Chapter 4

A CASE SEQUENCE

A case sequence is a series of cases that all address the same question. Here that question, broadly speaking, is the division of responsibility for the safety of children between their parents and landowners onto whose property they (the children) "trespass."

What distinguishes this sequence is that the nine cases in the series come from a single jurisdiction, California, and that seven of the nine were decided by the "same" court, the Supreme Court of California. This allows us, without distraction from the fact that different courts may see cases differently, to concentrate on the fundamental question that all first-year courses, at least, are about: *how do courts go about their business*? Or, to put the same question in other words: *what makes judges rule as they do in individual cases*? We gain greater understanding of that process by watching one *court* over time (here from 1891 to 1959) than one *doctrine* over time — frequently the organizing principle in your substantive courses. In addition, there are three other goals that we have in mind.

On the practical level, you will learn how to read cases against one another: how to read the first case, standing by itself; how to read the next case in relation to the preceding case; to read the third in light of the prior two, the fourth against the prior three, etc. — all the time articulating and rearticulating, shaping and reshaping "the rule of law" evolving under the court's jurisprudence. You are, in a word, to *synthesize* all the cases. Synthesis, the dictionary tells us, is "the composition or combination of parts or elements so as to form a whole."[1] In law, the evolving rule is the whole, the parts or elements are the cases, and the composition or combination of the parts is your active, creative contribution.

On a more poetic level, you will learn to tell a story, for cases are stories, and law and narrative are "inseparably related."[2] About the telling of stories, Lon Fuller had this to say:

> If I attempt to tell a funny story which I have heard, the story as I tell it will be the product of two forces: (1) the story as I heard it, the story *as it is* at the time of its first telling; (2) my conception of the point of the story, in other words, my notion of the story *as it ought to be*. As I retell the story I make no attempt to estimate exactly the pressure of these two forces, though it is clear that their respective influences may vary. If the story as I heard it was, in my opinion, badly told, I am guided largely by my conception of the story as it ought to be, though through inertia or

[1] WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1198 (9th ed. 1989).

[2] Robert M. Cover, *The Supreme Court, 1982 Term — Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 5 (1983).

imperfect insight I shall probably repeat turns of phrase which have stuck in my memory from the former telling. On the other hand, if I had the story from a master raconteur, I may exert myself to reproduce his exact words, though my own conception of the way the story ought to be told will have to fill in the gaps left by faulty memory. These two forces, then, supplement one another in shaping the story as I tell it. It is a product of the *is* and the *ought* working together. There is no way of measuring the degree to which each contributes to the final result. The two are inextricably interwoven, to the point where we can say that "the story" as an entity really embraces both of them. Indeed, if we look at the story across time, its reality becomes even more complex. The "point" of the story, which furnishes its essential unity, may in the course of retelling be changed. As it is brought out more clearly through the skill of successive tellers it becomes a new point; at some indefinable juncture the story has been so improved that it has become a new story. In a sense, then, the thing we call "the story" is not something that is, but something that becomes; it is not a hard chunk of reality, but a fluid process, which is as much directed by men's creative impulses, by their conception of the story as it ought to be, as it is by the original event which unlocked those impulses. The *ought* here is just as real, as a part of human experience, as the *is*, and the line between the two melts away in the common stream of telling and retelling into which they both flow.

Exactly the same thing may be said of a statute or a decision. It involves two things, a set of words, and an objective sought. This objective may or may not have been happily expressed in the words chosen by the legislator or judge. This objective, like the point of the anecdote, may be perceived dimly or clearly; it may be perceived more clearly by him who reads the statute than by him who drafted it. The statute or decision is not a segment of being, but, like the anecdote, a process of becoming. By being reinterpreted it becomes, by imperceptible degrees, something that it was not originally. The field of possible objectives is filled with overlapping figures, and the attempt to trace out distinctly one of these figures almost inevitably creates a new pattern. By becoming more clearly what it is, the rule of the case becomes what it was previously only trying to be. In this situation to distinguish sharply between the rule as it is, and the rule as it ought to be, is to resort to an abstraction foreign to the raw data which experience offers us.[3]

Or, in Professor Cover's words:

We inhabit a *nomos* — a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void. * * *

In this normative world, law and narrative are inseparably related. Every prescription is insistent in its demand to be located in discourse — to be supplied with history and destiny, beginning and end, explanation and

[3] LON FULLER, THE LAW IN QUEST OF ITSELF 8–10 (1940).

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> purpose. And every narrative is insistent in its demand for its prescriptive point, its moral. History and literature cannot escape their location in a normative universe, nor can prescription, even when embodied in a legal text, escape its origin and its end in experience, in the narratives that are the trajectories plotted upon material reality by our imaginations. * * *
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> The codes that relate our normative system to our social constructions of reality and to our visions of what the world might be are narrative. The very imposition of a normative force upon a state of affairs, real or imagined, is the act of creating narrative. The various genres of narrative — history, fiction, tragedy, comedy — are alike in their being the account of states of affairs affected by a normative force field. To live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the "is" and the "ought," but the "is," the "ought," and the "what might be." Narrative so integrates these domains. Narratives are models through which we study and experience transformations that result when a given simplified state of affairs is made to pass through the force field of a similarly simplified set of norms.
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> The intelligibility of normative behavior inheres in the communal character of the narratives that provide the context of that behavior. Any person who lived an entirely idiosyncratic normative life would be quite mad. The part that you or I choose to play may be singular, but the fact that we can locate it in a common "script" renders it "sane" — a warrant that we share a *nomos*.[4]

Finally, you are simultaneously involved with a larger project: to understand a "case law system."

> This brings us at last to the case system. For the truth of the matter is a truth so obvious and trite that it is somewhat regularly overlooked by students. *That no case can have a meaning by itself!* Standing alone it gives you no guidance. It can give you no guidance as to how far it carries, as to how much of its language will hold water later. What counts, what gives you leads, what gives you sureness, *that is the background of the other cases* in relation to which you must read the one.[5]

Think back to the pages we devoted to the *Kelly* case. Make an argument, based on that discussion, that Llewellyn is right: "*no case can have a meaning by itself!*" Make an argument, based on that discussion, that Llewellyn is wrong: a case *can* have a meaning by itself! Is there support for either or both positions in the case itself?

There is a moral here and it is simple: *In this course*, do not concentrate your focus on the substantive law. It is useless to read a Torts hornbook or treatise or

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[4] Cover, *supra* note 2, at 4–10. *See also* the excerpt from Dworkin's *Law as Interpretation*, *infra* pages _____–_____.

[5] KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 48–49 (Oceana Pubs. 1960; first published 1930).

one of many law review articles on "attractive nuisance," per chance the substantive doctrine involved in this case sequence. "Per chance" because we chose the sequence as an effective illustration of the processes by which a court struggles to an inevitably fleeting "solution"; any other sequence supplied with the same attributes would have done as well, regardless of the substantive law involved. If you want to read for our purposes, then read *The Nature of the Judicial Process*, read *The Bramble Bush*, read *An Introduction to Legal Reasoning*;[6] read a novel that says something about law either as a matter of jurisprudence or practice (why not *Bleak House* or *The Brothers Karamazov*?). All of these go to the point of this enterprise; reading "Torts" does not.

We will now read and synthesize nine cases. After each and every case, you should ask yourself these questions:

1) Had I been the plaintiff's lawyer, how would I have argued this case *at the time*?

2) Had I been the defendant's lawyer, how would I have argued this case *at the time*?

3) Were I a judge, how would I have voted *at the time*?

4) An anxious landowner with an enclosed private swimming pool asks me the day after the decision in each of these cases: "What is my potential liability? What is the law?" What do I answer?

5) The parent of a child who has drowned in a neighbor's enclosed pool asks me: "based on the 'existing law,' should I sue?" What do I tell her?

6) How is (5) different from (4)?

BARRETT v. SOUTHERN PACIFIC CO.

91 Cal. 296, 27 P. 666 (1891)

DE HAVEN, J.

This is an action to recover damages for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant. The plaintiff recovered a judgment for $8,500, and from this judgment, and an order denying its motion for a new trial, the defendant appeals.

It was shown upon the trial that defendant maintained a railroad turn-table upon its own premises in the town of Santa Ana. This table was about 150 yards from defendant's depot, and near its engine-house, and distant 72 feet from a public street, and it was not protected by any inclosure, nor did the defendant

[6] EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949). Levi was a professor of law, Dean of the Law School, and President at the University of Chicago, as well as Attorney General of the United States during the Ford Administration. This book is a brief, classic text that describes the variations in judicial approaches in common law, statutory, and constitutional cases.

employ any person whose special duty it was to guard it. It was provided with a latch and slot, such as is in common use on such tables, to keep it from revolving. There were several families with small children residing within a quarter of a mile from the place of its location, and previous to the time when plaintiff was hurt, children had frequently played around and upon it, but when observed by the servants of defendant were never permitted to do so. At the date of plaintiff's injury he was eight years of age, and on that day he, with his younger brother, saw other boys playing with the turn-table, and, giving them some oranges for the privilege of a ride, got upon it, and while it was being revolved plaintiff's leg was caught between the table and the rail upon the headblocks, and so severely injured that it had to be amputated. The defendant moved for a nonsuit, which motion was denied. This ruling of the court, and certain instructions given to the jury, present the questions which arise upon this appeal.

The appellant contends that it was not guilty of negligence in thus maintaining upon its own premises, for necessary use in conducting its business the turn-table in question, and which was fastened in the usual and customary manner of fastening such tables; that the plaintiff was wrongfully upon its premises, and therefore a trespasser, to whom the defendant did not owe the duty of protection from the injury received, and that the court should have so declared, and nonsuited the plaintiff. This view seems to be fully sustained by the case of Frost v. Railroad Co., decided by the supreme court of New Hampshire, 9 Atl. Rep. 790. But, in our judgment, the rule as broadly announced and applied in that case cannot be maintained without a departure from well-settled principles. It is a maxim of the law that one must so use and enjoy his property as to interfere with the comfort and safety of others as little as possible consistently with its proper use. This rule, which only imposes a just restriction upon the owner of property, seems not to have been given due consideration in the case referred to. But this principle, as a standard of conduct, is of universal application, and the failure to observe it is, in respect to those who have a right to invoke its protection, a breach of duty, and, in a legal sense, constitutes negligence. Whether, in any given case, there has been such negligence upon the part of the owner of property, in the maintenance thereon of dangerous machinery, is a question of fact dependent upon the situation of the property and the attendant circumstances, because upon such facts will depend the degree of care which prudence would suggest as reasonably necessary to guard others against injury therefrom; "for negligence in a legal sense is no more than this: the failure to observe for the protection of the interests of another person that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury." Cooley on Torts, 630. And the question of defendant's negligence in this case was a matter to be decided by the jury in view of all the evidence, and with reference to this general principle as to the duty of the defendant. If defendant ought reasonably to have anticipated that, leaving this turn-table unguarded and exposed, an injury, such as plaintiff suffered, was likely to occur, then it must be held to have anticipated it, and was guilty of negligence in thus maintaining it in its exposed position. It is no answer to this to say that the child was a trespasser, and if it had not intermeddled with defendant's property it would not have been hurt, and that the law imposes no duty upon the defendant to make its premises a safe playing ground for children. In the forum of law, as well as of common sense, a child of immature years is expected to

exercise only such care and self-restraint as belongs to childhood, and a reasonable man must be presumed to know this, and the law requires him to govern his actions accordingly. It is a matter of common experience that children of tender years are guided in their actions by childish instincts, and are lacking in that discretion which, in those of more mature years, is ordinarily sufficient to enable them to appreciate and avoid danger: and, in proportion to this lack of judgment on their part, the care which must be observed toward them by others is increased; and it has been held in numerous cases to be an act of negligence to leave unguarded and exposed to the observation of little children dangerous and attractive machinery which they would naturally be tempted to go about or upon, and against the danger of which action their immature judgment interposes no warning or defense. These cases, we think, lay down the true rule. The fact that the turn-table was latched in the way such tables are usually fastened, or according to the usual custom of other railroads, although a matter which the jury had a right to consider in passing upon the question whether defendant exercised ordinary care in the way it maintained the table, was not, of itself, conclusive proof of the fact. Nor is the liability of the defendant affected by the fact that the table was set in motion by the negligent act of other boys * * *.

Judgment and order affirmed.

We concur: BEATTY, C.J.; MCFARLAND, J.

Immediately following is a "Sample Brief" of *Barrett*. It features two important changes from our brief for *Kelly*: when we prepared the *Kelly* brief we said repeatedly that different "actors" would write different "scripts." We now give you an illustration of that. You will note that we have three versions of the Issue and four of the Holding. In *Kelly*, we had three each for both but they all tried to give an objective account; they aimed to demonstrate the point that an individual case can support multiple understandings — but the mode, the tone, was non-partisan. Here we do something different: our three versions of the Issue represent how three actors in our little drama — plaintiff, defendant, judge's law clerk — might put the question. When we discussed the jury selection process we said it allows you "to begin subtly to lay out your version of the case."[7] What is true there is doubly true here: a good lawyer will state the issue (or the "question presented," as it is often referred to in appellate filings) in the way that is most favorable to her client.

Take a look at the plaintiff's version of the issue. What does it stress? How does it try to engage the court's sympathy?[8] On what is it trying to focus the court?

Now compare the defendant's statement. What does it stress? What does it omit? What is it trying to appeal to? On what is it trying to focus the court?

Finally, does the clerk provide an honest, objective, non-partisan description of what this is all about?

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[7] *See supra* p. _____.

[8] *Cf.* Cardozo's "lad of sixteen" in *Hynes*, *supra* p. _____.

Four holdings: we begin with a narrow holding, move to a broader one, to a still broader one, and finally to an impermissibly broad one. Study them closely: experience tells us that you have a seemingly irresistible urge toward a global statement. Resist it! Earlier we said about the "Facts" part of your brief: when in doubt, put it in. Now we say: err on the side of narrower rather than broader statements. First, it is harder to read cases narrowly, and so you need a lot of practice. Second, you cannot really do serious harm by staying closer to the bottom of our inverted pyramid — but you can do serious harm by floating skyward into the wild blue yonder. Third, judges, and other lawyers, know how to, and do, read cases narrowly, and you must be able to keep up with them.

All else in our Sample Brief is self-explanatory.

Sample Brief

Barrett v. Southern Pacific Co., 91 Cal. 296, 27 P. 666 (1891) (3-0) (DeHaven for himself and Beatty, CJ, and McFarland)

Statement of the Case

Negligence action to recover damages for personal injuries sustained by an 8-year-old on defendant railroad's turntable.

Facts

Defendant railroad maintained 72 feet from a public street a turntable which was neither enclosed nor protected by a guard. The table was equipped with a latch and slot, such as was customary in the industry, to prevent it from revolving.

Several families with small children lived within a quarter mile of the table. The children frequently played around or on the table, but were never permitted to do so when observed by defendant's employees.

Plaintiff, then 8 years old, and one of a number of children on the scene, got on the turntable, and while it revolved his leg got caught. It was injured so severely that it had to be amputated.

Procedural History

Defendant moved for a nonsuit.[9] Motion denied. Jury trial. Jury renders verdict for plaintiff. Judgment entered on the verdict.

Defendant moves for a new trial. Motion denied.

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[9] In 1891 in California a motion for a nonsuit had a particular meaning, which, for present purposes, you need not understand. You should treat a motion for a nonsuit as equivalent to a demurrer, but one that comes at the end of *plaintiff's* case. Compare the "motion for directed verdict" which comes at the end of *plaintiff's and defendant's* case. In all three cases, the moving party is essentially saying, "so what?".

As we noted earlier, modern terminology is quite different. However, you must try to understand the relevant terminology in each and every case you will read in law school or in practice in order to understand older cases.

Defendant appeals from the denial of his motion and from the judgment for the plaintiff.

Outcome

The Supreme Court of California affirms the order denying the motion for a new trial and the judgment for the plaintiff.

Issue

[How the plaintiff might state it.]

Where a young child is seriously injured on a railroad turntable located within easy access of many small children residing in the vicinity, and the railroad knows that such children frequently play on this dangerous, unguarded, and unlocked machinery, which could have been easily and cheaply locked, should the railroad be under a duty of care towards such children, notwithstanding that technically the children are trespassing on defendant's property when serious bodily harm comes to them?

[How the defendant might state it.]

Where a landowner maintains on its premises equipment necessary to the regular and ordinary conduct of his lawful business, and does so in a manner customary in the industry, should it be held liable to trespassers when it has repeatedly and expressly denied such trespassers permission to be on, and evicted them from, the premises?

[Your judge for whom you are clerking has asked you what this case is about.]

Does/should a railroad owe a duty of care to an 8-year-old severely injured on the railroad's turntable, notwithstanding the general rule that landowners owe no duty to trespassers, be they adults or children, where the railroad knew of the presence of children on, and had evicted them from, its premises, and, following industry custom, had not locked the turntable?

Holding

[First version — sticking closely to the facts.]

Where a railroad locates an unenclosed turntable 72 feet from a public street, and within a quarter mile of families with small children, and where the railroad knows that children have played on the turntable, and the railroad could at little cost lock the turntable, the law will impose a duty of care towards such children, and the negligent breach of that duty will subject the railroad to liability where its negligence results in serious bodily harm.

[Second version — broader, but still cautious.]

Where a railroad maintains a turntable and knows or has reason to know that children of young years and immature judgment frequently play around or on the turntable, a duty of care will be imposed and the negligent breach of that duty will result in liability for personal injuries.

[Third version — clearly broader, but still within permissible bounds.]

Where a landowner maintains on his premises dangerous machinery and knows or should know that small children intermeddle with the machinery, yet takes no special precaution to safeguard it, landowner will be under a duty of care to such children for personal injuries, notwithstanding that the children are trespassing.

[Fourth version — an impermissible version.]

Landowners owe a duty of care to trespassing children sustaining injuries on their land.

Reasoning

The court acknowledges the background norm, namely no duty of care is owed to trespassers, as exemplified by the New Hampshire case of *Frost v. Railroad.*

However, it refuses to apply the rule to "children of tender years" who lack judgment to appreciate and avoid danger. Hence others, here the railroad, owe them a duty of care in proportion to this lack of judgment.

It was then for the jury to decide whether the defendant's conduct was negligent under the circumstances of this case, including the fact that the table was latched in the way that such tables are customarily fastened, but could have been easily locked.

Items of special note

The court cites no California cases; it cites a general statement about negligence by Cooley.

NOTES AND QUESTIONS

(1) Before this decision, what was the background norm? What has happened to it?

(2) The court says (following the cite to *Frost v. Railroad Co.*):

> But . . . the rule [that no duty is owed to trespassers] . . . cannot be maintained without a departure from well-settled principles. It is a maxim of the law that one must so use and enjoy his property as to interfere with the comfort and safety of others as little as possible consistent with its proper use. This rule . . . But this principle, as a standard of conduct. . . .

Recall our earlier discussion of rules and standards.[10] Identify the *rules* involved in *Barrett* (and *Frost*). Identify the competing *standards*. Rewrite the passage so that it makes sense.

(3) The appellant contended that the plaintiff was "a trespasser to whom [it] did

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[10] *See supra* page _____.

not owe the duty of protection." Was this a description of the world or the assertion of a norm? Does it matter which it was? (You might want to think again about our discussion of the cement factory and your "right" not to have it spew dust on you).[11]

(4) Contrast the precedential value of the following two cases:

In case 1 the child injured on the turntable sues the railroad; the trial court denies the defendant's demurrer and holds a trial. The trial judge denies the defendant's motion for a directed verdict and sends the case to the jury. The jury finds for the defendant. There is no need for, and no purpose to, a motion for a j.n.o.v., or appeal, by the defendant and no appeal is possible by the plaintiff because the judge made no ruling of law against the plaintiff. Case 1 ends in the trial court with a judgment for the defendant by jury verdict.

In case 2 the child is injured on the turntable. The defendant demurs. The trial judge grants the demurrer and dismisses the complaint. The plaintiff appeals. The Supreme Court reverses the grant of demurrer and sends the case back for trial. At trial the jury finds for the defendant (as in case 1). Case 2, in other words, also ends in the trial court with a judgment for the defendant by jury verdict.