[HIGH COURT OF AUSTRALIA.]

SMITH . . . . . APPELLANT;
PLAINTIFF,

AND

LEURS AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS,

H. C. OF A. 1945.

ADELAIDE, *Sept.* 27.

MELBOURNE, *Oct.* 22.

Latham C.J., Starke, Dixon and McTiernan JJ.

Infants and Children—Liability of parent for torts of child—Parent's duty of care—Permitting boy to have shanghai.

L., a boy aged thirteen years, while engaged in play, fired a stone from a shanghai and hit S., another boy, in the eye, seriously damaging his sight. S. sued L.'s parents claiming damages for negligence in failing to control L. and in allowing him to have and use the shanghai. There was evidence that the parents knew the boy had a shanghai, had warned him of the danger of using it, and had forbidden him to use it outside the limits of his home. There was no evidence that L. had any vicious tendencies.

Held that in the circumstances of the case the parents were not guilty of any breach of duty.

Decision of the Supreme Court of South Australia (Full Court), affirmed.

APPEAL from the Supreme Court of South Australia.

Brian Leurs, a boy aged 13 at the material time, was the adopted child, under the *Adoption of Children Act* 1925-1943 (S.A.), of Henry Edward Leurs (hereinafter called " the father ") and Winifred Mary Leurs (hereinafter called " the mother "). There was no evidence that he had any vicious propensities, but, as his father and his mother were aware, he was in possession of a shanghai. The father said that he had warned the boy of danger in using the shanghai, and the mother that she had told him that he must use it only at the side of the house and must shoot towards the wall. This latter instruction was disobeyed, and on 17th December 1943 Leurs was away from his home with the shanghai in his possession. On this day two groups of boys, which also included William Brian Smith,

aged about 13 years, became engaged in a form of play in which the two groups chased each other and missiles such as stones, lumps of earth and apricots were used. At some stage, Leurs fired a stone from his shanghai which hit Smith in the eye and seriously damaged his sight.

An action was brought against Leurs for damages for assault and against the parents for negligence. It was alleged that the parents were negligent in allowing Leurs to have the possession and/or use of a shanghai. Particulars of negligence alleged were :—(*a*) lack of control or supervision of Leurs in the possession or use of the shanghai and further in his possession or use of it outside the limits of his own home ; (*b*) failure to take the shanghai away from Leurs or to destroy it or to prevent him from obtaining possession of it ; and (*c*) allowing him possession and/or use of the shanghai outside the limits of his own home.

There was evidence that other boys in the district had shanghais.

On the trial of the action before *Mayo* J. in the Supreme Court of South Australia, it was held that the parents were liable for damages for negligence : *Smith* v. *Leurs* (1). On appeal to the Full Court of South Australia, this decision was reversed.

From this latter decision the plaintiff, the respondent in the Full Court, appealed to the High Court.

Hicks (with him *R. Badger*), for the appellant. There was evidence on which the trial judge could reasonably find, as he did find, negligence on the part of the parents in that they permitted their son to use a thing known to be capable of danger to others. Parents should not let boys of 13 have shanghais, unless they are confident that there will be no damage. On the evidence here, the parents were not confident. The judgment of the trial judge should be restored. [He referred to *Halsbury's Laws of England*, 2nd ed., vol. 23, p. 630 ; *Salmond* on *Torts*, 9th ed. (1936), p. 69 ; *Hawley* v. *Alexander* (2) ; *Bebee* v. *Sales* (3) ; *Burfitt* v. *A. & E. Kille* (4) ; *Ricketts* v. *Erith Borough Council* (5) ; *Heberley* v. *Lash* (6) ; *Black* v. *Hunter* (7) ; *Kenealy* v. *Karaka* (8) ; *Brown* v. *Fulton* (9).]

Millhouse K.C. (with him *Nelligan*), for the respondents. Prudent parents could do no more than warn the child. It would be impracticable to compel them to take such articles as shanghais away

(1) (1944) S.A.S.R. 213.
(2) (1930) 74 Sol. J. 247.
(3) (1916) 32 T.L.R. 413.
(4) (1939) 2 K.B. 743.
(5) (1943) 2 All E.R. 629, at p. 632.
(6) (1922) 41 N.Z.L.R. 609, at p. 611.
(7) (1925) 4 D.L.R. 285.
(8) (1906) 26 N.Z.L.R. 1118.
(9) (1881) 9 Rettie 36

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from children. Even on the findings of the trial Judge, there was no lack of care by the parents.

Hicks, in reply.

Cur. adv. vult.

The following written judgments were delivered :—

LATHAM C.J. The respondent Brian Leurs is an infant who on 17th December 1943 was 13 years of age. He is the adopted son of the other respondents to this appeal. On the date mentioned he, with other boys, including the appellant William Brian Smith, was engaged in what was apparently semi-hostile play in which two groups of boys chased one another, threw dirt, stones and apricots at each other, and used shanghais. The boy Leurs fired a stone from a shanghai and hit Smith in the eye, seriously damaging his sight. The boy Smith sued the boy Leurs and his parents for damages for assault in the case of the infant defendant, and for negligence in the case of the adult defendants. Judgment was given by *Mayo* J. against all three defendants for the sum of £305 4s. 6d. damages. Upon appeal to the Full Court, the judgment against the adult defendants was set aside, and the plaintiff now appeals to this Court. No question arises as to the liability of the infant defendant.

The contention of the plaintiff is that the adult defendants were guilty of negligence which caused the injury to the plaintiff. The alleged negligence consisted in allowing their child, aged 13 years, to have a shanghai, though they knew of the possible dangers associated with its use. The particulars of negligence alleged lack of proper or any control or supervision of the boy in the possession or use of the shanghai, and, further, in his possession or use of it outside the limits of his own home ; secondly, failure by the parents to take away from the boy or to destroy the shanghai or to prevent him taking possession of it ; and, thirdly, allowing him to have the possession or use of the shanghai outside the limits of his own home.

Evidence was given by answers to interrogatories and otherwise which showed that the parents knew that the boy had a shanghai. Evidence was also given by the father that he had warned him of danger in using it, and by the mother and the child that she had told him that he must use it only at the side of the house and must shoot towards the wall. His Honour found that the adult defendants did make an attempt to restrict the use of the shanghai to the premises of the boy's home, but that they did not prevent

him from taking the shanghai with him away from his home premises. There was evidence that most boys in the district had shanghais. There was no evidence that the infant defendant had any vicious propensities. The question is whether in these circumstances the adult defendants were guilty of negligence.

It was not contended before this Court that a shanghai was a chattel which was dangerous *per se*, so that it should be classed with explosives, poisonous chemicals, loaded guns, tigers, &c. The learned judge held that, as a shanghai had a capacity to injure people, the adult defendants should have prevented the boy from taking the shanghai with him when he left his home, and that they were negligent in not foreseeing the potential danger to other persons and in guarding against it by a complete prohibition of the possession of the shanghai by the boy away from his home.

The boy Leurs is an adopted child—see *Adoption of Children Act* 1925-1943 (S.A.), s. 11. He lived with the adult defendants and was under their control. A parent as such is not responsible for the torts of his child, though, if the child is his servant or acts with his authority, the parent will be liable as his employer or principal. But a person who, as a parent, has the control of a child is responsible for negligence in the exercise of that control if injury results. Whether there is negligence depends upon all the circumstances. A baby two years old playing with another baby should not be allowed to have a knife or a box of matches. It may be negligent to allow a particular child to have an air gun (*Bebee* v. *Sales* (1)). Is it negligent to allow a boy of 13 to have a shanghai, after giving him caution and warning about its use? A shanghai does not go off "of itself" by accident—as may happen with a loaded gun. It requires deliberate intention before it can produce any effect. It is a common object in boyhood life. Annoyance rather than actual physical harm is the worst that is normally to be expected from its use. In this case, the boy was warned of the danger: he was old enough to understand the warning: he was told not to use the shanghai away from home: he disobeyed this order: there is no evidence to show that such disobedience was to be anticipated or that any special circumstances existed, such as, for example, a disposition to cause injury to other persons. In my opinion, these facts show that the adult defendants took all the precautions which could reasonably be expected. In the absence of special circumstances, I agree with the learned judges in the Full Court, who were of opinion that to require parents to prohibit absolutely the use of a shanghai by a boy or to take it away from him whenever

(1) (1916) 32 T.L.R. 413.

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he left home would involve setting up an impracticable and unreasonably high standard of parental duty.

In my opinion, the appeal should be dismissed.

STARKE J. Most of the boys in the Black Forest District in South Australia had " shanghais," which they used. The infant defendant, Leurs, whose age was about fourteen, made a " shanghai " for himself. The plaintiff, whose age was about fourteen, and one of his brothers, whose age was about eleven, also used " shanghais." School at Black Forest " broke up " on 16th December 1943, and the boys were on holiday. On 17th, the infant defendant and one of his friends were playing together and had some shots with their shanghais. They saw the plaintiff, his two brothers and a friend, gave chase and threw stones on the roof and near the windows of their home. The plaintiff and his party then chased the infant defendant and his friend and threw stones, lumps of earth and apricots at them. The infant defendant fired back with his shanghai and unfortunately hit the plaintiff in the left eye with a piece of gravel and seriously injured it.

Judgment was entered against the infant defendant for £305 and also against H. E. and Winifred Leurs, who had adopted him pursuant to the *Adoption of Children Act* 1925-1943 (S.A.), which provides that for all purposes civil and criminal an adopted child shall be deemed in law to be the child born in lawful wedlock of the adopting parent, and by the *Guardianship of Infants Act* 1940 (S.A.) each parent has equal rights and responsibilities with regard to an infant. On appeal, the Supreme Court set aside the judgment against H. E. and Winifred Leurs and dismissed the action against them.

A parent or guardian is not in general liable for the torts of a child, but it has been held that the parent will be liable if the child's tort were due to the parent's negligent control of the child in respect of the act that caused the injury (*Winfield, Law of Tort*, 2nd ed. (1943), p. 109 ; *Dixon* v. *Bell* (1) ; *Bebee* v. *Sales* (2) ; *Brown* v. *Fulton* (3) ; *Burfitt* v. *A. & E. Kille* (4))—Compare *North* v. *Wood* (5) ; *Ricketts* v. *Erith Borough Council* (6) ; *MacDonald's Tutor* v. *County Council of Inverness* (7).

Young boys, despite their mischievous tendencies, cannot be classed as wild animals, nor can " shanghais " be classed as dangerous articles which require " consummate care " in their use. But, in

(1) (1816) 5 M. & S. 198 [105 E.R. 1023].
(2) (1916) 32 T.L.R. 413.
(3) (1881) 9 Rettie 36.
(4) (1939) 2 K.B. 743.
(5) (1914) 1 K.B. 629.
(6) (1943) 2 All E.R. 629.
(7) (1937) S.C. 69.

the control of their children, parents must not omit to do that which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or do anything which a prudent and reasonable man would not do: See *Blyth* v. *Birmingham Waterworks Co.* (1).

In the present case, the parents knew that the infant defendant had a shanghai and that there were dangers associated with its use. The defendant Winifred Leurs deposed that she had never had any trouble with the infant defendant and that he was easily controlled. Moreover, both parents warned him not to use the "shanghai" except in the yard of their home and for shooting gravel at birds. The use of almost any article involves risk to others, but parents are not guilty of negligence in the control of their children in failing to deprive them of playthings which common use and experience have not shown to be specially or peculiarly dangerous, their balls and "scooters," their toy guns and "pea shooters," their "bows and arrows," "shanghais" and so forth. The question whether parents have exercised the care that reasonable and prudent parents would have exercised in the control of a child is one of fact having regard to all the circumstances of the case, and the answer to that question must vary with those circumstances. In the present case, the Supreme Court on appeal concluded that the parents had not been guilty of any breach of their duty in allowing the infant defendant to have possession of a "shanghai" and that conclusion appears to me reasonable and proper in the circumstances of this case. The opposite conclusion would exact from parents an obligation to control their children almost impossible of performance.

The appeal should be dismissed.

DIXON J. The not uncommon error that a parent is responsible for the harm done by his young child is perhaps to be accounted for by the persistence of the notions of early law. But the French *Code Civil* adopted or preserved the rule; "Le père, et la mère après le décès du mari, sont responsables du dommage causé par leurs enfants mineurs habitant avec eux" (Article 1384).

In English law, the development was the other way and, in 1860, *Willes* J. was able to say: "I am not aware of any such relation between a father and a son, though the son be living with his father as a member of his family, as will make the acts of the son more binding upon the father than the acts of anybody else" (*Moon* v. *Towers* (2)). But, apart from vicarious responsibility, one man

(1) (1856) 11 Ex. 781, at p. 784 [156 E.R. 1047, at p. 1049].

(2) (1860) 8 C.B. N.S. 611, at p. 615 [141 E.R. 1306, at p. 1308].

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may be responsible to another for the harm done to the latter by a third person; he may be responsible on the ground that the act of the third person could not have taken place but for his own fault or breach of duty. There is more than one description of duty the breach of which may produce this consequence. For instance, it may be a duty of care in reference to things involving special danger. It may even be a duty of care with reference to the control of actions or conduct of the third person. It is, however, exceptional to find in the law a duty to control another's actions to prevent harm to strangers. The general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third. There are, however, special relations which are the source of a duty of this nature. It appears now to be recognized that it is incumbent upon a parent who maintains control over a young child to take reasonable care so to exercise that control as to avoid conduct on his part exposing the person or property of others to unreasonable danger. Parental control, where it exists, must be exercised with due care to prevent the child inflicting intentional damage on others or causing damage by conduct involving unreasonable risk of injury to others (*Salmond, Torts*, ch. III., s. 17 : 6 (p. 69 of 9th ed. (1936)); *Winfield, Torts*, 2nd ed. (1943), p. 105; *American Restatement of Law, Torts, Negligence*, §315, §316; *Bebee* v. *Sales* (1); *Brown* v. *Fulton* (2))—Cf. *North* v. *Wood* (3); *Black* v. *Hunter* (4); *Kennedy* v. *Hanes* (5); *Edwards* v. *Smith* (6).

The standard of care is that of the reasonably prudent man, and whether it has been fulfilled is to be judged according to all the circumstances including the practices and usages prevailing in the community and the common understanding of what is practicable and what is to be expected.

The question in the present case is in a narrow compass. The plaintiff, a boy aged 14 years of age, sustained an injury to his eye from a stone fired at him from a catapult, or shanghai, by another boy. Should the parents of the second boy be held liable for want of care in suffering him to carry the shanghai? He fired the stone at the plaintiff in the course of some hostilities between two parties of boys which involved stone throwing and the like. It occurred at Black Forest, a suburb of Adelaide, where, it is to be inferred, there are streets of dwellings and some industrial activity, but also some trees and open spaces. In the district, it was common for the boys to have shanghais, which, of course, they made for themselves.

(1) (1916) 32 T.L.R. 413.
(2) (1881) 9 Rettie 36.
(3) (1914) 1 K.B. 629.
(4) (1925) 4 D.L.R. 285.
(5) (1940) 3 D.L.R. 499, at pp. 509-510.
(6) (1940) 4 D.L.R. 638.

The defendants, whose liability we have to determine, knew the boy possessed the shanghai, but, according to the findings of fact, as I understand them, they made no attempt to deprive him of it, though one or other of them did warn him of the dangers of its use and did forbid him to use it elsewhere than at his own home. *Mayo* J., who tried the action, considered that these admonishments were not enough and that, having regard to the risk of injury to person or property, accidental or intentional, involved in a boy of that age bearing a shanghai, the parents were guilty of negligence.

On appeal to the Full Court, his decision was reversed by *Napier* C.J., *Angas Parsons* and *Reed* JJ. on the ground that it exacted too high a degree of care, one out of step with the general practice and understanding of ordinary people, and that the parents had done all that a reasonable person could demand of them, the only further step open being to attempt to prevent the boy retaining or obtaining possession of a shanghai. As so often happens in the law of tort, the liability of the party is seen to depend on a vague and uncertain standard giving little guidance either to judge or litigants.

A nice assessment of the risk to persons or property from a boy in possession of a shanghai gives but small assistance in forming a conclusion upon the measures a parent is called upon to take. Everyone knows that a stone discharged from a properly made shanghai will break an electric globe, a roofing slate, or window, and may do more than trivial injury to head, face, or finger, and that the chances of a boy making any of these his target may be arranged in a sharply descending scale. That shanghais are not instruments of precision is common knowledge and it is apparent that in thickly populated and built-up areas the risks attending their use are greatly increased and at the same time the boy finds fewer legitimate occasions for discharging a shanghai than he would in more open country. If the important consideration be, as no doubt it is, how the community regards these risks, whether as nothing but unavoidable or reasonable incidents of vigorous boyhood, or as something reprehensible that a parent or guardian may and ought to stop, then we are thrown back to a great extent on our conceptions of what is reasonable and proper, practical and usual.

It is true that civic authority and school masters have always frowned upon the instrument and have attempted actively to repress it. This, I think, has been the case not only here but in England, where substantially the same instrument is known by the ancient name of catapult, and in America, where it is called a slingshot. Civic authority has perhaps carried on an ancient tradition from the days of the stone bow which must have served the same

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purpose, though, doubtless, propelling stones with more force. The *Liber Albus* of the City of London contains an ordinance "that no person shall be so daring as to carry a bow for doing mischief known as a 'stanbowe' within the city or in the suburbs" (*Riley's* Translation, p. 242). Yet, when Sir Toby Belch watched Malvolio, he cried: "Oh for a stone bow to hit him in the eye."

Except in New Zealand (1927, No. 35, s. 3 (*w*)) and in Western Australia (55 Vict. No. 27, s. 96 (10)), there appears to be no modern statute, either in England or Australia, for the repression or discouragement of the shanghai or catapult *eo nomine*. On the other hand, Professor *Morris*, *Austral English* (1898), collects under the word "shanghai" a number of quotations from 1863 to 1895, nearly all of which condemn the weapon as a source of public danger and annoyance.

They are in the main extracts from newspapers either reporting the extreme view of a magistrate, or recording the opinion of a correspondent on the subject of birds, or of a versifier, and they do not necessarily show that popular opinion condemned those who allow children to make and use shanghais.

The whole matter appears to me in the end to come down to weighing the risks to others which the boy's possession of a shanghai involves against the difficulties and disadvantages of an attempt on the part of parents to eliminate those as well as other forseeable risks to strangers from the conduct of their sons by seeking to restrict their forms of amusement and activity to those regarded as perfectly safe and harmless. The Full Court held that the moderate course the defendants took of telling the boy to use the shanghai only on his own premises sufficed. Though I think that it is not easy to choose between the two points of view adopted in the Supreme Court, on the whole I am not prepared to differ from the view taken in the Full Court.

McTIERNAN J. In my opinion, the appeal should be dismissed.

The question in this case is whether the adult respondents are liable for the injury which the other respondent, a boy of 13 years of age, caused to the appellant by hitting him with a stone which he fired from a shanghai. He is the adopted child of the adult respondents, and it is convenient to refer to them as his parents. The offending boy has been held liable in tort. If the parents are also liable for the injury, it is because they are guilty of an independent tort resulting in the accident: they are not liable for the personal tort of the boy. The cause of action alleged against them is negligence.

The gist of such cause of action is that a boy of 13 years of age armed with a shanghai is likely to cause injury to persons in the locality where he plays, and that his parents, knowing these facts, and having authority to control his conduct, and therefore a duty to take due care for the safety of persons likely to be injured by missiles fired by the boy from the shanghai, were guilty of negligence by permitting him to have the shanghai, and that this default resulted in the accident to the appellant.

But counsel for the appellant expressly said in this Court that he did not contend that a shanghai is dangerous *per se*. The evidence shows that it was common for boys in the locality to make and use shanghais. Besides, it is common knowledge that a shanghai is peculiarly a boy's contrivance for firing missiles. It would exaggerate the risk created by a boy in possession of a shanghai to hold that a parent who has the authority to control him is, regardless of other circumstances, guilty of negligence unless he deprives the boy of the shanghai.

In my opinion, the law does not cast that particular duty upon a parent having such authority. The question whether it is negligence on his part to permit the boy to have the shanghai depends upon the circumstances of the case. Those circumstances may include the parent's knowledge of the behaviour of the boy when armed with a shanghai, the nature of the locality where the boy lives, and the action which the parent, having the supervision of the boy's conduct, may have taken to correct the propensity which a boy may have to use a shanghai without proper caution.

In the present case, the parents forbade the boy to use the shanghai outside the boundaries of the area containing his home. The boy disobeyed this order and used the shanghai outside those boundaries without the parents' knowledge. The order was a genuine one. I think that, in the face of the parents' order to the boy, it would not be reasonable to find, that they were guilty of a breach of any duty to take due and reasonable care for the appellant's safety because they merely permitted the boy to have the shanghai.

Appeal dismissed. John Hatherleigh Smith the next friend of the appellant William Brian Smith to pay respondents' costs of appeal.

Solicitors for the appellant, *Badger & Badger.*

Solicitors for the respondents, *Baker, McEwin, Ligertwood & Millhouse.*

C. C. B.