McHale v Watson [1966] HCA 13; (1966) 115 CLR 199 (7 March 1966)

HIGH COURT OF AUSTRALIA

McHALE v. WATSON [1966] HCA 13; (1966) 115 CLR 199

Negligence

High Court of Australia
McTiernan A.C.J.(1), Kitto(2), Menzies(3) and Owen(4) JJ.

CATCHWORDS

Negligence - Infant - Standard of care - Materiality of defendant's age.

HEARING

Adelaide, 1965, September 28, 29;
Melbourne, 1966, March 7. 7:3:1966
APPEAL from Windeyer J.

DECISION

1966, March 7.
The following written judgments were delivered:-

McTIERNAN A.C.J. In this case, the plaintiff Susan McHale suffered serious own age and of Barry Watson, then aged twelve years and two months, a few years older than the others. It was school holidays in January 1957 and Susan and her mother had come from South Australia on a visit to Portland in Victoria and Barry and his mother had come from New South Wales also as visitors to that town. The children had met, being neighbours, in Lighthouse Street, Portland, and late in the afternoon of January 21st played chasings, a children's game also known as tag, in which one player called "it" chases the others until one is touched or tagged and that player in turn becomes "it". A structure made of four corner posts of hardwood, with pickets between them, was "base" for the game. Each post was four feet high and measured 3" X 2": the pickets were short and above them the structure was open. The enclosed area was about four square feet and within it was a young ornamental tree. There was a row of such structures each enclosing a tree in the street. When the game was at an end Susan and Barry were on opposite sides of the tree guard called "base". She was to Barry's left and he was standing facing a corner post: the distance between the two children was little more than the distance between two sides of the guard; both were, of course, outside it. Barry took an object from his pocket and threw it in front of him. It hit Susan in the right eye with sad consequences to her; the sight of the eye was destroyed. The object was a round piece of welding rod, of small circumference, and six inches long. One end had been sharpened by Barry on the rocks at the beach where he had been earlier in the day amusing himself in the company of another young boy by spearing starfish and prizing

shell-fish off the rocks with this implement. He had picked it up outside his father's workshop on his way to the beach. (at p202)

2. There was a contest at the trial whether Barry had aimed it at Susan. She and one of her young companions said in evidence that he had done so. Windeyer J. did not accept the evidence of either of the girls on that point. Barry said in evidence that he aimed the object at the corner post which he was facing, his idea being to make it stick in the post. The object was made of soft steel; in form it was not finished as a dart although it was described as such in the statement of claim. The learned judge was impressed by Barry's demeanour as a witness and regarded his account of the accident as more probable than that of the others. His Honour analysed the evidence and reasoned from it to his conclusion on the question how Susan came to be hit in the eye by the object. He considered that in all probability the object hit the corner post, which Barry was facing, with force and glanced off it in the direction of Susan. Barry was standing a degree left of the post and threw the object with his left hand. In argument counsel for the plaintiff attacked the finding and contended that the evidence could not support it. In my opinion the evidence would not justify a finding that the object did not strike the post at which Barry aimed it before it struck Susan in the eye. (at p202)

3. In the action Susan claimed damages from Barry upon a cause of action framed in trespass and a second cause of action in negligence. The allegations made in the statement of claim are that Barry either threw the object directly at Susan or in her direction. These allegations are traversed in the defence. As regards trespass, Barry also pleaded that the occurrence was an inevitable accident and was not due to negligence or default on his part (see Stanley v. Powell (1891) 1 QB 86). Windeyer J., in the reasons for his decision, discussed the question of whether the defendant had the onus of proving the special matters alleged in his defence and referred to a number of authorities. His Honour then said: "I accept Doctor Bray's proposition that as Barry Watson threw the thing which hit the plaintiff in the eye he is liable for the consequences, unless I am satisfied, on the balance of the probabilities, that he did not intend it to hit her and that he was not negligent in throwing it as and when he did" (1964) 111 CLR, at p 389. (at p203)

4. Windeyer J. said in his reasons for judgment: "It has been strongly urged for the plaintiff that, in considering whether Barry was negligent, I must judge what he did by the standard expected of a reasonable man, and that that standard is not graduated according to age. In one sense, of course, that is so; for the question whether conduct was negligent, in a legal sense, always depends on an objective standard. This has been generally recognized ever since Tindal C.J. said in Vaughan v. Menlove [1837] EngR 424; (1837) 3 Bing (NC) 468 (132 ER 490) : 'Instead of saying that the liability for negligence should be coextensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe' (1837) 3 Bing (NC), at p 475 (132 ER, at p 493) . In Glasgow Corporation v. Muir [1943] UKHL 2; (1943) AC 448 Lord Macmillan said: 'The standard of foresight of the reasonable man is, in one sense, an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question . . . . The reasonable man is presumed to be free both from over-apprehension and from over-confidence, but there is a sense in which the standard of care of the reasonable man involves in its application a subjective element. It is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have had in contemplation, and what accordingly the party sought to be made liable ought to have foreseen' (1943) AC, at p 457 . That is the question I have to determine. It is a

question of fact, a jury question, not a question of law. I have not to determine it by regarding the facts of other cases, but by regarding all the circumstances of this case. I do not think that I am required to disregard altogether the fact that the defendant Barry Watson was at the time only twelve years old. In remembering that I am not considering 'the idiosyncrasies of the particular person'. Childhood is not an idiosyncrasy. It may be that an adult, knowing of the resistant qualities of hardwood and of the uncertainty that a spike, not properly balanced as a dart, will stick into wood when thrown, would foresee that it might fail to do so and perhaps go off at a tangent. A person who knew, or might reasonably be expected to know that might be held to be negligent if he were not more circumspect than was this infant defendant. But whatever the position would be if the facts were different, my conclusion on the facts of this case is that the injury to the plaintiff was not the result of a lack of foresight and appreciation of the risk that might reasonably have been expected, or of a want of reasonable care in aiming the dart. I find that Barry Watson was not negligent in the legal sense" (1964) 111 CLR, at pp 396, 397 . (at p204)

5. The appeal was argued on two main grounds: first that his Honour was in error in holding that the liability or degree of responsibility of the defendant Barry Watson or the standard of care to be exercised by him in any way differed from the liability degree of responsibility or standard of care which would have been proper had he been over the age of twenty-one years; and secondly that his Honour should have made a finding of negligence whether he applied the standard of the ordinary reasonable man or the standard (whatever it might be) appropriate to a twelve-year-old boy. (at p204)

6. I do not agree with either of those grounds. In my opinion the passage which I have quoted from his Honour's judgment does not contain any misdirection in law and I see no reason for interfering with his conclusion. The crucial question is whether his Honour erred in saying that he could not disregard the fact that the defendant Barry Watson was twelve years old at the time of the accident and in order to answer that question it is necessary to determine by what standard of care the infant defendant should be judged. It is a well-established principle that an infant may be held liable for torts which are not ex contractu, but there is a paucity of judicial authority on the standard of care applicable to young children. Perhaps this lack of authority is due to the fact that young children are rarely worth suing and plaintiffs usually rely on making parents and guardians liable for the wrongful acts of their children and charges as was attempted in another case heard with the present and which Windeyer J. dismissed. (at p204)

7. There is ample authority for the proposition that in cases dealing with alleged contributory negligence on the part of young children they are expected to exercise the degree of care one would expect, not of the average reasonable man, but of a child of the same age and experience. No Australian or English decision was cited relating to the standard to be applied where a young child is sued in negligence. The subject, however, is discussed in several textbooks and there seems to be a consensus that the age and experience of an infant should be taken into account when considering the reasonableness of his conduct. The learned author of Salmond on Torts, 13th ed. (1961), at pp. 77, 78 said: "it would seem that in order to make a child liable for negligence, it must be proved that he failed to show the amount of care reasonably to be expected from a child of that age. It is not enough that an adult would have been guilty of negligence had he acted in the same way in the same circumstances. This, indeed, seems never to have been decided, but it would seem implied in the decisions on the contributory negligence of children. In general the principle appears to be that a minor who is incapable of forming a culpable intention or of realizing the probable consequences of his

conduct is relieved from liability in those cases in which fault is essential to liability, but that wherever a liability is imposed irrespective of fault he is fully liable as a normal adult". In Clerk & Lindsell on Torts, 12th ed. (1961), par. 157 it is stated: "by analogy with the cases concerning contributory negligence of young children it seems probable that the age of an infant defendant is relevant in torts involving negligence or malice. If the defendant is of tender years it will be a question of fact whether he is of such age that he ought to have foreseen the consequences of his act, and that malice or want of due care could reasonably be ascribed to him". Fleming, The Law of Torts, 3rd ed. (1965), pp. 117, 118 is to the same effect: "there is no doubt that a child, whether as plaintiff or defendant, is only expected to conform to the standard appropriate for children of the same age, intelligence and experience. If unable to understand the nature and likely consequences of his actions, negligence is not attributed to him at all ; but given perception of the risk, he must display the judgment and behaviour proper for a child with like attributes. Some safeguard to the public is afforded by the obligation of parents and school authorities to observe reasonable care in the supervision of children under their control. Moreover, a minor who engages in dangerous adult activities, such as driving a car or handling industrial equipment, must conform to the standard of the reasonably prudent adult ; his position being analogous to that of beginners who, as we have seen, are held to the objective standard". (at p206)

8. The decision of the Supreme Court of Canada in Walmsley v. Humenick (1954) 2 DLR 232 is frequently cited in this connexion. In that case the infant defendant, who was a child not quite five years of age shot an arrow which struck another child and resulted in the loss of that child's right eye. The plaintiff sued the infant defendant and his parents, although the plaintiff's counsel did not rely heavily on the allegation of negligence against the infant defendant. In the course of his reasons for judgment Clyne J. stated : "I think the circumstances coupled with the evidence of the children would be sufficient to justify a finding of negligence in an adult, or at least I am prepared to assume so for the sake of argument. The cases clearly demonstrate, however, that what may be lack of reasonable care in an adult cannot be considered to be so in the case of a child having regard to its capacity to understand and appreciate the nature of its actions. Speaking of a boy of four, Davis J. held in Hudson's Bay Co. v. Wyrzykowski (1938) 3 DLR 1, at p 5 ; (1938) SCR 278, at p 286 : 'The child on account of its age was incapable of negligence on its part.' In an earlier negligence case, Acadia Coal Co. v. McNeil (1927) 3 DLR 871, at p 876 ; (1927) SCR 497, at p 504 , Newcombe J. in delivering the unanimous judgment of the Court said : 'Children aged seven and nine years have by the common law the benefit of something in the nature of a presumption that they have not sufficient capacity to know that they are doing wrong.' . . . In the present case I have no hesitation in finding that the infant defendant had not reached that state of mental development where it could be said that he should be found legally responsible for his negligent acts. Putting it another way, it might be said that at his age he had not yet acquired that capacity to reason which would place him within the category of the 'reasonable man' as that term is used in the cases defining negligence. Because of the defendant child's lack of capacity, the plaintiff's cause of action against him based on negligence must fail" (1954) 2 DLR, at p 238 . (at p206)

9. His Honour accepted the view taken by Manson J. in Sheasgreen v. Morgan (1952) 1 DLR 48 that "mere age is not in itself the test but rather the capacity of the infant to understand" (1952) 1 DLR, at p 61 . It would appear, however, that his Honour decided the case on the incapacity of a child of this age to commit a tort rather than on the basis that the child exercised the degree of care one would expect of a child of his age. If this is so then the case is of little use in deciding the instant case. (at p207)

10. In Joseph v. Swallow & Ariell Pty. Ltd. [1933] HCA 47; (1933) 49 CLR 578 Dixon J. (as he then was) commented on the passages to be found in Beven on Negligence, 4th ed. (1928), vol. 1, pp. 182, 183. His Honour said : "Mr. Beven himself appears to have taken the view that a child under seven years of age was not open to a charge of contributory negligence ; that a child so young could not be considered a responsible agent upon whom the ordinary duty of care rested. But, in deference to some Scottish cases, the editors of his work are disposed to abandon so definite a rule and to allow that a child is under a duty to exercise such a degree of care for his own and others' safety as might reasonably be expected from one of his age and capacity" (1933) 49 CLR, at p 585 . (at p207)

11. There is ample American authority in favour of applying a lower standard of care in cases involving the primary negligence of young children. The American Restatement of the Law of Tort, par. 283, divides infants into three categories for the purpose of discussing the standard of care applicable. The categories and the standards of care required are as follows : -

(a) Children who are so young as to be manifestly incapable
of exercising any of the qualities necessary to the perception of risk.

This group would comprise babies and children of very tender years and instead of formulating a standard of care for them it suffices to say that they are incapable of negligence. (b) Infants who, although they have not yet attained majority,
are capable as adults of foreseeing the probable consequences of their actions. In view of the capabilities of this class the standard of care required of them is the same as that required of adults. (c) Children who come between the extremes indicated in the
above categories and whose capacities are infinitely various. The standard of care required of these children is that which it is reasonable to expect of children of like age, intelligence and experience. (at p207)

12. In 27 Am. Jur., p. 814, the position is summarized as follows : "in cases of torts arising from negligence, although there is some authority to the contrary, there is authority to the effect that the age and capacity of the infant charged with the tortious negligence may become matters of importance. There is authority to the effect that a minor charged with actionable negligence is not to be held to the standard of care of an adult without regard to his nonage and want of experience. Reasonable care, having regard to the age and state of development of the individual, is required of minors as well as adults, and no different measure is to be applied to their primary than to their contributory faults. It has been stated that a child's care must be measured by its intelligence. It has also been stated that a child is required to exercise only that degree of care which the great mass of children of the same age ordinarily exercise under the same circumstances, taking into account the experience, capacity, and understanding of the child. A minor whose negligence is in question is, in the absence of evidence to the contrary, universally considered to be lacking in judgment". Prosser on Torts, 2nd ed. (1955), p. 128 contains a similar statement. The author considers that the standard of care applicable to children must necessarily be a subjective one although it is not entirely subjective and "if the conclusion is that the conduct of the child was unreasonable in view of his estimated capacity, he may still be found negligent, even as a matter of law". (at p208)

13. The learned authors of Harper and James, The Law of Torts, refer to the problem in vol. 2 at pp. 926, 927. They point out that the commentators and Courts are divided on the question.

They conclude, however : "courts should and probably will (for the most part) hold the child defendant who is engaging in dangerous adult activities (such as driving a car) to the standard of the reasonably prudent adult. It is less important and more doubtful what rule will emerge as to injuries caused by children at play". (at p208)

14. I shall refer to two American cases. In the case of Charbonneau v. MacRury (1931) 73 Am LR 1266 the administrator of a minor's estate commenced an action to recover damages for injuries resulting in death which were allegedly caused by the negligence of the defendant who was also a minor. The defendant was licensed to drive a motor vehicle under a statute which provided for the issue of a licence after proof that the applicant was a proper person to receive it and forbade the issue of a licence to any person under sixteen years of age. It was argued on behalf of the plaintiff that this fact conclusively established that the defendant's capacity to exercise care was the same as that of an adult. This argument was rejected and judgment entered for the minor defendant. The plaintiff conceded that the infancy of a person is of material importance in determining whether he has been guilty of contributory negligence but contended that a minor charged with actionable negligence is to be held to the standard of care of an adult without regard to his nonage and want of experience. Snow J. who delivered the judgment of the Court stated that, in the case where a minor's contributory negligence had been in issue, the conclusion of the Court that his infancy was a factor to be considered had been expressed in terms which applied to his primary as well as to his contributory fault. His Honour concluded : "There is nothing in the language of these cases which suggests any distinction between the care required of an infant in his own protection and that exacted of him in his conduct towards others. On the contrary, it tends to refute such a distinction" (1931) 73 Am LR, at p 1272 . The Court held that "the law recognizes that indulgence must be shown the minor in appraising the character of his conduct. This is accomplished however through no arbitrary exception to the general rule of reasonable care under all the circumstances. As we have said this is always the test. But what is reasonable when the actor is a minor? Manifestly the adult test of the standard man cannot be applied in disregard of the actor's youth and inexperience. Either a new standard denoting the average person of the minor's age and development must be taken as the yardstick, or else allowance must be made for the minor's stage of development as one of the circumstances incident to the application of the general rule of reasonable care. As a practical matter it is not important which course is pursued. This court, however, is inclined to approve the latter both as supporting the theory that reasonable care under all the circumstances is a universal rule, and in the interest of simplicity of applying the law to the facts" (1931) 73 Am LR, at p 1274 . (at p209)

15. In Hoyt v. Rosenberg (1947) 173 Am LR 883 a boy of twelve years was playing a game of "kick the can" and the plaintiff was one of the participants. In the course of the game the boy kicked the can so that it struck the girl in the face and resulted in her losing the use of an eye. Barnard P.J., who delivered the judgment of the Court, stated : "There is no dispute as to the general rules of law here applicable. While a minor, like an adult, is required to exercise ordinary care he is only required to exercise that degree or amount of care that is ordinarily exercised by one of like age, experience and development" (1947) 173 Am LR, at p 886 . The Court referred to the "established rule that a minor is expected to use, not the quantum of care expected of an adult, but only that degree or amount of care which is ordinarily used by children of the same age under similar circumstances. In deciding whether, in such a case, there has been a failure to use ordinary care to avoid injury to other children, the test is, and must be, not what an adult would have there done or what the results indicate should have

been done, but what an ordinary child in that situation would have done" (1947) 173 Am LR, at pp 888, 889 . (at p210)

16. In the present case we are concerned with a boy of the age of twelve years and two months. He was not, of course, a child of tender years. On the other hand, he was not grown up and, according to the evidence, he played as a child. I think it was right for the learned trial judge to refer to him in common with Susan and the other playmates as young children. It cannot be laid down as an absolute proposition that a boy of twelve years of age can never be liable in negligence ; nor that he would always be liable in the same manner as an adult in the case of that tort. The defendant's conduct in relation to this object which he threw, a useless piece of scrap metal, is symbolic of the tastes and simplicity of boyhood. He kept the object in his pocket after using it earlier in the day to scrape marine life off the rocks at the beach ; after that he carried it around with him for the rest of the day until the accident happened. It was the type of thing that a wise parent would take from a boy if he thought the boy would play with it as a dart in the company of other children. The defendant on his way from the beach took the object from his pocket to show Susan and her companions, whom he met playing in a paddock, what he was doing at the beach - apparently he was proud of how he had transformed the piece of scrap metal by rubbing it on the rocks. The game of chasings having ended, the wooden corner post was an allurement or temptation to him to play with the object as a dart. If it had stuck into the post at the first throw, doubtless, he would not have been content with one throw. The evidence does not suggest that the defendant was other than a normal twelve-year-old-boy. His Honour considered that the defendant, being a boy of twelve years, did not have enough maturity of mind to foresee that the dart might glance off the post in the direction of Susan if he did not make it hit the post squarely, and that there was a possibility that he might not succeed in doing so. It seems to me that the present case comes down to a fine point, namely whether it was right for the trial judge to take into account Barry's age in considering whether he did foresee or ought to have foreseen that the so-called dart might not stick in the post but be deflected from it towards Susan who was in the area of danger in the event of such an occurrence. I think that there is no ground for disagreeing with the conclusion of Windeyer J. on this question. The correctness of this decision depends upon the special circumstances of the case and it does not lay down any general principle that a young boy who cannot be classified as a grown-up person cannot be guilty of negligence in any circumstances. (at p211)

17. I would dismiss the appeal. (at p211)

KITTO J. The appellant, a girl of nine, was hit in the eye by a piece of steel welding rod, about six inches in length and a quarter of an inch in diameter, which had been sharpened at the end that struck her. According to findings which are not challenged, the spike, as it has been called, was thrown by the respondent, a boy of twelve, with the intention of endeavouring to make it stick into a hardwood post at a point at which he aimed, but it glanced off the post and struck the appellant. The respondent, it has been found, had no intention of either hitting the appellant or frightening her. The question whether he is liable in damages for the injury which the appellant sustained depends upon whether by throwing the spike as he did he committed a breach of a duty of care which he owed her. (at p211)

2. The respondent was standing a foot or two from the post, and the appellant was at most four or five feet from him and to his left. He knew that the spike was sharp, and therefore that it might injure anyone whom its sharpened end should strike. If he had been an adult the question to be decided would have been whether an ordinary person in his situation,

exercising reasonable foresight, would have realized that if he should throw the spike at the point on the post at which in fact he aimed there was such a likelihood of its glancing off the post and hitting the appellant that in ordinary prudence he ought not to throw it as he did. The learned trial judge did not express a concluded opinion as to the answer he would have given to this question. Saying that he did not think he was required to disregard altogether the fact that the respondent was at the time only twelve years old, his Honour reached the conclusion that the injury to the appellant "was not the result of a lack of foresight and appreciation of the risk that might reasonably have been expected, or of a want of reasonable care in aiming the dart" (1964) 111 CLR, at p 397 . I take this to mean that the test to be applied in determining whether the appellant's injury resulted from a breach of a duty owed to her by the respondent should be stated not in terms of the reasonable foresight and prudence of an ordinary person, but in terms of the reasonable foresight and prudence of an ordinary boy of twelve; and that the respondent should succeed because an ordinary boy of twelve would not have appreciated that any risk to the appellant was involved in what he did. (at p211)

3. The appellant invites us to hold that this was wrong both in law and in fact. The principal argument submitted on her behalf was directed to the question of law. It was that the common law prescribes a minimum standard of care to be observed by everyone for the safety of all who may be injured by non-observance of it, and that that is the standard of care reasonably to be expected of a man of reasonable foresight and prudence in the circumstances. Thus it is contended that in relation to every set of circumstances and every person, child as well as adult, the test of actionable negligence is accurately stated, not only in substance but literally, in Baron Alderson's well-known formulation in Blyth v. Birmingham Waterworks Co. [1856] EngR 223[1856] EngR 223; ; (1856) 11 Ex 781 (156 ER 1047) : "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do" (1856) 11 Ex, at p 784 (156 ER, at p 1049) . (at p212)

4. It is necessary to go back beyond Baron Alderson's time, for he was stating in concrete terms, for application in the general run of cases, the conception of reasonableness of conduct in reference to which liability for negligence had come to be based; and the question whether his statement is literally applicable in the case of a child (even substituting "person" for "man", in accordance with the tenor of the judgment) is a question as to the true theory of liability in negligence rather than one of verbal interpretation. It has been by many considered, though Diplock J. (as he then was) suggested doubt about it in Fowler v. Lanning (1959) 1 QB 426, at p 433 , that in mediaeval England liability for causing harm to another was absolute, provided only that the case fell within one of the established forms of action. Holdsworth gives an illustration from the Year Books (35 Hy. VI), where counsel was appealed to not to go on with a case against a child because he could not have known what he was doing, "so that there could hardly be said to be an act in this case"; and he adds that it seems to have been admitted that if the child pleaded and was found guilty the judge would have no discretion: History of English Law, vol. iii, p. 376 (n). Bacon, in a passage in his Maxims which is quoted by Holdsworth, op. cit. vol. iii, pp. 376, 377, wrote, "so if an infant within" (meaning, no doubt, under) "years of discretion, or a madman, . . . put out a man's eye, or do him like corporal hurt, he shall be punished in trespass." And even as late as the 17th century, it was considered that infancy, dementia, chance, ignorance, civil subjection, compulsion, necessity, fear, did not ordinarily excuse a person from civil liability for damages for injury caused, because, as was said, "such a recompense is not by way of penalty, but a satisfaction for damage done to the party": Hale's Pleas of the Crown, 1800 ed., vol. i, p. 15. (at p213)

5. Partly, no doubt, as a development of the idea always recognized that this strict liability should extend only to immediate and not to remote consequences of the act, the law came in time to limit it to acts involving a shortcoming on the part of the defendant: Holdsworth, op. cit. vol. iii, p. 379. Act of God and inevitable necessity thus came to be admitted as excuses; and, those steps having been taken, liability not unnaturally became further restricted so as not to attach to acts which, though causes of harm, were inherently proper and were for that reason to be considered not so proximate as to entail liability: Holdsworth, op. cit. vol. viii, pp. 455 et seq. But propriety, in the relevant sense, has never been a matter of a morally blameless state of mind: see Pollock's excursus on negligence in The Law of Torts, 15th ed. (1951), p. 336, and the observations of Lord Denning as to unsoundness of mind in White v. White (1950) P 39, at p 58 . In so far as "proper" is an apt word to use in this connexion it connotes nothing but conformity with an objective standard of care, namely the care reasonably to be expected in the like circumstances from the normal person exercising reasonable foresight and consideration for the safety of others. Thus a defendant does not escape liability by proving that he is abnormal in some respect which reduces his capacity for foresight or prudence. (at p213)

6. The principle is of course applicable to a child. The standard of care being objective, it is no answer for him, any more than it is for an adult, to say that the harm he caused was due to his being abnormally slow-witted, quick-tempered, absent-minded or inexperienced. But it does not follow that he cannot rely in his defence upon a limitation upon the capacity for foresight or prudence, not as being personal to himself, but as being characteristic of humanity at his stage of development and in that sense normal. By doing so he appeals to a standard of ordinariness, to an objective and not a subjective standard. In regard to the things which pertain to foresight and prudence - experience, understanding of causes and effects, balance of judgment, thoughtfulness - it is absurd, indeed it is a misuse of language, to speak of normality in relation to persons of all ages taken together. In those things normality is, for children, something different from what normality is for adults; the very concept of normality is a concept of rising levels until "years of discretion" are attained. The law does not arbitrarily fix upon any particular age for this purpose, and tribunals of fact may well give effect to different views as to the age at which normal adult foresight and prudence are reasonably to be expected in relation to particular sets of circumstances. But up to that stage the normal capacity to exercise those two qualities necessarily means the capacity which is normal for a child of the relevant age; and it seems to me that it would be contrary to the fundamental principle that a person is liable for harm that he causes by falling short of an objective criterion of "propriety" in his conduct - propriety, that is to say, as determined by a comparison with the standard of care reasonably to be expected in the circumstances from the normal person - to hold that where a child's liability is in question the normal person to be considered is someone other than a child of corresponding age. (at p214)

7. Assistance on the subject is not to be found in the shape of specific decision in England or in this country, and judicial opinions in the United States and Canada have varied both in result and in reasoning. It seems to me, however, that strong support for the view I have indicated is provided by decisions on the cognate subject of contributory negligence. It is true that contributory negligence is not a breach of legal duty ; it is only a failure to take reasonable care for one's own safety. But I must respectfully disagree with those who think that the deficiences of foresight and prudence that are normal during childhood are irrelevant in determining what care it is reasonable for a child to take for the safety of others though relevant in determining what care it is reasonable for a child to take for himself. The standard is objective in contributory negligence no less than in negligence, in the sense that an

ordinary capacity for care is postulated, and is notionally applied to the circumstances of the case in order to determine what a reasonable person would have done or refrained from doing, regardless of the actual capacity for foresight or prudence possessed by the individual plaintiff or defendant. The competition as to efficiency of causation is between "a breach of duty by the defendant and the omission on the part of the plaintiff to use the ordinary care for the protection of himself or his property that is used by the ordinary reasonable man in those circumstances" : per Lord Atkin in Caswell v. Powell Duffryn Associated Collieries Ltd. (1940) AC 152, at p 164 . See also the quotations which Lord Wright repeated with approval in the same case (1940) AC, at pp 174, 175 . (It would seem that Jordan C.J. took a somewhat different view in Cotton v. Commissioner for Road Transport and Tramways (1942) 43 SR (NSW) 66, at pp 69, 70 , for he expressed himself in terms of the capacity of the individual to take care. In so far as his Honour's observations suggest a subjective standard for contributory negligence they ought not, I think, to be accepted.) (at p215)

8. It seems never to have been doubted in any reported case from Lynch v. Nurdin [1841] EngR 52; (1841) 1 QB 29 (113 ER 1041) onwards, that contributory negligence on the part of a child consists in a failure to exercise the care reasonably to be expected of an ordinary child of the same age. See also Harrold v. Watney (1898) 2 QB 320 ; Yachuk v. Oliver Blais Co. Ltd. (1949) AC 386, at p 395 . Baron Parke made an interesting remark in Lygo v. Newbold [1854] EngR 86; (1854) 9 Ex 302, at p 305 [1854] EngR 86[1854] EngR 86; ; (156 ER 129, at p 130) , to which Davidson J. referred in Cotton v. Commissioner for Road Transport (1942) 43 SR (NSW), at p 77 . He said that the decision in Lynch v. Nurdin [1841] EngR 52; (1841) 1 QB 29 (113 ER 1041) "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. In these words, as it seems to me, the whole matter is summed up : the standard of care is objective ; it is the standard to be expected of a child, meaning any ordinary child, of comparable age - the child there was sufficiently described as of tender years - not that which is to be expected of an adult ; and the child's blamelessness, by the standard so determined, is treated as saving his conduct from being regarded as such a cause of his injury as to affect the question of the defendant's liability. (at p215)

9. I am therefore of opinion that the learned trial judge did not misdirect himself on the question of law. There remains the question of fact : did the respondent, in throwing the spike as he did though aware of the proximity of the appellant, do anything which a reasonable boy of his age would not have done in the circumstances - a boy, that is to say, who possessed and exercised such degree of foresight and prudence as is ordinarily to be expected of a boy of twelve, holding in his hand a sharpened spike and seeing the post of a tree-guard before him? On the findings which must be accepted, what the respondent did was the unpremeditated, impulsive act of a boy not yet of an age to have an adult's realization of the danger of edged tools or an adult's wariness in the handling of them. It is, I think, a matter for judicial notice that the ordinary boy of twelve suffers from a feeling that a piece of wood and a sharp instrument have a special affinity. To expect a boy of that age to consider before throwing the spike whether the timber was hard or soft, to weight the chances of being able to make the spike stick in the post, and to foresee that it might glance off and hit the girl, would be, I think, to expect a degree of sense and circumspection which nature ordinarily withholds till life has become less rosy. (at p216)

10. Sympathy with the injured girl is inevitable. One might almost wish that mediaeval thinking had led to a modern rule of absolute liability for harm caused. But it has not ; and, in

the absence of relevant statutory provision, children, like everyone else, must accept as they go about in society the risks from which ordinary care on the part of others will not suffice to save them. One such risk is that boys of twelve may behave as boys of twelve ; and that, sometimes, is a risk indeed. (at p216)

11. In my opinion the appeal should be dismissed. (at p216)

MENZIES J. The appellant, by her next friend, sued the respondent, by his guardian ad litem, for damages for assault and trespass. Her action failed because the learned trial judge found as follows : - . . . my conclusion on the facts of this case is that the injury to the plaintiff was not the result of a lack of foresight and appreciation of the risk that might reasonably have been expected, or of a want of reasonable care in aiming the dart. I find that Barry Watson was not negligent in the legal sense. I therefore dismiss the case against him" (1964) 111 CLR, at p 397 . His Honour so found after casting the onus of disproving negligence upon the defendant in accordance with the decision in Blacker v. Waters (1928) 28 SR (NSW) 406 ; 45 WN 111 and the authorities there cited. This decision upon the onus of proof has already excited comment - see (1965) 39 ALJ 97 - but in the event his Honour's ultimate conclusions did not rest upon this decision. (at p216)

2. It was conceded upon this appeal that there was no intentional assault or trespass and that therefore the respondent was entitled to the judgment in his favour if it was a correct finding that there was no negligence on his part : Stanley v. Powell (1891) 1 QB 86 ; Fowler v. Lanning (1959) 1 QB 426 . (at p216)

3. In Degg v. Midland Railway Co. [1857] EngR 289; (1857) 1 H & N 773 (156 ER 1413) Bramwell B. said : - "There is no absolute or intrinsic negligence ; it is always relative to some circumstance of time, place or person . . . It seems to us there can be no action except in respect of a duty infringed . . ." (1857) 1 H & N, at pp 781, 782 (156 ER, at p 1416) . In Thomas v. Quartermaine (1887) 18 QBD 685 Bowen L.J. said : - " . . . the ideas of negligence and duty are strictly correlative, and there is no such thing as negligence in the abstract; negligence is simply neglect of some care which we are bound by law to exercise towards somebody" (1887) 18 QBD, at p 694 . Accordingly, it was well said in 1903 that: "For as an act of negligence implies a breach of some duty, the nature and extent of that duty must first be ascertained before it can be decided as a fact whether there has been any breach of it; and it would seem to follow that an act of negligence cannot be greater or less than is involved in the breach of the particular duty. Once you have ascertained the nature of the duty imposed, you can determine as a matter of fact whether it has been discharged or neglected. You cannot do so before you have ascertained what that duty is; and it does not assist you in ascertaining it to classify the degree of negligence": Sington - The Law of Negligence. (at p217)

4. The first inquiry must therefore be - what duty of care was owed by the respondent, a boy of twelve, to the appellant, a girl of ten, upon the occasion when he threw a three-inch piece of welding rod, which had been brought to a blunt point at one end, into her eye causing her the loss of the sight of that eye? (at p217)

5. The finding of the learned trial judge, which I have quoted, was based upon a view that the duty of care which the respondent owed to the appellant was less demanding than would have been the duty owed to the girl by a man in the position of the respondent. This, I think, appears expressly from that part of the judgment in which his Honour said: "It may be that an

adult, knowing of the resistant qualities of hardwood and of the uncertainty that a spike, not properly balanced as a dart, will stick into wood when thrown, would foresee that it might fail to do so and perhaps go off at a tangent. A person who knew, or might reasonably be expected to know that might be held to be negligent if he were not more circumspect than was this infant defendant" (1964) 111 CLR, at p 397 . But whether or not I am right in this construction of what his Honour said, I have no doubt whatever that he would not have absolved the respondent from negligence had the respondent been a man. What the respondent did was to throw with force a piece of metal like a blunt, headless nail in the general direction of the appellant. When he did so, the respondent and the appellant were close to, but on opposite sides of, a tree guard about three feet square and four feet high protecting a small tree. It consisted of four posts joined at the top but otherwise open at the sides except for a height of a couple of feet from the ground. The respondent threw his missile ahead of him to drive it into one of the four posts of the guard. It hit the appellant in the eye. The weight of the oral evidence was that the missile did not hit the post. His Honour's finding was that it probably hit the post and bounced off. Thus, his Honour said: - "I accept the defendant's statement that he threw the missile at the post expecting it to stick in it. It does not put any strain on one's memory of boyhood to see this as a boyish impulse. It either missed the post or hit it and glanced off and hit the plaintiff. The latter seems to me far the more likely. Admittedly the plaintiff was not far away. Nevertheless to hit her when trying to hit the post would mean a very bad aim on the part of the defendant, who was standing close up to the post. But that a metal rod, sharpened at the end but not balanced as a true dart, might not stick into a hardwood post at which it was thrown is by no means improbable. If thrown with any force it might on hitting it be deflected and go off at an angle. I think that most probably that is what happened in this case" (1964) 111 CLR, at p 396 . His Honour then posed for himself this question: "Did that happening, unintended and unexpected by Barry Watson, occur without any lack of due care on his part?" (1964) 111 CLR, at p 396 . (at p218)

6. If a man had acted as his Honour found the boy acted here, there could have been no question of his negligence whether or not the missile hit the post. The respondent therefore escaped liability because, being but a boy of twelve, it was found that he "was not negligent in the legal sense" (1964) 111 CLR, at p 397 in doing what was, of course, a very foolish act. (at p218)

7. There is some authority of a persuasive kind in favour of the view that the duty of care towards others which the law imposes upon a child is different from that which it imposes upon an adult. Thus, in the American Law Institute's Restatement of the Law of Torts, vol. 2, par. 283, it is stated: "Unless the actor is a child or an insane person, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances". The exception here stated is further elaborated as follows: - "A child of tender years is not required to conform to the standard of behaviour which it is reasonable to expect of an adult, but his conduct is to be judged by the standard of behaviour to be expected from a child of like age, intelligence and experience. A child may be so young as to be manifestly incapable of exercising any of those qualities of attention, intelligence and judgment which are necessary to enable him to perceive a risk and to realize its unreasonable character. On the other hand, it is obvious that a child who has not yet attained his majority may be as capable as an adult of exercising the qualities necessary to the perception of a risk and the realization of its unreasonable character. Between these two extremes there are children whose capacities are infinitely various. The standard of conduct required by such a child is that which it is reasonable to expect of children of like age, intelligence and

experience. In so far as concerns the child's capacity to realize the existence of a risk, the individual qualities of the child are taken into account. If the child is of sufficient age, intelligence and experience to realize the harmful potentialities of a given situation, he is required to exercise such prudence in caring for himself and such consideration for the safety of others as is common to children of like age, intelligence and experience". This is hardly the statement of an objective standard, and perhaps it ought to be read as if the norm is what is to be expected of a reasonably prudent child of like age, intelligence and experience. Even so understood, however, the acceptance of such a standard would require, in each case where there is an allegation that a child's negligence has caused damage to another, a determination of the age, intelligence and experience of the defendant himself as a prerequisite to ascertaining the duty of care to which he is subject by law. Furthermore, if a child's conduct is to be judged by a child's standards, presumably there should also be special standards of care applicable to other classes of persons having less capacity than the ordinary reasonably prudent man - e.g. the mentally defective or the senile. Outside the United States, the only decisions that have been found which give support to the proposition that a child is only liable for acts or omissions causing harm to others if such acts or omissions depart from the standards of the ordinary reasonably prudent child of the same age, intelligence and experience, are the Canadian cases of Walmsley v. Humenick (1954) 2 DLR 232 and Hatfield v. Pearson (1956) 1 DLR (2d) 745 . In the former case, Clyne J. said: - "The statement of claim contains an allegation of negligence against the infant defendant to the effect that in discharging the arrow into the right eye of the defendant he was acting without reasonable care. Counsel for the plaintiffs did not press the point very strongly having in mind no doubt the several cases decided recently on the subject of the negligence of infants, but nevertheless the point was left in such a way that I must deal with it" (1954) 2 DLR, at p 237 . After consideration of the evidence, his Honour continued: - "I think the circumstances coupled with the evidence of the children would be sufficient to justify a finding of negligence in an adult, or at least I am prepared to assume so for sake of argument. The cases clearly demonstrate, however, that what may be lack of reasonable care in an adult cannot be considered to be so in the case of a child having regard to its capacity to understand and appreciate the nature of its actions. Speaking of a boy of four, Davis J. held in Hudson's Bay Co. v. Wyrzykowski (1938) 3 DLR 1, at p 5; (1938) SCR 278, at p 286 : 'The child on account of its age was incapable of negligence on its part'. In an earlier negligence case, Acadia Coal Co. v. McNeil (1927) 3 DLR 871, at p 876 , Newcombe J. in delivering the unanimous judgment of the Court said: 'Children aged seven and nine years have by the common law the benefit of something in the nature of a presumption that they have not sufficient capacity to know that they are doing wrong'. If such a presumption exists it may of course be rebutted by evidence. An exhaustive review of the authorities dealing with the subject of the negligence of children was recently made by my brother Manson J. in Sheasgreen v. Morgan (1952) 1 DLR 48 , where he says at pp. 61, 62: 'While mere age is not in itself the test, but rather the capacity of the infant to understand and appreciate, certainly it may, and often is, obvious to the trial judge that by no stretch of the imagination could contributory negligence be imputed to the infant'. In the present case I have no hesitation in finding that the infant defendant had not reached that stage of mental development where it could be said that he should be found legally responsible for his negligent acts. Putting it another way, it might be said that at his age he had not yet acquired that capacity to reason which would place him within the category of the 'reasonable man' as that term is used in the cases defining negligence" (1954) 2 DLR, at p 238 . It is to be observed that the cases upon which Clyne J. relied were all cases where the question was of a child's contributory negligence. This is a matter to which I will have to return. (at p220)

8. The cases decided in the United States are collected in two decisions reported in the American Law Reports - Annotated. Kuhns v. Brugger (1957) 68 Am LR (2d) 761 and Charbonneau v. MacRury (1931) 73 Am LR 1266 . In the former case it was said: - "Even though the standard of care applicable to a minor differs from that applicable to an adult, nevertheless a minor may be guilty of actionable negligence. Both an adult and a minor are under an obligation to exercise reasonable care; however, the 'reasonable care' required of a minor is measured by a different yardstick - it is that measure of care which other minors of like age, experience, capacity and development would ordinarily exercise under similar circumstances. In applying that yardstick, we place minors in three categories based on their ages: minors under the age of seven years are conclusively presumed incapable of negligence; minors over the age of fourteen years are presumptively capable of negligence, the burden being placed on such minors to prove their incapacity; minors between the ages of seven and fourteen years are presumed incapable of negligence, but such presumption is rebuttable and grows weaker with each year until the fourteenth year is reached" (1957) 68 AmLR (2d), at pp 769, 770 . These observations cannot be regarded as a correct statement of the law to be applied by this Court. The annotation to Kuhns v. Brugger (1957) 68 AmLR (2d) 761 deals with the liability of the parents of infants rather than with the liability of infants for damage caused by the infant's use of firearms and it is not surprising that the cases show that where the question was whether or not parents were negligent in allowing their children access to firearms, the age, experience and disposition of the child was regarded as a matter of importance. Charbonneau v. MacRury (1931) 73 AmLR, at p 1266 was an unsuccessful appeal against a judgment in favour of the defendant who had been sued for damages for negligently driving a car when he was seventeen years of age. It was said: "Reasonable care, having regard to the age and stage of development of the individual, is required of minors as well as adults, and no different measure is to be applied to their primary than to their contributory faults" (1931) 73 AmLR, at p 1266 but "a minor charged with actionable negligence is not to be held to the standard of care of an adult without regard to his nonage and want of experience" (1931) 73 AmLR, at p 1266 . Elsewhere it was said: "The understanding of this court that the general standard of care governing the conduct of adults, namely, reasonable care under all the circumstances, applies as well to minors as to adults, and that infancy and want of experience of the latter are merely evidential factors to be weighed, with the other circumstances, is made plain" (1931) 73 AmLR, at p 1275 by other cases which the court then proceeded to cite. If, however, the jury are to be told that the standard of care required of a child is that of an ordinary reasonable adult, it could not be otherwise than contradictory and confusing to add that, in determining whether a child defendant's conduct conformed to that standard, the immaturity natural to his age should be taken into account. The court, after stating that a minor is universally considered to be lacking in judgment and subject to failings normally incident to immaturity as well as to "ordinary human failings" said: "It is for these reasons that the law recognizes that indulgence must be shown the minor in appraising the character of his conduct. This is accomplished however through no arbitrary exception to the general rule of reasonable care under all the circumstances. As we have said this is always the test. But what is reasonable when the actor is a minor? Manifestly the adult test of the standard man cannot be applied in disregard of the actor's youth and inexperience. Either a new standard denoting the average person of the minor's age and development must be taken as the yardstick, or else allowance must be made for the minor's stage of development as one of the circumstances incident to the application of the general rule of reasonable care. As a practical matter it is not important which course is pursued. This court, however, is inclined to approve the latter both as supporting the theory that reasonable care under all the circumstances is a universal rule, and in the interest of simplicity of applying the law to the facts. The latter course merely requires the jury to apply

the accepted rule of reasonable conduct under the circumstances, of which the stage of development of the minor is one, while the former imposes upon the jury the duty first to set up a standard youth for each particular case from the composite factors of age and experience as disclosed in the evidence, and then to apply that standard to the remaining circumstances in proof" (1931) 73 AmLR, at p 1274 . As I see it, the two courses referred to really do not exist and, for reasons already stated, if allowance is to be made for the immaturity of youth, it must be made by adopting what the court described as a different yardstick of duty. That, as has been seen, is the course taken in the Restatement and in Kuhns v. Brugger (1957) 68 AmLR (2d) 761 . The statement of law to be found in Charbonneau v. MacRury (1931) 73 AmLR 1266 seems to me, with great respect and despite the disclaimers made therein, to depart altogether from an objective standard by defining the duty of care resting upon any defendant as conditioned by his own characteristics. Thus, the age, the stage of physical development, the intelligence of a child, the physical defects of an adult - though not his mental incapacity short of insanity - are to be taken into account in deciding whether the defendant failed to observe the duty of care imposed upon him by law. This is achieved by stating the duty to be reasonable care under the circumstances of the particular case and then bringing into account the characteristics of the defendants as part of the circumstances. (at p222)

9. The judgment reveals that there are opposing authorities among both judges and textbook writers in the United States upon the question of the general duty of care owed by infants to others and it seems that where the view has been taken that a child is only bound to exercise towards others that degree of care which children of the same age would ordinarily exercise in the same circumstances, a good deal of reliance has been placed upon cases in which the question has been whether or not a child plaintiff has been guilty of contributory negligence. This is true of Charbonneau v. MacRury (1931) 73 AmLR 1266 itself and it is the matter to which I now turn. (at p223)

10. Where in an action for negligence by a plaintiff child the defendant raises as a defence the contributory negligence of the plaintiff, it is now established that the defence may fail either because in the circumstances there is nothing upon which a finding could be made that the child was capable of taking care for its own safety (Cronan v. Hepburn (1958) VR 112) or, where the child is capable of taking such care, it is not established that it failed to take that degree of care for its own safety such as that which could reasonably be expected of such a child (Joseph v. Swallow & Ariell Pty. Ltd. [1933] HCA 47[1933] HCA 47; ; (1933) 49 CLR 578). As is said in Beven on Negligence, 4th ed. (1928), p. 196 : "The first point to be noticed is that a young child may be incapable of contributory negligence. Then, conduct that in the case of an adult would disentitle to recover, in the case of a child may be no obstacle. Again, conduct that disentitles a child from recovering may vary in proportion to the child's age". (at p223)

11. Where the question concerns the plaintiff's contributory negligence, the law permits a subjective test, and this is so not only in the case of children. Any person under a disability is only required to take such reasonable care for his own safety as his capabilities permit. A one-legged man crossing a road is not expected, in the face of danger, to display the agility of a two-legged man. Thus, in Cotton v. Commissioner for Road Transport and Tramways (1942) 43 SR (NSW) 66 Jordan C.J. said : "It is conceived that contributory negligence in the sense in which it is now being considered occurs only when a person fails to take all such reasonable care as he is in fact capable of. I am not aware of any case in which a person has been held to be guilty of contributory negligence through the application of some arbitrary

general standard, notwithstanding that he had been as careful as he could. . . . In every case in which the injured child is not so young as to be obviously incapable of taking care, if there is evidence that carelessness on the child's part contributed to its injury, the questions whether it was capable of taking care, and if so whether it took such care as it was reasonably capable of, having regard to its age and intelligence, are questions of fact which the jury must determine" (1942) 43 SR (NSW), at pp 69, 70 . (at p224)

12. There is, however, no justification for deciding whether a defendant has been negligent by the test which the law adopts for ascertaining whether a plaintiff has been guilty of contributory negligence in the sense that he has failed to take reasonable care for his own safety. This can readily be demonstrated by attempting to adapt the first citation just made from the judgment of Jordan C.J. to a different purpose. It could not be said that in the case of a defendant actionable negligence only occurs when a person fails to take all such reasonable care as he is in fact capable of. To adopt such a proposition would be to substitute a subjective test for the well-established objective test of negligence stated by Tindal C.J. in Vaughan v. Menlove [1837] EngR 424[1837] EngR 424; ; (1837) 3 Bing (NC) 468 (132 ER 490) . "Instead therefore of saying that the liability for negligence should be coextensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe" (1837) 3 Bing (NC), at p 475 (132 ER, at p 493) . (at p224)

13. Moreover, there is no inconsistency between the adoption of an objective test when the question is whether the defendant has been negligent, and the adoption of a subjective test when the question is whether the plaintiff has been guilty of contributory negligence in the sense of lack of care for himself. The objective test to be applied to determine liability follows inevitably from the statement of the duty of care which the law imposes upon one man in his relationship with others ; no such duty is necessarily in question when the question is merely whether the plaintiff has been guilty of contributory negligence. See Nance v. British Columbia Electric Railway Company Ltd. (1951) AC 601 , where Viscount Simon said : "The statement that, when negligence is alleged as the basis of an actionable wrong, a necessary ingredient in the conception is the existence of a duty owed by the defendant to the plaintiff to take due care, is, of course, indubitably correct. But when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury" (1951) AC, at p 611 . The problem discussed by Sholl J. in Noall v. Middleton (1961) VR 285 need not be considered here. (at p225)

14. In my opinion, therefore, the reliance which has been placed upon the contributory negligence decisions in cases where the issue was actionable negligence has been misplaced. (at p225)

15. I have found no English or Australian authority to support the statements in the United States and Canadian authorities to which I have referred and, in my opinion, what is there stated to be the law conflicts with the fundamental principle of the law of negligence, viz. that the standard of care fixed by the law to determine actionable negligence is an objective standard - that is, the care to be expected of an ordinary reasonable man. This, except in special categories, is the standard to be applied to any person capable of negligence in the

absence of some consensual modification - express, implied or, perhaps, imputed : see, for instance, the statements of Dixon J. in The Insurance Commissioner v. Joyce (1948) 77 CLR 39, at p 59 , and Webb J. in Roggenkamp v. Bennett [1950] HCA 23; (1950) 80 CLR 292, at p 303 . See, too, Walker v. Turton-Sainsbury (1952) SASR 159 and Jones v. Manchester Corporation (1952) 2 QB 852, at p 871 . (at p225)

16. It may, of course, be objected that the adoption of a hard-and-fast rule to be applied to all cases will sometimes produce what appears to be some hardship but, if so, it should also be recalled that hard cases make bad law. It is, moreover, necessary to observe that the law of negligence is primarily concerned with the circumstances under which a person who suffers damage may recover compensation, and there is no necessary connexion between legal liability to make compensation and moral culpability. Another objection to a standard rule is that it may appear riduculous in determining liability to judge immaturity by maturity or, as it was put in argument, to put an old head upon young shoulders. Again the answer to such a criticism is that it was not without good reason that the law has adopted a general standard to determine liability for negligence and the application of a general standard to anyone who is himself either above or below the standard may produce a result that is open to criticism as ridiculous when judged by an irrelevant philosophy. Were the law to require from every person the exercise of all the skill of which he is capable to avoid harm to others, it would be a different law from the established law of negligence and it would be based upon a philosophy different from that underlying the present law. Whether or not it would be a better law is outside any question here relevant, but an attempt to use the results which would follow from the application of such a law, to test the reasonableness of what I understand the present law to require, appears to me to be misconceived. (at p226)

17. My conclusion is, therefore, that as the duty of care which the respondent owed to the appellant was to take such care as an ordinary reasonable man would have taken in the circumstances, the appeal should succeed. (at p226)

18. I would add that if, contrary to my opinion, the conduct of the respondent ought to be judged by the standard of a reasonable boy of the world rather than a reasonable man of the world, I would still conclude that the respondent had been negligent. It appears to me that no boy of twelve could reasonably think that he could hurl a nail into a post, and I have no doubt that the capacity of the respondent's missile to penetrate a piece of wood was less than that of an ordinary three-inch nail ; it was blunt and lacked the weight of a head. Furthermore, in the face of the evidence I would not infer, as did his Honour, that the missile hit the post and was deflected. Upon the facts, I would conclude that a reasonable boy would not throw a three-inch piece of metal, head high, in the direction of another person. (at p226)

19. I consider, therefore, that this appeal should be allowed and the action retried. (at p226)

OWEN J. This action, which was tried by Windeyer J., arose out of a happening which occurred in 1957. The plaintiff was then a girl aged nine and one of the defendants, Barry Watson, was twelve years of age. The other two defendants are his parents. On the day in question the two children, along with some others, were playing together on a grass strip bordering a road. Barry Watson had a short length of metal welding rod about 6" long one end of which had been rubbed down to a chisel-like shape so that it might be used to scrape shellfish off rocks. It was referred to in the evidence as a dart. The children were standing near a small ornamental tree around which was a wooden tree guard about 3 ft. square with corner posts of 3" X 2" hardwood about 4 ft. high. Barry Watson was standing within a foot

or so of one side of the tree guard and the plaintiff was standing near the opposite side. He was playing with the dart and threw it at one of the corner posts of the guard thinking that it would stick into the wood. It struck the post, glanced off it and hit the plaintiff in the eye doing her serious injury. There was conflicting evidence as to what occurred but the facts set out above are those found by the learned judge. He further found that Barry Watson had not intended the dart to hit the plaintiff and that, in acting as he had, he had not been negligent. Accordingly his Honour found in the boy's favour. The plaintiff's claim against the other defendants, the boy's parents, alleged that they had been negligent in allowing the boy to have the dart, in failing to supervise his use of it, in failing to warn the plaintiff or her parents that he had the dart and in failing to warn the plaintiff or her parents of its dangerous nature. His Honour found for the parents and no complaint is now made of this, the appeal being only against the judgment entered in favour of the boy. (at p227)

2. It has been submitted that the learned judge fell into error in a number of respects. It was said that he should have found and that we should now find that the dart was not aimed at the post nor did it hit the post and glance off. If not deliberately aimed at the plaintiff it was nevertheless thrown in her direction and a finding of negligence should be made against the boy. It was further submitted that his Honour had misdirected himself as to the appropriate standard of care to be applied in considering the issue of negligence. Having regard to the presence of the plaintiff and the other children, an adult taking reasonable care for their safety would not have thrown the dart as the boy did and, so it was said, in considering whether the boy had been negligent, his conduct was to be judged in the light of what a reasonable man would or would not have done in the circumstances. The fact that the defendant was only twelve years old was irrelevant in determining whether or not he had acted negligently. (at p227)

3. No sufficient reason has been shown, in my opinion, for interfering with the finding that the dart was thrown at the post in the expectation that it would stick into it or with the finding that it hit the post and glanced off before striking the plaintiff's eye. Nor would I interfere with the finding that the boy was not negligent unless in arriving at that conclusion the learned judge erred in taking into account the boy's age and in directing himself as to the standard of care against which the boy's actions were to be viewed. It was conceded by counsel for the appellant - and rightly so - that where it is alleged against a child that he was guilty of contributory negligence, his age is a material factor and that his actions are to be judged by what would reasonably be expected of a child of like age and development. But, it was said, this was not the test when what was alleged was that a child had caused harm to another by negligence. (at p227)

4. The contention that his Honour erred in these respects is based upon a passage in his Honour's judgment in which he said: "It has been strongly urged for the plaintiff that, in considering whether Barry was negligent, I must judge what he did by the standard expected of a reasonable man, and that that standard is not graduated according to age. In one sense, of course, that is so ; for the question whether conduct was negligent, in a legal sense, always depends on an objective standard. This has been generally recognized ever since Tindal C.J. said in Vaughan v. Menlove [1837] EngR 424; (1837) 3 Bing (NC) 468 (132 ER 490) , 'Instead of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe' (1837) 3 Bing (NC), at p 475 (132 ER, at p 493) . In Glasgow Corporation v. Muir [1943] UKHL 2; (1943) AC 448 , Lord Macmillan said : 'The

standard of foresight of the reasonable man is, in one sense, an impersonal test. It elimates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. . . . The reasonable man is presumed to be free both from over-apprehension and from over-confidence, but there is a sense in which the standard of care of the reasonable man involves in its application a subjective element. It is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have had in contemplation, and what accordingly the party sought to be made liable ought to have foreseen' (1943) AC, at p 457 . That is the question I have to determine. It is a question of fact, a jury question, not a question of law. I have not to determine it by regarding the facts of other cases, but by regarding all the circumstances of this case. I do not think that I am required to disregard altogether the fact that the defendant Barry Watson was at the time only twelve years old. In remembering that I am not considering 'the idiosyncrasies of the particular person'. Childhood is not an idiosyncrasy. It may be that an adult, knowing of the resistant qualities of hardwood and of the uncertainty that a spike, not properly balanced as a dart, will stick into wood when thrown, would foresee that it might fail to do so and perhaps go off at a tangent. A person who knew, or might reasonably be expected to know that might be held to be negligent if he were not more circumspect than was this infant defendant. But whatever the position would be if the facts were different, my conclusion on the facts of this case is that the injury to the plaintiff was not the result of a lack of foresight and appreciation of the risk that might reasonably have been expected, or of a want of reasonable care in aiming the dart. I find that Barry Watson was not negligent in the legal sense" (1964) 111 CLR, at pp 396, 397 . (at p229)

5. It is not altogether clear to me whether the learned judge judged the boy's conduct by comparing it with the standard of care to be expected of a reasonable adult or by comparing it with the standard reasonably to be expected of a boy of the "like age, intelligence and experience", to use a phrase taken from the judgment of the Supreme Court of Canada, delivered by Kerwin C.J.C., in McEllistrum v. Etches (1956) 6 DLR (2d), at p 7. But it seems to follow from the fact that his Honour had regard to the fact that the defendant was a boy that he must have accepted the view that the standard to be applied was not that of an adult but of a boy of similar age. (at p229)

6. In considering the question of law thus raised I have found it helpful to consider what would have been required of a trial judge had the case been heard before a jury. If the appellant's submissions are correct it would have been necessary to direct the jury that they should find the boy to have acted negligently if they thought that what he had done would not have been done, in the circumstances, by a reasonable man and that on that issue they must disregard the fact that the defendant was a child. And if the action had been one between an infant plaintiff and an infant defendant in which contributory negligence on the part of the plaintiff was raised, it would have been necessary to direct the jury that in considering the plaintiff's conduct they must take his age into account and compare his actions with those reasonably to be expected of a child of the same age, but that in considering whether the defendant had acted negligently the fact that he was a child was irrelevant and his conduct was to be measured against that reasonably to be expected of an adult. This seems to me to be contrary to common sense which has played a large part in the development of the common law. A jury thus directed would, I should think, form the opinion, with some justification, that the law was an ass and would probably pay little or no attention to the direction that the defendant was to be treated as though he had been an adult. Unaided by authority, I would have thought that the direction relating to negligence would be wrong. It is plain that in dealing with the question of contributory negligence on the part of a child, its age is a

relevant fact since the care expected of it is that reasonably to be expected of a child of similar age, intelligence and experience. That has been laid down again and again. McEllistrum's Case (1956) 6 DLR (2d) 1 is an example. Joseph v. Swallow & Ariell Pty. Ltd. [1933] HCA 47; (1933) 49 CLR 578 in this Court is another. As Dixon J. (as he then was) said: "If a child of such tender years be capable of contributory negligence, the degree of care must only be that which could reasonably be expected of childhood" (1933) 49 CLR, at p 586 . Perhaps the best known authority on the point is Lynch v. Nurdin [1841] EngR 52[1841] EngR 52; ; (1841) 1 QB 29 (113 ER 1041) . It is true that in cases of contributory negligence what is alleged is that the plaintiff failed to take reasonable care for his own safety whereas in cases of negligence the duty imposed upon the defendant is a different one, a duty to take reasonable care for the safety of others, but notwithstanding that the duty is different I do not understand why it should be said that the standard of care differs according to whether the issue is one of negligence or of contributory negligence. There appear to be few cases in the reports in which it has been necessary to consider the standard to be applied in cases where a child is alleged to have been guilty of negligence causing harm to another. One such case is Hatfield v. Pearson (1956) 1 DLR (2d) 745 , where the rule applicable in the case of contributory negligence was applied to a case of negligence on the part of an infant defendant, and a number of cases in the courts of the United States in which the same view appears to have been taken are referred to in Professor Prosser's work on the Law of Torts, 2nd ed. (1955), pp. 127, 128. I have not been able to obtain the reports in which these decisions appear but the learned author, after saying at p. 124 that "The whole theory of negligence presupposes some uniform standard of behavior. Yet the infinite variety of situations which may arise makes it impossible to fix definite rules in advance for all conceivable human conduct. The utmost that can be done is to devise something in the nature of a formula, the application of which in each particular case must be left to the jury, or to the court. The standard of conduct which the community demands must be an external and objective one, rather than the individual judgment, good or bad, of the particular actor ; and it must be, so far as possible, the same for all persons, since the law can have no favorites. At the same time, it must make proper allowance for the risk apparent to the actor, for his capacity to meet it, and for the circumstances under which he must act." goes on : "As to one very important group of individuals, it has been necessary, as a practical matter, to depart to a considerable extent from the objective standard of capacity. Children, although they are liable for their torts, obviously cannot be held to the same standard as adults, because they cannot in fact meet it. It is possible to apply a special standard to them, because 'their normal condition is one of incapacity and the state of their progress toward maturity is reasonably capable of determination'. It has also been held that a special standard is to be applied to persons at the other extreme of life, whose mental faculties have been impaired by age. While most of the cases dealing with children have involved contributory negligence, it has been held that there is no difference in principle when the child is a defendant. Since the capacities of children vary greatly, not only with age but also with individuals of the same age, no very definite statement can be made as to the standard to be applied to them. To a great extent it must necessarily be a subjective one. It must be 'what it is reasonable to expect of children of like age, intelligence and experience'. The capacity of the particular child to appreciate the risk and form a reasonable judgment must be taken into account. More will be required of a child of superior intelligence for his age than of one who is mentally backward. But the standard is still not entirely subjective, and if the conclusion is that the conduct of the child was unreasonable in view of his estimated capacity, he may still be found negligent, even as a matter of law." In dealing with the same subject, the American Restatement of the Law of Torts par. 283 is as follows: "A child of tender years is not required to conform to the standard of behaviour which it is reasonable to expect of an adult, but his conduct is to be

judged by the standard of behaviour to be expected from a child of like age, intelligence and experience. A child may be so young as to be manifestly incapable of exercising any of those qualities of attention, intelligence and judgment which are necessary to enable him to perceive a risk and to realize its unreasonable character. On the other hand, it is obvious that a child who has not yet attained his majority may be as capable as an adult of exercising the qualities necessary to the perception of a risk and the realization of its unreasonable character. Between these two extremes there are children whose capacities are infinitely various. The standard of conduct required of such a child is that which it is reasonable to expect of children of like age, intelligence and experience. . . .". To much the same effect is a statement in Holmes' The Common Law, pp. 108, 109, to which my brother Kitto has drawn my attention: "The standards of the law are standards of general application. The law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men. It does not attempt to see men as God sees them, for more than one sufficient reason. In the first place, the impossibility of nicely measuring a man's powers and limitations is far clearer than that of ascertaining his knowledge of law, which has been thought to account for what is called the presumption that every man knows the law. But a more satisfactory explanation is, that, when men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare. If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbours, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbours than if they sprang from guilty neglect. His neighbours accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account. The rule that the law does, in general, determine liability by blameworthiness, is subject to the limitation that minute differences of character are not allowed for. The law considers, in other words, what would be blameworthy in the average man, the man of ordinary intelligence and prudence, and determines liability by that. If we fall below the level in those gifts, it is our misfortune ; so much as that we must have at our peril, for the reasons just given. But he who is intelligent and prudent does not act at his peril, in theory of law. On the contrary, it is only when he fails to exercise the foresight of which he is capable, or exercises it with evil intent, that he is answerable for the consequences. There are exceptions to the principle that every man is presumed to possess ordinary capacity to avoid harm to his neighbours, which illustrate the rule, and also the moral basis of liability in general. When a man has a distinct defect of such a nature that all can recognize it as making certain precautions impossible, he will not be held answerable for not taking them. A blind man is not required to see at his peril; and although he is, no doubt, bound to consider his infirmity in regulating his actions, yet if he properly finds himself in a certain situation, the neglect of precautions requiring eyesight would not prevent his recovering for an injury to himself, and, it may be presumed, would not make him liable for injuring another. So it is held that, in cases where he is the plaintiff, an infant of very tender years is only bound to take the precautions of which an infant is capable ; the same principle may be cautiously applied where he is defendant". In Halsbury, 2nd ed., vol. 23, p. 571, it was said that the standard of care required "is the same for every one of full age who is in possession of all his faculties and is of sound mind" and, at p. 701 of the same volume, that "the defendant's infancy may be relevant to the question whether the act or omission complained of was or was not negligent". In vol. 28 of the 3rd edition, p. 10, the first of these passages is replaced by one which reads: "It is the same for everyone, and it does not vary with the individual on whom rests the particular duty to take care". The second passage from the 2nd edition quoted above is omitted in the 3rd edition but a footnote appears at p. 10 of vol. 28 of that edition that : "It is possible that the care required of a child is not

that of a reasonable man but only such as is reasonably to be expected of those of his age" and reference is made to Walmsley v. Humenick (1954) 2 DLR 232 . That was an action in trespass and negligence brought against a child and, in the course of his judgment, Clyne J. said : "The cases clearly demonstrate, however, that what may be lack of reasonable care in an adult cannot be considered to be so in the case of a child having regard to its capacity to understand the nature of its actions" (1954) 2 DLR, at p 238 . The real issue was, however, whether the defendant was so young as to be incapable of committing a tort and the learned judge's remarks were, I think, directed to the question whether the child was so young as to be incapable of being held to be blameworthy. In Salmond on Torts, 12th ed. (1957), p. 71, it is said that the youth of a defendant may afford evidence tending to disprove the existence of malice or some other mental state which is an essential element in the plaintiff's cause of action. The learned author goes on: "Similarly, it would seem that in order to make a child liable for negligence, it must be proved that he failed to show the amount of care reasonably to be expected from a child of that age. It is not enough that an adult would have been guilty of negligence had he acted in the same way in the same circumstances. This, indeed, seems never to have been decided, but it would seem implied in the decision on the contributory negligence of children."

In Fleming's Law of Torts, 2nd ed. (1961), p. 123, it is stated that "In the case of children, the law has made considerable concession to the subjective standard. Most of the decisions have been concerned with contributory negligence, where there is a general tendency to take an indulgent view and give added weight to exculpatory considerations; but there is no doubt that a child, whether as plaintiff or defendant, is only expected to conform to the standard which ordinary children of his age, intelligence and experience would exercise under similar circumstances. If the child lacks capacity to understand and appreciate the nature of his actions, negligence is not attributed to him at all; but, given perception of the risk, he must exercise the judgment of the standard child of his age". The learned author, however, excepts cases in which a "minor engages in dangerous adult activities, such as driving a car or handling industrial equipment". In such cases, he says, he must conform to the standard expected of a reasonable man. Professor Street, in his Law of Torts, 2nd ed. (1959), refers to Lord Macmillan's statement in Glasgow Corporation v. Muir [1943] UKHL 2[1943] UKHL 2; ; (1943) AC 448 , that "The standard of foresight of the reasonable man . . . . eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question" (1943) AC, at p 457 . And goes on, at p. 124 : "Yet it is inadequate, not to say question-begging, to say that the standard then is an objective one. The definition of the reasonable man is not complete unless the words 'in the circumstances' are embodied. Plainly, these words may prevent the test from being wholly objective, for the boundary between the external facts and the qualities of the actor is ill-defined. How far, then, is the standard of the 'reasonable man' an objective one? Infants must, it seems, be treated as a category apart. In many cases infants have been held not guilty of contributory negligence where adults would, on similar facts, have been deemed to be contributory negligent - the test is: what degree of care for his own safety can an infant of the particular age reasonably be expected to take ? No English cases laying down the standard required of an infant who is a defendant, have been traced. Perhaps the rule for contributory negligence applies here." (at p234)

7. There is, then, a considerable body of opinion amongst the textbook writers, supported by decisions in Canada and the United States, that where an infant defendant is charged with negligence, his age is a circumstance to be taken into account and the standard by which his conduct is to be measured is not that to be expected of a reasonable adult but that reasonably

to be expected of a child of the same age, intelligence and experience. In none of the other textbooks which I have examined does the question appear to have been considered. (at p234)

8. For these reasons I am of opinion that Windeyer J. rightly took into consideration the fact that Barry Watson was only twelve years old and that he did not misdirect himself as to the degree of care reasonably to be expected of a boy of that age. (at p234)

9. I would dismiss the appeal. (at p234)

ORDER

Appeal dismissed with costs.