Patrick Keffe, an Infant, by his Guardian, vs. Milwaukee & St. Paul Railway Company.

SUPREME COURT OF MINNESOTA

21 Minn. 207; 1875 Minn. LEXIS 94

January 11, 1875, Decided

[Note in the opinion below the use of words (in boldface) in support of a theory of allurement and attraction. (S. Schane)]

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff, an infant, by his guardian, brought an action in the Court of Common Pleas for Ramsey County (Minnesota), to recover damages for injuries sustained while playing upon a turn-table of defendant railroad company. The court of common pleas granted the railroad company's motion for judgment on the pleadings. The motion was granted, judgment was entered accordingly, and the infant appealed.

OVERVIEW: The infant's leg had to be amputated as the result of an injury incurred while playing on the railroad company's turn-table. The trial court determined that the infant was a mere trespasser who had no more right than any other trespasser to require the railroad to exercise care to protect him. On appeal the court found that the infant occupied a very different position from that of a mere voluntary trespasser. To treat the infant as a voluntary trespasser was to ignore the averments of the complaint; that the turn-table, which was in a public, open, and frequented place, was, when left unfastened, very attractive, and dangerous to young children. The complaint also averred that the railroad knew that many children were in the habit of going upon the turn-table to play. The court concluded that the infant was induced to come upon the railroad's turn-table by the railroad's own conduct, and that the turntable was a hidden danger. The court held that the railroad was bound to use care to protect children from the danger from which they could not be expected to protect themselves. There was no allegation of contributory negligence or negligence on the part of the infant's parents.

OUTCOME: The court reversed the judgment.

OPINION

Young, J. In the elaborate opinion of the court below, which formed the basis of the argument for the defendant in this court, the case is treated as if the plaintiff was a mere trespasser, whose tender years and childish instincts were no excuse for the commission of the trespass, and who had no more right than any other trespasser to require the defendant to exercise care to protect him from receiving injury while upon its turn-table. But we are of opinion that, upon the facts stated in the complaint, the plaintiff occupied a very different position from that of a mere voluntary trespasser upon the defendant's

property, and it is therefore unnecessary to consider whether the proposition advanced by the defendant's counsel, viz, that a land-owner owes no duty of care to trespassers, is not too broad a statement of a rule which is true in many instances.

To treat the plaintiff as a voluntary trespasser is to ignore the averments of the complaint, that the turn-table, which was situate in a public (by which we understand an open, frequented) place, was, when left unfastened, **very attractive**, and, when put in motion by them, was dangerous to young children, by whom it could be easily put in motion, and many of whom were in the habit of going upon it to play. The turn-table, being thus **attractive**, presented to the natural instincts of young children a **strong temptation**; and such children, following, as they must be expected to follow, those natural instincts, were thus **allured into a danger** whose nature and extent they, being without judgment or discretion, could neither apprehend nor appreciate, and against which they could not protect themselves. The difference between the plaintiff's position and that of a voluntary trespasser, capable of using care, consists in this, that the plaintiff was **induced to come** upon the defendant's turn-table by the defendant's own conduct, and that, as to him, the turntable was a hidden danger, **a trap**.

While it is held that a mere licensee "must take the permission with its concomitant conditions, it may be perils," (Hounsell v. Smith, 7 C. B. (N. S.) 731; Bolch v. Smith, 7 H. & N. 836,) yet even such licensee has a right to require that the owner of the land shall not knowingly and carelessly put concealed dangers in his way. Bolch v. Smith, per Channell and Wilde, B B.; Corby v. Hill 4 C. B. (N. S.) 556, per Willes, J.

And where one goes upon the land of another, not by mere license, but **by invitation** from the owner, the latter owes him a larger duty. "The general rule or principle applicable to this class of cases is that an owner or occupant is bound to keep his premises in a safe and suitable condition for those who come upon and pass over them, using due care, if he has held out any **inducement, invitation or allurement,** either express or implied, by which they have been led to enter thereon." Per Bigelow, C. J., in Sweeny v. Old Colony and Newport R. Co., 10 Allen 368, reviewing many cases. And see Indermann v. Dawes, L. R. 1 C. P. 274; L. R. 2 C. P. 311.

Now, what an express **invitation** would be to an adult, the **temptation** of an **attractive** plaything is to a child of tender years. If the defendant had left this turn-table unfastened for the purpose of **attracting young children** to play upon it, knowing the danger into which it was thus **alluring them**, it certainly would be no defence to an action by the plaintiff, who had been **attracted upon the turn-table** and injured, to say that the plaintiff was a trespasser, and that his childish instincts were no excuse for his trespass. In Townsend v. Wathen, 9 East, 277, it was held to be unlawful for a man to tempt even his neighbor's dogs into danger, by setting traps on his own land, baited with strong-scented meat, by which the dogs were allured to come upon his land and into his traps. In that case, Lord Ellenborough asks, "What is the difference between drawing the animal into the trap by his natural instinct, which he cannot resist, and putting him there by manual force?" And Grose, J., says, "A man must not set traps of this dangerous description in a situation to invite his neighbor's dogs, and, as it were, to compel them by their instinct to come into the traps."

It is true that the defendant did not leave the turn-table unfastened, for the purpose of injuring young children; and if the defendant had no reason to believe that the unfastened turn-table was likely to attract and to injure young children, then the defendant would not be bound to use care to protect from injury the children that it had no good reason to suppose were in any danger. But the complaint states that the defendant knew that the turn-table, when left unfastened, was easily revolved; that, when left unfastened, it was **very attractive**, and when put in motion by them, dangerous, to young children: and knew also that many children were in the habit of going upon it to play. The defendant therefore knew that by leaving this turn-table unfastened and unguarded, it was not merely **inviting young children** to come upon the turn-table, but was holding out an **allurement**, which, acting upon the natural instincts by which such children are controlled, drew them by those instincts into a hidden danger; and having thus knowingly **allured them** into a place of danger, without their fault, (for it cannot blame them for not resisting **the temptation** it has set before them,) it was bound to use care to protect them from the danger into which they were thus led, and from which they could not be expected to protect themselves.

We agree with the defendant's counsel that a railroad company is not required to make its land a safe play-ground for children. It has the same right to maintain and use its turntable that any landowner has to use his property. It is not an insurer of the lives or limbs of young children who play upon its premises. We merely decide that when it sets before young children a temptation which it has reason to believe will lead them into danger, it must use ordinary care to protect them from harm. What would be proper care in any case must, in general, be a question for the jury, upon all the circumstances of the case.

The position we have taken is fully sustained by the following cases, some of which go much farther in imposing upon the owner of dangerous articles the duty of using care to protect from injury children who may be tempted to play near or meddle with them, than it is necessary to go in this case. Lynch v. Nurdin, 1 Q. B. 29; Birge v. Gardner, 19 Conn. 507; Whirley v. Whiteman, 1 Head 610.

It is true that, in the cases cited, the principal question discussed is not whether the defendant owed the plaintiff the duty of care, but whether the defendant was absolved from liability for breach of duty, by reason of the fact that the plaintiff was a trespasser, who, by his own act, contributed to the injury; and the distinction is not sharply drawn between the effect of the plaintiff's trespass, as a bar to his right to require care, and the plaintiff's contributory negligence, as a bar to his right to recover for the defendant's failure to exercise such care as it was his duty to use. But as a young child, whom the defendant knowingly **tempts to come upon his land**, if anything more than a technical trespasser, is led into the commission of the trespass by the defendant himself, and thus occupies a position widely different from that of an ordinary trespasser, the fact that the courts, in the cases referred to, assumed, instead of proving, that the defendant owed to a young child, under such circumstances, a duty he would not owe to an ordinary trespasser, for whose trespass he was not in any way responsible, does not weaken the authority of those cases. And in Railroad Co. v. Stout, 17 Wall. 657, 21 L. Ed. 745, (a case in all respects similar to the present,) the distinction insisted on by counsel is taken

by Mr. Justice Hunt, and the circumstance that the plaintiff was in some sense a trespasser is held not to exempt the defendant from the duty of care. In the charge of the learned circuit judge at the trial of the last named case, (reported under the title of Stout v. Sioux City & Pacific R. Co., 2 Dillon 294,) the elements which must concur to render the defendant liable, in a case like the present, are clearly stated.

In Hughes v. Macfie, 2 Hurlst. & Coltm. 744, and Mangan v. Atterton, L. R. 1 Exch. 239, cited by defendant's counsel, there was nothing to show that the defendants knew or had reason to apprehend that the cellar lid in the one case, or the crushing machine in the other, would be likely to **attract young children** into danger. It must be conceded that Hughes v. Macfie is not easily to be reconciled with Birge v. Gardiner, and that Mangan v. Atterton seems to conflict with Lynch v. Nurdin; but whether correctly decided or otherwise, they do not necessarily conflict with our decision in this case.

Much reliance is placed by defendant on Phila. & Reading R. Co. v. Hummell, 44 Pa. 375, and Gillis v. Penn. R. Co., 59 Pa. 129. In the first of these cases, the plaintiff, a young child, was injured by coming upon the track while the cars were in motion. The only negligence charged upon the defendant was the omission to give any signal at or after the starting of the train. If the plaintiff had been crossing the track, through one of the openings which the company had suffered the people in the neighborhood to make in the train while standing on the track, and the cars had then been run together upon him, without any warning, the case would more nearly resemble the present; but the facts, as they appear, show that the company used abundant care, and that it had no reason to suppose that the plaintiff was exposed to danger; and the decision is put upon the latter ground, although Strong, J., delivering the opinion of the court, uses language which lends some support to the defendant's contention in this case. Gillis v. Penn. R. Co. was properly decided, on the ground that the company did nothing to invite the plaintiff upon the platform, by the fall of which he was injured, and that the platform was strong enough to bear the weight of any crowd of people which the company might reasonably expect would come upon it. Neither of these cases is an authority against, while a later case in the same court, (Kay v. Penn. R. Co., 65 Pa. 269,) tends strongly to support, the plaintiff's right of action in this case; and the recent case of Pittsburg A. & M. Passenger R. Co. v. Caldwell, 74 Pa. 421, points in the same direction.

It was not urged upon the argument that the plaintiff was guilty of contributory negligence, and we have assumed that the plaintiff exercised, as he was bound to do, such reasonable care as a child of his age and understanding was capable of using, and that there was no negligence on the part of his parents or guardians, contributing to his injury.

Judgment reversed.