HIS MAJESTY THE KING (RESPONDENT) ..... APPELLANT;

AND

ALFRED LAPERRIÈRE, ÈS-QUAL. (SUPPLIANT) ..... RESPONDENT.

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*Feb. 25, 26.
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HIS MAJESTY THE KING (RESPONDENT) ..... APPELLANT;

AND

OMER DUBEAU, ÈS-QUAL. (SUPPLIANT) .. RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Negligence—Petition of right—Injury to minor children through explosion of thunderflash—Alleged negligence of army officers in leaving live explosive in a field after manoeuvres—Small children later finding it, playing with and lighting it—Liability of the Crown—Negligence or fault of the children—Division of negligence—Whether doctrine of contributory negligence applicable to the Crown, when cause of action arises in Quebec province—Exchequer Court Act, R. 5 C., 1927, c. 34, section 19 (c), amended by 2 Geo. VI (Dom.), c. 28, s. 1.

During the evening of October 10, 1942, a detachment of soldiers belonging to a Canadian regiment carried on military exercises on the course of the old Kent Golf Club, near the city of Quebec. During these manoeuvres some seventy five thunderflashes were used. On October 31st one unexploded thunderflash was found on the adjoining farm of one Giroux by two boys who had been looking for golf balls, one of them being Marcel, minor son of the respondent Dubeau. The boys opened the thunderflash and extracted bits of powder from it, which they ignited with matches and caused small explosions. Marcel took home with him the thunderflash containing the remaining of the powder. On the same evening, these two boys, with several others including Gaston, minor son of the other respondent Laperrière, gathered on the street. After burning a small bit of the powder on the sidewalk, Gaston and the other boy who had found the explosive decided to ignite the remainder of the powder in the thunderflash all at once. After two attempts had been made with no result, Gaston and Marcel, respectively 11 and 12 years of age, thinking that the explosive had not been properly lighted, were about to pick it up, when it exploded causing severe injuries to the two boys. The respondents, in their qualities of tutors to their minor sons, by petitions of right, claimed damages from the Crown, alleging its liability for the negligence of its officers or servants in the exercise of their duties or employment. The Crown contended that there was nothing in the case which was of a nature to involve its liability, that the military exercises had taken place on private properties, that young Dubeau was illegally on such lands when he found

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

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the explosive and that there had been no negligence on the part of any of its officers or servants while acting within the scope of their duties or employment. The Exchequer Court of Canada maintained the respondents' petitions of right, fixed the amount of the damages to a sum of about $15,371.00 in each case and then reduced such amount by one third on the ground that the two boys were at fault to that extent. The Crown appealed to this Court, and the suppliants cross-appealed, claiming that the Crown should be held liable for the full amount of the damages.

Held, affirming the judgments of the Exchequer Court of Canada ([1945] Ex. C.R. 53), The Chief Justice dissenting, that the appeals by the Crown should be dismissed and that the petitions of right of the respondents be maintained for the amount of damages awarded by that Court.

Held also that the cross-appeals by the respondents should be dismissed.—Rand J., dissenting, was of the opinion that the full amount of the damages should be granted.

Per The Chief Justice (dissenting)—A child, who is of sufficient age (at least over 7 years) and who also possesses requisite intellectual capacity and rational judgment, is legally liable to account for his acts: such doctrine is adopted by noted French authors and by a jurisprudence derived from many decisions rendered by the Quebec courts. Thus, when a child is found to be guilty of contributory negligence, he is evidently guilty of negligence and answerable for the full liability attached to his illegal act, unless there is evidence that another person has contributed with him to cause the damages: he is solely responsible, being the *causa causans.* In the present case, the military men cannot be charged with gross negligence for having willingly and knowingly left on the ground a dangerous explosive, as, upon the evidence, they were ignorant of the fact that a thunderflash had remained unexploded. Assuming that, because the military men did not ascertain before leaving that no thunderflash was left unexploded, it would constitute negligence on their part, there is no evidence that they were aware, or should have been aware, that children would enter the ground after the manœuvres had taken place; on the contrary, the evidence shows that there could not be such possibility Moreover, in view of the opinion expressed by the trial judge that the two boys possessed sufficient intelligence to have foreseen the possible consequences of their acts, they should be treated the same as if they had been adults; and the Crown would not have been held liable if adults had committed these acts. On the whole, the minor sons of the respondents have conducted themselves with the full knowledge of the possible consequences of their acts and they have suffered injury through their own want of prudence. In any event, there has been, from the time the explosive has been found to the time when the accident occurred, a sequence of intervening events which makes of the alleged negligence of the military men a most remote cause *(causa sine qua non)* of the accident and of the damages resulting from it, but not a *causa causans.*

Per Kerwin J.:—On the facts of the case, there was negligence on the part of the officers in charge of the military exercises, their acting within the scope of their duties or employment, in leaving, without making a search, the unexploded thunderflash, a dangerous article, on Giroux's farm, where the two boys on the day in question went with at least the implied permission of the owner. Under all circumstances, steps should have been taken to see that all the thunderflashes used had been exploded; and, in the absence of such steps, it should have been anticipated that an unexploded one would be found by children on Giroux's farm and that such children might so play with it as to cause injuries to themselves. While the two boys were normal and intelligent enough to understand to a certain extent the imprudence of their acts, they were, nevertheless, of such an age as not fully to comprehend the dangerousness of their actions: such was the finding of the trial judge and it should not be disturbed.

Per Hudson and Estey JJ.:—The Crown appellant has failed to prove that after the manoeuvres all the thunderflashes were accounted for and had, in fact, exploded. Notwithstanding that no permission had been obtained to use Giroux's land in any way, and in spite of the fact that these thunderflashes were thrown from a point adjoining it and in its direction, no effort was made to see that these thunderflashes did not reach it, nor to warn Giroux of the possibility that some of them might have reached his farm, upon which the boys who found the explosive were not trespassers. Under the circumstances, these facts constituted negligence. The conduct of the two boys, having regard to their capacity, knowledge and experience, constituted also negligence, but that the boys were negligent, however, does not necessarily relieve the first party negligent of liability. Nevertheless, in spite of their partial knowledge of the possibility of injury with which they were confronted, they cannot be entirely excused because in part their negligent conduct has contributed to their own injuries.

Per Rand J. (dissenting on the cross-appeal):—A highly dangerous explosive has been unlawfully placed and left on land where two boys who shortly thereafter found it had permission to be. The high degree of care required of those who control such articles means the anticipation of a greater range of probable mischief and, in this case, reaching to the children injured. The natural consequences of that initial *culpa* extend then to the injuries suffered unless it can be said that at some point a new and independent actor has intervened. The intervening act in this case, if an adult had been concerned rather than a boy of 12, would be held to be new and independent; it was not a situation in which contributory negligence could operate; it would have been an intermeddling by a responsible person with what he would know could be dangerous. There are degrees of liability for consequences between two or more participants in a negligent cause, but there is no binding authority which attributes fractional liability or deprivation of right to an infant in proportion to his appreciation of a particular situation; in relation to a specific act, he must be either responsible or not responsible, there is no halfway culpability and these boys of 11 and 12 cannot be held to conduct that in the

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circumstances would have avoided the results which happened. The act of both boys, moving to pick up the explosive after the fuse had been lighted, not only negatives intelligence and general capacity which would have placed them in an older age or adult category, but demonstrates their inadequate appreciation of the danger they were courting. Their conduct then was normal, likely and, just as prudent behaviour in an adult, innocent: that excludes any qualification or limitation of the right to recover full damages from the Crown.

The Crown contended that its liability under section 19 (c) of the *Exchequer Court Act* is confined to cases where the injuries to person or property are exclusively "resulting from the negligence of any officer or servant of the Crown", i.e. that there is no right of action against the Crown in a case of contributory negligence on the part of the Crown and the subject.

Held, per Kerwin, Hudson and Estey JJ. that the Crown's contention is not well founded when the cause of action arose in the province of Quebec. The Chief Justice and Rand J. expressing no opinion.

Per The Chief Justice:—There is no necessity to decide such question in view of the conclusion arrived at, that the Crown was in no way liable for the accident.

Per Kerwin J.:—In cases between subject and subject in Quebec, damages must be mitigated in the case of common fault. This being the general law in that province, it is the law to be applied to the Crown under section 19 (c): it has been so settled by decisions in this Court.

Per Hudson and Estey JJ.:—In many decisions of this Court as well as of the Exchequer Court of Canada, where action was brought under section 19 (c) and the cause of action arose in Quebec, damages were apportioned between the Crown and the subject, when the negligence on the part of servants of the Crown contributed to the loss, thus indicating a long accepted construction of that section.

Per Rand J.:—It is unnecessary to consider this ground of appeal, in view of the opinion above reported.—*Semble* that there is nothing whatever anomalous in the view that what Parliament intended in creating liability of the Crown was to adopt the law then existing in each province, except as it might thereafter be amended or changed by Parliament, but that in any event the interpretation placed on section (19 (c) since its enactment has established a jurisprudence which would now be too late to modify.

APPEALS by the Crown and CROSS-APPEALS by the suppliants from the judgments of the Exchequer Court of Canada, Angers J. (1), maintaining the suppliants' claims made by way of petitions of right, for damages amounting to about $15,371.00 in each case and then reducing such amount by one third owing to the suppliants' minor sons being at fault to that extent.—The Crown appealed to this

(1) [1945] Ex. C.R. 53.

court, praying for the dismissal of the petitions of right, and the suppliants cross-appealed, claiming that the Crown should be held liable for the total amount of damages found by the trial judge.

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Aimé Geoffrion K.C. and *Gérard Lacroix K.C.* for the appellant.

Frédéric Dorion K.C. and *Camil Noël* for the respondents.

The CHIEF JUSTICE (dissenting): Ces deux causes nous viennent par voie d'appel de la Cour d'Echiquier du Canada qui a accordé à l'intimé Dubeau une somme de $10,247.23 pour dommages, étant les deux tiers d'une réclamation de $15,370.84, (la différence représentant la somme que cette Cour a cru devoir retrancher parce qu'elle est arrivée à la conclusion que Dubeau s'était rendu lui-même coupable de négligence contributoire), et accordant à Laperrière $10,-248.39, étant les deux tiers de sa réclamation de $15,372.59, la différence ayant été retranchée pour la même raison que celle qui a été adoptée dans le cas de Dubeau.

Les deux causes ont été entendues ensemble, sur la même preuve, et nous pouvons en disposer pour des raisons à peu près identiques. La nature des faits est très importante pour la décision que nous avons à rendre.

Le ou vers le 10 octobre 1942, un détachement de militaires de la cité de Québec, sous les ordres du Ministre de la Défense Nationale, s'est rendu sur un terrain appartenant à la compagnie Quebec Power, situé dans la ville de Courville, et de là sur un autre terrain appartenant à François-Xavier Giroux, cultivateur du même endroit.

Les militaires y firent des exercices dans le but de se préparer à un raid simulé qui devait avoir lieu à Québec quelques jours plus tard et qui, de fait, eut lieu après ces exercices.

Au cours de ces manœuvres, le détachement s'était servi d'explosifs et il aurait apparemment lancé sur le terrain de Giroux un explosif communément appelé "thunderflash".

Le samedi, 31 octobre, le fils du pétitionnaire, âgé de 12 ans et accompagné d'un autre garçon du même âge, trouva ce "thunderflash" en jouant sur le terrain de Giroux, et il

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s'amusa à en retirer de la poudre en petites quantités et à y mettre le feu. Cela produisit une explosion minime au cours de laquelle son compagnon se brûla le pouce.

Tous deux eurent alors l'idée d'apporter le "thunderflash" au village de Courville et, le soir du même jour, accompagnés d'autres garçons du même âge, parmi lesquels se trouvait cette fois le fils du pétitionnaire Laperrière, ils commencèrent à s'adonner au même jeu après avoir de nouveau retiré du "thunderflash" une petite quantité de poudre; puis ils décidèrent de mettre le feu au "thunderflash" lui-même afin de produire ce qu'ils ont appelé un feu d'artifice.

Le "thunderflash" ne s'alluma pas immédiatement; ils crurent que le feu s'était éteint et alors le jeune Dubeau et le jeune Laperrière voulurent prendre le "thunderflash" dans leurs mains dans le but d'en rallumer le feu lorsqu'une explosion violente se produisit, enlevant au jeune Dubeau et au jeune Laperrière une partie de leur main droite, ce qui nécessita plus tard, pour chacun d'eux, l'amputation complète de la main droite.

Les deux pétitionnaires sont respectivement les pères de ces deux jeunes gens et, par voie de pétition de droit, ils réclamèrent de la Couronne les sommes ci-haut mentionnées, en alléguant que l'accident était dû à la négligence, à l'incurie et à la faute des militaires qui, dans les circonstances, agissaient sous les ordres de Sa Majesté le Roi par l'intermédiaire de son Ministre de la Défense Nationale.

Le Procureur-Général du Canada, au nom de Sa Majesté, plaida que les exercices des militaires avaient eu lieu sur des terrains privés, que le jeune Dubeau, au moment où il trouva l'explosif, était illégalement sur ce terrain, que d'ailleurs il n'y avait eu aucune négligence de la part ou des officiers en charge des exercices ou des militaires eux-mêmes, et que rien de ce qui s'était passé n'engageait la responsabilité de la Couronne.

L'honorable juge de première instance a apprécié la preuve de la façon suivante:

Il a été d'avis que le "thunderflash" trouvé sur le terrain de Giroux avait été laissé là, non explosé, par les militaires; que tout s'était bien passé ainsi qu'il est rapporté plus haut quant à la manière dont l'accident s'était produit; que le

jeune Dubeau, lorsqu'il trouva l'explosif, traversait la propriété de Giroux qui est voisine d'un terrain de golf, pour chercher des balles de golf; que cependant le terrain de golf était hors d'usage depuis trois ou quatre ans; et, de l'aveu du jeune Dubeau, en passant sur le terrain de Giroux, il se trouvait sur la propriété d'un étranger, où personne ne lui avait donné la permission de passer bien que c'était son habitude de passer sur cette propriété pour se rendre au golf.

Quant à Laperrière, il n'a vu l'explosif pour la première fois qu'après le souper lorsque les jeunes garçons se réunirent et qu'ils décidèrent, au lieu de se contenter de faire brûler un peu du contenu de l'explosif, de le brûler tout ensemble pour produire ce qu'ils appelèrent un feu d'artifice.

Le jeune Laperrière, au cours de l'appel au procès, a admis qu'il savait que, quand on met le feu à la poudre, cela explose et "c'est dangereux".

Tous deux avaient déjà joué avec des pétards ordinaires, mais ils ont avoué que l'explosif en question n'était pas un pétard comme ils avaient l'habitude d'en voir.

Le jeune Dubeau, au cours de son témoignage, déclara d'abord qu'au souper il avait informé son père de sa découverte et que ce dernier lui avait dit de ne pas jouer avec l'explosif qu'il avait trouvé parce que c'était dangereux.

Son père et sa mère lui auraient alors "défendu de jouer avec ça;" ils lui ont dit que c'était dangereux et "malgré cela il a joué avec". Il avoua que pour produire un feu d'artifice il lui fallait faire quelque chose que son père lui avait recommandé de ne pas faire, en lui disant que c'était dangereux.

Mais plus tard, dans sa déposition, il se contredit d'une façon flagrante et affirma qu'il n'en avait parlé ni à son père ni à sa mère.

Comme cette dernière affirmation du jeune Dubeau est corroborée par son père et par sa mère, l'honorable juge de première instance a cru devoir l'accepter.

Giroux, le propriétaire du terrain, fut entendu comme témoin et déclara que le jeune Dubeau avait passé une partie de l'été chez-lui à l'époque des foins; également que Dubeau et d'autres petits compagnons venaient jouer au

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golf, surtout à l'automne, tant sur le terrain de golf que sur son propre terrain, et il ajouta qu'il ne les empêchait pas parce qu'il "n'y avait pas grand tort à faire".

D'autre part, les officiers et les militaires qui ont rendu témoignage ont affirmé que

> en autant qu'ils savaient, le public n'avait pas accès à l'endroit où les manœuvres se faisaient, et qu'il n'était pas à leur connaissance que ces manœuvres s'étaient faites sur la propriété de Giroux.

On aurait employé au cours de ces manœuvres 75 "thunderflashes" contenus dans une boîte, et les instructions étaient d'être prudents dans la distribution de ces explosifs et la façon de les allumer, vu qu'il était admis qu'ils étaient dangereux; mais, d'après les affirmations des militaires, ces instructions avaient été suivies.

Personne n'a eu connaissance qu'un explosif aurait été laissé sans qu'il eût subséquemment explosé.

Le constable en chef de la compagnie Quebec Power, en septembre et octobre 1942, s'occupait des terrains du club de golf Kent et du "power house", et il a témoigné que durant l'été et l'automne de 1942 les terrains étaient fermés et que seules les personnes ayant un permis avaient le droit d'y aller.

Il a déclaré qu'il a lui-même renvoyé des gens qui étaient venus sur le terrain sans permis et qu'il avait donné ordre à ses hommes d'en faire autant.

L'honorable juge de première instance a été d'avis qu'il était possible que le "thunderflash" en question ait été lancé du terrain de golf sur la propriété de Giroux. Il a cru qu'il n'y avait pas d'autre conclusion à tirer du fait que l'explosif avait été trouvé sur cette propriété.

De là il a conclu que le fait d'avoir laissé dans un champ utilisé pour des manœuvres militaires un explosif constitue une négligence de la part des officiers qui avaient la direction de ces manœuvres; que des officiers prudents auraient dû faire ou faire faire des recherches sur le terrain des manœuvres pour vérifier s'il y restait des explosifs non explosés; or, comme rien de tout cela n'a été fait, d'après le juge, ces omissions de la part des officiers et du quartier-maître, tous serviteurs de la Couronne aux termes de l'article 50A de la *Loi de la Cour d'Echiquier du Canada,* entraînent, à son avis, la responsabilité de la Couronne.

Mais, par ailleurs, le juge de première instance fut d'avis que le jeune Dubeau et le jeune Laperrière avaient été chacun d'eux partiellement responsables de l'accident.

Il dit de Dubeau:

C'est un enfant intelligent qui savait que la poudre est une matière inflammable, explosive et dangereuse, qui était au courant du fait que Guy Bouchard s'était brûlé un doigt en en faisant brûler une petite quantité provenant du "thunderflash" et qui, désireux de faire un feu d'artifice, a, avec son ami Gaston Laperrière, décidé de mettre le feu à ce qui restait du "thunderflash" et de le faire éclater.

Il cite Savatier dans son Traité de la Responsabilité Civile, et H. et L. Mazeau dans leur Traité Théorique et Pratique de la Responsabilité Civile, Délictuelle et Contractuelle.

C'est d'ailleurs l'essence de la doctrine

que les tribunaux ont à rechercher si l'enfant avait l'intelligence assez développée pour comprendre, sinon la malice, au moins l'imprudence de son acte. (Savatier, tome 1er, nº 199); (Mazeaud, tome 2, nº 1468 et la note sous ce paragraphe.)

Il cite également Sourdat, Traité Général de la Responsabilité, (tome 1, nº 17); Demolombe, Cours de Droit Civil, (tome 31, nºs 494 et 495); Baudry-Lacantinerie et Barde, Traité de Droit Civil, (tome 15, nº 2864); Planiol et Ripert, Traité Pratique de Droit Civil, (tome 6, nº 497).

Tous ces auteurs sont d'avis que

le mineur, nonobstant son âge, est pécuniairement responsable s'il a pu se rendre compte de la portée de son acte.

En ce sens, ces auteurs adoptent la doctrine de Pothier qui, dans son Traité des Obligations, nº 118, al. 3, édit. Dupin, 1, p. 63, écrivait:

On ne peut précisément définir l'âge auquel les hommes ont l'usage de la raison, et sont, par conséquent, capables de malignité, les uns l'ayant plus tôt que les autres; cela doit s'estimer par les circonstances.

L'honorable juge passa ensuite à la jurisprudence de la province de Québec et il référa à la cause de *Rowland* v. *La Corporation de la paroisse de Rawdon et autres* (1).

En toute déférence, cette cause fait bien voir la distinction qui existe avec celle qui nous est soumise.

Dans la cause de *Rowland* (1), la corporation défenderesse avait entrepris la réfection d'un chemin et, dans ce but, employait de la dynamite. Le contracteur procédait

(1) (1939) Q.R. 77 S.C. 477.

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de cette façon à trois ou quatre endroits simultanément. Pendant cette opération personne n'avertissait le public ni ne l'empêchait de circuler, personne n'était chargé de surveiller les détonateurs et le public circulait librement.

Le jeune Rowland trouva le bout d'une mèche, la prit, la mit dans sa poche, l'en sortit à plusieurs reprises même devant son père, l'apporta chez lui, tenta de l'allumer avec une allumette mais sans succès, alla alors ensuite derrière la maison, l'alluma avec un feu de papier croyant que cela ferait l'effet d'une pièce pyrotechnique. L'explosion se produisit et lui causa des blessures aux mains et à l'œil.

La décision de la Cour fut que le contracteur, préposé de la corporation défenderesse, aurait dû savoir qu'il était dangereux de laisser sans surveillance des explosifs à un endroit où le public et surtout des enfants circulaient librement.

La négligence attribuée au contracteur, et, par son intermédiaire, à la corporation défenderesse, fut déclarée une faute résultant d'avoir permis au public de circuler sans l'avertir du danger.

Une autre cause citée par l'honorable juge de première instance, *Cutnam* v. *Léveillé* (1), est susceptible de la même distinction car la faute sur laquelle s'appuie cet arrêt est que le défendeur qui avait la garde d'explosifs, négligea "de les tenir hors d'atteinte de personnes étrangères et irresponsables".

L'honorable juge Archambault y réfère également à la cause de *Plante* v. *La Cité de Montréal,* (portant le numéro 75, 238 des dossiers de la Cour Supérieure de Montréal, lequel n'a pas été rapporté) qui est le cas d'opérations de minage faites par la cité de Montréal, où l'enfant avait ramassé un détonateur à l'endroit des travaux et

it has been shown that the spot where they were found is a public place, opened to pedestrians and where children are accustomed to play without hindrance.

Encore, *Makins* v. *Piggott & Inglis* (2) couvre le cas d'un bâton de dynamite trouvé par un enfant de quinze ans qui l'avait ramassé et fait éclater en le frottant.

Le propriétaire du bâton de dynamite fut trouvé responsable; mais il s'agissait d'un procès par jury où, par consé-

(1) (1931) 37 R.L. n.s. 84. (2) (1898) 29 Can. S.C.R. 188.

quent, les jurés étaient maîtres des faits, et la Cour Suprême du Canada, en accordant jugement aux demandeurs, jugea que, en ce qui concernait l'enfant,

if his negligence contributed to the accident, the jury should have so found; and that whether or not he was a trespasser, was also a question for the jury, who did not pass upon it.

Dans la cause de *Lambert* v. *Canadian Pacific Railway Co.* (1), un enfant de huit ans fut trouvé coupable de négligence contributoire. Dans la cause de *Morin* v. *Lacasse* (2), le père d'un enfant de sept ans fut trouvé coupable de faute commune pour "n'avoir pas exercé une surveillance convenable sur cet enfant".

Dans *Burke* v. *Provencher* (3), un enfant de huit ans fut trouvé en faute

lorsqu'il traversa une rue en faisant irruption derrière un tramway sans s'assurer qu'il pouvait le faire sans danger.

Dans la cause de *Desroches* v. *St-Jean* (4), la Cour du Banc du Roi (en appel) a jugé que

quoiqu'on ne puisse attendre d'un enfant de neuf ans le discernement et la prudence d'un adulte, au cas de faute de sa part, il sera responsable de l'accident dont il est victime mais dans une proportion moindre que celle d'un adulte.

Dans *Normand* v. *The Hull Electric Company* (5), où il s'agissait d'un accident survenu au fils du demandeur, âgé de dix ans et demi, résultant du fait qu'il avait voulu monter sur un tramway en mouvement, la Cour de Révision modifia le jugement de la Cour Supérieure et diminua le montant des dommages accordé par cette dernière Cour "vu son opinion qu'il y avait eu négligence de la part de l'enfant du demandeur".

Dans *Figiel* v. *Hoolahan et al* (6), un enfant de dix ans avait été blessé par une automobile en traversant une ruelle à l'arrière de la résidence de ses parents. Il fut jugé:

There was fault on the part of the victim of the accident in that he stepped from the vacant lot into a paved lane practically in front of the automobile, without looking to his left to see whether any traffic was coming, and as he was ten years old, he had obtained a sufficient degree of intelligence so that he could have some appreciation of the danger to which he was exposing himself.

(1) (1932) 38 R. de J. 196.
(2) (1931) Q.R. 69 S.C. 280.
(3) (1929) Q.R. 67 S.C. 500
(4) (1928) Q.R. 44 K.B. 562.
(5) (1909) Q.R. 35 S.C. 329.
(6) (1939) Q.R. 78 S.C. 179.

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De même encore dans la cause de *Marquis* v. *Prévost* (1) où un enfant de neuf ans s'était engagé à la course dans l'intersection de deux ruelles, sans se soucier de la circulation; et aussi dans la cause de *Légaré* v. *Quebec Power Company* (2), où un enfant de treize ans blessé par un courant électrique provenant de fils appartenant à la défenderesse, rompus et tombés sur la voie publique et que l'enfant a touchés, bien qu'il eût été conseillé de ne pas le faire, il fut décidé qu'il y avait faute commune et 75% de la responsabilité fut imputé à l'enfant.

Dans la cause de *Lauzon* v. *Lehouiller* (3), il fut décidé que

il y a lieu de tenir compte de l'âge de l'enfant et de faire supporter à un enfant de huit ans une part de responsabilité moindre que celle qui devrait être imputée à un enfant plus âgé.

Tout récemment, dans la cause de *The Oliver Blais Company Ltd.* v. *Yachuk* (4), qui présentait de grandes similitudes avec celle-ci, cette Cour a confirmé le jugement de la High Court d'Ontario qui avait imputé 75% de la responsabilité d'un accident à deux jeunes enfants, âgés respectivement de neuf et de sept ans.

Dans cette cause, l'honorable juge Urquhart, qui présidait alors la Cour, déclara entre autres choses:

I have little hesitation in finding that he (the infant plaintiff) was so negligent. The first point that should be considered is whether a boy of 9 years and one month, as this boy was at the time, could be guilty at all of contributory 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 short 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.

Et l'honorable juge Urquhart passe en revue un certain nombre de causes pour appuyer son jugement.

Le résultat de l'examen très élaboré que fait dans le jugement *a quo* l'honorable juge de première instance est que:

un enfant qui a atteint l'âge de discernement, généralement fixé à 7 ans, doit être tenu responsable de son acte de négligence et appelé à en supporter seul, ou conjointement avec d'autres, selon le cas, les conséquences.

Comme le dit Savatier, (Responsabilité Civile, tome 1, n° 199)

la minorité n'est pas, en soi, une impossibilité de prévoir et d'éviter l'acte illicite, donc une cause d'irresponsabilité.

(1) (1939) 45 R. de J. 494.
(2) (1939) Q.R. 77 S.C. 552.
(3) [1944] R.L. 449.
(4) [1946] S.C.R. 1.

En somme, cette doctrine et cette jurisprudence impliquent que l'enfant qui a l'âge, l'intelligence et le discernement voulus, est légalement responsable de ses actes. En effet, il suffit d'y réfléchir: Etre tenu coupable de négligence contributoire équivaut à dire: être tenu coupable de négligence et entraîne la pleine responsabilité de l'acte. L'atténuation ne provient que du fait qu'une autre personne a elle aussi été responsable. Et si l'on arrive à la conclusion que les deux responsabilités ont contribué aux dommages, alors on en fait supporter une partie par chacun de ceux qui y ont contribué. Mais la négligence de l'un n'est appelée négligence contributoire, cela est évident, que si une autre personne a, pour sa part, contribué aux dommages.

Si les circonstances ne permettent pas de relier à ces dommages la contribution de cette autre personne, il s'en suit nécessairement que la première est uniquement responsable et est seule la *causa causans*. D'où il résulte que dire d'un enfant qui remplit les conditions voulues qu'il a été coupable de négligence contributoire, cela équivaut à dire qu'il a été coupable de négligence, qu'il en supportera seul les conséquences, si nulle autre personne n'y a contribué avec lui.

Et voici maintenant l'appréciation que fait le juge des deux jeunes victimes de l'accident qui a donné lieu à la présente cause:

> Marcel Dubeau est un enfant normal, sain d'esprit, d'une intelligence suffisamment développée et capable de comprendre, dans une certaine mesure, l'imprudence de son acte.
>
> Gaston Laperrière est un enfant normal, sain d'esprit, d'une intelligence suffisamment développée et capable de comprendre, dans une certaine mesure, l'imprudence de son acte.

L'honorable juge a été d'avis que

> le fait d'avoir laissé des explosifs sur les terrains de manœuvres constituait une négligence grossière, d'autant plus grossière qu'elle était facilement évitable.

Mais, dans les circonstances, il a cru qu'il y avait lieu de tenir chaque enfant, respectivement, partiellement responsable de l'accident, conjointement avec la Couronne. Il a attribué la responsabilité dans les proportions de $33\frac{1}{3}\%$ à chacun des jeunes gens, et $66\frac{2}{3}\%$ à la Couronne.

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A l'argumentation devant cette Cour, la Couronne a soulevé la question de savoir si la doctrine de la faute commune pouvait s'appliquer à elle, et c'est là un point d'une grande importance qui est susceptible de se poser de plus en plus à l'avenir.

La prétention du savant procureur de la Couronne, en l'espèce, est que l'article 19 (*c*) de la *Loi de la Cour d'Echiquier du Canada,* suivant sa véritable interprétation, stipule que la Couronne ne peut être responsable en dommages vis-à-vis d'une personne ou à l'égard d'une propriété que si les dommages résultent exclusivement de la négligence d'un officier ou d'un serviteur de l'Etat dans l'exercice de ses devoirs ou de ses fonctions;

("resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment").

Il a ajouté que l'accident qui résulte de la faute commune est un accident qui est la suite de la combinaison des négligences de chaque participant, et non pas un accident qui résulte uniquement de la négligence de l'officier ou du serviteur de l'Etat.

Je n'ignore pas l'arrêt de cette Cour dans *Canadian National Railway Company* v. *Saint John Motor Line Limited* (1), où l'honorable juge Newcombe avait exprimé l'opinion unanime des juges qui avaient alors siégé dans cette affaire; mais je n'ai pas à me prononcer sur la question soulevée ici par l'appelante (et où il aurait fallu examiner minutieusement le jugement dont je viens de parler), car je suis d'avis que, en l'occurrence, l'appelante ne peut pas être tenue légalement responsable de l'accident dont les fils des deux intimés ont été les victimes.

Si je pouvais être d'accord avec le juge qui a décidé ce procès en qualifiant de négligence grossière des militaires qui auraient volontairement et sciemment laissé sur le terrain un explosif du genre du "thunderflash" dont il s'agit, je ne puis le suivre lorsqu'il se prononce ainsi dans un cas où, de toute évidence, il n'y a eu de la part des militaires, aucun acte volontaire et conscient.

Il est manifeste que les militaires ne savaient pas que ce "thunderflash" était resté sur le terrain sans avoir explosé. Le fait est que le juge de première instance a été amené à

(1) [1930] S.C.R. 482.

faire consister la négligence dans le fait que les officiers n'auraient pas, avant de quitter le terrain des manœuvres, fait un examen minutieux des terrains de golf et de celui de Giroux pour vérifier si, par hasard, un "thunderflash" était resté sur les terrains sans exploser. Mais, à supposer que ce défaut de vérification eût pu être considéré comme une négligence—ce qui ne me paraît pas certain—je crois que ce qui manque à l'appréciation des faits dans le jugement dont est appel, c'est qu'il n'y a aucune preuve que les officiers ou les militaires savaient ou auraient dû savoir que des enfants se rendraient sur le terrain où les manœuvres ont eu lieu.

Je ne pense pas me tromper en disant que tous les jugements où des adultes ont été trouvés responsables d'accidents survenus à des enfants et causés par l'abandon d'objets dangereux dans un certain endroit, ou le défaut de surveillance d'appareils dangereux, ont toujours été rendus dans ce sens, parce que le juge saisi de la cause avait d'abord considéré comme prouvé le fait que ces adultes savaient ou auraient dû savoir que le public ou des enfants avaient accès à l'endroit où se trouvait l'objet dangereux; comme par exemple: des objets laissés sur une rue ou une voie publique, ou des objets abandonnés ou non surveillés dans quelque région où le public ou des enfants avaient l'habitude de se rendre ou de jouer. Telle fut la base du jugement de la Cour du Banc du Roi dans la cause de *Canadian Pacific Railway* v. *Coley* (1).

Mais ici il n'y a aucune preuve que les militaires savaient ou auraient dû savoir que des enfants pourraient venir sur le terrain des manœuvres. Au contraire, tout indiquait qu'il n'y avait aucune possibilité de ce genre. Le terrain de golf était fermé depuis trois ou quatre ans; le terrain de Giroux était un terrain privé, et le constable de la compagnie Quebec Power a déclaré que lui et ses subordonnés s'employaient à empêcher tout le monde de se rendre sur l'un ou l'autre de ces terrains; les enfants, au moment où ils ont trouvé l'explosif, n'étaient même pas sur le sentier où Giroux tolérait le passage, mais ils se trouvaient à un tout autre endroit. Rien ne pouvait faire prévoir aux militaires que des enfants se rendraient à cet endroit, et il ne fut certaine-

(1) (1907) Q.R. 16 K.B. 404.

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ment pas établi, au cours de l'enquête, que les militaires ou leurs officiers savaient ou avaient vu, ou auraient dû voir ou savoir que des enfants circuleraient autour de cet endroit. Dans les circonstances, il manque donc un élément essentiel pour que l'on puisse attribuer de la négligence aux militaires qui avaient employé des explosifs de ce genre dans l'exercice légitime et même obligatoire de leurs manœuvres.

Il me faut donc écarter toute attribution de faute aux militaires et, par le fait même, à la Couronne.

Mais, en plus, vu la décision du juge de première instance sur l'intelligence des jeunes Dubeau et Laperrière, je ne vois pas bien comment l'on pourrait les traiter, pour le cas qui nous occupe, autrement que comme des adultes.

Des adultes qui auraient fait ce que le jeune Dubeau et le jeune Laperrière ont fait auraient pu difficilement convaincre une cour de justice que la Couronne pourrait être tenue responsable de ce qui était arrivé.

Il ne m'est pas possible de voir en quoi, dans les circonstances, le cas des deux jeunes gens peut être distingué de celui d'un adulte.

Ils avaient, dit le juge de première instance, toute l'intelligence nécessaire pour comprendre ce qu'ils faisaient. Ils avaient déjà eu un avertissement lorsque le jeune compagnon de Dubeau s'était brûlé le pouce sur le terrain de Giroux, après avoir mis le feu à une petite quantité de poudre retirée du "thunderflash". Et d'ailleurs, ce n'est pas au moment où ils ont trouvé l'explosif que les dommages ont été causés. Il aurait pu y avoir une nuance si le "thunderflash" avait fait explosion au moment où ils le trouvèrent et s'en emparèrent. Mais le jeune Dubeau l'a emporté avec lui, et ce ne fut que plus tard, plusieurs heures après, dans la rue, alors qu'ils jouaient avec d'autres petits compagnons que l'accident s'est produit. D'après leur propre témoignage, ils savaient bien alors et appréciaient toute la portée de leur acte. Ils ont encore commencé par extraire de la poudre et à y mettre le feu. Puis lorsqu'ils décidèrent de mettre le feu au "thunderflash" lui-même, ils ont eux-mêmes déclaré qu'ils voulaient faire un feu d'artifice. C'est bien à cela qu'ils s'employèrent et c'est bien cela qu'ils espéraient. Et même là encore, l'accident ne s'est pas produit. Le moment fatal est venu lorsqu'ils ont cru que

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le feu s'était éteint; ils ont même mis le pied sur le "thunder-flash" pour s'en assurer davantage; puis tous deux, le jeune Laperrière et le jeune Dubeau, ont pris l'explosif dans leurs mains et c'est alors qu'ils ont subi des dommages dont ils se plaignent maintenant.

Il ne m'est pas possible de dire qu'ils n'ont pas agi en toute connaissance de cause et qu'ils n'ont pas été les victimes de leur propre imprudence.

A tout événement, il y a eu entre le moment où Dubeau a trouvé l'explosif sur le terrain de Giroux et le moment où l'accident s'est produit, toute une série d'événements intermédiaires qui rendent la prétendue négligence des militaires une cause certainement très éloignée (*causa sine qua non*) de l'accident et des dommages en résultant, mais non pas une *causa causans*.

Tout particulièrement pour le jeune Laperrière, il s'agit simplement d'un *novus actus interveniens*; ce qui, après tout, n'est qu'une façon de dire que la prétendue négligence des militaires n'a pas contribué à l'accident qui s'est produit. (*Potvin* v. *Gatineau Electric Light Co.*, (1) C.P.).

Comme le dit le juge de première instance lui-même:

> Il me semble évident que l'explosif qui a blessé le fils du pétitionnaire n'aurait pas explosé s'il n'avait pas été manié par lui.

Il ne pouvait être vraisemblablement prévu par les militaires ou leurs officiers que ce qui est arrivé se produirait.

A mon avis, les deux jeunes gens, avec l'intelligence les caractérisant, les connaissances qui leur ont été trouvées par le juge de première instance, sont uniquement responsables du malheureux accident dont ils ont été les victimes; et, toute participation des militaires—si l'on peut dire qu'il y en a eu—a certainement été trop éloignée pour que l'on puisse en tirer des conséquences de responsabilité légale contre eux.

Je suis d'avis de maintenir l'appel dans chacun des jugements *a quo*, et de rejeter chacune des actions avec dépens dans les deux cours.

KERWIN J:—These appeals from two judgments of the Exchequer Court of Canada were argued together. In one case the petition of right was presented by Omer Dubeau as tutor of his son Marcel Dubeau and in the

(1) [1935] 4 D.L.R. 1.

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other by Alfred Laperrière as tutor of his son Gaston Laperrière. Each boy was injured under circumstances which, in the opinion of the trial judge, Mr. Justice Angers, made the Crown liable as for the negligence of its officers or servants in the exercise of their duties or employment under the provisions of section 19 (c) of the *Exchequer Court Act* as enacted by chapter 28 of the 1938 statutes, taken in conjunction with section 50 (a) of the *Exchequer Court Act* as enacted by chapter 25 of the statutes of 1943-1944. The trial judge found the boys at fault to the extent of one-third and, therefore, reduced the sums which he otherwise would have allowed the suppliants. No question arises as to the amounts involved but the appellant argues that the suppliants are not entitled to succeed to any extent.

On October 10, 1942, a detachment of soldiers belonging to the 57th Quebec Field Battery engaged in a scheme on the old Kent Golf Club course at Courville, Quebec, and, in the course of this operation, seventy-five explosives known as thunderflashes were employed. The evidence accounts for their distribution and, on the whole, that every one who received a thunderflash was under the bona fide impression that each one used had actually exploded. The golf course had been closed to the public for some time but, whether the fact be that the men engaged in the scheme did not go outside the limits of the course, an unexploded thunderflash was found on or about October 31, 1942, on the adjoining Giroux farm. The evidence shows that at or about the spot where the thunderflash was found, the ground was disturbed in such a fashion that it might be proper to draw the inference that some of the men had actually used part of the Giroux farm but, whether that be so or not, it is undoubted that this particular thunderflash had been used during the course of the scheme.

It was found by Marcel Dubeau and another boy, Guy Bouchard. These two boys were playing on the farm without the knowledge of the owner but they had on various occasions worked there and had also looked for golf balls. It seems clear that on the day in question they were there with at least the implied permission of the owner. They extracted bits of powder from the thunderflash, which

they ignited with matches and caused small explosions. Marcel Dubeau took home with him the thunderflash containing the remainder of the powder. At the trial, Marcel, at one stage, testified that he told his father about what he had found and that he was warned to be careful but, on re-examination he denied this, and in this he was confirmed by his father. The trial judge chose to believe the boy's latter story thus confirmed, and I can see no reason to interfere with that finding. That same evening Marcel was playing with a number of friends, including Gaston Laperrière, and had burned a small bit of the powder on the sidewalk when Gaston and Guy Bouchard decided to ignite the remainder of the powder in the thunderflash all at once. After two attempts had been made to ignite it and it did not seem to be burning, Marcel and Gaston were about to pick it up when it exploded causing severe injuries to the two boys.

On these facts the appellant contends that there was no negligence on the part of any officer or servant of the Crown while acting within the scope of his duties or employment. The trial judge found that there was negligence on the part of the officers in charge of the scheme in leaving the unexploded thunderflash on Giroux's farm without making a search, and with that I agree. It is evident that whether any of the men actually traversed part of Giroux's farm or not, the latter was in fact used as part of the area for the scheme and although in time of war considerable latitude must be allowed the armed services in their training operations in Canada, under all the circumstances in the present case, steps should have been taken to see that all the thunderflashes used had been exploded. Thunderflashes are dangerous articles and in the absence of any such steps it should have been anticipated that an unexploded one would be found by children on Giroux's farm and that such children might so play with it as to cause injuries to themselves. The fact that this particular one, while found on the farm, caused the injuries complained of at another spot, including those to one who is not the finder, can make no difference.

The appellant argues that the injuries did not *result* from such negligence but that it was caused by a *novus*

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actus interveniens, namely, the action of the two boys. Subject to the question discussed later, this, however, was the thing that the officers or servants should have anticipated, and the doctrine contended for has no application.

The suppliants cross-appeal and claim that the Crown should be held liable for the total amount of damages found by the trial judge. At the time of the accident, the boys were respectively eleven and twelve years of age. The trial judge saw them and came to the conclusion that while they were normal and intelligent enough to understand to a certain extent the imprudence of their acts, they were, nevertheless, of such an age as not fully to comprehend the dangerousness of their actions. This finding should not be disturbed. *Bouvier* v. *Fee* (1).

It is clear, I think, that in the words of Lord Sumner in *Glasgow Corporation* v. *Taylor* (2), infancy as such is not a status conferring right and that a measure of care appropriate to the inability or disability of those who are immature or feeble in mind or body is due from others, who know of or ought to anticipate the presence of such persons within the scope and hazard of their own operations. Lord Denman's statement in *Lynch* v. *Nurdin* (3) that "ordinary care must mean that degree of care which may reasonably be expected from a person in the plaintiff's situation" has always been accepted as an authoritative statement of the law relating to the contributory negligence of children; see, for instance, the statement of Duff J., as he then was, in *Winnipeg Electric Railway Co.* v. *Wald* (4) where he stated that the trial judge in that case might perhaps have told the jury that

> if they accepted the appellant's account, it would be a question for them whether the plaintiff's conduct had fallen below the standard of reasonable care to be expected from a child of her years;

This is as applicable in Quebec as in the common law provinces: *Bouvier* v. *Fee* (1).

To revert to the negligence found against the Crown,— it should be held to extend to the foreseeability that the thunderflash might be found by children but the extent of

(1) [1932] S.C.R. 118.
(2) [1922] 1 A.C. 44, at 67.
(3) (1841) 1 Q.B. 29.
(4) (1909) 41 Can. S.C.R. 431, at 444.

the liability must depend upon the age of the children playing with it. It was definitely settled in this Court in *Price* v. *Roy* (1), that in cases between subject and subject in Quebec, damages must be mitigated in the case of common fault; and see the decision of the Privy Council in *The Montreal Tramways Company* v. *McAllister* (2). This being the general law in Quebec, it is settled by decisions in this Court that it is the law to be applied to the Crown under section 19 (c) of the *Exchequer Court Act*. In view of this, I am unable to agree with Mr. Geoffrion's argument that the Crown's liability under that section is confined to cases where the negligent act of the Crown's officer or servant is the sole cause of the injury.

I would dismiss the appeals with costs and the cross-appeals without costs.

The judgment of Hudson and Estey JJ. was delivered by

ESTEY J.:—These appeals are from judgments rendered in the Exchequer Court of Canada apportioning damages suffered by the boys in the loss of their right hands when on the evening of October 31, 1942, a thunderflash exploded. The boys reside at Courville, Quebec, and at that time were respectively 12 years and 8 months and 11 years and 7 months of age.

The military authorities, having obtained permission to so use the premises, on the evening of October 10, 1942, conducted military manoeuvres at the Kent Golf Club. About 30 men were so engaged and in the course of these manoeuvres 75 thunderflashes were used. These were dangerous missiles about 10″ long and 1″ in diameter, manufactured for the purpose of representing "gunfire and shellfire in training". That they were dangerous is not disputed. The instructions for using them required that the cap be removed, the fuse ignited, and then, lest "somebody could get hurt", thrown some distance as they exploded in a few seconds.

These thunderflashes were thrown at distances varying from 25 to 100 feet. The learned trial judge finds that manoeuvres were not conducted on the farm of Mr. F. X. Giroux adjoining that of the Kent Golf Club, but it is clear that one group of the men was during the manoeuvres

(1) (1899) 29 Can. S.C.R. 494. (2) (1916) 26 R.L. n.s. 301.

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stationed near Giroux's farm and that this and other thunderflashes were thrown upon the farm of Giroux. The learned trial judge states:

> Au cas où j'admettrais, ce que je ne suis pas disposé à faire, qu'aucun militaire n'est entré sur la propriété de Giroux durant les manœuvres, je ne verrais pas d'autre conclusion à tirer qu'un "thunderflash" a été jeté sur sa propriété

It is apparent that the officers in charge cautioned the men as to the dangerous character of these thunderflashes and at the trial the appellant sought to prove that after the manoeuvres all the thunderflashes were accounted for and had, in fact, exploded. The evidence indicates they were not able to do so. Notwithstanding that no permission had been obtained to use Giroux's land in any way, and in spite of the fact that these thunderflashes were thrown from a point near the Giroux farm and in the direction thereof, no effort was made to see that these thunderflashes did not reach the farm, nor to warn Mr. Giroux of the possibility that some of these thunderflashes might have reached his farm.

> The law of England in its care for human life requires consummate caution in the person who deals with dangerous weapons.

Erle C. J., *Potter* v. *Faulkner* (1); Beven 4th Ed. p. 201. Again:

> The duty of the defendants on bringing this foreign and dangerous material on the ground and exploding it there was to keep all the results of the explosion on their own lands, and it escaped from their own lands at their peril.

Swinfen Eady M. R. in *Miles* v. *Forest Rock Granite Co. (Leicestershire) (Limited)*, (2).

> This amounts to saying that in dealing with a dangerous instrument of this kind the only caution that will be held adequate in point of law is to abolish its dangerous character altogether.

Pollock, 14th Ed., p. 402.

Under the circumstances, the throwing of these thunderflashes upon the farm of Giroux, the failure to ascertain if any so thrown had not exploded, or to notify Giroux of their possible presence and dangerous character, constituted negligence.

Later in the same month, on Saturday afternoon, October 31, Marcel Dubeau and Guy Bouchard (about 11 years of age) went out to play upon the premises of the Kent

(1) (1861) 1 B. & S. 800. (2) (1918) 34 T.L.R. 500, at 501.

Golf Club where they had at times acted as caddies. It was their habit to look for golf balls, apparently both on the premises of the golf club and upon the farm of Giroux. At the time in question they were looking for golf balls on the farm of Giroux and there came upon the unexploded thunderflash (sometimes referred to in the evidence as "bâton"). It looked to them like a large firecracker and they proceeded to examine it.

Marcel Dubeau deposed as follows:

Q. Quand vous avez vu ce bâton, qu'est-ce qui est arrivé?

R. On l'a ouvert.

Q. Qui l'a ouvert?

R. Guy, on voyait qu'il y avait de quoi dedans. On a mis ça à terre, on en a vidé un peu sur ce carton-là, (No. 5), et là, on a mis une allumette dedans, ça fait toute une boucane; il s'est brûlé un peu le pouce; on a laissé tout ça là, on est descendu avec ce qui restait dedans.

Q. Vous avez laissé tous ces papiers (nos. 4 et 5).

R. Oui, monsieur. On a descendu le bâton, on a vu un tas de planches chez monsieur Giroux; c'était l'heure du souper; je l'avais dans mes poches; on l'a fait prendre un peu; je l'ai mis dans ma poche, et j'ai dit: on va aller souper, on se rencontrera à soir dans la rue St-Joseph.

Q. Et là?

R. On s'est rencontré, on était plusieurs, il y en avait une gang, là on en a fait brûler là aussi; on mettait ça sur le trottoir; ça faisait une fumée; il en restait pas beaucoup dans la boîte; on a dit: on va faire tout brûler, ça va être beau. Là, Gaston Laperrière, il a pris une allumette et il l'a mis sur le bout, il voyait que ça allumait pas, et il l'a éteint avec son pied; et il est allé une deuxième fois pour l'allumer; il voyait pas de feu, il a été pour voir, il a été pour le prendre avec sa main, et là il s'est fait une explosion.

Both Marcel Dubeau and Gaston Laperrière gave evidence at the trial and the learned trial judge had an opportunity to hear and to observe with respect to their knowledge and capacity. He finds with respect to Marcel Dubeau:

Je suis d'opinion par ailleurs que Marcel Dubeau, le fils du pétitionnaire, a lui-même été partiellement responsable de l'accident. C'est un enfant intelligent qui savait que la poudre est une matière inflammable, explosive et dangereuse, qui était au courant du fait que Guy Bouchard s'était brûlé un doigt en en faisant brûler une petite quantité provenant du "thunderflash" et qui, désireux de faire un feu d'artifice, a, avec son ami Gaston Laperrière, décidé de mettre le feu à ce qui restait du "thunderflash" et de le faire éclater. Le pauvre enfant ne savait pas évidemment qu'il y avait dans le "thunderflash" une quantité de poudre aussi considérable que celle qui s'y trouvait encore et il ne prévoyait pas qu'une explosion si violente se produirait.

His finding with respect to Gaston Laperrière is to the same effect.

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Marcel Dubeau and Guy Bouchard thought they had found a firecracker. They had neither seen nor heard of a thunderflash, and having regard to its size, the fact that the cap would have been removed before it was thrown, and its general appearance, one can understand how boys might well think they had found a firecracker. As Marcel Dubeau stated:

> Je pensais que c'était des petits pétards qu'on achetait.

The boys knew that firecrackers contained powder and "ça faisait seulement qu'un petit paff".

In the evening on St. Joseph street one of them lighted the thunderflash and Gaston Laperrière, not satisfied with the way it was burning, put it out with his foot and lighted it again, and when this time it did not appear to burn, the two boys, Marcel Dubeau and Gaston Laperrière, picked it up with their right hands when it exploded.

They admitted they appreciated danger. Marcel Dubeau admitted: "Je pensais que c'était pas dangereux".

Gaston Laperrière: "Q. Quand ça explose, c'est dangereux? R. Oui, monsieur."
but then explains:

> R. Je le savais, mais je ne savais pas . . . je ne pensais pas que ça allait faire tant de dommage que ça.

These boys were not trespassers upon the Giroux farm. They and other boys were in the habit of going there and for the purpose they were pursuing when they found this thunderflash. Giroux knew of their doing so over a period of time and never made objection thereto. Indeed, Marcel Dubeau often worked on the Giroux farm, had in fact worked there that day and finished about 2.30 in the afternoon.

Mr. Geoffrion pressed that even if the military authorities were negligent, the conduct of the boys plainly indicated they were aware of the danger and therefore their conduct in these circumstances constituted an intervening act of a third person of such a character as to relieve the appellant of responsibility. He points out that the first time the powder was lighted Guy Bouchard's fingers were burned and that Marcel Dubeau, one of the injured boys, was

present and witnessed that incident, and thereafter stood further back from the danger. That after supper when a group of about 25 boys gathered on St. Joseph street they lighted the powder on the sidewalk and it burned with a puff. They wanted a bigger puff and decided to burn all of the remaining powder at once. That when it was lighted and it did not burn as they anticipated from their experience with firecrackers, Gaston Laperrière put it out with his foot. Then when he re-lighted it and it did not appear to burn, he and Marcel Dubeau both took it in their hands when it exploded. He submits this constituted conduct so absurd and foolish in the light of their capacity, knowledge and experience and of what had taken place as to be quite beyond the field of reasonable foreseeability and the appellant ought not to be held liable therefor.

The conduct of these boys was in relation to what they believed to be a large firecracker. Upon their own admissions they knew it contained powder and was dangerous.

Where a child is of such an age as to be *naturally ignorant of danger* or to be unable to fend for itself at all, he cannot be said to be guilty of contributory negligence with regard to a *matter beyond his appreciation,* but quite young children are held responsible for not exercising that standard of care which may reasonably be expected of them.

23 Halsbury, p. 688, para. 972.

In view of their admissions and the finding of the learned trial judge, it is impossible to say, at least with respect to a firecracker, that these boys were "naturally ignorant of danger", or that it was "a matter beyond his (their) appreciation". In my opinion, having regard to their capacity, knowledge and experience, their conduct constituted negligence. That the boys were negligent, however, does not necessarily relieve the first party negligent of liability.

That a thunderflash left unexploded in a field adjoining a golf course would be picked up and meddled with in a manner that might cause injury or damage is a consequence that in my opinion would be anticipated by a reasonably careful person. If within the field of that reasonable anticipation injury results, the fact that the party finding the dangerous missile is negligent does not relieve the first party from liability.

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A boy 17 years old found a gun and without realizing it was loaded he pointed it at and shot another boy. In an action against the party who had so left the gun, Holmes L. J., stated:

> There is no evidence of how the path was used, but the jury were at liberty to infer that it was used to some extent; and their knowledge of the world would tell them that a gun casually laid aside has a great fascination for some people, who seem to have a natural impulse to handle and examine it, and who often do so in so careless and unskilful a way as that it is discharged without intention on their part. I do not attach much importance to the age of the defendant's son. He was old enough to know that it was dangerous to handle the gun on full cock, which had evidently been placed where he found it for some temporary purpose by a person who had been using it; and in my own reading and experience negligence in connection with firearms is as common in the case of men as of boys. Quite irrespective of the age of the persons who might use the path, I think that there was evidence from which the jury were at liberty to find that the defendant, when placing the gun against the fence, ought to have contemplated that it might fall into negligent hands. *Sullivan* v. *Creed,* (1).

Then again, in Pollock on Torts:

> A wrongful or negligent voluntary act of Peter may create a state of things giving an opportunity for another wrongful or negligent act of John, as well as for pure accidents. If harm is then caused by John's act, which act is of a kind that Peter might have reasonably foreseen, Peter and John may both be liable; and this whether John's act be wilful or not, for many kinds of negligent and wilfully wrongful acts are unhappily common, and a prudent man cannot shut his eyes to the probability that somebody will commit them if temptation is put in the way. One is not entitled to make obvious occasions for negligence.

Pollock on Torts, 14th ed. at p. 376.

Lord Dunedin in another case:

> It has, however, again and again been held that in the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives and other things *ejusdem generis,* there is a peculiar duty to take precaution imposed upon those who send forth or instal such articles when it is necessarily the case that other parties will come within their proximity; the duty being to take precaution; it is no excuse to say the accident would not have happened unless some other agency than that of the defendant had intermeddled with the matter.

Dominion Natural Gas Co. v. *Collins,* (2).

Gloster v. *Toronto Electric Light Co.,* (3); *Makins* v. *Piggott & Inglis,* (4); *Whitby* v. *Brock,* (5).

(1) [1904] 2 I. R. 317, at 355.
(2) [1909] A.C. 640, at 646.
(3) (1906) 39 Can. S.C.R. 27.
(4) (1898) 29 Can. S.C.R. 188.
(5) (1888) 4 T. L. R. 241.

Conduct that will relieve the first party negligent of liability is described by Lord Wright:

> It must always be shown that there is something which I will call ultroneous, something unwarrantable, a new cause coming in disturbing the sequence of events, something that can be described as either unreasonable or extraneous or extrinsic.

The Oropesa, (1).

The negligent conduct of the boys, Dubeau and Laperrière, cannot be so described. It falls far short of that of the 14 year old boy who, while employed at his work, decided to quit. To do so he crawled over or under a barricade in front of an open door, jumped onto a smoke flue and when it gave way fell and lost his life. His death was due to his *"own rash act"*: *Dominion Glass Co.* v. *Despins* (2).

Another illustration, a boy of 12 years walked on a trestle across a ravine 17 to 19 feet deep and 300 feet wide in the face of conspicuous danger signs. Recovery could not be had. It was just as if some person was saying to the boy: "It is dangerous to go there". As Anglin J. states:

> It shocks my common sense to think that a boy or a person who had been warned in that way and does go there and is injured by something he did not anticipate to find, should be entitled to recover.

Shilson v. *Northern Ontario Light and Power Co.* (3).

That the boys believed they were playing with powder which they knew to be dangerous, that they were playing with a firecracker larger than they were familiar with, distinguishes this case and its facts from the case of *Makins* v. *Piggott & Inglis,* (4) where a boy scratched a detonator of which he was "unaware of its character" and did so "in ignorance of its dangerous character" and thereby caused an explosion that

> could not be said to be his voluntary act in the sense that would incapacitate him from recovery.

The conduct of Marcel Dubeau and Gaston Laperrière indicated that they appreciated the possibility of injury, not the possibility of an injury so great as that which they suffered, but an injury similar in character. The difference is one of degree rather than of kind. Therefore, in spite of their partial knowledge of that with which they were

(1) [1943] 1 A.E.R. 211, or 214.
(2) (1922) 63 Can. S.C.R. 544.
(3) (1919) 59 Can. S.C.R. 443, a 446.
(4) (1898) 29 Can. S.C.R. 188.

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confronted, they cannot be entirely excused because in part their negligent conduct has contributed to their own injuries. In the language of *Makins* v. *Piggott & Inglis* (1) their conduct was voluntary with respect to a dangerous substance. In *Clarke* v. *Army & Navy Co-Operative Society,* (2), the defendants when they sold the tin of chlorinated lime appreciated the possibility of danger. No negligence was found on the part of the purchaser who recovered damages. Collins, M. R., stated at p. 161:

> I do not think it is very material whether he (the manager) attributed their being dangerous to the right reason or not. He clearly knew that the tins were potentially dangerous, for he instructed his assistants not to sell them without giving a warning to purchasers.

It would appear that when due consideration is given to the capacity, knowledge and experience and age of the boys in relation to all the facts and circumstances in this case, the law applicable is that set forth in the well-known case of *Lynch* v. *Nurdin* (3) and quoted with approval by Anglin J. (later Chief Justice) in *Geall* v. *Dominion Creosoting Co.,* (4).

> 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.

The appellant contends that if this be a case in which both parties contribute, and therefore a case of contributory negligence, the action on behalf of the boys must fail because section 19 (c), under which this action is brought, gives a right of action against the Crown only where the injuries are those "resulting *exclusively* from the negligence of any officer or servant of the Crown". Section 19 (c) of the *Exchequer Court Act,* being 1927 R.S.C., c. 34:

> 19. (c) Every claim against the Crown arising out of any death or injury to the person or to property *resulting* from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

The phrase "resulting from the negligence of any officer or servant of the Crown" has been in this section since it

(1) (1898) 29 Can. S.C.R. 188.
(2) [1903] 1 K.B. 155.
(3) (1841) 1 Q.B. 29, at 35.
(4) (1917) 55 Can. S.C.R. 587, at 610.

was enacted in 1887, and though twice amended, this phrase has remained unchanged. Referring to this enactment Mr. Justice Gwynne stated:

> The object, intent and effect of the above enactment was, as it appears to me, to confer upon the Exchequer Court, in all cases of claim against the government, either for the death of any person, or for injury to the person or property of any person committed to their charge upon any railway or other public work of the Dominion under the management and control of the government, arising from the negligence of the servants of the government, acting within the scope of their duties or employment upon such public work, the like jurisdiction as in like cases is exercised by the ordinary courts over public companies and individuals.

The City of Quebec v. *The Queen,* (1).

Sir Charles Fitzpatrick C. J., referring to the same section stated:

> Since the judgment in *The King* v. *Armstrong* (2), it must be considered as settled law that the *Exchequer Court Act* not only creates a remedy, but imposes a liability upon the Crown in such a case as the present and that such liability is to be determined by the laws of the province where the cause of action arose.

The King v. *Desrosiers,* (3).

The law varies in the respective provinces and the Crown has in the past quite properly availed itself of any defence provided by the law of the province in which the cause of action arose. This is illustrated by decisions in which the fellow servant rule was pleaded. When the cause of action arose in the province of Manitoba where the fellow servant rule obtained the suppliant's action failed: *Ryder* v. *The King,* (4). When the cause of action arose in the province of Quebec, where the fellow servant rule did not obtain, the suppliant recovered: *The Queen* v. *Fillion,* (5). See also *The King* v. *Armstrong,* (2).

In this Court the damages were apportioned where the negligence on the part of servants of the Crown contributed to the loss. The cause of action arose in the province of Quebec and action was brought under the present section 19 (c) (then sec. 20 (c)). Anglin C.J.:

> It seems to follow that we have here a case of "common offence or quasi-offence" of the respondent company and of the appellant resulting in a joint and several obligation on their part to persons who have sustained consequential injury (art. 1106 C. C.), with the result that there must be an apportionment of responsibility between these co-debtors
> * * *

(1) (1894) 24 Can. S.C.R. 420, at 449.
(2) (1908) 40 Can. S.C.R. 229.
(3) (1908) 41 Can. S.C.R. 71, at 78.
(4) (1905) 36 Can. S.C.R. 462.
(5) (1895) 24 Can. S.C.R. 482.

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The King v. *Canada Steamship Lines Ltd.* (1).

In the Exchequer Court damages have been apportioned between the Crown and the subject where the cause of action arose in the province of Quebec: *Lapointe* v. *The King,* (2); *Rochon* v. *The King,* (3); *Thiboutot* v. *The King,* (4); also two as yet unreported cases, *Martial St. Jacques* v. *The King,* and *Joseph Bouchard* v. *The King.*

The foregoing indicates the long accepted construction of section 19 (c). The insertion of the word "exclusively" in this section as suggested would make a substantial difference and at variance with the construction already established. It would therefore appear that the addition of any such word is a matter for the consideration of parliament rather than for the Court.

In my opinion the appeals should be dismissed with costs and the cross-appeals without costs.

RAND J.:—The essential fact of these cases is that what is known as a "thunderflash", a tube between 10 and 12 inches long and $1\frac{1}{2}$ inches or so in diameter, loaded with powder, highly dangerous, and used in military field exercises, was unlawfully placed and left on land where two boys who shortly thereafter found it had permission to be. Apart from the continuing trespass, the high degree of care required of those who control such articles means the anticipation of a greater range of probable mischief and that it must reach to children in their position I do not doubt. The natural consequences of that initial culpa extend then to the injuries suffered unless it can be said that at some point a new and independent actor has intervened.

The conception of "cause" in article 1053 of the Civil Code does not differ, in a case of this nature, from that of the Common Law: and as put by Lord Sumner in *S.S. "Singleton Aubry"* v. *S.S. "Paludina"* (5) in language approved by Lord Wright in *The Oropesa* (6).

> Cause and consequence in such a matter do not depend on the question, whether the first action which intervenes, is excusable or not, but on the question whether it is new and independent or not.

(1) [1927] S.C.R. 68, at 79.
(2) (1913) 14 Ex. C.R. 219.
(3) [1932] Ex. C.R. 161.
(4) [1932] Ex. C.R. 189.
(5) [1927] A.C. 16.
(6) [1943] 1 A.E.R. 211 at 216.

But where we are dealing with persons in their normal state of mind and body acting deliberately, in the absence of special circumstances, the innocence or culpability of the intervening act, certainly as we have it here, must, as to the actor himself, fix it either as a consequence of the initial cause or a new and originating cause. The chain of events was such that if an adult had been concerned rather than a boy of 12, the intervening act would be held to be new and independent; it was not a situation in which contributory negligence could operate; it would have been an intermeddling by a responsible person with what he would know could be dangerous.

As I understand the judgment below, it holds there can be partial culpability, in the case of children, for a given act. We do admit degrees of liability for consequences between two or more participants in a negligent cause, but I know of no binding authority which attributes fractional liability or deprivation of right to an infant in proportion to his appreciation of a particular situation. In relation to a specific act he must be either responsible or not responsible for its consequences; there is no halfway culpability; and the question is whether or not these boys of 11 and 12 are to be held to conduct that in the circumstances would have avoided the results which happened.

What is the standard by reference to which that question is to be answered? It has been declared by Baron Parke, in his customary terseness and clarity of language:

> The decision of *Lynch* v. *Nurdin* (1) proceeded wholly upon the ground that the Plaintiff had taken as much care as could be expected from a child of tender years—in short, that the Plaintiff was blameless and consequently that the act of the Plaintiff did not affect the question;

Lygo v. *Newbold* (2) (in argument).

The same rule is laid down by Duff, J. (as he then was) in *Winnipeg Electric Railways* v. *Wald,* (3).

> * * * it would be a question for them whether the Plaintiff's conduct had fallen below the standard of reasonable care expected from a child of her years.

That sets up an objective criterion: the prudent child of given years. But age is not to be taken too literally: understanding and care appear in rough categories. It is

(1) (1841) 1 Q.B. 29.
(2) (1854) 156 E.R. 130.
(3) (1909) 41 Can. S.C.R. 431, a

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not, however, the actual capacity of the child whose conduct is being examined; on this basis, the standard would be that of the tribunal itself; and the inconvenience and uncertainty of that, long ago pointed out by Chief Justice Tindal in *Vaughan* v. *Menlove* (1) in relation to adults, increase as we take into account the instincts and impulses of the child, in certain circumstances so susceptible to excitement. But that mode of stating the standard does not affect the substantial identity of the conduct so defined with that from which, in the particular situation, there would be only the exceptional departure by persons of the same age class.

As with the adult, the standard would take into account any clearly shown special knowledge, and, probably, the fact that the child's intelligence and general capacity had indubitably placed him in an older age category. But there is nothing of the unusual here. The act of both boys moving to pick up the explosive after the fuse had been lighted not only negatives such a capacity but demonstrates their inadequate appreciation of the danger they were courting.

If, then, the child in all the circumstances has used as much care as the ordinary child of his years would have used or if he has acted as all save the exceptional child of his age would have acted, his act is innocent; if not, as regards his own injury it is culpable: and whether his responsibility is exclusive or contributory depends on the nature of the events into which he has projected himself.

To determine if he has met the standard, I ask myself what is the general opinion of prudent persons—"the common sense of the community" as Holmes has put it—as to the likely and expectable conduct of an ordinary boy of 11 or 12 who gets hold of such an explosive; and the answer is, I think, that it would be just what happened here. It follows that he should not be allowed to handle by himself and alone such a menace as a thunderflash; and the universal care and apprehension attending holiday celebrations in fireworks attests this. In the common understanding, the natural and probable consequence of the conjunction of a normal boy of that age and such a compact danger will be that he will pry and meddle to his own injury. There is the virtually inevitable external behaviour which adults

(1) (1837) 4 Scott's Rep. 244, at 252.

must foresee in relation to acts which may, without justification or excuse, bring about that conjunction. The conduct of the boys here, then, was normal, likely, and, just as prudent behaviour in an adult, innocent. That excludes any qualification or limitation of the right to recover from the appellants.

This makes it unnecessary for me to consider Mr. Geoffrion's argument that the liability of the Crown under section 19 (c) of the *Exchequer Court Act* is limited to cases in which the act of the Crown's servant is the sole cause of the injury. I should perhaps say that I see nothing whatever anomalous in the view that what Parliament intended in creating liability of the Crown was to adopt the law then existing in each province except as it might thereafter be amended or changed by Parliament, such as for instance in the field of navigation and shipping; but in any event the interpretation placed on this section since its enactment has established a jurisprudence which I think it is now too late to modify.

As no question of quantum of damages has been raised, in each case I would dismiss the appeal with costs and allow the cross-appeal with costs both here and in the Court below.

Appeals dismissed with costs.

Cross-appeals dismissed without costs.

Solicitor for the appellant: *Gérard Lacroix.*

Solicitors for the respondents: *Dorion, Dorion & Robitaille.*