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).

0002 [ST: 103] [ED: 10000] [REL: 2] **Composed:** Tue Feb 9 09:29:51 EST 2010
XPP 8.1C.1 Patch #6 LS000000 nllp 3534 [PW=540pt PD=720pt TW=360pt TD=580pt]
VER: [LS000000-Local:12 Jan 10 15:21**][MX-SECNDARY:** 25 Nov 09 08:31**][TT-:** 11 Dec 09 09:00 loc=usa unit=03534-ch0004**]** **0**

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).

> 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. * * *
>
> 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.
>
> 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

---

[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).

0004 [ST: 103] [ED: 10000] [REL: 2] **Composed:** Tue Feb 9 09:29:52 EST 2010
XPP 8.1C.1 Patch #6 LS000000 nllp 3534 [PW=540pt PD=720pt TW=360pt TD=580pt]
VER: [LS000000-Local:12 Jan 10 15:21**][MX-SECNDARY:** 25 Nov 09 08:31**][TT-:** 11 Dec 09 09:00 loc=usa unit=03534-ch0004**]** **0**

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?

---

[7] *See supra* p. _____.

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

0007 [ST: 103] [ED: 10000] [REL: 2] **Composed:** Tue Feb 9 09:29:52 EST 2010
XPP 8.1C.1 Patch #6 LS000000 nllp 3534 [PW=540pt PD=720pt TW=360pt TD=580pt]
VER: [LS000000-Local:12 Jan 10 15:21**][MX-SECNDARY:** 25 Nov 09 08:31**][TT-:** 11 Dec 09 09:00 loc=usa unit=03534-ch0004**]** **0**

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.

---

[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.

0009 [ST: 103] [ED: 10000] [REL: 2] **Composed:** Tue Feb 9 09:29:52 EST 2010
XPP 8.1C.1 Patch #6 LS000000 nllp 3534 [PW=540pt PD=720pt TW=360pt TD=580pt]
VER: [LS000000-Local:12 Jan 10 15:21**][MX-SECNDARY:** 25 Nov 09 08:31**][TT-:** 11 Dec 09 09:00 loc=usa unit=03534-ch0004**]** **0**

[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

---

[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.

PETERS v. BOWMAN
115 Cal. 345, 47 P. 113 (1896)

McFarland, J.

This action was brought by plaintiff to recover damages for the death of his infant son, who was drowned in a pond of water upon a lot of land owned by the defendant, Bowman. The jury returned a verdict for the defendant and the plaintiff appeals from the judgment, and from an order denying his motion for a new trial.

The facts are practically undisputed, and may be stated briefly: Defendant owned the lot in question, and resided on it for several years prior to 1889. It was part of what is known as "Ashbury Heights," in San Francisco. The land sloped toward the west, and on the westerly side fronted on Ashbury Street. It does not appear whether or not it was in a thickly-settled neighborhood. In its natural condition the surface water which came from the lot flowed off through a gully across Ashbury street (over which there was a small bridge), and emptied into a pond a couple of blocks away. At some time prior to 1889 the city of San Francisco graded Ashbury street and threw up an embankment along the street and across the gully, and on the westerly side of said lot, to the height of eight or ten feet. This prevented the flow of surface water from the lot, and on this account, defendant removed his residence, in 1889, to an adjoining county. From that time until 1894, when the boy was drowned, the surface water, being stopped by said embankment, would form during the rainy season a pond, which disappeared during the dry season. Defendant did nothing to create the pond, or to prevent the water from flowing away; and, so far as he is concerned, it may be considered as a natural pond. The lot was not inclosed by a fence or otherwise. After defendant removed his residence, he did not often visit the lot, and did not give permission to or invite

---

[11] *See supra* pages _____–_____.

anyone to go upon it; but children did visit it, and play upon the pond, and he must be presumed to have known that fact. He drove children away once, and a policeman did the same several times. The plaintiff knew of the existence of the pond, and knew that his son knew of it, and he "never told him not to go rafting on the pond." The son was over eleven years old, and was "a bright, active boy, an intelligent boy for eleven years, more so than the average boy of that age." He lived with his father, the plaintiff, on Castro Street, "four or five blocks over the hills" southerly from the pond. He had been at the pond often before the day of the accident. He was allowed by his father to run on the streets. On February 16, 1894, he went with two other boys to the pond, and while floating on the pond on a rudely-constructed raft made of railroad ties, and when running along one of the timbers, he fell off, and was drowned. They went onto the pond from the southeasterly side — the side farthest away from Ashbury Street.

Upon these facts the verdict was right and a verdict for plaintiff would have been unwarranted. The deceased boy was, at the time of the accident which caused his death, a trespasser on the land of defendant and the general rule undoubtedly is that the owner of land is under no duty to keep his premises safe for trespassers. * * * The exceptions to the general rule are instances where the owner maintains on his land something in the nature of a trap or other concealed danger, known to him, and as to which he has given no warning to others and instances where there had been something in the nature of a wanton injury to a trespasser, as where the owner had set spring guns on his premises, by which the trespasser had been shot. There is, also, the instance of an excavation adjoining a public highway, into which a traveler on the highway, where he had the right to be, had accidentally fallen. There are other exceptions not necessary to be here mentioned. And the general rule applies to children as well as to adults, with some exceptions hereinafter noticed. "The rule is that, ordinarily, the owner of premises owes no duty of immunities to trespassers, though the latter be infants." (Whittaker's Smith on Negligence, 2d ed., 67, note, and cases there cited.)

Plaintiff seeks to take this case out of the principle above stated by applying to it what is now known as the "Rule of the Turntable Cases." That rule, which is a marked exception to the general principle, has been approved in many of the states, and in others has been repudiated. It must be taken as approved in this state by the decisions of this court in Barrett v. Southern Pac. Co., 91 Cal. 296, 27 Pac. 666, and other cases cited by appellant. * * * But the rule of the Turntable Cases is an exception to the general principle that the owner of land is under no legal duty to keep it in a safe condition for others than those whom he invites there, and that trespassers take the risk of injuries from ordinary visible causes; and it should not be carried beyond the class of cases to which it has been applied. And the cases to which the rule has been applied, so far as our attention has been called to them, are nearly all cases where the owner of land had erected on it dangerous machinery, the consequences of meddling with which are not supposed to be fully comprehended by infant minds. * * *

It is not contended by appellant that the rule of the Turntable Cases has ever been applied to facts like those in the case at bar. His contention is that the reasoning and philosophy of the rule ought to extend it to a case like the one at bar. But the same reasoning does not apply to both sets of cases. A body of water —

either standing, as in ponds and lakes; or running as in rivers and creeks, or ebbing and flowing, as on the shores of seas and bays — is a natural object, incident to all countries which are not deserts. Such a body of water may be found in or close to nearly every city or town in the land; the danger of drowning in it is an apparent open danger, the knowledge of which is common to all; and there is no just view, consistent with recognized rights of property owners, which would compel one owning land upon which such water, or part of it, stands or flows, to fill it up, or surround it with an impenetrable wall. However, general reasoning on the subject is unnecessary, because adjudicated cases have determined the question adversely to appellant's contention. No case has been cited where damages have been successfully recovered for the death of a child drowned in a pond on private premises who had gone there without invitation; while it has been repeatedly held that in such a case no damages can be recovered. It was directly so held in Klix v. Nieman, 68 Wis. 271, 32 N.W. 223; in Overholt v. Vieths, 93 Mo. 422, 6 S.W. 74; in Hargreaves v. Deacon, 25 Mich. 1; in Gillespie v. McGowan, 100 Pa. St. 144; and in the recent case of Richards v. Connell, 45 Neb. 467, 63 N.W. 915. In the last-named case the complaint alleged that the plaintiff's infant son was drowned in a pond on defendant's land in the vicinity of a public school, and the other facts alleged were almost exactly the same as those alleged and proven in the case at bar; but the trial court sustained the demurrer to the complaint on the ground that it did not state a cause of action, and, on appeal, the supreme court of Nebraska affirmed the judgment. The court, in its opinion, after reciting the averments of the complaint, say: "The single question presented by the record is whether the owner of a vacant lot, upon which is situated a pond of water, or a dangerous excavation, is required to fence it, or otherwise insure the safety of strangers, old or young, who may go upon said premises not by his invitation, express or implied, but for the purpose of amusement, or from motives of curiosity. The authorities we find to be in substantial accord, and sustain the proposition that, independent of statute, no such liability exists." * * *

It may be well to notice briefly one or two of the other cases in point. In Klix v. Nieman, supra, the plaintiff's son fell into a pond on defendant's land which had been caused by water collecting in an excavation, and was drowned. The case was very similar to the one at bar, and the supreme court of Wisconsin, in delivering its opinion, says, among other things, as follows: "So the single question presented is: Was it the duty of the defendant to fence or guard this hole or excavation on his lot (which it does not appear he made, or caused to be made), where surface water collected, in order to secure the safety of strangers, young or old, who might go upon or about the pond for play or curiosity? If the defendant was bound to so fence or guard the pond, upon what principle or ground does this obligation rest? There can be no liability unless it was his duty to fence the pond. It surely is not the duty of an owner to guard or fence every dangerous hole or pond or stream of water on his premises, for the protection of persons going upon his land who had no right to go there. No such rule of law is laid down in the books, and it would be unreasonable to so hold." * * * In Gillespie v. McGowan, supra, plaintiff's son, eight years old, had fallen into a cistern on defendant's land which had been abandoned, but had once been used in connection with brickmaking. The court, in delivering its opinion, among other things, say: "* * * Vacant brickyards and open lots exist on all sides of the city. There are streams and pools of water where children may be

drowned. There are any quantities of surface where they may be injured. To compel the owners of such property either to inclose it or to fill up their ponds and level the surface, so that trespassers may not be injured, would be an oppressive rule. The law does not require us to enforce any such principle, even where the trespassers are children. We all know that boys of eight years indulge in athletic sports. They fish, shoot, swim, and climb trees. All of these amusements are attended with danger, and accidents frequently occur. It is a part of the boy's nature to trespass, especially where there is tempting fruit; yet I have never heard that it was the duty of the owner of a tree to cut it down because a boy trespasser might possibly fall from its branches. Yet the principle contended for by the plaintiff would bring us to this absurdity, if carried to its logical conclusion. Moreover, it would charge the duty of the protection of children upon every member of the community except their parents."

The foregoing are a few of the many authorities which are particularly applicable to the case at bar, and show that in a case like this there can be no recovery. * * *

The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

NOTES AND QUESTIONS

(1) The court says it was not contended that the rule of the turntable cases had ever been applied to facts like those in *Peters*. As plaintiff's lawyer, would you have so contended? Make the argument.

(2) The court seems to fear that if it allowed recovery here, owners would next have to cut down their apple trees. This argument is known as the "slippery slope." Why, or when, is the slope slippery? That is, why would a sensible first step lead inescapably to a silly last step? Either later courts should be able to avoid the silly outcome, or that outcome is not so silly after all. Note that those making a slippery slope argument are fundamentally distrustful of later decisionmakers.

Concern over the slippery slope may lead a court to reach the "wrong" outcome in the case before it in order to avoid worse outcomes in the future. Can you justify making today's plaintiff (or defendant, in other circumstances) pay the price for a feared inability of later courts to stop sliding down the slope? Critics of slippery slope arguments characterize the argument as amounting to this: "we ought not to make a sound decision today, for fear of having to draw a sound distinction tomorrow."[12]

Is the slippery slope argument a variation on the frequent lament: "But where do you draw the line?" On line-drawing, ponder this:

---

[12] The comment is attributed to Sir Frederick Maitland. *See* Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1030 n.7 (2003).

> [I]n my mind the best rejoinder to those who have trouble with line-drawing is the comment of John Lowenstein of the Baltimore Orioles: "They should move first base back a step to eliminate all the close plays."[13]

(3) If the court's concern was not the slippery slope, what was it? Consider these possibilities:

> (a) The costs of requiring fences or other protective measures would outweigh the benefits.
>
> (b) Boys will be boys, and so protective measures are in any event impossible.
>
> (c) It would be unjust to make the landowner the insurer of trespassers on her land.
>
> (d) It would be unjust to permit parents to externalize the costs of looking after their children.
>
> (e) Right or wrong, "the law" does not allow recovery here.

(4) Given what the court tells us "the law" is, did the case ever have to go to the jury? Suppose the defendant had demurred. How should the trial court have ruled?

(5) Do we need to reformulate the rule of *Barrett* and, if so, how? What do you now know about the *scope* of *Barrett* that you did not know before?

PETERS v. BOWMAN

115 Cal. 345, 47 P. 598 (1897)

In bank. Petition for rehearing. Denied. For original opinion, see 47 Pac. 113.

BEATTY, C.J.

A rehearing of this cause is denied, but the statement contained in the department opinion to the effect that no similar case had been cited in which damages were allowed, requires correction. The case of City of Pekin v. McMahon, 154 Ill. 141, 39 N.E. 484, was noted on the margin of appellant's brief, but escaped attention. There are circumstances which distinguish that case from this, particularly with respect to the culpability of the defendant; but the similarity is sufficient to justify counsel in his claim that his position is supported by a case in point. I can only say that the reasoning of the opinion in that case has failed to convince me, and that the decision stands alone and without other support than may be found in the turntable cases, from which the supreme court of Illinois was unable to distinguish it. I think, however, that there is a distinction which relieves us of the necessity of extending an exceptionally harsh rule of liability to such a case. A turntable is not only a danger specially created by the act of the owner but it is a danger of a different kind to those which exist in the order of nature. A pond, although artificially created, is in nowise different from those natural ponds and

---

[13] Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 380 n.52 (1985) (quoting DETROIT FREE PRESS, Apr. 27, 1984, at F1).

streams, which exist everywhere, and which involve the same dangers and present the same appearance and the same attractions to children. A turntable can be rendered absolutely safe, without destroying or materially impairing its usefulness, by simply locking it. A pond cannot be rendered inaccessible to boys by any ordinary means. Certainly no ordinary fence around the lot upon which a pond is situated would answer the purpose; and therefore, to make it safe, it must either be filled or drained, or, in other words, destroyed. But ponds are always useful, and often necessary, and where they do not exist naturally must be created, in order to store water for stock and for domestic purposes, irrigation, etc. Are we to hold that every owner of a pond or reservoir is liable in damages for any child that comes uninvited upon his premises and happens to fall in the water and drown? If so, then upon the same principle must the owner of a fruit tree be held liable for the death or injury of a child who, attracted by the fruit, climbs into the branches, and falls out. But this, we imagine, is an absurdity, for which no one would contend, and it proves that the rule of the Turntable Cases does not rest upon a principle so broad and of such rigid application as counsel supposes. The owner of a thing dangerous and attractive to children is not always and universally liable for an injury to a child tempted by the attraction. His liability bears a relation to the character of the thing, whether natural and common, or artificial and uncommon; to the comparative ease or difficulty of preventing the danger without destroying or impairing the usefulness of the thing; and, in short, to the reasonableness and propriety of his own conduct, in view of all surrounding circumstances and conditions. As to common dangers, existing in the order of nature, it is the duty of parents to guard and warn their children, and, failing to do so, they should not expect to hold others responsible for their own want of care. But, with respect to dangers specially created by the act of the owner, novel in character, attractive and dangerous to children, easily guarded and rendered safe, the rule is, as it ought to be, different; and such is the rule of the turntable cases, of the lumber-pile cases, and others of a similar character.

* * * In the Illinois case cited by counsel the city of Pekin was held to have been culpable in excavating a deep pit within the city limits, which afterward filled up with water. It might be granted that that case was well decided, and the principle of the Turntable Cases properly applied, without holding that this defendant is similarly liable. There the existence of a pond in a thickly-peopled quarter was due to the act of the party charged. Here, the existence of the pond was due to the exercise by the city of San Francisco of a power and authority which the defendant could not lawfully resist. By the act of the city, and without any fault on his part, his lot was converted into a pond. He might, it is true, have filled it up; but he was no more bound to do so than if it had been a natural pond, because it was in no respect more of a nuisance than it would have been if it had been there before the city was laid out.

The facts being undisputed, it is the province and the duty of the court to decide, as matter of law, whether a defendant has been guilty of culpable negligence, and I think that it would be most unjust to hold that in this case the defendant has omitted any duty that he owed to the child of plaintiff. * * *

Rehearing denied.

QUESTIONS

(1) What does "in bank" (or, more commonly, "en banc") mean?

(2) Does the "correction" undertaken by the court change anything about "the rule" of *Peters* as you understood it after the original opinion? To put it differently, is *Peters II* important or unimportant?

SANCHEZ v. EAST CONTRA COSTA IRRIGATION CO.

205 Cal. 515, 271 P. 1060 (1928)

LANGDON, J.

This is an appeal by the defendant from a judgment in favor of the plaintiff in the sum of $6,000 for the death of the infant son of plaintiff, who was drowned in a syphon at the bottom of an irrigation ditch belonging to the defendant. The defendant owned certain irrigation canals and ditches in Contra Costa County. One of its canals was approximately 10 miles long, and crossed under various roads. In one place it was necessary for this canal to cross a wide arroyo or stream known as Marsh Creek. To cross this creek it was necessary to construct a syphon from the canal on the one side of the creek to the canal on the other side. This syphon ran from the bottom of the irrigation main canal downward under Marsh Creek and came up into the irrigation main canal upon the other side of Marsh Creek. The opening of this syphon in the end of the canal was four feet in diameter, and was unguarded. The defendant company had constructed, within a short distance of the place of the accident, several small houses in which employees of the company, with their families, resided. The roadway leading to these houses ran alongside the side of the canal and along the edge of Marsh Creek; there being nothing but the thickness of a low concrete bulkhead between the canal and the road. The plaintiff was an employee of the company, and lived in one of the said houses with his wife and children. His five year old son, who was drowned, had been playing with other children at the edge of the canal, and attempted to wet his handkerchief in its waters to wipe some blood from an injury he had sustained. He fell into the main canal, which, at the time of the accident, was filled with about 3 feet of water, and then, evidently, slipped into the syphon at the bottom of this 3 feet of water. The water in the canal was muddy and the opening of the syphon could not be seen. The body of the child was recovered from a place some 15 feet down in the syphon. There was no sign of warning to notify passers by of the presence of this large syphon.

Appellant contends that it was not required to guard its canal against the danger of children falling into it, and this is conceded by the plaintiff and respondent. However, this case involves a situation where the defendant has placed upon its property an artificial peril, a concealed danger, without warning to those who were invited by defendant to live close by. The case of Faylor v. Great Eastern Quicksilver Mining Co., 45 Cal. App. 194, 187 P. 101, while presenting a different situation, announces a rule, the reasons for which make it applicable here. In that

0017 [ST: 103] [ED: 10000] [REL: 2] **Composed:** Tue Feb 9 09:29:53 EST 2010
XPP 8.1C.1 Patch #6 LS000000 nllp 3534 [PW=540pt PD=720pt TW=360pt TD=580pt]
VER: [LS000000-Local:12 Jan 10 15:21**][MX-SECNDARY:** 25 Nov 09 08:31**][TT-:** 11 Dec 09 09:00 loc=usa unit=03534-ch0004**]** **0**

case, it was reiterated that the rule of nonliability was not to be applied in "instances where the owner maintains on his land something in the nature of a trap, or other concealed danger, known to him, and as to which he gave no warning to others." * * *

In the instant case, the canal with its shallow water was the bait of the trap. The defendant knew that children lived close by, and the opening to the syphon might have been easily guarded. It is a matter of common knowledge that children playing on the edge of a shallow body of water will be tempted to play in the water and to reach into it, and, while defendant need not have guarded against this open and obvious stream of water, under numerous California decisions, we think a different rule applies where an apparently harmless, shallow stream of water contains a large opening into which anyone might slip, which opening is wholly unguarded and completely concealed from view. If the children had gone swimming in this canal and had slipped into the syphon, a similar legal situation would have been presented. The children assumed the risk of the open, obvious, notorious danger incident to the canal, containing about 3 feet of water; but they did not assume the risk of an unknown, concealed, and unguarded danger. [The present case falls within an] exception to the general rule * * *.

The judgment is affirmed.

We concur: RICHARDS, J.; SHENK, J.

NOTES AND QUESTIONS

(1) What authority did the Supreme Court of California cite?

(2) Does this decision follow *Barrett*? Does it follow *Peters*?

(3) The court describes this case as falling within an exception to the general rule. What is the general rule in cases like this (query: *like what*?) and what are the exceptions?

(4) How can there be exceptions to rules? Is not an exception really just a violation (or, more charitably, a suspension) of the rule, and also of the general principle that like cases must be treated alike? If you respond, there are always exceptions to rules, do you recall whether Steffi Graf was permitted to serve three times at Wimbledon to Venus Williams rather than twice when the first serve is not a *let*? Suppose the umpire is convinced that Graf should get three serves to compensate for Williams's advantage in age. This would certainly be an exception to the rule that a player gets two serves. Would it be an exception to or an application of the rule that like cases must be treated alike? Are legal rules different from rules of games and if so, how do they differ?[14] Are there rules for breaking

---

[14] Kenneth I. Winston, *On Treating Like Cases Alike*, 62 CAL. L. REV. 1 (1974), will introduce you to a wealth of literature on questions of this nature. Incidentally, it was said that Ted Williams often got four strikes because his eyes were so good that umpires would give him close calls that they might not have given other hitters.

0018 [ST: 103] [ED: 10000] [REL: 2] **Composed:** Tue Feb 9 09:29:53 EST 2010
XPP 8.1C.1 Patch #6 LS000000 nllp 3534 [PW=540pt PD=720pt TW=360pt TD=580pt]
VER: [LS000000-Local:12 Jan 10 15:21**][MX-SECNDARY:** 25 Nov 09 08:31**][TT-:** 11 Dec 09 09:00 loc=usa unit=03534-ch0004**]** **0**

rules? Are there rules about breaking the rules about breaking the rules?[15]

(5) How does one know whether there still is a general rule or whether there are only exceptions "left?" And if there are only exceptions left, where did the general rule go and when did it leave?

> Is this question reminiscent of the classical Greek paradox of Sorites — the heap?
>
> If the removal of one grain of salt from a heap still leaves a heap, the paradox goes, and so too with the removal of the next grain, and the next, and the one after that, and so on, then it must follow that the removal of *all* the grains still leaves a heap. This is of course absurd, because we all know that heaps and empty spaces are different * * *.[16]

(6) Is there something misleading about setting up what appears to be a dichotomy: rules on one hand, exceptions on the other?

Professor Schauer has written:

> [T]here is no logical distinction between exceptions and what they are exceptions to, their occurrence resulting from the often fortuitous circumstance that the language available to circumscribe a legal rule or principle is broader than the regulatory goals the rule or principle is designed to further. As products of the relationship between legal goals and the language in which law happens to be written, exceptions show how the meaning of a legal rule is related to the meaning of the language that law employs. * * * In important ways exceptions link law to its linguistic and categorical underpinnings, situating law in a world it both reflects and on which it is imposed.
>
> The use (or not) of exceptions can thus tell us more than we have traditionally thought about how law is located in a linguistic and categorical world. But that location is contingent, and consequently what is at some time or place a broad rule with an accompanying exception is at other times a narrow rule having no need for an exception to perform the same prescriptive task.[17]

Can you think of examples that would illuminate Professor Schauer's point? Here is one he uses:

> A good example * * * is the traditional legal prohibition of fornication. Fornication is defined in Webster's Third New International Dictionary as "sexual intercourse other than between a man and his wife." Thus, a statutory or common law prohibition of fornication excludes sexual intercourse between married persons without the necessity of a separate

---

[15] *See* Stewart Macaulay, *Popular Legal Culture: An Introduction*, 98 YALE L.J. 1545, 1556 n.50 (1989), *citing* MARVIN HARRIS, CULTURAL MATERIALISM: THE STRUGGLE FOR A SCIENCE OF CULTURE 274–275 (1980).

[16] Schauer, *supra* note 13, at 378. The paradox goes back to Zeno of Elea, the pre-Socratic philosopher who contrived a famous series of paradoxes around the notion of infinite regress.

[17] Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871, 871–872 (1991).

> exception. Were the word "fornication" absent from the language, however, or were the category of "sexual intercourse other than between married persons" absent from the antecedent conceptual apparatus of the society, then we would expect to see the same prohibition couched in terms of a primary prohibition on sexual intercourse with an accompanying exception for sexual intercourse between married persons.[18]

The next two cases, *Copfer v. Golden* and *Wilford v. Little*, must be read together and we postpone all questions and comments until after *Wilford*. Note that both are cases decided by the District Court of Appeal, not the California Supreme Court. They carry correspondingly less authority but are nevertheless important strands in our story.

COPFER v. GOLDEN

135 Cal. App.2d 623, 288 P.2d 90 (1955)

VALLÉE, J.

This is an action for damages for personal injuries sustained by plaintiff while playing on property owned by defendant Vaughn C. Golden. Plaintiff was 6 years of age at the time of the accident. * * * The cause was tried by the court without a jury. * * * Judgment was for plaintiff * * *.

[Defendant owned two adjacent lots. A year or more before the accident defendant moved a building onto the western portion of the two lots, and made it an apartment house. Since 1949, when he bought the two lots, defendant had stored on the eastern portion of the lots materials, machinery, and equipment he used in his business of buying, selling, and moving old buildings. In October 1952 defendant conveyed the western portion of the two lots to his mother and father. The deed was not recorded until May 29, 1953. The court uses the words "the property" to refer *only* to the eastern portion of the two lots.] The accident occurred on May 22, 1953. At that time there was on the property lumber, cement blocks and steps, an old Chevrolet, tires, wheels, pipe, trusses, a hamburger stand for resale, a trailer, a 2-wheeled tubular frame stripped-down trailer, and other material. All of the equipment and material on the property had been moved there by Vaughn and was his property. The tubular part of the stripped-down trailer was a hollow half section of a 12-inch piece of tubing placed over the wheels on each side to make a runway to haul a tractor. Pieces of lumber were tied by wire across the top of the tubular frame trailer and there was some loose lumber on it. Vaughn used it to haul lumber.

Prior to the day of the accident, a number of children lived in the apartment house next to the property in question. That day there were about 13 living there. There was no place for children to play on the west 50 feet of Lots 33 and 34 on which the apartment house was located. They, including plaintiff, played on the east 75 feet and on the equipment which Vaughn kept there. He had observed

---

[18] *Id.* at 878.

them playing on the equipment from time to time and had told them to leave.

Plaintiff, with her parents and younger brothers and sisters, moved into the apartment house in February 1953. On May 22, 1953 plaintiff was severely injured while playing with three other small children on the property in question. There was evidence from which the court could have inferred that she was playing on the tubular frame trailer at the time she fell and was injured on the tubular part of the trailer. * * *

One who maintains upon his property a condition, instrumentality, machine, or other agency which is dangerous to children of tender years by reason of their inability to appreciate the peril therein, and which is one he knows or should know and which he realizes or should realize involves an unreasonable risk of death or serious bodily harm to such children, — is under a duty to exercise reasonable care to protect them against the dangers of the agency. Thus one is negligent in maintaining an agency which he knows or reasonably should know to be dangerous to children of tender years at a place where he knows or reasonably should know such children are likely to resort or to which they are likely to be attracted by the agency unless he exercises reasonable care to guard them against danger which their youth and ignorance prevent them from appreciating. If, to the knowledge of the owner, children of tender years habitually come on his property where a dangerous condition exists to which they are exposed, the duty to exercise reasonable care for their safety arises not because of an implied invitation but because of the owner's knowledge of unconscious exposure to danger which the children do not realize. Children of tender years have no foresight and scarcely any apprehensiveness of danger, a circumstance which those owning instrumentalities with a potential for harm must bear in mind; for it is every individual's duty to use toward others such due care as the situation then and there requires. Civ. Code, § 1714. "The known characteristics of children, including their childish propensities to intermeddle, must be taken into consideration in determining whether ordinary care for the safety of a child has been exercised under particular circumstances." Crane v. Smith, 23 Cal.2d 288, 297, 144 P.2d 356, 361. Of course, if adults or children of such age as to ordinarily be capable of discerning and avoiding danger are injured while trespassing upon the property of another, they may be without remedy; while under similar circumstances children of tender years would be protected.

The Restatement says:

> A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if
>
> (a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and
>
> (b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and

(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and

(d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein.

Rest., Torts, § 339. See 65 C.J.S., Negligence, § 28, p. 454. The rule in California is substantially as stated in the Restatement. [Citations omitted].

Dean Prosser says:

"Where the trespasser is a child, one important reason for the general rule of non-liability is lacking. Because of his immaturity and lack of judgment, the child is incapable of understanding and appreciating all of the possible dangers which he may encounter in trespassing, and he cannot be expected to assume the risk and look out for himself. While it is true that his parents or guardians are charged with the duty of looking out for him, it is obviously neither customary nor practicable for them to keep him under observation continually, or follow him wherever he may go. If he is to be protected, the person who may do it with the least inconvenience is the one upon whose land he strays, and the interest in unrestricted freedom to make use of the land may be required, within reasonable limits, to give way to the greater social interest in the safety of the child."

A duty rested on defendant Vaughn C. Golden to protect the young and heedless from themselves and guard them against perils that reasonably could have been foreseen. The trial court was warranted in finding that the circumstances here called the duty into play. The question whether injury to a child legally incapable of negligence will import negligence to the owner or possessor of the injuring instrumentality depends on the circumstances of each case and is peculiarly one for the trier of fact. It was for him to say whether the tubular frame trailer was a dangerous instrumentality of a class which was an unreasonable risk of serious bodily harm to children of tender years upon which they were likely to trespass. The evidence is uncontradicted that defendant Vaughn C. Golden knew that children of tender years, including plaintiff, strayed onto his property and played on the tubular frame trailer and other contrivances and material he kept there. It was for the trial court to say whether the condition was one which he knew or should have known and which he realized or should have realized involved risk of serious bodily harm to children of tender years. It appears to be conceded that plaintiff because of her youth did not realize the risk involved in playing on the tubular frame trailer. It was also for the trier of fact to say whether defendant Vaughn C. Golden should have guarded against injury to the trespassing children. In a word, whether the facts exist which bring the doctrine of injuries to trespassing children into play is generally a question for the trier of fact. * * *

The judgment in favor of plaintiff and against defendant Vaughn C. Golden is affirmed.

PARKER WOOD, Acting P.J., and ASHBURN, J., pro tem., concur.

WILFORD v. LITTLE

144 Cal. App. 2d 477, 301 P.2d 282 (1956)

FOURT, J.

Plaintiffs commenced an action to recover damages for the death of a minor son who fell into the private swimming pool on defendants' residential property. To an amended complaint the defendants demurred and the same was sustained with leave to amend. No amendment was made and judgment of dismissal was entered. This appeal is from the judgment of dismissal.

A fair résumé of the matters set forth in the amended complaint are as follows: On or about August 31, 1954, the swimming pool in question contained water to a depth of about 9 feet at one end, with a diving board extending over the water. Small children played on the property adjacent to the property of the defendants. The pool and diving board could be seen by the children from the adjacent property and this was known to the defendants. On the date heretofore mentioned Christian McLean Wilford, the four-and-one-half year old son of plaintiffs, and some other small children, were attracted onto the property of the defendants by the diving board and pool. Christian McLean Wilford and one other small boy began to play upon the diving board which was similar to a see-saw or teeter-board in that it had an "up-and-down" motion when jumped upon. The pool was so constructed that it was difficult for a child to hold onto the sides of the pool. The boy and his companions were too young to appreciate the danger involved in playing on the diving board and in the pool. In the course of play the lad fell or jumped from the diving board into the water and drowned. Neither of the plaintiffs knew, nor had reason to know that there was a swimming pool in the neighborhood, or that the property of the defendants was not fenced or enclosed in any manner to keep children or others away from the pool. A fence or other enclosure could have been installed at a relatively small cost. It was then alleged that the defendants were negligent in not properly enclosing the pool and that this negligence resulted in the death of plaintiffs' son to their damage in the sum of $50,000, together with expenses in the sum of $992.06.

> It is appellants' contention that California has adopted the rule of law generally referred to as the "Attractive Nuisance Doctrine," or the "Rule of the Turntable Cases," as set forth in the Restatement of the Law of Torts, and cites as authority for such contention the case of Copfer v. Golden, 135 Cal. App.2d 623, 627–628, 288 P.2d 90, and the cases cited therein. It is our opinion, however, that a swimming pool and diving board is not an attractive nuisance as that term is generally used. The California Annotations to the Restatement of the Law of Torts contain the following language (at pages 141–142):
>
> "§ 339. Artificial conditions highly dangerous to trespassing children.
>
> "* * * (b) Ponds or reservoirs: There is no liability for drowning of children in ponds or reservoirs under the attractive nuisance doctrine. * * * Peters v. Bowman, 1896, 115 Cal. 345, 47 P. 113, 598, 56 Am.St.Rep. 106, is the leading decision. In this case the water collected on a vacant lot by

reason of an embankment erected by the city in grading a street. Polk v. Laurel Hill Cemetery Ass'n, 1918, 37 Cal.App. 624, 174 P. 414, a child of eight drowned in an unguarded reservoir in a cemetery being used as a park. Reardon v. Spring Valley Water Co., 1924, 68 Cal.App. 13, 228 P. 406, a five year old boy drowned after a fall from a rowboat which was allowed to remain unfastened in a negligently guarded reservoir. The court refused to hold that the presence of the boat brought the case within the doctrine.

"(c) 'Siphon' cases: There are several decisions but in only one was the doctrine held applicable. (1) Sanchez v. East Contra Costa Irr. Co., 1928, 205 Cal. 515, 271 P. 1060. In the other two cases there is an obvious effort to pattern after the rules announced in this opinion. Plaintiff's son, aged five, was drowned in a canal when he fell into it after trying to wet his handkerchief. The body was found in a 'siphon' which carried the water under a cross-stream. The court held that defendant had created a concealed danger in the nature of a trap (siphon) to those who lived close by, and one that could easily be guarded. (2) Melendez v. City of Los Angeles, 1937, 8 Cal.2d 741, 68 P.2d 971. The demurrer to the complaint was sustained and on appeal this action of the court was affirmed. The court cited and approved Restatement § 339 as an exception to the rule of nonliability but held the doctrine not applicable. The complaint alleged that plaintiff's two sons were drowned in a pool of water in a storm drain. One son, aged 11, was on a raft and fell into the water and into a deep hole concealed and unknown to him. The other son, aged 13, went to his rescue and was similarly drowned. The decision held that the deep hole was not an artificial contrivance of the possessor of the land and the precedent followed is Beeson v. City of Los Angeles [115 Cal. App. 122, 300 P. 993], infra."

In the recent case of Lake v. Ferrer, 139 Cal. App.2d 114, 293 P.2d 104, hearing denied in the Supreme Court, March 28, 1956, plaintiffs' son of two and one-half years was attracted to the defendant's swimming pool and trespassed upon the defendant's property, fell into the swimming pool and drowned. Plaintiff parents did not know of the pool's existence and had not been told of it. In the Lake case, the plaintiffs relied for authority upon section 339 of the Restatement of Torts and practically all of the cases cited in the instant case, plus several others. It was held that the attractive nuisance doctrine did not apply under allegations considerably stronger than those presented in the instant case. * * *

There are several elements to the doctrine of attractive nuisance in this state. The contrivance must be artificial and uncommon, as well as dangerous * * *.

In Peters v. Bowman, 115 Cal. 345, 355 [47 P. 113, 598, 599] the court said:

"A turntable is not only a danger specially created by the act of the owner but it is a danger of a different kind to those which exist in the order of nature. A pond, although artificially created, is in nowise different from those natural ponds and streams, which exist everywhere, * * *. A pond cannot be rendered inaccessible to boys by any ordinary means. Certainly no ordinary fence around the lot upon which a pond is situated would answer the purpose; and therefore, to make it safe, it must either be filled

0024 [ST: 103] [ED: 10000] [REL: 2] **Composed:** Tue Feb 9 09:29:54 EST 2010
XPP 8.1C.1 Patch #6 LS000000 nllp 3534 [PW=540pt PD=720pt TW=360pt TD=580pt]
VER: [LS000000-Local:12 Jan 10 15:21**][MX-SECNDARY:** 25 Nov 09 08:31**][TT-:** 11 Dec 09 09:00 loc=usa unit=03534-ch0004**]** **0**

> or drained, or, in other words, destroyed. * * * The owner of a thing dangerous and attractive to children is not always and universally liable for an injury to a child tempted by the attraction. * * * As to common dangers, existing in the order of nature, it is the duty of parents to guard and warn their children, and, failing to do so, they should not expect to hold others responsible for their own want of care. * * *"

Courts in California have held repeatedly that a body of water, natural or artificial, is not such a thing as may be held to constitute an attractive nuisance. It may be attractive to children but it is also of a common and ordinary nature of that which is to be found anywhere.

Appellants here have advanced an argument very similar to that presented in the case of Meyer v. General Electric Company, 46 Wash.2d 251, 280 P.2d 257. In the Washington case plaintiffs' two year and eight months old child trespassed onto defendant's premises and was drowned when he fell into an artificial ditch on said premises. In reversing a judgment for the plaintiff, the court said, at pages 258–259:

> "This state adheres to the attractive nuisance doctrine. However, our question is: Under what circumstances will a watercourse constitute an attractive nuisance?
>
> "It is the weight of authority that a *natural* watercourse is not an attractive nuisance, and that an artificial one is not if it has natural characteristics.
>
> "* * * It was not unnaturally dangerous, had no element of deception or of an inextricable trap, and, in fact, presented no danger by reason of being artificial that was different in any way from that of a natural watercourse. We hold, as a matter of law, that it was not an attractive nuisance. * * *
>
> "The presence of danger to an unattended infant is not necessarily a test of anything but the need of parental care. An infant is afraid of nothing and in danger of everything when left to his own devices. The primary duty of care is upon the parents of an infant. (Citing case.) Their neglect will not convert a situation admittedly dangerous to an infant into an attractive nuisance which would not be so classed as to older children."

The judgment is affirmed.

WHITE, P.J., concurs.

DORAN, J., dissents.

NOTES AND QUESTIONS

(1) For better or worse (we shall explain "worse" shortly), these cases inject the Restatement of the Law of Torts into the "attractive nuisance" debate. The *Restatement of Torts*, a Torts casebook tells you,

> is a summary of the law of torts that was prepared by Professor Francis Bohlen and was published by the American Law Institute [in 1939]. A

0025 [ST: 103] [ED: 10000] [REL: 2] **Composed:** Tue Feb 9 09:29:54 EST 2010
XPP 8.1C.1 Patch #6 LS000000 nllp 3534 [PW=540pt PD=720pt TW=360pt TD=580pt]
VER: [LS000000-Local:12 Jan 10 15:21**][MX-SECNDARY:** 25 Nov 09 08:31**][TT-:** 11 Dec 09 09:00 loc=usa unit=03534-ch0004**]** **0**

> newer version, called the Restatement (Second) of Torts, was prepared by Professors William Prosser and John Wade and was also published by the ALI [in 1965]. The ALI is composed of lawyers, judges, and law professors. The Restatement is not authoritative in the sense that precedent in the relevant jurisdiction would be authoritative. Nevertheless, courts often cite the Restatement and are influenced by it. One pervasive issue is whether courts sometimes neglect careful analysis of problems by deferring too readily to the Restatement.[19]

A "hornbook" (do you know why *horn* book?) well-beloved by generations of first-year law students says:

> In this process of weighing interests [in torts cases], and more broadly in ongoing critical evaluation of the development of tort law, the influence of writers upon the courts has been very great. Moreover, within the past half century there has been a very significant attempt at a searching and exhaustive analysis of the entire field in the American Law Institute's Restatement of the Law of Torts, which was begun in 1923, completed in 1939, and more recently revised in the Second Restatement. Some of the most eminent legal scholars have taken part in this work, with the assistance of numerous judges and lawyers.
>
> The form of the Restatement is perhaps unfortunate, in that it seeks to reduce the law to a definite set of black-letter rules or principles, ignoring all contrary authority — since the law of torts in its present stage of development does not lend itself at all readily to such treatment. There is room for suspicion that the courts have tended to cite the Restatement when they are already in agreement with it, and to ignore it when they are not, so that the impressive list of references to it in the cases may be somewhat misleading; and there are those who have disagreed with many of its conclusions, and even denounced the whole project.[20]

Why "for worse"? The foregoing excerpts tell you why. "The form of the Restatement is perhaps unfortunate, in that it seeks to reduce the law to a definite set of black-letter rules or principles . . . since the law of torts in its present stage of development does not lend itself at all readily to such treatment." To which we would add, how can a body of "law" dominated by standards of reasonableness applied to the facts of each case largely by juries chosen for only one case ever lend itself to such treatment? And why should that be a desirable goal?

But the crux of the matter, for our purposes, is this: "One pervasive issue is whether the courts sometimes neglect careful analysis of problems by deferring too readily to the Restatement."

Whatever may be true for courts, we know it to be true for you. Understandably bewildered by what Cardozo called the "trackless ocean" on which you feel yourself floating, you grab onto the Restatement the way a drowning man or woman might grab onto a piece of driftwood. That is, when given an "attractive nuisance"

---

[19] Robertson, Powers, & Anderson, Torts 15 (1989).

[20] Prosser and Keeton on Torts 17 (5th ed. 1984).

problem, you do not carefully analyze each and every fact for its relevance to *this* particular case. Rather, you neatly copy each and every subsection of Section 339: 339(a), 339(b), 339(c), 339(d), then say of each one something like, "Clearly, this applies (or doesn't apply) here and therefore judgment for plaintiff (or defendant)." *It won't do.* You must doggedly grapple with the facts of the cases, not copy the Restatement.

(2) The *Copfer* court says: "The rule in California is substantially as stated in the Restatement." Would you, after *Barrett*, *Peters*, and *Sanchez* (none of them cited in *Copfer*) agree that "the rule" is "substantially" as stated in the Restatement? Make an argument that it is. Make an argument that it is not.

(3) *Copfer* refers to Section 1714 of the California Civil Code, which provides:

> Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself.

The court's paraphrase reads:

> It is every individual's duty to use toward others such due care as the situation then and there requires.

Is that a legitimate paraphrase of 1714? If you had read 1714 before you read *Copfer*, would you have thought it was primarily about the duties of potential defendants or about limitations on recovery by potential plaintiffs? Is the moral of the story: don't ever trust anyone to paraphrase a statute?

Does 1714 embody a rule or a standard? If the latter, can it decide this case without more? Should it make a difference to the decisionmaker that this rule or standard appears in a statute rather than in a prior case?

(4) We now turn to what for us is the most important aspect of these two cases, considered together: in *Copfer*, a 6-year-old who fell from a trailer on defendant's property was allowed to recover after a *trial* by the court sitting without a jury. In *Wilford*, a 4½-year-old who fell off a diving board and drowned was denied relief when the *defendant's demurrer* was sustained. Is there an explanation for this seeming irrationality?

On page _____ we introduced you to the idea that appellate courts are limited in their reviewing function when considering a question of fact but that — within the boundaries of stare decisis — they rule supreme on questions of law. In the one setting they owe deference to the decision "below," in the other they do not.

This leaves these interrelated questions: when is something a question of fact and when is it a question of law? Can a trailer ever be an attractive nuisance — is that a question of fact or a question of law? Can a pool ever be an attractive nuisance — is that a question of fact or a question of law? And who decides which it is going to be?

The answer to the last question and thus implicitly to the first is: the appellate court decides. And when will it call something a question of law? When it thinks the

0027 [ST: 103] [ED: 10000] [REL: 2] **Composed:** Tue Feb 9 09:29:54 EST 2010
XPP 8.1C.1 Patch #6 LS000000 nllp 3534 [PW=540pt PD=720pt TW=360pt TD=580pt]
VER: [LS000000-Local:12 Jan 10 15:21**][MX-SECNDARY:** 25 Nov 09 08:31**][TT-:** 11 Dec 09 09:00 loc=usa unit=03534-ch0004**]** **0**

law should keep either (a) *all defendants of this kind* or (b) *this defendant* away from the jury.

In the first instance it will say: "there is no such cause of action; we do not recognize defendant's conduct as giving rise to a legally cognizable claim." (Hence we will sustain the demurrer or, in modern terminology, dismiss for failure to state a claim upon which relief can be granted). In the second instance it says: "Yes, there is such a claim; we do recognize this kind of conduct by a defendant as potentially giving rise to liability, depending on the context in which it took place" (hence the demurrer should have been overruled; the pre-trial motion to dismiss denied). BUT, the court says, "in *this* case, on *these* facts, under *these* circumstances, no reasonable jury, no jury except one that has taken all leave of its senses or has been tampered with, could plausibly find for the plaintiff" — hence the defendant is entitled to a directed verdict.

Peters v. Bowman I and *II* held: natural bodies of water or artificial bodies of water with natural characteristics are *as a matter of law* not "attractive nuisances." That is, as a matter of law, the landowner owes no duty even to trespassing children. It reflected a policy about the general undesirability of holding landowners liable for having water on their land; it did not reflect a judgment about this particular landowner under these circumstances.

Peters I had been a jury case. Recall that we asked after the case: did the case have to go to the jury? You should now understand that the answer is *no* and that the trial judge would have been affirmed even if he had granted defendant a directed verdict (motion to dismiss complaint after all evidence has been presented but before the case is sent to the jury). Remember, juries exist to find facts; if water is not an attractive nuisance as a matter of law, and we already know that the case involves a body of water, then there is nothing for the jury to do, for there is no fact that could create liability.

But you must also understand this: the result, the outcome in *Peters*, namely judgment for the defendant, could well have been the same even if the court had chosen to recognize such a cause of action; even if it had, in other words, imposed a duty on landowners whose land has a body of water on it (just as it had imposed a duty on landowners who had dangerous machinery on their land). In that event, the plaintiff might[21] have been entitled to go to the jury — but the jury, of course, was free to find that *under these circumstances* (the boy's age, the way in which the "pond" had come about)[22] *this* defendant was not, in the judgment of the community, to be found to have breached his duty.

Most likely that is what the jury thought — after all, it returned a verdict for the defendant.

---

[21] Note that we say *might*, not *would*. The reason: even if a duty to use care were imposed, the plaintiff might not introduce enough evidence that defendant breached his duty to support a jury verdict for the plaintiff. In such a case the court directs a verdict for defendant not because defendant had no duty, but rather because plaintiff has not shown breach of that duty.

[22] Perhaps the thought crossed your mind why the plaintiff did not sue the City of San Francisco. The most likely answer is that at that time the city would have been immune against torts claims — a longstanding legal rule now frequently abrogated.

0028 [ST: 103] [ED: 10000] [REL: 2] **Composed:** Tue Feb 9 09:29:54 EST 2010
XPP 8.1C.1 Patch #6 LS000000 nllp 3534 [PW=540pt PD=720pt TW=360pt TD=580pt]
VER: [LS000000-Local:12 Jan 10 15:21]**[MX-SECNDARY:** 25 Nov 09 08:31]**[TT-:** 11 Dec 09 09:00 loc=usa unit=03534-ch0004] **0**

Had the jury returned a verdict for the plaintiff, what would have happened? The California Supreme Court, we know, did not want to put landowners with bodies of water on their property under a duty, not even to trespassing children. *As a matter of law*, bodies of water could not be, in its view, attractive nuisances. Hence presumably (because you never know) it would have reversed the judgment for the plaintiff, thus telling the trial court, you should not have given this case to the jury, there was nothing for it to do.

As it happened, the Supreme Court did not have to talk about the propriety of giving the case to the jury because *for different reasons* the jury had found for the defendant.

It is important for you to understand this clearly — because we do not want you to fall into the error of thinking: letting a case go to the jury equals a judgment for the plaintiff.

Wilford was treated as a swimming pool case. (An important aside: as the plaintiff's lawyer, would you have argued *Wilford* as a pool case? Was there not a better theory?) The California Supreme Court had "laid down the law" regarding bodies of water. The trial court knew what the law was regarding bodies of water. Hence: demurrer sustained. The District Court of Appeal, too, knew what the law was. It also did not think it was its province to "overrule" the Supreme Court of California. If the no duty rule regarding bodies of water was to be changed, that job properly belonged to the Supreme Court and not to the lower level decisionmaker. Hence: judgment of dismissal affirmed.

Copfer involved a trailer. There were two rules in the system (ignoring *Sanchez* for present purposes): the "no duty for water" rule and the "turntable rule." The latter imposed a duty on landowners who kept certain machinery on their land, but it did not make them liable as a matter of law for any injury occurring on their property.[23] Rather, as *Barrett* said, "the question of defendant's negligence [i.e., whether he breached his duty] in this case was a matter to be decided by the jury in view of all the evidence."[24]

The trial judge in *Copfer* evidently thought trailers were like turntables and unlike bodies of water. Hence he had a trial; because both parties waived a jury trial the judge himself sat as the trier of fact. He found that under the circumstances the defendant had not acted in the manner in which we expect the reasonable and prudent person with machinery on his lot to act; that is, he found that the defendant had breached his duty and hence he gave judgment for the plaintiff.

The District Court of Appeal refused to decide either (a) that trailers were more like bodies of water than they were like turntables or (b) to establish a separate "trailer rule" according to which trailers, in analogy to bodies of water, should be held *not* to be attractive nuisances as *a matter of law.*

Had it done either of these, it would presumably have reversed and told the trial judge: you erred when you thought being injured by falling off a trailer results in

---

[23] If they were, plaintiffs would be entitled to summary judgments.

[24] *See supra* p. _____.

0029 [ST: 103] [ED: 10000] [REL: 2] **Composed:** Tue Feb 9 09:29:54 EST 2010
XPP 8.1C.1 Patch #6 LS000000 nllp 3534 [PW=540pt PD=720pt TW=360pt TD=580pt]
VER: [LS000000-Local:12 Jan 10 15:21**][MX-SECNDARY:** 25 Nov 09 08:31**][TT-:** 11 Dec 09 09:00 loc=usa unit=03534-ch0004**]** **0**

a legally cognizable claim. Instead, it was satisfied that under the turntable rule the defendant here had been under a duty and that all the rest was a question of fact. Hence its "standard of review" had to be one of deference to the trier of fact. In exercising this limited reviewing function the court let itself be guided by the Restatement which, in section 339 (a) through (d), identifies factors to look to in judging the defendant's behavior. *But it is worth remembering that all this is already in Barrett:*

> Whether, in any given case, there has been such negligence upon the part of the owner of the 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 against injury therefrom.[25]

It seems then, does it not, that we can fault neither court for what it did. But it still may strike you as irrational to let trespassing kids recover, under the appropriate circumstances, when they fall off trailers but not, regardless of the circumstances, when they drown. What produces that irrationality? The answer is probably not to your liking: the source of the trouble is having a per se rule, a nice, firm, orderly, stable, rigid, inflexible (unjust?) rule of law: thou shallst not recover when you drown. To be sure, it saves us time, it saves us trouble, and it spares us from having to deal with those messy facts.

But is it worth it in this context? On one hand we have parents who argue that they should not have to shoulder 100 percent of the burden of looking after their children; that they cannot "fence" their children; that we should not want them to do that; that children need to be curious and need to explore (that's how we get Mac computers and the Polio vaccine). On the other hand we have owners who argue that they are entitled to enjoy their land free from concerns over those who go where they are not invited and not wanted and have no business being; that they should not be expected to fell their trees and fill in the ponds and streams God put on their land; that there is no way to "childproof" against enterprising youngsters short of turning their land into a fort; and that the decision to have children entails the acceptance of responsibility for their well-being and also of the possibility that they will suffer injury or death because life is dangerous.

Does this sort of conflict strike you as best being solved by per se rules? By saying *either*: you own land, there is a body of water on your land, you are under no duty to trespassers, including children, regardless of the circumstances; *or*: you own land, there is a body of water on your land, you are always liable when a child drowns in that body of water, regardless of what you did to safeguard it against children.[26]

If neither leaves you satisfied, if you want to say, can't we decide this *case by case* — then must you not, under our system, treat it as a negligence case and allow the jury to decide case by case whether the defendant fell short of the standard of

---

[25] *Supra* p. _____.

[26] We would call that absolute or strict liability and it is the counterpoint to the *Peters* rule.

reasonable and prudent care in the circumstances? And if we do that we reintroduce inconsistency, unpredictability, and perhaps unfairness into the system.

Are there other contexts in which you do want rules, in which you do *not* want case by case adjudication? How about procedural rules, "housekeeping" rules, so to speak — would they fall into this category?[27]

(5) We said above that to treat something as a question of law is one mechanism a court can use to keep a case away from the jury. Why would it want to do that? We can come up with different answers in different contexts (the issue is too difficult for the jury to understand, the jury may let itself be swayed by passion, the evidence is too difficult for laypersons to assess, etc.) — but do they at bottom all express a measure of distrust of the jury? Or might courts honestly and impartially think that indeed some questions are questions of fact (e.g., how, where, when) and others questions of law (e.g., what *should* be the rule for cases like this)?[28]

We come now to the pivotal case in the sequence.

KNIGHT v. KAISER

48 Cal.2d 778, 312 P.2d 1089 (1957)

McComb, Justice.

From a judgment predicated upon the sustaining of defendant's demurrer to plaintiff's third amended complaint without leave to amend in an action to recover damages for the death of plaintiff's son, plaintiff appeals.

The amended complaint, in substance, alleged that plaintiff was the natural mother of decedent, Johnny William Bass, Jr., 10 years of age; that defendant owned and maintained premises in Stockton on which it had placed or caused to be placed large piles of sand and gravel and, adjacent thereto, a large conveyor belt; that no fences, guards or railings were placed around these sand and gravel piles or a portion of the conveyor belt; that a road or pathway was close to these objects and children were in the habit of playing upon the sand and gravel piles and the conveyor belt; that defendant knew or should have known the conditions existing involved an unreasonable risk of death or serious bodily harm to children playing on the sand and gravel piles; and that on August 20, 1953, plaintiff's son, while playing upon the premises and digging in one of the sand piles, was asphyxiated when it collapsed upon him.

Plaintiff contends that the facts alleged in the complaint as amended state a cause of action within the "attractive nuisance" doctrine. This contention is untenable.

---

[27] These questions recur in Chapter 5 because Chapter 5 deals with Precedent — that is, with the *rule* that a court must follow its prior decision in a factually similar case — and where we must ask, is that rule more appropriate in some contexts than in others.

[28] The court/jury theme permeates torts and criminal law. Your efforts to understand here will also be amply rewarded in those courses.

Where the facts are undisputed, as in the instant case, it is a question of law whether or not the facts alleged fall within the scope of the "attractive nuisance" doctrine.

Applying this rule to the admitted facts in the present case, it is conceded that defendant maintained upon its premises large sand and gravel piles and a large conveyor belt; that decedent while playing and digging in one of the sand piles was asphyxiated when it collapsed upon him.

It is the general rule that where a person goes upon the premises of another without invitation, as a bare licensee, and the owner passively acquiesces in his presence, if any injury is sustained by the licensee by reason of a mere defect in the premises the owner is not liable for negligence, for the licensee has assumed the risk himself. * * *

The law is also established that in the absence of circumstances which bring a case under the "attractive nuisance" doctrine, an owner of land owes no other duty to a child trespassing on his premises than he owes to an adult trespasser. (Peters v. Bowman, 115 Cal. 345, 349, 47 P. 113.)

To the general rule there is this exception: If an owner of land maintains thereon what is commonly called an "attractive nuisance," the owner is liable for injuries resulting to a trespassing child.

In view of the foregoing rules and the facts alleged in the complaint, this question is presented: Does a sand pile constitute an "attractive nuisance," i.e., a fact which places liability upon the owner of property for injuries to a trespassing child?

This question must be answered in the negative. It is settled that a body of water, natural or artificial, does not constitute an "attractive nuisance" that will subject the owner to liability for trespassing children who are attracted thereto and are drowned.

As far as attractiveness to children is concerned, there is no significant difference between a body of water and a sand pile. Pools of water and sand piles duplicate the work of nature and are not uncommon. In fact, a pool of water is far more dangerous than a sand pile, which in and of itself is not dangerous. The dangers connected with and inherent in a sand pile are obvious to everyone, even to a child old enough to be permitted by its parents to play unattended.

Sand piles may be attractive to children, but they are also of a common and ordinary nature and are found in numerous places, quite frequently in the child's own backyard. It is common for children to play in sand piles and to dig holes and make excavations in them. They are early instructed by their parents as to the danger of cave-ins. Hence, the owner of private property who maintains thereon a sand pile that merely duplicates the work of nature and to which no new dangers have been added should not be liable to a trespassing child for injuries under the "attractive nuisance" doctrine.

In Restatement of the Law of Torts, volume 2, section 339, page 922, it is said that the duty of the possessor of land "does not extend to those conditions the existence of which is obvious even to children and the risk of which is fully realized

by them. This limitation of the possessor's liability to conditions dangerous to children, because of their inability to appreciate their surroundings or to realize the risk involved therein, frees the possessor of land from the danger of liability to which he would otherwise be subjected by maintaining on the land the normal, necessary and usual implements which are essential to its normal use but which reckless children can use to their harm in a spirit of bravado or to gratify some other childish desire and with as full a perception of the risks which they are running as though they were adults." (Cf. 28 A.L.R.2d (1953), § 4, p. 200.)

In Anderson v. Reith-Riley Const. Co., 112 Ind. App. 170, 44 N.E.2d 184, defendant removed a large amount of sand from its property, leaving a hole 100 feet long, 50 feet wide and 10 feet deep, with perpendicular walls. Plaintiff's son, nine years of age, was attracted to the hole, where he excavated below the surface and was killed in a cave-in which followed. The court held that defendant was not liable under the "attractive nuisance" doctrine, saying at page 185, 44 N.E.2d:

> "Nature has created streams, lakes and pools which attract children. Lurking in their waters is always the danger of drowning. Against this danger children are early instructed so that they are sufficiently presumed to know the danger that if the owner of private property creates an artificial pool on his own property, merely duplicating the work of nature without adding any new danger, and a child, without invitation, ventures on the private property, enters the pool and is drowned, the owner is not liable because of having created an 'attractive nuisance.'
>
> "Nature has created cliffs and embankments which attract children. And here again is always the danger of falling over the cliffs or down the embankments. Against these dangers children are early instructed so that they are sufficiently presumed to know the danger that if the owner of private property by excavating for a basement on his own property, thereby creates an artificial cliff, and a child, without invitation, ventures on the private property and falls into the excavation, the owner is not liable because of having created an 'attractive nuisance.'
>
> "Another common danger in cliffs and embankments is that of cave-ins from excavation below the surface. And it is common for children in play to make such excavations in the sides of cliffs and embankments for the purpose of creating caves, tunnels, etc. So they are early instructed as to the danger of cave-ins and are sufficiently presumed to know the danger that if the owner of private property by excavating on his own property, creates an artificial cliff or embankment, merely duplicating the work of nature without adding any new dangers, and a child, without invitation, ventures on the private property, excavates below the surface and is injured or killed by a resultant cave-in, the owner is not liable because of having created an 'attractive nuisance.' Nor does the rule change with the varying texture of the earth. The danger is the same danger, real and obvious, with only the percentage of probability of the occurrence increased or decreased with the earth's fineness or firmness. * * *"

It is thus evident that the sand pile did not constitute an "attractive nuisance." This conclusion is in accord with the generally accepted rule — to restrict and limit,

rather than to extend, the doctrine of "attractive nuisance." It is a doctrine to be applied cautiously and only when the facts come strictly and fully within the rule.

Finally, it is to be noted that if it is conceded that the conveyor belt mentioned in the pleading might constitute an "attractive nuisance," there is no allegation that it caused or contributed to decedent's death. There is a total absence of an allegation of a causal connection between the conveyor belt and his unfortunate death. Under these circumstances, the maintenance of the conveyor belt does not bring the case under the "attractive nuisance" doctrine.

The judgment is affirmed.

SHENK, SCHAUER, and SPENCE, JJ. concur.

TRAYNOR, Justice.

I dissent.

The Civil Code, section 1714, provides: "Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself." Nevertheless, the cases are replete with statements that an occupier of real property owes no such general duty of care to trespassers and bare licensees. With respect to adults we need not pause to determine how many of such statements constitute no more than a determination by the court that the defendant was not negligent at all or that the plaintiff assumed the risk or was guilty of contributory negligence as a matter of law. Clearly the fact that the plaintiff is a trespasser or a bare licensee is relevant to the question what precautions the reasonable man would take to protect him. * * * It cannot be denied, however, that in the case of adult trespassers and licensees the operation of no-duty rules has in many instances resulted in immunity for conduct that unreasonably endangered the plaintiff and was therefore negligent toward him. The dilemma of choosing between such cases and the rule set forth in section 1714 is not now before us. In the case of trespassing children a review of the better considered cases convinces me that it does not exist.

In Barrett v. Southern Pacific Company, 91 Cal. 296, 27 P. 666, this court followed the Supreme Court of the United States in Sioux City & Pacific Railroad Company v. Stout, 21 L.Ed. 745, 17 Wall (U.S.) 657, by solving the problem of the land occupier's liability to trespassing children for dangerous conditions maintained on the premises in terms of ordinary negligence principles. It pointed out that it could not recognize a rule that no duty was owed to trespassing children without departing from well-settled principles.

To recognize such a duty of care toward trespassing children does not impose an unreasonable burden on the defendant, and "it must be kept in mind that it requires nothing of the owner that a man of ordinary care and prudence would not do of his own volition, under like circumstances. Such a man would not willingly take up unreasonable burdens, nor vex himself with intolerable restrictions." Chicago, B. & Q. R. Co. v. Krayenbuhl, 65 Neb. 889, 91 N.W. 880, 882, 59 L.R.A. 920. "The owner of a thing dangerous and attractive to children is not always and universally liable

for an injury to a child tempted by the attraction. His liability bears a relation to the character of the thing, whether natural and common, or artificial and uncommon; to the comparative ease or difficulty of preventing the danger without destroying or impairing the usefulness of the thing; and, in short, *to the reasonableness and propriety of his own conduct, in view of all surrounding circumstances and conditions*. As to common dangers, existing in the order of nature, it is the duty of parents to guard and warn their children, and, failing to do so, they should not expect to hold others responsible for their own want of care. But, with respect to dangers specially created by the act of the owner, novel in character, attractive and dangerous to children, easily guarded and rendered safe, the rule is, as it ought to be, different; and such is the rule of the turntable cases, of the lumber-pile cases, and others of a similar character. But the owner of a thing dangerous and attractive to children is not always culpable, and therefore is not always liable for an injury to a child drawn into danger by the attraction. It is necessary to discriminate between the cases in which culpability does and does not exist." Beatty, C.J., on denial of rehearing in Peters v. Bowman, 115 Cal. 345, 356, 47 P. 113, 598, 599. Italics added.

As Chief Justice Beatty stated such culpability turns on "the reasonableness and propriety of" the defendant's "conduct, in view of all surrounding circumstances and conditions," or, in other words, it is determined by applying familiar negligence standards. [Citations omitted.] Section 339 of the Restatement of Torts has defined these standards by stating four conditions that must be satisfied to impose liability on a possessor of land for injury to trespassing children caused by a structure or other artificial condition on the land. Liability exists if "(a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and (b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and (d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein." This section was cited with approval in Melendez v. City of Los Angeles, 8 Cal.2d 741, 68 P.2d 971, and has frequently been held to be in accord with the law of this state.

In the present case the allegations of plaintiff's complaint satisfy the foregoing requirements. * * *

Despite the apparent sufficiency of these allegations, the majority opinion holds that the complaint does not state a cause of action on the ground that a sand pile does not constitute an attractive nuisance. This holding necessarily either departs from the general principles governing liability to trespassing children by adopting a special sand-pile rule, or is based on the tacit taking of judicial notice of facts with respect to children and sand piles contrary to those alleged in the complaint. It cannot be justified on either ground. There are no established precedents in this state dealing with sand piles, as there are with respect to bodies of water, that might, under the doctrine of stare decisis, justify adhering to a rigid rule without regard to the facts of the particular case. Precedent-wise we are free to follow the general principles governing liability to trespassing children. In purporting to do so, the majority opinion states that "sand piles duplicate the work of nature and are

not uncommon," and that "The dangers connected with and inherent in a sand pile are obvious to everyone, even to a child old enough to be permitted by its parents to play unattended." There is no basis, however, for concluding that every sand pile necessarily duplicates the work of nature or holding as a matter of law that no defendant should reasonably foresee that the dangers connected with and inherent in its sand pile are not obvious to children old enough to be permitted to play unattended. Although Anderson v. Reith-Riley Const. Co., 112 Ind.App. 170, 44 N.E.2d 184, supports the majority's position, the other cases cited in the majority opinion may be explained on their particular facts. Moreover, authority contrary to the Anderson case is not lacking.

Whether the maintenance of a sand pile can give rise to liability for harm to trespassing children must necessarily turn on the facts of the particular case. Children accustomed to playing in sand piles in their own yards may be totally unfamiliar with the hazards of a large pile maintained for industrial purposes. The very harmlessness of the familiar small pile may lull them into a sense of security. Nor are all children reared in such proximity to natural bluffs, cliffs, caves, and large sand dunes that they may be presumed to be familiar with them or to have been warned of their characteristics by their parents. Thus even if it could be assumed that the sand piles in this case duplicated natural sand piles, we could not judicially notice that plaintiff's child should necessarily have been aware of their hazards. Dean Prosser has pointed out that many "courts have said that the doctrine does not apply to common conditions, or to natural conditions of the land, or that it is limited to latent dangers, or to highly dangerous conditions, or to special and unusual conditions of modern industry; but all such statements appear to be made with reference to the particular case, and to be directed at nothing more than the existence of a recognizable and unreasonable risk of harm to children." (Prosser on Torts, 2d ed., § 76, p. 443.) Professors Harper and James state: "In addition to the probability of trespass, the dangerous condition of the premises must be produced by man, and either created or maintained by the occupier. This requirement stems from the law's reluctance to impose purely affirmative obligations on a man. It is sometimes said that man-made conditions which merely reproduce natural ones stand on the same footing. But if there is to be exemption here it must obviously rest on a different basis. That basis may often be found in the fact that children are likely to appreciate the risks of natural dangers, such as water, fire, or high places, so that these conditions are not highly dangerous to them. But this is not always the case. Some natural conditions have more concealed danger than a turntable, and if a landowner reproduces such a 'natural trap,' liability should not be excluded. Given affirmative arrangement of the premises, the touchstone of liability should be unreasonable probability of harm. All other criteria should be used as guides only, and not erected into rigid rules." (2 Harper and James, Law of Torts, § 27.5, pp. 1452–1453.)

The evil of creating rigid rules is demonstrated by some of the California cases dealing with bodies of water. Since ordinarily it may be presumed that children are aware of the dangers of drowning and since frequently the burden of adequately protecting children from that risk is out of proportion to it, usually the maintenance of a body of water should not give rise to liability. Blindly, however, the rule appropriate for the usual case has been extended to the unusual case unless there

0036 [ST: 103] [ED: 10000] [REL: 2] **Composed:** Tue Feb 9 09:29:55 EST 2010
XPP 8.1C.1 Patch #6 LS000000 nllp 3534 [PW=540pt PD=720pt TW=360pt TD=580pt]
VER: [LS000000-Local:12 Jan 10 15:21**][MX-SECNDARY:** 25 Nov 09 08:31**][TT-:** 11 Dec 09 09:00 loc=usa unit=03534-ch0004**]** **0**

was something abnormal about the body of water itself. See, Sanchez v. East Contra Costa Irr. Co., 205 Cal. 515, 271 P. 1060; Long v. Standard Oil Co., supra, 92 Cal.App.2d 455, 207 P.2d 837. Thus recovery has been denied on the pleadings for the death of very young children who could not be presumed to appreciate the danger despite allegations sufficient to justify recovery under general principles and where the facts alleged did not indicate that the burden of protecting such children outweighed the risk to them. Wilford v. Little, 144 Cal.App.2d 477, 301 P.2d 282; Lake v. Ferrer, 139 Cal.App.2d 114, 293 P.2d 104. In nonwater cases, on the other hand, the error of rigid categorization has been recognized and avoided. Woods v. City and County of San Francisco, supra, 148 Cal.App.2d 958, 963–965, 307 P.2d 698; Morse v. Douglas, 107 Cal.App. 196, 200, 290 P. 465; Faylor v. Great Eastern Quicksilver Min. Co., 45 Cal.App. 194, 204, 187 P. 101. This conflict should be resolved by disapproving the former cases. In any event the error of those cases should not be extended. As stated in the Faylor case, "while matching cases is an interesting mental recreation, it is not by matching cases, but by the correct application of sound legal principles, that a case such as this is best determined. . . ." 45 Cal.App. at page 204, 187 P. at page 105. "The naming or labeling of a certain set of facts as being an 'attractive nuisance' case or a 'turntable' case has often led to undesirable conclusions. The inclination is then to find a *stare decisis* pigeonhole or category. The difficulty in such procedure is that too often the result of such a search is the reaching of irreconcilable conclusions. . . . [T]he only proper basis for decision in such cases dealing with personal injuries to children are the customary rules of ordinary negligence cases." Kahn v. James Burton Co., supra, 51 Ill.2d 614, 126 N.E.2d 836, 841.

I would reverse the judgment.

GIBSON, C.J., and CARTER, J., concur.

Rehearing denied.

NOTES AND QUESTIONS

(1) Justices McComb and Traynor[29] disagree in any number of ways. Try to pinpoint their disagreements. They involve (at least) three distinct areas: legal doctrine, judicial attitude, and the method or approach for determining liability. With regard to the last of these, consider the following chart:

McComb	Traynor
judge	jury
law	facts
rules	standards

[29] Justice Traynor ranks as one of the great common-law jurists. It is fair to say that, with help from the New Jersey Supreme Court, the California Supreme Court, under Justice Traynor's tutelage, created much of the law of products liability. Look for his name in your casebooks.

What does this mean and does it help you describe the different methodologies the two justices endorse?

(2) Justice McComb says: "Where the facts are undisputed, as in the instant case, it is a question of law whether or not the facts alleged fall within the scope of the 'attractive nuisance' doctrine."

Review the many assertions of fact made by Justice McComb in his opinion. Which are "undisputed"? Why are they undisputed? Because of the procedural posture of the case — the trial court's sustaining of a demurrer to the complaint? Are there facts which Justice McComb claims to know that are not contained in the complaint? How does Justice McComb know these facts?

In particular, what does Justice McComb know about Johnny William Bass, Jr.'s knowledge about the dangers of sand piles? Might reasonable people differ about what 10-year-old Johnny knew? If so, why is this fact "undisputed"?

Might a jury rather than a trial judge or an appellate court be the more appropriate agency to determine Johnny's cognitive abilities, knowledge, and maturity?

Does Justice McComb claim to know what was in Johnny's mind because as a judge he knows what is in all children's minds? Does Justice McComb have some special understanding about every ten-year-old in the state of California? Could he?

(3) Justice Traynor begins by quoting section 1714 of the California Civil Code. And again we must ask: does section 1714 decide this case? Does it decide any particular case? If it postulates a principle or standard, rather than a rule, is it nevertheless helpful?

(4) Justice Traynor cites *Peters II* (the denial of rehearing) in seeming support of his opinion. Is that not rather problematic, to say the least? Then why does he do it? What is it in *Peters II* that is useful to him here?

(5) Referring to section 339 of the Restatement of Torts, Traynor says it has "frequently been held to be in accord with the law of this state." If so, does that mean that somewhere along the line *Peters* has been quietly overruled? Can courts "quietly," that is, without ever expressly saying so ("sub silentio," as the phrase goes), overrule a case? Is it desirable to do so? Shouldn't a court at least have to say something on this order: "The matter does not appear to [us] now as it appears to have appeared to [us] then?"[30]

In any event, could any of the courts referred to by Justice Traynor have overruled *Peters*?

(6) On a different occasion, Justice Traynor commented:

> A generation ago Mr. Justice Cardozo reflected from experience that the judicial process had recurringly to be creative. For recurringly it happened that a judge failed to find the amiable *ratio decidendi* supposedly awaiting

---

[30] Baron Bramwell in Andrews v. Stytrap, 26 L.T. R. (N. S.) 704, 706 (Ex. 1872), quoted in Ruggero J. Aldisert, *Precedent: What It Is and What It Isn't; When Do We Kiss It and When Do We Kill It?*, 17 Pepperdine L. Rev. 605, 630 (1990). Baron Bramwell was actually speaking in the first person singular.

0038 [ST: 103] [ED: 10000] [REL: 2] **Composed:** Tue Feb 9 09:29:56 EST 2010
XPP 8.1C.1 Patch #6 LS000000 nllp 3534 [PW=540pt PD=720pt TW=360pt TD=580pt]
VER: [LS000000-Local:12 Jan 10 15:21]**[MX-SECNDARY:** 25 Nov 09 08:31]**[TT-:** 11 Dec 09 09:00 loc=usa unit=03534-ch0004] **0**

> discovery among the reeds of precedent to swaddle a foundling case becomingly and set its cries at rest. Since he could not let it cry forever, he must needs swaddle it with some inventive covering suitable for the occasion and durable enough to serve the future. Every basic precedent was thus once made up out of whole cloth woven by a judge.
>
> There is now wide agreement that a judge can and should participate creatively in the development of the common law. Yet each time he does so, he must reckon with the ancient suspicion that creativeness is a disturbing excess of skill, at odds with circumspection, darkly menacing the stability of the law. Actually, the creative decision is circumspect in the extreme, for it reflects the most careful consideration of all the arguments for a conventional solution and all the circumstances that now render such a solution so unrealistic as to doom its serviceability for future cases. * * *
>
> The real concern is not the remote possibility of too many creative opinions but their continuing scarcity. The growth of the law, far from being unduly accelerated by judicial boldness, is unduly hampered by a judicial lethargy that masks itself as judicial dignity with the tacit approval of an equally lethargic bar.[31]

In his dissent, is Justice Traynor making something "out of whole cloth," and what, exactly, is it?

(7) *Knight* is the case we meant when, in discussing briefing, we said the dissent can be more important than the court's opinion. The questions that follow all deal with dissents.

(a) The court's opinion speaks to the parties, to the lawyers in the case, to the legal community and to the community, or parts of it, at large. To whom does the dissenter speak?

According to Cardozo:

> The voice of the majority may be that of force triumphant, content with the plaudits of the hour, and recking little of the morrow. The dissenter speaks to the future, and his voice is pitched to a key that will carry through the years. Read some of the great dissents * * * and feel after the cooling time of the better part of a century the glow and fire of a faith that was content to bide its hour. The prophet and martyr do not see the hooting throng. Their eyes are fixed on the eternities.[32]

Justice Rehnquist dissented in *Roe v. Wade* (the 1973 decision holding that the Constitution protects a women's right to choose to have an abortion) and voted to overrule it throughout his remaining 23 years on the bench. Was he a "prophet and martyr" who bravely resisted the "hooting throng" of pro-choice advocates?

On the less exalted plain of "attractive nuisance," to whom was Justice Traynor speaking?

---

[31] Roger Traynor, *Comment on Paper Delivered by Charles D. Breitel*, *in* Legal Institutions Today and Tomorrow 51–52 (Monrad Paulsen ed., 1959).

[32] Benjamin N. Cardozo, Law and Literature and Other Essays and Addresses 36 (1931).

(b) Consider whether dissent is

> disastrous because disunity cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends. People become aware that the answer to the controversy is uncertain, even to those best qualified, and they feel free, unless especially docile, to ignore it if they are reasonably sure that they will not be caught. The reasoning of both sides is usually beyond their comprehension, and is apt to appear as verbiage designed to sustain one side of a dispute that in the end might be decided either way, which is generally the truth.

So said Judge Learned Hand.[33] Would you counter that "monolithic solidarity" might obstruct legal change; that "lawless persons will defy the law whether it is laid down by a court speaking through a 9 to 0 majority or a court speaking through a 5 to 4 majority"; and that judicial controversies *cannot* "generally be decided either way — that is, honestly"?[34]

If you had owned a pool in California at the time and had thought about your potential liability, what significance would you have attached to *Knight's* being a 4 to 3 decision? And to the fact that one of the four was a member of the unanimous three-judge panel in *Sanchez*? (Noticing such a fact is one of the things that Llewellyn meant by "reading.")

(c) If dissent cannot be repressed, should the dissenter at least dissent quietly, without, that is, issuing an opinion?

> [W]here significant and deeply held disagreement exists, members of the Court have a responsibility to articulate it. This is why, when I dissent, I always say why I am doing so. Simply to say, "I dissent," I will not do.[35]

Justice Brandeis, on the other hand, often withheld issuing dissenting opinions "replete with the most exquisite detail of citation and the most comprehensive of footnotes."

> Brandeis was a great institutional man. He realized that the Court is not the place for solo performances, that random dissents and concurrences weaken the institutional impact of the Court and handicap it in the doing of its fundamental job. Dissents and concurrences need to be saved for major matters if the Court is not to appear indecisive.[36]

(d) Consider Canon 19 of the Canons of Judicial Ethics:

> It is of high importance that judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusion and

---

[33] Learned Hand, The Bill of Rights 72–73 (1958).

[34] Michael Musmanno, Harvard Law School Record, Mar. 1958. Justice Musmanno, who sat on the Pennsylvania Supreme Court from 1952 to 1968, is a colorful figure whose battle for publication of his dissenting opinions is recounted in Michael A. Musmanno, *Dissenting Opinions*, 60 Dick. L. Rev. 139 (1956).

[35] William J. Brennan, Jr., *In Defense of Dissents*, 37 Hastings L.J. 427, 435 (1986).

[36] John P. Frank, *Book Review*, 10 J. Legal Educ. 401, 404 (1958) (reviewing Alexander M. Bickel, The Unpublished Opinions of Mr. Justice Brandeis (1957)).

the consequent influence of judicial decision. A judge should not yield to pride of opinion, or value more highly his individual reputation than that of the court to which he should be loyal. Except in case of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort.

(e) Finally, we want to highlight this statement by Justice Traynor:

There are no established precedents in this state dealing with sand piles, as there are with respect to bodies of water, that might, under the doctrine of stare decisis, justify adhering to a rigid rule without regard to the facts of the particular case.

Is this a disingenuous or misleading statement? If so, why? This is a difficult question, demanding that you think about what precedent and stare decisis mean, before you attempt to answer. We will return to it in Chapter 5.

REYNOLDS v. WILLSON

51 Cal. 2d 94, 331 P.2d 48 (1958)

SHENK, Justice.

This is an appeal by the defendants from an order denying their motion for a judgment notwithstanding the verdict in an action for personal injuries.

The plaintiff is Keith Reynolds, a boy two years and three months of age at the time of the accident which occurred on January 31, 1953. He is the youngest son of Dr. and Mrs. William J. Reynolds, Jr., who were living at the time with their family of four children at the southeast corner of Wilson Avenue and Buckingham Way in the Fig Garden residential district in the City of Fresno. The defendants, Mr. and Mrs. Melville E. Willson, occupied their residence at the southwest corner of Van Ness Avenue and Buckingham Way. The homes of the two families occupy the full frontage of the block on Buckingham Way between Wilson and Van Ness Avenues with a vacant lot between the houses. The defendants' lot faces on Van Ness Avenue with a frontage of 135 feet, and extends 285 feet on Buckingham Way. Their residence was built in 1930 in what was then a sparsely settled subdivision. The area has since developed into a well occupied section with some 30 families residing in the immediate vicinity. At the time of the accident, approximately 50 or 60 children ranging in age from two years to teenage resided in the neighborhood. An elementary school is located a few blocks away. The defendants had occupied this property since April 1951.

At the rear of their property the defendants maintained a swimming pool. It is about 20 by 40 feet in dimensions and in depth is graduated from about 3 feet on its north side to 9 feet 4 inches on its south side. The shallow portion is toward Buckingham Way with steps leading down from ground level in the northwest corner. A stucco wall extends most of the way around the defendants' property. There is a 10 1/2 foot opening in the wall on the Buckingham Way side in the garage area with gate bolts on each side of the opening but no gate was then maintained. A concrete pavement forms an apron in front of the garage and leads

into a walk-way toward the residence and into a walk-way to dressing rooms back of the garage. Buckingham Way is not a through street, is relatively free from traffic and children were accustomed to resort to it for recreation. The swimming pool was visible therefrom by children and adults through the open gateway. At the time of the accident the cost of installing a gate in the opening in the stucco wall was not more than $25.

The Willsons and the Reynolds were neighborly and invitations to use the swimming pool were extended by the Willsons to the Reynolds and their children. The Reynolds took advantage of the invitation and used the pool on many occasions. Other children in the neighborhood enjoyed a like privilege during the swimming season which ended in September. A general condition, attached by the defendants to the use of the pool, was to the effect that when small children were to use the pool or play in the adjoining area, an adult should be present. The plaintiff was taken to the pool when adults were present during the swimming seasons of 1951 and 1952. On at least one occasion Mrs. Willson observed the plaintiff making his way toward the pool unattended and she returned him to his home.

At the close of the 1952 season the water in the pool was only partially drained. At the close of previous seasons it had been fully drained. Mr. Willson testified that the pool was left in a partially filled condition at the close of the 1952 season in order to prevent his and other children from playing therein and injuring themselves on the concrete surface. At the time of the accident water covered the concrete floor about to the base of the steps at the shallow end of the pool. Near the center of the floor was an abrupt decline to deeper water. In the winter months just prior to the accident the pool, as thus partially filled, had accumulated dirt, decayed leaves from nearby trees, and other decomposed material. Algae and other substances had accumulated and settled on the concrete surface beneath the water, causing it to become slippery when stepped upon.

On the day of the accident Mrs. Reynolds left in the early morning with her three older children for Yosemite Valley. Dr. Reynolds left for his office a little later. The plaintiff child stayed at home in the care of a maid-housekeeper. She put the child down in his room for his nap about 3:30 in the afternoon. When he was supposedly asleep she engaged in a telephone conversation in another room. In about 15 minutes she returned to the boy's room and found him missing. Apparently he had climbed out of a window. She searched the home and neighborhood but failed to find him. Dr. Reynolds returned to his home about 4 p.m. He joined in the search. He entered the defendants' yard through the opening in the wall on Buckingham Way which led to the swimming pool and saw the boy lying face down in the water. He went into the pool to rescue the child. Because of the slippery condition of the bottom, he was unable to carry him to the steps. As soon as possible artificial respiration was administered. Adrenalin was injected directly into the boy's heart. An ambulance was called and upon its arrival oxygen was administered, and the boy was taken to a hospital. He was unconscious for five or six days and at the end of 10 days was paralyzed. Since that time he has made a partial recovery but is afflicted with the symptoms of cerebral palsy and his brain and nervous system are permanently damaged.

The plaintiff, through his father as guardian ad litem, sued for damages on behalf of the child and obtained a verdict in the sum of $50,000. The defendants do not complain of the amount.

The action was brought apparently on three theories of liability; first, on the theory outlined in section 339 of the Restatement of the Law of Torts * * *.

The second was on the theory that if section 339 is not applicable to the facts of the case or should not be followed, another basis of liability was the physical condition of the pool, maintained as it was at the time of the accident as constituting a peril in the nature of a "trap" as that term has come to be known to the law of this state.

The third theory was that under the facts the defendants owed to the plaintiff the duty of ordinary care as an invitee on the premises.

The action was commenced and the litigation was conducted throughout on behalf of the plaintiff, by allegation, proof, argument to the jury and on appeal, on all three theories, and from the standpoint that the liability of the defendants depended on questions of fact to be determined by the jury.

As noted, the jury returned a verdict in favor of the plaintiff and the only question to be determined on the appeal is whether there is sufficient competent evidence in the record to support the verdict on any of the theories relied upon. * * *

It is contended by the plaintiff that the theory of liability prescribed by section 339 of the Restatement of the Law of Torts * * * is applicable to the facts of the case; that the conditions therein required to impose such liability have been met, and that such a theory is not inconsistent with, but is in conformity with the law of this state.

To meet the requirements of section 339 of the Restatement of the Law of Torts, it appears that the defendants were the possessors of the land; that the swimming pool was a structure artificially constructed thereon; that the plaintiff was an infant of tender years and a trespasser at the time of the accident as contemplated by the section; that the nature of the structure was such that the defendants knew that children were likely to trespass thereon; that the condition in which the pool was maintained at the time was such that the defendants realized or should have realized it involved an unreasonable risk of death or serious bodily harm to children[37]; that because of his youth the plaintiff did not discover the condition of the pool or realize the risk involved in coming within the area made dangerous by it, and that the cost of making it safe against children was slight as compared to the risk to young children trespassing thereon.[38]

---

[37] The defendant Melville E. Willson testified that after the close of the 1952 swimming season he realized that the condition in which he had left the pool after the former season was unsatisfactory even for the safety of his own children, so he decided to try to make it safer by partially filling it. This he did in December, the month before the accident happened. It was after the pool had been thus partially filled that the algae accumulated under the shallow water near the steps.

[38] It was in evidence that the aperture in the fence through which the plaintiff gained access to the

With the limitations placed upon the reviewing court in the consideration of the evidence on an appeal of this sort it must be concluded that the conditions necessary to establish liability on the theory of section 339 have been met.

The defendants maintain that if this be so and liability thus attaches under their situation the doctrine of attractive nuisance will apply to every possessor of land maintaining a private swimming pool. But such is not the case. It is established in this state that a private swimming pool is not an attractive nuisance as a matter of law. [Citations omitted.] The manner of its maintenance and use may, however, be such as to impose the duty of ordinary care on the possessor toward children of tender years notwithstanding they may technically occupy the position of trespassers at the time. That is the theory of liability imposed by section 339 whether the structure maintained be a swimming pool or some other artificial structure maintained upon his property.

The plaintiff does not rely solely upon the liability of section 339 but takes the position that the verdict is also sufficiently supported on both of the other two theories. With this we must agree at least as to the second theory.

The second theory is that the possessor of land is liable for the negligent maintenance on his premises of an artificial instrumentality which might constitute a dangerous contrivance in the nature of a "trap" and be encountered by children of tender years incapable of contributory negligence, and who are known by the possessor to enter or would be expected to enter his premises as trespassers. Such a case was Sanchez v. East Contra Costa Irr. Co., 1928, 205 Cal. 515, 271 P. 1060.
* * *

In the present case the jury was entitled to find that when in December the defendants partially filled the pool with water nearly to the steps in an endeavor to make it safer for their own children they had in effect made it more attractive to young children such as the plaintiff and that by maintaining the pool in its then condition they were guilty of maintaining a trap as to the plaintiff and responsible to him under the doctrine of ordinary care.

It should be said here, that it is the generally accepted rule as recognized by comment (b) to section 339, that the duty of the possessor does not extend to dangerous conditions on the land which are obvious even to children, such as the usual risks of fire, water, falling from a height and the like (see Prosser on Torts, 2d ed. 1955, 441-442). When however, there are, in addition to the usual risks, concealed dangers not obvious, especially to children, the trap theory may be applied.

In view of the fact that the order must be affirmed for other reasons, it is unnecessary to determine the extent to which the defendants owed a duty to the plaintiff as an alleged invitee. * * *

[The court proceeded to describe seriatim ten separate California appellate opinions, addressing the difference between obvious dangers and hidden traps.]

---

pool could have been closed or otherwise made safe from entrance by children at an expenditure of about $25.

Knight v. Kaiser Co., 1957, 48 Cal.2d 778, 312 P.2d 1089, does not preclude the application of section 339 of the Restatement of the Law of Torts to the present case. In that case, the decedent, a boy of ten, was suffocated when one of the defendant's sand piles collapsed on him. The sand was stored on the defendant's private property along with other building material, machinery and supplies. The discussion in that case emphasizes the obvious nature of the hazard involved in playing or digging in a sand pile. * * * It was held, consistent with section 339 of the Restatement of the Law of Torts, that the hazard of playing in the sand pile is an open and obvious one for which the possessor could not, under the facts of that case, be held liable.

From the foregoing cases and others which might be cited, it is apparent that recovery is granted or denied depending on the facts of each case. Where the elements of section 339 have been fulfilled or the existence of a trap has been sufficiently shown recovery has ordinarily been awarded on the basis of want of ordinary care on the part of the defendant. Where, as in the cases relied on by the defendant, one or more elements of section 339 have failed of proof and no evidence of a trap or other basis of liability proved, recovery has been denied. Recovery in the present case is consistent with the established law of this state.

The order is affirmed.

GIBSON, C.J., and CARTER and TRAYNOR, JJ., concur.

SPENCE, Justice (dissenting).

It has been said that "hard cases make bad law." Such appears to be the situation here; but this case is a hard one only in the sense that a young child has suffered an unfortunate injury. The question involved, however, is whether liability for that unfortunate injury was properly imposed upon the defendant landowners under the circumstances presented by the record. I am of the opinion that such liability was not properly imposed, and that the majority opinion sustains an order which cannot be sustained under the settled law of this state.

The fundamental question presented is whether there was a violation of any duty owed by the defendant landowners toward the trespassing child. This question in turn depends upon the nature and extent of any duty owed by the defendant landowners toward the trespassing child with respect to the condition of the landowners' premises.

The answer to this fundamental question cannot be determined by a mere reference to section 1714 of the Civil Code, which provides in general terms that liability may ordinarily be predicated upon "want of ordinary care." The application of that section is not universal, as it depends upon the relationship of the parties. Traditionally, as will be seen from the authorities hereinafter cited, the duty of a landowner toward a trespasser with respect to the condition of the premises has been held by this court, and practically every other court, to be definitely less than the general duty to exercise ordinary care, which last mentioned duty is owed by the landowner to the business visitor. There is sound reason for this differentiation in the nature of the duty owed, and it is firmly embedded in our law. It is neither an anomaly nor a mere remnant of ancient law. * * *

Heretofore, three members of this court have expressed their dissatisfaction with the settled law of this state on the subject of the duty owed by the landowner to trespassing children. Their views are set forth in the dissenting opinion of Mr. Justice Traynor in Knight v. Kaiser Co., 48 Cal.2d 778, 785–792, 312 P.2d 1089. They there advocated "disapproving the former cases." 48 Cal.2d at page 792, 312 P.2d at page 1097. While I do not agree that the numerous prior decisions should be disapproved, Mr. Justice Traynor made a forthright approach to the problem in that dissent. The dissenting justices in Knight v. Kaiser Co., supra, have now joined in the opinion prepared by Mr. Justice Shenk. That opinion purports to distinguish, rather than to disapprove, the prior decisions in which liability has been denied, but I am of the opinion that no tenable distinction can be made. In other words, the majority opinion here cannot be reconciled with the prior decisions, and the labored but futile attempt of the majority opinion to bring them into harmony has the unfortunate result of leaving the law in hopeless confusion.

Before discussing the applicable authorities, a brief statement should be made concerning the record in this case. The material facts are not in dispute. With respect to the status of the child, there is no question but that the child was a trespasser. * * *

With respect to the condition of the pool, the exhibits and all the testimony show that the water was clear and that the bottom of the pool, together with the small amount of leaves, silt and algae thereon, was plainly visible. Thus the condition shown involved nothing more than the common, obvious condition which is ordinarily incident to any body of water, natural or artificial.

The situation in this case is therefore controlled by the rules set forth in the numerous cases denying liability for injuries to trespassing children incurred by encountering the common, obvious hazards incident to such bodies of water. * * *

The majority opinion concedes that "It is established in this state that a private swimming pool is not an attractive nuisance as a matter of law." That opinion nevertheless bases its affirmance upon its conclusion that the evidence was sufficient to justify the imposition of liability either (1) under the theory embodied in section 339 of the Restatement of the Law of Torts, or (2) under the so-called "trap" theory. I cannot agree. Where the evidence is uncontradicted, the question of the sufficiency of the evidence to bring the condition within any exception to the general rule limiting the liability of the landowner to trespassers has been treated by the above-mentioned authorities as a question of law for the court. Here the evidence was uncontradicted. There was no showing of any condition presenting anything but the common, obvious danger ordinarily incident to any body of water. It therefore follows as a matter of law under the cited authorities that liability was improperly imposed.

Considering first the so-called "trap" theory, * * * liability has never been imposed in this state under the "trap" theory, or any other theory, for any common, obvious condition incident to a body of water, natural or artificial. On the contrary, liability under the "trap" theory can only be based upon a "hidden danger" (65 C.J.S., Negligence, § 38, pp. 503–504) or a "concealed danger" (35 Cal. Jur.2d, Negligence, § 100, p. 609). * * *

The Sanchez case was later distinguished by this court in Melendez v. City of Los Angeles, supra, 8 Cal.2d 741, 68 P.2d 971, where liability was denied. This court there affirmed a judgment entered following the sustaining of a demurrer without leave to amend on the ground that neither the "attractive nuisance" doctrine nor the "trap" doctrine was applicable. There it was alleged that the two young boys were drowned in an artificial pool where the "deep hole in this pool was completely concealed by the muddy condition of the water in the pool." This court * * * held the [lower' court's] decision to be consistent with the Sanchez case on the ground that the "concealed hole was not an artificial contrivance or appliance maintained by the owner. . . ." This court further said with respect to the Sanchez case, "In the latter case there was a concealed contrivance which no one would suspect." * * *

Turning now to the consideration of section 339 of the Restatement of the Law of Torts, the majority opinion appears to give that section the force of a legislative enactment nullifying our prior decisions, and extending the exceptions to the general rule to conditions other than those falling within the so-called "attractive nuisance" exception or the "trap" exception, as defined by our decisions. Of course, the Restatement does not have the force of a legislative enactment and in any event, section 339, properly construed, has never heretofore been interpreted by this court as declaring a rule purporting to extend those exceptions. On the contrary, reference has been made to that section in our decisions in which liability has been denied (Knight v. Kaiser Co., supra, 48 Cal.2d 778, 312 P.2d 1089; Melendez v. City of Los Angeles, supra, 8 Cal.2d 741, 68 P.2d 971), and the section has been treated as establishing tests consistent with such decisions. The decisions have further stressed the harshness of any exceptions to the general rule limiting the liability of the landowner to the trespasser and have cautioned against the extension of such exceptions. Heedless of that caution, the majority opinion now has apparently given section 339 its broadest possible interpretation and thereby sanctions the extension of the heretofore well-defined exceptions into ill-defined fields. Any such extension to cover the situation here is obviously inconsistent with our prior decisions as well as with the language employed in the opinions.

The background of section 339, which throws some light upon its proper interpretation, is considered at length in Prosser on Torts, 2d Ed., pp. 432 et seq. * * * Dean Prosser's interpretation of section 339 appears to be in line with the above-mentioned authorities denying liability for injuries sustained by trespassing children in encountering the common, obvious dangers of bodies of water, natural and artificial.

From this historical background, it seems evident that section 339 was intended merely to follow the rules generally adopted by the courts of those jurisdictions, including California, which had theretofore recognized the so-called "attractive nuisance" exception; and to formalize and rationalize that exception. * * *

This court adopted the "attractive nuisance" exception at an early date, but it has not heretofore attempted to interpret section 339 of the Restatement of the Law of Torts or to discuss definitively its relation to our decisions. * * * The opportunity is now presented for this court clearly to define its position, and I think that it should grasp that opportunity. This the majority opinion has failed to do. It

states that "the conditions necessary to establish liability on the theory of section 339 have been met"; it makes a futile attempt to distinguish the prior decisions; it declares that "recovery is granted or denied depending on the facts of each case"; and it makes the bald statement that "Recovery in the present case is consistent with the established law of this state." In my opinion, the majority opinion will serve only to confuse rather than to clarify the settled law in this important field. * * *

The necessity for clarification by this court of the meaning of section 339 is apparent from a reading of Copfer v. Golden, 135 Cal.App.2d 623, 288 P.2d 90, upon which the District Court of Appeal relied in its opinion in the present case. Reynolds v. Willson, Cal.App., 308 P.2d 464. The Copfer case did not involve a body of water, but its reasoning shows that section 339 was there construed in a manner which would equate its requirements merely with section 1714 of the Civil Code. There the injury to the trespassing child occurred when it fell from a trailer parked on the premises of the owner. There is nothing in that opinion to indicate that the trailer was anything other than a lawful type of trailer presenting only the common, obvious risks which might be presented by any type of trailer upon which a child might see fit to climb. For aught that appears, it was the type of vehicle which could have been lawfully parked upon the streets without incurring liability to children who might have climbed upon and fallen from it. Nevertheless, the court there sustained a judgment imposing liability where the injury occurred when the trespassing child climbed upon and fell from the trailer while parked on the owner's property. In my opinion, the court there placed an erroneous interpretation upon section 339 and further, reached the wrong result on the facts even under its own erroneous interpretation of the section. There was no petition for hearing by this court. I believe that this court should disapprove Copfer v. Golden, supra, and should clearly enunciate this court's interpretation of section 339 for the guidance of the bench and bar. That case and its interpretation of section 339 was made the cornerstone of the opinion of the District Court of Appeal in the present case, when it declared that "The rule in California is stated in Copfer v. Golden, 135 Cal.App.2d 623, 288 P.2d 90, 92." (Reynolds v. Willson, supra, Cal.App., 308 P.2d 464, 468. It is the only case cited in the briefs or by the District Court of Appeal which has any tendency to support the conclusion reached by the majority, and yet the majority opinion fails expressly to approve or disapprove, or even to mention it.

Of the cases which are cited in the majority opinion, all are in accord with the views expressed in this dissent, and none lend support to the majority. * * *

While this court unquestionably has the power to disapprove prior decisions where it finds compelling reasons for so doing, it likewise has the duty to exercise that power sparingly to the end that the law may possess to a high degree the desirable attributes of certainty and stability. Furthermore, if compelling reasons do appear to this court for disapproving settled rules of law, then this court has the further duty of expressly stating such disapproval and of clearly declaring the new rules which are to replace the old. Those duties cannot be met by declaring in vague terms "that recovery is granted or denied depending on the facts of each case" or by the employment of reasoning which is couched in obscure words and phrases. The bench and bar will be compelled to speculate on the answer to the

question: Has this court now departed from the settled law of this state, and if not, what is the effect of the majority opinion? Despite the declaration of the majority that the imposition of liability here is "consistent with the established law of this state," it fails to sustain that thesis, and it leaves the answer to the above question shrouded in doubt. * * *

In conclusion, it must be remembered that just as happened here, a tragic accident will occasionally occur. But accidents to children resulting from common, obvious conditions are no more unusual when they are trespassing on the land of others without right than they are when playing on their own premises or on public property where they have a right to be. Danger and reasonable risks of harm are present everywhere. Clearly the play apparatus customarily found in public school yards and in public playgrounds, as well as the conditions found around lakes and ponds in public parks, are all "attractive" to children and present dangers and risks of harm at least equal to those presented by any condition which existed on the premises of the defendant landowners. Nevertheless, all such common, obvious dangers have been consistently held to be insufficient to impose liability. I would adhere to the settled rules and reverse the order.

SCHAUER and MCCOMB, JJ., concur.

NOTES AND QUESTIONS

(1) "This is an appeal by the defendants from an order denying their motion for a judgment notwithstanding the verdict . . . ," a motion now called the *renewal of a motion for judgment as a matter of law.*[39] Explain what the defendants are arguing.

(2) "As noted, the jury returned a verdict in favor of the plaintiff and *the only question to be determined on the appeal* is whether there is sufficient competent evidence in the record to support the verdict on any of the theories relied upon." Prior to reading this, would you not have thought that "the question to be determined on the appeal is whether landowners who maintain a pool on their premises shall be under a duty of care toward trespassing children (young children?)"?

Explain the difference between these two formulations of "the question to be determined on the appeal."

(3) Justice Shenk's change of mind or heart accounts for the different outcomes in *Knight* and *Reynolds*, decided a year and four months apart. (Do you suppose it was Justice Traynor's dissent in *Knight* that persuaded him? Then again, Justice Shenk voted to let the parents of the drowned child recover in *Sanchez*.) Is it "just" for a legal system to take perhaps even drastic turns in the rules of the game because of one man or one woman?

(4) In California, the Chief Justice assigns the task of writing the court's

---

[39] See text accompanying note 41 in Chapter 1.

opinion. Here Chief Justice Gibson apparently chose Justice Shenk. Do you suppose Justice Traynor would have written a different opinion (than the one Justice Shenk wrote) had he been the author? What might Justice Shenk have done then? What effect would that have had on the "holding" of the case?

Incidentally, the mechanism for assigning opinions varies from court to court. The California Supreme Court is unusual in having the Chief Justice assign the opinion even if he is in dissent. In the United States Supreme Court, the Chief Justice assigns the opinion if he is in the majority; otherwise the senior Justice who is in the majority makes the assignment. On the New York Court of Appeals, opinion assignments are by lot. Think about why these different approaches might have been adopted. Which makes the most sense?

(5) Do people rely on "the law" — including precedential cases?

> Practically in its application to actual affairs, for most of the laity, the Law, except for a few crude notions of the equity involved in some of its general principles, is all *ex post facto*. When a man marries, or enters into a partnership, or buys a piece of land, or engages in any other transaction, he has the vaguest possible idea of the Law governing the situation, and with our complicated system of Jurisprudence, it is impossible it should be otherwise. If he delayed to make a contract or do an act until he understood exactly all the legal consequences it involved, the contract would never be made or the act done. Now the Law of which a man has no knowledge is the same to him as if it did not exist.[40]

Is it the laity with whom we are concerned?

And see also Cardozo:

> The picture of the bewildered litigant lured into a course of action by the false light of a decision, only to meet ruin when the light is extinguished and the decision overruled, is for the most part a figment of excited brains. The only rules there is ever any thought of changing are those that are invoked by injustice after the event to shelter and intrench itself. In the rarest instances, if ever, would conduct have been different if the rule had been known and the change foreseen. At times the change means the imposition of a bill of costs that might otherwise have been saved. That is a cheap price to pay for the uprooting of an ancient wrong.[41]

Then again:

> The doctrine [that tort liability for injuries suffered by third parties on unsafe leased premises is confined to the lessee and does not extend to the landlord], wise or unwise in its origin, has worked itself by common acquiescence into the tissues of our law. It is too deeply imbedded to be superseded or ignored. Hardly a day goes by in our great centers of population but it is applied by judges and juries in cases great and small. Countless tenants, suing for personal injuries and proving nothing more

---

[40] John Chipman Gray, The Nature and Sources of Law 100 (1921).

[41] Benjamin N. Cardozo, Growth of the Law 122 (1924).

> than the breach of an agreement, have been dismissed without a remedy in adherence to the authority of *Schick v. Fleischhauer* and *Kushes v. Ginsberg*. Countless visitors of tenants and members of a tenant's family have encountered a like fate. If there is no remedy for the tenant, there is none for visitors or relatives present in the tenant's right.[42]

(6) The *Reynolds* decision "stands on more than one leg," as the saying goes. Does being a centipede make a case a stronger, more stable precedent than being a flamingo? Or is the effect just the reverse: the more "legs," the weaker the precedential value of the case?

(7) Justice Shenk says the defendant asserts that Section 339 of the Restatement is not applicable; "that the cases in this state are inconsistent with the declaration of liability and duties stated in that section. *Upon examination it is found that this is not so*." (Emphasis added.) He then buttresses this latter statement with Peters *v. Bowman*; *Melendez v. City of Los Angeles*; and *Knight v. Kaiser*. In none of these cases (nor in any of the others he discusses) did the plaintiff recover. How, then, can Justice Shenk possibly say "this [the non-applicability of sec. 339] is not so"? Did not Llewellyn tell us: "*no rule can be the ratio decidendi from which the actual judgment * * * does not follow*?" (Emphasis his).

(8) Justice Spence has two separate quarrels with the court: one is over what the substantive rule ought to be in cases of this kind and the other concerns how the majority is going about its business. In which of these is he more convincing and why?

(9) A private swimming pool — is it or is it not an "attractive nuisance"? Could a defendant still prevail in a pool case in which a young child has come to harm on a motion to dismiss for failure to state a claim upon which relief can be granted? After all, Justice Shenk says: "It is established in this state that a private swimming pool is not an attractive nuisance as a matter of law."

GARCIA v. SOOGIAN

52 Cal.2d 107, 338 P.2d 433 (1959)

GIBSON, Chief Justice.

In this action, which was tried by the court sitting without a jury, plaintiff recovered damages for injuries she sustained while playing on defendants' lot, and defendants have appealed.

The accident happened about 8 p.m., when it was getting dark. Plaintiff, who was 12 years and 8 months old, had trespassed on defendants' lot in order to play a form of hide-and-seek with other children. She cut her ankle when, running in pursuit of a playmate, she attempted to jump over a stack of prefabricated building panels containing windows, failed to clear the stack, and landed on top, her foot crashing through the glass. The panels over which she jumped were part of building materials stored on the lot by defendants for the purpose of erecting

---

[42] Cullings v. Goetz, 256 N.Y. 287, 176 N.E. 397, 398 (1931) (Cardozo, J.).

several prefabricated houses. The materials had been placed about 120 to 150 feet back from the street. The panels with glass, each weighing about 200 pounds, had been stacked in firm, orderly piles which were from 24 to 30 inches high, 8 feet long and at least 4 feet wide. Plaintiff's sister, who was one of the children on the lot at the time of the accident, testified that she saw the stacks that evening and that none of them were covered. There was other testimony that at least two of the piles were uncovered. During working hours defendants, who were engaged in building at a nearby site, watched the lot and ordered children away, and, in the absence of defendants, a man who lived in the vicinity did the same on their behalf whenever he saw children on the lot.

The sole question presented on this appeal is whether the judgment is supported by the evidence.

* * * The rule set forth in section 339 [of the Restatement of Torts] has been adopted as the law of this state. Courtell v. McEachen, 51 Cal.2d 448, 334 P.2d 870; Reynolds v. Willson, 51 Cal.2d 94, 331 P.2d 48.

It is apparent that the application of this rule depends upon a number of variable factors. The question of liability must be decided in the light of all the circumstances and not by arbitrarily placing cases in rigid categories on the basis of the type of condition involved without giving due consideration to the effect of all the factors in a particular situation. There is no inflexible rule which would exclude liability in every case involving building materials or buildings under construction, and each such case must be judged on its own facts. * * *

The circumstance that a condition giving rise to injury is common in character does not necessarily exclude liability. Of course, if a dangerous condition is common, children are more likely to be aware of the risk than if the condition is unusual, but it does not follow that common conditions can, under no circumstances, give rise to dangers which are not obvious to children. What is important is not whether conditions are common in character but whether their dangers are fully understood by children. In discussing the duty of care owed by the possessor of land in connection with the ability of children to appreciate the risk presented, the Restatement says, in comment (b) to section 339, that the duty extends to dangerous conditions "which, though observable by adults, are likely not to be observed by children or which contain risks the full extent of which an adult would realize but which are beyond the imperfect realization of children." The duty, of course, does not extend to "those conditions the existence of which is obvious even to children and the risk of which is fully realized by them." Rest., Torts, § 339, comment (b). The further statement in comment (b) that the limitation on the duty operates to remove liability with respect to "the normal, necessary and usual implements which are essential to [the land's] normal use," appears in a sentence which, when taken as a whole, refers only to those situations in which children, knowing the danger of the implements as fully as adults, use them "in a spirit of bravado."[43]

---

[43] The sentence in question reads: "This limitation of the possessor's liability to conditions dangerous to children, because of their inability to appreciate their surroundings or to realize the risk involved therein, frees the possessor of land from the danger of liability to which he would otherwise be subjected

There is thus no justification for regarding the commonness of a condition as having a decisive significance independent of the obviousness of the risk. Unfortunately, several cases, both in allowing and denying recovery, have used broad language which could be understood as meaning that a common condition can never give rise to liability. Knight v. Kaiser Co., 48 Cal.2d 778, 782, 312 P.2d 1089. Dean Prosser correctly points out: "Many courts have said that the doctrine does not apply to common conditions . . . or that it is limited to . . . special and unusual conditions of modern industry; but all such statements appear to be made with reference to the particular case, and to be directed at nothing more than the existence of a recognizable and unreasonable risk of harm to the child." Prosser on Torts (2d Ed. 1955) 443. See also Reynolds v. Willson, 51 Cal.2d 94, 331 P.2d 48.

A common condition, namely, fire or embers, led to the injuries of the minor plaintiff in the recent case of Courtell v. McEachen, 51 Cal.2d 448, 334 P.2d 870, and we held that, if the condition causing the accident was not obvious to the child, there could be liability under the law applicable to trespassing children. * * * We wish to emphasize that the mere fact that the condition causing an injury is common in character will not prevent recovery by a trespassing child.

With respect to whether the circumstances of this case warrant recovery, it should be kept in mind that a possessor of land is not under a duty to prevent every possibility of harm but only to exercise due care as to those risks which he should realize are unreasonably great and threaten serious bodily harm in a way unlikely to be appreciated by children whose trespass he should foresee. The ability to appreciate danger varies, of course, with the age of the child, and there can be no recovery if the child is of sufficient age and mental capacity to look out for himself under the circumstances presented.

As we have seen, the panels containing windows were heavy and were firmly stacked a considerable distance from the street in such a manner that the glass could be reached only at the top of the piles, 24 to 30 inches from the ground. The chance was slight that a child of plaintiff's age would fail to see the glass or appreciate what risk was presented, and there is no evidence that plaintiff was of less than average intelligence for her age. It may be, as plaintiff in effect testified, that, because it was getting dark, she did not see the glass before jumping, but defendants could not reasonably be required to foresee that there was any substantial likelihood that a normal child of more than 12 would not appreciate the danger of jumping over a large pile of building materials when darkness prevented sufficient perception of the nature of the obstacle. In the light of the undisputed facts now before us, there is no sound basis for concluding that the condition which caused plaintiff's injury should have been recognized as constituting an unreasonably great risk of serious bodily harm which plaintiff was unable to discover or appreciate because of her immaturity. Accordingly, the evidence did not warrant a recovery by plaintiff.

The judgment is reversed.

---

by maintaining on the land the normal, necessary and usual implements which are essential to its normal use but which reckless children can use to their harm in a spirit of bravado or to gratify some other childish desire and with as full a perception of the risks which they are running as though they were adults." Rest., Torts, § 339, comment (b).

SHENK, TRAYNOR, and PETERS, JJ., concur.

[If the defendant asked your advice, would you tell him it is quite safe for him to leave his stuff where it is?]

SPENCE, Justice (concurring and dissenting).

I concur in the judgment of reversal, but for the reasons hereinafter stated, I am of the opinion that such reversal should be accompanied with directions to enter judgment in favor of the defendants.

This is another of a series of recent appeals involving the same fundamental question, namely, the nature of the duty owed by the landowner to the trespassing child with respect to the condition of the landowner's premises. While I agree with the majority that "the evidence does not bring the case within the rule set forth in section 339 of the Restatement of Torts," I am further of the opinion that the reversal should be squarely based upon the decisional law of this state involving comparable situations in connection with building materials or with buildings under construction such as Knight v. Kaiser Co., 48 Cal.2d 778, 312 P.2d 1089.

While the reversal ordered by the majority here is entirely consistent with the long line of "former cases," I am of the opinion that such reversal is inconsistent with the majority opinions in Reynolds v. Willson, 51 Cal.2d 94 [331 P.2d 48], and Courtell v. McEachen, 51 Cal.2d 448 [334 P.2d 870]. I discussed the inconsistency of the Reynolds and Courtell opinions with the "former cases" in my dissenting opinion in those cases, and need not repeat that discussion here. Suffice it to say that each of those cases, like the present one, involved only a common, obvious risk rather than some uncommon or concealed risk such as had been previously required to bring the condition within any recognized exception to the general rule which limits the duty owed by the landowner to the trespassing child.

If the well-considered rules established by the "former cases" are to be disregarded upon the ground that they put cases "in rigid categories on the basis of the type of condition involved," then the majority should expressly disapprove those cases, rather than being content with giving them passing reference and leaving to possible conflicting implications the question of whether those cases are being approved or disapproved. However, it should be stated in this connection that a legal principle which is supported by sound reason and abundant authority, should not be disregarded merely because it may impart a fair degree of certainty, or even rigidity, to an important phase of the law. Adherence to well-considered and well-established guiding principles makes for stability in the law while, on the other hand, the jumping from case to case, without following any consistent pattern and without regard for established principles, can only create endless confusion. * * *

But regardless of whether the majority may see fit to approve or disapprove * * * Knight v. Kaiser Co., supra, the position of the majority should be made clear. The existing chaos will only be perpetuated by continuing to quote section 339 of the Restatement of Torts without adequately discussing its relation to the "former cases," and then resting upon the truism that "recovery is granted or denied depending on the facts of each case." Reynolds v. Willson, supra, 51 Cal.2d 94, 106, 331 P.2d 48, 60. Just as the conflict between the two divergent lines of cases and

the conflict between the varying constructions placed upon section 339 become more apparent with the filing of each decision, so the duty of this court to resolve those conflicts becomes more imperative. Clarification could be easily accomplished by frankly recognizing the conflict and by meeting the issue squarely; but until that is done, the bench and bar will be compelled to journey on insecure footing over uncertain legal ground in a perplexing situation similar to that described by Justice Learned Hand when he said: "It is quite impossible to establish any rule from the decided cases; we must step from tuft to tuft across the morass." Hutchinson v. Chase & Gilbert, 2 cir., 45 F.2d 139, 142.

For the reasons stated, and for the added reason that there is no suggestion that any further evidence could be adduced which would justify the imposition of liability upon the defendants, I would reverse the judgment with directions to the trial court to enter judgment in favor of the defendants.

SCHAUER and MCCOMB, JJ., concur.

QUESTIONS

(1) What did you understand "the law" to be after *Reynolds* and before *Garcia*?

(2) Is it the same now that we have *Garcia*?

(3) All seven justices agreed that the appellant won, but they split 4-3 regarding rationale and, on a narrow point, outcome. What exactly is the difference between the order issued by the court and that which the concurring (and dissenting) justices would have issued?

KING v. LENNEN

53 Cal. 2d 340, 1 Cal. Rptr. 665, 348 P.2d 98 (1959)

GIBSON, Chief Justice.

Plaintiffs brought this action for damages for the wrongful death of their son, Boyd, who drowned in defendants' swimming pool. A general demurrer to the complaint was sustained without leave to amend, and plaintiffs have appealed from the ensuing judgment.

The allegations of the complaint may be summarized as follows: Defendants' property was located on the northwest corner of an intersection, and they maintained an artificial swimming pool on the premises about 30 feet from one of the streets. Along that street defendants had partially constructed a concrete block wall with an opening four feet wide directly opposite the pool, and facing the other street was a wood rail fence with openings through which children could readily enter. Defendants permitted their cow, two dogs, and three horses to roam freely near the pool. The animals and the pool could be seen by children of tender years who regularly used the streets adjacent to defendants' premises, and, as defendants knew or should have known, such children, attracted by what they saw, habitually entered the premises and played with the animals and in and about the

pool. The water in the pool was three and one-half feet deep at the shallow end and nine feet at the deep end. It was dirty and opaque, and its depth could not be ascertained by looking into it. A sharp drop divided the shallow from the deep water, there were no steps, ladders, rails, or other fixtures to assist a person in the pool to hold on or to climb out, and the walls and bottom of the pool were lined with a slippery plastic material. Boyd, who was one and one-half years old, lived with his parents on the southeast corner of the intersection diagonally across from defendants. During the five months immediately preceding the accident, defendants' teen-age daughter had been employed as a baby sitter by plaintiffs for compensation, and in order to entertain Boyd on these occasions, as defendants knew or should have known, their daughter would bring him to their home and permit him to play with the animals near the pool, with the result that he became attracted to the animals and the pool. Due to the frequency of the babysitting arrangement the relationship was a continuing one, and, by reason of the relationship, Boyd on the date of his death was on the premises at the express invitation of defendants. No adults were present between 6 a.m. and 6 p.m. on weekdays, including the day when at approximately 11 a.m. Boyd's body was found at the bottom of the pool. The pool constituted a dangerous condition and an unreasonable risk of bodily harm to children of tender years, who could not reasonably be expected to realize or appreciate the danger, and Boyd was attracted to the pool without knowledge of the danger. The usefulness of maintaining the pool was slight as compared with the risk involved, and reasonable safeguards could have been provided at small cost.

The rule set forth in section 339 of the Restatement of Torts has been adopted as the law of this state with respect to the liability of a possessor of land for the death of or injury to a child trespasser. * * *

As we explained in Garcia v. Soogian, 52 Cal.2d 107, 110, 338 P.2d 433, 435, the question of liability must be decided in the light of all the circumstances and not by arbitrarily placing cases in rigid categories on the basis of the type of condition involved. We also pointed out in that case that the circumstances that a condition giving rise to injury is common in character does not necessarily exclude liability, that the ability to appreciate danger varies with the age and mental capacity of the child, and that what is important is not whether conditions are common in character but whether their dangers are fully understood by children. In Courtell v. McEachen, 51 Cal.2d 448, 458, 334 P.2d 870, we held that a young trespassing child who was injured by a common condition, namely, fire or embers, might recover under the law applicable to trespassing children and that it was for the trier of fact to determine whether the child was injured by a risk not obvious to her. While a child is more likely to be aware of a dangerous condition which is common than of one which is unusual, see Garcia v. Soogian, it seems obvious that the common nature of a danger, such as that of drowning in a pool, should not bar relief if the child is too young to realize the danger. Even very young children cannot always be kept under the supervision of their parents, and the question whether a parent in a wrongful death case was guilty of contributory negligence in permitting his young child to play unattended near the defendant's property will ordinarily be for the trier of fact.

A number of cases decided before Garcia v. Soogian and Courtell v. McEachen reasoned that the "attractive nuisance" doctrine does not apply unless the dangerous condition is uncommon and different from natural conditions which exist everywhere and that a body of water, natural or artificial, is a common danger and therefore, as a matter of law, will not subject the possessor to liability for the drowning of a trespassing child, even if that child is too young to appreciate the danger. [Citations omitted.] This reasoning is inconsistent with the Restatement rule, and the cases cited above [inter alia, *Knight* and *Peters*] are disapproved insofar as their language or holdings are contrary to the views expressed herein.

The complaint alleges facts sufficient to meet the requirements enumerated in section 339 of the Restatement and thus states a cause of action. It is specifically alleged that defendants knew or should have known that children of tender years habitually entered the premises and played in and about the pool and that defendants knew or should have known that Boyd had frequently been brought to the vicinity of the pool by their daughter with the result that he had become attracted to it. The allegations describing the condition of defendants' pool and the surrounding premises, including the absence of an adequate fence or other safeguards, state facts sufficient to permit a trier of fact to find that defendants should have realized that a serious danger of drowning was presented with respect to any unsupervised child of Boyd's age who might come to the pool. Obviously it could be found that a child of one and one-half years would not understand the risk involved in being near a swimming pool, and it is alleged that Boyd did not know the danger. The last of the requirements set forth in section 339 was also sufficiently covered by the allegations that the utility to defendants of maintaining the condition was slight as compared with the risk to young children and that reasonable safeguards could have been provided at little cost.

The judgment is reversed.

TRAYNOR, PETERS, and WHITE, JJ., concur.

SPENCE, Justice.

I dissent. * * * I would adhere to the settled rules established by the "former cases" and would affirm the judgment.

SCHAUER and MCCOMB, JJ., concur.

NOTES AND QUESTIONS

(1) Could *King* have been written more narrowly? On the facts described by the Court, was it necessary to "disapprove" *Peters* and *Knight* in order to reverse the lower court's decision?

(2) Is it proper for Justice Spence to continue to dissent? Isn't the law now "settled," and is he not simply being obstreperous?

(3) Consider:

> This kind of dissent, in which a judge persists in articulating a minority view of the law in case after case presenting the same issue, seeks to do more than simply offer an alternative analysis — that could be done in a single dissent and does not require repetition. Rather, this type of dissent constitutes a statement by the judge as an individual: "Here I draw the line." Of course, as a member of a court, one's general duty is to acquiesce in the rulings of that court and to take up the battle behind the court's new barricades. But it would be a great mistake to confuse this unquestioned duty to obey and respect the law with an imagined obligation to subsume entirely one's own views of constitutional imperatives to the views of the majority. * * * We are a free and vital people because we not only allow, we encourage debate, and because we do not shut down communication as soon as a decision is reached. As law-abiders, we accept the conclusions of our decision-making bodies as binding, but we also know that our right to continue to challenge the wisdom of that result must be accepted by those who disagree with us. So we debate and discuss and contend and always we argue. If we are right, we generally prevail. The process enriches all of us, and it is available to, and employed by, individuals and groups representing all viewpoints and perspectives. * * *
>
> The right to dissent is one of the great and cherished freedoms that we enjoy by reason of the excellent accident of our American births.[44]

(4) Would it be fair to say something like the following: California attractive nuisance law is "settled" in this sense: all landowners owe a duty to all children.[45] But whether they have breached that duty will depend on the particular circumstances of each case. There may be the unusual case in which the circumstances are such that no untainted, reasonable jury could possibly find for the plaintiff. In that event, the court will direct a verdict for the defendant. But in the overwhelming number of cases the jury will have to pass judgment on whether the landowner's conduct measures up to the standard that the community expects from its members; whether in other words, the defendant has acted in the manner of the reasonable and prudent person.

(5) By the time the Supreme Court decides *King*, California attractive nuisance law looks awfully different than it had at the beginning of the case sequence. The cumulative change is profound, but no single decision marks an abrupt break; the change has been incremental. Try to chart the steps of this transformation.

(6) *King* brings our case sequence to a close, but of course it does not mark the end of the evolution of California law. No case ever does or could. What do you

---

[44] Brennan, *supra* note 35, at 437–438. Justice Brennan was speaking in the context of the death penalty cases. From January 14, 1957 to July 19, 1990, Justice Brennan filed a total of 2,347 dissents. Included in that number are approximately 1500 "stock dissents" in death penalty cases, a great many of them from denials of certiorari in which Justice Brennan would simply note that he deemed the death penalty unconstitutional in all circumstances. These figures are from Charles G. Curtis, Jr., *The Great Dissenter*, Remarks Delivered at the 1990 Brennan Clerks' Reunion, Oct. 13, 1990. Justice Brennan also wrote a great many opinions *for* the Court.

[45] If you have already studied *Palsgraf* in your Torts class, you will recognize Judge Andrews' dissent in this statement. If you haven't yet, try to recall this discussion when you do.

suppose comes next? Where is this area of California law headed?

A Contemplative Note

At least as to swimming pools, is the proper level of precaution best left to local ordinances requiring fencing? Should failure to fence and consequent death result in a criminal prosecution to bring the matter forcefully to the attention of pool owners? Compare state statutes that require the removal of doors from discarded refrigerators so that children do not suffocate. Should pool manufacturers and installers be subject to a code that provides for safety?

In short, does the problem of swimming pools push at the limits of what courts can do effectively? Is this an instance where a legislative solution is superior to the case by case development of the common law?[46]

Assignment

Mr. and Mrs. Harrington live in a residential area of Sullivan Harbor, a coastal town in California. They have a dog run, an orchard, and a 20 x 40 foot swimming pool in their backyard (the front of their house faces the ocean). Because the yard is an attraction for children, the Harringtons have erected a six-foot fence to enclose the entire rear portion of their lot.

One of the Harrington's neighbors, Herbert Young, had a five and a half-year old son, an ill-tempered and recalcitrant child named Julius. Young often warned Julius not to go on to other people's property, but Julius was not wont to listen and on occasion joined other children in climbing over the Harrington's fence. Whenever the Harringtons came upon these unwanted visitors, they immediately ordered them off the premises. On one or two occasions they went so far as to call the parents of some of the youngsters to complain.

One fine morning, Mrs. Harrington began to empty the pool in order to clean it. By noon, the pool still contained water at the deep end, but the shallow part had fully drained. Mrs. Harrington covered the exposed portion of the bottom with a cleaning substance. At that moment, she was called into the house to answer the telephone. She returned approximately thirty-five minutes later and discovered Julius' body floating in the deep end of the pool. Attempts to revive him were unsuccessful. Footprints indicated that Julius had probably climbed down the steps into the shallow part of the pool, lost his balance on the surface made slippery by the detergent, and slid into the water.

(1) Young has come to your law firm for advice. A senior partner asks for your opinion. He knows you have just read the nine pertinent cases. He wants you to prepare a written statement (a "memorandum of law") about three pages long, which synthesizes California "attractive nuisance" law. State which cases would support Mr. Young's claim, which would represent obstacles, what arguments to make, and what arguments to expect from the opposing side.

(2) You work in a different law firm. The Harringtons have come for help; they are now the defendants in Mr. Young's suit.

---

[46] Judge Weinstein suggested that we raise these questions with you.

(a) The trial court denied their motion to dismiss for failure to state a claim upon which relief can be granted. The District Court of Appeal affirmed the trial court's decision. The California Supreme Court has agreed to hear the case. A senior partner has asked you to prepare a three-page draft of the brief to be submitted to the Court, asking for a reversal.

(b) The trial court denied their motion for a directed verdict and the jury returned a verdict for Mr. Young. The trial court also denied the Harringtons' motion for a judgment notwithstanding the verdict. They want to know what chances they may have to prevail if they appealed. Your senior partner wants a three-page memo explaining your thinking on the matter.

(3) You are a law clerk to the Chief Justice of the California Supreme Court while the case described in 2(a) above is before the Court. She has asked you to make a tentative decision and to prepare a three-page draft opinion.