been made thereunder, the negligence consisted of selling such a small quantity of gasoline to two young 20 boys without more investigation, selling in a dangerous container, contrary to express instructions and with no investigation of any sort and without attempting to give the boys a safety container or even looking for one about the station.

Was there also a breach of the regulations? Under the Act, sec. 12, the Lieutenant-Governor-in-Council may make certain regulations as provided in thirteen sub-sections which follows that statement.

Section 12 was enacted in 1937 at which time the pertinent regulations were in force.

Evidently the legislature was not satisfied with the efficacy of the 30 omnibus sub-clause (L) which reads:

"(L) Generally for the better carrying out of the provisions of this Act" to justify and support the regulation in question herein for it enacted in 1938 by 2 Geo. VI, ch. 14, sec. 2, a new sub-section inserted as (jj).

Subsection (j) which was in the old Act, R.S.O., ch. 332, sec. 12, and which the new sub-section follows:

"(j) Prescribing the construction, equipment and operation of conveyances and containers used for the transportation and storage of gasoline, kerosene and distillate."

The new sub-section (jj):

40 "(jj) Prescribing the method, manner and equipment to be used in the handling, storing, selling and disposing of gasoline, keresone and distillate."

Mr. Robinette argued that this is the sub-section which would justify the regulation in question herein but that when the new sub-section was passed the regulation was not re-enacted and therefore it is not in force and is of no effect.

Mr. Keogh's reply to that is two-fold: (1) that the omnibus clause (L) justified and supports the said regulation, (2) on the argument he offered

In the Supreme Court of Ontario Reasons for Judgment at second trial 29th May, 1944 Continued

a new regulation amending clause (a) of Regulation 39. I have not admitted this in evidence and can see no relevancy in it anyway.

It is probable that the Regulation has no force and the alleged breach thereof is of no help to the plaintiff on the above account.

But assuming that it is in force, is the plaintiff's case advanced very much by it?

Regulation 39 reads 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 a label shall be attached by the vendor in each case on which shall be printed in bold type a warning that the contents are dangerous and should not be exposed to fire or flame and should not be used for cleaning purposes in any building, provided that this regulation shall not apply to,—

(a) the bulk sale or delivery of gasoline in quantities, five gallons or over, in regular gasoline drums, half drums, quarter drums or sealed containers complying with the specifications of the Board of Transport Commissioners for Canada or the Interstate Commerce Commission of the United States, or

(b) the delivery in a metal container of gasoline required to refuel a motor vehicle to permit of its being moved." Sub-section (a) as an exception does not apply.

Mr. Robinette contends that there is no definition anywhere of what is a class I liquid. However, it is obvious from the context, both in (a) and (b) that gasoline is included in the definition of Class I liquids.

The whole section provides a sufficient definition of Class I liquids so far as this case is concerned.

Clearly if it were not for the exception, and if regulation No. 39 is in force (as I am assuming for the present that it is) no one can sell gasoline in other than a safety container of a type produced in evidence.

We must therefore look at the exception.

The effect of an excepting proviso, is to except out of the preceding portion of the enactment something which but for the proviso would be within it.

In *Canadian Northern Ry Co.* v. *The King*, 64 S.C.R. 264, at p. 269, Duff, J. (as he then was), repeated what he called the Golden Rule of reading Acts of Parliament enunciated by Lord Wensleydale in *Grey* v. *Pearson* (1857), 6 H.L.C.S. 61, at 106:

"In construing wills and indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to unless that would lead to an absurdity or some repugnance or inconsistency with the rest of the instrument; in which case the grammatical or ordinary sense of the words may be modified so as to avoid that absurdity, repugnancy or inconsistensy but no further."

There is, however, another general rule and that is to get the benefit of an exception, the defendant must bring himself within it. *Luciani* v. *British American Assce. Co.*, 65 O.L.R. 687, at 695 (an insurance case but the same rule applies to statutes as to insurance policies and other documents).

The question of the construction of an exception arises in many cases on taxation: e.g., *Ruthenian Catholic Mission of St. Basil* v. *The Mundare School District,* [1924] S.C.R. 620, at 625 and 629.

In the Supreme Court of Ontario Reasons for Judgment at second trial 29th May, 1944 Continued

In such cases, exceptions are strictly construed on the dual ground that any one who advances a claim to special treatment must show that he is unquestionably within the exception and also that each exemption from taxation increases the burden on the rest of the public.

See *City of Montreal* v. *College Sainte Marie,* [1921] 1 A.C. 288, at 290-1; *Commissioners of Income Tax* v. *Pemsel,* [1891] A.C. 531. In this
10 connection in the last mentioned case, Lord Halsbury said at 551:

"There is no purpose in a taxing Act but to raise money and an exception is just as much within this criticism as any other part of the Act since every exemption throws an additional burden on the rest of the community."

An exception must be construed with reference to the enacting clause to which it is appended: See *Ex parte Partington* (1847), 6 Q.B. 649, at 653; *In re Brocklebank,* 23 Q.B.D. 461, at 462-3.

But "The language of statutes is peculiar and not always what a rigid gramarian would use; we must do what we can to construe them."
20 Per Grove, J., *Lyons* v. *Tucker,* 6 Q.B.D. 660, at 664.

"It must, however, be conceded that, where the grammatical construction is quite clear and manifest and without doubt, *that* construction ought to prevail, unless there be some strong and obvious reason to the contrary. But the rule adverted to is subject to this condition that however plain the apparent grammatical construction of a sentence may be, if it be perfectly clear from the contents of the same document (and the same rule applies in the construction not only of an Act of Parliament but of deeds and wills and of any subject of a like nature) that the apparent grammatical construction cannot be the true one then *that* which upon the whole
30 is the true meaning, shall prevail in spite of the grammatical construction of a particular part of it."

Per Pollock, C.B., in *Waugh* v. *Middleton* (1853), 8 Ex. R. 352, at 357.

See also *Bradlaugh* v. *Clarke* (1883), 8 A.C. 354, at 384, where Lord Fitzgerald stated the same principle in somewhat clearer language; and *Caledonian Rail Co.* v. *North British Rail Co.,* 6 A.C. 114, at 122.

In Halsbury, Vol. XXXI, at p. 478, the learned author after referring to cases where there is no ambiguity, says:

"If the terms employed are ambiguous, then the intention of Parliament must be sought first from the statute itself, then in other legislation
40 and contemporaneous circumstances and finally by ascertaining:

1. What was the Common Law before the Act.
2. What was the mischief or defect for which the Common Law did not provide.
3. What remedy the Parliament resolved and appointed to cure the disease.
4. The true reason of the remedy."

I thought it well to set out the above general principles before looking at sec. 39 of the Regulations and the exception contained in clause (b).

In the Supreme Court of Ontario Reasons for Judgment at second trial 29th May, 1944 Continued

In the above sub-section, the enacters of the regulation and exception intended to alleviate the rigidity of the regulation in cases of sale for the purpose of putting a stalled vehicle into operation.

What is the meaning of the word "require"? Murray gives it a number of definitions begining with "inquire" and running through "request" (several varieties of this meaning) "demand" and ending with "need" which is the last meaning of the word. This last is probably the most popular and most used meaning.

Mr. Keogh's interpretation adds two words. He argued that it means 10 "require in fact" and that the council would have said "requested" if it had meant such. I am not sure that I can ascribe such omniscience to the enacters of the regulation and exception.

Although "requested" may not be the most obvious meaning of the word, is it not the meaning intended? If a car were stranded half a mile down a country road, would a gasoline attendant be expected to leave his station and accompany the purchaser to see if a car were actually in distress? I am aware that such is the regulation of the Oil Controller but the object of that regulation is the husbanding of gasoline and to counteract the propensity of certain members of the public to obtain extra 20 gasoline to the disadvantage of the war effort.

The exception in this case has no such object. It is benevolent legislation. It takes into account that a person might be stranded on a country road and would probably have no standard container handy—also that a gasoline station (as may have been the case here) might have none at the time. It would be impracticable for the attendant in every case to see if the gasoline was "required in fact." This opinion is also borne out by the evidence of the Assistant Fire Marshal (himself a lawyer) who seemed to me to put a similar interpretation upon the exception.

My opinion is that having regard to the object of the enacter in put- 30 ting the exceptions in, viz., to deal with cases of distress as most would be, in the light of the above principles, the interpretation of "requested" is much more likely than that of "needed" and that the exception should be thus interpreted in aid of the defendant.

The word "refuel" causes some difficulty. According to Mr. Keogh, it means more than the mere priming of the carburetor and that what is involved in the word is a re-stocking of the tank. In support of that contention, he referred to the evidence of MacDonald that the usual minimum sent out to a car in distress is one gallon. "Refuel" is probably a colloquialism as it is not to be found in several dictionaries. According to 40 Murray's Dictionary, it means to supply again with fuel. However, the word is not given in the Century nor in Funk & Wagnall's Dictionaries. "Fuel" as a verb is defined in Murray's as "to feed or furnish with fuel." The same meaning is given in the Century Dictionary and Webster's defines it as meaning "to feed with or procure fuel." Funk & Wagnall's "to feed or supply with fuel."

It will be seen that the choice of words in this exception is not a very happy one but again I should think that this word should be given the widest meaning and therefore all that would be involved would be the feed-

ing of fuel to the vehicle in any quantity which would enable it to be moved.

So, if the feeding of a small quantity of fuel would accomplish that end, as it well might by priming, that would be sufficient.

So, in my opinion, to satisfy the exception so far as the defendant is concerned, if a messenger came with a metal container, to the station and asked to be given fuel to start a stalled vehicle, the defendant would not have broken the regulation in supplying same.

I cannot, therefore, see that the regulation (if, indeed, it is in force) helps the plaintiff at all. But without it, there is sufficient, as I have
10 pointed out, to find the defendant guilty of negligence.

It will be noted even if the gasoline had been sold in a safety container, the boys could still have soaked and ignited the bulrush or could have thrust the bulrush in the spout of the container but it is unlikely that the remaining contents of the container would have caught fire.

The next question which must be asked is: Was the infant plaintiff guilty of negligence which caused or contributed to his injuries?

I have little hesitation in finding that he was so negligent.

The first point that should be considered is whether a boy of nine years and one month, as this boy was at the time, could be guilty at all of con-
20 tributory negligence. I have examined a great many cases on this subject and my conclusion is that where the boy is an ordinary bright alert lad as this boy appears to be, and was shown to be at the time, there has been a sort of dividing line fixed at seven years. Under seven years unless there is extraordinary brightness in scarcely any case has a child been held guilty of contributory negligence.

In the case of *Winnipeg Electric* v. *Wald,* 41 S.C.R. 431, it was held that where a child is of tender age, that is not over six, the trial Judge may properly refrain from putting any question to the jury where the injury was not caused entirely by the child's negligence.

30 In *Downing* v. *G.T.R.*, 58 D.L.R. 423, it was said that it was not the law of Ontario that no child of eight could be guilty of contributory negligence. The capacity of the child is the test.

In *Bouvier* v. *Fee,* [1932] 2 D.L.R. 424, it is said that where the child is under eight years of age, (in that case seven), it is eminently an issue for the determination of the trial Judge. See also *Tabb* v. *G.T.R.*, 8 O.L.R. 203, where a boy of nine years of age was injured; and *Potvin* v. *C.P.R.*, 4 O.W.R. 511, where the Plaintiff was eight years and seven months old.

In *Downing* v. *G.T.R.* (supra), at 426, where the boy was about eight years old, Rose, C.J.H.C., said in speaking to the jury "that the standard
40 by which the boy's acts were to be judged, was not the standard which would be applied in the case of a man, and that what the jury would have to consider was whether the boy had displayed such reasonable care as was to be expected from him, having regard to his youth and general intelligence."

There are numerous cases, also, as to a nine year old child. See *Mayer* v. *Prince Albert,* [1926] 4 D.L.R. 1072; *Mercer* v. *Gray,* [1941] 3 D.L.R. 564; and *Adams* v. *Betts,* [1936] 1 D.L.R. 182.

In the Supreme Court of Ontario Reasons for Judgment at second trial 29th May, 1944 Continued

Applying the principles laid down in the above cases to the facts and circumstances herein, I find that this boy is now a bright, intelligent boy. His brother, two years younger, is also an exceptionally bright intelligent boy. The accident, of course, occurred nearly four years ago, but casting back my mind from the present I would say that when the plaintiff was nine years and one month old, 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 hand-
10 ling 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, had seen his father lighting his torch and knew that 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.

In lighting the bulrush as he did, in the proximity of a can of gasoline,
20 the consequences of which I think he ought to have foreseen, he was guilty of negligence, and while it is true that the subsequent act of the brother in attempting to extinguish the bulrush by beating it on the ground actually touched off the gasoline in the can, really causing the accident, it was the negligence of the plaintiff that started the train of events which caused his injuries, after the two boys had the can of gasoline in the lane, and had got the bulrush and the matches, and, therefore, his negligence contributed materially to the accident.

In making the above appraisal of the acts of the infant plaintiff, I am not overlooking the fact that the standard by which the boy's acts are
30 to be judged is not that which would be applied in the case of a man. I have taken into consideration his age, his intelligence, as I have sized it up, and as it is shown by the evidence to have been. I have considered the so-called recklessness or venturesomeness of youth in determining that against the defendant and its agent.

Another point argued by Mr. Robinette was that if there was joint negligence, that of the boy amounted to ultimate negligence in law, and was, therefore, the only efficient cause of the accident.

There is much to be said for this point of view, but I cannot see that the negligence of the defendant is not a causa causans. Furthermore, I
40 am faced by the recent decision of *Gives* v. *Canadian National Railway Co.*, [1941] O.R. 341, and so must, under all the circumstances, decide against this argument.

The question of volenti was also explored by Mr. Robinette, but after considerable discussion he came to the conclusion (with which I agree) that the doctrine of volenti not fit injuria did not come to his aid in this particular set of circumstances.

Therefore, it being my opinion that the defendant company, through its agent Black, was negligent, and also that the infant plaintiff was negli-

gent, each contributing by such negligence to the injuries which followed, it remained to be determined to what extent each one contributed. My opinion is that the plaintiff's contribution was ever so much the greater and I would place it at seventy-five per cent., and the defendants at twenty-five per cent. The plaintiffs will therefore recover only one-fourth of the total amount assessed to them.

In the Supreme Court of Ontario Reasons for Judgment at second trial 29th May, 1944 Continued

In regard to the plaintiffs' damages the father is out-of-pocket, it is admitted, the sum of $2,712.75, and no deduction that I can see can be made from that. As to the infant plaintiff's damages they are very difficult to determine. He was burned very badly in both legs from about four inches above his knees down to the tip of his toes. He was in the Kirkland Lake Hospital for two or three months and later for two and a half years in the Sick Children's Hospital in Toronto. He was horribly burned, in many places right down to the bone. He had to have sixteen grafts from his chest, his back, his thighs and those parts of his body are horribly scarred. He will have to have other grafts soon. His legs are horribly scarred. The bones of his ankle fused as a result of his injuries or as the result of his immobility for such a long time afterwards and this has had to be corrected both by skilful operation and by means of a special shoe. One of his legs is shorter than the other and apparently this condition is permanent. He will always have a stiff ankle. He cannot run, jump or skate and will never be able to do so. He can swim. In life he will not be able to do any heavy manual work because he cannot stand for any length of time without the ankles swelling. He will be able to do any sedentary office job. He would be able to drive a car,—act as chauffeur for example. It is not likely he will improve very much in the future but he has gone a long way forward since the last trial a year ago. He has to go through life with the disfigurements. He has lost a year of schooling. Fortunately in the Sick Children's Hospital they provided for schooling to some extent. He has endured terrible pain and suffering and a great deal of discomfort which will extend some time into the future.

The tendency in a case of this sort is to allow one's sympathy for the terrible injuries to run away with one's judgment in assessing damages. One must take into account a large number of things. In the first place as to the boy's chances of long life—the hazards which a boy of that age must undergo before he attains majority, his prospects of marriage or otherwise, his limitation as to the jobs which are available to a young man of foreign extraction—on the other hand one must remember that injuries from accidents are varied in nature and quality. An accident may result in little injury, an accident may result in a very great injury, and in considering the damages I think that one should place the accident in the general scale of acidents. One might ask himself whether this accident was as serious as if he had lost a leg for example, or if he had lost an arm, or an eye. For these accidents different Courts have awarded certain damages. It must be remembered that I am assessing the damages for all time, and that in assessing damages one should not be niggardly, nor should one be over generous. I should try, as far as possible, to be reasonable, and sensible in doing this.

In the Supreme Court of Ontario Reasons for Judgment at second trial 29th May, 1944 Continued

I think, all things considered, that I would be correct in assessing this boy's damages at $8,000. The boy, being seventy-five per cent. responsible, there will have to be a reduction—that of the father, to $678.19, and the boy's to $2,000—the last sum to be paid into Court for his benefit in the usual way.

As to costs, while the plaintiff's negligence has been found to be ever so much greater than that of the defendant, I do not think on the authorities, that this is a case where I should divide the costs. R.S.O., ch. 115, sec. 7, gives the presiding Judge power in a just case to order the plaintiff
10 to bear some portion of the costs but as in *Saunders* v. *Brown*, 33 O.W.N. 675, where the principles involved were fully discussed, I can find no special circumstances justifying such action.

Therefore the defendants should bear the full costs of the action. There will be judgment therefore for the adult plaintiff in the sum of $678.19 and for the infant plaintiff in the sum of $2,000.00 with full costs of the action and any other costs over which I have control by virtue of the decision of the Court of Appeal. Action against defendant MacDonald dismissed with costs.

Law Stamps $2.50

In the Court of Appeal Formal Judgment at second appeal 19th Dec., 1944

In the Supreme Court of Ontario

The Honourable the Chief Justice of Ontario The Honourable Mr. Justice Roach The Honourable Mr. Justice McRuer	Tuesday the 19th day of December, A.D. 1944.

BETWEEN:

WILLIAM YACHUK, an infant under the age of 21 years, by his next friend, Tony Yachuk, and the said TONY YACHUK,

Plaintiffs,

10 (Seal)

—AND—

THE OLIVER BLAIS COMPANY LIMITED and TECK IMPERIAL SERVICE STATION and CLARENCE MacDONALD,

Defendants.

1. UPON MOTION made on the 7th and 8th days of November, 1944, unto this Court by counsel on behalf of the Plaintiffs by way of appeal from the judgment pronounced by the Honourable Mr. Justice Urquhart on the 29th day of May, 1944, herein, and upon motion made on the same 20 day unto this Court by counsel on behalf of the Defendant The Oliver Blais Company Limited by way of cross-appeal from the said judgment, in the presence of counsel for all parties, upon hearing read the pleadings, the evidence adduced at the trial and the judgment aforesaid, this Court was pleased to direct the said motions to stand over for judgment and the same coming on this day for judgment;

2. THIS COURT DOTH ORDER that the said appeal be and the same is hereby allowed and that the said judgment be and the same is hereby varied, and as varied shall be as follows:

"(1) THIS COURT DOTH ORDER AND ADJUDGE that the 30 adult Plaintiff, Tony Yachuk, do recover from the Defendant, The Oliver Blais Company Limited $2,712.75 damages.

"(2) AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the infant Plaintiff, William Yachuk do recover from the Defendant, The Oliver Blais Company Limited, $8,000.00 damages which said sum is to be paid into this Court by the said Defendant to the credit of the said infant Plaintiff, William Yachuk, who was born on the 25th day of June, 1931.

"(3) AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the Defendant, The Oliver Blais Company Limited

In the Court of Appeal Formal Judgment at second appeal 19th Dec., 1944 Continued

do pay to the Plaintiffs their costs of this action forthwith after taxation thereof.

"(4) AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that this action be and the same is hereby dismissed without costs as against the Defendant, Clarence MacDonald."

3. AND THIS COURT DOTH FURTHER ORDER that the Defendant, The Oliver Blais Company Limited do pay to the Plaintiffs their costs of this appeal and their costs of the first trial and first appeal in this action forthwith after taxation thereof.

10

Chas. W. Smyth,
REGISTRAR, S.C.O.

Entered O.B. 189, page 183.
January 20, 1945.
W.

C.A.

WILLIAM YACHUK ET AL.
v.
THE OLIVER BLAIS COMPANY ET AL.

Copy of reasons for judgment of the Court of Appeal (Robertson, C.J.O., and Roach and McRuer, JJ.A.), delivered 19th December, 1944.
J. L. G. KEOGH, for the plaintiffs, appellants.
J. J. ROBINETTE, for the defendant, respondent.
Argued November 7th and 8th, 1944.

In the Court of Appeal Reasons for Judgment at second appeal 19th Dec., 1944

MCRUER, J.A.:—This action is brought by the infant plaintiff and his father to recover damages for injuries suffered by reason of the defendant, The Oliver Blais Company Limited, having negligently sold gasoline to the infant plaintiff and his small brother, which was ignited under circumstances that I will hereafter set out in some detail.

The Oliver Blais Company Limited, the respondent, is an incorporated Company which, at the material times, operated a service station in the Town of Kirkland Lake for the sale of gasoline and like products. Before delivery of the statement of claim the action was discontinued against Teck Imperial Service Station.

The infant plaintiff was seriously burned by the ignited gasoline, and heavy expense has been incurred by the adult plaintiff for medical attention and hospitalization. At the trial the damages suffered by the infant plaintiff were assessed at $8,000, and those of the adult plaintiff at $2,712.75. Both the infant plaintiff and the defendant were found to be negligent, and the degree of fault apportioned between them at seventy-five per cent. to the infant plaintiff and twenty-five per cent. to the defendant, The Oliver Blais Company Limited. Judgment was therefore entered in favour of the infant plaintiff for $2,000 and the adult plaintiff for $678.19. The plaintiffs appeal and the defendant, The Oliver Blais Company Limited cross-appeals.

The matter came on for trial before Urquhart, J., and a jury at the Assizes for the County of York, sitting at the City of Toronto. At the conclusion of the case for the plaintiff a motion was made on behalf of the defendant MacDonald for a non-suit. The motion was granted, and the action as against that defendant was dismissed without costs. Against this judgment there has been no appeal.

The trial of the action against the defendant, The Oliver Blais Company Limited, continued and at the conclusion of the evidence the learned trial Judge exercised his discretion to take the case from the jury and dispose of it himself. Counsel for the plaintiffs contends that the learned trial Judge erred in taking the case from the jury. The learned trial Judge has set out his reasons for the exercise of the discretion which was vested in him, and in the result I agree.

On the 31st July, 1940, the infant plaintiff, who was at that time nine years of age, and his younger brother, seven years of age, obtained from their mother, who was ill in bed, five cents each for the purpose of buying chocolate milk. The infant plaintiff used his money for the purpose for

In the Court of Appeal Reasons for Judgment at second appeal 19th Dec., 1944 Continued

which it was given to him. His younger brother did not. The two boys, having five cents between them, conceived the idea that they would procure some gasoline and make torches to "play Indians." The plan was to soak the heads of some bulrushes with gasoline and to light them. With this end in view the two boys set out to purchase the gasoline. In the first instance they went to a service station operated by one of the defendant's competitors, and requested gasoline, offering as a container a glass coffee jar. This, they were refused on account of the fact that it was contrary to regulations prescribed for handling gasoline, to deliver gasoline in a
10 glass container. The boys went home and secured a tin lard pail. There is a difference in the evidence as to whether the pail had a cover on it or not. The learned trial Judge has found that it did, and I accept his finding. The boys returned to the service station where they had been refused delivery of gasoline, and were again refused. They thereupon went to the service station operated by the defendants and asked one Black, the attendant in charge, a boy just under the age of fifteen years, for five cents' worth of gasoline. The younger of the two boys says that he said the gasoline was for an outboard motor. The learned trial Judge has found that, if this was said, Black did not hear it.

20 Black's version of the transaction is, "He (the infant Plaintiff) asked me for a nickel's worth of gasoline to put in his mother's car that was stuck down the street." With this the infant plaintiff substantially agrees. Both of the boys swore that the younger boy gave the money to Black. Black says he does not think it was the younger boy who had the money. On this point the learned trial Judge makes no finding. He finds, however, for very cogent reasons, fully set out in his reasons for judgment, that Black had a real doubt about the purpose for which the gasoline was going to be used. In this finding I entirely agree. The circumstances of the whole transaction were such as to put any reasonable man on his guard
30 and warn him that this was a fictitious story, put forward by two small boys who were bent on mischief. Black did nothing to verify the statement of the infant plaintiff, or to question him, except to ask him if he wanted the gasoline for dry cleaning. Black's evidence in reference to the transaction is as follows:—

> "Q. What did the older boy say to you? A. He asked me for a nickel's worth of gasoline to put in his mother's car that was stuck down the street.
>
> "Q. What did you say? A. Well, I thought for a minute and then I asked him, 'Did you want it for dry cleaning?' That was our
> 40 question that we always put to anything like that. And he said, no he didn't. So I got the pump going and then I asked him again if he wanted it for dry cleaning, and he said 'No.' And then I explained to him that if he did it was of no use as it contained lead and that there was another substance in the service station which I could give him for dry cleaning if he wanted it for that, so there was no need for gasoline, but he insisted it was not for dry cleaning—his mother's car was stuck down the street and that is what he wanted it for."

Black reported the matter to the Assistant Manager of the service station and handed the five cents to him. The Assistant Manager asked what it was for and Black's evidence is that he said "a couple of boys had come and obtained a small quantity of gasoline. And I says, 'That is all right, isn't it?' and he said, 'Yes,' *as far as he knew. So that was all I thought about it then.*"

Black was asked, "Did you have any doubt in your mind", and his answer was, "No, I was just—in a way—I mean it is a small quantity and that and I just thought the boys were still nearby and I could have got
10 them then, and he (the Assistant Manager) seemed to think everything was all right, so I let it go."

The learned trial Judge, in finding the defendant negligent, stated, "I am firmly convinced, and I so find, that the defendant's agent Black could reasonably have anticipated when selling the gasoline to the infant plaintiff, 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." With this finding I agree.

In *Cooke* v. *Midland Great Western Railway of Ireland,* [1909] A.C.
20 229, Lord Macnaghten formulated the question applicable to that case, which may be applied to the circumstances of this case:

> "The question for the consideration of the jury may, I think, be stated thus: Would not a private individual of common sense and ordinary intelligence, placed in the position in which the company were placed, and possessing the knowledge which must be attributed to them, have seen that there was a likelihood of some injury happening to children resorting to the place and playing with the turntable, and would he not have thought it his plain duty either to put a stop to the practice altogether, or at least take ordinary precautions to pre-
> 30 vent such an accident as that which occurred."

Applying the language of Lord Macnaghten 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?

Gasoline is a highly dangerous substance. Not only is it very inflam-
40 mable, but in certain conditions, explosive. The vapours from it will ignite at some distance from the liquid itself. When a small quantity touches one's clothing, it makes the clothing inflammable. These facts are well known by the average adult, and ought to be known by anyone selling gasoline, and have a bearing on the duty of the defendant's servant, when putting forth such a substance into the hands of two boys, seven and nine years of age, under the circumstances of this case. These facts also have a bearing on what may be expected of children into whose hands there has been put a substance with such dangerous and tempting possibilities.

In the Court of Appeal Reasons for Judgment at second appeal 19th Dec., 1944 Continued

It was submitted on behalf of the defendant that notwithstanding the negligence of its servant, the chain of causation between his negligence and the damage sustained by the infant appellant, was broken by the deliberate act of the infant plaintiff in lighting the bulrush which had been saturated with gasoline, and that the conduct of the infant plaintiff was the conscious act of another's volition and constituted novus actus interveniens.

I do not think this is an answer to the plaintiff's claim. In my opinion the language of Lord Sumner (then Hamilton, L.J.) in *Latham* v. *R. Johnson & Nephew Limited,* [1913] 1 K.B. 398, at p. 413, applies:—

10 "Children acting in the wantonness of infancy and adults acting on the impulse of personal peril may be and often are only links in a chain of causation extending from such initial negligence to the subsequent injury. No doubt each intervener in a causa sine qua non, but unless the intervention is a fresh, independent cause, the person guilty of the original negligence will still be the effective cause, if he ought reasonably to have anticipated such interventions and to have foreseen that if they occurred the result would be that his negligence would lead to mischief."

Having determined that the defendant's servant was negligent in sup-
20 plying gasoline to the infant plaintiff and his small brother, there remains to be considered whether the infant plaintiff can be held to be guilty of contributory negligence.

After obtaining the gasoline the two boys took it to a lane. The younger boy was sent home for the bulrushes, which he brought back. The boys called for two other boys, who were not at home. A boy, a year older than the infant plaintiff, came up the lane and prompted the infant plaintiff into lighting a bulrush. He said to him, "I dare you to light one of those. I bet you are afraid." The infant plaintiff then dipped the head of a bulrush in the gasoline and handed it to the younger boy, while he,
30 the infant plaintiff, lighted it with a match which the smaller boy had brought from their home. The flame flared up and the younger boy evidently being panic stricken, started to beat it on the ground instead of letting it burn away in the air. Between the two boys was the open pail of gasoline. It may be that after the bulrush was dipped in the gasoline and before it was lighted, gasoline had dripped on to the ground and on to the infant plaintiff's clothing. In any case, when the smaller boy beat the flaming bulrush on the ground the gasoline in the pail was ignited and the infant plaintiff's pants caught fire and his legs were very seriously burned, resulting in permanent injuries, as set out in the learned trial
40 Judge's reasons for judgment.

The learned trial Judge finds that the infant plaintiff was of such an age that he could be guilty of contributory negligence "in the abstract", and also "in respect of the handling of gasoline and gasoline fires." He gives as his reason for this that he was a bright boy, standing well in the grades at school, and that he knew the danger of matches. He had watched his father operate a gasoline torch in his workshop and had been told to

get away from the torch. His father would not allow children in the workshop. He finds, "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." He finds that the infant plaintiff was negligent "in lighting the bulrush as he did in the proximity of a can of gasoline, the consequences of which, I think, he ought to have foreseen . . . and while it is true that the subsequent act of the brother in attempting to extinguish the bulrush by beating it on the ground, actually touched off the gasoline in the can, really causing the accident, it was the negligence of the plaintiff that started the train of things which caused his injuries after the two boys had the can of gasoline in the lane and had got the bulrush and matches and therefore his negligence contributed materially to the accident."

With the greatest respect, I cannot agree with the learned trial Judge in this finding. I do not think that the learned trial Judge has applied the proper principles in finding the infant plaintiff guilty of contributory negligence. I am of the opinion that it is inconsistent with the finding that Black was negligent in supplying the gasoline to the infant plaintiff and his brother. 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 defendant to put gasoline in the hands of the two boys under the circumstances found by the learned trial Judge, it cannot be an answer to say that the boys used the gasoline for a dangerous purpose under those circumstances and did thereby cause injury to one of them.

Lord Denman, C.J., in *Lynch* v. *Nurdin* (1841), 1 Q.B. 30, at p. 38, deals with the principle that, in my opinion, should be applied to this case:-

> "But the question remains, can the plaintiff then, consistently with the authorities, maintain his action, having been at least equally in fault. The answer is that, supposing that fact ascertained by the jury, but to this extent, that he merely indulged the natural instinct of a child in amusing himself with the empty cart and deserted horse, then we think that the defendant cannot be permitted to avail himself of that fact. The most blameable carelessness of this servant having tempted the child, he ought not to reproach the child with yielding to that temptation. He has been the real and only cause of the mischief. He has been deficient in ordinary care; the child, acting without prudence or thought, has, however, shown these qualities in as great a degree as he could be expected to possess them. His misconduct bears no proportion to that of the defendant which produced it."

In considering whether the infant plaintiff's act in lighting the bulrush was negligence on his part, all the circumstances surrounding the accident must be taken into account. These include the infant plaintiff's knowledge of gasoline as an inflammable and dangerous substance, his capacity to understand the peculiar characteristics of gasoline, and the likely reactions

of the younger boy in whose hands the bulrush was when lighted, the capacity of the infant plaintiff to curb and control those natural mischievous tendencies in a boy of nine years of age, and his ability to act with prudence when "dared" to a course of action by an older boy.

In *Cook* v. *Midland Great Western Railway Company of Ireland*, supra, Lord Atkinson says at p. 237:

> "The authorities from *Lynch* v. *Nurdin* downwards establish, it would appear to me, first, that every person must be taken to know that young children and boys are of a very inquisitive and frequently mischievous disposition, and are likely to meddle with whatever happens to come within their reach; . . . then the owners of those machines or vehicles will be responsible in damages for injuries sustained by these juvenile intermeddlers through the negligence of the former in leaving their machines or vehicles in such places under such conditions, even though the accident causing the injury be itself brought about by the intervention of a third party, or the injured person, in any particular case, be a trespasser on the vehicle or machine at the moment the accident occurred."

I will assume 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. There is no evidence to indicate that he knew that gasoline would flare up, that the fumes would be likely to ignite and cause the gasoline in the pail to burn, or that the younger boy would likely become terror stricken and beat the flaming torch on the ground in the vicinity of the open gasoline can. If he had known all these things, it is highly unlikely that he would have lighted the torch while it was being held by the younger boy. It is one thing to hold that a boy of nine years of age is guilty of contributory negligence where the danger is obvious and apparent even to a child, such as in highway traffic cases, but where the danger is not so obvious or apparent, and the knowledge necessary for its apprehension cannot be imputed to the boy, is another thing. This is especially true where there is either in the substance put into the child's hands or in the condition of things to which he has access, something in the nature of a temptation or an allurement. If one gives to a child an explosive substance and the child, with a limited knowledge in respect to the likely effect of the explosion, is tempted to meddle with it to his injury, it cannot be said in answer to a claim on behalf of the child that he did meddle to his own injury, or that he was tempted to do that which a child of his years might be reasonably expected to do.

In arriving at my conclusion in respect to the liability of the defendant, I have not considered the application of The Gasoline Handling Act, R.S.O. 1937, ch. 332, and the regulations passed thereunder.

It is argued by counsel for the appellant that the following regulation passed by Order-in-Council, which came into force on the 1st day of February, 1937, imposed a statutory duty on the defendant to deliver the gasoline only in a metal container of a safety type which was filed as an exhibit at the trial:—

"Portable containers in which Class I liquids are sold or delivered to the public shall be of an approved metal safety type and a label shall be attached by the vendor in each case on which shall be printed in bold type a warning that the contents are dangerous and should not be exposed to fire or flame and should not be used for cleaning purposes in any building, provided that this regulation shall not apply to

"(b) the delivering in a metal container of gasoline required to re-fuel a motor vehicle to permit of its being moved."

Counsel for the plaintiffs argued that unless it is found that this gasoline was sold for the purpose of re-fueling a motor vehicle, the sale does not come within the exception and that the defendant's servant committed a breach of the Act by delivering the gasoline in a lard pail of the type described in the evidence. It was argued that if the metal safety type container had been used, it is difficult to see how this accident could have happened, as the container is kept automatically sealed at all times.

Counsel for the defendant submitted that this regulation is ultra vires, and that there was no power under the Act as it stood at the time the regulation was passed conferring on the Lieutenant-Governor-in-Council the power to make a regulation of this character. A careful reading of The Gasoline Handling Act does not indicate that it was originally passed for the purpose of the protection of any part of the public. In 1938 the following clause was added to section 12 of the Act, which empowers the Lieutenant-Governor-in-Council to make regulations:

"(jj) Prescribing the method, manner and equipment to be used in handling, storing, selling and disposing of gasoline, kerosene and distillate."

The validity of the regulation in question must be viewed in the light of the language of the Act as it stood prior to this amendment. I am of the opinion that sec. 39 of the regulations in question was not within the powers of the Lieutenant-Governor-in-Council at the time it was passed. The defendant, however, made the regulations a rule of conduct governing the sale of gasoline by its employees, and as such they may be taken into consideration in deciding whether or not the defendant was negligent. Other than this, I would hold that they have no bearing on the case.

Having come to the conclusion that the finding of the learned trial Judge as to contributory negligence cannot stand, it is necessary to consider whether the case should be sent back for a new trial or be disposed of by this Court. On the argument counsel for the defendant frankly stated to the Court that he did not ask for a new trial. His language was, "whatever the Court does, do not send it back for a new trial."

I am of the opinion that this Court, acting under the principles outlined in *Mersey Docks and Harbour Board* v. *Proctor*, [1923] A.C. 253, at p. 258, can properly dispose of the action. There is very little conflict in the evidence necessary to a decision. It is true that the learned trial Judge had an opportunity of seeing the infant plaintiff, but this was four years after the accident happened. In my opinion the appearance of a boy

In the Court of Appeal Reasons for Judgment at second appeal 19th Dec., 1944 Continued

at thirteen years of age could be of little assistance in determining whether he could be guilty of contributory negligence in these circumstances at nine years of age.

Counsel for the plaintiffs submits that the damages suffered by the infant plaintiff were assessed at too small an amount. Counsel for the defendant submits that it was too high. I cannot find any valid reason for interfering with the assessment of damages by the learned trial Judge.

I would allow the plaintiffs' appeal, and dismiss the cross-appeal. Judgment should be entered for the infant plaintiff for $8,000 and for 10 the adult plaintiff for $2,712.75, together with the costs of this appeal, including the costs of the former trial and appeal.

ROBERTSON, C.J.O., and ROACH, J.A., agree with MCRUER, J.A.

In the Supreme Court of Canada

On Appeal from The Court of Appeal for Ontario

Wednesday, the 28th day of November, A.D. 1945

PRESENT:

THE HONOURABLE THE CHIEF JUSTICE OF CANADA

The Honourable Mr. Justice Kerwin
The Honourable Mr. Justice Hudson
The Honourable Mr. Justice Rand
10 The Honourable Mr. Justice Estey

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.

The appeal of the above named Appellant from the Judgment of the Court of Appeal for Ontario pronounced in the above cause on the 19th day 20 of December in the year of our Lord 1944, varying the Judgment of the Honourable Mr. Justice Urquhart of the Supreme Court of Ontario rendered in the said cause on the 29th day of May in the year of our Lord 1944, having come on to be heard before this Court on the 6th and 7th days of June, in the year of our Lord 1945, in the presence of Counsel as well for the Appellant as for the Respondents, whereupon and upon hearing what was alleged by Counsel aforesaid, this Court was pleased to direct that the said appeal should stand over for Judgment, and the same coming on this day for Judgment, this Court did order and adjudge that the said appeal should be and the same was allowed, that the said Judgment of the said 30 Court of Appeal for Ontario should be and the same was reversed and set aside and that the said Judgment of the Honourable Mr. Justice Urquhart should be and the same was restored.

And this Court did further order and adjudge that the said Appellant should and do pay to the said Respondents the costs incurred by the said Respondents in the Supreme Court of Ontario, including the costs of the first trial and appeal to the Court of Appeal for Ontario. And this Court

In the Supreme Court of Canada Formal Judgment 28th Nov., 1945 Continued

did further order and adjudge that there should be no costs to either party of the appeal or cross appeal to the Court of Appeal for Ontario on the second occasion. And this Court did further order and adjudge that the said Respondents should and do pay to the said Appellant the costs incurred by the said Appellant in this Court.

SETTLED this 23rd day of January, A.D. 1946.

(sgd) Paul Leduc

REGISTRAR

Oliver Blais Company Limited v. Yachuk

In the Supreme Court of Canada Reasons for Judgment 28th Nov., 1945

CORAM: The Chief Justice, Kerwin, Hudson, Rand and Estey, J.J.

KERWIN, J.: (concurred in by the Chief Justice)

On a summer day in 1940, William Yachuk was burned severely and an action was brought on his behalf against Oliver Blais Company Limited to recover damages therefor and by William's father for medical and other expenses. The circumstances are as follows.

William, nine years of age, and his brother Victor aged seven had gathered at their home at Kirkland Lake, in the Province of Ontario, some
10 bulrushes. Some days before Victor had seen a moving picture depicting Indians with lighted torches and the two boys conceived the idea of playing Indians and lighting the bulrushes, and for that purpose, of securing gasoline. It was during the school holidays and their mother, who was confined to her bed as the result of illness, gave each of the boys five cents in order to buy chocolate milk. William spent his money for that purpose but Victor retained his for the purchase of the gasoline.

The two boys went to the defendants' gasoline station in Kirkland Lake and while at the trial such a question was investigated, no issue is now raised as to the competence of the individual at the station with whom
20 the boys conducted their business,—a fifteen year old high school boy by the name of Black. The two Yachuk boys presented themselves with an empty lard pail about four inches deep and four inches in diameter with a cover on it. William told Black that he wanted the gasoline to put in his mother's car which he stated "was stuck" down the street. While it is not important, the trial judge was unable to find who paid over the five cents but considered it probable that the five cents was handed over by the younger brother. Black asked if the gasoline were wanted for dry-cleaning, explaining that, if so, the gasoline had lead in it and was unsuitable for the purpose. William insisted for the second time that his mother's car was
30 stuck down the street and that the gasoline was required for the car.

There was no car down the street. The boys went to a lane out of sight of the gasoline station and some distance away from it although in the general direction in which they had indicated that the motor car was stationed. William then sent his brother to their house for the bulrushes and some matches. Upon the brother's return, William dipped one of the bulrushes in the pail of gasoline, handed the dipped bulrush to the younger brother, and then lighted it. Upon its flaming up, Victor became afraid and tried to beat it out on the ground. At that time the boys were standing about four feet apart with the pail of gasoline open midway between them. The gaso-
40 line in the pail caught fire from the bulrush, splashed on the trousers which William was wearing, and these caught fire. William rolled on the ground in an effort to put out the flames and finally a man and a woman came with water and threw it on him. William was most seriously burned. The trial took place with a jury but for reasons with which we are not concerned, the case was taken from them and the matters in issue were determined by the trial judge alone.

In the Supreme Court of Canada Reasons for Judgment 28th Nov., 1945 Continued

His finding that the defendants were negligent, with which finding the Court of Appeal agreed, is in these words:—

"I am firmly convinced, and I so find, that the defendant's agent Black could reasonably have anticipated when selling the gasoline to the infant plaintiff, 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."

I have no quarrel with this statement of the question to be answered or with
10 the following question put by McRuer J,, in the Court of Appeal:—"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?"

Gasoline is a dangerous substance unless handled with proper care. Irrespective of the question of certain provincial regulations mentioned hereafter, were the defendants under a duty not to sell the gasoline to the
20 infants? Should Black have refused to sell the gasoline to William Yachuk because he should have anticipated that William (or his brother) might do, if not the identical thing that followed, something that would cause damage to himself?

The fact that no car required gasoline can make no difference in the decision of the initial problem presented for determination. We may suppose cases where the car was "stuck" and the mother of the boys had sent them to the gasoline station, or where, in addition to these facts, the mother had telephoned the station to make sure that the boys would be given the gasoline. Presuming that in the ordinary course of these supposed cases
30 the boys would be out of sight of their mother and the service station attendant for a sufficient but not undue time, I have been unable to distinguish them from the one in hand.

Each case must depend upon its own circumstances and I therefore add that I have not overlooked the finding at the trial, concurred in by the Court of Appeal, that Black had a real doubt about the purpose for which the gasoline was going to be used. The trial judge believed Black as to the representation that had been made to him but continued that although Black says that "he did not doubt that statement, I am of the opinion and I so find that Black had real doubts and misgivings (which were justified)
40 as to the propriety of his sale. In the first place the sale was contrary to the express instructions of the manager of the defendants who, in instructing the boy and probably considering his youth, had given him instructions that he was to sell gasoline only in a standard safety container. Secondly, it must or should have been a suspicious matter to him when two small boys with five cents came with an ordinary tin for the purpose of getting gas. If one boy had come alone it might have appeared to have been an errand but why would a mother send a large boy accompanied by a small

brother for that purpose. That circumstance should have put Black on his guard. Black was only six years older than the oldest boy and he would undoubtedly have recollections of his own childhood and of the danger of playing with matches and the propensity of children to play with them and the general recklessness of children. In my opinion both the extraordinary nature of the transaction and the age of the boys involved, and the fact that he was putting in their hands a dangerous commodity which would cause damage if not handled with great care is such a circumstance that he might reasonably have anticipated that it would be used for an unauthorized and dangerous purpose."

As to the first reason given by the trial judge for his conclusion that Black had doubts as to the propriety of the sale, the manager's instructions were given, as the learned trial judge had previously pointed out, ex abundanti cautela because the particular regulation in question, if it were in force at the time, clearly permitted the sale in any metal container for the purpose of re-fueling a car to permit of its being moved. While Black may have doubted whether he should, in view of the manager's instructions, sell gasoline in the pail, I am unable to deduce from that 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 the two boys came together should have raised, or did raise, any doubt in Black's mind. My conclusion is that it would be putting too great a burden on the conduct of everyday affairs to hold that under all the circumstances of the case Black was prohibited from selling the gasoline to the boys.

This brings me to the regulations, which now require a closer examination because the respondents argue that they were breached. The regulations were passed under the authority of the Gasoline Handling Act, R.S.O. 1937, chapter 332, section 12 of which authorized the Lieutenant-Governor-in-Council to make regulations:—

> "(j) Prescribing the construction, equipment and operation of conveyances and containers used for the transportation and storage of gasoline, kerosene and distillate.
>
> ---
>
> (l) generally for the better carrying out of the provisions of the Act."

It was under the Act as it thus stood that the following regulation was passed:—

> "39. Portable containers in which Class I liquids are sold or delivered to the public shall be of an approved metal safety type and a label shall be attached by the vendor in each case on which shall be printed in bold type a warning that the contents are dangerous and should not be exposed to fire or flame and should not be used for cleaning purposes in any building, provided that this regulation shall not apply to

In the Supreme Court of Canada Reasons for Judgment 28th Nov., 1945 Continued

(a) . . . . .

(b) the delivering in a metal container of gasoline required to re-fuel a motor vehicle to permit of its being moved."

In 1938 clause (jj) was added to section 12 of the Act so that the Lieutenant-Governor-in-Council was authorized to make regulations:—

"(jj) Prescribing the method, manner and equipment to be used in the handling, storing, selling and disposing of gasoline, kerosene and distillate."

The Court of Appeal concluded that at the time the regulations were 10 promulgated section 39 thereof was not within the powers of the Lieutenant-Governor-in-Council while the trial judge considered that, even if section 39 were authorized by the Act as it originally stood, the defendants were protected by the exception on the ground that the word "required", in the context in which it was found, meant "requested" instead of "needed" and that the exception should be thus interpreted in aid of the defendants. As to the word "re-fuel", he considered that it should be given the widest meaning and therefore all that would be involved would be the feeding of the fuel to the vehicle in any quantity which would enable it to be moved. I agree with the view of the trial judge on this point and say nothing as to 20 that expressed by the Court of Appeal.

The respondents further contended that, in any event, regulation 39 had been made a rule of conduct by the appellants and that it should be considered in determining whether or not they were negligent. As I have already mentioned, the trial judge stated (and with that I agree), that the manager's instructions were given ex abundanti cautela; but moreover, the evidence shows that regulation was actually applied in the service station with due regard to the terms of proviso (b). Notwithstanding the superficial attractiveness of the argument, I adhere to the view that Black did not act unreasonably or negligently.

30 In the result, the appeal should be allowed and the action dismissed with costs throughout, including the costs of the first trial and of the first appeal to the Court of Appeal.

THE OLIVER BLAIS CO. LTD.

— v —

WILLIAM YACHUK

BEFORE: The Chief Justice, Kerwin, Hudson, Rand and Estey, JJ.

ESTEY, J.: (concurred in by Hudson, J.)

On July 31st, 1940, the infant plaintiff (respondent), William Yachuk, just passed nine years of age, and his brother, Victor, about seven years of age, went to the defendant's (appellant's) service station at Kirkland Lake with a small lard pail and purchased five cents' worth of gasoline
10 "for my mother's car that is stuck down the street". In fact, they wanted and did use the gasoline to burn bulrushes, in the course of which the infant plaintiff was so burned about his feet and legs as to leave him with a permanent injury.

The infant plaintiff, William Yachuk, claims general damages for the injuries which he suffered to his person, and his father, as plaintiff, claims for medical, surgical and nursing and other expenses which he incurred with respect to the infant plaintiff as a consequence of the injury. The learned trial judge found both parties negligent and assessed the infant plaintiff with 75% of the fault and the defendant with 25%.

20 The Appellate Court placed the entire responsibility upon the defendant and directed judgment in favour of the plaintiffs for the full amount of the damages as found by the learned trial judge—for the infant plaintiff $8,000, and his father $2,712.75.

The learned trial judge, with respect to the defendant company, found as follows:

> "I have no doubt that the defendant, therefore, by the Act of its agent, was negligent in selling the gas to the boys and that such negligence caused or contributed to the injuries the plaintiff sustained.
>
> "——the negligence consisted of selling such a small quantity of
> 30 gasoline to two young boys without more investigation, selling in a dangerous container, contrary to express instructions and with no investigation of any sort and without attempting to give the boys a safety container or even looking for one about the station.
>
> "I am firmly convinced and I so find that the defendant's agent Black could reasonably have anticipated when selling the gasoline to the infant plaintiff 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."

40 With respect to the infant plaintiff, William Yachuk, the learned trial judge found as follows:

In the Supreme Court of Canada Reasons for Judgment 28th Nov., 1945 Continued

"The accident, of course, occurred nearly four years ago, but casting back my mind from the present I would say that when the plaintiff was nine years and one month old, 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
10 before the occurrence watched gasoline in his father's torch and had been with his father on a job or two, had seen his father lighting his torch and knew that 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.

"In lighting the bulrush as he did, in the proximity of a can of gasoline, the consequences of which I think he ought to have foreseen, he was guilty of negligence, and while it is true that the subsequent
20 act of the brother in attempting to extinguish the bulrush by beating it on the ground actually touched off the gasoline in the can, really causing the accident, it was the negligence of the plaintiff that started the train of events which caused his injuries, after the two boys had the can of gasoline in the lane, and had got the bulrush and the matches, and, therefore, his negligence contributed materially to the accident."

The Court of Appeal agreed with the learned trial judge in his finding of negligence with respect to the appellant. The appellant (defendant) in this Court, however contended that the learned judges in both courts
30 erred in so finding and submitted that Black, having acted on the falsehood of William Yachuk it follows that the use made of the gasoline by the infant plaintiff would not have been foreseen or anticipated by a reasonable man acting in the same or similar circumstances.

Black had been carefully instructed by his employer with respect to the selling of gasoline. He had read the placard of the Department of Highways posted on the wall of the service station entitled "Warning re Gasoline." He also knew that the regulations permitted the delivery of gasoline in a metal container to refuel a motor vehicle; but notwithstanding these regulations, he admits, and the manager of the service station
40 corroborates, that he was specifically told, with respect to small retail sales, that no gasoline was to leave the property except in a safety can, a can specially designed which they had at the filling station and with which he was familiar.

It is significant, in view of the foregoing, that immediately he was asked by the boys to sell them five cents' worth of gasoline "for my mother's car that is stuck down the street", he deposed: "Well I thought

for a minute", and then asked them if they wanted it for "dry cleaning". He asked this twice, but they persisted it was for their mother's car. Then, when he handed the five cents to the assistant manager, explained that two boys had purchased gasoline and then asked: "That is all right, isn't it?" and received the answer: "Yes, as far as I know." At the trial, following this evidence, he is asked the question: "Did you have any doubt in your mind"? He answered: "No, I was just—in a way—I mean it is a small quantity and that and I just thought the boys were still nearby and I could have got them then, and he seemed to think everything was all right 10 so I let it go."

He made no inquiry with respect to the type or location of the automobile, nor indeed did he ask any of a number of appropriate questions that the circumstances would immediately suggest. He contented himself with a warning not to use the gasoline for dry cleaning purposes.

Black himself was a boy of about fourteen or fifteen years of age at the time of this accident. He was therefore in law an infant and subject to the standard of a reasonable boy acting in the same or similar circumstances. The learned trial judge found him negligent and the evidence supports that finding, but it is not entirely his personal conduct or negligence, 20 however blameworthy that may be, that is here in question. At the time of his employment he was not allowed to work at the pumps. After a period of instruction and experience about the garage he was deemed competent by his employer and placed in charge of the pumps to sell gasoline to the public. It would appear that as a boy of his age he had not acquired the confidence of one older and more experienced, and, therefore, immediately called the nature of the transaction to the attention of the assistant manager and received such an assurance that he did not call the boys back.

The evidence supports the finding that the defendant has negligently placed in the hands of two young boys a dangerous substance, with respect 30 to which their negligent conduct would be anticipated or foreseen by a reasonably careful person in the same or similar circumstances. It was conduct within the range or field that a reasonable person would expect of a boy who, while exercising a degree of reason and discretion, is still influenced and directed by those natural instincts common to boys who act in a spirit of adventure or, as in this case, in imitation of the Indians who, with lighted torches, they observed in the movies.

Then with respect to the infant plaintiff and his younger brother, they had decided to burn bulrushes as had the Indians in the movies. They desired gasoline for the purpose, and taking a coffee jar went to a filling 40 station where they were refused gasoline because of the container. They returned with a tin lard pail to the same vendor and were again refused. They crossed the street to the defendant's station where they purchased five cents' worth of gasoline, the infant respondent explaining that they desired it for "my mother's car that is stuck down the street." They then went back for the bulrushes, and taking them to a lane the infant plaintiff

In the Supreme Court of Canada Reasons for Judgment 28th Nov., 1945 Continued

dipped a bulrush into the gasoline and lighted same. At some time prior to lighting the bulrush he decided to call on two of his friends and remarked to his younger brother: "If John and Max are not home I don't think we should light them." They were in fact not home, but nevertheless the bulrush was lighted. It burned vigorously; the younger boy in his endeavour to put it out by beating it on the ground ignited the nearby can of gasoline. Somehow the clothing of the infant plaintiff caught fire causing his injuries.

The learned trial judge has found that the infant respondent was not 10 a child of tender years, as that phrase is understood and applied in law, but rather a boy beyond that age and therefore one whose conduct may constitute contributory negligence. The learned judges in the Court of Appeal have concluded otherwise. Their view is that "he had the limited knowledge in regard to gasoline indicated by the learned trial Judge", but were of the opinion that the record discloses "no evidence to indicate that he knew that gasoline would flare up, that the fumes would be likely to ignite and cause the gasoline in the pail to burn, or that the younger boy would likely become terror stricken and beat the flaming torch on the ground in the vicinity of the open gasoline can."

20 With great respect I cannot avoid the conclusion that the prime reason they wanted the gasoline was because they knew it would flare up, and while no doubt they did not anticipate precisely what happened, the infant plaintiff did appreciate the possibility of harmful consequences, as evidenced both by the remark he made to his younger brother with regard to the two boys they called for: "If John and Max are not home I don't think we should light them," as well as his conduct throughout. His father was a plumber, who had a shop in part of his house, where he had gasoline. As the learned trial judge commented, the infant plaintiff had been with his father upon a job or two, had seen his father lighting the torch, and had 30 been warned to keep away from it. These factors are evidence in support of the finding of the learned trial judge, who had the opportunity of observing and estimating his capacity, knowledge and experience. It is in the language of Chief Justice Anglin:

> "Eminently an issue for determination by a trial Judge . . . ."
> *Bouvier* v. *Fee,* (1932) S.C.R. 118 at p. 120.

With great respect to the learned judges who entertain a contrary view, I think it should be accepted in this case.

If the infant be held an infant of tender years, then I agree that there is an inconsistency, as pointed out by the learned judges of the Appellate 40 Court, in a finding of negligence on the part of the appellant and contributory negligence on the part of the infant respondent, but I do not think this inconsistency exists where the child is held to be beyond tender years. The quotation from *Lynch* v. *Nurdin* (1841) 1 Q.B. 29 at p. 38, quoted by the learned judges of the Court of Appeal appears to indicate the position and the limit of the suggested inconsistency. It may be found where the child

is of tender years and "merely indulged the natural instinct of a child in amusing himself with the empty cart and deserted horse", and again, "the child acting without prudence or thought". The Court was there dealing with a child between six and seven years of age, but here we have a boy of nine who impressed the learned trial judge with his capacity, knowledge and experience to the extent that he found him a boy beyond tender years and therefore one whose conduct may constitute contributory negligence. If in fact, having regard to his age, capacity, knowledge and experience, his conduct be found to constitute contributory negligence, he is in the
10 same position as anyone else whose conduct constitutes contributory negligence. In the same case *Lynch* v. *Nurdin*, (1841) 1 Q.B. 29, where they were dealing with infants of tender years, Denman C.J. incorporates the following in his judgment:

> "If I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first."

20 This was quoted with approval by Mr. Justice Anglin (later Chief Justice) in *Geall* v. *Dominion Creosoting Co.*, 55 S.C.R. 587 at p. 611.

In my opinion, as intimated above, the infant respondent did, upon his own evidence, disclose sufficient knowledge of gasoline and a concern with respect to the possibilities of danger arising out of his own course of conduct to support a finding that he did not exercise that care which a reasonably careful boy of nine years, of his capacity, knowledge and experience would have exercised under the same or similar circumstances.

The negligent conduct of the appellant in delivering the gasoline as he did had not spent or exhausted itself but remained an operative and ef-
30 fective force when that of the infant respondent joined therewith to effect the unfortunate injury. The conduct of both parties constitutes contributory negligence.

The appellant further submits that if both parties have been negligent, the infant respondent's negligence under the circumstances should be classed as ultimate negligence, or as the negligence of one who, notwithstanding the appellant's negligence, had the last clear chance to avoid the consequences of that negligence.

The authorities indicate that while the time factor is important it is not conclusive. Not only must the negligence be subsequent, but it must be
40 severable or independent in order to be classed as "ultimate" or "last clear chance." It is difficult to describe the defendant's negligence as severable from that of the infant plaintiff when the latter received the gasoline in a container that the defendant regarded, as evidenced by the instructions given to its agent, as not reasonably safe for such a purpose, even in the case of an adult.

In the Supreme Court of Canada Reasons for Judgment 28th Nov., 1945 Continued

I have found no case which would hold that the appellant was relieved of liability when the negligent conduct which he contends was ultimate negligence was a foreseeable consequence arising out of his own negligent conduct. It seems contrary to principle that the appellant, having placed a dangerous substance in other than a safety container in the hands of a boy whose negligent conduct was foreseeable, should escape liability by contending that while he knew or ought to have known that injurious consequences would follow, nevertheless he is not liable because that foreseeable negligent conduct resulted in injury. In my opinion the negligence of both 10 parties is so intimately associated and "wrapped up" in the production of the injury that the negligence of the infant respondent should not be described as "ultimate" or as "last clear chance."

Then the appellant submits that the negligent "conduct of the infant plaintiff was 'a conscious act of another volition' and constituted a 'novus actus interveniens'."

> "What has been called the conscious act of another volition may remove liability from one who has been previously negligent if it is proved that in fact that conscious act was the real cause which brought the injury about, but not if it is left in doubt whether the 20 conscious act was the real cause or not, nor if such a conscious act was one of the possible events which there was a duty on the part of the negligent person to guard against."
> *Halsbury,* 2nd Ed. Vol. 23, p. 594, par. 845.

Then again:

> "If what is relied upon as novus actus interveniens is the very kind of thing which is likely to happen if the want of care which is alleged takes place, the principle embodied in the maxim is no defence."
> Greer, L. J., *Haynes* v. *Harwood,* (1935) 1 K.B., 146 at p. 156.

30 The appellant, in support of his contention, submitted two decisions: *Dominion Natural Gas Company* v. *Collins and Perkins,* (1909) A.C. 640, and *Scott* v. *Philip,* 52 O.L.R. 513. In the former the defendant company's negligence was held to be the proximate cause and in the latter the defendant was relieved of liability because the negligent intermeddling with the defendant's automobile by a boy nine years of age was not a foreseeable consequence, but in that case Chief Justice Meredith, in the course of his judgment, at p. 518 states:

> "I am of opinion that there was no evidence to warrant the conclusion that the appellant ought, as a reasonable man, to have antici-40 pated that which the boy did, and that negligence on his part was not established."

The authorities appear conclusive that this contention of the appellant cannot be maintained, where as in this case the negligent conduct of the infant respondent was a foreseeable consequence of its own negligence.

The respondents (plaintiffs) contend that the defendant (appellant) violated Regulation 39 (b) passed under The Gasoline Handling Act, R.S.O. 1937, Chapter 332 Section 12 as that section was amended in 1938. In my view of the facts of this case it is not necessary to deal with the points raised with respect to this legislation.

It follows that the infant plaintiff, because of the contributory negligence rule, would not succeed at common law but it is that rule which has been modified by the Ontario Negligence Act. Under the latter he may recover damages on the basis of apportionment, he being one whose fault or
10 neglect contributed to the loss or damage.

Then should the father's damages be apportioned? The Negligence Act, 1937, R.S.O. Chap. 115, had modified the defence of contributory negligence and provided in certain cases for the apportionment of damages.

> "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 negli-
> 20 gence, 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."

This section specifically provides for the apportionment of damages as between the parties who by their fault or neglect have contributed to the loss or damage. While the father was in no way associated with the events that inflicted the injury suffered by the infant plaintiff, it must not be overlooked that, although a separate and distinct cause of action his has been regarded as a consequential or dependant action and treated
30 upon much the same basis as the infant. The contributory negligence of the latter was a bar to his recovery at common law. It seems, therefore, to follow that under the Negligence Act the principle that his action is affected by the negligence of the infant should be recognized and his damages therefore apportioned on the same basis as that of the infant.

It seems, further, that this is consistent with the conclusion arrived at in *Littley* v. *Brooks & Canadian National Ry. Co.* (1932) S.C.R. 462, where the damages recovered by the plaintiffs under the Fatal Accidents Act, R.S.O., 1927, c. 183 ("Lord Campbell's Act"), were apportioned because of the provisions of the Contributory Negligence Act under which
40 that case was decided.

This view appears to be strengthened by a consideration of the other provision in this section for one who is not at fault or neglect and therefore does not contribute to the loss or damage but is described as a "person suffering loss or damage for such fault or negligence." The damage suffered by such a person is not apportioned, and for the whole amount he has a

joint and several claim against those who are at fault or negligent. If the father be classified as such a person he would have, under this statute, a joint and several claim against the appellant, his infant son, and co/respondent, for his expenditure in discharging the duty which the law imposes upon him as parent. This duty to provide necessaries to his infant is imposed because of the relationship of parent and child and the dependency and inability of the child to provide for himself. *Banks* v. *Shedden Forwarding Co.* (1906) 11 O.L.R. 483; *Young* v. *The Town of Gravenhurst,* (1911) 24 O.L.R. 467. Under Section 242 of the Criminal Code the
10 criminal responsibility is defined and inter alia that the infant be under sixteen years of age, a member of the parent's household and the necessaries required in order to preserve the life or the health of the child. While this does not impose a civil obligation in a case such as this where the civil obligation exists it has been recognized as proper to consider such a provision when determining what is required under certain circumstances.

The Negligence Act modifies the defence of contributory negligence and provides for the apportionment of the damages between those at fault or neglect. It preserves to those who, as a consequence of that fault or neglect, suffer loss or damage without fault or neglect on their part, their
20 common law right to a joint and several claim against these contributors. The common law never contemplated the parent having a claim against his infant for expenditures incurred in providing the necessaries for the preservation of that infant's health and life. I do not think under the language of this statute we should attribute to the legislature an intention to give to the parent a joint and several claim against his infant for the discharge of his parental duty. Such a construction is incompatible with the reason and basis of his obligation, and apart from express words to that effect, or words which necessarily imply that result, this construction ought not to be adopted.

30 The learned trial judge has determined the degree in which the parties hereto are respectively found to be at fault or negligent by apportioning to the plaintiff 75% of the fault and the defendant with 25%. The determination of the degree of fault or neglect appears to be a question which the trial judge is in a much better position to estimate than an Appellate Court which must rely entirely upon the printed record. There does not appear to be any manifest error in law or fact involved in the apportionment, and in my opinion it should not be disturbed.

In my opinion the appeal should be allowed and the judgment of the learned trial judge restored. The respondent should have his costs in the
40 Supreme Court of Ontario, including the costs of the former trial and appeal. The appellant should have his costs of appeal to this court, but there should be no costs to either party of the appeal or cross-appeal to the Court of Appeal on the second occasion.

THE OLIVER BLAIS COMPANY LIMITED

—AND—

WILLIAM YACHUK

CORAM: The Chief Justice, Kerwin, Hudson, Rand and Estey, JJ.

RAND, J.:—That the giving of the gasoline to the two children was, in the circumstances, a negligent act towards them, I do not doubt. Gasoline is a highly dangerous substance which requires special care in handling. Its chief danger is in relation to fire; and the fascination of fire for children is proverbial. One who sets such a danger in motion is held to re-
10 sponsibility for all consequences that in the foresight of a prudent person may result.

But that probability in this case arose not from special circumstances or from responsible volition on the children's part. Having regard to their age, understanding, experience and self-control, they acted as ordinary children would be expected to act. In this their natural curiosity and the intractable impulse "to see what would happen," in the opportunity furnished by the act of the station attendant, played their part. The usual and expectable conduct in ordinary children of such years—and I agree with the Court of Appeal that the evidence does not place the respondent on a
20 higher level than that—is, in relation to the legal standard of care, equivalent to prudent conduct in an adult; and just as prudent conduct gives rise to no legal responsibility for injurious consequences, so the normal conduct of average young children is exempt likewise.

There was here, therefore, an act done by the appellants, a foreseeable consequence of which was injury to the respondent in the course of ordinary behaviour on his part; and the liability of the appellants in such circumstances would seem to be clear.

I would dismiss the appeal with costs.

Order of His Majesty in Council granting leave to appeal 2nd Aug., 1946

(L.S.)

At the Court at Buckingham Palace

The 2nd day of August, 1946

PRESENT:

THE KING'S MOST EXCELLENT MAJESTY

LORD PRESIDENT — MR. SECRETATY EDE

LORD MACMILLAN — MR. BARNES

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 30th day of July 1946
10 in the words following, viz.:—

"Whereas by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of (1) William Yachuk an infant under the age of twenty-one years by his next friend Tony Yachuk and (2) Tony Yachuk in the matter of an Appeal from the Supreme Court of Canada between the Petitioners (Plaintiffs) Appellants and The Oliver Blais Company Limited (Defendant) Respondent setting forth (amongst other matters): that the Petitioners are an infant (thereinafter called "the infant Appellant") and his
20 father (thereinafter called "the adult Appellant") who commenced proceedings in the Supreme Court of Ontario against the Respondent and other Defendants who are no longer concerned in these proceedings for damages for the negligence of the Respondent 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 in a small tin pail: that the damages claimed by the infant Appellant were in respect of personal injuries sustained by him by burns after he and his brother had ignited the gasoline and the damages claimed by the adult Appellant were for out-of-pocked expenses incurred by him
30 for surgical and other treatment for the infant Appellant necessitated by such injuries: that the Supreme Court of Ontario assessed the damages caused to the infant Appellant at $8,000, and those caused to the Adult Appellant at $2,712.75 and held that the Respondent was guilty of negligence but that the infant Appellant (although not the adult Appellant) was guilty of contributory negligence: that the Supreme Court of Ontario found the degree of negligence of the infant Appellant to be 75 per cent. and of the Respondent to be 25 per cent. and ordered Judgment to be entered for the infant Appellant for 25 per cent. of the total damages sustained by him viz. $2,000 and Judg-
40 ment to be entered for the adult Appellant (against whom no negli-

Order of His Majesty in Council granting leave to appeal 2nd Aug., 1946 Continued

gence had been found) for 25 per cent. of the total damages sustained by him viz. $678.19: that the infant and the adult Appellants appealed and the Respondent cross-appealed to the Court of Appeal for Ontario which Court unanimously held that the infant Appellant was not guilty of contributory negligence and that the Respondent was guilty of negligence: that it accordingly allowed the Appeal and dismissed the Cross-Appeal and ordered Judgment to be entered for the infant Appellant for $8,000 damages and for the adult Appellant for $2,712.75 damages: that the Respondent appealed to the Supreme Court of Canada and the five members of such Supreme Court were divided in their opinions: that two Judges held that the Respondent was not guilty of any negligence, two Judges held that the Respondent was guilty of negligence but that the infant Appellant (although not the adult Appellant) was guilty of contributory negligence and found the degree of negligence of the infant Appellant to be 75 per cent. and of the Respondent to be 25 per cent.: and one Judge held that the Respondent was guilty of negligence but that the infant Appellant and the adult Appellant were guiltless of contributory negligence: that the Supreme Court ordered the Judgment of the Court of the Trial Judge to be restored and Judgment to be entered for the infant Appellant for $2,000 and for the adult Appellant for $678.19: And humbly praying Your Majesty in Council to grant the Petitioners special leave to appeal from the Judgment of the Supreme Court of Canada dated the 28th November 1945 or for further or other relief:

"And whereas by virtue of the aforesaid Order in Council there was also referred unto this Committee a humble Petition of the above-named Respondent the Oliver Blais Company Limited in the matter of the above-mentioned Appeal humbly praying Your Majesty in Council to grant the Petitioner special leave to appeal by way of Cross-Appeal from the Judgment of the Supreme Court of Canada dated the 28th November 1945 or for further or other relief:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petitions into consideration and having heard Counsel on behalf of the Parties on both sides Their Lordships do this day agree humbly to report to Your Majesty as their opinion (1) that leave ought to be granted to William Yachuk and Tony Yachuk to enter and prosecute their Appeal against the Judgment of the Supreme Court of Canada dated the 28th day of November 1945 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs (2) that leave ought also to be granted to the Oliver Blais Company Limited to enter and prosecute its Appeal by way of Cross-Appeal against the said Judgment of the said Supreme Court upon depositing in the Registry of the Privy Council the sum of £400 as security for costs (3) that the Appeals ought to be consolidated and heard together upon one printed case on each side (4) that the proper officer of the said Supreme Court

Order of His Majesty in Council granting leave to appeal 2nd Aug., 1946 Continued

ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeals upon payment by the Petitioners of the usual fees for the same."

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed, obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Govern-
10 ment of the Dominion of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

E. C. E. LEADBITTER.

(Printed by His Majesty's Stationery Office Press,
Drury Lane, W.C.2.)

PART II

EXHIBITS

Exhibits No. 1 List of out-of-pocket expenses

(EXHIBIT 1)

Dr. A. B. LeMesurier	$ 150.00
Dr. A. W. Farmer	400.00
Hospital for Sick Children	1,629.15
Hospital for Sick Children (Orthopedic Shoes)	19.00
Ruth Hoople (Reg. Nurse)	42.00
Ruth Creighton (Reg. Nurse)	23.75
10 Ruth Creighton, return train fare—Kirkland Lake to Toronto	24.10
B. Graham (Reg. Nurse)	42.00
City of Toronto, Ambulance	2.00
Kirkland Lake Hospital (Canadian Red Cross Society)	155.60
Drs. Armstrong, Rumball and Messenger	100.00
Crutches	3.00
2nd Pair of special shoes	20.00
Mrs. Yachuk—return train fare—Kirkland Lake to Toronto	24.10
Mrs. Yachuk and William Yachuk—return fare Kirkland Lake to Toronto	36.55
20 Tony Yachuk—3 return trips by truck, St. Catharines to Toronto	30.00
Victorian Order of Nurses, Kirkland Lake	11.50
TOTAL	$2,712.75

XI accounts attached

No. 1

IN THE SUPREME COURT OF ONTARIO
Yachuk v. Oliver Blais Co.
This Exhibit the property of Plaintiff is produced by
the this 10
30 day of May, 1944.
"Frank L. Nash",
Asst. Registrar
S.C.O.

Exhibits No. 1 List of out-of-pocket expenses Continued

Consultation Hours
2.30—4.30 P.M.
By Appointment

Telephone Randolph 3007

Suite 606
Medical Arts Building

Toronto 5, February 24th, 1943.

Mr. Tony Yachuk,
17 Manning Street,
St. Catharines,
10 Ontario.

DR. A. B. LeMESURIER

For Professional Services, $150.00.

The Medical Arts Building
Bloor West at St. George Street
Toronto.

March 12, 1943.

Bench, Keogh & Cavers,
3 James Street,
St. Catharines, Ontario.

20 To A. W. FARMER, M.D.

For Professional Services, $400.00.

Re: William Yachuk

Accounts Rendered Monthly.

Exhibits No. 1 List of out-of-pocket expenses Continued

J. H. W. Bower,
Superintendent.

J. S. Crawford,
Sec.-Treas.

THE HOSPITAL FOR SICK CHILDREN
67 College Street
Toronto

Mar. 23/43 194

Mr. Tony Yachuk,
46 Kirkpatrick Ave.,
Kirkland Lake, Ont.

10 re: William Yachuk.

Sept. 15/40—to—Mar. 3/42—	534 Days @ $2.35	$1,254.90
Nov. 8/40—Transfusion Fees		5.00
May 9/42—to—July 18/42—	7 Days @ $3.00	21.00
	63 Days @ $1.75	110.25
Aug. 10/42—to—Oct. 20/42—	7 Days @ $3.00	21.00
	64 Days @ $1.75	112.00
Nov. 17/42—to—Nov. 26/42—	9 Days @ $1.75	15.75
Dec. 18/42—to—Feb. 2/43—	7 Days @ $3.00	21.00
	39 Days @ $1.75	68.25
20		$1,629.15
Total Amount paid by parents, to date		$1,221.40
		$407.75

Orthopedic Shoes Supplied to William	$13.00
Paid in full—Feb. 2/43	$13.00

August 7, 1940.

Mr. Tony Yachuk, Father of
William Yachuk

To Ruth Hoople Reg. Nurse

For attendance from Aug. 1st, 8 a.m., 1940, to Aug. 7th, 8 p.m., 1940,

30 .... nights ......7...... days at $6.00 .... $42.00

Travelling Expenses .... $

Received Payment Total $42.00

$42.00 With Thanks

"Ruth Hoople".

Exhibits No. 1 List of out-of-pocket expenses Continued

Received from Mr. T. Yachuk the sum of $23.75 for nursing son, Billie.

"Ruth Creighton, Reg.N."

Train ticket, to Toronto, $24.10 also paid by Mr. Yachuk.

August 7, 1940.

Mr. Tony Yachuk, Father of
William Yachuk

To Bernice Graham, Reg. Nurse

For attendance from July 31st, 8 p.m., 1940, to August 7th, 8 a.m., 1940,
.......7....... nights .... days at $6.00 .... $42.00

10 Travelling Expenses .... $

Received Payment Total $42.00

$42.00 With thanks

"B. Graham, Reg. N."

No. 911

Toronto, Sept. 15, 1940.

RECEIVED from Mrs. Yachuk...
Address .... Kirkland Lake, Ont. ....
$2.00 .... Two .... 00/100 Dollars
being Ambulance Fee for Bill Yachuk ....

20 From Union Depot .... To .... H.S.C. ....

CITY OF TORONTO

Department of Public Health
Per: "L. Cavers".

..................Hospital, Sept. 25, 1940.

Mr. Tony Yachuk
46 Kirkpatrick St.

1983-40
In Account with

Canadian Red Cross Society

30 ONTARIO DIVISION

Hospital Service	Debit	Credit	Balance
acct. of July, 1940	$155.60		

May we remind you of your promise to make a payment on Billy's account on September 15th? We would therefore appreciate it by return of mail.

Exhibits No. 1 List of out-of-pocket expenses Continued

Telephone 76 | 52B Government Rd., W.

Jan. 4, 1941.

Kirkland Lake,
Ontario.

Mrs. Tony Yachuk,
46 Kirkpatrick

R. H. ARMSTRONG, M.D.
W. C. RUMBALL, M.D. D. B. MESSENGER, M.D.
Physicians and Surgeons

To Professional Services $100.00

10

Items given at office on request.

No. 19003

HOSPITAL FOR SICK CHILDREN
67 College Street, Toronto 2
Country Branch, Thistletown, Ont.

20

Dec. 13, 1943.

Received from Mrs. Yachuk ....
the sum of Ten .... 00/100 Dollars $10.00
deposit on pr. made shoes .... Wm. ....

J. S. Crawford,
Secretary-Treasurer.
Per "M.R."

No. 23389

to be mailed
next week

30

HOSPITAL FOR SICK CHILDREN
67 College Street, Toronto 2
Country Branch, Thistletown, Ont.

March 24, 1944.

Received from Mr. A. Yachuk $10.00
the sum of Ten .... 00/100 Dollars
shoes for Wm. ....

J. S. Crawford,
Secretary-Treasurer,
Per "M.R."

Exhibits No. 3 Underwriters' Laboratories Standard for Design and Construction of Safety Cans

(EXHIBIT 3)

UNDERWRITERS' LABORATORIES
STANDARD
for
DESIGN AND CONSTRUCTION
of
SAFETY CANS.
May 14, 1930.

10

No. 3
IN THE SUPREME COURT OF ONTARIO
Yachuk v. Oliver Blais Co.
This Exhibit the property of Plaintiff is produced by
the this 11th
day of May, 1944.

"Frank L. Nash",
Asst. Registrar
S.C.O.

20

UNDERWRITERS' LABORATORIES, INC.

Subj. 30 May 14, 1930.

UNDERWRITERS' LABORATORIES'
STANDARD
for
DESIGN AND CONSTRUCTION
of
SAFETY CANS.

GENERAL

This Standard covers the design and construction of safety cans to be
30 employed for temporary storage and handling of flammable liquids such as gasoline, naptha, etc., inside of buildings that are not provided with special storage rooms of proper construction.

This Standard states minimum requirements. It is based upon records of tests and field experience, and is subject to revision as further experience and investigations may show to be necessary or desirable.

Exhibits No. 3 Underwriters' Laboratories Standard for Design and Construction of Safety Cans Continued

Devices or products which comply with this Standard will not necessarily be acceptable if they have other features which, when examined and tested, are found to impair the results contemplated by this Standard.

A device or product having materials or forms of construction differing from those detailed in this Standard may be examined and tested according to the intent of the Standard and if found to be substantially equivalent may be given recognition.

In this Standard, the following words are used as defined below:
"shall" is intended to indicate requirements.
10 "should" is intended to indicate recommendations, or that which is advised but not required.

DESIGN

1. These devices shall be of such design that when completely filled with liquid they will regain their stability when tipped in any direction to an angle of 30 Deg. from the vertical. The capacity shall not exceed 10 U.S. gallons.

2. To insure a reasonable degree of stability, the diameter of the base of the can shall be equivalent to at least eighty-five per cent. of the height of its body.

20 3. Each opening into the can body shall have an automatic valve, which will remain securely closed with the can in all positions, until it is opened by the application of manual pressure at a specific point in a definite direction. (A series of small holes, controlled by a single valve, is considered a single opening). Cans having a capacity of one quart or over may be provided with a screw cap closure for the filling opening, provided the cap is lined with resilient material not readily affected by the liquid or its vapors and is attached to the can with a chain.

4. Cans shall be provided with a valve or equivalent device of such design that internal pressure of vapor will be relieved considerably before it
30 accumulates in an amount sufficient to rupture any seam of the can.

5. Cans smaller than one quart shall be limited to a single valved opening into the body, adapted to both filling and emptying.

6. No can shall have more than two valved openings and, where two are used, each valve shall be closed independently of the other to avoid leaks resulting from unequal wear of valves or from lost motion.

7. Openings into the body of the can shall not be provided with stuffing boxes, removable plugs, or corks. Bottoms of cans shall be set up at least one-eighth inch above the lower edge of the body to protect the bottom from abrasion and puncturing.

40 8. Suitable handles of substantial design shall be provided, both for carrying the can and for holding it while in use.

Exhibits No. 3 Underwriters' Laboratories Standard for Design and Construction of Safety Cans Continued

CONSTRUCTION

MATERIALS:

9. Cans shall be constructed from either steel sheets, suitably coated to retard corrosion, or of copper or brass sheets of equivalent thickness. Sheets coated with tin and lead shall be equivalent to commercial 13-lb. terne plate.

10. The thickness of steel sheets measured under the coating shall be not less than that enumerated in the following table. Coating which is removed or injured in the process of manufacture shall be replaced by solder.

10

Trade Size	Minimum Thickness of Metal in Body, Bottom and Top.
1 pt.	No. 26 U.S. gauge (0.01875 in.)
1 qt.	"
2 qt.	"
1 gal.	"
2 gal.	No. 24 U.S. gauge (0.025 in.)
3 gal.	"
5 gal.	"
10 gal.	No. 22 U.S. gauge (0.03125 in.)

20

Seams and Joints:

11. All seams and joints in contact with liquid or vapors shall be made mechanically secure in addition to being thoroughly sweated with solder, unless brazed or made with a continuous weld. Formed seams shall be not less than 1/8 in. wide, measured from the offset. Acceptable types of seams and joints are illustrated by Fig. 1.

30 Handles:

12. (a) Cans of the 2-gal. and larger sizes should be equipped with a bail handle unless they incorporate other acceptable cans for readily carrying them from place to place.

(b) In the absence of a foot ring or reinforcing ring at the bottom edge and if the bottom is not set up a sufficient distance from the edge to serve as a grip in pouring, a bottom handle shall be provided.

13. Handles and other fitting shall be secured to cans by rivets or by some other acceptable method which will withstand the handling incident to rough usage. The heads of the rivets shall be on the inside of the can so 40 that the formed head can be made on the fitting rather than against the metal of the can itself. Rivets shall be sweated with solder for tightness unless the can is galvanized after forming.

14. Handles shall have a grip of not over 1½ in. wide, and the hand clearance shall not be less than 3½ in. by 1 in. Edges of sheet metal handles shall be hemmed or wired.

Exhibits No. 3 Underwriters' Laboratories Standard for Design and Construction of Safety Cans Continued

Spouts and Fill Fittings:

15. Fill openings shall be not less than ½ in. in diameter, and shall be so located as to permit ready filling of the can.

16. Acceptable provision shall be made for properly venting the can during the filling operation.

17. Screens incorporated in the assembly of safety cans to remove dirt and other foreign materials from the liquid while not required by these specifications, if supplied shall be made of perforated brass or possess other acceptable construction not readily affected by corrosion. They shall
10 be readily removable for cleaning.

18. All fill and discharge fittings shall be made of non-corrodible metal, and shall be secured to the cans above the highest liquid level. Castings, if used, shall be not less than ⅛ in. thick and shall be close grained and free from imperfections. Tubing, if used, shall be not less than No. 16 B. & S. gauge (0.050) in wall thickness.

Valves:

19. Metal parts of valves shall be made of non-corrodible material, except that springs may be of steel and, if necessary, suitably protected against corrosion. Non-metallic parts shall be of material not readily affected by
20 the liquid used or its vapor, and shall be so located that they will not be injured by a funnel employed in filling the can. Gaskets shall be made of material whose suitability for this use has been determined by Underwriters' Laboratories and shall be mechanically secured in place.

20. Bearing pins, for valves, shall be at least 3/32 in. in diameter and shall be headed over at each end to prevent loosening and become lost. Wire used in springs for closing valves shall be not less than 0.050 in. in diameter.

Workmanship:

21. Cans shall be made and finished with the degree of uniformity and
30 grade of workmanship practicable in well-equipped shops.

Marking:

22. Each can shall be plainly marked either with the name or trade mark of the manufacturer, or with some other identifying symbol agreed upon with the laboratories.

TESTS

23. Each can shall be tested by the manufacturer for leaks before it is shipped.

24. Each can (not including the valve) shall be capable of withstanding, without leakage, an air pressure of not less than 5 lb. per sq. in.

40 25. Each valve shall be capable of withstanding, without leakage of more than 4 drops (1/100 U.S. Fluid ounce) per min., the pressure obtained when the completely filled can is inverted. The valve shall not be open when the can is laid on a plane surface in any position.

26. The valve shall be capable of withstanding 6,000 operations without failure of any part, and shall then be able to comply with the above leakage test requirements.

Exhibits No. 4 Extract from the Gasoline Handling Act and Regulations passed thereunder

(EXHIBIT 4)

12. The Lieutenant-Governor in Council may make regulations,—

(a) providing for the appointment of such inspectors, officers and other persons as may be necessary for the proper carrying out of the provisions of this Act and the regulations;

(b) providing for the issuing of licenses authorized by this Act and for the production or posting thereof and prescribing the fees payable therefor;

(c) prescribing the records and books relating to gasoline, kerosene
10 and distillate to be kept by any person or class of persons whether or not such person or class of persons is licensed under this Act;

(d) providing for the making of returns and statements by any person or class of persons whether or not such person or class of persons is licensed under this Act;

(e) exempting any person or class of persons from the operation of or compliance with this Act or the regulations, or of any of the provisions thereof;

(f) requiring that all gasoline stored or offered for sale in Ontario shall be graded according to such scale as the regulations may
20 prescribe;

(g) requiring importers, manufacturers, jobbers and vendors of gasoline to indicate the grade and price of gasoline offered for sale;

(h) fixing the grade or quality of gasoline which may be offered for sale;

(i) providing for the sealing of pumps, tanks, reservoirs and other containers of gasoline;

(j) prescribing the construction, equipment and operation of conveyances and containers used for the transportation and storage of gasoline, kerosene and distillate;

30 (jj) prescribing the method, manner and equipment to be used in the handling, storing, selling and disposing of gasoline, kerosene and distillate;

(k) providing for the holding of inquiries into the operation of this Act and into any charges of complaint that any person has violated or failed to observe any provision of this Act or the regulations, or has made any false statement in any return or statement required to be made by this Act or the regulations, or into any other matter arising in the administration of this Act, and providing that the person holding such inquiry shall have all the powers of
40 a commissioner appointed under the PUBLIC INQUIRIES ACT including the power to take evidence under oath;

(l) generally for the better carrying out of the provisions of this Act. R.S.O. 1937, c. 332, s. 12; 1938, c. 14, s. 2.

Exhibits No. 4 Extract from the Gasoline Handling Act and Regulations passed thereunder Continued

39. Portable containers in which Class 1 liquids are sold or delivered to the public shall be of an approved metal safety type and a label shall be attached by the vendor in each case on which shall be printed in bold type a warning that the contents are dangerous and should not be exposed to fire or flame and should not be used for cleaning purposes in any building, provided that this regulation shall not apply to,—

(a) the bulk sale or delivery of gasoline in quantities, five gallons or over, in regular gasoline drums, half drums, quarter drums or sealed containers complying with the specifications of the Board 10 of Transport Commissioners for Canada or the Interstate Commerce Commission of the United States, or

(b) the delivery in a metal container of gasoline required to refuel a motor vehicle to permit of its being moved.

(c) the taking of samples for test purposes, by oil company representatives or by officials appointed under the Act or these Regulations, in metal containers sealed on the premises of the service station.

No. 4

IN THE SUPREME COURT OF ONTARIO
20 Yachuk v. Oliver Blais Co.
This exhibit the property of Plaintiff is produced by
the this 11th
day of May, 1944.

"Frank L. Nash",
Asst. Registrar
S.C.O.

Exhibits No. 5 Placard Warning re Gasoline

(EXHIBIT 5)

(Coat of Arms)
Ontario

Department of Highways

WARNING RE GASOLINE

Extracts from The Gasoline Handling Act,
R.S.O. 1937, c. 332

IN THIS ACT:

1. "Gasoline" shall include any liquid derived from petroleum, coal
10 or natural gas whether or not it is mixed, combined or compounded with any other substance or material, as well as benzol and other liquids by whatever name known or sold, produced, prepared or compounded for the purpose of generating power by means of internal combustion or which may be used for such purpose except the product commonly known as kerosene or coal oil when such product is not mixed or combined with gasoline, benzol or any other liquid described by this clause.

2.—(1) No person shall offer for sale, or sell gasoline, kerosene or distillate in Ontario unless licensed so to do by the Minister under this Act.

(2) No person, other than a railway company, shall transport gaso-
20 line, kerosene or distillate in Ontario unless licensed so to do by the Minister under this Act.

3. No person shall mix, combine or compound any constituent of gasoline with any other substance or material whether a constituent of gasoline or not, for the purpose of offering such mixture, combination or compound for sale unless licensed so to do by the Minister.

4. Every person who violates any of the provisions of this Act or the regulations for which no other penalty is provided, shall be guilty of an offence and shall be liable for a first offence to a penalty of not less than $25 and not exceeding $100, or to a term of imprisonment of not less than
30 ten days and not exceeding one month, or to both, and for a second or subsequent offence to a penalty of not less than $100 and not exceeding $500, or to a term of imprisonment of not less than one month and not exceeding six months, or to both. R.S.O. 1937, c. 332, s. 14.

5.—(1) "Motor Vehicle" shall include automobile, motor bicycle and any other vehicle propelled or driven otherwise than by muscular power; but shall not include the car of an electric or steam railway or any other motor vehicle running only upon rails or any steam traction engine.

(2) No owner or operator of a motor vehicle shall permit the engine to run while any flammable petroleum product is being delivered to the
40 fuel tank and no person shall deliver any flammable petroleum product to the fuel tank of a motor vehicle while its engine is running.

Exhibits No. 5 Placard Warning re Gasoline Continued

6. Every importer, refiner, distributor, jobber, wholesaler, retailer and transporter of gasoline, kerosene or distillate, and every person who acts as an agent for a person engaged in the business of handling gasoline without Ontario and every person who mixes, combines or compounds gasoline, shall—

(a) Keep records showing all gasoline, kerosene or distillate, coming into his possession or ownership or under his control as well as the disposition thereof;

(b) Retain in his possession all vouchers and records of every kind in
10 any way relating to such gasoline, kerosene or distillate received by him;

(c) Cause a physical inventory of all gasoline, kerosene and distillate to be made at the close of business on the last business day of each calendar month;

(d) Furnish the Minister with such information as the Minister may from time to time require.

7. No person driving, loading, unloading or riding upon or being about a vehicle shall smoke or have in his possession any lighted pipe, cigar, cigarette or lighted match.

8.—(1) Flammable petroleum products may be stored or kept at a
20 service station or store in quantities not exceeding 50 gallons in all of Class I, and 1,000 gallons in all of Class II in a building of fire-resistive construction located at least 50 feet from any other building and used only for such purpose.

(2) Petroleum products may be stored or kept at a service station or store in quantities not exceeding 5 gallons in all of Class I and 150 gallons in all of Class II in a building of fire-resistive construction at least 10 feet from any other building or in a fireproof room with automatic fire doors, such building or room to be subject to the approval of an authorized official as to construction and location and to be used only for such purpose.

30 (3) A quantity of petroleum products not exceeding 5 gallons in all of Class II may be stored or kept in tightly closed metal containers at a service station or store.

9. Portable containers in which Class I liquids are sold or delivered to the public shall be of an approved metal safety type and a label shall be attached by the vendor, in each case on which shall be printed in bold type a warning that the contents are dangerous and should not be exposed to fire or flame and should not be used for cleaning purposes in any building, provided that this regulation shall not apply to—

(a) the bulk sale of gasoline in quantities exceeding five gallons in
40 regular gasoline drums, half drums, quarter drums or sealed containers complying with the specifications of the Board of Railway Commissioners for Canada or the Interstate Commerce Commission of the United States, or

Exhibits No. 5 Placard Warning re Gasoline Continued

(b) the delivery in a metal container of gasoline required to refuel a motor vehicle to permit of its being moved.

10. Flammable petroleum products shall not be drawn off from containers nor handled nor used in the presence of any flame or fire, nor in any location where flammable vapours from such petroleum products may be communicated to any open flame or fire.

11. No person shall provide for or permit the supplying of Class I liquids to the public by any self-serve method in any quantities whatever.

12. All drums and barrels used for flammable petroleum products
10 shall, when emptied, be tightly closed and an authorized official may prohibit, or limit the storage of such empty drums or barrels in any place where he deems it advisable.

13. No flammable petroleum products or crank-case oil shall be permitted to enter any sewer or subsurface drainage system but suitable liquid collectors shall be provided.

14.—(1) Approved fire extinguishing devices and materials shall be provided and maintained in good condition at service stations and at stores where petroleum products are kept or stored.

(2) An easily accessible remote-control switch shall be provided for
20 electrically-operated pumps.

S. O. CUTHBERTSON. Chief Inspector, Gasoline Handling Act.

T. B. McQUESTEN, Minister of Highways.

POST THIS CARD IN A CONSPICUOUS PLACE