Privy Council Appeal No. 88 *of* 1946

William Yachuk and Another - - - - - - *Appellants*

v.

The Oliver Blais Company Limited - - - - - *Respondent*

The Oliver Blais Company Limited - - - - - *Appellant*

v.

Yachuk and Another - - - - - - - *Respondents*

(*Consolidated Appeals*)

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH APRIL, 1949

Present at the Hearing:

VISCOUNT SIMON
LORD PORTER
LORD DU PARCQ
LORD MACDERMOTT

[*Delivered by* LORD DU PARCQ]

William Yachuk, an infant who sued by his father as next friend, and Tony Yachuk (the father suing in his own right) were plaintiffs, and the Oliver Blais Company Limited was defendant, in an action begun in January, 1943, in the Supreme Court of Ontario. Two other defendants who were also sued are no longer concerned in the proceedings, and no further reference need be made to them. The plaintiffs' claim was for damages for negligence and breach of statutory duty. Of the alleged breach of statutory duty all that need now be said is that no argument was addressed to their Lordships in support of that head of the claim. The negligence alleged consisted in supplying the infant plaintiff, then a child of nine years of age, with a small quantity of gasoline, with the result that he suffered injury, and his father was put to expense. The first hearing of the action was abortive, as a new trial was ordered on appeal. The case was ultimately tried by Urquhart, J., who, for reasons which are now irrelevant, discharged a jury before whom the hearing had begun, and proceeded to hear and determine the case without their assistance. The learned judge found that there was negligence on the part of the defendant Company, and that its negligence was a cause of the injuries which the infant plaintiff had sustained. He further found that there was contributory negligence on the part of the infant plaintiff. He assessed the damages at $8,000 in respect of the infant plaintiff and $2,712.75 in respect of the adult plaintiff, but, inasmuch as he regarded the infant plaintiff as "seventy-five per cent. responsible" for his own injuries, he apportioned the damages, as between the defendant Company and each of the plaintiffs, in proportion to the degree of negligence so found. It was therefore adjudged that the infant plaintiff should recover $2,000 and his father $678.19. The question whether the terms of the Negligence Act (R.S.O. 1937, c. 115) could justify, on any view of the facts, this reduction of the damages awarded to the father does not appear to have been argued before the learned judge. It was

answered in the affirmative by two judges of the Supreme Court of Canada. As will appear, no other judge had occasion to pronounce on it, and their Lordships have not found it necessary to consider it.

The plaintiffs appealed, and the defendant cross-appealed, to the Court of Appeal for Ontario. A judgment with which Robertson, C.J.O., and Roach, J.A., expressed their agreement was delivered by McRuer, J.A. The appeal of the plaintiffs was allowed, the Court holding that the defence of contributory negligence failed. The cross-appeal was dismissed. The order of the Court was that judgment should be entered for the full amounts at which Urquhart, J., had assessed the damages, without deduction.

From this order the defendant appealed to the Supreme Court of Canada. Of the five judges who heard the appeal two, the Chief Justice of Canada and Kerwin, J., were of opinion that the appeal should be allowed and the action dismissed, holding that negligence could not be imputed to the defendant's salesman. The other three (Hudson, Rand and Estey, JJ.) were all agreed that there was negligence on the part of the defendant's salesman, but whereas Hudson and Estey, JJ., thought that the trial judge was right in his finding of contributory negligence, and in reducing the damages accordingly, Rand, J., agreed with the decision of the Court of Appeal for Ontario. In the result an order was made restoring the judgment of Urquhart, J.

This result satisfied neither plaintiffs nor defendant, and each side sought and obtained leave to appeal to His Majesty in Council, the defendant by way of cross-appeal.

It is now necessary to set out in a little detail the relevant facts as they were found by the learned judge at the trial. In the afternoon of the 31st July, 1940, the infant plaintiff, who was accompanied by a younger brother then aged seven, went to the respondent's gasoline station in Kirkland Lake. A youth named Black, who was employed by the respondent, was then serving customers. The boys bought from him five cents' worth of gasoline. It appears that the five cents were paid to Black by the younger boy, but "the transaction" (the learned judge found) "was with the larger boy" who twice told Black that he wanted the gasoline to put in his mother's car which "was stuck down the street." Black, who had been instructed that the gasoline in the pumps contained lead and ought not to be used for dry cleaning, then asked whether it was to be used for dry cleaning. The infant plaintiff replied that it was not and repeated that it was needed for his mother's car. Black repeated his question, and received the same reply. The boys had provided themselves with a lard pail with a closely fitting, but removable, lid and Black, not without "real doubts and misgivings . . . as to the propriety of his sale" (which, in the learned judge's view, were justified) supplied them with about a pint of gasoline, half filling the pail. That Black had doubts was indicated both by his question about dry cleaning, and by the fact that before the boys had gone beyond recall he told the assistant-manager about the sale, and said "That's all right, isn't it?" The learned judge attached importance to the fact that the gasoline was not supplied in a "safety container", but in a receptacle which he found to be unsafe.

The story which the infant plaintiff told to Black was untrue. The boys' mother was in fact ill in bed. The five cents had been provided by her for the purchase of a confection known as chocolate milk. The boys wanted the gasoline in order to make use of it in a game in which they proposed to play the part of Red Indians, and to enact a scene which they had witnessed in a moving picture. For this purpose torches were required, and it had occurred to them that by soaking in gasoline some bulrushes which they had gathered and setting them alight with matches, satisfactory torches might be made. They had failed to obtain the necessary gasoline from another station in the neighbourhood, where it had been refused at first because they brought with them a glass container, and later, when they arrived with the lard pail, because (the learned

judge thought) " they told a different story on this occasion." It was after the latter rebuff that they visited the defendant's station and were successful.

The sequel may be told in the learned judge's own words: " 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. They went to a lane, out of sight of the gas station and some distance away from it. 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 were no sparks." The unhappy result was that " the infant plaintiff was most painfully and seriously burned."

On these facts the learned judge found " that under all the circumstances of the case, Black should have reasonably anticipated that the gasoline might be used for a dangerous purpose by these two young lads " and held that his negligence contributed to cause the injuries which the infant plaintiff suffered.

As appears from the summary of the proceedings at the beginning of this judgment, all the Courts in Canada have concurred in these findings, although the Court of Appeal for Ontario went further, holding that contributory negligence could not be imputed to the infant plaintiff and that his injuries must be attributed solely to the negligence of the defendant. It would be contrary to the well known rule of practice by which their Lordships are guided to reject these concurrent findings of fact. In their Lordships' opinion it is hopeless to contend that there was not evidence to support the findings. Not all the reasons given for them by the learned judge seem to their Lordships to be equally convincing, but the evidence taken as a whole in their view fully substantiates the conclusion at which both the judge and the two appellate courts in Canada arrived on these matters. The rule as to concurrent findings is none the less applicable when the decision of a Court is not unanimous: see *Robins* v. *National Trust Co.* [1927] A.C. 515, 517; *Srimati Bibhabati Devi* v. *Kumar Ramendra Narayan Roy* [1946] A.C. 508, 521.

It was contended on behalf of the defendant, at their Lordships' bar, as it had been, without success, at the trial, that assuming its employee to have been negligent, the subsequent acts of the infant plaintiff were the real cause of his injuries, and were an intervening cause, or *novus actus interveniens*, to which alone those injuries should be ascribed. Alternatively the defendant relied on the finding of the learned judge, supported as it was by the judgment of the Supreme Court of Canada, that there was contributory negligence on the part of the infant plaintiff.

The latter of these submissions accords with the judgment under appeal, and it is convenient to deal with it at once. The negligence of the defendant consisted in putting into the hands of a small boy a dangerous substance with which a reasonable man, taking thought, would have foreseen that the child was likely to do himself an injury. The fact that the boy told an untruth in order to persuade Black to give him the gasoline, a fact on which the defendant's counsel much relied, cannot avail the defendant in view of the learned judge's finding that Black's doubts as to the propriety of the sale were justified. To put a highly inflammable substance into the hands of a small boy is to subject him to temptation and the risk of injury and this is no less true if the boy has resorted to deceit in order to overcome the suppliers' scruples. The child's deceit can afford no excuse to the supplier when it is found that the story told was such as to arouse, rather than allay, suspicion in the mind of a reasonable

man. In the circumstances, therefore, their Lordships think that McRuer, J.A., was right in applying to this case the principle stated by Lord Denman, C.J., in *Lynch* v. *Nurdin* (1841) 1 Q.B. 30, at p. 38: "The most blameable carelessness of this servant having tempted the child, he (the defendant) 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." The negligence of the defendant's servant in the present case may call for less severe condemnation than these words express: the principle which they embody is none the less applicable.

Urquhart, J., was led to his finding of contributory negligence by the view which he formed as to the special characteristics of the infant plaintiff. He found that the boy was "mentally alert" and "bright", and said of him "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 dangers of matches. His father had gasoline in his workshop which was attached to the house. The (infant) 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" (in which he worked as a plumber). "I have no doubt," the learned judge added, "that the boy fully appreciated that gasoline was a dangerous substance, and had considerable knowledge that it burned in no ordinary manner."

It was contended on behalf of the plaintiffs that the learned judge's findings were illogical and inconsistent. Black was negligent because he ought to have recognised that a boy of the age of the infant plaintiff not only lacked knowledge and experience, but was likely to have mischievous propensities. These defects being characteristic of the normal boy, it was impossible (so ran the argument) to impute to this boy, whatever exceptional training or experience he might have had and however reckless he might appear to have been, any failure to take reasonable care for his own safety. In other words, he could not be found guilty of contributory negligence.

Their Lordships do not find it necessary to decide whether there is a necessary inconsistency, in all cases in which the defendant owes a duty to show special care in his dealings with a child, in a finding of negligence by the defendant coupled with one of contributory negligence by an infant plaintiff. If the evidence had shown that the infant plaintiff in the present case had in fact greater knowledge of the dangerous properties of gasoline than would be imputed normally to a child of his age, a more debatable question would have arisen. A careful examination of the evidence has satisfied their Lordships that the boy had no knowledge of the peculiarly dangerous quality of gasoline. He knew, no doubt, that an object soaked in gasoline could be ignited with a match. He did not know, and there is no evidence that he had ever been told, that gasoline was a volatile liquid capable of producing a highly inflammable vapour likely to burst into flame if heat were brought near it. He knew (he said in his evidence) that "it would burn like a match . . . after you strike it." His father said that he had never warned him about gasoline, because he did not think that a boy could buy it. The boy himself said, what is likely enough, that his father had told him to keep away from his gasoline torch, but that he was "pretty sure" that neither of his parents had ever warned him "to be careful with gasoline." On the evidence it is, in their Lordships' view, impossible to regard him as any more capable of taking care of himself in the circumstances in which he was placed than a normal

boy of his age might be expected to be. In the words of Denman, C.J., although he may be said to have acted "without prudence or thought", he "showed these qualities in as great a degree as he could be expected to possess them." It is a fair inference from the evidence that it was the very property of gasoline which he neither knew, nor could be expected to know, which brought about his misadventure. Their Lordships are accordingly of opinion, in agreement with the Court of Appeal for Ontario, that on the facts of this case the finding of contributory negligence cannot be supported.

It follows from what their Lordships have already said that the attempt to attribute the disaster which happened solely to the acts of the infant plaintiff must fail. That defence cannot indeed be maintained in the light of the concurrent findings of fact in this case, for when once the negligence of the defendant's servant has been found to have contributed to cause damage to the plaintiff, it is impossible to say that a new cause has intervened so as to relieve the defendant of all responsibility for the evil consequences which followed his wrongful act. Their Lordships will add, however, that even without regard to the rule of practice as to concurrent findings they would have had no difficulty in arriving at the same conclusion. However the case is put, the answer made by McRuer, J.A., in the Court of Appeal for Ontario, seems to their Lordships to be conclusive in the light of the evidence: "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 reasonably be expected to do."

Their Lordships will humbly advise His Majesty that the plaintiffs' appeal should be allowed, the judgment and order of the Supreme Court of Canada set aside, the judgment and order of the Court of Appeal for Ontario of the 19th December, 1944, restored, and the cross-appeal of the defendant dismissed. The defendant must pay the plaintiffs' costs of the appeal to the Supreme Court of Canada and of the appeal and cross-appeal to His Majesty in Council.

(64695) Wt. 8062—31 110 4/49 D.L.

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