[HIGH COURT OF AUSTRALIA.]

ADELAIDE CHEMICAL AND FERTILIZER COMPANY LIMITED . . . . . Defendant, } Appellant;

AND

CARLYLE . . . . . Plaintiff, Respondent.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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Adelaide, *Sept.* 20, 23, 24.

Melbourne, *Dec.* 19.

Rich A.C.J., Starke, Dixon and McTiernan JJ.

Negligence—Dangerous fluid—Sulphuric acid—Supply in earthenware container—Breakage—Suitability of container—Injury to person taking delivery—Claim under Lord Campbell's Act—Dependants—Widow and child—Claim on behalf of widow only—Wrongs Act 1936 (*S.A.*) (*No.* 2267), *Part II.*

Evidence—Admissibility—Res gesta.

A company which manufactured and supplied sulphuric acid was accustomed to supply the acid in earthenware jars. These jars were manufactured and supplied to the company by a reputable firm of manufacturers and were tested by the manufacturers and by the company. The jars were in general use as containers for sulphuric acid, and the company had used large numbers with few breakages. Experiments showed that the jars, if filled with fluid of approximately the same weight as sulphuric acid, when tilted and allowed to fall some nine inches, invariably broke. The corrosive nature of the contents of the jars made them highly dangerous to persons handling them, if they were broken and the acid escaped. The company was accustomed to supply sulphuric acid in these containers to C.'s employers. As C. was attempting to lift one of the jars in order to move it from the company's delivery platform to his buckboard which was standing nearby, the jar broke. The contents were spilled over C., who immediately hastened inside the company's building and began to wash the acid from his legs. His wife, who had been sitting in the buckboard, followed him and asked what had happened. He replied :—" I took hold of the handle of the jar, tilted it slightly towards me, to get my other hand underneath, and the top of the jar seemed

to come away in my hand. It must have been faulty or cracked." Later C. was treated at a hospital and was advised to report next day to a doctor. He failed to do so, but his wife treated him with a preparation which a chemist advised her was a proper treatment for burns, as in fact it was. Later there were unexpected conditions, and a doctor was immediately called in. Streptococcal septicaemia developed, and C. died. His widow brought an action against the company under Part II. of the *Wrongs Act* 1936 (S.A.) (*Lord Campbell's Act*) on her own behalf only, proceedings on behalf of the only child of the marriage having been taken under the *Workmen's Compensation Act*. In the Supreme Court of South Australia it was found that the particular jar from which the damage resulted was defective and also that the jar was of an unsafe and dangerous type; and the widow was awarded damages.

Held:—

(1) That, whether or not the evidence of C.'s statement to his wife was admissible, and whether or not there was evidence to support the finding that the particular jar was defective, there was sufficient evidence to support the finding that the jar was not reasonably safe, and this finding should not be disturbed; accordingly, the company was properly found to have committed a breach of the duty of care which it owed to C.

(2) That it had not been established that the death was due to the intervention of a new and independent cause.

(3) That contributory negligence by C. had not been established.

(4) That the widow's failure to sue on behalf of the child did not result in the action's being improperly constituted: *Avery* v. *London and North Eastern Railway Co. Ltd.*, (1938) A.C. 606, followed.

Per Starke and *Dixon* JJ.: Admissibility of statements as part of *res gestae* discussed.

Decision of the Supreme Court of South Australia (*Cleland* J.): *Carlyle* v. *Adelaide Chemical and Fertilizer Co. Ltd.*, (1939) S.A.S.R. 458, affirmed.

APPEAL from the Supreme Court of South Australia.

Leslie Morton Carlyle, a married man with one child, was an employee of a herd-testing association, an institution subsidized by the Government of South Australia. Concentrated sulphuric acid, a highly corrosive commodity, was used by Carlyle in the course of his herd testing. This sulphuric acid was supplied to the association, under arrangement with the South-Australian Department of Agriculture. The sulphuric acid was supplied by the Adelaide Chemical and Fertilizer Co. Ltd., a manufacturer and supplier of sulphuric acid. The sulphuric acid was supplied in earthenware jars. Each jar was cylindrical in shape with a uniform diameter of about ten inches until, at a point thirteen inches from its base, it tapered into a cone which terminated in a short neck wherein a stopper was inserted. Each jar had a handle of earthenware which

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formed an integral part of its structure and which was united to it at its neck and shoulder. The jar contained approximately three gallons of acid, which weighed about 56 lbs. The jar weighed 19 lbs., so that the total weight of the jar and contents was about 75 lbs. There was evidence that the jars were supplied to the company by a reputable firm of manufacturers and were in general use as containers of sulphuric acid. There was further evidence that the jars were tested by the manufacturers and by the company and that the company used large numbers of the jars and had few breakages. Experiments showed, however, that the jars, if filled with fluid of approximately the same weight as sulphuric acid, when tilted and allowed to fall some nine inches, invariably broke. The corrosive nature of the sulphuric acid made the contents of the jars highly dangerous to persons who handled them, should the jars break and the acid escape.

On 31st March 1939 Carlyle, accompanied by his wife, drove his buckboard to the company's delivery platform for the purpose of taking delivery of two of these jars of sulphuric acid. These jars were on the delivery platform, an erection about three feet three inches from the ground, consisting of jarrah planks affixed to bricks. As Carlyle was attempting to lift one of the jars in order to move it to his buckboard, the jar broke. The contents were spilled over Carlyle, who immediately hastened inside the building, removed his trousers and began to wash the acid from his legs. His wife gave the following evidence :—" I was attracted by my husband making a noise—I heard him make a sound of some sort—a cry or something. I looked around, and he was standing half facing me, with liquid pouring over him from an earthenware jar. The biggest portion of that jar was on the platform but the top part was in two or three pieces on the pavement. The jar was lying on its side. The piece that contained the handle of the jar —the handle itself—was on the pavement. Most of the jar remained on the platform. . . . I saw my husband instantly jump up on to the platform and he disappeared. I scrambled out of the car as quickly as I could and I went through the big doors of the premises that were open to the street, and when I saw my husband he was practically stripped, sitting in a sink, with water pouring over him. . . . So soon as I saw my husband sitting under the tap, as I've related, I asked him what happened. My husband said, 'I took hold of the handle of the jar, tilted it slightly towards me, to get my other hand underneath, and the top of the jar seemed to come away in my hand. It must have been faulty, or cracked.'" Later Carlyle was treated at the Adelaide Hospital, where he was advised

to report next day to the nearest doctor. This advice was not followed, but his wife treated him with tannemol, which, a chemist advised her, was a proper treatment for burns. Subsequently unexpected conditions supervened, and a doctor was immediately summoned. Streptococcal septicaemia developed, and Carlyle died.

His widow, on behalf of herself only, and not on behalf of herself and her child, brought an action in the Supreme Court of South Australia claiming damages from the company. The action was brought under Part II. of the *Wrongs Act* 1936 (S.A.), which contains provisions corresponding to Lord Campbell's Act. Upon the hearing the court was informed that the plaintiff claimed damages only equal in amount to what her share would have been, had she received damages on behalf of the child as well, and was also informed that proceedings on the child's behalf had been taken under the *Workmen's Compensation Act*. *Cleland* J., who tried the action, gave judgment for the plaintiff. His Honour found that the particular jar was defective and also that the jars in general use by the defendant company, although not defective in any particular sense, were in a general sense unsafe and dangerous.

The company appealed to the High Court.

Other material facts appear from the judgments hereunder.

Mayo K.C. (with him *Astley*), for the appellant. It is submitted that (1) no negligence by the appellant was proved; (2) the cause, or a proximate cause, of the smashing of the jar was the deceased's failure to take care; (3) this is a case of *volenti non fit injuria*; (4) the death was caused by another agency or the intervention of another agency; (5) the action is not properly constituted; (6) the evidence of the remarks made by the deceased to his wife was improperly admitted. Negligence involves a breach of a duty to the person damnified, and cases such as *Donoghue* v. *Stevenson* (1) and *Grant* v. *Australian Knitting Mills Ltd.* (2) have no direct bearing on the present case. The only breach of duty can be either the selection of the type of jar usually used or the selection of the particular jar. As to selection of the particular jar, see *Halsbury's Laws of England*, 2nd ed., vol. 23, p. 573. The type of jar was in universal use in Australia, it was the kind of jar used daily by the deceased for twelve years, it was the type of jar which the deceased (through the Department of Agriculture) had sought to have given to him, and the deceased knew as much of earthenware as the appellant and as much of sulphuric acid as was material. These latter considerations also found the defence of *volenti non fit injuria*. The duty to take care involves reasonable selection only.

(1) (1932) A.C. 562. (2) (1936) A.C. 85.

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[DIXON J. When dealing with dangerous things what is reasonable involves what is necessary to prevent escape.]

The word "dangerous" is relative. A commodity may be dangerous in some cases and not in others. The appellant has acted reasonably. The jars in question have been used by the company for fifty years and by the deceased for twelve years without adverse consequences. The deceased alone was concerned in lifting the jar, and he had done so before. Assuming the jar was not proper for the purpose for which it was designed, the deceased, with the knowledge he had, had the onus thrown upon him of taking care. There is no evidence that anything better could have been substituted for the type of jar now in use. The best test of reasonableness is what has been the result of reasonable use over a period of years (*Cox Bros. (Australia) Ltd.* v. *Commissioner of Waterworks* (1)). There is no evidence of a breach of duty in selecting the particular jar (*Fitzpatrick* v. *Walter E. Cooper Pty. Ltd.* (2)). Where you get persons equally knowledgable of the danger, there is no absolute liability.

[DIXON J. referred to *Crisfield* v. *Ireland* (3).]

In all the circumstances the appellant's selection of a container was not a breach of duty, or, if it were, the result was contributed to by the deceased. The deceased's death was due to his failure to take the advice given him at the Adelaide Hospital to consult a doctor. The streptococcus must have entered after he left the hospital and because of his failing to follow the directions there given him (*Innes or Grant* v. *G. & G. Kynoch* (4)). The infant son should have been joined as a plaintiff (*Wrongs Act* (S.A.), secs. 20, 21, 23). *Avery* v. *London and North Eastern Railway Co.* (5) is distinguishable, as the circumstances there were different. [Counsel also referred to *Bellambi Coal Co. Ltd.* v. *Murray* (6).]

Skipper (with him *Hollidge*), for the respondent. The duty was on the appellant; there was no duty on the deceased's part to offer any protection. *Avery v. London and North Eastern Railway Co.* (5) shows that the action is properly constituted. It is clear beyond controversy that the whole top of the jar came off in a fairly clean break at the junction between the cylindrical part and the shaped-up cone, that the cylindrical part was unbroken and that the jars broke in the circumstances to which they were exposed in the experiments made on the jars. Evidence of the deceased's

(1) (1933) 50 C.L.R. 108, at p. 118.
(2) (1935) 54 C.L.R. 200, at p. 218.
(3) (1918) V.L.R. 105.
(4) (1919) A.C. 765, at p. 770.
(5) (1938) A.C. 606.
(6) (1909) 9 C.L.R. 568, at pp. 579-581, 604.

statement to his wife was properly admitted, and there were amply sufficient grounds on which *Cleland* J. could find, as he did, both that the particular jar was defective and that jars of the type used by the appellant were insufficient for their purpose. It is not necessary for us to show any specific act of negligence. As to inference and conjecture, see *Kerr or Lendrum* v. *Ayr Steam Shipping Co. Ltd.* (1). The findings of fact were entirely in the respondent's favour; and there is no ground for saying that they were wrong. At the least there was a duty on the appellant to give warning of the brittle nature of the container. [Counsel referred to *Donoghue* v. *Stevenson* (2); *North-western Utilities Ltd.* v. *London Guarantee and Accident Co. Ltd.* (3); *Rainham Chemical Works Ltd.* v. *Belvedere Fish Guano Co. Ltd.* (4); *Western Engraving Co.* v. *Film Laboratories Ltd.* (5).] As to the defence of *novus actus interveniens*, see *Fife Coal Co.* v. *Young* (6). If the injury were due to treatment given by the wife, the answer to the defence is found in *Williams* v. *Graigola Merthyr Co. Ltd.* (7). The maxim *volenti non fit injuria* affords no defence (*Dann* v. *Hamilton* (8)).

Astley, in reply, referred to *Burfitt* v. *A. and E. Kille* (9).

Cur. adv. vult.

Dec. 19

The following written judgments were delivered:—

Rich A.C.J. This appeal comes from a judgment of *Cleland* J. given on the trial of an action in favour of the plaintiff.

The action is brought in respect of the death of her husband by a widow under Part II. of the *Wrongs Act* 1936 (S.A.), which is founded on the provisions of *Lord Campbell's Act*. The deceased was employed by an institution more or less of a governmental character, as a herd tester, and for the purposes of his work he required supplies of sulphuric acid. The appellant company provided the sulphuric acid in earthenware jars, of which he took delivery. One of these jars was broken as he was attempting to move it from a platform at the front of the appellant's stores to his buckboard standing nearby. The sulphuric acid was spilt over his legs, and, although they were not badly injured, septicaemia set in and he died.

The appeal raises several points for our consideration.

1. The appellant objects that the action was defectively constituted because there was a child of the marriage on whose behalf

(1) (1915) A.C. 217, at p. 233.
(2) (1932) A.C. 562.
(3) (1936) A.C. 108, at pp. 118-120.
(4) (1921) 2 A.C. 465, at p. 471.
(5) (1936) 1 All E.R. 106.
(6) (1940) A.C. 479.
(7) (1924) 17 B.W.C.C. 202.
(8) (1939) 1 K.B. 509.
(9) (1939) 2 K.B. 743, at p. 747.

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the widow did not purport to sue. We are told that the reason is that independent proceedings for workers' compensation had been instituted on behalf of the infant, who had since recovered £600. Our attention was called by Mr. *Skipper* for the respondent to the recent decision of the House of Lords in *Avery* v. *London and North Eastern Railway Co.* (1), and he contended that the grounds of their Lordships' decision are inconsistent with the appellant's objection. In this contention I agree. I therefore think this point fails.

2. The appellant maintained that, as the deceased died of a streptococcal infection, the real cause of death was not the sulphuric acid burn, which merely provided the opportunity for the incursion of the streptococci, but the contact which the deceased must have had with whatever object was the source of infection. In my opinion this argument is unsound. The sulphuric acid caused a physical injury to which the deceased's death is traceable as a proximate and not remote consequence. The liability of wounds to infection is a normal and not abnormal characteristic of injury. Medical treatment has made what at one time was a most usual, if not invariable, result of any serious wound appear so infrequent as to bear the aspect of the result of independent carelessness in treatment. Of course, infective conditions did not always result in septicaemia. But even at the present time it is impossible for a court to treat the infection of a wound as a *novus actus interveniens*. This point also fails.

3. The appellant then complained that *Cleland* J. erroneously admitted and acted upon a hearsay statement made by the deceased to his wife within a few minutes of his injury. The statement, if made and true, would serve to show that the jar broke in the deceased's hands owing to some crack or concealed defect. And *Cleland* J. made a finding to this effect and based his judgment upon it as one alternative ground of negligence on the part of the appellant. I am not prepared to hold that the evidence was admissible as part of the *res gestae*, as *Cleland* J. held, but I find it unnecessary to decide the point because I think his judgment should be upheld on the other alternative upon which it was rested.

4. That ground was that jars, having regard to their brittleness and liability to fracture on overturning from the vertical to the horizontal, were unsuitable for the purpose of holding a heavy fluid of such dangerous properties as sulphuric acid. No doubt it is not easy for the appellant to provide a container fulfilling all the varying demands of durability, convenience, resistance to corrosion and cheapness. But courts of law exact a high standard of diligence in safeguarding those required to handle dangerous chemicals in the

(1) (1938) A.C. 606.

course of their vocations from injuries arising from their accidental escape. Manufacturers who put them out must adopt containers which are not liable to break under conditions that may be expected to arise not infrequently in the course of their subsequent life without any negligence on the part of those through whose hands they will pass. It is not for the court to say exactly what ought to be done—whether glass containers should be used or earthenware less brittle could be made or the containers should be shaped in a different manner with a broader base and tapering sides or the containers should be enclosed so that they could not be used bare without a protective covering or crate or whatever measures are open. But it is for a court to say that every care should be taken to see that the slip of the hand or failure of muscular control on the part of a workman who allows a jar to fall on its side in moving it does not necessarily mean that a large body of sulphuric acid is discharged over him. *Cleland* J. had evidence before him that, if a jar of acid was overturned, it always broke. With this central fact and an amount of information about possible containers and the number of breakages experienced and the course of manufacture and trade before him, I think that *Cleland* J. was fully entitled to conclude that the jars in use were unsuitable because they did not provide sufficient safeguards.

5. It was suggested on behalf of the appellant that the deceased must have been guilty of contributory negligence. I do not think so. A heavy jar may be allowed to slip occasionally in spite of the most careful handling.

In my opinion the appeal should be dismissed with costs.

STARKE J. This appeal is from a judgment of the Supreme Court of South Australia.

The respondent, who is the widow of one Carlyle, deceased, brought an action against the appellant, claiming damages for negligence on the part of the appellant causing the death of her husband. It was brought for her own benefit and is based upon the *Wrongs Act* 1936, which contains provisions corresponding to the English Act known as *Lord Campbell's Act*. The appellant is a manufacturer and supplier of sulphuric acid, which, as is well known, is highly corrosive. It supplies the acid to the public in containers or earthenware jars which are obtained from the makers, in this case from the proprietors of the Bendigo Potteries. The deceased was a herd tester employed by a herd-testing association—a semi-government institution subsidized by the Government, but paid by the Department of Agriculture in South Australia. Concentrated

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sulphuric acid was used by the deceased in the course of his herd testing. It was supplied to him by the appellant by arrangement with the Department of Agriculture. Approximately, he was supplied with two jars a month.

In March of 1939 the appellant supplied him with sulphuric acid in two earthenware jars, each containing approximately three gallons of acid, which with the jar (19 lbs.) weighed approximately 75 lbs. Whilst in the course of taking delivery of the acid from the appellant's delivery platform in Adelaide, one of the jars was broken and the acid ran out and over the legs and feet of the deceased, who was severely injured and subsequently died from blood-poisoning or streptococcal septicaemia.

It was not disputed that the appellant stood in a relationship of duty towards the deceased, to whom it had delivered sulphuric acid in earthenware jars: See *Farr* v. *Butters & Co.* (1), per *Scrutton* L.J. It is a duty involving the exercise of care and caution. The degree or amount of care required is "in proportion to the magnitude and the apparent imminence of the risk."

It was suggested that the present case fell within the rule of strict and unqualified liability propounded in *Rylands* v. *Fletcher* (2). But that rule was propounded in relation to the occupation of property. "We think," said *Blackburn* J., delivering the judgment of the Exchequer Chamber, "that the true rule of law is that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes must keep it at his peril" (3). The rule has been applied to the undertakings of gas and electric companies: See *Northwestern Utilities Ltd.* v. *London Guarantee and Accident Company Ltd.* (4).

It was next argued that the earthenware jars containing sulphuric acid were things dangerous in themselves and that the rule of law in such cases was also one of strict and unqualified liability, as was illustrated in the cases by the use of such expressions as "consummate care" (*Faulkner* v. *Wischer & Co. Pty. Ltd. and Rosenhain & Co.* (5); *Pollock* on *Torts*, 13th ed., p. 518); "a degree of diligence so stringent as to amount practically to a guarantee of safety"; "the high degree of care, amounting in effect to insurance against risk" (*Donoghue* v. *Stevenson* (6)). It would appear to be a question of law, if the facts are undisputed, whether goods fall within the category of things dangerous in themselves (*Blacker* v. *Lake &*

(1) (1932) 2 K.B. 606, at pp. 614-617.
(2) (1868) L.R. 3 H.L. 330; (1866) L.R. 1 Ex. 265.
(3) (1866) L.R. 1 Ex., at p. 279.
(4) (1936) A.C. 108.
(5) (1918) V.L.R. 513, at p. 539.
(6) (1932) A.C., at p. 612.

Elliot Ltd. (1); *Faulkner* v. *Wischer & Co. Pty. Ltd. and Rosenhain & Co.* (2))—See also *Wray* v. *Essex County Council* (3).

In my judgment, earthenware jars containing sulphuric acid do fall within the category of things dangerous in themselves because the acid if it escaped might put life or limb in peril, particularly the lives and limbs of those who handled them or used the acid. But still the law, in my judgment, does not impose a rule of strict and unqualified liability in the case of things dangerous in themselves. The degree of care that is required in the case of such things is that which is reasonable in the circumstances, that which a reasonably prudent man would exercise in the circumstances. A reasonably prudent man would, no doubt, in the cases of such things exercise a "keener foresight" or "a degree of diligence so stringent as to amount practically to a guarantee of safety," or "a high degree of care amounting in effect to an insurance against risk," or "the greatest care" or "consummate care." The duty is "more imperious" when things dangerous in themselves are being handled (*Jefferson* v. *Derbyshire Farmers Ltd.* (4)).

That the rule as to things dangerous in themselves is as stated may be gathered from the judgment of the Judicial Committee in *Dominion Natural Gas Co. Ltd.* v. *Collins and Perkins* (5) :—"The gas company were not occupiers of the premises on which the accident happened. Further, there being no relation of contract between the company and the plaintiffs, the company cannot appeal to any defect in the machine supplied by the defendants which might constitute breach of contract. There may be, however, in the case of anyone performing an operation, or setting up and installing a machine, a relationship of duty. What that duty is will vary according to the subject matter of the thing involved. 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 that the accident would not have happened unless some other agency than that of the defendant had intermeddled with the matter" (*Jefferson* v. *Derbyshire Farmers Ltd.* (6); *Parry* v. *Smith* (7); *Faulkner* v. *Wischer & Co. Pty. Ltd. and Rosenhain & Co.* (8)). And whether the degree of care that a reasonably prudent man would exercise

(1) (1912) 106 L.T. 533, at p. 535.
(2) (1918) V.L.R. 701, at p. 705. 40 A.L.T. 14
(3) (1936) 3 All E.R. 97, at p. 101.
(4) (1921) 2 K.B., at p. 281.
(5) (1909) A.C. 640, at p. 646.
(6) (1921) 2 K.B., at p. 289.
(7) (1879) 4 C.P.D. 325.
(8) (1918) V.L.R. 513, 701. 40 A.L.T. 14.

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in respect of things dangerous in themselves has been observed becomes ultimately a question of fact.

In the present case, the learned trial judge found that the particular—the broken—jar was defective, and also that the jars in general use by the defendant, although not defective in any particular sense, were in a general sense unsafe and dangerous. The first finding was based in part upon a statement made by the deceased to his wife, the respondent. She was sitting in the motor vehicle belonging to the deceased and saw her husband at the appellant's platform. "I was attracted," she said, "by my husband making a noise—I heard him make a sound of some sort—a cry or something. I looked around, and he was standing half facing me, with liquid pouring over him from an earthenware jar. The biggest portion of that jar was on the platform but the top part was in two or three pieces on the pavement. The jar was lying on its side. The piece that contained the handle of the jar—the handle itself—was on the pavement. Most of the jar remained on the platform. . . . I saw my husband instantly jump up on to the platform and he disappeared. I scrambled out of the car as quickly as I could and I went through the big doors of the premises that were open to the street, and when I saw my husband he was practically stripped, sitting in a sink, with water pouring over him . . . So soon as I saw my husband sitting under the tap, as I've related, I asked him what happened. My husband said, 'I took hold of the handle of the jar, tilted it slightly towards me, to get my other hand underneath, and the top of the jar seemed to come away in my hand. It must have been faulty, or cracked.'" The husband's statement was admitted as part of the *res gesta*, but it is objected that the statement was inadmissible. Statements forming part of a transaction are admissible as relevant facts, but statements regarding relevant facts are only admissible as a medium of proof if they comply with certain conditions. Thus, statements accompanying or explaining the fact or transaction in issue have been admitted in evidence as part of the *res gesta*. This doctrine is ill defined and uncertain in application. According to *Taylor* on *Evidence*, 10th ed., par. 583, "the best general idea of what is meant by *res gestae*, is that this expression includes everything that may be fairly considered 'an incident of the event under consideration.'" But this proposition is unsatisfactory, for it is clear that such statements or declarations must, in order to be admissible, be contemporaneous or substantially contemporaneous with the fact, i.e., "made either during, or immediately before or after, its occurrence—but not at such an interval from it as to allow of fabrication, or to reduce them to the mere narrative of a

past event " (*Phipson, Law of Evidence*, 5th ed. (1911), p. 47). " The rule," says Professor *Thayer, Legal Essays, Bedingfield's Case*, at p. 274, " calls for a declaration which is made either while the matter in question is actually going on, or immediately before or after it . . . the nearness in time should be such that the declaration may in a fair sense be said to be part of the *res gesta*, i.e., a part of the transaction of which it purports to give an account." Thus in the case of *Vicksburg and Meridian Railroad Co.* v. *O'Brien* (1) the question of fact was the rate of speed of a train at the time of an accident. The engineer of the train made a statement some ten to thirty minutes after the accident that its speed was about eighteen miles per hour. The majority of the court, four justices dissenting, held that the statement was inadmissible. The statement, the majority said, was made " after the accident had become a completed fact. . . . It did not accompany the act from which the injuries in question arose. It was . . . the mere narration of a past occurrence, not a part of the *res gestae* " (2). It is difficult to reconcile this decision with that of the same court in *Traveller's Insurance Co.* v. *Mosley* (3). But the latter decision has been criticized and is difficult, it has been said, to support upon the facts reported (See *Thayer, Legal Essays, Bedingfield's Case*, at pp. 276, 279); but the former decision is fairly close to the English decisions, *R.* v. *Bedingfield* (4) and *R.* v. *Goddard* (5). The admissibility of the statement or declaration is a matter of law. But, as *Field* J. observed in his dissenting opinion in the *Vicksburg Case* (6), " the admissibility of a declaration, in connection with evidence of the principal fact . . . must be determined by the judge according to the degree of its relation to that fact, and in the exercise of a sound discretion ; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description." The whole subject has been discussed at large by Professor *Thayer* in the *Essays* already mentioned, by Mr. *S. L. Phipson* in the *Law Quarterly Review*, vol. 19, p. 435, and by Professor *Wigmore* in his work on *Evidence*, 2nd ed. (1923), vol. 3, pars. 1745 et seq.

The facts of which the declarations or statements are evidence are equally ill defined. According to *Taylor* and *Phipson*, the declarations or statements when admissible in evidence are no proof whatever of the facts themselves, the existence of which must be established *aliunde*. " And although receivable," says Mr.

(1) (1886) 119 U.S. 99 [30 Law. Ed. 299].
(2) (1886) 119 U.S., at p. 105 [30 Law. Ed., at p. 301].
(3) (1869) 75 U.S. 397 [19 Law. Ed. 437].
(4) (1879) 14 Cox C.C. 341.
(5) (1882) 15 Cox C.C. 7.
(6) (1886) 119 U.S., at pp. 108, 109 [30 Law. Ed., at p. 302].

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Phipson, "to explain, identify, or corroborate, it is doubtful how far they can be used as evidence of the truth of any of the facts stated": See *Taylor* on *Evidence*, 10th ed., par. 586; *Phipson, Law of Evidence*, 5th ed. (1911), p. 49, and cases there cited; *Phipson*, "The Doctrine of Res Gesta in the Law of Evidence," *Law Quarterly Review*, vol. 19, at p. 448. The American cases and authors view the matter somewhat differently. "This" (Declarations are no proof of the facts themselves) "perhaps sometimes misleads. Of course, when it is said that you must have your fact, your *res gesta*, it is implied that you cannot depend on the declaration for the proof of that; but it must not be supposed that the declaration is not legitimately used to prove what the declaration imports, and to supply new and otherwise unproved, or insufficiently proved, elements in the *res gesta*" (*Thayer, Legal Essays, Bedingfield's Case*, at p. 288)—*Wigmore* on *Evidence*, 2nd ed., vol. 3, pp. 762, 764. Unless this be true, the celebrated controversy in connection with *Bedingfield's Case* (1) and the decisions of *R.* v. *Foster* (2), *R.* v. *Lunny* (3), *R.* v. *Goddard* (4), seem almost meaningless. *Holmes* J., in delivering the judgment of the Supreme Judicial Court of Massachussets in *Elmer* v. *Fessenden* (5), whilst recognizing that declarations are not evidence of the past facts which they may recite, yet affirms that they have been admitted to prove the cause of a wound or injury when the declarations were made at the time or immediately after the event and adds that, if they are not exceptions to the general rule, they at least mark the limit of admissibility. So much may also, I think, be deduced from the English cases such as *Thompson* v. *Trevanion* (6), *R.* v. *Foster* (2) and *R.* v. *Lunny* (3) and *R.* v. *Thomson* (7).

In the present case, the admission in evidence of the statement of the deceased to his wife involves a conclusion by the trial judge that the statement was so near in point of time to the accident that it was substantially contemporaneous with it and might in a fair sense be said to be part of the transaction or accident of which it purported to give an account. Unless clearly wrong, this conclusion of fact on the part of the learned judge should be sustained. So far from being clearly wrong, the conclusion is reasonably open upon the facts. The statement, it is true, was not made at the moment when the earthenware jar was broken and the injuries to the deceased were sustained; but it was made almost immediately afterwards and whilst the deceased was endeavouring to wash the

(1) (1879) 14 Cox C.C. 341.
(2) (1834) 6 C. & P. 325 [172 E.R. 1261].
(3) (1854) 6 Cox C.C. 477.
(4) (1882) 15 Cox C.C. 7.
(5) (1890) 151 Mass. 357.
(6) (1693) Skin. 402 [90 E.R. 179].
(7) (1912) 3 K.B. 19, at p. 22.

sulphuric acid from his body. According to the wife, she heard her husband's cry and immediately ran to him and asked what had happened. The conclusion of the learned judge upon the facts proved justified his admission of the statement of the deceased in evidence. And in my opinion the statement might be legitimately used to explain the accident and how it occurred if the learned judge were satisfied that the statement had been made and were true. But the deceased's conclusion that the jar was faulty or cracked was no evidence of that fact. That was a matter of fact for determination by the learned judge himself. Upon this basis there was evidence upon which the judge might reasonably conclude, as he did, that the particular jar—the broken jar—was defective, and that the appellant had not discharged the duty of care, already stated, which it owed to the deceased.

In my opinion, the further finding of the learned judge that the jars in general use by the appellant, although not defective in any particular sense, were in a general sense unsafe and dangerous, is also warranted by the evidence. The appellant led evidence that its jars were supplied by a reputable firm of manufacturers and were in general use as containers for sulphuric acid, that the manufacturers and the appellant tested the jars, that the appellant used large numbers of the jars and had few breakages. But it appears from the evidence that the jars used by the appellant were "decidedly brittle" and that earthenware jars are "fairly easily broken." Experiments established that the jars, if filled with fluid, tilted and allowed to fall some nine inches, invariably broke and spilled the fluid. The jars were unprotected by wicker or other coverings, but it appears that the appellant delivered the jars to its customers filled with acid, sometimes in wooden crates, holding two jars, and at other times without a crate. The deceased was accustomed to handling sulphuric acid in jars supplied by the appellant. On the day of the accident he returned two empty jars and said he would retain a crate which had been formerly supplied to him with jars containing sulphuric acid. At the same time, he ordered two additional jars of acid, which were delivered to him on the appellant's platform, and he was in the act of loading them and placing them in the crate which he had retained on his car. But delivering, transporting and handling these jars, containing sulphuric acid, was an ordinary use of the jars by the appellant and its customers. The appellant could not regulate its duty on the assumption that only careful people would handle its jars or that no untoward event would happen. It was bound to take into consideration that not only careful but careless people might handle them and that sudden

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or untoward knocks might fracture or break its brittle and easily broken jars (*Henwood* v. *Municipal Tramways Trust (S.A.)* (1)). The corrosive content of the jars made them highly dangerous to persons handling them if they were broken and the acid escaped. The appellant was in these circumstances under a duty, as already stated, to use a high degree of care that jars which it used as containers for sulphuric acid were not unsafe and dangerous. The learned judge found that the appellant had failed in this duty, and the finding is reasonably open upon the facts proved and should accordingly be supported.

The suggestion is untenable that the damages awarded to the respondent were not directly traceable to the negligence of the appellant but were due to the operation of independent causes, namely, the disobedience of medical orders and the want of proper treatment of the injuries by the deceased and his wife: See *In re Polemis and Furness, Withy & Co.* (2). The cause of death was streptococcal septicaemia following, according to medical opinion, upon the infection of a wound or burn upon the body of the deceased brought about by the operation of sulphuric acid upon his skin. But the evidence does not establish any fault on the part of the deceased or his wife. After treatment at the Adelaide Hospital, the deceased did not report to the nearest doctor next day, as advised, but his wife treated him to the best of her ability with tannemol, which a chemist advised her was a proper treatment for burns, as in fact it was, and she called in a doctor so soon as unexpected conditions developed.

Lastly it was contended that the action was not properly constituted in that it was not brought for the benefit of the wife and child of the deceased but for the benefit of the wife alone. The contention cannot be sustained in view of the reasons given in the House of Lords in the case of *Avery* v. *London and North Eastern Railway Co.* (3), and those reasons also make it clear that the appellant is protected from a further claim by the child under the Act corresponding to *Lord Campbell's Act*. The learned judge was satisfied that a claim on behalf of the child was being pursued under the *Workmen's Compensation Act* and did not think it necessary to require that the action should be brought for the benefit of the child as well as for the benefit of the wife. And I gathered from statements at the Bar that the claim was brought to a successful result.

The appeal should be dismissed.

(1) (1938) 60 C.L.R. 439, at p. 453. (2) (1921) 3 K.B. 560, at p. 577.
(3) (1938) A.C. 606.

DIXON J. The deceased was an employee of a herd-testing association, and the sulphuric acid appears to have been sold or supplied, under arrangements with the South-Australian Department of Agriculture, to the association as the purchaser and not to him. The deceased took delivery of the sulphuric acid as the servant of the purchaser, and not as a principal whose rights in relation to the condition of the chattel sold would be governed primarily by the terms of the contract of sale: See per *Brett* M.R. in *Heaven* v. *Pender* (1). The existence of a duty towards a person in such a position in reference to unusual dangers was established long ago by *Farrant* v. *Barnes* (2), though that case dealt with the necessity of giving him a warning of the danger and did not describe the general nature of the duty or define its measure. But it would not now be denied that, if a chattel involves unusual danger to those who handle it, a vendor delivering it to a servant or agent of a purchaser is bound to exercise reasonable care for the safety of the person so receiving it, and the degree of care and the sufficiency, as a fulfilment of the duty, of a warning or of any other measure that may be adopted will depend upon the nature of the danger and the other circumstances of the case: Cf. *Donoghue* v. *Stevenson* (3).

In the present case, notwithstanding that the deceased was fully alive to the harm which might be done by sulphuric acid and therefore to the necessity of handling the jars so as not to break them or spill their contents, the injurious properties of the chemical are such as to place upon the defendant a high obligation of care to guard against its accidental escape from the containers. It was incumbent upon the defendant to exercise at least all reasonable care to provide a vessel as durable and free from liability to break in the ordinary course of handling as is compatible with the conditions and exigencies of manufacture and trade. The substantial question in the case is whether upon the evidence the finding that the defendant did not perform that duty ought to stand.

In so far as the finding depends upon the inference that the jar broke in the deceased's hands owing to a latent defect which the defendant should have discovered, I do not think that it can be supported. A necessary part of the foundation for that inference appears to me to be a statement attributed to the deceased to the effect that, as he tilted the jar, holding its handle, the top of the jar seemed to come away in his hand. He made the statement to his wife as he sat in a sink with water pouring over his legs to wash off

(1) (1883) 11 Q.B.D. 503, at pp. 510, 511.
(2) (1862) 11 C.B.N.S. 553 [142 E.R. 912].
(3) (1932) A.C., at pp. 596, 597.

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the sulphuric acid. The breaking of the jar occurred on a platform adjoining the street. The deceased at once hastened into the building, took off his trousers and began to wash the acid from his legs. His wife, who was sitting in a truck in the street, followed him inside. A very short time, therefore, must have elapsed from the breaking of the jar until the deceased, in answer to his wife's question, gave his account of the accident. His statement was received in evidence on the ground that it formed part of the transaction. In my opinion it was not admissible. The statement was a mere narrative explaining an event that had occurred, although only a minute or two before, an event that was complete when the jar broke and the acid spilt over the deceased's legs. It was what it purported to be, an explanation of something that had occurred and was over.

What the deceased said could not be made admissible unless it could be brought within the category of declarations or statements forming a portion of or an incident in the transaction which in all its parts and details constitutes one of the matters in issue.

Unfortunately the scope and application of the doctrine and its basis in theory have been a source of endless discussion and difference of opinion. The sharp distinction drawn, according to the accepted English theory of the law of evidence, between relevant facts and the media of proof of their occurrence or existence makes it necessary to refer oral declarations or statements receivable in evidence to one head or the other. Such a declaration is admitted either because it is itself a relevant fact or because, the facts declared being relevant, the declaration is a lawful medium of proof of those facts.

Under the first head what is relevant is the fact that some statement was made, independently of its content. Thus, the directions and comments of a policeman on point duty at a corner where two cars collide given during the course of their approach and collision clearly form "part of the transaction" in a question of liability between the drivers, and, to whatever they may amount, they may be given in evidence as a constituent portion of the complete occurrence.

Under the second head the declaration is a narrative of a past event and is recounted to the court as the equivalent of or a substitute for direct testimony of the event it narrates. Of this nature are dying declarations, declarations of deceased persons in the course of duty or against interest, and declarations as to the state of the declarant's health or bodily feelings. If, in the example given, the policeman goes to the help of the colliding motorists, his instructions and statements while he is disentangling the passengers and

disengaging the cars might be considered still to form part of the transaction, because such a casualty cannot be treated as over and complete at the instant of impact. But, when he begins to make his notes, he is clearly taking up the task of recording facts that have occurred, and what he writes is narrative and cannot be received as evidence, that is, unless he dies and it is tendered as a declaration in the course of duty.

Now, it is clear that the purpose of admitting a statement under the one head is entirely different from that of admitting it under the other. Under the first head, what the people say during the progress of the event is regarded as part of what they do. If what is said happens to include a reference to a fact or past occurrence, the circumstance that it is admissible under the first head makes it no proof of that fact or occurrence.

To return to the same example, if, as the cars drew near, the policeman shouted an imputation upon the past conduct of one of the drivers, what he said could not be treated as proof of the latter's previous misdoings.

On the other hand, if it came about that his notes or subsequent report became admissible as a declaration in the course of duty, it would afford proof of every relevant fact it stated.

In the treatment of statements made as or after the commission of a crime of violence or the occurrence of some accident or casualty comes to an end, this distinction marks a divergence in the views held upon the question when and why they should be admissible. Speaking generally, the view obtaining among English lawyers is that the reception of such statements in evidence can be justified only under the first head, so that they are admissible only as one of the parts or details of a transaction not complete when the statements were uttered and as supplying no proof of antecedent facts. In America, on the other hand, the view is widely held that they are receivable as declarations of facts already past, or, at all events, passing, and admitted in evidence as an exception to the rule excluding hearsay, on the ground that a guarantee of their truth is to be found in their spontaneity, in the lack of "time to devise or contrive" and in the instinctive character of utterances made under the influence of excitement. Of this latter view Professor *Wigmore* is the most notable exponent (Cf. pars. 1745 et seq. of vol. III. of his treatise on *Evidence*); while the former view receives the support of Mr. *Phipson* (*Evidence*, Book II., ch. VI., 6th ed., pp. 58, 59, and *Law Quarterly Review*, vol. 19, pp. 435-448).

But, though the general tendency in England is to restrict the principle to the reception of statements forming an integral part of

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the transaction considered as a whole and to reject the doctrine that spontaneous declarations are admissible as an exceptional medium of proof, yet English decisions do show some reliance on the greater trustworthiness of statements made at once and without reflection in support of their admissibility. In the early case of *Thompson* v. *Trevanion* (1) *Holt* C.J., at nisi prius, in an action for wounding the wife of the plaintiff, " allowed that what the wife said immediate upon the hurt received, and before she had time to devise or contrive anything for her own advantage, might be given in evidence." In a late case *Bailhache* J., in reference to a statement made after a motor-car collision, stated as conditions of admissibility that the words should be spoken at the time and be the natural consequence of the collision, " words which spring out of the fact of collision, so to speak, inevitably and almost without the exercise of the will of the speaker and are at any rate spontaneous " (*Tustin* v. *W. Arnold & Sons* (2)). But these observations seem meant rather to emphasize the closeness of the connection with the essential part of the transaction than to formulate an independent ground of admissibility. Among the English cases some differences in the application of the doctrine may be seen, as might be expected in a question depending so much on matters of degree. In *R.* v. *Foster* (3) its application was liberal ; but a rigid or restricted application was given to the rule in *R.* v. *Bedingfield* (4), which became the subject of a controversy and afterwards was made the text of a full discussion of the subject by Professor *James Bradley Thayer* (*Legal Essays*, p. 207), whose chief purpose was to dispel the confusion which the failure to distinguish other subjects had brought upon the question. Examples on either side of the line, but less open to question, will be found in *Agassiz* v. *London Tramway Co.* (5) and *The Schwalbe* (6). In the former case evidence was rejected of what passed between a passenger and the conductor of an omnibus about the driver's conduct immediately after a concussion which threw a woman from her seat ; in the latter, as two colliding vessels drew apart the pilot of one exclaimed that the helm was still a-starboard, and this was admitted : See, further, *R.* v. *Christie* (7). In this court, in *Brown* v. *The King* (8), evidence of what was said by a wounded man to another mortally wounded at the same time was rejected. They had both just been shot, and enough time only had elapsed to

(1) (1693) Skin. 402 [90 E.R. 179].
(2) (1915) 113 L.T. 95, at p. 96 ; 31 T.L.R. 368, at p. 369.
(3) (1834) 6 C. & P. 325 [172 E.R. 1261].
(4) (1879) 14 Cox C.C. 341.
(5) (1872) 27 L.T. 492.
(6) (1859) Sw. Ad. 521 [166 E.R. 1244].
(7) (1914) A.C. 545, at pp. 556, 566, 567.
(8) (1913) 17 C.L.R. 570.

allow the fatally injured man to walk twenty-five yards and the other to walk from the front to the back of a cottage. The judgment of *Isaacs* and *Powers* JJ. (1) refers to many of the decided cases and sets out and adopts the formulation of principle which *Cockburn* C.J. had made in the course of the controversy arising out of *Beding-field's Case* (2). The ground for rejecting the evidence was that the two men had left the house where the shooting took place; they did not apprehend a continuation of the attack and were seeking attention for their wounds, not escaping. "Not only the main transaction, but also every subsidiary incident, so far as related to the act complained of, was at an end. The incident offered in evidence was unconnected in causality with the shooting: if it had been so connected—as by flight to escape its continuance—the slight lapse of time and the mere fact of twenty-five-yards' distance would not have been sufficient in themselves to have destroyed the natural nexus. But when there is no natural connection by continuance—which may have a liberal connotation—and there is a distinct and appreciable break of time and place, it would in our opinion be going beyond the limit of authority to admit evidence, which is in substance and reality a mere narration respecting a concluded event, a narration not naturally or spontaneously emanating from or growing out of the main transaction, but arising as an independent and additional transaction" (3). In my opinion these observations are equally applicable to the present case.

But for the statement said to have been made by the deceased, I do not think a finding would or could have been made that the jar broke without falling. The defendant's case was that the deceased allowed it to slip so that it fell from a tilted position to the horizontal floor, which, though of wood, was rigid. Upon that case, however, the question arises whether the defendant should be absolved from failure in that degree of care which the injurious character of the fluid demanded. It appears that sulphuric acid has a high specific gravity, and the top of a jar not quite full would undergo much stress on falling to a horizontal position upon a hard floor. Experiments have shown that almost invariably the force suffices to break such a jar. They are of earthenware and are said to be "brittle." A metal jar would be unsuitable for sulphuric acid, and glass jars would be costly. Expedients for encasing the jars were said to be open to objection because acid would spill as it was poured out and the casing would be destroyed or corroded. But *Cleland* J., who tried the action, found that the jars were not

(1) (1913) 17 C.L.R., at p. 598. (2) (1879) 14 Cox C.C. 341.
(3) (1913) 17 C.L.R., at p. 597.

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suitable vessels for the supply of sulphuric acid to consumers. He had before him some statistical figures of the number of breakages. The proportion to vessels handled was by no means great, but the instances were not inconsiderable in number and illustrated a source of potential danger. The jars necessarily went into use by persons who lifted them, tilted them and carried them. They were extremely heavy, and the prospect of jars being allowed without negligence occasionally to slip to a hard floor upon their sides was by no means remote. Whenever this happened a jar of the kind in use might be expected to break. It was not shown to be unreasonable or impracticable to provide jars less liable to break.

In these circumstances I am unable to say that the conclusion was not fairly open to the learned judge that the container was insufficient as a safeguard against the danger of injury from the escape of sulphuric acid. It is true that courts should be slow to say that the ordinary practice of a trade involves a want of due care. But it must be remembered that the reasonable care required by the law means a standard of diligence growing in strictness as the danger increases, and a very high degree of precaution is necessary in the case of an injurious chemical like sulphuric acid. By using jars insufficiently strong to withstand overturning, a manufacturer may impose on those handling the jars a practical necessity of exercising on their part extreme care for their own safety, and this may reduce the likelihood of accidents. But the manufacturer has the primary duty of care and cannot transfer it in such a manner. I think that the learned judge's finding on this head of negligence should stand.

That the deceased was guilty of contributory negligence was not established.

An argument was advanced that the death of the deceased was not the consequence of the burns he sustained from the acid because it was due to septicaemia arising from a streptococcal infection entering through the tissue broken down by the burns. Such an infection, whoever and whatever was to blame for it, cannot be considered a new and independent cause. It is a recognized danger to which traumatic injury exposes the sufferer and is regarded as part of the possible consequences of the infliction of a wound.

The contention that the action was not properly constituted under *Lord Campbell's Act* because the child who has claimed and received workmen's compensation is not included in the particulars of persons represented appears to be answered by *Avery* v. *London and North Eastern Railway Co.* (1).

For these reasons the appeal should be dismissed with costs.

(1) (1938) A.C. 606.

McTiernan J. In my opinion the appeal should be dismissed. The consideration of the case begins with the proposition that sulphuric acid is in the view of the law a dangerous thing—that is, dangerous in itself; it will inevitably injure any person upon whom it spills. The risk that it may cause injury if it escapes from the container in which it is being supplied subjects the supplier to a strict responsibility. It is his duty, at all events, to supply it in a container that will not be broken by any of the ordinary hazards incidental to the lifting and handling of the container by the person taking delivery of it. The respondent founds her action on this breach of duty. She alleges that her husband suffered fatal burns as the result of the breach of this duty by the defendant, and she sues on her own behalf for damages proportionate to the loss she has sustained by the death of her husband, the action being brought under Part II. of the *Wrongs Act* of South Australia.

The defendant supplied three gallons of sulphuric acid to the deceased in a jar which broke when he was in the course of taking delivery of it. He was lifting it from a platform on the defendant's premises into his vehicle. The platform was about three feet above the place where the respondent's husband stood when he was attempting to take delivery of the jar. It was left at a distance of less than a foot from the edge of the platform. The result of the accident was that the sulphuric acid poured over the deceased, causing severe burns from which he died several weeks afterwards.

The jar was made of glazed earthenware. It had a cylindrical body, conic shoulders, bearing a glazed earthenware handle for lifting it, and a short neck with a stopper. The jar with its contents of sulphuric acid weighed 75 lbs. Its base was ten inches in diameter, and the height from base to shoulders was thirteen inches. The learned judge found that the deceased attempted to lift it from the platform in a natural and proper manner. It was necessary because of its weight for him to use both hands. He caught the handle with his right hand, and, after tilting the jar, put his left hand under it to lift it, but before the base of the jar was entirely clear of the platform the jar broke. It fell on its side, and the sulphuric acid poured over the deceased. The top part of the jar and the handle came apart from the rest of the jar. When the deceased applied the necessary force in order to lift it from the platform, the jar proved unequal to this lateral or horizontal strain and the top broke away at the shoulder. The learned judge found that jars of the description now in question are usually and commonly used for the purpose of supplying acid to consumers, but he was satisfied by the evidence of tests to which jars of the same size,

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shape, weight and material were subjected that they are excessively brittle and unsuitable vessels in which to supply sulphuric acid to consumers and that the jars were unsafe and dangerous to be used for that purpose. There is ample evidence to support this finding. His Honour also found that this mishap occurred because there was a hidden defect, probably a crack, in this particular jar. However, in reaching this last conclusion some reliance appears to have been placed on evidence of what the deceased himself said after the jar broke. But it is not necessary to consider the question of the admissibility of this evidence, because, apart from it, there is, in my opinion, clear evidence to justify the conclusion that the defendant was guilty of a default which caused the accident resulting in the death of the respondent's husband. It was negligence on the part of the defendant to use a container which would break and permit the acid to escape, as this one did, when subjected to the ordinary usage incidental to lifting the jar from the platform into the deceased's vehicle.

The defendant seeks to exculpate itself on the ground that it was —as the trial judge found—the practice in the trade to use unprotected jars similar to that which broke for supplying sulphuric acid in three-gallon lots. The evidence of the practice was relevant to the issue, but it was not conclusive in the defendant's favour. In *Blenkiron* v. *Great Central Gas Consumers Co.* (1) *Cockburn* C.J. said :—"And those who carry on operations dangerous to the public are bound to use all reasonable precautions—all the precautions which ordinary reason and experience might suggest to prevent the danger. It is not enough that they do what is usual if the course ordinarily pursued is imprudent and careless; for no one can claim to be excused for want of care because others are as careless as himself; on the other hand, in considering what is reasonable, it is important to consider what is usually done by persons acting in a similar business." The nature of the consequences to be apprehended if the acid escaped while the plaintiff's husband was taking delivery of it was the chief consideration governing the precautions which the defendant was bound to take to prevent its escape. As the jar used by the defendant was brittle and unsafe for delivering three gallons of sulphuric acid, it is no answer to the charge that reasonable precautions to prevent injury to the deceased were not taken for the defendant to say that it was the practice in the trade to use that kind of jar for that purpose.

The plaintiff claimed damages on her own behalf but not on behalf of her child, of whom the deceased was the father. A claim

(1) (1860) 2 F. & F. 437, at p. 440 [175 E.R. 1131, at pp. 1132, 1133].

was made on behalf of the child under the *Workmen's Compensation Act*. The plaintiff's damages were assessed upon the basis of what her own share would have been had she claimed and recovered damages on behalf of the child as well. The assessment on that basis was in the circumstances right (*Avery* v. *London and North Eastern Railway Co.* (1)).

Appeal dismissed with costs.

Solicitor for the appellant, *R. N. Finlayson.*
Solicitors for the respondent, *Scammell, Hardy & Skipper.*

C. C. B.

(1) (1938) A.C. 606.