THE ALLURING TURNTABLE

REARDON v. ATTORNEY-GENERAL, [1954] N.Z.L.R. 978.

The question of the liability of occupiers of dangerous premises, already complex with its distinctions between trespasser licensee and invitee, becomes even more so when the person injured is a child.

Two aspects of this question arose recently in Reardon v. Attorney-General, [1954] N.Z.L.R. 978. A child of six was playing on a railway turntable near the Taita Railway Station when the turntable was set into motion. His feet were jammed and were severely injured. The evidence showed that there was a worn track leading up to the turntable, that the fence was down and it was quite clear that the area was used by children of the neighbourhood as a playground. Efforts had been made on many occasions by railway officials and employees to keep children away from the turntable, and the plaintiff himself had been chased away once or twice by railway men. On other occasions, however, children including the plaintiff had been allowed to stay and even assist the railway men shift the turntable.

First was the child on the turntable as a licensee of the Railway Department? If he were a trespasser no action would lie. Secondly, if he were a licensee, was the Department in breach of any duty?

To establish a licence, a plaintiff must prove that he has the permission, express or implied, of the occupier to enter the premises. This is unequivocally stated by Viscount Dunedin in Robert Addie and Sons (Colleries) Ltd. v. Dumbreck, [1929] A.C. 358 at 373:

> . . . it is permission that must be proved, not tolerance, though tolerance in some circumstances may be so pronounced as to lead to a conclusion that it was really tantamount to permission.

The same principle is enunciated by Lord Goddard in Edwards v. Railway Executive, [1952] A.C. 737 at 747:

> . . . there must be evidence . . . that the landowner has so conducted himself that he cannot be heard to say that he did not give it.

In Reardon's case (supra) it was necessary for the plaintiff to establish this permission from the Railway Department. Fair J. considered that there was evidence of permission by the employees, but no evidence that the employees' permission bound the Crown (idem at 996). North J. considered that this was not the real issue. The plaintiff relied not on any authority to invite on the part of the employees, but on the casual attitude of the Department to the presence of the children on its land. He relied on the principle enunciated by Viscount Dunedin in Addie's case (supra at 371) that the licensor

> . . . has either expressly permitted him to use his lands or knowledge of his presence more or less habitual having been brought home to him, he has then either accorded permission or shown no practical anxiety to stop his further frequenting the lands.

On this latter approach there was evidence of knowledge "brought home" to the Department and "no practical anxiety" to stop the practice.

But some anxiety had been shown - the children had on occasions been sent away. What then constitutes "practical anxiety"?

It should be remembered that this question will not arise in two instances. If the plaintiff knows he is a trespasser, that concludes the matter. Similarly if the occupier has given express permission. But where the jury has to decide whether tacit permission has or has not been granted or whether practical anxiety has or has not been shown - and the issue is one of fact to be decided by the jury as in Reardon's case (supra) - what is to be the criterion? At what stage does lack of "practical anxiety" become tacit permission?

In this respect it is submitted that the judgment of North J. is inadequate. Beyond stating that the facts before him made out a stronger case than those in Edwards's case (supra) he suggests no criterion. Lord Porter says in Edwards's case (supra, at 744):

> . . . I cannot see that the respondents were under any obligation to do more than keep their premises shut off by a fence which was duly repaired when broken and obviously intended to keep intruders out.

In Lord Porter's opinion the action of the Railway Executive in refencing showed sufficient practical anxiety.

Trespass notices, occasional prohibitions, broken fences, worn tracks, consents - all are evidence from which the jury may conclude that tacit permission is or is not to be inferred. But these facts are of general application. The jury in each case must decide whether the plaintiff is a licensee or not. Thus in Breslin v. London and North Eastern Railway Co., [1936] S.C. (Ct. of Sess.) 816, the plaintiff knew that he was not allowed by the defendant company to enter the premises and this really disposed of the matter. There was no suggestion that the prohibition was relaxed in this instance by anyone other than the porter who had no authority to do so. Edwards's case (supra) is a similar type of case and should not be taken as general authority for this reason. For the boy knew that he was not allowed on the railway embankment.

When the occupier first learns of an unsolicited entry, he cannot be said to have consented to it. At this stage the person entering cannot know whether his entry will be resented or not, but he can feel that his entry is observed and tolerated. There will come a time - perhaps the first time of entry in the case of a child - when it would be reasonable to assume that entry is permitted because no practical anxiety has been shown to keep the child out.

The issue left to the jury will be the same whether the plaintiff is an adult or a child, but those facts that would justify a belief that his entry is permitted will vary according to the age of the plaintiff (1).

The second aspect of Reardon's case concerns the duty owed by a licensor to a licensee, and what constitutes a breach of this duty.

North J. has given a considered opinion especially for the purposes of indicating the law which a jury is required to apply in making its findings of fact, and this opinion is concurred in by Stanton J. He says (at 1003):

> The measure of the Railway Department's duty to licensees . . . was not to expose such persons to a trap or a concealed danger on the premises which was not apparent to the licensee but which, nevertheless, was known by the Railways Department to exist. It was not a duty to take reasonable care to make the premises safe, for the licensee must take the premises as he finds them and run the risk of dangers that are obvious. It follows, then, that any inquiry into the question of responsibility must commence by ascertaining whether, in fact, a trap or unusual danger did exist on the premises. The next step is to ascertain whether the occupier had knowledge of the physical facts which constituted the trap or unusual danger: Hawkins v. Coulsdon and Purley Urban District Council, [1954] 1 All E.R. 97. And the final step is to ascertain whether the occupier had taken reasonable care to protect the licensee from the danger. Usually it is sufficient for the occupier to show that a warning had been given. If it so happens, however, that the injured licensee is a child of tender years, then the scope of the inquiry - but not its nature - is enlarged, for not only will the existence of danger not be as apparent to a young child, but the occupier who permits children to enter his premises is obliged to have regard to the possibility that an object on his land, which is perfectly safe if left alone, may act as a magnet to a child who will be tempted to meddle with it: see Gough v. National Coal Board, [1953] 2 All E.R. 1283.

North J. then refers (ibid) to the judgment of Hamilton L.J. in Latham v. R. Johnson and Nephew Ltd., [1913] 1 K.B. 398, 415, for a discussion of "traps" and "allurements". The latter, Viscount Dunedin suggests in Addie's case (supra at 376) are ". . . just the bait of the trap . . . ."

The important thing about a "trap" is that it is a "concealed danger". If a danger is obvious, that is, if it is not concealed, there can be no trap. But obvious or concealed to whom? To the licensee.

Lord Atkinson says in Cooke v. Midland Great Western Railway, [1909] A.C. 229 at 238:

> The principle . . . must, in any given case, be applied with a reasonable regard to the physical powers and mental faculties which the owner, at the time he gave the licence, knew, or ought to have known, the licensee possessed.

Or, as Devlin J. put it in Phipps v. Rochester Corporation, [1955] 1 All E.R. 129 at 143:

> He must be taken to know generally the "habits, capacities and propensities" of those whom he himself has licensed but not their individual peculiarities.

With this knowledge, and with the knowledge of the physical facts that constitute the danger - see Hawkins v. Coulsdon and Purley Urban District Council, [1954] 1 Q.B. 319 - the licensor is then in a position to judge whether in fact a trap for his licensee exists. With this knowledge, actual or implied, it can clearly be seen that what constitutes a concealed danger for one is not necessarily a concealed danger for another. The danger might consist in the physical state of the premises: for example, a sudden drop, a faulty step, a jutting-out grille, the presence of glass. Or it might result only as a result of interference with something on the premises: for example, a moving escalator, a machine, a trolley, or even a poisonous berry.

The latter class mentioned forms the class commonly known as "allurements". Something which though harmless unless interfered with, proves an irresistible attraction - a magnet - to the child licensee. To the adult the danger is obvious. To the child the danger may well be concealed, and if so, it is a trap. This class of trap becomes such as a result of

interference. An important principle recently affirmed must, however, be noted. This was first stated in Lynch v. Nurdin (1841), 1 Q.B. 29; 113 E.R. 1041. Lord Denman C.J. in delivering the judgment of the Court says (at 1044):

> . . . supposing . . . he merely indulged the natural instinct of a child in amusing himself . . . then we think that the defendant cannot be permitted to avail himself of that fact [sc. the interference].

This principle is re-affirmed in the recent case of Gough v. National Coal Board, [1954] 1 Q.B. 191. Once a licence to enter the premises is proved to exist, that licence must be deemed to extend to the interference with "alluring" objects on the land.

The duty thus relates to concealed dangers for the licensee. It has no relation to injury or damage resulting from anything that is not a concealed danger. Apart from the existence of such dangers the licensee must accept the premises as he finds them.

The establishment of a licence establishes per se knowledge in the licensor of the licensee's "habits, capacities and propensities". But as has already been said, the licensee must also establish that the licensor had knowledge of the physical facts constituting the trap.

The duty involved is expressed in two different ways by North J. in Reardon's case (at 1003). It is a duty "not to expose", or alternatively, to take "reasonable care to protect the licensee from the danger". The duty can be discharged in two ways. Either the licensor must remove the "concealment" from the danger, thus removing the trap, or else he must take action to protect the licensee from the trap which remains.

Thus in the case of adults it will generally be found sufficient to give a warning. The first class of trap loses its danger because the adult has knowledge of it - it becomes obvious. As for the second class of trap the adult cannot set up an "allurement" to justify his interference or to estop the licensor from pleading that the licence did not extend to

the interference. And if, on the facts, it were proved that the licence did so extend, the danger would be obvious.

But the case of a child licensee is different in so far as mere warning may not render the danger obvious. Although some warning has been given, the child might still be exposed to a trap. Some reasonable form of protection must be given to the licensee - the most obvious is fencing. However, it should be added that the duty is to protect the licensee, not to make the premises safe. And if the licensee has protection he is not exposed to a concealed danger. Though protection may in many cases also make the premises safe, this is not always so: the emphasis here is on the protection of the licensee, not the safety of the premises.

So it will be seen that the satisfaction of the duty by the second method may be regarded as satisfaction of the first, with the emphasis on protection.

The trend of opinion concerning the nature of the licensor's duty seems to show a gradual emancipation from the view that a licensee must simply accept the premises as he finds them to the view expressed by North J. in Reardon's case. Not that North J. should be considered as making any innovation in the law: rather his judgment should be regarded as setting out the precise nature of the licensor's duty.

The nature of the duty, in so far as it applies to the "alluring" class of traps was indirectly suggested by Lord Macnaghten in Cooke v. Midland Great Western Railway, [1909] A.C. 229, 234. This case was much criticised by contemporary writers as containing an innovation in the law. All the members of the Court of Appeal in Jenkins v. Great Western Railway, [1912] 1 K.B. 525, held that it applied only to cases where the licence extends not merely to the premises but also to the alluring object. As a result of Gough's case (supra) it is now quite clear that when a licence to enter premises is established that licence must be deemed to extend to the "alluring" object on the premises.

It is also quite clear that there are many cases where a child plaintiff will succeed whereas an adult would not. But the statement of Farwell L.J. in Latham v. R. Johnson and Nephew Ltd., [1913] 1 K.B. 398, at 407, should be noted:

> I am not aware of any case that imposes any greater liability on the owner towards children than towards adults; the exceptions apply to all alike and the adult is as much entitled to protection as the child.

Commenting on this passage Bankes L.J. in Hardy v. Central London Railway Company, [1920] 3 K.B. 459 says (at 465):

> This is no doubt true, but in accepting the proposition the fact must not be lost sight of that a very different inference may have to be drawn from facts when dealing with the case of an infant, than when dealing with the case of an adult.

This, it is submitted, is a very apt statement of the law.

The terms "child" and "adult" are relative terms, importing mental, rather than chronological, age. In all cases the liability remains the same, but the scope of the inquiry made to fix liability will be extended in the case of the child. To adopt the words of North J. in Reardon's case (supra, at 1004), ". . . the scope of the inquiry - but not its nature - is enlarged . . . ."

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(1) In the case of a very young child, the "conditional licence" test discussed in Latham v. R. Johnson and Nephew Ltd., [1913] 1 K.B. 398; Bates v. Stone Parish Council, [1954] 1 W.L.R. 1249; and Phipps v. Rochester Corporation, [1955] 1 All E.R. 129, has been applied, and would seem to obviate the difficulty of imputing "knowledge" or "belief" to a very young child.