CASES

DETERMINED BY THE

SUPREME COURT OF CANADA ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

THE OLIVER BLAIS COMPANY LIMITED (DEFENDANT) ..... APPELLANT;

AND

WILLIAM YACHUK, AN INFANT UNDER THE AGE OF TWENTY-ONE YEARS, BY HIS NEXT FRIEND, TONY YACHUK, AND THE SAID TONY YACHUK, (PLAINTIFFS).. RESPONDENTS.

1945

*June 6, 7
*Nov. 28

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Sale by defendant at its gasoline station of small quantity of gasoline to child, nine years of age, on his statement that it was wanted for his mother's car that was "stuck"—The child burned while playing with the gasoline—Whether defendant liable in damages—Whether contributory negligence of child—Contention of "ultimate" negligence or "last clear chance"—Apportionment of fault—Application of apportionment to child's father's claim for damages—Gasoline Handling Act, R.S.O. 1937, c. 332, s. 12; and Regulation 39 passed thereunder—Negligence Act, R.S.O. 1937, c. 115.

The infant plaintiff, nine years of age, accompanied by his brother, aged seven, came with an empty lard pail to an attendant at defendant's gasoline station and asked for and got five cents' worth of gasoline, saying that he wanted it for his mother's car that was "stuck down the street." In fact he wanted it for "playing Indians" with lighted bulrushes. The boys went away from, and out of sight of, the gasoline station, dipped a bulrush in the gasoline and lighted it, which resulted in severe burns to the infant plaintiff. He and his father sued defendant for damages. The trial Judge ([1944] 3 D.L.R. 615; [1944] O.W.N. 412) found that both defendant's attendant and the infant plaintiff were negligent and apportioned the degrees of fault

*PRESENT:—Rinfret, C.J. and Kerwin, Hudson, Rand and Estey JJ.

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at 25 per cent. against defendant and 75 per cent. against the infant plaintiff, and gave judgment against defendant for one quarter of the damages, which he assessed. The Court of Appeal for Ontario ([1945] O.R. 18; [1945] 1 D.L.R. 210) held that defendant should be held solely responsible and gave judgment against it for the full amount of the damages suffered (as assessed by the trial Judge). Defendant appealed to this Court, asking that the action be dismissed, or, in the alternative, that the judgment of the trial Judge be restored.

Held: *Per* the Chief Justice and Kerwin J: Defendant's appeal should be allowed and the action dismissed. *Per* Hudson and Estey JJ.: Defendant's appeal should be allowed and the judgment of the trial Judge restored. *Per* Rand J.: Defendant's appeal should be dismissed. In the result, the Court pronounced judgment allowing the appeal and restoring the judgment of the trial Judge.

Per the Chief Justice and Kerwin J.: Defendant's attendant did not act unreasonably or negligently. It would be putting too great a burden on the conduct of everyday affairs to hold that under all the circumstances of the case he was prohibited from selling the gasoline to the boys. As to the contention that defendant acted in breach of regulation 39, passed under *The Gasoline Handling Act,* R.S.O. 1937, c. 332, s. 12—Assuming the regulation to have been in force at the time (as to which no opinion was expressed), the facts brought the case within proviso (*b*) by which the regulation did not apply to "the delivery in a metal container of gasoline required to refuel a motor vehicle to permit of its being moved".

Per Hudson and Estey JJ.: The evidence supported the finding, as made in effect by the trial Judge, that defendant negligently placed in the hands of two young boys a dangerous substance, with respect to which their negligent conduct would be anticipated or foreseen by a reasonably careful person in the same or similar circumstances. (In the view taken of the facts, it was found unnecessary to deal with points raised with respect to *The Gasoline Handling Act* and Regulation 39 passed under it). On the other hand, the evidence and the trial Judge's opportunities at trial justified acceptance of his findings to the effect that the infant plaintiff appreciated the possibility of harmful consequences; that, having regard to his capacity, knowledge and experience, he was not, at the time of the accident, a child of tender years, as that phrase is understood and applied in law, but a boy beyond tender years, and therefore one whose conduct might constitute contributory negligence. The conduct of defendant, and that of the infant plaintiff, each constituted contributory negligence. The negligence of both was so intimately associated and "wrapped up" in causing the injury that the negligence of the infant plaintiff should not be held to be "ultimate" or the negligence of one who, notwithstanding defendant's negligence, had the last clear chance to avoid its consequences. Nor could defendant's contention that the infant plaintiff's conduct was "a conscious act of another volition" and constituted a *novus actus interveniens,* be maintained where, as here, the infant plaintiff's negligent conduct was a foreseeable consequence of defendant's own negligence. The infant plaintiff should recover damages from defendant on the basis of apportionment under *The*

Negligence Act, R.S.O. 1937, c. 115; and the trial Judge's apportionment of fault should be accepted; and, on a proper construction of that Act (discussed), the apportionment should apply to the father's damages.

Per Rand J.: Defendant should be held solely responsible. The giving of the gasoline to the two children was, in the circumstances, a negligent act towards them, a foreseeable consequence of which was injury to the infant plaintiff in the course of ordinary behaviour on his part. Having regard to the children's age, understanding, experience and self-control, a child's natural curiosity and the fascination for him of fire (in relation to which lies the chief danger of gasoline), they acted as ordinary children would be expected to act. The usual and expectable conduct in ordinary children of such years 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.

APPEAL by the defendant The Oliver Blais Company Limited from the judgment of the Court of Appeal for Ontario (1) varying the judgment of the trial Judge, Urquhart J. (2).

The said defendant owned and operated a gasoline service station in the town of Kirkland Lake, Ontario. The action against it was for damages by reason of the sale to the infant plaintiff, a boy nine years of age, of a small quantity of gasoline in an empty lard pail, which gasoline, the infant plaintiff told the service station attendant, was to put in his mothers's car that was "stuck down the street", but which gasoline was in fact wanted for use in play, through which use it caught fire, and the infant plaintiff was seriously burned.

The material facts of the case are set out in the reasons for judgment in this Court now reported.

Urquhart J. found that both the service station attendant and the infant plaintiff were negligent and apportioned the degrees of fault at 25 per cent. against the defendant and 75 per cent. against the infant plaintiff. He assessed the damages to the infant plaintiff at $8,000 and the damages to his father, the other plaintiff, at $2,712.75; and gave judgment in favour of the infant plaintiff for $2,000 and in favour of his father for $678.19.

(1) [1945] O.R. 18; [1945] 1 D.L.R. 210.
(2) [1944] 3 D.L.R. 615; [1944] O.W.N. 412.

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The Court of Appeal held that the infant plaintiff should not have been found guilty of contributory negligence; and that the defendant should be held solely responsible for the accident; and, accepting the trial Judge's assessment of damages, gave judgment in favour of the infant plaintiff for $8,000 and in favour of his father for $2,712.75.

The defendant appealed to this Court, claiming that the action should be dismissed, or, in the alternative, that the judgment of Urquhart J. should be restored.

John J. Robinette K.C. for the appellant.

J. L. G. Keogh for the respondents.

The judgment of the Chief Justice and Kerwin J. was delivered by

KERWIN J.—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 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 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 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 gasoline 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.

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

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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 the following question put by McRuer J.A. 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 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 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) 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.

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(*l*) generally for the better carrying out of the provisions of this 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,—

(*a*) * * *

(*b*) the delivery in a metal container of gasoline required to refuel 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 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 "refuel", 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 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.

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 judgment of Hudson and Estey JJ. was delivered by

ESTEY 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 "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 per cent. of the fault and the defendant with 25 per cent. 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 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.

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With respect to the infant plaintiff, William Yachuk, the learned trial judge found as follows:

> 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 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 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 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 corroborates, that he was specifically told, with respect to small retail sales, that no gaso-

line 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, he 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 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, 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 transac-

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tion 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 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 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 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 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 contri-

butory 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.

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 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* (1)). 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 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* (2) 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

(1) [1932] S.C.R. 118, at 120. (2) (1841) 1 Q.B. 29 at 38.

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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 same position as anyone else whose conduct constitutes contributory negligence. In the same case, *Lynch* v. *Nurdin* (1), 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 so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first.

This was quoted with approval by Mr. Justice Anglin (later Chief Justice) in *Geall* v. *Dominion Creosoting Co.* (2).

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 effective 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

(1) (1841) 1 Q.B. 29. (2) (1917) 55 Can. S.C.R. 587, at 611.

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 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.

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 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 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.

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Greer L. J., *Haynes* v. *Harwood* (1).

The appellant, in support of this contention, submitted two decisions: *Dominion Natural Gas Company* v. *Collins and Perkins* (2), and *Scott* v. *Philp* (3). 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 anticipated 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 neglect contributed to the loss or damage.

Then should the father's damages be apportioned? *The Negligence Act,* R.S.O. 1937, Chap. 115, has 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 negligence, but as between themselves, in the absence of any contract express or implied, each shall be liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.

(1) [1935] 1 K.B. 146, at 156.
(2) [1909] A.C. 640.
(3) (1922) 52 Ont. L.R. 513.

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 dependent action and treated 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 and Canadian National Railway Co.* (1), 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 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.* (2); *Young* v. *Town of Gravenhurst* (3). Under section 242 of the *Criminal Code* the criminal responsibility is defined and, *inter alia,* that the infant be under sixteen years of age,

(1) [1932] S.C.R. 462.
(2) (1906) 11 Ont. L.R. 483.
(3) (1911) 24 Ont. L.R. 467.

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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 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.

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 per cent. of the fault and the defendant with 25 per cent. 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 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.

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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 responsibility 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 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.

Appeal allowed and judgment of the trial Judge restored. Costs as awarded in the judgment of Hudson and Estey JJ.

Solicitors for the appellant: *O'Meara & Burns.*

Solicitors for the respondents: *Bench, Keogh, Grass & Cavers.*