JUDGMENT 23. 1973

IN THE PRIVY COUNCIL No. 32 of 1972

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

BETWEEN :-

SOUTHERN PORTLAND CEMENT LIMITED (Defendant) Appellant

- and -

RODNEY JOHN COOPER (Plaintiff) Respondent

CASE FOR THE RESPONDENT

CIRCUMSTANCES OF APPEAL

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1. This is an appeal pursuant to Special Leave granted by the Queen's Most Excellent Majesty in Council to Southern Portland Cement Limited to appeal from the judgment and orders of the Full High Court of Australia (Barwick C.J., McTiernan and Menzies Jj., Walsh J . dissenting) delivered and made on the 5th day of May, 1972. p. 329 p. 328

2. Your Respondent RODNEY JOHN COOPER as Plaintiff instituted the present proceedings by his next friend Peter Alphonsus Cooper against the Appellant (as Defendant) on the 3rd day of October, 1967 in the Common Law Jurisdiction of the Supreme Court of New South Wales and by his Declaration claimed damages from the Appellant on five counts, the substance of which is as follows :- p. 1

(a) By his first count the Plaintiff sued the Defendant for its breach of its duty in its capacity of occupier of land, to the plaintiff, he being on the said land lawfully and with the leave and licence of the Defendant. p. 1

(b) By his second count the Plaintiff sued the Defendant for its breach of duty in its p. 2

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capacity of occupier of land, to the Plaintiff, he being on the land as a trespasser.

p. 2 (c) By his third count the Plaintiff sued the Defendant for its breach of duty, in its capacity of the occupier of land upon which was an allurement to children, the Respondent being so allured.

p. 3 (d) By his fourth count the Plaintiff sued the Defendant pursuant to the provisions of the Mines Inspection Act, 1901 (N.S.W.) for its breach of duty owed to the Plaintiff pursuant to Section 55 of that Act.

p. 3 (e) By his fifth count the Plaintiff sued the Defendant pursuant to the provisions of the Mines Inspection Act, 1901 (N.S.W.) for its breach of duty owed to the plaintiff by failing to place certain electrical conductors not less than 18 feet above the ground of the said land.

p. 5 3. The Defendant by its pleas:-

(a) Denied negligence;

(b) Denied the averment of fact in each count of the declaration;

p. 6 (c) Alleged contributory negligence.

4. The matter came on for hearing before Collins J. and a jury of four.

p. 185 5. The learned trial Judge withdrew from the jury, consideration of the first, second, fourth and fifth counts of the Plaintiff's Declaration, leaving for their decision the third count of the said Declaration.

p. 204 6. The jury returned a verdict for the Plaintiff in the sum of ($56,880.00).

p. 204 7. The Defendant appealed to the Court of Appeal Division of the Supreme Court of New South Wales seeking that the verdict of the jury be set aside or alternatively that there be a new trial of the action or a new trial limited to damages.

p. 207 8. The Plaintiff cross appealed seeking a new trial on the first, second, fourth and fifth

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counts of the Declaration. (At the hearing of the appeal in the fourth and fifth counts were not pressed).

9. By majority (Asprey and Holmes Jja, Taylor AJA dissenting) the Appeal was upheld and a verdict entered for the Defendant. p. 210 p. 266

10. The Plaintiff then appealed to the High Court of Australia against the order of the Court of Appeal seeking to have the verdict of the jury restored and against the dismissal of his Cross Appeal whereupon it was ordered that the Order of the Supreme Court of New South Wales, Court of Appeal Division be set aside and in lieu thereof that the appeal to the High Court be allowed with costs. p. 267 p. 328

FACTS OF APPEAL

1. The Plaintiff as at the date of the injury (viz. the 30th day of July 1967) which gave rise to the proceedings :-

(a) was thirteen years of age - having been born on the 27th day of December, 1953; p.11 Ll.29-35

(b) ordinarily resided with his family at the "company town" of South Marulan, where he had resided throughout the whole of his life; p.12 Ll.7-20 p.68 L.8

(c) resided in a house owned and provided by the Defendant company to its employees. p.12 L.12

2. The Defendant was a corporation conducting the activity at South Marulan, of quarrying, processing and transporting from there limestone.

3. South Marulan is an isolated township situated in the south of New South Wales. It is surrounded by bushland and plains and cut off on the south by the precipitous gorge of the Shoalhaven River. It is 7 miles from the nearest town (Marulan) and 5 miles from the Hume Highway. p.12 L.14

4. South Marulan is a township of 35 to 40 houses and consists almost exclusively of company employees and their families. It was brought into existence by the Defendant for the purpose of and in conjunction with its p.12 L.14 p.38 L.10

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p.92 limestone quarrying activities. In reality it was owned and controlled by the Defendant.

5. The township of South Marulan was adjacent to the workings of the company.

6. The area of the land on which the workings of the company were conducted so far as presently relevant consisted of an area constructed of residue from the quarrying and crushing of limestone. The residue which has been referred
p.29 L.13 to as "fines" and resemble coarse sand was so dumped and spread as to extend the level of the town over adjacent valleys and with the progress of dumping to form a plateau over the valleys.

7. This flat area thus built up had been utilised by the company for location of crushing plant, bins and railway lines including an area for assembling of railway trucks; known as the back shunt.

p.26 L.31 8. In relation to the lower area over which the fines were extended slopes were formed (these have been referred to in the evidence as "sand hills").

p.94 9. One such area of dumping and where dumping had been proceeding was the area referred to as the "back shunt" where the flat area of the Defendant's workings was being extended to accommodate additional railway trucks waiting to be taken from the workings.

p.36 L.31 10. The Defendant had caused at some time prior to the time of injury to the Plaintiff a high tension electric line conducting 33,000 volts to
p.29 L.36 be brought across its land by means of poles.
p.36 L.29 This line which was "bare" was on wooden poles
p.43 L.9 situate (originally) upon land where fines had
p.61 L.13 not been dumped.
p.36 L.8

p.57 L.19 11. To touch such a powerline would be extremely dangerous to human life.

p.30 L.4 12. The natural land surface where the said high tension wires were brought across the land of the defendant was below the level of the workings of the company and proximate to the area where the Defendant was and had been dumping

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fines for the purpose of extending the back shunt.

13. In due course of dumping of the fines to extend the back shunt the Defendant by its servants or agents caused the slope of the back shunt to approach, extend beyond the rise towards the said high tension wires ultimately to be within approximately four feet of same. p.30 p.43 L.15 p.30 L.33 p.31 L.10 p.27 L.24 p.37 L.21

14. The officers of the company were aware of the fact that the fines as dumped had progressed beyond the wires and were lessening the distance between their surface and the high tension wires. p.30 L.20 p.36 L.20 p.44 L.9 p.58 L.21

15. The heap of fines had impinged onto neighbouring land the property of a Mr. Cooper (unrelated to the Plaintiff) and had in fact buried the fence between the Company property and that of the Defendant. p.63 L.9

16. The children who lived in the village were in the habit of going on to, upon and across the land on which the company conducted its operations, near to the buildings and across the railway lines. p.25 L.7 p.35 L.10 p.13 L.3 p.31 L.22

17. The children of the village were in the habit of playing on slopes of fines - particularly those which had been recently dumped - and this was known to the servants or agents of the Defendant company who on evidence adduced had no objection to this. p.31 L.26 p.58 L.8 p.72 L.32 p.32 L.9

18. The sloping sides of the plateau formed of fines were used by children for playing upon generally including the sliding of sheets of material such as galvanised iron. Newly dumped fines were particularly attractive for this purpose. p.104 L.30 p.39 L.1

19. The company had conducted community activities on its said land. p.72 L.20 p.104 L.1

20. There was no marked line of division between the land on which the Defendant conducted its operations and the town; there were no fences, signs nor indications preventing or forbidding entry on to the work areas. p.35 L.13 p.13 L.9

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p.70 L.13

21. The family of the Plaintiff with the consent of the Company took on to and grazed and tethered certain goats, their property, on the land where the Defendant conducted its said operations.

22. The Plaintiff and hsi brothers and sisters were in the habit of going on to the said land to tend the said goats particularly on weekends. The goats were normally kept on the side of the railway line away from the
p.70 L.30 town and not far from where the Plaintiff was
p.71 L.1 injured.

23. The children of the town including the Plaintiff were in the habit of playing in fields proximate to the back shunt and the Defendant's workings and in particular at an
p.39 L.10 outcrop of rocks known as Granny's Chair,
p.12 L.33 (on the land of a Mr. Cooper) which was
p.16 L.1 estimated by the Plaintiff as being 100
p.25 L.4 yards from the heap of fines on which he was
p.39 L.18 injured (by Allan Clifford Gutske 300 to 400
p.59 L.19 yards).

24. Granny's Chair was situate on the other side of the back shunt from the home of
p.25 L.4 the Plaintiff and he had to cross the area of
p.13 L.5 workings or the railway line leading from this
p.39 L.15 area to get to it.

25. The children of the town including the
p.12 L.29 Plaintiff were in the habit of trapping
p.59 L.1 rabbits in fields proximate to the workings
p.105 L.12 of the company and the back shunt and on the side of the back shunt away from the town.

26. The town being isolated and small the children were in the habit of amusing themselves at and about the town, its environs and the workings as best they could.

p.38 L.20 27. Children were often seen on heaps of
p.105 L.30 fines by employees (two officers) of the Defendant.

28. It was stated in evidence by Mr. Geoffrey Cosgrove that there was no objection to
p.46 L.11 children playing around the fines to his knowledge and that a lot of children playing around the top area, (which would exclude

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only the quarry) but that they were not to go to the bottom section (the quarry).

29. On the date of injury, the 30th July, 1967, a Sunday, the Plaintiff and friends had been playing in the area of and at Granny's Chair. p.14 L.16 p.20 L.32

30. The Plaintiff and his friends came upon the heap of fines the access to which was quite open and proceeded to roll stones down and to "toboggan" down the slopes. p.15 L.15 p.16 L.5 p.60 L.18

31. There was no danger apparent to the Plaintiff, from playing on the "sandhill" and on heaps of fines, nor was there any warning of any danger. p.16 L.29 p.23 L.14 p.40 L.3

32. In the course of climbing the slope the Plaintiff's right arm came into contact with high tension wire. Current passed through his body and exploded out at various points. The arm atrophied permitting the release of the Plaintiff who fell and rolled unconscious to the foot of the slope. p.60 L.30 p.27 L.25-30 p.37 L.25

33. The Plaintiff sustained an electric shock, devitalisation of the left arm to shoulder level, severe burns to the face, scalp, back, buttocks and lower limbs, a deep ulceration in the left heel and consequentially amputation at right shoulder level, brain damage and scarring.

34. On the facts which were before the jury it was open to the jury to find :-

(a) That the Defendant was the occupier of the land over which the power lines were conducted.

(b) That children came upon and frequented the land for various purposes and could be expected to be at different parts of the land at different times.

(c) That the whole of the ares of the workings would excite the curiosity of children and that the slopes of fines in particular were an attraction to children.

(d) That the defendant by its officers were aware of the fact that children came upon the

land where the company conducted its operations, in the circumstances set out above.

(e) That the area where the fines sloped away from the back shunt was proximate to an area where children constantly played and resorted.

(f) That it was known to the officers of the defendant company that the children played in and resorted to area proximate to the back shunt and sloping fines.

(g) That there was an expectation that children would come on to the slope of the back shunt.

(h) That the Defendant by its officers was aware that the highly dangerous power line had been brought to within an unsafe distance of the heap of fines and could cause grave injury to persons who may touch it.

(i) That access to the heap of fines was simple and unobstructed, in particular having regard to the fines having intruded on to neighbouring property.

(j) That the presence of anyone on the batter of the back shunt would place such person in peril of grievous injury from the high tension wire.

(k) That the danger was not apparent, but the situation which arose was one of a concealed trap.

It is submitted also that there was sufficient evidence of licence to require the learned trial Judge to leave to the jury the first count of the declaration and that in the event of the present Appeal being successful and a new trial being ordered, this count should be left to jury determination.

REASONS

The instant appeal raises the following issues for consideration, namely -

A. In relation to the Respondent's right to hold his verdict:

(a) whether the relationship between the parties gave rise to any duty of care, and if so

(b) the content of that duty of care, and

(c) whether on the findings of the jury there was any evidence of breach of that duty of care.

B. In relation to the Respondent's application for a new trial;

(a) Whether there was any evidence, fit to go to the jury, in support of the first count, namely whether there was any evidence that the Respondent was on the premises with the permission of the Appellant.

A. THE DUTY RELATIONSHIP.

1. Historically the Common Law recognised that certain well defined relationships between individuals gave rise to a duty of care. For example, the relationship of master and servant, the relationship of driver and passenger etc. were recognised at Common Law as duty relationships long before Lord Atkin, in Donoghue v. Stevenson, attempted to subsume them under a comprehensive and all embracing formula.

However, these relationships were clearly defined, and their incidents were well known, so that every case presented the same major consideration, namely control, or means of control, by the defendant over a situation where there was a risk of injury to the plaintiff whose presence was within the defendant's contemplation.

2. The occupier/trespasser relationship is not susceptible of the same analysis.

Firstly, "the trouble starts with the all too embracing definition of trespasser which includes any person who happens to enter upon someone else's land without consent or privilege. This category, ... is wide enough to brand so motley a lot as a poacher and burglar, a toddler too young to know better, as well as a respected stockbroker who has lost his way or is taking a short cut across vacant land to a station", as trespassers - see Fleming on Torts, 4th edition, p.400.

Secondly, the danger over which the occupier has control, or the means of control, can vary from the apparently innocuous but highly dangerous buried minefield or high tension electricity wire to the loosened flagstone in a garden path.

3. It is our submission that the failure of the Courts to find a satisfactory solution to the occupier/trespasser problem arises from the attempt to subsume a series of different relationships under a single heading, and to devise a single simplistic all embracing formula which is quite inappropriate to the multiplicity of situations involved.

Accordingly, the first requirement is to analyse and define the relationships in which the parties stand for the purpose of ascertaining whether any of such relationships give rise, or should be held to give rise, to a duty of care.

4. As Windeyer J. points out in Commissioner for Railways v. Cardy, 104 C.L.R. 274 at 217, two different duty relationships may coexist at the one time based upon the one and the same set of facts; a view which was subsequently approved by the Judicial Committee in McDermott v. Commissioner for Railways, (1967) 1 App. Cas. 169 at 186-189 and at 191.

Accordingly the facts must be analysed to ascertain whether they should be held to give rise to several different duty relationships.

5. In our submission the relevant facts are as follows :-

(a) A 33,000 volt high tension electric line ran across the land of the Appellant which the Appellant well knew was extremely

dangerous to human life.

(b) The Appellant created a highly dangerous situation upon its land by allowing the batter line of the back shunt to come within 3 feet of the said high tension power lines.

(c) The Appellant knew that the freshly tipped "fines" on the batter of the back shunt was an allurement or enticement to children which could well induce them to play and slide on such "fines" and thereby come into contact with the said high tension power lines.

(d) The Plaintiff was accurately and appropriately described as "a straying child" in that he was entitled to play upon certain areas of the Appellant's property and was accustomed to roam across other areas which were not delineated or marked off by any fencing or other barriers.

(e) The Appellant knew that children roamed the area of its works and played in a field, known as "Granny's Chair", which was close to the heap of fines on the back shunt, and from where the fines heap was clearly visible.

(f) That although the high tension power line was highly dangerous, it presented a deceptively innocuous appearance to straying children.

6. Since the decision in McDermott v. Commissioner for Railways (ante) that occupation of land is a ground of liability, and not a ground of exemption from liability, it is clear that if the facts otherwise establish a relationship from which a duty of care arises, or should be held to arise, it is no answer for the occupier to argue that it happened on his land at a place where the plaintiff was a trespasser.

7. It is submitted that a duty of care arises, or should be held to arise out of the relationship between a person who has created or continued a highly dangerous state of affairs and a person whose presence was known or should have been expected, in the vicinity of that danger. This duty finds its leit motif in the traditional concern of the Common Law for highly dangerous situations. Exemplifications of the Common Law's concern for

highly dangerous situations are to be found in the law dealing with the category of chattels dangerous per se, e.g. poison, acids, nuclear waste etc. See Adelaide Chemical v. Carlisle, 64 C.L.R. 514 at 522 and 523, and Dominion Natural Gas v. Collins, (1909) A.C. 640 at 646.

More recently the decisions of the High Court in Thompson v. The Bankstown Council, 87 C.L.R. 619 and Munnings v. The Hydro Electricity Commission, 45 A.L.J.R. 378, reaffirm this basis of liability where the defendant has created, or allowed a highly dangerous situation to arise in relation to high tension power lines.

We submit that access to an unguarded 33,000 volt high tension electric power line falls within the category of highly dangerous situations and in respect thereof the Defendant owed a high duty of care to persons whose presence was to be expected in the vicinity.

8. Alternatively, it is submitted that the relationship between a straying child and a person who attracts or entices that child to a situation of danger gives rise to a duty of care owed by the former to the latter.

We acknowledge that the traditional Common Law view of the doctrine of allurement was that it provided only an evidentiary base for the imputation of a fictional licence in favour of the child. But with the Judicial abolition of the fictional licence in Commissioner for Railways v. Cardy, 104 C.L.R. 274, it is necessary to give the allurement doctrine its own substantive role in the law. We adopt, with respect, the words of Lord Wilberforce in Commissioner for Railways v. Herrington, (1972) 2 W.L.R. 537, at p. 560 that allurement "reflects the perfectly sound conception that as particular things are ("foreseeably") likely to be attractive to children, the occupier owes a duty, if they are dangerous, not to put them in the children's way."

We submit that both in law and in logic there is every reason for holding that a proximity relationship exists between straying children and a person who entices, attracts or allures such straying children to a source of significant danger. This relationship should be held to give

rise to a duty of care.

9. Accordingly we submit that an analysis of the facts discloses two duty relationships in addition to the duty relationship arising out of the occupier-trespasser state.

THE CONTENT OF THE DUTY RELATIONSHIP.

1. In our submission the duty is to guard against injury to the Plaintiff arising from the danger for which the Defendant is responsible. As the source of the duty is common humanity (see Commissioner for Railways v. Herrington, ante) the standard of care is not objective but personal to the particular Defendant. The relevant considerations are fully discussed in Commissioner for Railways v. Herrington (ante) and Goldman v. Hargreaves, (1967) 1 A.C. 645 at 663, we shall not restate them here.

BREACH OF DUTY.

1. The trial judge directed the jury in the following terms:

> "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 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 onto 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 word 'Allurement' is a traditional word. What is a thing that is alluring to children? - something that is attractive to children,

something that attracts them to approach it and perhaps play about it or approach it in any other way ... It is your duty now, against that background, to examine what I have put to you. The occupier of premises is bound to take reasonable care. The law is not so unreal as to demand of any human being or institution perfect care; but having regard to all the circumstances, the duty is to take reasonable care and a failure to take reasonable care is a breach of that duty and is called - as I have already told you - negligence. The occupier is under a duty to protect children. This duty of care, in the circumstances of this accident, is only in favour of children. Because it is considered - and you might think realistically so, - that children, being children, might be lured or attracted onto premises where they have no right to be, where an adult would not be so lured or attracted, or if there were an allurement or attraction he would be expected to reject that allurement or attraction. Did this slope constitute an allurement?".

2. In view of the foregoing direction the jury must be taken as making the following findings in the Plaintiff's favour:

(a) That the Defendant failed to take reasonable care to protect the Plaintiff from a risk to which he was exposed by a dangerous condition, in the nature of a trap, of part of the Defendant's premises.

(b) That such part of the Defendant's premises was an allurement to children drawing them on to the premises and to the dangerous part of the premises.

(c) That such danger was known to the Defendant and unknown and not obvious to the Plaintiff.

(d) That the Defendant knew there was a likelihood that children would be in or near the premises who would be attracted to the danger by the allurement.

(e) That the Defendant failed to protect the Plaintiff against the danger to which he

was exposed.

(f) That the unguarded high tension wire was both a highly dangerous and a trap for the unsuspecting.

(g) That the danger had been created by the Defendant as had the allurement.

3. On the aforesaid findings there was evidence of breach of both the additional duty relationships discussed in paragraphs 7 and 8 above. Accordingly the verdict for the Plaintiff should stand.

We would add that it is irrelevant to breach of these duty relationships to ask whether the evidence would support breach of some other duty relationship and, in particular, it is irrelevant to ask whether the evidence would support a verdict in the Plaintiff's favour if the only relevant relationship were occupier and trespasser.

B. Alternatively the Respondent seeks a new trial of the action on the basis that there was evidence from which the jury could hold that the Appellant had granted the Respondent a real licence to come and go upon its land and the trial judge was therefore in error in directing a verdict for the Defendant upon the first count.

1. It was common ground that the Appellant had granted the Respondent a real permission or licence to be upon certain portions of the Appellant's property, namely in the village where he lived, the school, roads, access areas etc.

2. There was evidence, not necessarily acceptable to the jury (the Plaintiff denied any knowledge thereof) that the schoolmaster at the local school had stated that certain areas were prohibited to children. These areas were not precisely defined; they were not fenced or marked off; there were no clear demarcation line between prohibited areas and permitted areas. In particular there was no direct evidence whether the prohibition extended to the battered slopes of the back shunt or was confined to the rail tracks laid on the top thereof.

3. The Plaintiff was injured while sliding or running down the battered side of the back shunt.

4. In our submission the following issues arose for the determination of the jury:

(i) Whether there was any prohibition in relation to employees' children, and

(ii) Whether such prohibition extended to the slopes of the back shunt.

5. We submit there was evidence upon which the jury would have been entitled to find:

(i) That the alleged prohibition did not exist, and

(ii) Did not extend to the slopes of the back shunt.

The trial judge was therefore in error in directing a verdict for the Appellant and there should be a new trial on this count.

FRANK McALARY

R.B. CROPLEY

No. 32 of 1972

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

B E T W E E N

SOUTHERN PORTLAND CEMENT LIMITED
(Defendant)
Appellant

- and -

RODNEY JOHN COOPER (Plaintiff)
Respondent

CASE FOR THE RESPONDENT
RODNEY JOHN COOPER

CARROLL AND O'DEA.,
Solicitors,
82 Elizabeth Street,
SYDNEY. N.S.W. 2000.
Solicitors for the Respondent

By their London Agents
KINGSFORD, DORMAN & CO.
13 Old Square,
Lincoln's Inn,
London, W.C.2.