JUDGMENT 23, 1973

IN THE PRIVY COUNCIL No. 32 of 1972

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

BETWEEN :-

SOUTHERN PORTLAND CEMENT LIMITED — Appellant

- and -

RODNEY JOHN COOPER — Respondent

CASE FOR THE APPELLANT

Record

1. This is an Appeal by Special Leave of the Judicial Committee granted upon the 30th day of October 1972 from the Judgment and Order of the High Court of Australia in its appellate jurisdiction (Barwick C.J., McTiernan and Menzies J.J; Walsh J. dissenting) dated 5th day of May 1972 whereby the said Court upheld the Appeal of the Respondent from a Judgment and Order of the Court of Appeal of the Supreme Court of New South Wales (Asprey and Holmes J.J.A; Taylor A.J.A. dissenting) dated the 2nd day of July 1971 upon an Appeal by the Appellant from the verdict of a jury given on the 21st day of May 1970 in an action which was heard in the Supreme Court of New South Wales before Collins J. and a jury and in which the Respondent was the Plaintiff and the Appellant was the Defendant. p.328 p.266 p.204

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2. The principal questions raised in this Appeal are :-

1) whether the learned trial judge gave correct directions in law to the jury :-

on the duty of the Appellant towards the Respondent who suffered personal injuries whilst on the Appellant's property assuming that the nature of the Appellant's property constituted an "allurement" to the Respondent who was then 13 years old.

2) if the directions of the learned trial judge were wrong in law, whether it was open to the learned Judges of the High Court of Australia to restore the verdict of the jury in favour of the Respondent upon a basis on which the jury was not directed, whether that other basis was according to law and if it was so open, whether the High Court of Australia ought to have taken such a course in the exercise of its discretion.

3) what is the principle which determines the responsibility to an infant trespasser of an occupier whose premises may be said to constitute an allurement.

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3. The Respondent as Plaintiff suing by his next friend (his father) issued a writ against the Appellant as Defendant on the 3rd day of October 1967. A Declaration was served by the Plaintiff on the 17th day of October 1967 which contained the following Counts :-

(1) There was a concealed danger or trap on the Defendant's premises which was known to them and to which they negligently exposed the Plaintiff who was on their premises as a licensee.

(2) The Defendant knew that its premises were dangerous and this danger was allowed to continue and the Defendants were in breach of their duty to the Plaintiff as a trespasser.

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(3) On the Defendant's premises was a pile of rubble "which was alluring to children and such as was likely to induce the presence on the said premises of children such as the Plaintiff" and the Defendants were negligent when they allowed the pile of rubble "to be in close proximity to a high tension electricity line" with the result that the Plaintiff suffered injuries.

(4) The Defendants as owners and operators of a quarry were in breach of their statutory duties under the Mines Inspection Act 1901 as amended by failing to mark high-pressure electricity conductors with "DANGER" as a result of which the Plaintiff suffered injuries, he being lawfully on the Defendants' premises at the material time.

(5) The Defendants were in further breach of their statutory duty as set out above in that the said conductors were below the minimum distance of 18 feet above the ground.

4. The Defendant denied each allegation and also pleaded contributory negligence by the Plaintiff. It was contended that the Plaintiff was negligent in the following respects :- p.5

(1) being within the Defendant's premises;

(2) running up and down a heap of rubble and slag;

(3) grasping and failing to avoid a high tension cable;

(4) failing to obey instructions to keep out of the quarry.

5. Issue was joined between the parties on all allegations and the trial of the action commenced in the Supreme Court of New South Wales on the 18th day of May 1970 before Collins J. and a jury of four. The first witness called was the Plaintiff himself who stated that he was injured in an accident on the Defendant's premises in July 1967 at a quarry of the Defendant where p.7 pp 11-204 pp 11-25 p 16

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his father worked. His family lived in a company house and the premises were at South Marulan which comprised only some 35-40 houses mostly occupied by the Defendant's employees and their families. At week-ends the Plaintiff normally went out rabbit-trapping and used to play at a place about half a mile from his home called Granny's Chair. On Sunday 30th July 1967 he played there with his younger brother and on their way home they met three other young boys and they all went up to the sand hills where he had been the day before. He started to run down them and next remembered waking up in hospital. He had never been told he should not go there. In cross-examination, the Plaintiff stated that he knew he was on Company property but he did not know he should not be there and he did not see any electric wires. He had not previously been in this area except on Saturday the preceding day.

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6. Evidence was given on behalf of the Plaintiff by Mr. Broks a fitter's assistant employed by the Defendant who rescued the Plaintiff. He was about 80'-100' down at the bottom of a slope which had been made up of tipped material. As he went down the slope, Mr. Broks noticed a wire about half an inch thick and about four to five feet above the ground as he had to duck under it. This wire had a burnt patch on it. Mr. Cosgrave a truck driver employed by the Defendant for some fourteen years explained that just prior to the accident he had been carting fines which were a material like coarse sand which was being dumped in order to extend that part of the railway line known as the "back shunt". There was a high voltage electric line in the vicinity which was becoming closer to the dump as the latter increased in size. This witness warned his foreman (Mr. Clooney) about what was happening and he promised to look into it. Mr. Cosgrave thought that the wires were five feet away from the dump at the time of the accident but another witness, Mr. Gutzke, an electrician employed by the Defendant, considered that the distance was only between 3ft. to 3ft. 6 inches. Mr. Gutzke put some danger signs up after the accident. There were none before.

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7. Mr. King who had been the foreman electrician at the time of the accident stated that he had warned Mr. Howard the quarry superintendent of the increasing proximity of the power line to the pile of fines in February 1967. He later gave a written warning which he believed was in May of that year and after that the drivers were instructed not to dump material near to the power line but the area was not fenced off, neither were any signs erected. He used to inspect the dump some three times a week and on either the Thursday or Friday before the accident, the power line was between six and eight feet from the dump.

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8. What happened at the material time was described by a boy called Kevin Smith (aged 12 at the time of the accident) who said that the five boys were rolling rocks from the top of the hill to the bottom and also sliding down the hill on a piece of tin. He was coming up the hill with the Plaintiff when somebody screamed and he saw the Plaintiff hanging on the wire from which sparks and red lights were coming. They had noticed the wire before but they did not know what it was. He had passed under the wire twice. He went to the same school as the Plaintiff and remembered being told by the headmaster to keep away from this area. (This had been denied by the Plaintiff). The Plaintiff's mother stated in evidence that boys used to play around the sandhills.

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9. The first witness for the Defendant was Mr. Bushell the headmaster of the local school who told the Court of the warnings he had given to children about the quarry area being dangerous and that the back shunt area where the accident occurred was out of bounds. The next witness was Mr. Howard an executive officer of the Defendant's who was the quarry superintendent in 1967 and had been at Marulan South Quarry since about 1960 when the electricity line was already in position. In 1967 there was six-day production working and maintenance was invariably carried out on Sundays including roads and areas. The Defendant's safety officer had never seen children or other strangers within the back shunt area. About

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two months before the accident Mr. Clooney the general quarry foreman was instructed to cease dumping material on the side of the back shunt where the accident took place and also to put a number of truckloads along that side to prevent any such dumping taking place. These instructions were carried out but on the Thursday before the accident the dump stop had been moved and the wires appeared to be closer than previously although out of reach of any one. He decided that the power line could not be allowed to remain where it was so he travelled to the Defendant's head office.

p 99 The following day he arranged that the County Council should re-locate the line as a matter of urgency and it was agreed that they should come to the site on the following Monday (the day after the accident).

Mr. Howard also stated in evidence that he went to the scene of the accident where he saw Mr. Broks with the injured Plaintiff. He noticed that the pile of fines was not there. About four to five hundred tons of material

p 99 had gone and the wire was much closer than when he saw it on the preceding Thursday.

pp 100 The clearance had been reduced from some six to eight feet to three to four feet. The fines had been pushed over contrary to his instructions and, despite inquiries, he had not been able to discover how this had

p 102 occurred. He had no record of the warning memo sent by Mr. King.

pp 125-133

p 126 10. Mr. Weston gave evidence that he was a shift foreman employed by the Defendant and a week before the accident he received instructions from the quarry foreman, Mr. Clooney, that no more fines were to be tipped on or over the back shunt. This

p 127 instruction was passed by him to the drivers.

p 128 On the Thursday however the dump stop had been removed. He only heard about the accident late on Sunday but went to the back shunt area on Monday morning when he saw

p 129 that the heap of fines that had been piled on the edge had been removed and pushed over with the result that the wires were lower.

pp 133-141

p 133 11. Mr. Phillips in evidence stated that he was an end loader operator and he removed

p 134 the dump stop on the back shunt he thought

p 135 it was on the Wednesday before the accident.

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He was told to do this by Mr.Pearson before dumping there was discontinued. If the dump stop was in place, the tippers would tip straight over the edge in an area remote from the power lines. If there was no dump stop, they would tip in a heap and the area would be levelled out by the front end loader. He had never seen children playing in the back shunt area. Mr. Pearson stated that he was the face foreman and was present when Mr. Howard gave Mr. Clooney instructions about a fortnight before the accident that dumping was to cease in the back shunt area because of the power line. Mr. Clooney was ill and unable to give evidence. The last witness for the Defendant was Mr. Creswick the welfare and safety officer who stated that he had never seen any children in the back shunt area where the accident happened. Nobody had told him of any dangerous situation with an electricity line but after the accident the area had been marked off with "Danger" signs and a fence.

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12. After the evidence had concluded, it was submitted that on the evidence the Defendant was entitled to have a verdict directed in its favour on each of the five counts. The learned trial Judge upheld the above submission except as regards Count 3 which he ruled raised matters for the jury to decide. It is respectfully submitted that this Count should also have been withdrawn from the jury as the matters alleged, even if established, disclosed no liability on the part of the Defendant.

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13. On Count 3 the learned trial Judge gave the following direction to the jury :-

p 187.11.24-46

"The Company was the occupier of the quarry premises; the Plaintiff is a boy of thirteen, who was on the premises and was injured by a condition of a part of the premises. The duty owed by the occupier of premises to a boy who is on the premises without any legal right to be there is well established, and the Plaintiff must show a breach of this well established duty.

The occupier of premises is bound by a duty to take reasonable care to protect

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children from risk to which they are exposed by a dangerous condition of part of the premises if that part of the premises constitutes an allurement to children to enter on to the premises and approach that dangerous part. The part must be dangerous in the sense that it is a concealed danger or a trap. Its existence and dangerous quality must be known to this occupier of the premises and unknown and not obvious to the children. Further, it should be known to the occupier that there is a likelihood that there will be in or near the premises children who will be subject to the allurement and who will in fact be allured by it".

The Appellant submits that this direction is not supportable in law.

p 204 — 14. The jury returned a verdict for the Plaintiff on Count 3 and award $56,800 damages.

pp 204-206 — 15. On the 9th day of June 1970 the Defendant filed a Notice of Appeal in the Supreme Court of New South Wales in which 19 Grounds were set out which (inter alia) repeated the submissions which had been made at the trial and also stated that the trial Judge "was in error in refusing to direct the jury that there was evidence of contributory negligence".

pp 207-209 — 16. On the 12th day of June 1970 the Plaintiff filed a Cross-Notice of Appeal which set out 8 Grounds of Appeal which alleged for various reasons set out, that the learned trial Judge was in error in withdrawing Counts 1, 2, 4 and 5 from the jury.

pp 210-265 — 17. The Judgment of the Court of Appeal was delivered on the 2nd day of July 1971. Asprey and Holmes J.J.A. were of the opinion that "the Defendant's appeal should be allowed and

p 210 ll.16-21 — that the verdict for the Plaintiff upon the third count should be set aside and verdict thereupon entered for the Defendant. The Plaintiff's cross-appeal should be dismissed".

p 265 — Taylor A.J.A. thought that the jury had not been properly directed on the third count and that there should be a retrial. It is

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respectfully submitted that the opinions of the majority of the judges of the Court of Appeal were correct and reliance is placed upon the following passages in the Judgments which emphasize that at the time of the accident, the Plaintiff was a trespasser :

Asprey J.A. in the course of his judgment said : pp 231-232 ll.37 l.14

"In the present case the learned trial Judge, in dealing with the third count, although treating the Plaintiff as a trespasser upon the back shunt, described to the jury the Defendant's duty towards him as one which arose when it was known to the occupier that there is a "likelihood" that there will be in or near the premises children who will be subject to the allurement and who will in fact be allured by it. Later in his summing up he said : 'The occupier of premises is bound to take reasonable care and a failure to take reasonable care is a breach of that duty. The occupier is under a duty to protect children'. He also said: 'As I told you, it must be known or at least be foreseeable and foreseen by the occupier that there was a likelihood that there would be in or near the premises children who would be subject to the allurement that existed on the premises.....It must be foreseeable by the occupier that this part would be an allurement to children'. In light of Quinlan's Case (supra) these directions do not correctly state the Defendant's duty towards the Plaintiff. The allegations in the third count are inapplicable to the Plaintiff as a trespasser and I am of the opinion that a verdict should have been directed for the Defendant upon that count".

Holmes J.A. said in the course of his judgment: p 243 ll.27-34

"The passages to which I have referred make it clear in my mind that there was no evidence upon which this count

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could be left to the jury and with great respect to His Honour simply to treat it as a matter in which an allurement arose and not to have regard to the primary circumstances that (allurement or not) the Plaintiff was in this situation a trespasser was wrong".

pp 267-269

18. By a Notice dated the 21st day of July 1971 the Plaintiff (then Respondent) appealed to the High Court of Australia against the judgment of the Court of Appeal. By its notice of appeal the Respondent sought an order restoring the verdict of the jury on the third count, or alternatively granting a new trial of all five counts in the declaration. When the appeal was called on

pp 269-327

in the High Court the Respondent by his Counsel announced that no attempt would be made to support the fourth and fifth counts.

pp 269-291

19. Barwick C.J. was of the opinion that the principle of liability involved in the third count as pleaded could not be supported. He also expressed the opinion that the jury had not been charged by the Judge according to law. He considered however that the verdict should not be disturbed because they were inherent in it findings which in light of supportable principle made the Defendant liable. His Honour said:

pp 290 l.32-p.291 l.43

"In my opinion, an allurement on the occupier's land does not itself give rise to a cause of action if it leads a child to trespass, though it might be said that in explaining their acceptance of Cardy's Case Their Lordships might seem to regard the allurement, if the ashtip became effective in that respect, to have given a right of action. As I remarked earlier, the Appellant's pleader seems to have taken such a view, for the third count, and indeed the summing up, is founded mainly on the allurement of the place where the Appellant sustained injury. However, holding the opinion which I do, I would not support the third count as drawn or as treated by the trial judge

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in summing up. The trial judge, in the portion of his summing up which I have set out, expanded the count, though still leaving the allurement as the source of a duty to protect the children who might be allured to the situation of danger.

But the matter does not end there. After verdict, bearing in mind the summing up, it must be taken that the jury found that the Respondent had created a situation of danger on its land. That situation was the proximity of the surface of the batter of the platform to the uninsulated high voltage transmission line. That situation of danger could only be regarded as highly dangerous to human life and safety. Then, the jury must be taken to have found that the Respondent knew of the existence and dangerous quality of what they must have concluded as a concealed trap as far as children were concerned. Further, because the place of the danger was attractive to children seeking their amusement in the remote area where they lived, and having regard to the terms of the summing up, the jury must have concluded that the Respondent must have known that it was likely that children would be attracted to the place of danger. In my opinion, that finding in the circumstances of the case is the equivalent of a finding that the presence of the children in the area was to be expected by the Respondent. Upon the possible view of the facts, which I have already indicated, there was, in my opinion, sufficient evidence to support such findings. They are sufficient, in my opinion, to support a verdict against the Respondent on the footing that, having created a situation highly dangerous to human life, the proximate presence of children was to be expected by it, with the consequence that the Respondent owed the Appellant a duty to take reasonable steps to prevent the Appellant suffering injury by that

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highly dangerous situation. If there was any duty, there can be no question that the Respondent failed to perform it.

Therefore, because of the findings inherent in it, and upon the basis I have indicated, I would not disturb the verdict of the jury. A comparable course taken in Cardy's Case does not seem to have excited criticism in the Privy Council in Quinlan's Case".

pp 292-300

20. McTiernan J. was also of the opinion that the jury had been misdirected by the trial judge. He expressed the further view that the jury if property directed would probably have returned the same verdict. The proper direction in His Honour's view would have been in accordance with the Addie formula as explained in Quinlan's Case (1964) A.C.1054.

His Honour said :

pp 299-300 l.28-l.9

"As regards the omission from the summing up of the words "reckless lack of care" (see passage quoted above from Quinlan's Case, at p.1084), this omission, in fact, resulted in misdirection of the jury. If the directions to the jury, suggested by Counsel for the Respondent, as being prescribed by that decision had been given to the jury, I think it would be right to presume they would have found as they did for the Plaintiff on the third count. It appears from the judgment of their Lordships in Quinlan's Case, at pp.1086-87 that they anxiously considered whether "it is right that this unhappy litigation should be further prolonged by an order that the action should be tried once more. On the first occasion the Respondent obtained a verdict on the ground that he entered on the crossing as a licensee, that this verdict was upset on appeal because there was no evidence of any such licence. On this occasion he has obtained a verdict on the ground that, though he himself a trespasser, the Appellant had sufficient notice of the

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likelihood of his presence to owe him a duty of care, which was breached by the locomotive engine not giving sufficient warning by whistle before it approached the crossing". Having regard to the evidence in the instant case of the means of ingress available to straying children, into the place at which the accident happened and the circumstances of the accident, I think that justice requires that the verdict on the third count be restored rather than that a new trial of that count be had".

21. Menzies J. did not refer to the summing up. He decided the appeal by applying a principle of law which was different from that upon which the jury had been charged by the trial judge. His Honour observed : pp 300-313

> "Accordingly, I propose to apply the formulation of Dixon C.J. in Cardy's Case to decide this appeal. Here the acts of the Defendant did create a situation of grave danger of serious harm; this situation could have been averted. Finally there was some evidence upon which it might be found that the Defendant was aware of the likelihood of persons coming within the proximity of the danger. The precautions taken, although inadequate to keep people away, showed a recognition that people could be expected to go there. Furthermore, the fact that the back shunt was part of the area to which those who lived in the area might resort, was known". p 312 ll.23-35

22. Walsh J. in his dissenting judgment expressed the following views : pp 313-327

(a) There was no evidence which could establish a breach of the duty owed by an occupier to a trespasser under the Addie formula as expounded in Quinlan's Case (1964) A.C. 1064.

(b) There was no other duty owed by the Petitioner to the Respondent.

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His Honour said :

"In my opinion, Mr. Glass of Counsel for the Respondent was right in submitting that Quinlan's Case did not set up a separate rule of liability relating to children subjected to an allurement to a danger, but treated the allowing of dangerous things attractive to children to be accessible, in places known to be frequented by children or so situated that it is extremely probable that children will come to them, as an important circumstance in the application of the general formula laid down in Addie's Case. I think, as others have thought (see for example, Victorian Railways Commissioners v Seal (1966) V.R. 107 at pp.130-132), that there is a difficulty in accommodating the acceptance of Their Lordships of the decision in Cardy's Case (to which I shall refer again) to the principles upon which there is an emphatic insistence in Quinlan's Case. But, in my opinion, that difficulty does not provide a justification for treating Cardy's Case as authority for any legal proposition which conflicts with the principles clearly stated in Quinlan's Case. I think that consistently with those principles, the only way in which the decision in Cardy's Case can be supported is to treat it as a case in which there was wanton or reckless conduct on the part of the Defendant".

23. It is respectfully submitted that the views expressed in the High Court of Australia by Walsh J. and in the Court of Appeal by Asprey and Holmes J.J.A. are correct in law and the Appellant humbly submits that the Judgment and Order of the High Court of Australia dated the 5th day of May 1972 be set aside and that the Judgment and Order of the Court of Appeal of the Supreme Court of New South Wales dated the 2nd day of July 1971 be restored and that this Appeal is allowed with costs for the following amongst other

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R E A S O N S

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(1) The evidence was incapable of proving a breach of duty under the Addie formula as expounded in Commissioner for Railways v Quinlan 1964 A.C.1064 and Commissioner for Railways v McDermott 1967 A.C. 1969 both decisions of Your Majesty's Council.

(2) As the relationship between the Appellant and the Respondent was at all material times that of an occupier of land and a trespasser thereon no duty was owed by the Appellant to the Respondent except that stated in the Addie formula as so expounded.

(3) In particular the Respondent being at all material times a trespasser on the Appellant's land was at no stage elevated to the status of an ordinary member of the public to whom the Appellant owed duties of foresight and reasonable care.

(4) That, upon the assumption that the Respondent was an infant who trespassed on the Appellant's premises because of an allurement, such evidence justified no special principle of liability and imported no exception to the Addie formula. It had no legal operation except to furnish evidence relevant to the question whether the requirements of the Addie formula had been satisfied.

HAROLD H. GLASS

JOHN A. BAKER.

IN THE PRIVY COUNCIL No.32 of 1972

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

B E T W E E N :-

SOUTHERN PORTLAND CEMENT LIMITED

Appellant

- and -

RODNEY JOHN COOPER

Respondent

CASE FOR THE APPELLANT

LIGHT & FULTON,
51, Victoria Street,
London S.W.1.

Solicitors for the Appellant