DOUGLAS McELLISTRUM, both personally and as administrator of the estate of Douglas Craig McEllistrum, deceased (*Plaintiff*) ..... APPELLANT;

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*June 19, 20
*Oct. 2

AND

ARCHIE JAMES ETCHES (*Defendant*) ..RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Contributory negligence—Child of tender years—Rule to be applied.

It cannot be laid down as a general rule that a child of 6 years is never to be charged with contributory negligence. Dictum of Trueman J.A. in *Eyers v. Gillis & Warren Limited* (1940), 48 Man. R. 164, disapproved. The proper rule is that where the age is not such as to make a discussion of contributory negligence absurd, it is a question for the jury in each case whether the infant exercised the care to be expected from a child of like age, intelligence and experience. *Mercer et al. v. Gray,* [1941] O.R. 127, approved.

Executors and administrators—Right to bring action in representative capacity—Action instituted before grant of administration—Other circumstances—The Trustee Act, R.S.O. 1950, c. 400, s. 37.

The plaintiff sued for damages arising out of the death of his infant son, claiming both personally, under *The Fatal Accidents Act,* and as administrator of his son's estate, under s. 37 of *The Trustee Act.* The action was commenced some two weeks before the grant of letters of administration to the plaintiff, and the Court of Appeal held that this fact was fatal to the claim under *The Trustee Act,* since an administrator had no status to sue until after his appointment.

Held: The judgment should be reversed in this respect. Assuming, but not deciding, that in Ontario an action under s. 37 of *The Trustee Act* could not be instituted by a person in the capacity of administrator before the grant of letters of administration to him, the writ in this action was nevertheless not void *in toto,* since the plaintiff admittedly asserted in it a valid claim under *The Fatal Accidents Act.* No period of limitation had expired when it came to the attention of the trial judge that letters of administration had not been granted until after the issue of the writ, and it would therefore have been open to him at that stage to order that the plaintiff, in his capacity of administrator, be added as a party plaintiff. The reason that no steps were taken at that time to regularize the matter was that counsel for the defendant made it plain that he was not raising the point that the action was improperly constituted. In these circumstances he should not now be heard to object on that ground, and the plaintiff should have judgment on this branch of the case.

*PRESENT: Kerwin C.J. and Taschereau, Cartwright, Fauteux and Abbott JJ.

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APPEAL from the judgment of the Court of Appeal for Ontario (1), varying the judgment at trial. Appeal allowed in part.

P. J. Bolsby, Q.C., for the plaintiff, appellant.

W. B. Williston, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—By leave of the Court of Appeal for Ontario the plaintiff in this action appeals from a judgment of that Court (1) which had varied the judgment at the trial held before a judge and jury. The plaintiff is Douglas McEllistrum in his personal capacity and as administrator of the estate of his infant son. It would appear that leave was given in order that this Court might pass upon the question as to whether an action for damages under s. 37 of *The Trustee Act*, R.S.O. 1950, c. 400, was properly brought by the father who, at the date of the issue of the writ, had not been appointed administrator. However, in order to appreciate various other questions raised by the appellant, it is necessary to set out in some detail the occurrence which gave rise to the action and some of the proceedings therein.

On March 3, 1953, the infant, who had just reached the age of 6 years, accompanied by a younger boy was walking westerly on the north side of McNaughton Avenue in the township of Chatham. Undoubtedly he moved from that position, which was a safe one, to the travelled portion of the highway and was struck by the defendant's motor vehicle which was also travelling westerly. His injuries consisted of a fractured or displaced nose, severe welts on his back, general bruises and internal injuries including a rupture of the spleen which was described as being an extremely painful injury. After removal to the hospital, he was kept under observation and about 10.30 on the next morning his condition began to worsen. About 1.30 p.m. the ruptured spleen was removed and from that time he remained unconscious except for response to deep or painful stimulus. He died on March 8, 1953.

(1) [1954] O.R. 814, [1954] 4 D.L.R. 350.

The writ was issued September 8, 1953; the statement of claim was delivered September 15, 1953, and in para. 1 thereof it was alleged that the plaintiff was the administrator of the estate and effects of the infant. In fact the plaintiff was not appointed administrator until September 25, 1953, but in its defence delivered September 26, 1953, the defendant admitted the allegation contained in the statement of claim. At the trial when the letters of administration were filed as an exhibit the following occurred:—

HIS LORDSHIP: What is the date of the letters of administration?

Mr. BOLSBY [counsel for the plaintiff]: The date of the granting of the letters of administration is the 28th [*sic*] of September, 1953.

Mr. THOMPSON [counsel for the defendant]: On that particular point, I do not know what significance it has but this action was started by the plaintiff who is the administrator some considerable time before and before letters of administration were obtained.

HIS LORDSHIP: The writ was issued the 8th of September?

Mr. BOLSBY: The date of death was the 8th of March, 1953, the granting of the letters of administration was the 25th of September, 1953.

HIS LORDSHIP: And the writ was issued on the 8th of September?

Mr. BOLSBY: That is correct, my Lord, the application was then before the Court. I will deal with any legal arguments in due course.

HIS LORDSHIP: There is nothing in the defence about it?

Mr. THOMPSON: No, I do not think it is significant anyway.

Mr. BOLSBY: Then why fight about it?

At the conclusion of the plaintiff's case which included the reading of extracts from the examination for discovery of the defendant, the latter called no evidence. Although the statement of defence contained no allegation of contributory negligence on the part of the infant, presumably counsel on each side dealt with the matter and undoubtedly the trial judge did so. The questions submitted to the jury and the answers are as follows:—

1. Has the defendant Etches satisfied you that the accident was not caused by any negligence or improper conduct on his part? Answer "Yes" or "No". Answer: No.

2. Was there any negligence on the part of the deceased Douglas Craig McEllistrum which caused or contributed to the accident? Answer "Yes" or "No". Answer: Yes.

3. If your answer to Question No. 2 is "Yes", then state fully of what the negligence of the deceased Douglas Craig McEllistrum consisted? Answer fully: The deceased Douglas Craig McEllistrum was negligent in that he darted into the path of the oncoming vehicle.

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4. If your answer to Question No. 1 is "No", and your answer to Question No. 2 is "Yes", state in percentages the degree of fault or negligence attributable to each.

Deceased Douglas Craig McEllistrum	70%
Defendant Etches	30%
Total	100%

5. Irrespective of how you answer the other questions, at what amount do you assess the total damages sustained by the plaintiff, Douglas McEllistrum?

(a) Out of pocket expenses	$ 720.69
(b) Under Trustee's Act for Pain and Suffering	3,000.00
(c) Under the Fatal Accident's Act	
(1) Funeral expenses	250.00
(2) General damages	NIL

Upon these answers, judgment was entered against the defendant for $1,191.21 made up as follows: For the plaintiff in his personal capacity, $216.21 (being 30 per cent. of the amount fixed by the jury for out-of-pocket expenses); for the plaintiff as administrator, $975. In view of the jury having assessed the total damages under *The Fatal Accidents Act,* R.S.O. 1950, c. 132, at $250 (the limit fixed by statute for funeral expenses) and in view of the finding of negligence on the part of the infant to the extent of 70 per cent., the trial judge directed that $75 be paid to the plaintiff in his personal capacity under that heading. The plaintiff was given his costs.

The defendant appealed to the Court of Appeal asking that the judgment be varied by re-assessing the quantum of the damages allowed the plaintiff under *The Trustee Act,* or that a new trial be ordered for the purpose of re-assessing such damages on the ground that the amount awarded was excessive and unreasonable and against the evidence and the weight of evidence. The plaintiff cross-appealed. By its first reasons the Court of Appeal directed that the judgment at the trial be varied and that the plaintiff personally recover from the defendant the sum of $216.21; that the claim of the plaintiff as administrator under *The Trustee Act* be dismissed without costs; that the plaintiff recover from the defendant $225 apportioned equally between him and his wife; and that the costs of the action in respect of the claim under *The Fatal Accidents Act* be paid by the defendant to the plaintiff on the scale of the County Court without a set-off. In his notice of cross-appeal the plaintiff

did not clearly say anything about the absence of any plea of contributory negligence but later he served a notice of motion for leave to amend his original notice by raising the point, whereupon the defendant moved that in the event of the Court granting that permission to the plaintiff, he, the defendant, should be given leave to amend his statement of defence by adding a paragraph alleging such contributory negligence. Both of these motions were granted by the Court of Appeal and objection is taken to the action of the Court in permitting the defendant to raise such a plea at that late date. In view of the course of the trial this Court will not interfere with the discretion of the Court of Appeal.

After the reasons for judgment of the Court of Appeal had been delivered the defendant moved to alter the minutes as settled by the Registrar on the ground that he had paid $1,000 into court in satisfaction of the plaintiff's claim at the time of the delivery of its defence, September 26, 1953. Upon that being brought to the attention of the Court of Appeal the direction as to costs was varied and the formal order provides that the costs of the action until payment into court should be paid on the scale of the County Court by the defendant to the plaintiff and that the costs after payment into court should be paid by the plaintiff to the defendant on the same scale. It was argued that the notice of payment into court did not comply with Rule 310 of the Ontario Rules of Practice and Procedure because, without any order of the Court, it did not specify the claim or cause or causes of action in respect of which payment was made and the sum paid in respect of each claim or cause of action. This question should have been raised at the time and it cannot now be said that the money was not properly paid into court.

There is no basis for the plaintiff's complaint of that part of the trial judge's charge to the jury where he instructed them that, if they considered the boy had "darted" into the path of the defendant's automobile, they might find that he had been guilty of contributory negligence, because whatever expressions were used in evidence, that was not an inappropriate manner of describing the infant's action. Extracts from the examination for discovery of the defendant having been put in as part of the plaintiff's case, there was no obligation on the trial judge to refer in detail to

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what there appeared. In his address to the jury counsel for the plaintiff had referred a number of times to the fact that the defendant had not gone into the witness-box or called any evidence. As to this, the trial judge directed the jury:—

> Do not infer anything from that one way or the other; do not infer any liability against him or give him the benefit of anything by reason of his failure to go into the witness-box. It is quite proper in the course of a trial and it is not unusual for a defendant not to put in evidence. There is nothing unusual about that. Very often they do but you should not let that influence you in any way any more than you will allow the fact that the plaintiff called a great number of witnesses to weigh in his favour or against him. If you just consider the evidence that was given by the witnesses as they gave their testimony and the exhibits then you will not go far wrong.

Bearing in mind that throughout his charge he made it abundantly clear that the onus throughout was on the defendant no fault may be found with the extract quoted.

It is agreed that the trial judge had before him the decision of the Ontario Court of Appeal in *Mercer et al. v. Gray* (1) that it is a question for the jury whether an infant such as the one here in question was guilty of contributory negligence. There is nothing inconsistent with that rule and the judgment of this Court in *T. Eaton Co. v. Sangster* (2) where the Court, without calling upon counsel for the other side, dismissed an appeal from the judgment of the Court of Appeal for Ontario (3) affirming a judgment at trial, from the report of which it appears that the child there in question was $2\frac{1}{2}$ years of age. Nor is it inconsistent with the decision in *Hudson's Bay Company v. Wyrzykowski* (4). According to the report in this Court the child was 4 years of age while in the Manitoba Reports the age is stated to be $3\frac{1}{2}$ years. In *Eyers v. Gillis & Warren Limited* (5), the Court of Appeal for Manitoba held that a girl of 6 years could not be guilty of contributory negligence. Whether the result arrived at in that case can be justified is not before us, but the statement of Trueman J.A., speak-

(1) [1941] O.R. 127, [1941] 3 D.L.R. 564.

(2) (1895), 24 S.C.R. 708.

(3) (1894), 21 O.A.R. 624, affirming 25 O.R. 78.

(4) [1938] S.C.R. 278, [1938] 3 D.L.R. 1, affirming 44 Man. R. 256, [1936] 2 W.W.R. 650, [1936] 4 D.L.R. 208.

(5) 48 Man. R. 164, [1940] 3 W.W.R. 390, [1940] 4 D.L.R. 747.

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ing on behalf of the Court, at p. 168, that it was well established "that a person of her tender age and inexperience cannot be charged with contributory negligence" must be taken to be inaccurate. The judgment of Duff J. in *The Winnipeg Electric Railway Company v. Wald* (1), relied on by Trueman J.A., does not decide the question as to whether a child of 6 years of age is accountable for contributory negligence; in fact he left it open and Girouard and Davies JJ. agreed with him. Idington J. did so hold, but it should be noted that the judgment of Ferguson J. in *Ricketts et al. v. The Village of Markdale* (2), referred to by him, did not settle the point because, as appears at p. 623, Ferguson J. was of opinion that contributory negligence on the part of a boy under 7 years of age had not been made to appear. The matter is mentioned but not decided in *Joseph v. Swallow and Ariell Proprietary Limited* (3), where there is a reference to Beven on Negligence. The present view of the law is summarized by Glanville L. Williams in his work on Joint Torts and Contributory Negligence, 1951, s. 89, p. 355. It should now be laid down that where the age is not such as to make a discussion of contributory negligence absurd, it is a question for the jury in each case whether the infant exercised the care to be expected from a child of like age, intelligence and experience. In the present case the trial judge so charged the jury.

The Court of Appeal considered that under the circumstances the amount allowed under *The Trustee Act* was so grossly excessive that it should be set aside. Counsel for both parties had agreed that in that event that Court should fix the damages rather than have a new trial, although Mr. Bolsby stated that his consent had been given on the condition that the infant would not be charged with contributory negligence. The Court of Appeal would have awarded $500 under that heading if it had not concluded that the plaintiff was not entitled to anything because he was not administrator of the infant's estate at the date of the issue of the writ. We agree with the Court of Appeal that the jury's estimate was grossly excessive and counsel

(1) (1909), 41 S.C.R. 431 at 443. (2) (1900), 31 O.R. 610.
(3) (1933), 49 C.L.R. 578 at 585-6.

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for both parties agreed that we should fix the damages and we see no reason to disagree with the amount mentioned by the Court of Appeal.

In view of the course of the trial, it is not necessary to decide whether the writ of summons so far as it related to the cause of action under *The Trustee Act* asserted by the plaintiff in the character of administrator was a nullity. Assuming without deciding that, in Ontario, an action under s. 37 of *The Trustee Act* for damages for a tort for personal injury caused to a deceased cannot be instituted by a person in the capacity of administrator before the grant of letters of administration and that in an action so commenced where no other claim is asserted the writ would be a nullity, it will be observed that in the case at bar the writ admittedly asserted a valid claim by the plaintiff in his personal capacity for damages under *The Fatal Accidents Act*. The writ therefore was not null *in toto*. It follows that when it was brought to the attention of the learned trial judge, on October 26, 1953, that letters of administration had not been granted to the plaintiff until after the issue of the writ it would have been open to him, on the view that so far as the writ related to the claim made *qua* administrator it was void, to order that the appellant in his capacity of administrator be then added as a party plaintiff. At that time no period of limitation had intervened, and the reason that the necessary steps to regularize the matter were not taken was that counsel for the respondent made it plain that he was not raising the point that the action was improperly constituted. Under these circumstances the respondent ought not to be heard to object in an appellate Court, and judgment on the cause of action under *The Trustee Act* should be entered for $150, that is, 30 per cent. of $500. In fact counsel for the respondent did not seek to insist on the point and by letters written after the judgment in the Court of Appeal and again on the argument in this Court offered to submit to judgment for $150 on this cause of action.

The appeal should be allowed in part and para. 1 of the formal order of the Court of Appeal, dated November 26, 1954, which embodies the terms of the judgment at the

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trial as varied by the Court of Appeal, should be amended by striking out cl. (2) and inserting in lieu thereof the following:—

(2) This Court doth further order and adjudge that the plaintiff recover from the defendant as damages under The Trustee Act the sum of $150.00.

The costs before the Court of Appeal will be as directed by that Court. Under all the circumstances there should be no costs in this Court.

Appeal allowed in part.

Solicitor for the plaintiff, appellant: P. J. Bolsby, Toronto.

Solicitor for the defendant, respondent: Donald G. E. Thompson, London.