TORT: CONTRIBUTORY NEGLIGENCE OF CHILD PLAINTIFF.

Yachuk and Another v. Oliver Blais Co. Ltd.[1]

" The plaintiff is always right " declared one distinguished lawyer on reading the history of this litigation. It certainly illustrates how high is the duty of reasonable care. A boy of nine years, accompanied by his brother aged seven, falsely told a garage servant that the mother's car was " stuck on the road " and needed petrol and he bought " five cents' worth of gasoline " which was placed in a lard pail. The story was false and the boys wished to play a game of Red Indians with torches. The garage servant was only fifteen years old.[2] With inventive skill, they made torches but the open pail of petrol caught fire and the plaintiff, the elder boy, was seriously burned.[3] The action began in 1943 in the Supreme Court of Ontario and reached the Privy Council in 1949. The intervening six years produced much litigation. The first hearing was abortive as a new trial was ordered on appeal. Another Judge (Urquhart J.) then tried the case but discharged the jury before the hearing had begun and proceeded to try it himself. He found contributory negligence on the part of the plaintiff and apportioned the damages. The Court of Appeal held that the defence of contributory negligence failed and gave judgment for the full amount. From this order, the defendant appealed to the Supreme Court of Canada. Of the five judges, two held that no negligence could be imputed to defendants at all and that the action should be dismissed. The other three agreed that the defendant's servant was negligent, but two agreed with the original decision of Urquhart J. and so an order was made restoring his judgment. Finally, the Judicial Committee advised that the plaintiff's appeal should be allowed and that the order of the Court of Appeal should be restored i.e. that the plaintiff should receive full damages. The history of this litigation is set out in full to point the moral that, while some form of appeal is advisable, a multiplicity of appeals makes the judicial process too costly. In this case there was no important question of law involved. The sole argument was the application of well-known principles of negligence and contributory negligence to facts about which there was no controversy. Yet six hearings spread over six years was the result.

The Judicial Committee held that it was impossible to upset the finding of negligence against the defendants, as it would run contrary to the well-known rule of practice by which their Lordships are guided to accept concurrent findings of facts in the Courts below—it was hopeless to contend that there was no evidence to support the findings, and the fact that the courts below were divided was irrelevant. The Judicial Committee took the view that the child's story to the garage servant was such as to arouse, rather than to allay, suspicion. It is easy to be wise after the event, but if a mother ran out of petrol on a road, one can easily imagine she would send her sons to buy a small quantity to get the car to the garage. However, the trial judge was in the best position to make a finding here, and he found negligence.

1. [1949] 2 All E.R. 150; 65 T.L.R. 300.
2. (1946) 24 Can. B.R. 60.
3. The father was also a plaintiff.

The real argument before the Privy Council was that the effective cause of the injuries was the intervening act of the plaintiff himself, or alternatively that the plaintiff was guilty of contributory negligence. It is difficult to see how this could be regarded as two arguments—according to the modern doctrine of contributory negligence the plaintiff is debarred from recovery because he is the cause of his own injury. Thus the two so-called alternatives are really one and the same.

Urquhart J. had found contributory negligence because he thought the plaintiff was mentally alert and bright and could appreciate the risk—his father was a plumber and worked with a petrol burner and had told the children to keep away. Counsel for the plaintiff argued that this finding involved an inconsistency: firstly the Judge found negligence in the defendants in that they delivered petrol to a child too young to appreciate the danger, and then he found that the child did appreciate the danger. The Judicial Committee were saved the necessity of dealing with this point, as on the facts their Lordships held that the child did not appreciate the peculiarly dangerous qualities of petrol, and hence that he was not guilty of contributory negligence. The verdict of the Court of Appeal was restored giving $8,000 dollars to the infant plaintiff and $2,712.75 to the adult plaintiff.

G.W.P.

TORT: NEGLIGENCE—LANDLORD—GRATUITOUS INSTALLATION OF DOMESTIC BOILER.

Ball and Another v. London County Council.[1]

The decision in *Donoghue v. Stevenson*[2] introduced order into one field of the law of negligence, but the spectre of *Cavalier v. Pope*[3] still leads many to say that *Donoghue's Case* is confined to personalty. There is no logical reason for distinguishing between realty and personalty in this regard and hence many cases try to erode the doctrine of *Cavalier v. Pope*, but of course it cannot be over-ruled. The result is not altogether felicitous. In this instant case, the defendants, the landlords, during B's tenancy, gratuitously installed a new domestic boiler to replace an old one. Stable J. treated the transaction as the performance of a gratuitous service, holding that in the circumstances the fact that defendants were the landlords was irrelevant. He found negligence and gave judgment for Plaintiff C, the daughter of the tenant, who was injured when the boiler exploded. If this decision were correct, the result would be that if the landlord instals a boiler before the lease begins, he is not liable for negligence: but if he instals it gratuitously during the currency of the lease, he is liable. The Court of Appeal reversed the decision. But they agreed that where the landlord entered premises after they were let, this position as to liability was the same as that of

1. [1949] 1 All E.R. 1056.
2. [1932] A.C. 562.
3. [1906] A.C. 428.