JUDGMENT 23 1973

IN THE PRIVY COUNCIL No. 32 of 1972

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA NEW SOUTH WALES REGISTRY

BETWEEN:

SOUTHERN PORTLAND CEMENT LIMITED — Appellant

- and -

RODNEY JOHN COOPER
AN INFANT by his Next Friend
PETER ALPHONSUS COOPER — Respondent

RECORD OF PROCEEDINGS

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BETWEEN :-

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-- and -

RODNEY JOHN COOPER
an infant by his Next Friend
PETER ALPHONSUS COOPER — Respondent

RECORD OF PROCEEDINGS

No. 1

ISSUES FOR TRIAL

In the Supreme Court of New South Wales

No. 1

Issues for Trial
17th October 1967

Writ Issued: 3rd October, 1967
Appearance Entered: 13th October, 1967
Declaration Dated: 17th October, 1967

SYDNEY) RODNEY JOHN COOPER an infant by his next
TO) friend PETER ALPHONSUS COOPER by CECIL O'DEA
WIT) his Attorney sues SOUTHERN PORTLAND CEMENT LIMITED a company duly incorporated and liable to be sued in and by its said corporate name for that at all relevant times the defendant was the occupier of certain premises and there was on the said premises a certain concealed danger or trap which said danger or trap was well known to the defendant and the plaintiff was on the said premises with the leave and licence of the defendant AND THEREUPON the defendant by itself its servants and agents so carelessly negligently and unskilfully conducted itself in and about exposing the plaintiff to the said danger or trap that the plaintiff sustained serious personal injuries WHEREBY the plaintiff

In the Supreme Court of New South Wales

No. 1

Issues for Trial 17th October 1967 (continued)

suffered and will suffer great pain of body and mind and was and will be permanently incapacitated and suffered and will suffer great mental and nervous shock and incurred and will incur expense for medical and nursing attention and for medicines and for ambulance and transport and such like and for loss of earning capacity in employment.

2. AND for a second count the plaintiff sues the defendant as aforesaid for that at all relevant times the defendant was the occupier of certain premises and to the knowledge of the occupier the said premises were frequented by strangers and were openly used by other people and there was to the knowledge of the defendant a great likelihood of boys and other persons coming and being upon the said premises and thereupon the defendant recklessly created and continued in existence a certain specific peril seriously menacing the safety of the said persons and the plaintiff was a boy who came onto the said premises and was in the vicinity of the said peril YET the defendant by itself its servants and agents negligently failed to take steps to exclude the plaintiff or to remove or reduce the danger of the said peril to him WHEREBY the plaintiff sustained the injuries and suffered the damage more particularly set out in the first count hereof.

3. AND for a third count the plaintiff sues the defendant as aforesaid for that at all relevant times the defendant was the occupier of certain premises and there was on the said premises a certain pile of rubble which was alluring to children and such as was likely to induce the presence on the said premises of children and the plaintiff was a child who was on the said premises and was allured by the said heap of rubble and thereupon the defendant by itself its servants and agents was so careless negligent and unskilful in and about allowing the said pile of rubble to be in close proximity to a high tension electricity line that the plaintiff sustained the injuries and suffered the damage more particularly set out in the first count hereof

4. AND for a fourth count the plaintiff sues the defendant as aforesaid for that at all relevent times the defendant was the owner of and operated a certain quarry which was a mine within the meaning of the Mines Inspection Act 1901 as amended and there were on the premises of the said quarry certain overhead electricity conductors which were high-pressure conductors within the meaning of Rule (56) of Section 55 of the said Act and the plaintiff was lawfully on the said premises YET the defendant by itself its servants and agents failed to mark at frequent intervals in a conspicuous manner with the word "Danger" or by red paint or by some other means so as clearly to indicate that they were at high-pressure the said overhead electricity conductors WHEREBY the plaintiff sustained the injuries and suffered the damage more particularly set out in the first count hereof.

5. AND for a fifth count the plaintiff sues the defendant as aforesaid for that at all relevant times the defendant was the owner of and operated a certain quarry which was a mine within the meaning of the Mines Inspection Act 1901 and there were on the premises of the said quarry certain overhead electricity conductors on the surface of the said quarry used for electrical voltages exceeding 650 volts to earth and the plaintiff was lawfully on the premises of the said quarry YET the said electrical conductors were not so placed as to be at a distance of not less than 18 feet above the ground of the said quarry WHEREBY the plaintiff sustained the injuries and suffered the damage more particularly set out in the first count hereof.

(SGD.) CECIL O'DEA
Attorney for the Plaintiff
82 Elizabeth Street,
SYDNEY 2000

PARTICULARS UNDER ORDER X RULE 7

Particulars under X Rule 7 17th October 1967

Dr. W. McCarthy — Amount to be ascertained

Children's Hospital, Camperdown — Amount to be ascertained

In the Supreme Court of New South Wales

No. 1

Issues for Trial 17th October 1967

Particulars under X Rule 7A 17th October 1967 (continued)

DATED this 17th day of October, 1967

(SGD.) CECIL O'DEA
Attorney for the Plaintiff,
82 Elizabeth Street,
SYDNEY 2000

PARTICULARS UNDER ORDER X RULE 7A

First Count

The defendant allowed a heap of rubble and slag to come into close proximity to a high tension transmission line and failed to take any steps to prevent danger of injury to the plaintiff from the said transmission line.

Second Count

The defendant allowed a heap of rubble and slag to build up to a dangerous proximity to a high tension line knowing that there was a great likelihood of children from the village adjoining the quarry being upon the premises of the quarry.

Third Count

The heap of rubble and slag was an allurement which was dangerous because of its proximity to the high tension electricity line.

Fourth Count

The high tension electricity lines contained no markings or notices to indicate the fact that they were carrying high pressure electricity in the vicinity of where they approached the heap of rubble and slag.

Fifth Count

The conductors were so placed that they were within a distance of 3 to 4 feet of the heap of rubble.

DATED the 17th day of October, 1967.

(SGD.) CECIL O'DEA
Attorney for the Plaintiff,
82 Elizabeth Street,
SYDNEY

PLEAS dated the 6th day of May, in the year of Our Lord One thousand nine hundred and sixty-eight.

SOUTHERN PORTLAND CEMENT LIMITED -ats- COOPER by his next friend COOPER

SOUTHERN PORTLAND CEMENT LIMITED by RICHARD LIVINGSTONE PARKER its Attorney says that it is not guilty.

2. AND for a second plea the Defendant as to so much of the first count of the declaration as alleges that at all relevant times the Defendant was the occupier of certain premises and there was on the said premises a certain concealed danger or trap which said danger or trap was well known to the Defendant and the Plaintiff was on the said premises with the leave and licence of the Defendant denies the said allegations and each of them.

3. AND for a third plea the Defendant as to so much of the second count of the declaration as alleges that at all relevant times the Defendant was the occupier of certain premises and to the knowledge of the occupier the said premises were frequented by strangers and were openly used by other people and there was to the knowledge of the Defendant a great likelihood of boys and other persons coming and being upon the said premises and thereupon the Defendant recklessly created and continued in existence a certain specific peril seriously menacing the safety of the said persons and the Plaintiff was a boy who came on to the said premises and was in the vicinity of the said peril denies the said allegations and each of them.

4. AND for a fourth plea the Defendant as to so much of the third count of the declaration as alleges that at all relevant times the Defendant was the occupier of certain premises and there was on the said premises a certain pile of rubble which was alluring to children and such as was likely to induce the presence of the said premises of children and the Plaintiff was a child who was on the said premises and was allured by the said heap of rubble denies the said allegations and each of them.

In the Supreme Court of New South Wales

No. 1

Issues for Trial Pleas

6th May 1968

(continued)

5. AND for the fifth plea the Defendant as to the first, second and third counts of the declaration says that the Plaintiff's injuries were caused or contributed to by the negligence of the Plaintiff.

6. AND for the sixth plea the Defendant was to so much of the fourth count of the Declaration as alleges that at all relevant times the Defendant was the owner of and operated a certain quarry which was a mine within the meaning of the Mines Inspection Act 1901 as amended and there were on the premises of the said quarry certain overhead electricity conductors which were high pressure conductors within the meaning of Rule 56 of Section 55 of the said Act and the Plaintiff was lawfully on the said premises denies the said allegations and each of them.

7. AND for the seventh plea the Defendant as to so much of the fifth count of the declaration as alleges that at all relevant times the Defendant was the owner of and operated a certain quarry which was a mine within the meaning of the Mines Inspection Act 1901 as amended and there were on the premises of the said quarry certain overhead electricity conductors on the surface of the said quarry used for electrical voltages exceeding 650 volts to earth and the Plaintiff was lawfully on the premises of the said quarry denies the said allegations and each of them.

R. L. PARKER
Attorney for the Defendant
20 Bridge Street,
SYDNEY

Particulars under Order XXX Rule 31B

6th May 1968

PARTICULARS UNDER ORDER XXX RULE 31B

The following are particulars of the acts of contributory negligence alleged against the Plaintiff:

1. The Plaintiff was negligent in being within the premises of the Defendant;

2. The Plaintiff was negligent in running up and down the heap of rubble and slag;

3. The Plaintiff was negligent in grasping and failing to avoid a high tension cable;

4. Failing to obey instructions to keep out of the quarry.

DATED this 6th day of May, 1968.

(SGD.) R. L. PARKER
Attorney for the Defendant
20 Bridge Street,
SYDNEY

10 REPLICATION dated the 13th day of May, in the year of Our Lord One thousand nine hundred and sixty-eight. Replication 13th May 1968

COOPER

-v-

SOUTHERN PORTLAND CEMENT LIMITED

The Plaintiff joins issue on the Defendant's Pleas herein.

20 (SGD.) CECIL O'DEA
Attorney for the Plaintiff
82 Elizabeth Street,
SYDNEY 2000

DATED this 13th day of May, 1968

CECIL O'DEA
Attorney for the Plaintiff
82 Elizabeth Street,
SYDNEY 2000

In the Supreme Court of New South Wales

No. 2

Demurrer of Defendant 15th May 1970

No. 2

DEMURRER OF DEFENDANT

IN THE SUPREME COURT OF NEW SOUTH WALES } No. 8786 of 1967

Friday the fifteenth day of May, in the year of Our Lord One thousand nine hundred and seventy.

SOUTHERN PORTLAND CEMENT LIMITED ats COOPER) SOUTHERN PORTLAND CEMENT LIMITED by RICHARD LIVINGSTONE PARKER its Attorney says that each of the five Counts in the Declaration is bad in substance.

THE POINTS INTENDED TO BE ARGUED ARE:

1. As to the first Count:

(a) It does not disclose a cause of action.

(b) It does not allege that the Plaintiff was unaware of the concealed danger (and accordingly does not plead facts necessary to impose upon the Defendant the duty owed by an occupier to a Licensee).

(c) It is defective in that it does not plead a breach of that duty which is owed by an occupier to a Licensee.

(d) The breach assigned is not of any duty owed by the Defendant to the Plaintiff.

2. As to the second Count:

(a) It does not disclose a cause of action.

(b) The facts pleaded do not disclose a duty in the Defendant to the Plaintiff.

(c) It does not plead a breach of any duty owed to the Plaintiff by the Defendant.

(d) The breach assigned is not of any duty owed to the Plaintiff.

(e) The Count does not allege that any danger created was continued with knowledge of the Plaintiff's presence.

(f) The breach assigned is not of any duty which the facts pleaded raise.

(g) The breach assigned is not of any duty which the Defendant owed the Plaintiff.

3. As to the third Count:

(a) It does not disclose a cause of action.

(b) The facts pleaded do not disclose a duty in the Defendant to the Plaintiff.

(c) It does not plead a breach of any duty owed to the Plaintiff by the Defendant.

(d) The breach assigned is not of any duty owed to the Plaintiff.

(e) The Count does not allege that any danger created was continued with knowledge of the Plaintiff's presence.

(f) The breach assigned is not of any duty which the facts pleaded raise.

(g) The breach assigned is not of any duty which the Defendant owed the Plaintiff.

4. As to the fourth Count:

(a) It does not disclose a cause of action.

(b) It does not plead facts disclosing a duty in the Defendant to the Plaintiff in respect of which the Plaintiff is entitled to sue for the breach thereof.

(c) The provision of the Statute pleaded does not give the Plaintiff a right of action against the Defendant in respect of the damages complained of.

In the Supreme Court of New South Wales

No. 2

Demurrer of Defendant 15th May 1970 (continued)

(d) Rule (56)(f)(xvii) of Section 55 of the Mines Inspection Act 1901 (as amended) does not confer any right of civil action for damages in respect of breach.

(e) Even if the relevant provision is capable of supporting a cause of action the Plaintiff was not one of those persons in whose favour such cause of action is or was available.

5. As to the fifth Count:

(a) It does not disclose a cause of action.

(b) It does not plead facts disclosing a duty in the Defendant to the Plaintiff in respect of which the Plaintiff is entitled to sue for the breach thereof.

(c) The provision of the Statute pleaded does not give the Plaintiff a right of action against the Defendant in respect of the damages complained of.

(d) Rule (56)(g)(xvi)(b) of Section 55 of the Mines Inspection Act 1901 (as amended) does not confer any right of civil action for damages in respect of breach.

(e) Even if the relevant provision is capable of supporting a cause of action the Plaintiff was not one of those persons in whose favour such cause of action is or was available.

R. L. PARKER
Attorney for the Defendant
16-20 Bridge Street
SYDNEY

No. 3

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Part Evidence of Cooper, R.J. 18th May 1970

TRANSCRIPT OF EVIDENCE OF WITNESSES BEFORE COLLINS, J.

IN THE SUPREME COURT OF NEW SOUTH WALES
IN CAUSES

No.8786 of 1967

CORAM: COLLINS, J. and a jury of four

Monday, 18th May, 1970

COOPER

-V-

SOUTHERN PORTLAND CEMENT LIMITED

MR. LOVEDAY, Q.C. with MR. MURPHY, appeared for the plaintiff.

MR. McGREGOR, Q.C. with MR. CLARKE, appeared for the defendant.

(Mr. Loveday opened to the jury.)

(Three photographs tendered by consent and marked Exhibit "A1" - "A3")

PLAINTIFF:
Sworn, examined, as under:

MR. LOVEDAY: Q. Is your full name Rodney John Cooper?
A. Yes.

Q. Do you live with your parents in Hume Street, South Marulan?
A. Yes.

Q. I think you are now sixteen years old?
A. Yes.

Q. You will be seventeen on 27th December of this year?
A. Yes.

Q. You were injured in an accident in July, 1967?
A. Yes.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Part evidence of Cooper R.J. 18th May 1970

(continued)

Q. At that time I think you were in first year at Goulburn High School; is that right?
A. Yes.

Q. You would then be 13 years old?
A. Yes.

Q. You were living at South Marulan with your parents and you had been living there all your life?
A. Yes.

Q. Your father worked at the quarry at Southern Portland Cement Ltd., the defendant?
A. Yes.

Q. You lived in a company house? A. Yes.

Q. And five miles from the Hume Highway?
A. Yes.

Q. There are no other towns or villages in the area?
A. No.

Q. South Marulan comprises about 35 to 40 houses occupied mostly by people, who work in the quarry, and their families?
A. That would be right.

Q. One of them is a school teacher and there is a school at South Marulan and there is a bowling club and a store?
A. Yes.

Q. And that is about all there is at South Marulan?
A. Yes, that is about all.

Q. At the week-ends what did you normally do?
A. I used to go rabbit-trapping.

Q. Where was it you would go rabbit-trapping?
A. At the back of the quarry.

Q. Where else did you go?
A. Wingha.

Q. Was there anywhere else you went at weekends? Where did you play normally?
A. I used to play over at Grannys Chair most of the time.

Q. Where was that in relation to your home?
A. Nearly half a mile.

Q. To get to Granny's Chair where did you have to go?
A. You had to cross the train lines.

Q. Are these train lines the siding which comes from the main line and only goes to the quarry?
A. Yes.

Q. Is there any fence or fencing of the train line?
A. No.

Q. Is there any fence between the houses and the quarry?
A. No.

Q. To get to Granny's Chair did you have to go through any fences at all?
A. I had to climb over one fence to go to it.

Q. What was that fence?
A. The fence to one of the paddocks.

Q. Between the company premises and one of the paddocks; was that right?
A. Yes.

Q. Where was Granny's Chair in relation to the company property?
A. It is at the back of the town.

Q. Would that be on Mr. Les Cooper's land?
A. Yes.

Q. He is no relation to you, I understand?
A. No.

Q. Where else did you play on the weekend?
A. At my mate's place.

Q. Did you play anywhere on the company's property? (Objected to; allowed.)
A. No, we never played in the company's ground much.

Q. Much?
A. Yes.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Part evidence of Cooper, R.J. 18th May 1970 (continued)

Q. What do you mean by much?
A. We never went there very often.

Q. When you did go there where did you play?
A. We were just walking through.

Q. You would walk through the company's property, would you?
A. Yes.

Q. Would you do that very often?
A. Not very often.

Q. Were you walking through the Company's property when you went to Granny's Chair?
A. I had to cross the train line to go over to it.

Q. Did you ever play anywhere on the Company's property?
A. No.

Q. On Sunday 30th July, do you remember going somewhere that afternoon after lunch?
A. We went to Granny's Chair and then we started to come home and went up to the sandhills.

Q. When you went to Granny's Chair did you have anyone with you?
A. Russell was with me.

Q. Is Russell your younger brother?
A. Yes.

Q. I think he is one year younger than you?
A. Yes.

Q. Anyone else?
A. No.

Q. Were there any other children over at Granny's Chair?
A. There were a few girls over there having a picnic.

Q. Were they from South Marulan?
A. Yes.

Q. How long were you playing over at Granny's Chair?
A. About an hour.

Q. What did you do then?
A. Started to head home and met a few mates.

Q. Whom did you meet?
A. Kevin Smith and Robbie Gutzke and Wayne Cooper.

Q. Wayne Cooper is your brother?
A. Yes.

Q. He was then nine?
A. Yes.

Q. Kevin Smith was about a year younger than you?
A. He would be about a year younger.

Q. And the Gutzke boy, how old was he?
A. He was only nine.

Q. That meant five of you?
A. Yes.

Q. Where did you go then?
A. We started to walk up towards the sandhills.

Q. Who suggested that; do you remember?
A. I think it was both of us.

Q. Had you ever been up to the sandhills before?
A. I went there the day before.

Q. Had you ever played in the sandhills?
A. Not very much.

Q. What do you mean by very much?
A. I would only play there one day.

Q. Had you played on any other sandhills in that area?
A. I played on a few of them.

Q. How did you play on these sandhills?
A. Run down them and climb up again.

Q. Was there anything you used to play with on them?
A. Get a sheet of tin and slide down.

Q. On this Sunday afternoon did the whole five of you go over to this sandhill?
A. Yes.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Part evidence of Cooper, R.J. 18th May 1970 (continued)

Q. Where was it that the sandhill was situated in relation to Granny's Chair - how far from Granny's Chair?
A. About 100 yards.

Q. Was there any fence or anything to prevent you going to the sandhill?
A. No.

Q. Did you see any men around?
A. No.

Q. Had anyone ever said to you that you should not go and play on the sandhills?
A. No.

Q. What happened when you got over to the sandhill?
A. I started to run down them.

Q. If you started to run down them I suppose you would have to run up them or struggle up them? Did you go up them as well as down them?
A. Yes.

Q. You tell me what happened while you were playing on the sandhills running up and down?
A. I can't remember.

Q. What is the last thing you can remember?
A. Just running down them.

Q. What is the next thing that you can remember?
A. Waking up in hospital.

Q. That would have been the Children's Hospital in Sydney?
A. Yes.

Q. Did you know of any danger at all in running up and down those sandhills?
A. No.

.....

(Part omitted comprised in documents transmitted to the Privy Council but not included in Record)

.....

CROSS-EXAMINATION

MR. McGREGOR: Q. You live at Mount Wilga, do you?
A. Yes.

Q. You actually board there?
A. Yes.

Q. But your family still lives in Marulan South?
A. Yes.

Q. That means, I suppose, that you don't know very many people down in Sydney?
A. No.

Q. And that makes it a little bit harder to find friends to go out with?
A. I am just not worried about friends.

Q, When you were living in Marulan South you have told us, or we have heard, this accident was on 30th July, 1967?
A. Yes.

Q. You had been at that stage and in that year attending the Goulburn High School?
A. Yes.

Q. But the year before were you at Goulburn High School?
A. No.

Q. You were where?
A. At primary school.

Q. Whereabouts?
A. Marulan South.

Q. That is a school in the village, is it?
A. Yes.

Q. What class were you in in 1966?
A. Fifth class.

Q. Might it have been sixth class, do you think?
A. Fifth class.

Q. How many pupils were in fifth class?
A. About six.

Q. How many pupils all told in that school?
A. 45 I think.

Q. Some of those would have been ones in kindergarten?
A. Yes.

Q. If you left those out there would be thirty-odd pupils?
A. About that.

Q. Who taught you at Marulan South?
A. We used to have a Mr, Demer.

Q. Who else?
A. Mr. Bushell.

Q, Mr. Bushell was the headmaster, was he?
A. Yes.

Q. Do you remember at school you used to be given some lectures?
A. No.

Q. Do you remember Mr. Bushell giving you some lectures?
A. No.

Q. Do you remember him giving lectures or talks to the whole school?
A. No.

Q. Do you remember he used to tell the school about the dangers of road traffic?
A. He used to talk about roads.

Q. For one thing, at the time the school came out in the afternoon was the time there was a change of shift at the works?
A. Yes.

Q. He used to warn you about being on the road?
A. Yes.

Q. He used to do this quite frequently, didn't he?
A. Not very often.

(Short adjournment)

(Witness stood down.)

....
(Part omitted comprised in documents transmitted to the Privy Council but not included in Record)
.....

PLAINTIFF
Further cross-examined

MR. McGREGOR: Q. I was asking you about the headmaster giving you some lectures. Remember me asking you the questions?
A. Yes.

Q. Do you also know that in the area around about where you live there are, first of all, some dams with water in them?
A. Yes.

Q. And there is also a water tower?
A. No.

Q. You did not ever hear of a water tower?
A. No.

Q. And in his lectures, the headmaster, in addition to talking about the dangers that children might experience from road traffic, used to warn you to keep away from the dams, didn't he?
A. No.

Q. Do you say he did not or you don't remember?
A. He did not say anything about them.

Q. Did he mention the water tower?
A. No.

Q. How often did lectures take place?
A. Not very often.

Q. Once a month?
A. Yes, about once a month.

Q. He also talked to you about the quarry, didn't he?
A. No.

Q. You just think. I suggest to you that the headmaster did in those lectures about safety talk to you about the quarry?
A. No.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Part evidence of Cooper, R.J. 18th May 1970 (continued)

Q. And I suggest to you that what he did was to tell you to stay well clear of the quarry?
A. No, he did not say that.

Q. And well clear of the railway lines?
A. No.

Q. Do you say you don't remember or you deny it?
A. I never heard him say that.

Q. You never heard him tell you not to trespass on the railway line or quarry?
A. No.

Q. Although he did lecture to you about once a month or so?
A. Yes.

Q. These lectures were to all of you together?
A. Yes.

Q. Do you remember that was before school went in in the morning?
A. No.

Q. When were they given?
A. During school hours.

Q. Your attendance at school was pretty good, wasn't it?
A. I don't know.

Q. Your father was also an employee of the quarry, you have told us?
A. Yes.

Q. He told you, didn't he, not to go on to the quarry property?
A. No.

Q. Never at any stage?
A. No.

Q. Of course, when you went out this afternoon the day you were injured you went down to Granny's Chair, was it?
A. Yes.

Q. Did you tell your mother you were going down to Granny's Chair?
A. No.

Q. You just did not tell her anything?
A. No.

Q. You knew yourself that you should not be on the railway line, didn't you?
A. No.

Q. There were trucks there, weren't there?
A. No.

Q. You say there were no trucks there this day?
A. I don't remember seeing any.

Q. But there were trucks in and out of that place all the time, weren't there?
A. There could have been.

Q. And what they used to do was this: The Railways would bring in trucks or there would be brought in trucks from the main line going towards Goulburn - the line that goes from Sydney to Goulburn and beyond was the main line, wasn't it?
A. Yes.

Q. And trucks would be brought on to the siding at the South Marulan area frequently, wouldn't they?
A. Yes.

Q. They would be allowed to be filled up underneath the kilns or the bins?
A. Yes.

Q. And they would be allowed to run the railway on to what was called the back shunt; is that right?
A. Yes.

Q. And this place where you were hurt was on the side at the back shunt, wasn't it?
A. Yes.

Q. So that in order to go down towards the back shunt you in effect used to walk down alongside the railway line?
A. Yes.

Q. You used to do that or you did that on that day?
A. Yes, I did that that day.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Part evidence of Cooper, R.J. 18th May 1970 (continued)

Q. So on the day you were injured you walked alongside the railway line on this back shunt for some hundreds of yards?
A. Yes.

Q. You of course knew that was company property?
A. Yes.

Q. And you knew you should not be there, didn't you?
A. No.

Q. Just to get it a little more clearly, I show you first of all Exhibit "A3". You can see in Exhibit "A3" the general area where your house was. Have you seen this photo before?
A. No.

Q. Just have a look at all those photographs, "A1" to "A3". Do you recognize the area in those?
A. Yes.

Q. Let me take you again to Exhibit "A3". That shows the area where the houses were, one of which you lived in?
A. Yes.

Q. Then further down you can see the trucks on the railway line, can't you?
A. Yes.

Q. At that point to the middle of the photo that is where that rail leads off to the main north-south Railway line, do you agree with that?
A. Yes.

Q. What used to happen was that the trucks would be brought in underneath those four kilns or bins there?
A. Yes.

Q. And they were loaded in that way?
A. Yes.

Q. Then they would be allowed to run down the hill to the right of the photograph?
A. Yes.

Q. And that was on top of what was called the back shunt and the place where you were injured was off to the right of the photograph?
A. Yes.

Q. And that day, in order to get down to where you were injured, did you walk along that railway line?
A. Yes.

Q. Well, you knew quite well you were on company property, didn't you?
A. Yes.

Q. And you knew that you should not be there, I suggest to you?
A. No.

Q. Can you see on that photograph or any of those photographs the place where Granny's Chair was?
A. No.

Q. When you got there that day did you see the electric wires?
A. No.

Q. Never at any time?
A. No.

Q. Was it that you can't remember?
A. I can't remember seeing them.

Q. How many times did you go up and down the slope?
A. I don't know.

Q. You have no memory of seeing them there at all?
A. No.

Q. At any time?
A. No.

Q. What were the names of the boys who were with you?
A. Leslie Cooper.

Q. That is your brother?
A. Yes. Kevin Smith, Robbie Gutzke.

Q. How do you spell that name?
A. I don't know, and Wayne Cooper.

Q. He is another brother?
A. Yes.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Part evidence of Cooper, R.J. 18th May 1970 (continued)

Q. How long is it since you have seen those boys? How long is it since you have seen Wayne Cooper?
A. A couple of months.

Q. And Leslie Cooper?
A. I saw him a couple of months ago.

Q. So you haven't seen either Wayne or Leslie Cooper for a couple of months?
A. No.

Q. What about Robbie Gutzke?
A. I have not seen him for a month either.

Q. What about Smith?
A. I haven't seen him for about a month either.

Q. You have not seen them this morning?
A. Yes, I saw them this morning.

Q. All of them?
A. Yes.

Q. Whereabouts?
A. Outside the Court.

Q. I asked you some questions about lectures. What did you understand the headmaster to be lecturing you about?
A. Roads.

Q. What else?
A. That is all.

Q. Did you understand he was telling you about looking after yourself for your own safety?
A. (No answer.)

Q. You understand when he gave you lectures about roads he was concerned about your own safety?
A. Yes.

Q. So he was giving you a lecture about taking care of yourselves for your own good?
A. Yes.

Q. Of course, you know anyway, that you should not go on to other people's property, don't you?
A. Yes.

RE-EXAMINATION

MR. LOVEDAY: Q. Can you get to Granny's Chair without crossing the railway lines?
A. No.

Q. How far away was Granny's Chair from this sandhill from where you were playing?
A. About 100 yards.

Q. Was Granny's Chair further away from your home than the sandhills?
A. No.

Q. It was further away?
A. Yes.

Q. In other words, Granny's Chair was the other side of the sandhill from your home?
A. Yes.

(Witness retired.)

ANTON BROKS
Sworn and examined as under:

MR. LOVEDAY: Q. Is your name Anton Broks?
A. Yes, that is right.

Q. Are you a fitter's assistant employed by Southern Portland Cement Limited, the defendant company?
A. Yes.

Q, And you live at the single men's quarters at South Marulan Quarry, is that right?
A. That is right.

Q. You are still working there?
A. Yes.

Q. Do you remember a Sunday afternoon, 30th July, 1967?
A. Yes.

Q. I think you were asleep in your quarters?
A. Yes, I was just resting.

Q. Was the quarry operating that Sunday afternoon?
A. No, not then, not that day.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Broks, A. 18th May 1970 (continued)

Q. Were there any company men on duty in the quarry?
A. I could not say at the time. I have got no idea whether there were or not.

Q. Are there ordinarily maintenance men on at the weekends, or anyone at all?
A. No, it was a quiet weekend.

Q. Anyway on this particular Sunday afternoon were you awakened by some boys who told you something?
A. Yes, I heard them running and crying.

Q. Did you go outside, and did you go with them?
A. Another bloke knocked on my door.

Q. Anyway, did you go running to some place where you saw an injured boy?
A. Yes.

Q. Where was that?
A. At the end of the railway line.

Q. How did you get to the injured boy?
A. I went up to the edge and heard the boy mumbling, like someone hurt or some sort of noise. So that I said to the other boys "He cannot be dead, because there is a noise." So I said then to go to the village and get some sort of help, because I thought help was needed.

Q. Did you go to the boy?
A. I ran straight down and I did what I could.

Q. Where was the boy?
A. The boy was about, it could be 80 to 100 feet down the slope?

Q. Down the bottom of the slope, was he?
A. Yes, between rocks or something.

Q. What sort of slope was it?
A. I could not tell you the degrees, how steep it was.

Q. Was it a natural slope?
A. No, it had been natural but there was a tip -

Q. It was made up of tip material; did you notice anything about it as you went down the slope, yourself?
A. Just wire, electric wire.

Q. What sort of wire or wires?
A. It would be about that thick. (Indicating).

Q. What, about half an inch thick?
A. Yes, something like that. I could not really say but it was about that. There was a black spot, like it had been a burn or something, I noticed, but there was not much time to look or think about it, because I ran down to the boy.

Q. Where were these wires as you ran down?
A. I beg your pardon?

A. Where was this wire or wires as you ran down the slope?
A. For example, like going down - (indicating) - and the wire was in front of me. I could not exactly say, It would be five or four feet or something from the ground.

Q. Four or five feet from the ground?
A. Yes.

Q. How high are you?
A. Myself, five foot five.

Q. Did you have to duck underneath, to get underneath them?
A. Yes. It was low, as far as I remember I ducked a bit down.

Q. You said you noticed some burnt patch on one of the wires; where was that in relation to the boy, up where he was or further along, or where?
A. That was just about the start of the slope - not the start.

Q. Was the burnt patch above where the boy was?
A. He was up, about another 70 feet past the wires, something like that.

Q. Underneath where the burnt patch was on the wire?
A. Yes.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J.
Evidence of Broks, A.
18th May 1970
(continued)

CROSS-EXAMINATION

MR. McGREGOR: Q. You, yourself, on occasions have warned people to keep away from the company premises, haven't you?
A. Anyone who is walking or some people asking -

Q. But you have told strangers to keep away when you have seen them?
A. It is not my business to say anything.

Q. Maybe, but you have warned strangers to keep away?
A. If anyone walks in, we try to tell them "to watch yourself, where you are going to." You cannot tell them to go.

Q. But you have told them to keep off the property, haven't you?
A. If nobody asks me, I do not, but if anybody say, of course, we try to tell people not to get into trouble, because they do not know.

(Witness retired.)

Evidence of Cosgrove, G.
18th May 1970

GEOFFREY COSGROVE
Sworn and examined as under:

MR. LOVEDAY: Q. Is your name Geoffrey Cosgrove?
A. Yes.

Q. You are a truck driver employed by Southern Portland Cement Limited, the defendant company, is that right?
A. That is correct.

Q. And you live at South Marulan?
A. Yes.

Q. And you have been employed there for many years, about fourteen years?
A. Yes.

Q. And do you remember young Rodney Cooper being injured in 1967?
A. Yes.

Q At that time I think you were driving a big Euclid truck?
A. That is correct.

Q. And you were doing some work carting material in and around the quarry?
A. That is correct.

Q. Just prior to his accident do you remember what you had been carting?
A. Yes, from time to time I had been carting fines, what we class as fines.

Q. What are fines?
A. Well, they are ground when the crusher crushes the limestone; it comes from the plant and is screened and it goes through a bin and is carted then to this dump and it is put in railway trucks -

Q. Is it something like coarse sand?
A. Yes.

Q. Where were you dumping it?
A. Down what we call the back shunt, to fill the railway line up.

Q. You were going to extend the railway line, further down in that direction, were you?
A. Yes.

Q. Under whose direction were you working?
A. The management.

Q. Well, who was your immediate boss?
A. The chute boss was Mr. Weston, I would say.

Q. And was there a quarry foreman, Mr. Cecil Clooney?
A. Yes.

Q. Was he one of your bosses too?
A. Yes, he was the main boss at the time.

Q. Do you remember if there were any wires in the area where you were dumping?
A. Yes, there were.

Q. What wires were these?
A. High voltage, main line.

Q. Do you know what voltage they were?
A. 33,000. (Objected to.)

Q. Were these the main voltage lines?
A. Yes.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Cosgrove, G. 18th May 1970 (continued)

Q. Where did they go to on the plant?
A. Well, they came in beside the back shunt, and down to the sub-station.

Q. Did you notice something about these wires in relation to where you were dumping?
A. Yes, as we were dumping, we were going to dump - we were moving out towards the wires and it would go over the top of the wires, so we were going around the side of it, and they were getting very close.

Q. You mean the top of the dump was higher than the wires?
A. Yes, it was higher.

Q. And the dump was moving out so as to be closer to the wires?
A. Yes.

Q. Did you speak to anyone about this?
A. Yes, I did.

Q. To whom did you speak?
A. The quarry foreman, Mr. Cecil Clooney.

Q. When was this in relation to the accident to young Rodney Cooper?
A. Well, it would be, I would say, six or seven weeks, maybe two months before.

Q. What did you say to Mr. Clooney?
A. I hopped out of my truck and he walked over to have a look, and I said, "Those wires are getting very close there, Cec." He said, "Yes, they are. I will have to look into that. Do not dump any more there. Take it up the end."

Q. Well, at that time how far were the wires away from the dump?
A. Estimating, I would say 5 feet.

q. Did you speak to anyone else about these wires?
A. Yes, Mr. Allan Gutzke, the electrician. I spoke to him about them. (Objected to.)

HIS HONOUR: Well, that can be struck out.

MR. LOVEDAY: Q. After the accident to young Rodney Cooper, did you have a look at those wires again?
A. Well, a while after yes.

Q. How long after, are you able to tell us?
A. Only a few days, I would say.

Q. A few days after?
A. Yes.

Q. How would you describe them then in relation to the dump; how far were they off the dump then?
A. They would be not much different; it would be roughly the same.

Q. Roughly the same as when you had spoken some six or seven weeks before this?
A. Yes.

Q. Have you got children, yourself?
A. Yes.

Q. Are there many children in this village, this mining village?
A. Yes, there are roughly 40 at the school, plus there would be quite a few going to high school on the bus, bigger children.

Q. Have you ever seen any children playing in the quarry area on these heaps?
A. Yes, around the heaps; you often see them there weekends.

Q. What do you mean by heaps?
A. Just this waste material. Not long after it is dumped, it is very soft, and if children go and they play in that - (Objected to.)

Q. I am talking about before the accident - (Objected to.)

Q. Before the accident did you ever seen any children playing in these heaps?
A. Yes, on the other side I have seen children playing around there, on many occasions.

Q. Were these heaps of fines?
A. Yes.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Cosgrove, G. 18th May 1970 (continued)

Q. And how far away from the heap of fines or the heap where the accident occurred were these other heaps where you have seen children playing?
A. It would be roughly half a mile away, on the other side, back towards the other side of the works.

Q. When would they play there?
A. Mainly weekends.

Q. And did anyone from the company ever object to their being there, that you saw?
A. Not that I know of. I would not know anything about that.

CROSS-EXAMINATION

MR. McGREGOR: Q. How old were your children?
A. When?

Q. Then, in 1967?
A. They would be eight. The eldest would have been eight, then the next, a girl, and the boy would have been about four.

Q. Well, I take it the eight year old and the six year old, you told them to keep away from the company property?
A. Well, they are girls.

Q. In any event, you would have told them to keep away from the company property?
A. Yes.

Q. And that was you, for one thing, had been told by the management to see that your children did not go into the company property?
A. No, well, more or less for my own reasons, because I do not like them running around too much.

Q. But you also had been told, hadn't you, that the management did not want children in there?
A. Well, I could not say to that. Possibly it might have been mentioned some time, although it has never been mentioned directly to me, about my children.

Q. I do not mean specifically about Cosgrove children, but generally you heard at safety lectures and other lectures, people told to warn strangers away from the company property?

A. Well, as far as the actual section down the bottom is concerned, I would say yes, but as far as the top section is concerned, I did not.

Q. You talk about the back shunt; there was a railway track running along there?
A. Yes.

Q. And trucks would be brought in from the main line?
A. Yes.

Q. And they would be filled, would they not?
A. Yes.

Q. And then they would be allowed to run by gravity down the back shunt until they were pulled up at the end of the back shunt?
A. That is right.

Q. And in that way a train would be assembled?
A. That is right.

Q. And when it was assembled, an engine would come and take it away to wherever it was to be delivered?
A. That is correct.

Q. And there was a distinct warning from time to time by the management for all children to be kept away from this area where this railway line was?
A. Possibly, but none directly to my children.

Q. Well, I am not quite putting it that way. That may or may not be, but I am saying that you heard that generally speaking the company wanted everybody warned to keep away from this area?
(Objected to; rejected.)

Q. Do you remember the matter being mentioned at safety meetings?
A. Well, as far as the bottom section was concerned, it was often mentioned at safety meetings, but the top section, if my children walked out my front gate to go to the shop, that is leased -

Q. I am not asking you that. I am asking you do you remember that at safety meetings there was a mention that the company wanted children or any

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Cosgrove, G. 18th May 1970

(continued)

strangers warned to keep away from the area where the railway lines were?
A. Well, I could not answer that because I cannot remember. But possibly they could have, but I would not say yes or no.

Q, It possibly could have?
A. Yes.

Q. You, yourself, say you told yours to keep away?
A. Yes, they are two girls and I like to keep them where I can see them.

Q. And you knew other fathers had warned their children to keep away - (Objected to; rejected.)

Q. You spoke about seeing wires after the accident, and you said you saw them a few days after?
A. Yes. Well, it is three years ago and I cannot give exact time.

Q. I suppose you recall the accident was on a Sunday, do you?
A. Yes.

Q. And when you say a few days, do you mean the following week or the week after?
A. Well, at least three or four days after.

Q. It might have been longer still?
A. Yes.

Q. And they were in the same position, you say?
A. Well, roughly the same, I would say. It is only my estimation.

Q. But it is quite clear in your mind that some three or four days afterwards the wires were in the same position?
A. Yes.

RE-EXAMINATION

MR. LOVEDAY: Q. You were asked by Mr. McGregor about children being kept away from what you said was the bottom area?
A. Yes.

Q. What is the bottom?
A. Well, down around the face, quarry face, and the machinery down the bottom. Mainly, children are stopped from there, but the top area, a lot of children play around at times - (Objected to.)

Q. I am only talking about before this accident. Was there any objection to children playing around the fines, the heaps?
A. Not to my knowledge. (Objected to; allowed.)

Q. And you say that to get to the shop your children had to go across company property?
A. Yes.

Q. Was there any restriction by way of fences or anything else marking off the working part of the company property from the houses and so on?
A. No.

(Witness retired.)

ALLAN CLIFFORD GUTZKE
Sworn and examined as under:

Evidence of Gutzke, A.C.
18th May 1970

MR. LOVEDAY: Q. Is your name Allan Clifford Gutzke?
A. Yes.

Q. Are you an electrician employed by the defendant company at Southern Portland Cement Company?
A. I am.

Q. Do you live at South Marulan?
A. That is right.

Q. And you have been living there and been employed in that job for some years?
A. Yes, that is right.

Q. Do you remember Rodney Cooper's accident there in July, 1967?
A. Yes, I do.

Q. Now did you ever go over to the area before his accident, the area where he was injured, to have a look at the area?
A. Yes, I did go over there.

Q. How long before the accident?

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Gutzke, A.C. 18th May 1970 (continued)

A. I would say approximately six weeks. I could not be sure of the time.

Q. Had someone spoken to you before you went over?
A. Actually the first time I went up, I was sent up to remove a tree.

Q. Well, did you notice something about some wires?
A. At the time I removed the tree, the wires were a long way away from the dust. It would be six or eight weeks before the accident.

Q. That is where the tree was?
A. Yes.

Q. Did you notice something about the wires and the stump, either then or a bit later?
A. I never went down after that. I had been told about it but I just passed the message on to my foreman.

Q. Then who is your foreman?
A. Mr. David King.

Q. What did you say to him?
A. I just passed on the report that a truck driver had told me that the dust was getting close to the high tension wires.

Q. As an electrician, are you able to tell me what these wires were? (Objected to; allowed.)

MR. McGREGOR: Could I ask him a question about his qualifications?

HIS HONOUR: No.

MR. LOVEDAY: Q. What were these wires?
A. These were high tension wires, which were 33,000 volts.

Q. Where did they come from and where did they go to?
A. They were our incoming power supply, and they went to a transformer which broke it down.

Q. They supplied power to the quarry?
A. To the bins and so on, yes.

Q. They were 33,000 volts; would that be a lethal voltage?
A. I would not be qualified - (Objected to.)

Q. On the day of the accident did you go to the scene?
A. Yes, I did.

Q. And what did you see when you got there?
A. My son came up to get me, and I went down to the top of the hill and saw Mr. Broks down with the boy.

Q. That was leading down to the bottom?
A. That is right, and I sang out and found out whether he was all right or not, and I went down the quarry with Mr. Howard to pick up a stretcher.

Q. Did you notice those high tension wires there then?
A. Yes, I saw the wires straight away.

Q. Where were they in relation to the dump, how far off the dump?
A. How far off the dump?

Q. How far away from the dump?
A. This would be very hard to say. It would be 3 ft. 3ft.6. I could not be accurate but it was about that.

Q. Well, did you notice anything on any of these wires?
A. You could see where the boy's hand - (Objected to.)

HIS HONOUR: Q. What did you see?
A. Well, you could see something burnt.

MR. LOVEDAY: Q. Did you know Rodney Cooper before this accident?
A. Yes, he used to play with my boy.

Q. How would you describe him?
A. Describe Rodney?

Q. Yes.
A. I used to roar at him. An ordinary boy, I suppose, no better than mine.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Gutzke, A.G. 18th May 1970 (continued)

Q. At weekends where did the boys - and girls for that matter - who lived in the village, play; this is before the accident to Rodney?
A. I do not really know. They used to play around there. We have got an oval and they played on the oval. Anywhere where boys will usually find anything to play with, I should imagine.

Q. Any place in particular - (Objected to; allowed.)

Q. Where did you see them playing; did you see them playing on company property?
A. Well, this is very difficult to answer, because we live at the company.

Q. Perhaps I should distinguish between company property and area covered by the workings?
A. Well, actually I have seen these boys playing, like, near the workings but not down actually on the workings.

Q. Not on the quarry face, down below?
A. No.

Q. What about on the dumps, up at the top?
A. Well, I have seen boys playing at the back, behind my place, on the dump. This is a mullock heap.

Q. Has that got any fines in it?
A. Yes, it is all fines.

Q. And this is before the accident?
A. Yes, it would be before the accident. I have seen them since I shifted to the house I am living in now.

Q. Did anyone ever speak to them about playing there?
A. Well, I would not know this.

Q. While you were seeing them, I mean while you were watching them playing on these heaps while you were watching?
A. Never when I was watching them, but I would not say nobody ever sent them off, but I have never seen them.

Q. Well, what sort of games did they play on these dumps?
A. The times I have seen them playing, they had a piece of flat iron and they used to get up on top of this dump and slide down it.

Q. Do you know a place called Granny's Chair is a rock.

Q. Whereabouts is that?
A. Granny's Chair is in private property, in Mr. Cooper's property.

Q. That is a Mr. Les Cooper, no relation?
A. No relation whatsoever. Well, where the kiln side is now, where we built a new kiln, this is nearly directly behind the kiln side now.

Q. To get to Granny's Chair from where the houses are have you to cross railway lines?
A. Yes.

Q. And do you go anywhere near where this accident occurred?
A. No, you would be 300 yards away from Granny's Chair.

Q. Where the accident happened?
A. At least, yes. It may be 400 yards. I could not be too sure of the correct distance.

Q. What, the accident happened further away down the railway line, did it?
A. Where the accident happened was closer to the main quarry.

Q. After the accident did you do anything to this power line, yourself?
A. I stopped back and roped the top of the hill and the bottom of the hill off and put danger tags over, around it. This was just on dark.

Q. Were there any danger tags or warning signs in or around this line before the accident happened?
A. Not that I know of.

Q. Well, were there any there for you to see when you went there on the day of the accident, before you put them there?
A. On the day of the accident, I would not have known whether they were there or not, because I was too concerned about the boy.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Gutzke, A.G. 18th May 1970 (continued)

Q. Well, you put danger signs around after the accident?
A. That is right.

Q. Before you put these danger signs around were there any signs there at all?
A. I did not see any, no.

CROSS-EXAMINATION

MR. McGREGOR: Q. In order to walk from Cooper's house to Granny's Chair you would in effect be going away from the working area of the quarry?
A. No, you would have to cross the railway line and you would be going away from the road, but actually you would not be going closer to the quarry.

Q. But you would be away from the working area?
A. No, you would still be going closer to the working area.

Q. Is it west, north, or which direction away?
A. I am not terribly good on directions. It is actually in the same direction as our main quarry, but it is not in the same direction as the road that leads into the quarry.

Q. Would it be right to say that Granny's Chair would be half a mile?
A. I doubt that. One-third of a mile.

Q. One-third of a mile?
A. Yes.

Q. And the heaps where you saw these children sliding, so you say, with a steel piece of metal, that would be 300 yards away from where this accident happened?
A. No, it would be further than that. Where I saw these children play is a dump completely isolated from this area at all, almost completely behind my house.

Q. How far away?
A. Well, this is on the residential side of the quarry where the houses themselves are; it would be 300 or 400 yards away from that dump in particular where the boy got hurt.

Q. And what, they were just heaps of sand there?
A. It is not sand; it is crushed limestone, and they are dumped there over the years.

Q. And no electric wires were there or near there?
A. On this particular dump, not where the boys were playing.

Q. I mean the one where they were sliding on sheets of galvanised iron?
A. No, not where I saw the boys sliding; there was no piece of wire.

Q. You mentioned your son?
A. Yes.

Q. Was he playing with the plaintiff; was he a boy who was accustomed to playing with the plaintiff?
A. No, not my youngest boy. The eldest one was but my youngest one was -

Q. Which one came to you this day and told you something?
A. Robert.

Q. How old was he?
A. Ten, I should imagine.

Q. At that stage?
A. At that stage.

Q. And I suppose you had told him frequently, had you, to keep away from the quarry area?
A. I am afraid I had not, not to keep away from the quarry area.

Q. Well, had you told him to keep away from the working area of the quarry?
A. I do not recollect ever telling him to keep away from the working area, because I took it for granted. I thought that they would not go down there.

Q. Well, you took it for granted for this reason, didn't you, that you knew they had been given lectures at school - (Objected to; rejected.)

Q. Had you been told that they had been given lectures at school about keeping away?
(Objected to; rejected.)

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J.
Evidence of Gutzke, A.G.
18th May 1970
(continued)

Q. Were you ever told, yourself, at the quarry, by any members of the management or any of your superiors to keep strangers away or to warn strangers away from the company area?
(Objected to; rejected.)

Q. Were you ever told by, for instance, Mr. Creswick, the safety officer, to tell your children - not yours specifically but any children - to stay away from the company working area? (Objected to; rejected).

Q. You used an expression when you were describing the plaintiff - "I used to roar". What did you mean by that?
A. I am afraid I do not understand.

HIS HONOUR: You said you used to roar at the boy; and you said "He is no better than mine"?
A. I suppose I would roar at every kid around. If you have got two boys coming up there playing and making a noise, I used to roar and I still roar.

Mr. McGREGOR: Q. You mean for something they were doing about your house?
A. Yes. They would not be doing something very wrong probably, but I used to tell them not to do it. That is about all.

(Witness retired.)

.....
Part omitted comprised in documents transmitted to the Privy Council but not included in the Record).
.....

Evidence of King, D.G.R.
18th May 1970

DAVID GEORGE ROBERT KING
Sworn, examined as under:

MR. LOVEDAY: Q. Is your name David George Robert King?
A. Yes.

Q. Do you reside at Tulloona Avenue, Bowral?
A. Yes.

Q. And you are employed by the defendant company, Southern Portland Cement Limited?
A. Yes.

Q. As a computer programmer in training at Berrima?
A. That is right, yes.

Q. The company has cement works at Berrima?
A. Yes.

Q. And a quarry at South Marulan?
A. That is right.

Q. And up until September 1968 were you the foreman electrician at the South Marulan plant and quarry?
A. I was.

Q. What was the power supply to the company's plant at South Marulan?
A. We were supplied with 33,000 volts by the Southern Tablelands County Council through their line adjoining part of the Southern Portland Cement old power line at the side of the quarry.

Q. And in February 1967 where did that line run in relation to the bins and the back shunt?
A. The line would have been at something like 15 degrees to the railway line along the shunt, and that line would have been some eighteen-odd feet away from the pile of dirt comprising the back shunt.

Q. Was there some programme to extend the back shunt?
A. This was going on at this time, yes.

Q. And what did that entail?
A. Truckloads of fine material were dumped over the ends and the sides of this back shunt, and the top of the shunt was levelled off by the front-end loader to keep this level, and the waste material piled over the end to extend the length of the back shunt.

Q. And did that have any effect as regards the proximity of this shunt with the power line?
A. Yes, as the length of the shunt was extended, so the pile of fines approached the power line.

Q. How did the height of the pile where they were dumping compare with the height of the power line?
A. The top of the pile was above the actual power line itself.

Q. So that as the pile was extended it was sloped in or brought closer to the power line; is that

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of King, D.G.R. 18th May 1970 (continued)

getting the picture correctly?
A. Yes.

Q. In February 1967 did you have something to do about this power line and this pile in relation to a tree?
A. Yes, I was informed by my leading hand that a tree that was being covered by the back shunt was being pushed towards the power line.

Q. Well, did you go to the area?
A. I went to the area and inspected this and arranged to have the tree removed, and also noted that the power line was coming terribly close to the fine material. (Objected to; allowed.)

Q. Did you make an estimate of how close you would be at the time, February 1967, to the power line if you walked down the slope of the fines?
A. I would have cleared the powerline by some six to eight feet if I had walked down the slope at that time.

Q. Then before this dump was being extended outwards, how far above the ground was the powerline?
A. The powerline would have been a good twenty-five feet above ground level.

Q. Did you do something about this situation?
A. Having removed the tree or arranging to have the tree removed, I reported the matter to Mr. Howard.

Q. Is that Mr. Howard who is in Court?
A. Yes.

Q. Sitting behind Mr. McGregor?
A. Yes.

Q. And he was at that time the quarry superintendent?
A. Yes.

Q. And still is?
A. No, not at the moment.

Q. Well, he was at the time?
A. At the time he was, yes.

Q. Then what did he say when you reported to him?
A. "Bullshit."

Q. Well, was there anything further that you did about it at this time?
A. At this time, no.

Q. Well, did you do anything further at a later stage?
A. At a later stage I noticed that the fine material was coming even closer to the powerline, and I set out in a memo, some time in May or perhaps earlier, that that was the case and that the line was some twelve feet away from the dumped material.

Q. That was a memo in writing?
A. Yes.

Q. To whom did you address it?
A. It was addressed to Mr. Howard.

MR. LOVEDAY: I call for that.

MR. McGREGOR: It is not produced.

MR. LOVEDAY: Q. Did anything happen about that?
A. I cannot remember whether this actually caused anything to happen, but I was pretty shortly afterwards instructed to keep a close watch on the situation.

Q. Did dumping continue in this area?
A. Around about the same time that I was told to watch the situation, truck drivers were instructed not to dump material at the particular section near the approach to the powerline.

Q. Were you inspecting the powerline at this stage?
A. I was regularly inspecting the powerline at this stage, yes.

Q. This was May, was it?
A. This was about May.

Q. Did you continue to inspect it in June?
A. I continued to inspect it right up to the time of the accident.

Q. And how close was the dump to the powerline just prior to the accident?
A. I inspected the powerline some few days before

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of King, D.G.R. 18th May 1970 (continued)

the accident and at this stage it appeared to be six to eight feet away from the dump.

Q. Did you go down to look at it more closely?
A. No, I inspected it from the top of the pile, which was approximately 20 feet above the level of the powerline.

Q. Did you speak to Mr. Howard at this stage?
A. Once I made a letter - I also reported verbally to Mr. Howard on the situation.

Q. How often?
A. Usually when there was any change, and towards the end, about once a week.

Q. Up until the time of the accident had anything been done to fence off this area or put any signs up, or anything of that nature?
A. No.

CROSS-EXAMINATION

MR. McGREGOR: Q. When you spoke about that distance, 12 to 14 feet, you gave this answer "I would have cleared the powerline by 6 to 8 feet if I had walked down." Do you remember saying that?
A. I do, yes.

Q. What you mean is that it would have been 6 to 8 feet above your head?
A. No, not above. I would have come no closer than 6 to 8 feet from the powerline at my nearest approach to the powerline.

Q. You mean that is the closest point you got to it?
A. That is right.

Q. Well at that stage it was about 12 to 14 feet above the surface of the slope?
A. That is so. Not about it; at its nearest point.

Q. Well, at the nearest point of the surface, 12 to 14 feet?
A. That is right.

Q. So that anybody who was standing directly under it, with it immediately above his head, would have to reach higher than 12 to 14 feet to touch it?
A. Very definitely, yes.

Q. And if you can imagine someone walking down that heap and the wire is across the top of it, if that person could project himself at right angles to the slope and touch it, that person would have to stretch 12 to 14 feet?
A. He mainly would, yes.

Q. You mentioned that you reported to Mr. Howard when it was - that it was originally 25 feet above ground level, and later as the fines got closer you reported to Mr. Howard
A. I reported to Mr. Howard that it was some 16 to 18 feet away from the pile.

Q. But you reported to Mr. Howard and you used the word which you say he said in reply to you?
A. That is so.

Q. But at that stage, of course, the line was 12 feet almost from the nearest point of the surface of this slope?
A. It was at least 12 feet, but this infringed the regulations under which I was working.

Q. It is correct to say that it was 12 feet above the surface?
A. Above the surface, yes.

Q. And then your evidence was that you were told to keep a close watch on it?
A. That is right.

Q. Who told you that?
A. Mr. Howard.

Q. So, what he told you in effect was this "Keep a close watch on the wire and the distance between the wire and the surface of the tipping area"?
A. That is right.

Q. And, of course, that was, as you understood the instruction, to ensure that it did not get too close?
A. And to report to him when it was getting closer.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of King, D.G.R. 18th May 1970 (continued)

Q. And you said also that truck drivers were instructed not to dump fines in the area under that wire?
A. They were instructed -

Q. By whom?
A. I should imagine the instruction would be relayed, by Mr. Howard through his foreman.

Q. You heard them instructed, did you?
A. I saw instructions in the tip book, yes.

Q. Then whose instructions were they? 10
A. Those probably would have been the general quarry foreman's or the quarry foreman.

Q. Who was that?
A. Either Cecil Clooney or Trever Pearson.

Q. The chain of command goes this way: Mr. Howard then to Mr. Clooney and Pearson and then to the truck drivers?
A. That is so.

Q. The truck drivers, of course, when they used to dump there used a dump stop? 20
A. I do not remember seeing one at this particular dump.

Q. You know what that article is?
A. I do.

Q. It is a device made of metal?
A. That is right.

Q. That is used in this fashion, that if you are going to dump close to an edge and you want to ensure that a truck does not get too close to the edge, the truck dumps over the top of this dump stop?
A. That is right. 30

Q. And it works, first of all, this way, that it has a metal surface and then it has rollers, in the fashion I demonstrate, assuming the book is the metal surface, and then it has a number of rollers at the back of it, put at an angle?
A. Yes.

Q. So that the truck then backs on to it and if the truck's wheels should come right up to the rollers, what happens is that the wheels continue to turn but the truck does not move any further, is that right?
A. Well the truck moves no further, yes.

Q. And the purpose of this then is to ensure that trucks do not back over the edge of a declivity where they are dumping?
A. That is right.

Q. And, of course, it serves also as a marker point as to where dumping is taking place?
A. Usually, yes.

Q. Therefore, if there were no dump stops at this place then it would not be a place that was marked for dumping?
A. That is right. From time to time -

Q. Is it right, as far as I have put it?
A. So far.

Q. I am going to suggest further to you that there was a time when this dump stop was actually positioned up in this area on the back shunt; do you agree with that?
A. I do not remember seeing it, but quite likely.

Q. And then later on it was removed?
A. Possibly so, yes.

Q. I mean removed from the immediate vicinity of where those wires came?
A. I never did see a dump stop in the vicinity of the wires.

Q. I suggest the movement of it was achieved by a front-end loader?
A. Yes.

Q. The metal contrivance itself was very heavy, and needed heavy duty equipment such as a front-end loader to move it?
A. That is right.

Q. Well, do you agree that it was actually in a position approximately adjacent to where the wires approached the side of the back shunt?

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of King, D.G.R. 18th May 1970 (continued)

A. As I say, I do not remember seeing a back stop at this particular dump. However, I did see material dumped, away from the edge and left there to be cleared by the front-end loader.

Q. What you saw - and this was very close to the time of the accident?
A. Yes.

Q. Piles of fines heaped up about the edge?
A. That is right.

Q. All you know is that it was left there, heaped up?
A. Yes, however it was moved -

Q. And that was immediately before this accident?
A. Several weeks before the accident, yes.

Q. And, of course, if there is a pile of stuff of that kind there, it would make it very difficult for a truck to dump over the top of it?
A. Precisely.

Q. These fines that you saw heaped up that way are heaped up above whatever surface of the back shunt -
A. That is right.

Q. When that was done, ordinarily it would be the job of a front-end loader if it was intended to push it over, to push it over the top?
A. That is right.

Q. And you saw this pile of stuff in position for some weeks before the accident?
A. Piles at various times heaped up. This was clear, every night, every day.

Q. But you did see that there remained in position a pile of this stuff for some weeks before the accident?
A. Not one pile remained there for two days. Stuff was repeatedly piled up.

Q. But the effect of it was that there did remain for some time a pile of stuff on the edge - on the edge of this back shunt?
A. Yes.

Q. Whereas the normal process was that it was not allowed to remain but it was within twenty four hours shifted off with a front-end loader?
A. It was always pushed over by a front-end loader, right up to the time of the accident.

Q. The back shunt, in effect, was like an arm projecting out in a roughly southerly direction?
A. That is right.

Q. And built up on either side?
A. That is right.

Q. And as it was extended, so the railway was extended along it?
A. That is right.

Q. I want to show you exhibit "A1"; do you recognise that as an aerial photograph which includes, amongst other things, the back shunt area?
A. That is right, yes.

Q. And it is that area that projects out, as it were, like an arm?
A. That is right.

Q. And which was being built up and extended by this tipping process?
A. That is right.

Q. And if you look at Exhibit "A2", although it is not as plain, you get another view of it end-on?
A. Yes, on this side of the line.

Q. The total back shunt is the arm on which there is a railway line?
A. Yes.

Q. The pile that you saw some weeks before was on the right side or on the side where the wires were?
(Objected to.)

Q. You did see a pile which was for some weeks there; whether we add to or subtract from it, there was a pile there for some weeks, wasn't there?
A. At some stage there would be no pile, because it would be cleared, then they would start again as soon as it became difficult for the trucks to approach the edge.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of King, D.G.R. 18th May 1970 (continued)

Q. You did see a pile, whether it was added to or subtracted from for some weeks before this accident?
A. That is right.

Q. I suggest to you that that was on the right side of the back shunt?
A. This is the right side, looking south?

Q. Yes.
A. Not all of it, no.

Q. But there was a considerable amount of it on the right side?
A. There was an amount, not a considerable amount, no.

Q. Well, the conveyor belts are on the left side, aren't they?
A. I beg your pardon. On the right side looking south there was some material dumped, quite a material amount.

Q. Let us assume that the railway line comes in on my right from Goulburn or from the main line?
A. Yes.

Q. And then it cuts under these bins where trucks are loaded?
A. Yes.

Q. And the back shunt in effect extends out?
A. That is right.

Q. And as it is increased in size and length by tipping, so the railway could be extended too?
A. That is right.

Q. The wires that you are talking about were on the right side as you look back along the back shunt?
A. Running across the corner.

Q. But on the right side, for the moment; they are on the right, aren't they, not the left?
A. Well, on the extreme right of the pile there were no powerlines, they ran at an angle.

Q. Supposing you were walking, you would go right down to the back end of that back shunt

and the wires would come across it at an oblique angle on the right?
A. Yes, the right end.

Q. They were not close at all until you got down towards the end?
A. Yes.

Q. This pile of material or a considerable portion of it was in effect left on the right, towards the end of that back shunt?
A. Yes.

Q. In that position, of course, it would be immediately opposite the closest point to which the wire approached the surface of the slope?
A. Will you repeat that?

Q. At that point, that pile of fines would be at the closest point to which the wire approached the surface of the slope?
A. They would be close, yes.

Q. And if you had to draw in the position of these wires, they came at an oblique angle in the fashion I demonstrate, didn't they?
A. Across the point yes.

Q. And so they approached where the books are - (demonstrating on Bar table) - fairly closely and then, of course, they veered off that way, further away from the end than where the books are?
A. Yes.

Q. So that there was only one point where they were in effect at their closest point?
A. Yes.

Q. It was not as if they were parallel to the back shunt?
A. That is right.

Q. That was not their position at all?
A. No.

Q. To show that on the photograph without being too precise about it, those wires are along where my finger travels?
A. Yes, that is right.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of King, D.G.R. 18th May 1970 (continued)

Q. And down then to portion of the company's works which were down there?
A. Yes. (Photograph shown to jury.)

Q. The pile that you are talking about, being on the right side, was somewhere down where my finger is there?
A. More towards the end, the southern end, yes.

Q. Of course, this accident happened very close to the end?
A. That is right, yes.

Q. In pushing over these fines, that was a job for the gentleman who drove the front-end loader?
A. That is right.

Q. Do you remember their names?
A. Not the drivers at that particular stage, no.

Q. You have no idea who they were?
A. There was a Mr. Weston.

Q. No, the drivers of the front-end loaders?
A. That is right, but whether he drove the front-end loader on that job, I could not say.

Q. Who else, do you remember?
A. Mr. Hordern.

Q. Mr. Phillips?
A. Yes.

Q. Is a Mr. Phillips still working with the company?
A. I do not know. I have not been there for some years.

MR. McGREGOR: Q. Did you have any of your electrical equipment at the end of the back shunt - the other end?
A. From time to time we had portable lights at the back shunt for drivers to see, yes.

Q. Did you have any of those lights in position at the time of the accident?
A. If there was work my electricians were instructed to set lights up as required.

Q. Have you any memory as to whether lights were set up?
A. I can't recall. If there was work during the night there would have been lights there.

Q. Did you have occasion to go to the back shunt every night?
A. I left work at four o'clock and if I inspected the dump it would have been in the early part of the afternoon before night operations.

Q. Have you inspected the dump?
A. Yes.

Q. Did you go down and inspect it every day?
A. For the few weeks prior to the accident I was inspecting the dump some three times a week.

Q. Can you remember when was the last time you inspected it before the accident?
A. Either the Thursday or the Friday.

Q. It could have been either?
A. It could have been either.

Q. It might have been a Wednesday?
A. No, it would have been either the Thursday or the Friday.

Q. But you have no positive recollection one way or the other?
A. No, I am sorry.

Q. The last you saw of it, whether it was Thursday or Friday it was six to eight feet at the nearest point to the surface?
A. That is right.

Q. Once again, that means to say if anyone were standing on the surface directly underneath it his feet would have been six to eight feet beneath it?
A. That is right.

Q. Whereas, if you could imagine a tall man who was, say, seven feet long with a reach of one foot, he could have just touched it?
A. It would have taken no great effort -

Q. I am not asking you that. I want it mathematically?

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of King, D.G.R. 18th May 1970 (continued)

A. At the nearest point to the powerline it would have been six to eight feet so to have protected himself to the nearest point of the powerline he would need to have a reach of some six to eight feet.

Q. And that was a few days before?
A. That is right.

Q. When you say it was a few days before, you mean a few days before the accident?
A. That is right.

Q. That could have been the Thursday you mentioned?
A. That is right.

Q. At that stage there was still a pile of fines backed up on the back shunt?
A. At this stage I don't think there were fines.

Q. Have you any memory?
A. At that point I don't think there were fines piled up.

Q. You say "I don't think". Why do you use that expression?
A. It is three years ago.

Q. You are saying it is so long ago that you cannot be sure and that is why you say you don't think?
A. That is right, I have no positive recollection.

RE-EXAMINATION

MR. LOVEDAY: Q. When you saw this on your last inspection, which you think probably was about Thursday, were the lines then within reach of anyone walking down this cliff? (Objected to; allowed.) Were they within reach?
A. It would have required no great effort to have reached them. (Answer objected to; allowed.)

Q. If you walked down would it have been possible for a six foot man, say, to have reached them? (Objected to; allowed.)
A. Yes, quite possibly.

Q. You asked also about this pile of fines which was there - I think you said from time to time?
A. That is right.

Q. What happened to them so that they ceased to be there at some times and at other times they were there?
A. As they accumulated or as the accumulation became more pronounced they would become more of a nuisance and would have been pushed over the front by the front-end loader, (Objected to; allowed.) they would have been picked up and carried away.

Q. What effect would that have of pushing them over the dump?
A. This would have the effect of making the dump grow greater in length.

Q. What about the powerline?
A. As they were pushed over they would have come closer to the powerline.

Q. Why didn't you report this? (Objected to; question withdrawn.)

Q. Is there any danger to human life in touching a 33,000 volt powerline (Objected to; allowed.)
A. Extreme danger.

(Witness retired.)

KEVIN SMITH
Sworn, examined as under:

MR. LOVEDAY: Q. Is your full name Kevin Smith?
A. Yes.

Q. You live at South Marulan?
A. Yes.

Q. You are a schoolboy?
A. Yes.

Q. I think you are now fourteen years old?
A. Yes.

Q. What school do you go to?
A. Goulburn High.

Q. What year are you in?
A. Second year.

Q. Do you know Rodney Cooper?
A. Yes.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Smith, K. 18th May 1970 (continued)

Q. Did you know Rodney Cooper before he was injured in July, 1967?
A. Yes.

W. Was he a mate of yours?
A. Yes.

Q. Had you ever played with him?
A. Yes.

Q. Where did you go to play with him - at week-ends I am particularly concerned with - before Rodney was injured?
A. I used to play in the sandhills further up from where we were here.

Q. What do you mean by the sandhills?
A. There was a pile of rocks and dirt where the Euclids had been tipping up behind the bosses.

Q. Was that the same place where Rodney was hurt?
A. No.

Q. How far away from where you used to play was that?
A. I don't know.

Q. Did you ever see any company workmen around w when you were playing on those sandhills?
A. Yes, we used to see the men knocking off from work and that.

Q. And any of them ever said anything to you?
A. No.

Q. You saw them. Did any of them ever speak to you?
A. No, they were at the office along the side of the road and we were in the hills.

Q. Did they see you?
A. Yes, some of them seen us.

Q. Did you ever go down to this sandhill before the day of the accident at all?
A. No, not to this particular place.

Q. Where was it? (Objected to; allowed.)
(No answer.)

Q. Near it?
A. Yes.

Q. For what purpose did you ever go down to that sandhill?
A. We used to go down to set out rabbit traps.

Q. How often did you go down there?
A. We used to go down there fairly often.

Q. Did you cross the railway line?
A. Yes.

Q. Did you ever see any workmen when you were going out to attend to your rabbit traps?
A. We used to see them when we were setting them.

Q. Did anyone ever say anything to you about going across the railway line or going down these sandhills?
A. No.

Q. Do you know the place called Granny's Chair?
A. Yes.

Q. Did you ever play there?
A. We used to play there quite frequently.

Q. Does your father work at the quarry also?
A. Yes.

Q. To get to Granny's Chair did you have to go across the railway line from your house?
A. Yes.

Q. Did other children from the village play at Granny's Chair?
A. Yes, there used to be a lot of people.

Q. On the day of the accident were you with Rodney?
A. Yes.

Q. Where did you first meet up with Rodney that day?
A. At the edge of the train line.

Q. Who was with you?
A. There was only me up there. There was Russell, Robbie Gutzke and I think it was Wayne.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Smith, K. 18th May 1970 (continued)

Q. Wayne and Rodney and anyone else you can remember?
A. No.

Q. How many does that make? Four or five?
A. Five.

Q. Where did you go after you met up with them?
A. We went back again to Granny's Chair and after a while we cut straight across.

Q. Where did you go?
A. I went past the hedge where they are building the kiln and past where the accident happened.

Q. Why did you go down to where the accident happened?
A. Just playing.

Q. When you got there were the whole five of you there?
A. Yes.

Q. What did you do?
A. We were rolling rocks from the top of the hill to the bottom.

Q. What else?
A. And sliding down on a piece of tin with the front folded up.

Q. Something like a toboggan?
A. Yes.

Q. Sliding down the hill?
A. Yes.

Q. Do you remember the accident happening?
A. A bit of it.

Q. You tell me what you remember of it?
A. We went down there to play and after a while, after we rolled a few rocks down, we went down and had a look to see what marks we put on the trees and Rodney and I were coming back to the top and I was ahead of Rodney. The only thing I seen when Russell screamed or one of the kids screamed, I looked down and a couple of minutes later Rodney was on the wire.

Q. Did you see Rodney hanging on to the wire?
A. Only a couple of seconds.

Q. What did you see while he was hanging on to the wire?
A. Sparks and red lights and that.

Q. Where were the sparks and red lights coming from?
A. Mainly off his hand.

Q. Were any coming off his leg?
A. There might have been a few.

Q. Had you noticed this wire before?
A. We had seen it but we did not know what it was.

Q. Was there any covering on this wire or was it bare; do you remember?
A. I think it was bare.

Q. What did you then notice?
A. After that we watched Rodney roll to the bottom when he let go and when I got to the top Russell was with me.

Q. Did you go and get some help?
A. Both of us.

Q. I think Mr. Brok was the first man back, wasn't he?
A. Yes.

Q. Did you know what that wire was?
A. Not at the time.

Q. Did you know there was any danger to you from that wire? (Objected to; rejected.)

CROSS-EXAMINATION

MR. McGREGOR: Q. What is the date of your birth?
A. 9th September.

Q. Which year?
A. 1955.

Q. So that you would be almost twelve at this time?
A. Yes.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Smith, K. 18th May 1970 (continued)

Q. You now are in the Goulburn High School but were you at Marulan South Public School then?
A. Yes.

Q. What class?
A. Fifth or sixth, I am not sure.

Q. How did your class compare to Rodney's? Was he in the same class as you?
A. No.

Q. Was he behind or in front of you? Was he in a higher class?
A. Yes, a higher class.

Q. You had been at school when the headmaster had given the boys some lectures on safety, hadn't you?
A. Yes.

Q. He mentioned various things in those lectures, didn't he?
A. Mainly about road safety.

Q. Road safety was one?
A. Yes.

Q. In particular, road safety when the shift was changing when you boys would be coming out of school?
A. Yes.

Q. And then he also told you to keep away from dams and the water tower, didn't he?
A. Yes.

Q. You remember that quite clearly, do you, being told to keep away from these places?
A. Yes.

Q. He told you to keep off the railway lines and away from the railway lines?
A. Not actually.

Q. Are you sure about that?
A. Yes.

Q. You said not actually. Do you think he did perhaps tell you to keep away from where the tracks were?
A. Yes, he told us to stay away from that part.

Q. And that part, of course, was the back shunt area?
A. Yes, and in front of where they were building the kilns.

Q. The headmaster also told you to stay out of the company's property, didn't he?
A. Yes.

Q. And you knew, of course, when you went back - when you went down on this back shunt area that you were going where the headmaster told you not to go?
A. Where we were going we did not think we were on the property because where there was a fence is covered with dirt.

Q. That is at the bottom of the back shunt, is it?
A. No, not that part - round the side of it.

Q. But you knew it was company property up on top of that dump at the back shunt area?
A. Yes.

Q. And you knew when you were climbing up the slope that it was company property?
A. Yes.

Q. You had been told by your father to keep out of the Company property? (Objected to; disallowed.)

Q. Don't answer this question until His Honour has had a chance to rule on it; do you understand that?
A. Yes.

Q. Had your father told you before this accident that you were not to go into the company area?
A. (Objected to; disallowed.)

Q. You remember me asking you some questions about the headmaster and the lectures he used to give you?
A. Yes.

Q. These lectures happened on more than one occasion, didn't they? (Objected to; allowed.)
A. Yes, I think about once a month.

Q. And you had had a lecture about this a matter of a month before the accident? (Objected to; allowed.)
A. About what?

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Smith, K. 18th May 1970 (continued)

Q. About going on to the company's property?
A. No.

Q. Do you remember I was asking you about lectures that the headmaster gave you?
A. Yes.

Q. One of the things he told you about was that you should stay out of the company's property?
A. Yes.

Q. And in particular, he told you to keep away from the railway lines and the trucks?
A. That was the part round near the bins and that.

Q. Did he tell you
A. Yes, that is round the bins.

Q. And you had to go past the bins to get to where the back shunt finished?
A. Yes, we could go either side.

Q. But you had to go along the back shunt past the bins in order to get to where the accident took place?
A. Yes.

Q. And the last lecture that he gave you was no more than one month from the time of this accident?
A. I can't remember.

Q. Anyway, he did give you these lectures about once a month?
A. Yes.

Q. Did you see the wire before Rodney was caught on it, or touched it?
A. Yes.

Q. When did you first see it?
A. When we first went down there.

Q. You were able to walk underneath it?
A. Yes.

Q. Only at one point was it close to where you were playing on the ground?
A. Yes, that is where Rodney was hurt.

Q. Anywhere else it was well above your head?
A. Yes.

Q. And when you climbed up and down you avoided where it came down near the ground?
A. Yes.

Q. And you avoided it because you thought it might be dangerous? (Objected to; rejected.)

Q. Did you climb up and down more than once?
A. No, I only climbed down once.

Q. And you climbed back once?
A. Yes, when I was going back up.

Q. You did pass under the wire twice?
A. Yes.

Q. And both times, for whatever reason, you avoided the point where it was close to the ground?
A. Yes.

Q. Look at this; we call it Exhibit "A1", but you need not worry about that. Does that show a picture of some of the works area?
A. Yes.

Q. And over here you can see trucks on the back shunt?
A. Yes.

Q. There were trucks on the back shunt that day when you were there?
A. There were only a couple.

Q. Is it over here where my finger is that you used to play on the sandhills that you described?
A. Yes.

Q. To get to there you would not have to cross any railway lines?
A. No.

Q. You might put a little cross where you showed me you played on the sandhills?
A. Where I used to play right along?

Q. Put a line along where you used to play.
(Witness marks Exhibit "A1".)

Q. Look at that picture which I show you, Exhibit "A3". It is behind where the pen is that the

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Smith, K. 18th May 1970

(continued)

sandhills are which you referred to and that you marked on Exhibit "A1"?
A. Yes.

Q. Would you put an arrow pointing down to that from above it? (Witness marks Exhibit "A3".)

Q. What about these rabbit traps that you mentioned? Can you see on this picture Exhibit "A1" the area where you used to put your rabbit traps? Don't mark it for a moment. Tell me if you can see the Area?
A. We used to go over round this area.

Q. Look and tell me if you can see it more plainly on the next photograph, Exhibit "A3"?
A. Yes, around this area.

Q. Have a look at Exhibit "A1" again which you saw first, and see if you can mark on it the area where you used to put the rabbit traps and you can put a circle or a sausage-shaped circle, if there is such a thing, so as to enclose the total area?
A. There. (Indicating.)

Q. That of course would be a fair way away from the company's property?
A. Yes.

Q. These lectures that the headmaster gave you, were they before school or during school lessons, or when?
A. During school lessons.

RE-EXAMINATION

MR. LOVEDAY: Q. I think you said in one or more of these lectures the headmaster gave you, and the other boys, I take it, he mentioned something about company property. What did he say to you?
A. He told us that down where all the Euclids and that are where they tip down at the bottom of the quarry and up where the tanks and kilns are, is out of bounds.

Q. Down the bottom of the quarry, that is where they are facing - (Objected to; allowed.)
A. Yes.

Q. What do you understand by the bottom of the quarry?
A. That is where they do all their mechanical work and blasting and that.

Q. Is that on the same level as where this accident occurred?
A. No, it is down the bottom.

Q. And not where the accident occurred?
A. Yes.

Q. Did the headmaster say anything to you about keeping away from there? (Objected to; allowed.)
A. He had told us that where they were back-shunting and that -

Q. What did he say?
A. He said "Stay away from all those areas and not to go near the back-shunt just in case one of the trucks derailed or something".

Q. Was there anything going on, on the Sunday, with shunting?
A. No.

Q. Was there any work at all going on in and around the quarry where you were where this accident happened?
A. No.

HIS HONOUR: Q. When you saw Rodney with his hand on the wire for those couple of seconds was he standing, kneeling, or sitting, or what was he doing?
A. He more or less had his knees off the ground. He was sort of bent.

Q. And his feet?
A. They were on the ground.

(Witness retired.)

(Further hearing adjourned to 10 a.m. Tuesday, 19th May, 1970.)

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Part evidence of Cooper, J.H. 19th May 1970

JUDITH HELEN COOPER
Sworn, examined as under:

MR. LOVEDAY: Q. Is your name Judith Helen Cooper?
A. Yes.

Q. You are the mother of Rodney Cooper, the plaintiff in this action?
A. Yes.

Q. And you live at South Marulan?
A. Yes.

Q. And you and your husband and family have lived there for many years?
A. Yes.

Q. How many years?
A. 19 years.

Q. I think you live in a house owned by the defendant company?
A. That is right.

Q. And your husband is employed by the defendant company?
A. Yes.

Q. What is his occupation?
A. He is a labourer.

Q. What does he earn?
A. I am not sure.

Q. What does he bring home? Perhaps I should not ask you that. Haven't you any idea how much he does earn?
A. No, I have not taken much notice of his pay packet.

Q. Anyway, I think you have five children living, is that right?
A. That is right.

Q. Who is the eldest?
A. Edward.

Q. How old is he?
A. He is 17.

Q. And then?
A. Rodney is 16. Russell is 15. Evan is 13 and Wayne is 12.

Q. Are they all at school or are some of them working?
A. There are three working - no, there are two working and two at school.

Q. Who are working?
A. Edward and Russell.

Q. What is Edward's job?
A. He is a labourer at the Abattoir.

Q. That is at Goulburn is it?
A. Yes.

Q. What does he earn?
A. $27 a week.

Q. What about Russell?
A. (Objected to.) He is working at a garage in Goulburn, at $15 a week.

Q. In 1967 were they then all still at school?
A. Yes.

Q. The two eldest ones were at Goulburn High School and the others at South Marulen, is that correct?
A. Yes.

Q. How had Rodney been getting along?
A. Not too bad.

Q. Was he a bright student at school or how would you describe him?
A. Well, he seemed to be learning a little bit better than the others.

Q. And how was he emotionally so far as his general manner and demeanour were concerned?
A. We always had very good conduct out of him.

Q. I think you had some goats, is that right?
A. That is right.

Q. And you had had some goats for a number of years?
A. Yes.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Part evidence of Cooper, J.H. 19th May 1970 (continued)

Q. How many goats did you have?
A. About 12.

Q. And had you had them for some years before the accident?
A. About four years.

Q. Where did you keep these goats?
A. On the company's property.

Q. Was that in and around the area where the workings were?
A. Yes. (Objected to.)

Q. Will you describe whereabouts you kept these goats?
(Objected to; allowed.)

Q. Where did you keep these goats?
A. Well, we kept them on the company's property, because we lived there and there was nowhere else to keep them.

Q. Who tended these goats?
A. The boys and I.

Q. Were they always in the one place or were they moved around?
A. No, they were moved around.

Q. Where were they moved around?
A. Well, to wherever we could find a bit of feed for them.

Q. Did anyone from the company ever speak to you about the goats? (Objected to.)
A. Yes, Mr. Cluny told us we could keep them there as long as we kept them tied up.

Q. Could you describe a little bit more about where these goats were?
A. Well, we usually kept them down around, like, the works - not the works but this side of the works, over the line.

Q. That is the opposite side of the line from where you live, is that right?
A. Yes.

Q. Do you know where Rodney was injured?
A. Yes.

Q. Anywhere near there?
A. Well, not far from there.

Q. Did you ever go on to the company's property to look after these goats?
A. We always went on the company's property.

Q. And to get to where these goats were, did you have to go past the company office?
A. No. (Objected to.)

Q. Where did you have to go on the company's property?
A. Well, we went around the back of it. We used to go on the property, we did not pass the office.

Q. What amount of looking after did these goats require?
A. Well, we used to have to attend to them two or three times a day, because they used to get tangled up.

Q. Who did the looking after of these goats?
A. Mostly I did, because the boys and my husband were at school - well, away, during the day.

Q. And at the weekends?
A. At the weekends the boys looked after the goats.

Q. At the weekends was there any work done in the company's works?
A. No, - only the fitters - (Objected to; allowed.)

Q. And what about trains; were there any trains at weekends?
A. Not unless they were working on production.

Q. Well, do you remember the weekend when Rodney was injured?
A. Do I remember it?

Q. Yes.
A. It was 30th July.

Q. It was the Sunday?
A. Yes.

Q. Were there any works going on at the works that weekend?
A. No. (Objected to; allowed.)

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Part evidence of Cooper, J.H. 19th May 1970 (continued)

Q. What was the first you knew about the accident?
A. When Russell came home and told us.

Q. Did you go to Goulburn Hospital with Rodney?
A. Yes.

Q. And later on did you go to the Children's Hospital in Sydney to see him?
A. Yes.

Q. And then Rodney came back home to you after he was discharged from hospital?
A. Yes.

Q. Was there also something else on the company's works that your children used to go to?
A. Yes, the school; and they used to hold Sunday School there.

Q. Sunday School also?
A. Yes.

Q. Where was the Sunday School?
A. They held it at the mess hall.

Q. And who attended this Sunday school?
A. Well, mostly all the children attended Sunday School.

Q. And where was the mess hall?
A. Just across the line, just across from the office.

Q. Just across from the office?
A. Yes.

Q. Where was it in relation to the houses; how far from the houses where people live?
A. I would say about a quarter of a mile.

Q. And where was it in relation to where Rodney was injured?
A. About 200 or 300 yards.

Q. Did you ever see any children on the company property when you were attending the goats?
A. Yes.

Q. Where did you see those children?
A. Well, they used to be playing around the sand heap.

Q. Over what period had this been going on?
A. Well, ever since we have been there.

.....
(Part omitted comprised in documents transmitted to the Privy Council but not included in Record)
.....

CROSS-EXAMINATION

MR. McGREGOR: Q. Can I just show you this photograph, Exhibit "A1". (Shown to witness.) Do you recognise that as an aerial view of some portion of the company area?
A. Yes, that is the back of the quarry, that is the -

Q. Are those the sandhills marked there?
A. Yes. It was down around here that the boys got, here.

Q. Are those the sandhills where the ink marks are, where you saw the boys playing?

Q. You mentioned about Sunday school?
A. Yes.

Q. Haven't they been holding, since 1961, Sunday school in village hall?
A. Yes, but that is on the company property.

Q. You remember me showing you a photograph Exhibit "A1"?
A. Yes.

Q. That would be to the right of this photograph, wouldn't it? (Shown to witness) It would be back here somewhere on the right side?
A. Yes, I think it would be.

Q. When you talk about company property, of course, the whole of the houses were company property as well as the working area?
A. That is right.

RE-EXAMINATION

MR. LOVEDAY: Q. You mentioned the village hall; is that the same as the mess hall?
A. Yes, that is where everything is held, if there are any functions on they are held in the hall.

(Witness retired.)

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Bushell, F.A. 19th May 1970

CASE FOR DEFENDANT

FRANCIS ALAN BUSHELL
Sworn, examined as under:

MR. McGREGOR: Q. Your full name is Francis Alan Bushell?
A. Yes.

Q. Your address is Marulan South?
A. Yes.

Q. You are the headmaster of the Marulan South Public School?
A. Yes.

Q. That appointment you took up in the beginning of 1966?
A. True.

Q. And you still maintain that appointment?
A. Yes.

Q. And you also live at Marulan South?
A. Yes.

Q. In the year 1966 approximately how many pupils were there at the school?
A. From memory I think forty-two, forty-three, somewhere in this vicinity.

Q. How many teachers were there?
A. Two.

Q. What classes were you embraced in the school?
A. My assistant teacher taught kindergarten, first and second, and I taught third, fourth, fifth and sixth.

Q. Between you you made up the total teaching staff?
A. Yes.

Q. You taught all subjects to your pupils?
A. Yes, all primary subjects.

Q. Do you remember the subjects you taught in fifth class?
A. We taught the usual primary material of English language, mathematics, social studies,

handwork for the boys and sewing for the girls, art, music; the general run of primary subjects right through. Included in this of course was health and hygiene and everything that is included in the primary syllabus.

Q. You knew the plaintiff, Rodney Cooper?
A. Yes.

Q. What class was he in, and I am asking you in 1966?
A. This is a very difficult question to answer. He was not in any one particular class.

Q. I want you to deal with that if you will?
A. I found many of the children in the school were of greatly varying abilities and I tried to classify them in such a way that we got the best for each child that we possibly could. We found some children may have been in third grade possibly for spelling, and they may have done reading, fourth grade mathematics or some may have even been doing fifth grade. Or the situation could be reversed. Rodney was in a situation of doing mainly third and fourth grade work.

Q. Was that a method of adjusting to his standard?
A. That was a method of adjusting the school work to the standards of the children as far as possible.

Q. What was your experience of him as a pupil in regard to his ability?
A. He was rather a slow learner. He had great difficulty with reading. We did the best that we could for all these children, naturally. I would have to say Rodney was a slow learner, he was a retarded child.

Q. How would you describe him in terms of his ability, one of the best, in the middle or one of the low grades?
A. He would have been in the lower echelons.

Q. Sometime after you came there do you remember being approached by Mr. Howard, the quarry superintendent, and Mr. Creswick?
A. Yes, they approached me - (Objected to.)

Q. Mr. Creswick was the safety officer?
A. Yes.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Bushell, F.A. 19th May 1970 (continued)

Q. They had a conversation with you, do not tell us what it was.
A. Yes.

Q. After that did you on occasions talk to children at general assembly or in class about certain matters?
A. Yes.

Q. Was it in class or at general assembly? Or both?
A. At both.

Q. Would you tell me what you said to the children, going as close as you can to what you did say, every one of us realising you cannot reproduce the words - (Objected to; allowed.)
A. Generally speaking, to cover the whole safety angle as much as we could concerning the children in that particular community.

Q. I am not asking you what your motive or intention was, what did you say to them?
A. To keep off the road, not to play on the road, not to play on or near the railway lines, the dams, the water tanks and to keep out of the quarry area.

Q. Dealing with that last matter, did you give some description of what you were referring to? (Objected to.)

MR. LOVEDAY: Perhaps he could say what he said.

MR. McGREGOR: Q. Tell us how you phrased this as far as you can - before you do so if you wish you may look at some photographs which we have here, Exhibits "A1" to "A3" - could they be put in front of the witness? (By leave shown to witness.) Would you just have a look at them?
A. This one would probably show most clearly I think (indicating).

Q. The only purpose is to enable you to tell us what you did tell the children.
A. Well I am sorry, but I can't remember the exact words that I used -

Q. We do not expect you to do that?
A. It was a matter which probably only took two or three minutes when I said such things as "Now don't play on the road - (Objected to.)

HIS HONOUR: Q. Tell us what you did say?
A. As far as I can remember?

MR. McGREGOR: Q. Yes, tell us how you described this area from which they were to keep out?
A. I pointed out to them that there was an area of danger which is drawing a line from behind the houses of Morrice Street across, below the office block of the quarry, to leave the working men's cubicles in the out-of-bounds area, across up to the western side of the bowling green and then on the western side between the railway and the fences of the houses facing Hume Street, sort of drew this imaginary line for them and said "Now if you go over that you are going into an area of great danger".

Q. Did you describe that area in some way as to what was there?
A. To the best of my knowledge I think I did, yes.

Q. What did you say it was?
A. I said this is a quarry area and this is a very dangerous area for small children.

Q. Did you use an expression in any way?
A. This area is out of bounds for children.

Q. You had a photograph in your hand and you said to his Honour you thought you could describe the area by reference to that photograph?
A. This is extremely difficult.

Q. Have a look at this photograph (shown Exhibit "A1"). Does that assist you?
A. This is the starting point of the line. These are the houses which front Morrice Street; Morrice Street is here (indicating).

Q. On the right of the photograph?
A. Yes. This line would then come behind these houses to exclude an area of dump over here; behind these houses and crossing, and the main office would be here somewhere (indicating).

Q. You point to a position just to the right of the photographs?
A. Yes.

Q. Where the main office was?
A. Yes. And then of course this photograph does

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Bushell, F.A. 19th May 1970 (continued)

not show it, would then swing around the bowling green which would be over further still.

Q. As far as you can would you place the pencil on the photograph to show that area which you describe as being excluded, so far as the photograph shows?
A. If you put the pencil there to erase this part (indicating).

Q. The part on the left was excluded?
A. Yes.

MR. McGREGOR: May we mark that on the photograph?

HIS HONOUR: Yes.

MR. McGREGOR: Q. Is the pencil in the right position now?
A. Yes, I would say so.

Q. The photograph Exhibit "A1" does not show the full company area of course?
A. No that one doesn't.

Q. You know an area called the back shunt area?
A. Yes.

Q. And in fact you know the area where Rodney was injured later in an accident?
A. I am not absolutely sure of the exact position of that area.

Q. You can assume it was on the side of the back shunt down towards the end. How did that area compare with what you told them as to what was out of bounds? (Objected to; rejected.)

Q. Where did the line run that you described to the children in relation to the back shunt area? (Objected to; allowed.)
A. The imaginary line that I would have drawn would have run to the eastern side of the railway line.

Q. This out-of-bounds area, that is what I am concerned with, was that back shunt area in the out-of-bounds area or in the area they could use?
A. It would have been in the out-of-bounds area.

Q. You told us you gave these lectures, or talks, or warnings. How often did you do it, on the average?
A. It is very difficult to say exactly how often but I would say approximately each month to six weeks.

Q. Have you with you in this Court the roll for the school for that year?
A. That is here.

Q. And have you checked on the attendance marked down for Rodney Cooper for that year?
A. Yes.

Q. What was his absence in respect of school days?
A. He was absent half a day that year.

Q. One half-day?
A. One half-day.

Q. Can you say whether it was morning or afternoon?
A. I could by reference to the roll.

Q. Could you tell us the date?
A. I could by reference to the roll.

Q. With His Honour's permission would you do that?
A. It was September 15th and it would have been an afternoon absence.

Q. That is 1966?
A. Yes.

Q. Did you, however, on occasions see children anywhere in this area which you said was out of bounds?
A. Yes.

Q. Whereabouts had you seen them?
A. On the railway line.

Q. What portion of the railway line?
A. On the railway line to the north of the area referred to as the bins.

Q. Can you see that area first of all in this photograph "A3"?
A. No it is not in that.

In the Supreme Court of New SouthWales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Bushell, F.A. 19th May 1970 (continued)

Q. Would it be to the left or right of that?
A. To the right.

Q. That means down in the back shunt area?
A. I am sorry -

Q. Look at it carefully. Are these the houses up here on the left?
A. Yes. I am sorry, it is to the left.

Q. To the left of the bins?
A. Yes.

Q. The bins are those four cylindrical objects?
A. Yes.

Q. So if this photograph went further to the left it would encompass that area?
A. Yes.

Q. The next photograph I show you as "A2". Does that enable you to show where the children were?
A. Yes.

Q. Just take your time.
A. Let me get this exactly right. This is the road and that is the railway line here? (Indicating).

Q. Yes. This is a quarry area down here, that is the back shunt and there are the bins (indicating).
A. I would say there (indicating) and again on another occasion here (indicating).

Q. Would you mark those two places with a cross, with this pencil? (Witness complies.)

Q. On how many occasions have you seen children at those points you marked with the cross?
A. They were two separate occasions.

Q. That is the only two occasions. What did you do when you saw them?
A. I told them I thought it was time they went home.

Q. And did they, get out of the railway line?
A. Yes.

Q. Have you at any other time seen children apart from perhaps conducted tours, in the area of the

bins and the back shunt or down in the quarry area?
A. Not that I can recall.

Q. Am I right in saying that the two points marked X are on the other side of the village from the working area of the company?
A. They are to the north of the working area, yes.

Q. That is to say, if you were coming in on a train you would pass those two points X before you got to the stage where you reached the village and the next thing you do is enter the area near the bins?
A. That is not absolutely correct. The village lies almost parallel to the railway line as it comes in and it is on the western side of the village.

Q. If you came along that railway line where you pass the two points marked X had you reached the bins?
A. No.

Q. How far away from them would you be?
A. The point farthest from the bins could be three to four hundred yards and the point closer to the bins would be 200 yards; I am only guessing.

Q. Was there any particular time you ensured you gave your talk or warning or lecture about where the children were not to go? (Objected to; allowed.)
A. Always immediately preceding a vacation period.

CROSS-EXAMINATION

MR. LOVEDAY: Q. Were you familiar with the whole of this company area?
A. At this time?

Q. In 1966.
A. No.

Q. Or in 1967?
A. No. I am not even familar with the whole company area now.

Q. I am talking about the area at South Marulan which comprises the actual quarry area where they do the blasting and get the limestone rock, that is one section; have you been down there?
A. Yes.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Bushell, F.A. 19th May 1970 (continued)

Q. How often did you go down there in 1966?
A. I have no idea could have been twice, three times, four times.

Q. Then there is an area at a higher level where the dumps are?
A. Yes.

Q. The children call those the sandhills, do you know that?
A. I am aware of that.

Q. How often did you go over that area during 1967? 10
A. Again I do not know. I cannot be specific I am afraid.

Q. May I take it you had no regular pattern whereby you went over this area in a patrol fashion or anything of that nature?
A. No.

Q. It was not your habit to patrol around the company area during weekends?
A. No.

Q. And you did not deem it any part of your duty 20
to see whether the children were playing in the company works area or not, at weekends?
A. No. Except if I happened to see them in a situation which I considered dangerous.

Q. But you did not actually go over to the dumps to have a look, did you?
A. No.

Q. You tell us Mr. Howard and Mr. Creswick came to see you?
A. Yes. 30

Q. When was that?
A. I have no idea of a date at all, but I think it was during the first term I was at Marulan South. It would have been in the first term of 1966. I am fairly sure of that but of a date, no, I have no idea.

Q. Is that the only time they came to see you?
A. Oh no, they have been to see me on other matters at other times.

Q. Did either Mr. Howard or Mr. Creswick come to you in 1967 and tell you there was a dangerous 33,000 volt electricity line?
A. No.

Q. Did you know anything about a dangerous high voltage electricity line?
A. No.

Q. Was anything said in your school to any of the pupils about a special danger from a high voltage line?
A. Not from any special line.

Q. May I take it your lectures, if I can put it that way, were part of a general safety lecture?
A. Yes.

Q. Specifically referable to these children living at South Marulan?
A. Yes.

Q. You would be concerned I suppose about them being careful of traffic, particularly at change-over of shifts?
A. Yes.

Q. To be careful crossing the road?
A. Yes.

Q. Especially young children toddlers?
A. Yes.

Q. You had those at school did you not?
A. Yes.

Q. And I suppose they were told to look to the left and look to the right and this sort of thing, and to walk and not run as they crossed the road?
A. Yes.

Q. Did you also tell them to be careful to avoid trucks on this railway line?
A. Yes.

Q. Because the railway line was completely unfenced, was it not?
A. In the village area, yes.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Bushell, F.A. 19th May 1970 (continued)

Q. And there was no physical barrier to the children going anywhere on the company works, was there - (Objected to.) I mean a fence?
A. One fence.

Q. Where was that?
A. At the top of the hill. Are you familiar with the area? The hill coming up from the quarry area and the area which you refer to, as the children said, the sandhills, there was a fence along the top there.

Q. That is the other side of the sandhill?
A. Yes - I am sorry, may I say something?

HIS HONOUR: Yes.

WITNESS: The fence was hardly necessary because there was quite a precipitious drop but there was a fence there, there was one fence.

MR. LOVEDAY: Q. But no fence to fence off the sandhills for example?
A. Not to my knowledge.

Q. No fence to fence off the railway line?
A. Not on the village side.

Q. Do you know an area called Granny's Chair?
A. I have heard of it.

Q. Have you ever been there?
A. No.

Q. Do you remember in 1966/67 there was a number of goats in the area. Cooper's goats?
A. Yes.

Q. Mrs. Cooper had about twelve goats, did she not?
A. I understand so.

Q. Well you saw them?
A. I don't know exactly how many there were.

Q. And you did not know their names either I suppose?
A. No.

Q. But you knew by sight that these were Mrs. Cooper's goats?
A. Yes.

Q. And these were depastured at various places from time to time, moved around, did you notice that?
A. Yes.

Q. Usually on a tether but some I suppose loose?
A. Yes.

Q. They got loose from time to time did they not?
A. Yes I am afraid they did.

Q. And these goats used to be depastured, tethered, in and around the company works area wherever there was a bit of grass?
A. I do not know about the company's works area but I do know they were tethered.

Q. Wherever there was some feed for them?
A. Probably.

Q. Sometimes too close to somebody's garden I suppose?
A. Definitely.

Q. Goats do not draw any line between flowers and grass, is that it?
A. No.

Q. Did you ever see the Cooper children tending these goats?
A. Yes.

Q. Did you ever see them tending the goats in the company's works area?
A. Not to my knowledge. I cannot remember that.

Q. But of course you were not in the company's works area yourself very much, were you?
A. No.

Q. Of course this area you have told us about and in respect of which you have drawn an imaginary line excludes the dumps area, does it not?
A. Yes.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Bushell, F.A. 19th May 1970 (continued)

Q. Did you know that children played in those dumps, sandhills, sometimes?
A. Only by being told abat it.

Q. I suppose after this accident happened everyone was very shocked?
A. I was.

Q. And you gave some special lectures then to the children, did you not?
A. Yes.

Q. And told them then they had to keep out of the works area altogether, did you not?
A. It was merely a repetition of what I had told them before.

Q. You were very vehement about it were you not?
A. Yes.

Q. Did the Cooper children still have to tend their goats in the company area? (Objected to; question withdrawn.)

Q. Would it be correct to say then that these children of yours at South Marulan are much the same as any other children - (Objected to; rejected.)

Q. You tell us you used to give them a lecture about every month or six weeks?
A. To the best of my memory, yes.

Q. Was this because you felt that repetition was beneficial?
A. I felt repetition was necessary.

Q. Necessary because children do not always do what they are told? (Objected to; rejected.)

Q. Did you go down to this area after the accident and have a look at it?
A. No.

Q. You have never been there?
A. Not unless I went unwittingly at some time and did not know, and I still do not know exactly where the accident occurred.

MR. McGREGOR: Q. (By leave.) I show you Exhibit "A1". You used the expression the sandhills. What did you understand to be described when the sandhills are referred to?
A. The area behind the houses in Morrice Street. It is an area of dumped sandy overburden I think as much as anything else.

Q. Can you point to it with your finger?
A. This area here (indicating).

Q. Is that the area where the blue line is?
A. Yes, that is the area I understand to be referred to as the sandhills.

(Witness retired and excused.)

KEVIN CHARLES HOWARD,
Sworn, examined as under:

MR. McGREGOR: Q. Your full name is Kevin Charles Howard?
A. That is right.

Q. You are the executive officer of the defendant company?
A. Yes.

Q. Your address is Queen Street, Bowral?
A. That is correct.

Q. In 1967 you were the quarry superintendent at Marulan South for the defendant?
A. I was.

Q. We are going to talk about an accident that took place with Mr. Rodney Cooper. You know where that occurred?
A. Yes I do.

Q. You know the electricity line which was involved in it?
A. Yes. It does not exist now but I recall it.

Q. When did you first come to work at the Marulan South Quarry?
A. About 1960 as I recall.

Q. Was the line then already in position?
A. Yes.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Howard, K.C. 19th May 1970 (continued)

Q. Was it in the same position as it was at the time when Rodney was injured?
A. Yes.

Q. Did you from the time you came there yourself live in the so-called village of Marulan South?
A. Yes, from about 1960 to 1969.

Q. I want you to take the photographs "A1" to "A3" in your hand and tell me if you can see any portion of the place where you lived?
A. Yes; not clearly.

Q. Would you mark it with a cross? (Witness complies on Exhibit "A2".)

Q. So that it does not become confused with another cross marking, would you put a circle around it? (Witness complies.)

Q. Is it visible on any of the photographs I have shown you?
A. Yes it is on this one (Indicating on Exhibit "A3").

Q. Would you mark it in a circle on that photograph? (Witness complies.) I think the back yard of the house is also visible in "A1". (Marks with circle.)

Q. At the weekend, what was the normal procedure, was there work carried on at the works?
A. Well there was a period at about that time, 1967, when we did have a six-day production working.

Q. That included Saturday?
A. That was Saturday being a normal working day. In addition to that there was maintenance invariably carried out on Sunday.

Q. That is to say, even when there was no work otherwise being done there was still maintenance being done on Sunday?
A, On almost all occasions, yes.

Q. What did the maintenance consist of?
A. This could vary from work down in the lower quarry area to work in virtually any one of the quarry areas; from the bins at one end to the equipment in the quarry at the other.

Q. Was that maintenance work on the machinery or on the terrain actually?
A. It could have been both. It could have been the maintenance of roads and areas.

Q. How many men normally would be engaged in maintenance?
A. We have a total of fifty men in the maintenance section and I would say normally perhaps half of those would work both days on a weekend.

Q. Saturday and Sunday?
A. All of them would work Saturday on production shifts and perhaps half on an average on the Sunday.

Q. Did you yourself have the habit of making an inspection on Saturdays and Sundays, or one or both days?
A. Usually both days, when I was in the area.

Q. First of all, did you ever see on those occasions any children in the works area, that is to say the area of the company other than the living area or in the vicinity of the bowling green?
A. Yes occasionally I would see them on weekends there.

Q. Whereabouts have you seen them?
A. That would vary. I think the most frequent spot would have been around the works office which was sort of adjoining the township.

Q. Was that in the works area in the sense of any activity industrially being carried on there?
A. No, not a works area as such, it was a clerical office.

Q. On any of those inspections did you ever see any adults who were not company employees in the works area?
A. Yes, we would occasionally see a car in the area that should not have been there.

Q. How many times have you seen children in the works area in the vicinity of the office or anywhere else?
A. I guess on weekends I might see them around the office perhaps every second occasion. In the actual

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Howard, K.C. 19th May 1970 (continued)

quarry workings, that would be more rare perhaps. It is difficult to say, certainly infrequently but occasionally.

Q. What action did you take if you saw children first of all near the office?
A. Usually a loud voice to scare them away was sufficient.

Q. You told them to go?
A. Told them to go. (Objection to leading.)

Q. What about if you saw them in the other area? I thought you said down in the quarry area or the workings area?
A. I think on those occasions I would always go up to the children and tell them why they should not be there and make sure they got out of the area.

Q. Has there ever been any occasion when you have seen children in either of those areas, or adults in either of those areas when you have failed to tell them to leave?
A. No, certainly not.

Q. In your capacity as superintendent did you give instructions to the safety officer on this matter?
A. Yes. Perhaps I should explain. We have a regular series of safety meetings - (Objected to; question pressed, question allowed.) It was at these meetings that the question of children arose and it was at that meeting the safety officer was instructed to see the headmaster about this matter.

Q. Apart from the headmaster did you give him any instructions or anybody any instructions as to what to do if persons other than persons actually employed in the company and about that work were found in the quarry working area?
A. Yes, this was brought out at the meetings at which all staff and foremen attended.

Q. What were they told?
A. It was a specific instruction to the safety officer but a more general instruction to the others.

Q. What was the instruction you gave?
A. To keep children out of the working area.

Q. In the time you were there up to the time of this accident had you ever seen children on the back shunt either on the railway line -
A. No.

Q. That is south of the bins, is it not?
A. Yes.

Q. The bins being those four cylindrical objects shown in the pictures?
A. Yes.

Q. The railway runs north and south there?
A. Yes.

Q. If you go down on the back shunt to near where the accident took place you go south?
A. That is right.

Q. Had you ever seen children or other strangers on that back shunt area?
A. Not prior to 1967, no.

Q. Did you see any in 1967?
A. Well of course there were some people there at the time of the accident and afterwards.

Q. But apart from the day of the accident?
A. No.

Q. As to the day of the accident, you arrived there after it had taken place?
A. That is correct.

Q. Did you see any children there earlier that day or at any time that day before the accident took place?
A. No.

Q. You mentioned that the electric wire, which was subsequently the wire where this accident took place, was in the position in 1961 when you came that it was when the accident took place, is that right?
A. I am not clear on the question. Was it the same line?

Q. It was the same line?
A. Yes.

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No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Howard, K.C. 19th May 1970 (continued)

Q. Let me ask you some questions about the process which was taking place. You were reclaiming limestone from a southern area of the total quarry works area?
A. Yes, this was a conventional open-cut quarry.

Q. And the spoil, or whatever you term it, was then dealt with in some kilns on the lower portion?
A. No, it was dug from the ground, it is rock, limestone.

Q. What was the next process in the treatment? It went to crushers?
A. It was blasted, loaded, went to crushers and then conveyed up the hill to those loading bins.

Q. And it was conveyed up in conveyor belts?
A. Yes.

Q. Underneath what we have heard are bins were trucks brought in from the main north-south line?
A. This is correct.

Q. Is there a slope running south back on to the back shunt?
A. That is correct.

Q. Would the trucks be allowed to run by merely manually taking off a brake until they were positioned under the bins?
A. That is correct.

Q. And then the filling operation would take place?
A. Yes.

Q. And then still with manual operation the truck would be allowed to run down on the back shunt?
A. Yes, gravitated we say.

Q. Before any truck was placed on that back shunt there would have been positioned there a guard's van?
A. That is right.

Q. So it would occupy the most southerly point to in effect where the buffers were?
A. Yes.

Q. In that way one by one the trucks would be allowed to run down until a train of conventional size was built up?
A. Yes.

Q. And then a locomotive was brought in from the main line and the train was taken to its destination?
A. Yes.

Q. To provide space for a train of conventional size was it thought necessary to extend the back shunt?
A. Well not with the trucks we were dealing with when we designed the back shunt but subsequent changes in truck length required us to extend this back shunt.

Q. What was the method of extending it?
A. Well one of the four materials we process and produce is a minus one inch sizing. This material is sometimes of too low a quality to convert to cement and on occasions is dumped. This is normally taken to another major dumping area but on this occasion it was suitable as a filling material. So this material is taken to that back shunt and dumped over the end.

Q. The back shunt then was moving gradually in a southerly direction?
A. Yes.

Q. When did that activity start?
A. It started in early 1967 as I can recall.

Q. At that time it started what was the position of the power line at which the accident happened, in relation to the ground?
A. The power line was running south almost parallel to the back shunt but not quite parallel so extension of that railway siding would have brought it into proximity, they were converging.

Q. They were converging as the back shunt went back?
A. Yes.

Q. What was the height before the work was undertaken of the power line above the ground?
A. I would be guessing there.

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No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Howard, K.C. 19th May 1970 (continued)

Q. Approximately?
A. Twenty-odd feet or so.

Q. Then as the work on the back shunt continued it would be getting closer to this power line?
A. That is right.

Q. In 1967 was there also some other building work going on there?
A. Yes, we were erecting a new lime burning kiln adjacent to and on the west side of those loading bins.

Q. Did this induce or indicate or provoke a decision to re-locate the electric supply line?
A. It did not initiate it. The original intention was to re-locate perhaps two poles to allow this extension of the back shunt to proceed. But the construction of the new lime-burning kilns, on investigation, would have required the removal of that power line.

Q. So in early 1967 was a survey undertaken?
A. Yes.

Q. Of what?
A. Of the old power line and the needs of the new lime-burning plant in terms of power lines.

Q. What was then discovered to be the condition of the old power line?
A. Well they were in poor condition and needed replacement.

Q. Speaking of that, you mean as to the supporting poles?
A. Both the poles and the alignment and the direction of that power line, it no longer served its purpose.

Q. What decision was taken about what would happen to those lines?
A. That we would pull them down and build a new line to serve both the new and old plants.

Q. Was the work undertaken at once?
A. No. Well there were problems in, firstly, deciding what power line requirements there were for this new plant.

Q. It was deferred for some time?
A. It was deferred.

Q. And then in 1967, and I am talking about early in 1967, what was the clearance between the nearest portion of the ground and this power line?
A. Well at the commencement of 1967 it would have been the original twenty plus feet.

Q. Then at some stage did you give some instructions about tipping on that back shunt, in 1967?
A. Yes, the original idea was to extend the back shunt as far as we could consistent with the power line still being there.

(Luncheon adjournment.)

(At this stage Mrs. Cooper excused from further attendance.)

MR. McGREGOR: Q. You did tell me in 1967 there was a survey of the power line carried out and a decision was made that it should be renewed?
A. Yes.

Q. And then you also told me the decision for the actual work of renewal was deferred due to the construction of the new kiln which was somewhere in the vicinity of the bins?
A. That is correct, yes.

Q. When was it that decision was deferred, was it in 1967?
A. Yes, quite early in 1967.

Q. At that stage what was the clearance between the line and the nearest point of any earth?
A. The nearest point would have been the ground and that would have been twenty-odd feet below the line.

Q. As time went on was the dumping of fines continued on the back shunt in 1967?
A. Yes.

Q. Did that have the effect of bringing the slope of the back shunt closer to the wires?
A. Yes.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Howard K.C. 19th May 1970 (continued)

Q. Then did you eventually come to a time when you gave some instructions to Mr. Clooney about tipping?
A. Yes, the instruction was to - (Objected to.)

Q. Before you tell us that, when did you give that instruction?
A. I cannot be clear about the time. It would have been certainly prior to the incident in July. Perhaps two months prior to that.

Q. And before you gave that instruction did you make an inspection, or did you see the position of the wire in relation to the side of the back shunt?
A. Yes.

Q. What was the distance at this time which separated the wire from the ground or the side of the back shunt?
A. It could have been as close as twelve feet. That is measured at right angles to the face of the dump.

Q. At right angles to the slope?
A. Yes. It would have been a much higher distance measured vertically.

Q. Who was Mr. Clooney?
A. Was and still is the general quarry foreman.

Q. In relation to any work you required done, stopped or implemented as to dumping on the back shunt who was the person to whom you should talk?
A. Well on this matter, on production matters, Mr. Clooney.

Q. Tell us what instructions you gave Mr. Clooney? (Objected to.) What did you tell him? (Allowed.)
A. The instruction was to cease dumping material on that side of the back shunt, that is the western side, to place a number of truckloads along on that side, that is on the surface of the back shunt on the western side so dumping could not physically be carried out and to place a dump stop on the far south-eastern corner of the back shunt.

Q. We have already heard a description of the dump stop in Court earlier in this case. It was

a device which was used in conjunction with Euclid trucks which themselves brought up the spoil if there was to be any tipping?
A. That is correct.

Q. It was always used when tipping was to take place?
A. Yes, it was the standing instruction no tipping could be done over an edge unless a dump stop was there.

Q. So you gave that instruction at some time without being able to precisely fix the point. Did you then check with Mr. Clooney whether he passed on that instruction?
A. I checked by seeing it had been carried out and this in fact was done.

Q. Sometime after giving the instruction you say you checked. Did you go back to that area?
A. Yes, the loads were placed on top and the back shunt was in the position I wanted it.

Q. The loads being placed on top, what effect did that have physically on the landscape? Where were they in effect?
A. They extended for some perhaps fifty feet. The amount of material would have been about four or five hundred tons and they would have been a heap some twelve feet, fifteen feet high, forming a physical barrier of dumped heaps on that side of the back shunt.

Q. Assuming they had stayed there what was the ability of any further tipping over that slope?
A. There could not be any tipping over that slope.

Q. Do you remember when it was you noticed that material had been placed there? If you cannot tell us, say so?
A. Not precisely. Some weeks prior to the point of time we are concerned with.

Q. You do remember the accident, you told us you actually came upon the scene after it had happened?
A. Yes.

Q. Do you remember the Thursday before that?
A. Yes.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Howard, K.C. 19th May 1970

(continued)

Q. Were you in the area of that back shunt?
A. Yes I went to the back shunt on that day and had a look at the area.

Q. First of all, was the dump stop still there?
A. The dump stop had been moved at that time.

Q. What about that barrier of fines you have described?
A. I cannot recall it in my mind that it was there, but knowing I had seen it there and instructed it to be there and not recalling it was missing, I assume it was still there.

Q. What about the wire, did you look at the wire?
A. Yes, the wires appeared to me to be closer than they were.

Q. What appeared to you to be the clearance?
A. I don't recall putting a distance of the clearance but I remember thinking at the time that they were out of reach but closer than they should have been.

Q. Out of reach of what?
A. Out of reach of anyone.

Q. Of anybody?
A. Of anybody.

Q. You mean who might walk down the slope?
A. Yes.

Q. What decision did you come to then?
A. I decided we could not allow the power line to remain where it was.

Q. What did you do on the Thursday?
A. I travelled to our head office at Berrima and spoke to the general manager of the company and pointed out - (Objected to; allowed.)

Q. You had a discussion with him?
A. Yes I told him I had reason to move this power line as a matter of urgency.

Q. And he said?
A. He said I could go ahead and do it.

Q. What did you then do?
A. The following day, the following morning -

Q. The Friday?
A. Yes, I rang the clerk of the Southern Tablelands County Council pointing out we had need to re-locate a power line and could they act as contractors to do the work as a matter of urgency.

Q. Was an appointment made?
A. Yes, it was agreed they would come up to the site on Monday, the following Monday after the 29th.

Q. That would be the day after the accident?
A. Yes.

Q. So it was the Thursday before you spoke with your manager. What was his name?
A. John McNicholl.

Q. The Friday would be the 28th, if the accident was on the 30th?
A. Yes, the 28th.

Q. You spoke to the gentleman at the County Council?
A. Yes, Mr. Davies, the clerk.

Q. What was the next thing about this matter?
A. The next thing I knew on Sunday afternoon when this accident was reported to me.

Q. You went down to the scene?
A. Yes.

Q. What did you notice?
A. There was an employee, Mr. Anton Broks at the bottom of the heap with the injured boy.

Q. What did you notice about this pile of fines you had last seen there?
A. The fines were not there.

Q. This some hundreds of tons was no longer there?
A. About four to five hundred tons of material.

Q. It was no longer there, on the top?
A. It was gone.

Q. What did you notice about the position of the wire?
A. The wire was much closer than when I saw it on the Thursday.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Howard, K.C. 19th May 1970 (continued)

Q. When you say much closer do you mean in all its positions or in only one particular position?
A. No, only one. This dump was circular in plan and the proximity of the line was only close at one particular point.

Q. How close was it at that point?
A. This is difficult to estimate. You could not get a rule on it but three, four feet, perhaps four feet.

Q. Supposing you had walked past that particular point where it was three or four feet from the wire, say six or eight feet to either side of it, what would have been the clearance?
A. Six or eight feet, about twice as much, roughly.

Q. How did that point where the wire was closest to the ground compare with the position corresponding above where these fines had been heaped?
A. It was not close to the ground, it was close to the face of the dump. The wires were about halfway between the top of the dump and the bottom of the original ground.

Q. You mean if that is the side of the back shunt the wires were about halfway (demonstrating.)
A. Yes.

Q. What I was directing your attention to was you told us about some fines which had been heaped up on top of the back shunt?
A. Yes.

Q. I am asking you how did that point where the wires were three or four feet from the surface of the back shunt, that slope, compare with the position which had been occupied by the material you had seen up on top?
A. They were right underneath, that is why we put the fines at that point.

Q. If someone had pushed them over they would have gone to that point?
A. Yes that is why they were there.

Q. Were the fines pushed over on any instruction given by you?
A. No, no the instruction was to leave them there.

Q. Well contrary to your instructions then?
A. Yes, contrary, definitely.

Q. You had given no orders that they should be moved since the time you had given the order they were to be piled up there?
A. No.

Q. Have you made inquiries or did you cause inquiries to be made as to who pushed them over?
A. Yes, I asked Mr. Clooney subsequent to the accident to find out where they had gone, why they had been pushed over.

Q. Were you able to find out who it was?
A. No.

Q. Were you able to find anyone who could tell you permission had been given for them to be pushed over?
A. No. We had found information to the contrary.

Q. Nothing to suggest someone by mistake had given permission to push them over?
A. No.

Q. As to the way to get fines which have been heaped up on that surface over the edge, what device was used?
A. We have three rubber-tyred end loaders that could be used for that purpose.

Q. Is there any other equipment, or was there any other equipment at the quarry which could have been used for that purpose?
A. No.

Q. Apart from inquiring from Mr. Clooney did you yourself make any personal inquiry amongst front end loaders as to who had done it?
A. No I did not. (Evidence objected to.)

HIS HONOUR: The reason why I have admitted all this evidence is because of the charge contained in the second count of the declaration, that the defendant had acted recklessly and wantonly.

MR. LOVEDAY: It would seem these were the employees of the defendant company that did this.

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No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Howard, K.C. 19th May 1970 (continued)

HIS HONOUR: Yes, but after all you could not say it was a truck driver who would act recklessly within the meaning of this. Surely that means persons in authority.

MR. LOVEDAY: He is acting within the scope of his employment and if his employment is to drive a front end loader and push material over the edge he can act wantonly and recklessly on behalf of the company.

HIS HONOUR: I thought this was to show even though there may have been negligence on the part of some person in the area the defendant is liable, it would not establish recklessness; lack of humanity is what the authorities say, intention to injure, phrases like that.

MR. LOVEDAY: Not on my reading of the authorities but I see the point Your Honour is making and I have made my objection.

MR. MCGREGOR: Q. Let me ask you about some other matters slightly unrelated to this. First of all, there was a claim here by a Mr. King he had sent a memo to you on the subject of the wire and its proximity. What do you say as to that?
A. Well I do not recall having seen that I am afraid. I have checked my files but I can find no record of it.

Q. You have also heard evidence given that when a report was made to you you answered with some exclamation which it is not necessary to repeat, do you remember that?
A. Yes.

Q. Have you any memory of that, or anything like it?
A. No specific memory of that incident, no, I am sorry.

Q. Was there ever an occasion when you were told that the wires were dangerously close to any portion of the company's premises and you dismissed the matter out of hand?
A. Well no. The question was raised by Mr. King after I had spoken to him about this tree matter at which time I was aware of the condition.

Q. Then there is mention here about the village hall as being a place used for Sunday school?
A. Yes.

Q. Whereabouts is that in relation to the village area?
A. Well it is in the centre of the village area.

Q. So it is separate from the working area of this quarry, or the back shunt or the bins?
A. Oh yes, quite separate.

Q. Do you know the boys who have been mentioned in this case? For instance, the Cooper brothers, other than the plaintiff, do you know them by sight?
A. Not individually by sight.

Q. Do you know the Cooper boys without being able to tell which is Russell and which is Wayne?
A. Yes.

Q. Have you seen them outside this Court?
A. Yes.

Q. When?
A. Yesterday and today.

Q. What about the boy called Bobby Gutzke?
A. Yes, he lived next door to me, I did know Bobby Gutzke quite well.

Q. Have you also seen him outside?
A. Yes I have.

CROSS-EXAMINATION

MR. LOVEDAY: Q. You had been in this area since about 1960?
A. Yes.

Q. And in 1960 I think the village was using the mess hall as the Sunday school was it not?
A. I am not certain on that point. The hall was built in 1961 and I know since that time they were using that for Sunday school. I cannot be sure in 1960.

Q. Can you recall at any time you were using the mess hall as a Sunday school?
A. No I cannot. It could have been though.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Howard, K.C. 19th May 1970 (continued)

Q. You would not deny the mess hall was used as a Sunday school at one stage?
A. Well I know in 1960 it was used as a private house so I doubt it was used as a Sunday school.

Q. The mess hall is outside the village area, is it not?
A. Yes.

Q. In the works area?
A. Yes it is just opposite the main office.

Q. You told us you made inspections every weekend?
A. Well most weekends. Every weekend I was there, yes.

Q. In these inspections you occasionally saw children in the quarry working area?
A. Yes.

Q. And occasionally saw other persons, strangers to the works?
A. Yes in motor cars.

Q. And sometimes hikers too coming up from the Shoalhaven?
A. Well, hikers with approval, boy scout groups and people like that.

Q. And they would come through the works areas on occasions would they not?
A. Approved groups, yes.

Q. Sometimes people without any approval would come through either coming up from the Shoalhaven or going down, did you ever experience that?
A. Not personally but I would say that could have happened, yes.

Q. When you talk about seeing children in the quarry workings, children from the village did go across to the western side of the workings into Les Cooper's land, did they not?
A. Yes.

Q. Did you know about that?
A. Yes.

Q. Did you ever go over to a place called Granny's Chair?

A. I assume this means a heap of rocks that I know of. I am not sure if the name relates to that place.

Q. And to get there if they went in a direct line from the village they would cross portion of the company's working area, would they not?
A. They would cross the top part of the quarry's railway siding.

Q. In the vicinity of the bins or kiln?
A. Yes, north of the kiln but in the vicinity of it.

Q. And children frequently went rabbit-trapping in that area and further to the south of that area did they not?
A. Yes.

Q. And to get to those areas they would go across the company's workings area?
A. Well I am only going on hearsay where they would go across.

Q. Well you saw them from time to time using the company's working area as a thoroughfare, did you not?
A. Well I would see them in there, I would not what purpose they were there.

Q. Did you not ever ask them what they were doing?
A. No specifically, no.

Q. Sometimes you might have seen them with a rabbit?
A. No, never.

Q. Did you ever see them playing on the sandhills, as they call them, the dumps?
A. If they mean those areas - I think it has been identified on a plan, yes.

Q. You have seen them there?
A. Opposite the main office.

Q. Well they were dumps of fines, were they?
A. Yes.
Q. Similar to the material which was used to extend the back shunt?
A. Yes.

Q. And the extension you were building to the back shunt was a dump of fines materials itself, was it not?

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No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Howard, K.C. 19th May 1970 (continued)

A. Well not exclusively. There were other materials put there as filling, excavation from the kiln for example.

Q. You were using it as a subsidiary dump, is that right?
A. No, I would say the other way around, we were putting fines there for a purpose not related to dumping.

Q. May I take it where the accident occurred was beyond the area where the railway line extended at that time? Do you understand what I am putting to you?
A. Well yes and no. The railway line was extended in short increments as we had advanced progressively.

Q. But where the accident actually occurred was beyond where the line had been extended up to that time?
A. It is difficult to say. The line was extended as we had extended the back shunt. Every time we went another forty feet we put another length of rail on. So it was never any more than forty feet between the end of the railway line and the extremity of the dump.

Q. This accident happened near the extremity of the back shunt as far as had been reached at that time?
A. Yes.

Q. And it was beyond where the line had reached was it not?
A. Well the edge of the dump was where the line had reached, yes.

Q. In other words it was possible to go to this place without crossing the line, to go from the village to this place without crossing the line?
A. Yes.

Q. Going around the back of the back shunt?
A. Yes.

Q. And indeed it was beyond the farthest point of the back shunt at that time?
A. What was beyond?

Q. The point where the accident happened?
A. No, that would have been approximately parallel to the furthest section of the railway line. It was not at the end of the dump so much as on the side of it.

Q. You were dumping so as to extend beyond where the accident happened?
A. Yes at the time of the accident we were.

Q. Did you continue to dump to extend the back shunt further?
A. At what point of time?

Q. After the accident.
A. Yes, on the eastern side we did.

Q. There was no more dumping carried out in the vicinity of the power line after the accident?
A. There could have been a little but it would not have been very much.

Q. Let me get this sequence of events straight. You say you decided to extend this back shunt area early in 1967, is that right?
A. Well we started to extend it. The decision could have been taken even earlier than that, perhaps late in 1966.

Q. And it was known then I take it that this would bring the heaped up material in close proximity to the power line?
A. Yes.

Q. A decision, however, was not made at that time to alter the power line, to divert it, is that correct?
A. Well the decision was made but it was not carried out.

Q. It was not carried out because there was still some technical problem associated with the kilns, is that what you mean?
A. Yes, it was a question of diverting or putting a bend in it or relocating it completely.

Q. You ultimately decided to re-locate it completely?
A. Yes.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Howard, K.C. 19th May 1970 (continued)

Q. When did you decide that?
A. This would have been perhaps three months before the accident, that is a rough estimate.

Q. Nothing was done, however, in that three months before the accident to re-locate the line, no actual work was done?
A. No, no actual work was done, except design work.

Q. And nothing was done to fence off or protect the power line from anybody getting too close to it?
A. No there was no need to at that point.

Q. You say no need. It was certainly within eighteen feet of the ground was it not, three months before the accident?
A. Look, I could not be sure on that.

Q. Mr. King, your foreman electrician, was worried about the line not complying with the Act was he not? (Objected to.) Did not he mention that to you? (Objected to; allowed.) Mr. King spoke to you and expressed his concern about the line not complying with the Act, is not that so?
A. The strict answer is no because I don't think Mr. King would have been aware of the Act.

Q. Were you aware of it?
A. Yes.

Q. What was your understanding of how far this line could be clear of the ground?
A. Well at the point of construction, eighteen feet.

Q. At the point of construction?
A. Yes, that was the only requirement of the Act as I understood it.

Q. You mean at the time of construction?
A. At the time of construction of that power line it should have been.

Q. It should have been eighteen feet but not afterwards. You did not think there was any requirement to maintain this power line eighteen feet above the ground?
A. Not in terms of the Act. In terms of general safety, yes.

Q. Did Mr. King speak to you about the power line in terms of general safety?
A. I would suggest it was the other way round, I spoke to Mr. King about the power line.

Q. Why did you speak to Mr. King about the power line?
A. There was a tree that was between the dump and the power line and as the dump was advancing so this tree was leaning towards the power line. I requested Mr. King to have the tree lopped down.

Q. How close was the tree to the power line?
A. Well this is difficult to say. In my opinion it was possible that the tree could touch the power line if and when it fell.

Q. Was this the only conversation you had with King about the power line?
A. Yes.

Q. This would have been in February, 1967, would that be right?
A. That would be the general order but I could not be specific.

Q. You heard Mr. King say yesterday he was instructed to do some work to remove a tree from a power line and that was in February 1967, does that agree with your recollection?
A. If he says that it was I would agree with it.

Q. You were present in Court yesterday when he said he reported to you about the matter of the power line, do you remember him saying that, immediately after removing the tree?
A. Yes, I am sure he would have made some statement about it to me, yes.

Q. But you say you were already fairly aware of the situation?
A. Yes.

Q. Did you make some remark to him when he reported it to you?
A. I am sure I would have said something to the extent I was aware of the problem.

Q. Do you deny you used that rude word that he said you used?

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No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Howard, K.C. 19th May 1970

(continued)

A. Well I can't deny it because I can't recall it. If I could recall it perhaps I could, but I can't I am afraid.

Q. You thought there was no need for any concern, is that the position?
A. Oh I would not say that.

Q. Did King subsequently report to you his concern about this power line?
A. I am afraid I cannot recall any specific occasions when Mr. King spoke to me - (interrupted).

Q. Do you deny he spoke to you?
A. No I could not do that but I am just not clear in my memory about it to be one way or the other.

Q. Did you say anything to him about it?
A. In the context of the tree I recall that clearly.

Q. Is that the only time you recall speaking to King about it?
A. I think so because it was not a matter under Mr. King's direct control.

Q. Who would have these memos that Mr. King might have written to you? Where would they be?
A. They would be in the file at the quarry office.

Q. Have you looked through that file?
A. Yes and I cannot find it.

Q. You got a subpoena to produce documents have you not? Have you seen that subpoena?
A. I don't think I have.

Q. At any rate you say you are not able to find such a document?
A. No.

Q. Do you deny ever having received one?
A. I don't deny it, I think it was highly unlikely but I cannot deny it, because King would not have communicated in writing to me.

Q. He might have communicated in writing of course to protect himself, might he not?
(Objected to; rejected.)

Q. Apart from this incident in February nothing further happened until about two months before the accident, is that what you say?
A. In connection with what?

Q. In connection with the power line or dumping?
A. Well there was quite a bit happened in connection with designing the power line relocation.

Q. But after King reported to you in February or after he removed the tree in February, dumping did continue to bring the power line closer to the heap?
A. Yes, to something more than twelve feet from the heap.

Q. You say that was about two months before July?
A. Approximately two months; some weeks.

Q. Did it occur to you that was a dangerous situation?
A. Dangerous in the long term, not dangerous in the short term.

Q. Did Mr. King report to you at that stage about the situation?
A. He could have done but I cannot recall it specifically.

Q. But you were fully aware of it?
A. Yes, I was making regular inspections of this area.

Q. So you were aware there was some danger of this heap getting so close to the power line as to bring it within reach?
A. If things continued without some action, yes.

Q. If dumping continued or if more material was pushed over the edge, that is what would inevitably happen would it not?
A. Yes.

Q. And in fact that is what did happen is it not?
A. That is correct.

Q. And there is no doubt that some employee or employees of the company in your mind continued to dump over the edge or push material over the edge

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No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Howard, K.C. 19th May 1970 (continued)

so as to bring about this dangerous state of affairs that existed on 30th July? (Objected to; rejected.)

Q. When you made an inspection two months before the accident you say then the wires could have been as close as twelve feet to the slope?
A. Yes.

Q. Does that mean twelve feet at its nearest point, or twelve feet above if you are standing on the slope beneath the wire?
A. No, twelve feet at the closest way of measuring between two points.

Q. At rightangles?
A. At rightangles to the slope.

Q. So it would have been some greater distance than twelve feet if you stood below it?
A. Perhaps twenty feet if you stood below.

Q. At that time you gave an instruction to Mr. Clooney?
A. Yes.

Q. You say that instruction was carried out?
A. Yes.

Q. You saw that it was carried out and you made an inspection to make sure it was carried out?
A. Yes I did.

Q. When you saw it was carried out you noticed that there were loads placed on the top adjacent to this area about ten feet or fifteen feet high?
A. Yes.

Q. And did you continue to make regular inspections?
A. I could not be certain of the frequency but I would say it would be perhaps one or two times a month, of that order.

Q. Once or twice a month?
A. Weekly or more.

Q. Did those piles continue in the same position?
A. To my memory, yes.

Q. Were they still there the Thursday before the accident?

A. Yes, although I am saying that with not the certainty that I saw them there. The only certainty I have is if they had not been there I would have noticed it and I didn't.

Q. Your recollection is they were there in the same condition as they had been when you arranged for them to be put there two months before?
A. Yes.

Q. You looked at the wires and you noticed they were closer than they had been two months before?
A. Yes.

Q. Obviously some more material had gone over the edge had it not?
A. Well there could have been two reasons for that condition occurring.

Q. What were those reasons?
A. One that the profile of the dump had changed. Instead of being concave it would have been convex or, as you suggest, material had been pushed over.

Q. In any event it was getting so close as to be a very urgent source of danger, very great source of danger?
A. I would not say great source but source of concern to me; not source of danger.

Q. At that stage it was within reach of any person walking up and down the slope?
A. No.

Q. It was not?
A. Not on the Thursday.

Q. Did you give specific instructions at that time about fencing the area off?
A. No.

Q. Or did you take any specific measures to ensure no more material went over the edge?
A. Yes, to the extent that the dump stop had been taken away from the area.

Q. Are you very clear about what the area was like on the Thursday before the accident?
A. Reasonably clear, yes, three years back.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Howard, E.C. 19th May 1970

(continued)

Q. Just think. Were these heaps still there in position or not?
A. I have asked myself this question and I can't be sure except that I am almost certain they must have been there.

Q. You are almost certain they must have been. That is a very important matter is it not?
A. But I just cannot remember more definite than that. The only thing I can say is I knew they were there, I knew I had left instructions they had to be there and I have no recollection of seeing them absent.

Q. If those heaps were still there that suggests that there had been no more dumping over this section during the last two months does it not?
A. Not really.

Q. Do you think that still might have happened?
A. Well it could have been the same heaps that were there two months ago or they could have been pushed over and replaced, I can't be clear.

Q. If that had happened of course that was a matter of great concern was it not, concern to you?
A. The only concern to me was that the power line was closer than I had seen it earlier.

Q. And if it had happened in the past that these heaps had been pushed over it might happen again might it not?
A. Well assuming the first part, yes.

Q. For one reason or other the heap was a lot closer to the power line than it had been two months earlier?
A. Well, a few feet closer, yes.

Q. A few feet closer. That is so is it not?
A. Yes.

Q. And was the slope any different in appearance? Was it concave instead of being convex?
A. I cannot recall forming an opinion I am afraid.

Q. Is not that an important matter?
A. Well it is viewed with hindsight I am afraid, but at the time - (interrupted.)

Q. Was it not of some concern to you that this heap was continuing to approach the power line?
A. Well I don't know about continuing.

Q. Despite your orders you had given two months earlier?
A. It had extended from the point at which I had given an order, yes.

Q. Was it not of some concern to you that the heap was continuing to approach the power line despite your orders that you had issued two months before?
A. Yes.

Q. Did you attempt to see why this was so?
A. No, my action is to move the power line.

Q. There was one of two things happened, either there had been a failure to comply with your orders, or else there had been a change in the nature of the slope. The first thing, you could have checked up by some inquiry to Mr. Clooney could you not?
A. Well the first point was really answered by the fact that the dump stop was missing, the dump stop had been moved on my instructions on the previous visit, that there was no more dumping required at that point, so there could have been no more dumping or pushing over occurring at this time.

Q. What do you say, there had been no more material pushed over the edge during the preceding two months?
A. I can't say that for certainty. There could have been.

Q. Did you make enquiries of Clooney to see whether it had or not?
A. No.

Q. Did you not think that was important?
A. I did not think the history was important, I thought the future was important, to stop it now being removed.

Q. Was not the future important in as much as you should take steps to make sure no more material was pushed over the edge?

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Howard, K.C. 19th May 1970

(continued)

A. I am not sure what answer you are requiring to that.

Q. Did it occur to you to take steps to ensure no more material was pushed over the edge on the Thursday before the accident?
A. No I can't say it did specifically.

Q. It would have been a simple matter for you to have issued a specific order to Clooney on the Thursday?
A. Yes, although it had been issued. It was a standing instruction to all foremen.

Q. But it had not been complied with?
A. Well I am not sure it had not.

Q. There is no doubt that some more material had gone over that edge in the last two months?
A. Yes, there is a doubt.

Q. On the day of the accident or after the accident, was it you who issued instructions to have a fence around this power line?
A. Well a fence top and bottom of the area, that is the dump, yes.

Q. How many men did you get on to that job?
A. Building the fence?

Q. Yes.
A. I think it was only a half-hour's job for an electrician but it was not a fence in the sense you mean.

Q. It was something to keep people off that section, to protect that section?
A. Not physically. It was I think four notices top and bottom saying Danger, 33,000 Volts.

Q. It would have been a very simple matter to have done that on the Thursday?
A. Yes it would except on the Thursday it was not as close as it was on the Sunday.

Q. But even on the Thursday it was in reach of a man was it not?
A. Oh no, definitely not in reach.

Q. What about a young lad walking down or walking up with a piece of iron that they used to slide down sandhills, was it in reach of that?
(Objected to; allowed.)
A. That is the only firm recollection I have in my mind, that I said to myself it is not within reach. I cannot be specific on heights or distances or anything else.

Q. Did you think it sufficiently important to go and measure it?
A. No, it was not measurable.

Q. Did you think it was sufficiently important to walk down the slope a little bit?
A. No.

Q. To see if it was in reach or not?
A. No, I viewed it from a number of points at the top.

Q. And you say it was not measurable?
A. Well in the sense you could not measure it while the power was in the line.

Q. You could go close enough to get a better estimate than looking at it from the top could you not?
A. As I say, my estimate was based on walking around the top viewing it from an angle.

Q. What you said in your evidence-in-chief was "I remember thinking they were out of reach." What did you mean by that?
A. That a person could not even go close in attempting to touch them.

Q. Do you mean no person could have touched them by reaching up with his hand?
A. Yes that was the opinion I formed.

Q. Does that mean they were at least eight feet away?
A. I think I have equated that to at least seven feet but probably eight feet would be more like it.

Q. Eight feet away from the dump, that is what you estimated it?
A. Yes.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Howard, K.C. 19th May 1970 (continued)

Q. There would have been no danger to you to walk down the slope at that stage?
A. There would have been a danger because the surface was quite hard. It was comprised of one-inch chips of rock, clay, quite hard and quite dangerous to walk down, very slippery.

Q. No danger from the wires to walk down?
A. No.

Q. There would have been no problem so far as going down and looking from underneath the wires how much clearance there was?
A. Well as I have said, there was a problem in walking down this very steep face.

Q. But it was loose was it not?
A. No, it contains a fair amount of clay and this had sealed and set.

Q. Was the surface of it the same on the Sunday?
A. Yes it was still quite dangerous to walk down.

Q. Still hard?
A. Yes.

Q. That seems to indicate does it not there was no further material pushed over the top from the Thursday to the Sunday?
A. Well it could indicate that there was rain in that period. This material set as soon as it has rain on it.

Q. Until there was rain the material was very soft was it not?
A. I don't know about soft. It was crushed rock up to one inch in size with clay in it. It was never soft in my opinion.

Q. It was loose so children could slide down it, is that so?
A. I do not think that had anything to do with the sliding, the sliding was because it was steep.

Q. But it was loose when first pushed over the edge?
A. Initially, yes.

Q. Was it loose on the Sunday?
A. I cannot recall that. I do recall it was

dangerous to walk down and I went down on an angle for the same reason. It usually had a crust on it.

Q. Anyway, you decided even on the Thursday, although in your opinion this line was out of reach of anyone, that there was a reason for urgency in moving it?
A. Yes.

Q. What was the reason for that?
A. Well it might have been seven or eight feet away, this was not a condition I could allow to continue.

Q. Why? Did you think it was dangerous?
A. It was dangerous to the extent the condition could worsen, the dump could alter in slope.

Q. So you felt on the Thursday there was a condition of danger either by an alteration of the slope or by some other reason to bring these power lines within reach? Is that why you thought it was necessary to do something?
A. I don't think it was a question of danger, it was a question they could not be allowed to continue in that fashion. It was either the dump or moving the power line.

Q. It was a matter of urgency you have told us?
A. Yes.

Q. And it was urgent because it was dangerous, is that right?
A. No, that it could become dangerous, not that it was dangerous.

Q. And it could become dangerous of its own accord by the movement in the slope, is that what you say?
A. Well I don't think I reasoned under what conditions it could become dangerous, I just did not like - (interrupted.)

Q. Is it not that it could become dangerous either because the slope might change a little or else some more material might be inadvertently dropped over the edge or pushed over the edge?
A. I think it was more a matter it was not good practice and I do not think the question of how, why or could become dangerous - (interrupted).

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Howard, K.C. 19th May 1970 (continued)

Q. It was a matter of urgency was it not because in your view it could become dangerous of its own accord, first of all?
A. I guess it could, yes.

Q. And it was also dangerous because some employee either through being over-zealous or not taking enough notice of his orders could push more material over, is not that putting it fairly?
A. I did not consider that, but in hindsight yes that could have happened.

Q. That is why you asked for permission to do something about it immediately.
A. Yes.

Q. And looking at the position now of course, I suppose you will agree it would have been better to have put some notices up and perhaps even fenced the area off? (Objected to; allowed.) Looking at it now?
A. Well I guess it could have been better, I don't know it would have been.

Q. Of course fairly soon after this accident the line was in fact moved was it not?
A. Yes, in accordance with the decisions on the previous Thursday.

Q. How long after was it before the line was moved?
A. I think it was completed on approximately the 10th of the next month.

Q. That would be August?
A. Yes, within two weeks anyway.

Q. In this intervening period was there anything further done to guard the area, apart from putting these notices up?
A. Yes, we took two steps in the intervening period. We erected notices at the top and the bottom of the dump and we brought in some quarrying equipment and dug a road around to the bottom of this dump and excavated some of this dump material and we moved it.

Q. So you removed the danger as well by in effect taking the dump further away from the line, is that what you did?

A. Well I don't know if we removed the danger because we were working at a very dangerous condition to do so.

Q. What you did was increase the area between the dump and the line?
A. Yes.

Q. Were there workmen using these front end loaders in or around the area on the Friday?
A. I am sorry, which Friday?

Q. That is the Friday before the accident.
A. Well not to my knowledge, no.

Q. Or the Saturday?
A. Again not to my knowledge.

Q. Did you make any further inspection between the Thursday and the Sunday?
A. No.

Q. Did you give any specific directions or instructions after your inspection on the Thursday?
A. Only in discussion with Mr. Clooney that the stop had been removed and the dumping was to finish on that area.

Q. Dumping was to finish?
A. Well dumping had finished and it was not to resume.

Q. You repeated previous instructions, is that what you say?
A. I don't know if it was a previous instruction, it was a previous decision no more dumping was to be carried out.

Q. Did you ask Mr. Clooney if some further dumping had taken place over the edge?
A. Not until after the accident on the Sunday.

Q. On the Thursday you contented yourself with saying to him "No more dumping at this point", is that what you say?
A. It was a question of discussing the problem, that I was going to Berrima to get the problem solved and the dump stop had been removed so no more dumping could take place. It was not an instruction as stating to him what the problem was.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Howard, K C. 19th May 1970 (continued)

Q. You were senior to him?
A. Yes.

Q. Did you give any specific instructions to him about not pushing any of this material over the edge?
A. No, it was an understood instruction.

Q. Well you expected he would not do anything so foolish, is that the point?
A. Yes, certainly.

Q. How many workmen were there engaged on these front end loaders?
A. In 1967 there could have been nine, perhaps ten.

MR. LOVEDAY: Q. What time of the day was it that you made your inspection on the Thursday, that is the Thursday before the accident?
A. That was mid-morning.

Q. Was Mr. King there with you on that occasion?
A. No.

Q. Did you see Mr. King in or near the area?
A. No.

Q. And were there any workmen working in the area with a front end loader?
A. No.

Q. Was there any workman in the area on the Friday with a front end loader?
A. Well, I could not say. I assume not.

Q. What about the Saturday, was there any work going on on the Saturday in the quarry?
A. I cannot recall that point, and I have not checked it. As I said before, there must have been some front end loader movement between the Thursday and the Sunday.

Q. Well, is this the point, that one or other of these nine workmen would have been driving a front end loader on the Friday somewhere in the works?
A. Yes, probably all nine of them would have been driving.

Q. What, there are nine front end loaders?
A. There are three loaders and I have nine employees driving them.

Q. There were no outsiders, no independent contractors who were working with front end loaders in the area?
A. Well, there were at the kiln side but I would not associate them with this activity.

Q. And when you came back on the Sunday were there any signs of any of these heaps there?
A. No the area was completely cleared.

Q. None at all?
A. None at all.

Q. What about the shape of the slope?
A. Well, I cannot recall identifying this.

Q. Was it any different to what it was on the Thursday?
A. I could not be sure on that point.

Q. But you could not be sure that there were any heaps there on the Thursday?
A. Well, I could be sure by inference, not by actually visualising them in my mind, as I am now.

Q. By inference, you mean construction?
A. Well, I mean I would have acted differently if I had seen them missing. It was known to the foreman and to the end operators that these were there for a purpose, and if I had seen them there on the Thursday I would have acted differently to what I did.

Q. The way you acted on the Thursday was to do something as a matter of urgency?
A. To relocate the line.

Q. What other step would you have taken?
A. I would have found out who moved them and why.

Q. Didn't you just say that you suspected that someone else had pushed the material over the edge to make it closer, in the last two months?
A. Well, it was a possibility that that had happened.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Howard, K.C. 19th May 1970 (continued)

Q. You made no inquiries about that?
A. Not specifically, no.

RE-EXAMINATION

MR. McGREGOR: Q. You were asked about your realisation, so it was put, that there was danger on Thursday when you saw the wires in the position you described.

Q. Up to that time, in all the years that you had worked in this area and carrying out your inspections, had you ever seen any persons on that slope?
A. No, never.

Q. Never?
A. Well, yes, there was an electrician on that slope cutting a tree down.

Q. I do not mean that. I mean have you ever seen any strangers or trespassers or children?
A. No.

Q. You were also asked about the mess hall; would you take the photographs that are numbered "A1", "A2", and "A3"?
A. Yes. (Shown to witness.)

Q. And see if you can see it on any of those. Just tell me yes or no to that question if you can please?
A. Yes, I can see it on "A2".

Q. Is that the only one on which you can see it?
A. Yes, it is the large building in the middle of the village.

Q. Will you put a line there and put the initials M.H. on the lower margin?
A. Yes.

Q. Draw a line right down to the bottom.
A. Yes.

Q. Can you see the area where you understand Granny's Chair or chairs to be?
A. Yes.

Q. Put down in the bottom of the margin "G.C." and a line up to indicate it.

A. Yes. (Marks photograph.)

Q. You were asked about fences; at the time of this accident was there a fence on the western bottom opposite or next to where the back shunt came out?
A. Yes, there was a fence along the western side of the whole of that railway embankment. (Photograph as marked shown to jury.)

WITNESS: (While photograph was being shown to jury.) That is the Marulan South Hall, not the Mess Hall.

MR. McGREGOR: Q. Where is the Mess Hall- I meant you to mark the mess hall, can you see that?
A. Yes, it is in this area.

Q. Will you take your pencil line up and continue it on to where the mess hall is?
A. You only want the mess hall marked?

Q. Yes, you can just mark it, carry the thing on to the mess hall.
A. Yes. (Marks photograph.)

Q. And the first stop is the Marulan South Hall?
A. It is the Community Hall.

Q. Just take "A1" and "A3" into your hand. You were asked about the sandhills. Can you see the sandhills in "A1"?
A. Yes.

Q. Is that the area where the blue line is?
A. Yes, it is where the biro mark is. (Shown to jury.)

(Witness retired.)

FREDERICK ALLAN WESTON
Sworn, examined as under:

MR. McGREGOR: Q. What is your full name?
A. Frederick Allan Weston.

Q. And your address is Barber Street, Marulan South?
A. Yes.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Weston, F.A. 19th May 1970 (continued)

Q. You are shift foreman employed by the defendant company?
A. Yes.

Q. And you were employed by it in 1967?
A. Yes.

Q. As a shift foreman?
A. As a shift foreman.

Q. And in that capacity would it be part of your duty to give instructions you had received from your superiors to the drivers of Euclid trucks and front end loaders?
A. Yes.

Q. Euclid trucks are a very large conveyance which have a capacity of up to 30 tons?
A. Yes, that is right.

Q. And they are used when it is necessary to cart the spoil or the matter reclaimed from the quarry in the defendant company's area?
A. Yes.

Q. Do you remember without specifying the precise date - do you remember the accident that involved Rodney Cooper?
A. Yes.

Q. Prior to the accident and in the week prior, do you remember some instructions that you were given?
A. Yes.

Q. By whom?
A. By the quarry foreman, Mr. Clooney previously.

Q. What were those instructions?
A. Those instructions were that no more fines were to be tipped on or over the back shunt.

Q. Can you remember when you received those instructions?
A. I received them at approximately round about 8.30 on the Monday morning.

Q. When fines were dumped from a Euclid truck - or anything else for that matter, is there a device called a dump stop which is used with the truck?
A. Yes.

Q. And the truck backs on to it and then it is prevented from going any further than the dump stop?
A. Yes.

Q. Was there then an instruction at the company as to the use of the dump, when dumping from a Euclid truck?
A. Yes.

Q. What was that instruction?
A. The instruction that all Euclid operators must use a dump stop or anyone caught not using a dump stop would face instant dismissal.

Q. Did you see the area of the back shunt during that week?
A. Yes.

Q. What day, can you remember; I mean the week preceding the accident?
A. On Tuesday morning and Thursday morning.

Q. Was the dump - had it before this been on the right side before you walked down the back shunt?
A. More or less in the centre.

Q. Was it still in that position?
A. Still in position on the Monday morning.

Q. Was it still in that position on the Tuesday?
A. Yes.

Q. Did you go back during that week?
A. Yes, I returned back again on the Thursday morning.

Q. Well, was the dump stop there?
A. The dump stop had been removed.

Q. Did you see something else on the Tuesday or the Thursday heaped up?
A. Yes, there was a heap on the right-hand side of your dump; it was more of a safety precaution.

Q. Which day did you see that?
A. It was there on the Tuesday morning and also on the Monday morning.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Weston, F.A. 19th May 1970 (continued)

Q. And was it there - you said it was on Tuesday; what about Thursday?
A. It was still there on the Thursday when I went to check to make sure that the instructions were carried out, that no loaders had pushed it over.

Q. You told us you received these instructions from Mr. Clooney; what did you do when you had those instructions given to you?
A. I went immediately to the dumping centre where lorry operators and Euclid drivers were and instructed them no more was to be dumped on top or over the dump and whatever fines were left on the dump were to be left there as a safety precaution for rail trucks and that, breaking away.

Q. On the Monday or Tuesday did you notice the position of the electric cable?
A. Yes.

Q. In relation to the surface of the slope, from the back shunt down?
A. Yes.

Q. How, on the Monday or the Tuesday, close did it appear to you?
A. In my opinion, I would say anywhere between 15 and 30 feet.

Q. And then did you notice it again on the Thursday?
A. Yes.

Q. Well, how did it appear to be then?
A. It appeared to be still the same.

Q. And then did you hear about the accident at the weekend?
A. Yes, only verbally, late in the evening.

Q. That was on the Sunday?
A. That was on the Sunday, just before I retired to have a sleep, before I resumed on the - I started work at 10.30 that night.

Q. And then did you see the back shunt in that area on the Monday?
A. Yes, I had a look at the back shunt on the Monday, when it came daylight.

Q. What did you notice about that heap of fines which had been piled on the edge?
A. I noticed it had been removed and pushed over the edge.

Q. What did you notice then about the proximity of the wire to the surface of the back shunt?
A. The wires had changed considerably, and they were more, lower at the back.

Q. And how long had you worked in this Company?
A. 14 years.

Q. And had you ever seen dildren from time to time in the company working area-
A. On the railway line, yes.

Q. Whereabouts?
A. That is behind the downside, up above your loading bin and also -

Q. Do you mean on the other side of the bins to the back shunt?
A. The other side of the bins, away from the back shunt.

Q. And what had you done on those occasions when you had seen them there?
A. I hunted them out of the area.

Q. What aged children, so far as you can recall, had you seen?
A. Anywhere from five to twelve, thirteen.

Q. On how many occasions have you seen them?
A. At least about six or seven times.

Q. Had you seen children on any other part of the working area of the company?
A. I also hunted them out of the area of the old fines dumping area, where we dumped occasionally now.

Q. Where is that?
A. That is on the eastern side of the railway line.

Q. Look at this photograph "A1" and tell me if you can see that area which you have just mentioned. (Shown to witness.)
A. Yes, that is all fines area. (Indicating.)

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Weston, F.A. 19th May 1970 (continued)

Q. Can you be a little more specific?
A. That is on the eastern side.

Q. And I think you made a circle that includes this bank on which there is a blue biro?
A. That is correct.

Q. What had you done when you had seen children there?
A. I had also hunted them out of that area.

CROSS-EXAMINATION

MR. LOVEDAY: Q. You say you had seen them near the bins area?
A. Above the bins area.

Q. What, between the bins and the back shunt?
A. No, between the bins and the village.

Q. Was that during the week?
A. During the week.

Q. What about the weekends, would you be there at the weekend?
A. Very seldom.

Q. Of course, during the week there is work going on in and around the bins, isn't there?
A. That is right.

Q. And there are rail trucks being moved up and back, forming trains and all this sort of thing?
A. Yes.

Q. And, of course, there is a need to keep the children out of the area while there is all this sort of activity going on?
A. Yes.

Q. At weekends when the plant was not operating, the position was a little bit different, wasn't it?
A. Yes.

Q. Were you over there at weekends?
A. Occasionally we worked weekends, very seldom.

Q. You did not live at South Marulan?
A. I live at South Marulan.

Q. Well, you know that at weekends when the plant was not working, children did commonly go over the workings, didn't they?
A. They could do. I do not go down the quarry area if I am not working.

Q. Well, the only time you hunted out, as you say, was during working hours?
A. Yes.

Q. Tell me, do you know Mrs. Cooper's goats; do you know of them?
A. Yes.

Q. They used to be tethered in positions wherever there was feed over the area of the company's grounds, didn't they?
A. Yes.

Q. Down near the back shunt, beyond there, and at other places? (Objected to; allowed.)
A. I would not know about behind the back shunt, because that is only scrub and rock, so I do not see why they would be down there.

Q. Where was the nearest place in that area where there was any feed?
A. Above the bins, between the bins and the village or on the eastern side of the township.

Q. Well, the goats used to be tethered down there?
A. That is right.

Q. And the Cooper children -
A. I have hunted the children and told them to take their goats elsewhere.

Q. You told them to take their goats elsewhere?
A. Yes.

Q. What, they were eating your flowers, were they?
A. No, it is not that.

Q. Well, you saw the Cooper children looking after the goats on the company property?
A. Yes.

Q. From time to time?
A. Yes.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Weston, F.A. 19th May 1970 (continued)

Q. And they included, I suppose, Rodney Cooper; do you know Rodney?
A. Yes.

Q. You saw him tending the goats from time to time too?
A. Yes.

Q. Have you got any children?
A. Five.

Q. What are their ages?
A. The eldest one is going on 16; the youngest is nine.

Q. And was your attention drawn to this power line?
A. Not specifically.

Q. Were you told why there should be no further dumping?
A. Yes.

Q. Who told you?
A. The quarry foreman.

Q. Mr. Cluny?
A. That is right.

Q. What did he say?
A. "I want no more fines dumped or pushed over the dump, because there is a boundary fence of Mr. Cooper running down the side of the dump".

Q. A boundary fence?
A. I presume it was a boundary fence.

Q. No more fines pushed over because there was a boundary fence there?
A. Yes.

Q. That is all that was said to you?
A. That is the instruction I received.

Q. In fact these fines had been dumped so that they were going under and over part of the boundary fence, hadn't they?
A. That is correct.

Q. Nothing about a power line at all?
A. No.

RE-EXAMINATION

MR. McGREGOR: Q. I did ask you did you ever see children on the working area, or words to that effect, and you told me that you had seen them on the railway line and then in the area of those sand hills which you indicated on the photograph?
A. Yes.

Q. Did you see them only on weekdays there?
A. That is all, to my knowledge.

Q. Had you ever seen children on the company area, on the working area at the weekends?
A. No.

(Witness retired.)

DOUGLAS THOMAS PHILLIPS
Sworn, examined as under:

Evidence of Phillips, D.T. 19th May 1970

MR. McGREGOR: Q. Your name is Douglas Thomas Phillips?
A. That is correct.

Q. What is your job with the defendant company?
A. End loader operator.

Q. And you live in the village of South Marulan?
A. No, Marulan.

Q. How long have you worked with the company?
A. Approximately nine years.

Q. Do you remember hearing of Rodney Cooper's accident?
A. Yes.

Q. Well, without being precise about what date that was, do you remember that you, on the week before it, were working at the company?
A. Yes.

Q. What shift were you working on?
A. Afternoon shift.

Q. And what were you exactly doing on the afternoon shift?
A. It is classed as afternoon maintenance shift. That is servicing end loaders, cleaning after, and the dumps -

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Phillips, D.T. 19th May 1970 (continued)

Q. And did that include necessarily driving of one of the end loaders?
A. Yes.

Q. And who was your immediate superior?
A. On afternoon shift we were left with instructions.

Q. You were left with instructions?
A. Yes.

Q. But who was the man -
A. Mr. Pearson.

Q. And do you remember in that week, sometime in the beginning of the week, getting some instructions from Mr. Pearson?
A. Yes.

Q. About what?
A. Removing a dump stop.

Q. Whereabouts was this dump stop?
A. It would be - the one in question you mean?

Q. Yes.
A. On the back shunt.

Q. What was the method of removing this article?
A. With the end loader it has a flat piece of steel, that we pick it up with, the bucket of the loader, and take it away.

Q. The dump stop has a kind of tongue on it, hasn't it?
A. Yes.

Q. And the end loader is able by extending its front, to hook under that tongue?
A. That is correct.

Q. And in that fashion it can lift it up and then take it to any new position?
A. That is correct.

Q. Well, you got an instruction about moving the dump stop which was on the back shunt?
A. Yes.

Q. Was there one or more than one there?
A. Only one.

Q. Did you move it?
A. Yes.

Q. What day, do you remember, did you do that?
A. Wednesday. I am not real clear, but Wednesday I think.

Q. Are you confident that it was Wednesday or are you not sure?
A. It would be mid-week, but I am not certain of Wednesday.

Q. And at that stage did you notice the position of the powerline on the western side of the back shunt?
A. No.

Q. Did Mr. Pearson's instructions give you any reason for moving the dump stop?
A. Other than they were doing - discontinued dumping there.

Q. When you went upon that back shunt did you notice anything on the side, on the western side of it, when you went up to remove the dump stop?
A. A row of fines that had been dumped out of the trucks was the only other thing there.

Q. Where were they?
A. On the western side.

Q. Were they lying flat on the ground; how were they placed?
A. It was a row of fines tipped side by side, right around the edge of the dump on that western side.

Q. Were they level, at ground level, or some other way?
A. No, quite mounted up.

Q. They were mounted up?
A. Yes.

Q. How were they placed in relation to the edge of the back shunt?
A. It would be about three feet from the back edge, to the edge.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Phillips, D.T. 19th May 1970 (continued)

Q. In that position could you have driven a Euclid truck, if you wanted to, any closer to the edge than that?
A. With safety?

Q. Yes.
A. Not really, no.

Q. Were they in such a position that any Euclid truck that wanted to get closer to the edge would have been stopped by the bank?
A. No other truck could tip over the bank, you mean?

Q. Yes.
A. No.

Q. I think you did not go back to this area at any time reasonably close to after you heard about the accident?
A. No, I have not been back to that dump.

Q. Over the years that you have been working on these premises, have you worked sometimes at weekends?
A. Yes, I have.

Q. And have you worked in only one portion of the area or in various portions of the area?
A. In various portions.

Q. And does that include the backshunt area?
A. Yes, it would include that.

Q. I am not interested in anything after this accident, but up to the time of the accident had you ever seen children playing up in the backshunt area?
A. No.

Q. What about on the railway lines in the vicinity of the backshunt and the bins and then north of that as if you were headed towards the main railway line; have you ever seen young children on the railway lines there?
A. That is previous to the accident?

Q. Yes.
A. No.

CROSS-EXAMINATION

MR. LOVEDAY: Q. You drove and sometimes serviced an end loader, is that the position?
A. That is correct.

Q. What was your main duty, driving or servicing?
A. On afternoon shift, both.

Q. Well, did you ever operate an end loader on work on that back shunt extension?
A Yes, I have.

Q. And during what period?
A. Only when the material was built up and had to be levelled off.

Q. Is this the position, that material was brought up by Euclids, dumped in heaps somewhere near the edge, and then the front end loader was used to push it over the edge and level it off?
A. Yes.

Q. Is that right; is that the operation?
A. Other than for when their dump stop was in place, and then they would tip straight over.

Q. Well, if the dump stop was in place, the Euclids would tip straight over the edge?
A. Yes.

Q. If the dump stop was not in place, the Euclids would tip in a heap and then the area would be levelled out by the front end loader, is that the position?
A. Yes.

Q. Had you worked on that area during the two months prior to Rodney Cooper's accident?
A. I would have.

Q. And what work had you carried out during that two months?
A. Just on that dump, only levelling out or positioning.

Q. What do you mean by that, that these heaps during that period of two months had been left by Euclid drivers, is that right?
A. Yes.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Phillips, D.T. 19th May 1970 (continued)

Q. And you had pushed them over the edge?
A. Yes.

Q. And up until the week before the accident, no one had ever given you any orders, special orders, about not dumping over the side of the dump where Rodney's accident occurred, is that so?
A. Yes.

Q. And in fact, you had been pushing further material over that face - can I use that term - right up until the week before the accident, is that right?
A. Yes, that is correct.

Q. And a week before the accident you were told not to push any more material over the edge there, is that the position?
A. From about mid-week, yes.

Q. From about the Wednesday before the accident you were given the orders "No more material to be pushed over the edge"?
A. Yes.

Q. And was any reason given to you as to why this order was given?
A. No, not that I can recall.

Q. Well, did you work in the area on the Thursday and the Friday?
A. No.

Q. Was there any other end loader to your knowledge working in the area after you got that order?
A. Not to my knowledge.

Q. Well, on the Wednesday you were told "no more material to be pushed over this face" - looking at it from the bins, that would be the right-hand side, is that so?
A. Not exactly. I was not told there was no more. They had finished dumping.

Q. Finished dumping?
A. Yes.

Q. At that stage was it all nice and level?
A. No.

Q. What was the position then?
A. There was a row - when I say a row I mean loads tipped side by side on the western end, or the right-hand side.

Q. A row of loads on the right-hand side?
A. Yes.

Q. That is, looking at this, from the bins end?
A. Yes.

Q. Out towards the end of the back shunt?
A. Yes.

Q. And the same sort of rows had been there from time to time and as you have levelled out over the preceding two or three months?
A. Yes.

Q. Were you told that you were to level that off?
A. I cannot remember clearly whether I had received an instruction to that effect, I am sorry.

Q. No one, as far as you can recall, gave you any specific instruction not to level it; is that putting it fairly?
A. Yes, I cannot recall getting any instruction.

Q. Of course, you did not have any children living at South Marulan, your house is at Marulan, is that correct?
A. That is so.

Q. Did you notice the powerline there?
A. Yes.

Q. On the Wednesday would it be correct that the powerline was only about six feet away from the slope?
A. I do not know.

Q. Are you able to give any estimate on how far away from the slope the powerline was? (Objected to; allowed.)

Q. Are you able to give any estimate as to how far away from the side of the slope the power line was on the Wednesday?
A. No.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Phillips, D.T. 19th May, 1970 (continued)

Q. You did see the powerline there?
A. Not on Wednesday, no.

Q. But on previous occasions when you had been levelling off I suppose?
A. Yes.

Q. And had you noticed as you had been levelling off on previous occasions that the dump was gradually creeping closer to these powerlines?
A. Yes.

Q. And had you seen Mr. King out there from time to time?
A. Not on that matter, I had not, no.

Q. No, but from time to time you had seen him in that area when you were levelling?
A. Not on the dump area, no.

RE-EXAMINATION

MR. McGREGOR: Q. You told me, did you not, that on this week you were on what was called the maintenance shift?
A. Afternoon maintenance.

Q. But a maintenance shift?
A. Yes.

Q. Being on the maintenance shift, was it ever part of your duties to do any pushing over or levelling with a front end loader?
A. Yes.

Q. Did you that week do any pushing over or levelling on the back shunt with a front end loader?
A. No, I am not clear, I am sorry. I could not remember clearly whether I did. I removed the dump stop.

Q. You remember that distinctly?
A. Yes, I distinctly remember that.

Q. And did you do any after removing the dump stop?
A. No.

Q. Well, when you left with the dump stop, was the rest of the material then in position on the

western or right-hand side as you look down from the bins?
A. Yes.

Q. That was the last time, was it, that you were up there that week?
A. Yes.

Q. And had you ever seen Mr. King in that area?
A. No, I do not think I had.

(Witness retired.)

(At this stage further hearing adjourned until 10 a.m. on Wednesday, 20th May, 1970.)

GEOFFREY COSGROVE
(Recalled on former oath):

HIS HONOUR: You are still on the oath you took on Monday.

WITNESS: Yes.

MR. McGREGOR: Q. Do you recall giving an account of a conversation you had with Mr. Cluny on the back shunt?
A. Yes.

Q. At that stage you were looking at or over the edge on to the slope?
A. Yes.

Q. And this all happened three years ago?
A. Yes.

Q. You did not make any notes about what you saw then?
A. Yes.

Q. And what you did was to give the best of your estimation of what you saw?
A. Yes.

Q. Looking back?
A. Yes, an estimation.

Q. And will you agree that your estimation of the distance necessarily would not be precise?

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Transcript of Evidence of Witnesses before Collins J. Evidence of Cosgrove, G. 20th May 1970

A. No, I would not say that. I would not say it would be exact.

Q. You did not go and measure it?
A. No, that is right.

Q. And not only that, it is a rather awkward situation to judge a distance when you are looking down that slope at something which is raised up?
A. Yes.

Q. Added to which that wire came in at an oblique angle, if you follow me, towards the back shunt?
A. It came around this way.

Q. Let us assume the table is the back shunt; it has got a slope going down?
A. Yes.

Q. The slope varies slightly as to its angle, do you agree?
A. Yes, I would say so.

Q. And then the wire came across, not parallel to it but came across so that when it got up towards the end it was closer than 50 yards back or 20 yards back?
A. Yes, it went alongside it like that. (Indicating.)

Q. It did go along the side, but it went at an oblique angle, do you know what I mean by that?
A. No, I do not.

Q. Let us assume the table is the back shunt. it came at it from the side so that it was further from the back shunt than when it got up towards the back shunt?
A. Yes, it was further away at one stage than at the other.

Q. About that time did you see Mr. Gutzke, the electrician, looking at this area?
A. He used to look at it frequently.

Q. Did you see him looking at it?
A. No, I reported it to Mr. Gutzke.

Q. Did you see him up there at any stage at the time that you looked at it?
A. He was at the bins, that is just up a bit further, but I did not see him.

Q. Did you see him go up there and have a look over about this time that you say you saw it?
A. Well, I could not swear to that.

Q. Will you agree now that the distance you saw the wire from the side of the back shunt at its nearest point at this time was approximately six to eight feet?
A. Well, I only gave my estimation of approximately five feet, and therefore I would still say that it was approximately 5 feet in my estimation. It may not be in other people's estimation.

Q. You know there are other estimates, don't you?
A. I do not know. I only gave my estimation.

Q. I suggest to you that thinking over it, you would agree that 5 ft. was not a good estimation at all?
A. Well, it is only my estimation. I have not got a tape measure mind.

Q. And you say that when you were there you never saw Mr. Gutzke looking at it?
A. I cannot remember.

Q. Or Mr. King?
A. Mr. King used to go up there.

Q. But did you see him actually looking at it about this time, at the area at the back shunt?
A. I cannot say that I did, because I was not up there a great deal. I might be up there an hour and go and I might be up there for half an hour and go.

Q. You do specifically remember being told by Mr. Cluny. "Do not dump any more"?
A. At that point up there, yes.

Q. And you did not dump any more?
A. No.

MR. LOVEDAY: Q. When was that in relation to Rodney's accident?
A. That would be six weeks to two months beforehand.

Q. And did you do any more dumping between then and the accident in that area?
A. Possibly once or twice, but on the other side.

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Transcript of Evidence of Witnesses before Collins J. Evidence of Cosgrove, G. 20th May 1970

(continued)

Q. Where were you working for that two months? (Objected to; allowed.)
A. Well, on various jobs. We had our trucks. We might be at a place carting over-burden or carting to the crusher, or if our trucks were out we might be on smaller vehicles at the time.

Q. Anywhere in the vicinity of this back shunt?
A. Well, we drove past it.

Q. Did you see at any time other trucks dumping in that area, during that two months?
A. Yes. (Objected to; allowed.)

(Witness retired).

ALLAN JAMES CHAPLIN
Sworn, and examined as under:

MR. McGREGOR: Q. Is your name Allan James Chaplin?
A. Yes.

Q. Your address is Marulan South?
A. Yes.

Q. In 1967 were you the shift foreman at the defendant company's works?
A. Yes.

Q. And that job, the job of shift foreman, was also one which was performed by Mr. Weston, was it?
A. Yes.

Q. And you two were the shift foremen?
A. Yes.

Q. Can you tell me the total number of employees approximately working with the company at that stage, I mean at Marulan South?
A. Roughly about 140, I would say.

Q. And was there a practice there for Mr. Cluny to transmit orders to you foremen or to the men directly?
A. Yes.

Q. Well, which was it; was it done both ways or only one way?
A. Which?

Q. I mean, supposing Mr. Cluny wanted to transmit orders to Euclid truck drivers or front end loader drivers, how would he do that?
A. He would give it to the foreman.

Q. That is you or Mr. Weston?
A. Yes.

Q. And you were still working with the company on the weekend when Rodney Cooper had an accident there?
A. Yes.

Q. And you actually did not go to the scene, did you?
A. No, I did not. I was away at the weekend.

Q. You were away?
A. Yes.

Q. Before that accident did you hear Mr. Cluny give certain instructions to you and Weston?
A. Yes.

Q. What were those instructions?
A. That he wanted no more fines over the western side of the back shunt, and that heaps of dirt had been tipped to prevent this, and he did not want it pushed over.

Q. And you heard him give those orders?
A. Yes.

Q. To whom did he give them?
A. Myself and Fred Weston.

Q. What did you do then as regards your operation?
A. Instructed Euclid drivers and loader drivers that this was not to be done, pushed over or tipped over on the western side.

Q. I want you to put your mind back to the last time you were in the back shunt area before the accident; when was that?
A. I would not be sure of the exact time, but it would be about the middle of the week.

Q. The middle of the week before?
A. Yes, but I am not sure of that.

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No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Chaplin, A.J. 20th May 1970 (continued)

Q. Was it after you were given these orders you mentioned?
A. Yes.

Q. When you went up there did you notice the surface of the back shunt area on the western or righthand side towards the end?
A. Yes.

Q. And was that in the area where the - below the top level of the back shunt?
A. Yes.

Q. What did you do up there?
A. The dirt had been tipped on the top: it was still there.

Q. Was it all levelled out?
A. No, all heaped up to prevent tipping.

Q. With dirt heaped up in that fashion, would it be possible for anything to get close enough to the edge to tip over?
A. No, this is the idea, to prevent this.

Q. Can you remember whether you saw the dump stop there, or not?
A. I would not be sure but I think it was lying on the eastern side. I would not be sure of this.

Q. Anyway it was not on the western side?
A. No, definitely.

Q. And then did you see on Monday the scene where this accident had apparently happened?
A. Yes.

Q. What did you notice about those piles of stuff?
A. The piles were gone.

Q. And do you know anyone who was told to push them off?
A. No.

Q. Do you know how that happened?
A. No.

Q. Let me ask you about the wire; when you went up there on that mid-week time that you told us about, did you look over the edge?
A. Yes.

Q. Could you see the wire?
A. Yes.

Q. Have you any idea of what the distance between it and the surface of the slope of the back shunt was at the closest point?
A. It would only be a rough guess, I would say 18 ft. or so at least.

Q. Did you look at it again on the Monday?
A. Yes.

Q. What did you notice about the distance then at the closest point?
A. It was pretty close.

Q. Can you remember how close?
A. I am not sure, no.

Q. Was there a works instruction with which you were familiar about the presence of children in the working area of the defendant company's works? (Objected to; allowed.)
A. Not an outright instruction, but more or less strangers, which I think includes kiddies, were to be kept off the place.

Q. How long had you been a foreman?
A. Roughly ten years.

Q. That goes back to 1960, does it, from now?
A. Yes.

Q. And during that time had you ever seen children in the works area?
A. Only small kiddies.

Q. Whereabouts?
A. A couple of occasions, once they were in the area of the office, that area, and I have turned them around and headed them back home, and another occasion, three little kiddies within the area of our new diesel loco shed, that was on the old departure line, and I headed them back.

Q. What did you say?
A. They were near the new diesel locomotive shed, the old departure line, and I have headed them back to the village.

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No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Chaplin, A.J. 20th May 1970

(continued)

Q. Well, you told them to get off, did you?
A. Yes.

Q. Those are two occasions?
A. Yes.

Q. Looking at these photographs I show you, which are exhibits "A1" and "A3", is it possible for you to identify the areas where you say these children were; let me just point this out to you, that, first of all, Exhibit "A1" shows the bins, the conveyor belt and the back shunt in the distance. Do you follow?
A. Yes.

Q. And somewhere to the right corner there are some houses or office buildings. Do you follow?
A. Yes.

Q. Then the other one, Exhibit "A3", shows the bins, taken from the other side. Do you follow?
A. Yes.

Q. You can see the gorge, and you can see the start of the back shunt on the right, but not the end of it?
A. Yes.

Q. And you can see some housing up on the left?
A. Yes.

Q. Can you show on any of those photographs approximately where these children were when you told them to get off?
A. The kiddies were up here, on the line, and this area here, near the office.

Q. Will you take a pen and mark a circle, putting a "K" in it, showing where these kiddies were; what you are marking is Exhibit "A3"?
A. Yes.

Q. Is it better to do it on "A1" or "A3"?
A. "A3". (Witness marks Exhibit "A3".)

Q. Surround this with another pencil mark about twice as big?
A. Yes. (Marks "A3")

Q. Is this the position, that you never did see any children on the back shunt area?
A. That is correct.

CROSS-EXAMINATION

MR. LOVEDAY: Q. Was there some order given in relation to dump stops and use of dump stops?
A. Yes.

Q. There was?
A. Yes.

Q. What was the company order or ruling in relation to the use of dump stops?
A. Dump stops had to be used when dumping.

Q. In dumping, dump stops had to be used; was that the order?
A. That is right.

Q. Was there some penalty if they were not used?
A. Yes.

Q. In dumping at all, not just dumping over the edge?
A. Yes, dumping over the edge.

Q. Dumping over the edge?
A. Yes.

Q. What about dumping that was not dumping over the edge?
A. No dump stop. In dumping over the edge, it had to be done with a dump stop.

Q. That did not apply to dumping any heaps not over the edge?
A. That is right.

Q. And a lot of the dumping on this back shunt area was dumping in heaps, wasn't it?
A. Yes, when the dump stop was not used.

Q. When the dump stop was not used or was not there, the Euclid drivers used to dump in heaps?
A. Yes.

Q. Is that putting it fairly?
A. That is putting it fairly.

Q. And then the front-end loader would come and level the area, pushing it until it started sliding down the edge?
A. We had been instructed to do this, yes.

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No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Chaplin, A.J. 20th May 1970

(continued)

Q. Actually the front end loader drivers would not have to go too close to the edge, because as soon as he pushed it somewhere near the edge the material would slide down the bank?
A. He would push it over.

Q. Push it over?
A. Yes.

Q. And that was the way in which this back shunt was being extended so as to lengthen the siding behind the bins, is that right?
A. Yes.

Q. At some stage Mr. Cluny told you he did not want any more material pushed over the western side, is that right?
A. Yes.

Q. Would that be about a week before or a month before or two months before the accident; how long?
A. I would not be sure of the exact amount of time, but I think about a week or so before.

Q. Was that right up until that time material had been dumped and pushed over the western edge?
A. Yes.

Q. Is that so?
A. Yes.

Q. And the slope would have been a slope, a fairly steep slope, the natural angle or repose of the material?
A. That would be right.

Q. Approximately what, 60 degrees?
A. About that, approximately.

Q. 60 degrees to the horizontal?
A. Yes, roughly about that, I would say.

Q. And this material on the western side was actually flung over the face into Mr. Les Cooper's property, wasn't it?
A. Yes, getting near Mr. Cooper's fence.

Q. It was flowing right over the top of it, wasn't it?
A. That is right.

Q. And that is the reason Mr. Cluny gave you for not dumping any more material there, isn't it?
A. Yes, more or less. There was a drain there too, I think.

Q. Nothing was said about a power line?
A. No.

Q. Or about the danger of a power line?
A. Not that I can recall, no.

Q. And in fact you did not take much notice of the power line, did you?
A. No, not really.

Q. This 18ft. that you are talking about, is that to the nearest point that is at right angles to the dump or is it in a different direction to the dump?
A. On the eye view of it, I would say roughly the distance between the slope and the wire, just roughly.

Q. At its closest point, 18 feet?
A. Yes.

Q. The closest point is the distance between the wires and the slope on a line at right angles to the slope?
A. Yes.

Q. That is the closest distance?
A. Yes.

Q. And you say that is 18 feet?
A. Just roughly, looking at it, yes.

Q. The slope was 80 to 100 feet high, wasn't it?
A. I would not know how high it was up there.

Q. Would that be about right, 80 to 100 feet high, this slope?
A. I do not think it would be quite that high, in my opinion.

Q. What I meant to convey was that the slope would be 80 to 100 feet in length but perhaps only 60 to 70 feet in a vertical direction from the ground?
A. That could be so.

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No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Chaplin, A.J. 20th May 1970

(continued)

Q. Would that be about the right estimate?
A. It could be.

Q. The slope brought up the level of about 60 feet or thereabouts, but the actual slope - because it was a slope - would have been 80 to 100 feet?
A. It could have been, just roughly.

Q. To build up that slope 18 feet would have taken some thousands of tons of material, wouldn't it?
A. It is hard to say.

Q. Spread over 80 to 100 feet, do you follow?
A. Yes.

Q. That is what happens when you build the slope up; it distributes the material all down the slope?
A. Yes.

Q. What was the length of this slope that was being built up?
A. Roughly 80 or 90 feet, I suppose.

Q. I do not mean from the top to the bottom; I mean in a horizontal position along the top, the length of material where the material was being dumped on the western side?
A. Oh, 70 or 80 feet.

Q. To build up an area 70 to 100 feet by 80 to 100 feet -

HIS HONOUR: By what width?

MR. LOVEDAY: By one foot.

HIS HONOUR: What width across?

Q. What was the width across this embankment?
A. 70 or 80 feet, I would say, roughly.

Q. No, that is going outwards; across it, how wide was it?
A. I do not recall just how wide it was.

Q. Well, a truck would go on to it, wouldn't it?
A. Yes.

MR. LOVEDAY: Q. 100 feet?
A. At least 100 feet.

Q. So that this shunt was about 100 feet at least wide?
A. Yes.

Q. And the dumping on the western side was over an area of 70 to 80 feet, is that right, near where these wires were?

HIS HONOUR: What do you mean by area; do you mean length?

MR. LOVEDAY: The length in a horizontal direction.

Q. Would you perhaps draw for me the section where this back shunt was being extended so as to indicate where the dump was?
A. I would say that area along there would be 70 to 100 feet approximately; that is just a rough estimate, and 30 feet there. (Indicating.)

Q. What are these two lines; are they railway lines?
A. Railway lines.

Q. Well, was there a terminal point on these railway lines?
A. Yes.

Q. What a buffer or something; what was at the end?
A. A sleeper.

Q. Well, just draw the sleeper in so that we know where the railway lines finished. Well, the railway line went right up to the sleeper, did it?
A. Pretty well.

Q. Where did the trucks go in to do their dumping?
A. Across the line.

Q. Across the line?
A. Yes.

Q. Well, was the shunt being sent in this direction or that direction?
A. Both directions, more or less.

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No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Chaplin, A.J. 20th May 1970 (continued)

Q. And is this north up here and west over there? (Indicating.)
A. West there. (Referring to sketch.)

Q. Well, let us put a little mark up here, which is west, there?
A. Yes. (Marks sketch.)

Q. What is this measurement, approximately 30 feet?
A. From the edge to the line, yes.

Q. That is horizontal?
A. Yes.

Q. And then there is a slope going down from this point here, is there?
A. Yes.

Q. Down towards Cooper's fence?
A. That is right.

Q. We will mark Cooper's fence down here, is that right?
A. Yes. (Marking sketch.)

Q. And this slope, you say, would be about 100 feet?
A. That would be right.

Q. It also extended beyond the end of the railway line, didn't it?
A. Yes.

Q. Well, extend it beyond where it went?
A. Yes. (Witness marks sketch.) This would be roughly.

Q. And was dumping going on all around the circumference of that?
A. Yes, I am not sure. I think dumping was going on here as well. Dumping was going on to fill around the back of the sleepers.

Q. I will put "dumping" on all of this, is that right?
A. Yes. (Marking sketch.)

Q. Is that right?
A. Yes.

Q. Now this section along here on the western side was 70 to 100 feet?
A. That would be rough, yes.

Q. Where dumping was going on?
A. Yes.

Q. Would that be correct?
A. Yes.

Q. What I am putting to you is that to an area approximately say, 70 feet by 80 feet by 1 ft. thick of material, how many tons of this material would be involved in that?
A. I would not know. It all depends how far it ran down.

Q. But the material would distribute itself all away down this slope, wouldn't it, to build this slope out one foot would mean if the material was all at its natural angle of repose, putting one foot of material all over this slope?
A. I do not suggest it would all run to the bottom though.

(Abovementioned sketch tendered and marked Exhibit "1".)

Q. You see what I am putting to you?
A. Yes.

Q. If you want to build up this slope by one foot, in other words, to bring it one foot closer to the power lines, it would have required a quantity of material represented by roughly 80 feet by 80 feet by one foot, wouldn't it? (Objected to; rejected).

Q. Did you have a look at this area after the accident?
A. Yes.

Q. Would you agree that the pile, that is the dump area on the western side, was then only three to four feet from the wires?
A. I would not just be sure how far it was. I would not be sure of the distance. It was close.

Q. Would it be about right?
A. Approximately, yes.

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No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Chaplin, A.J. 20th May 1970 (continued)

Q. And only a week before, in your estimation it was 18 ft. from the wire?
A. Yes.

Q. Had you been on duty during that week?
A. Yes.

Q. Had there been there a large amount of material, dumped in that area during that week?
A. Not to my knowledge, no.

Q. Well, who was in charge; was it you or was it Mr. Weston, or who was in charge of dumping in the area?
A. It could have been anyone on the day shift. I was on night shift.

Q. Was it your responsibility on night shift?
A. Yes.

Q. What about on night shift; was there any material dumped in that area in the week prior to the accident on night shift?
A. I would not be sure. I cannot recall. We only dump when necessary, and I cannot remember.

Q. Did you make any close inspection during that week?
A. No.

Q. Wasn't it part of your job?
A. No, not if we were not dumping, it was not.

Q. Did Mr. Cluny or Mr. Howard or anyone say "Keep a very special watch on that area to see no more material is dumped over"?
A. Not that I can recall, no.

Q. Did anyone say to you at any time before the accident, "Watch out for the danger of these transmission lines"?
A. No, I di not remember.

Q. You would be speaking to Mr. Howard, I suppose, practically every day, wouldn't you?
A. Pretty well. It all depends. Not on night shift, no.

Q. Did you speak to him between the Thursday prior to the accident and the accident?
A. No, not that I can remember.

Q. Well, if you did not speak to him, was that because you were on night shift?
A. That would probably be the reason.

Q. And if Mr. Howard had any instruction for you, I suppose he would put it in writing, would he?
A. Yes, it would go through the -

Q. Was there any written instruction given to you after Thursday about danger of dumping on this area?
A. No, not that I can recall.

Q. Well, you would recall it, wouldn't you?
A. Yes.

Q. Was any instruction given to you through Mr. Cluny or anyone else, at any time, about the danger of dumping on this area?
A. No.

Q. There was, you have told us, a departmental instruction or a company instruction about that strangers should be kept off the place?
A. Yes.

Q. Is that right?
A. That is right.

Q. Well, you would not call the children of an employee strangers, would you?
A. Not really. They would come into the part of trespassers.

Q. Do not worry about the law - (Objected to.)

Q. I am only asking what you understand by the term strangers; you would not regard a child of an employee as a stranger, would you?
A. No, not as a stranger, no.

Q. And all that you were concerned about when you told little children, toddlers and so on, to go out of the way, was to keep them out of any possible danger?
A. For the children's safety, that is correct.

Q. And that was when you were working on your shift, I suppose?
A. That is right.

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No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Chaplin, A.J. 20th May 1970

(continued)

Q. When they were moving vehicles around and there was plenty of activity going on; that is so, isn't it?
A. That is right.

Q. But, of course, the position was very different at the weekend, wasn't it, when there was no work going on?
A. That would be right.

Q. Did you ever go over the area at weekends?
A. Not unless I was on duty.

Q. Not unless you were on duty?
A. No.

Q. Didn't you ever go out perhaps to have a walk in surrounding fields or countryside?
A. No.

Q. To trap rabbits?
A. No.

Q. Do you have any children, yourself?
A. Two.

Q. How old are they?
A. One is 7½ now and the other is three months.

Q. Did you ever go on to the company area at weekends, except on duty?
A. No.

Q. Did you ever see any goats around?
A. Yes, Mr. Cooper had goats.

Q. Mr. & Mrs. Cooper?
A. Yes.

Q. Did you ever see the Cooper children tending the goats?
A. Yes.

Q. You did not hunt them off, did you, when they were tending the goats?
A. Well, they were grazing behind the cottages there, I did not have to.

Q. Well, they also used to graze on the company work area, where there was any feed, didn't they?
A. I do not know what you call the company area. They were behind the homestead there.

Q. Well, that is all the company area, I suppose, isn't it?
A. Yes.

Q. How far out does the company area extend; can you see it on Exhibit "A2", the photograph?
(Objected to; withdrawn.)

Q. Are there fences fencing off the company area from the surrounding properties?
A. I would not be sure on that. I am just not sure on the leases, on the boundary lesses of the company property.

Q. You are not sure on the boundaries?
A. No.

Q. There is a fence between the company's property and Mr. Les Cooper's isn't there, on the western side?
A. There is a fence there but I am not sure whether the company's lease runs into Mr. Cooper's or not.

Q. You are not sure?
A. No, I am not sure on the boundaries.

Q. You see the photograph, Exhibit "A1" (shown to witness)?
A. Yes.

Q. What is this area down here on the left?
A. That is the quarry magazine area there and the road going to it.

Q. That is beyond the back shunt, isn't it?
A. Along a fair way. Yes, well over in the distance.

Q. Did you ever see any of the Cooper goats down there?
A. No.

Q. You did not?
A. No.

Q. Well you do not know where the fences were or where the boundaries of the Company's leases were, is that the position?
A. Yes. I know the fences but I am not sure where the boundaries come into it.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Chaplin, A.J. 20th May 1970 (continued)

RE-EXAMINATION

MR. McGREGOR: Q. You were asked about commands being passed down?
A. Yes.

Q. And you can assume that we know here that Mr. Howard was the superintendent and Mr. Cluny - he was the next one below him?
A. That is right.

Q. And did you gentlemen come next after Mr. Cluny?
A. The face foremen, Pearson, and the shift foremen.

Q. And then you and Weston?
A. Yes.

Q. And they were the foremen in the works at that time?
A. Yes.

Q. You were asked questions about children and strangers?
A. Yes.

Q. Whether you regarded them as strangers or not; did you ever fail to send them off the works area when you saw them?
A. No.

Q. And when you were working at weekends or saw them there at weekends or week days, did you send them off?
A. I would have done but I have never seen them there at the weekends, but they would have been sent off.

(Witness retired).

Evidence of Pearson, T. 20th May 1970

TREVOR PEARSON
Sworn, examined as under:

MR. McGREGOR: Q. Is your name Trevor Pearson?
A. Yes.

Q. And do you reside at Marulan South?
A. Yes.

Q. And you were the face foreman of the defendant company?
A. Yes.

Q. At Marulan South?
A. Yes.

Q. Well, you were the face foreman of the defendant company in 1967?
A. Yes.

Q. And you joined the company, I think, in 1952?
A. That is correct.

Q. And do you recall the time of the accident that Rodney Cooper had, without being precise about the date?
A. Yes, I do remember it.

Q. I mean you remember hearing about it?
A. Yes.

Q. And you were not at the site or near the site when it happened, were you?
A. No.

Q. And before the accident, in the week before or at any time before, did you hear some instructions passing between Mr. Howard and Mr. Cluny?
A. Yes, I was present when Mr. Howard gave Mr. Cluny instructions, approximately two weeks before the accident I would say.

Q. Well, what was said?
A. That a row of fines was to be dumped around the edge of this back shunt, the dump stop to be removed and tipping over and dumping was to cease in this area, because of the power line and because we had extended this as far as we wanted it to go.

Q. And did you then hear those instructions conveyed to anyone else?
A. No, I cannot say that I did.

Q. You cannot say that you did?
A. No.

Q. Was it part of your duties to convey them to anyone else?
A. Not directly.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Pearson, T. 20th May 1970 (continued)

Q. But indirectly?
A. Yes, to the loader operator, possibly on afternoon shift.

Q. And did you do that?
A. I daresay I would have done, both by written instruction and verbal, but I cannot say "Yes, I do remember this".

Q. You cannot remember that precisely?
A. No.

Q. Who was that person?
A. It would be Doug Phillips, Mr. Phillips.

Q. From the time you have been there at these works, what was done if children were seen on the works area at any time, whether at weekends or week days?
A. Well, they were immediately chased away from the area.

Q. And have you, yourself, chased children off that area?
A. On occasions, yes.

Q. On week days or weekends, or which?
A. Well, both. On school holidays you would chase children away on some occasions, and at weekends.

Q. And on your job are you there occasionally at weekends, or were you in those years?
A. Yes, I would say that I would go down the quarry at least on one or either of the two days.

Q. Have you got any idea how many occasions, say in 1966 and before this accident in 1967, you saw children on the area, on the working area?
A. Well, I could not say precisely, but on several occasions, yes, I would have seen children in the area.

Q. And what did you do?
A. Well, chase them off the job.

Q. Can you remember now precisely where you saw them?
A. Yes, I can remember coming in contact with

children in the actual quarry site itself, around in the railway line area on the northern side of the loading bins, and in the vicinity of No. 7 conveyor.

Q. Look at these photographs; the quarry area itself, I am showing you; is that much like the quarry area down here?
A. Yes, that is the excavation.

Q. You said something about that railway line north of the bins; can you see that area in Exhibit "A3"?
A. Yes, that would be in this area here.

Q. That is where you see "Railway Trucks" to the left of the bins and to the left side of the photograph?
A. Yes.

Q. And then you said in the vicinity of the conveyor belts?
A. Yes.

Q. Can you see that in Exhibit "A1"?
A. Yes, that would be this area here. (Indicating).

Q. Well, the conveyor belt is that long cylindrical looking contrivance going from some buildings towards the left of the photograph, up to the bins on the right?
A. Yes, that is correct.

Q. At any stage, did you ever see children, week days or weekends, in the vicinity of the back shunt?
A. No, I cannot say that I have.

Q. There has been reference to a Mr. Cluny; did something happen to him about some weeks ago?
A. Yes, Mr. Cluny had a heart attack.

Q. Where did he go?
A. About three weeks ago he was admitted to hospital.

Q. Whereabouts?
A. In Goulburn.

Q. Did you visit him there?
A. Yes, I visited him there.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Pearson, T. 20th May 1970 (continued)

Q. When did you last see Mr. Cluny?
A. Last Sunday night.

Q. Well, when did he come home from hospital?
A. Last Saturday morning.

Q. And you saw him last Sunday, that is two or three days ago?
A. Yes.

Q. Is he back at work since?
A. Not yet.

Q. What did you observe; what did you notice about his condition.
A. Well, the man was heavily sedated. He could not hold a normal conversation, because he would get lost, and his eyes were very dull and drowsy, and it took him all his time to walk, say, about 30 feet from a lounge room to a dinner table.

CROSS-EXAMINATION

MR. LOVEDAY: Q. Mr. Cluny is apparently not here today?
A. That is correct.

Q. Is Mr. Creswick, the safety officer, here?
A. Yes, I saw him out in the corridor, yes.

Q. He is here?
A. Yes.

Q. Are there any other officers from the company here? (Objected to; allowed.)

Q. Are there any other officers of the Company here?
A. Yes, there is a shift foreman outside.

Q. A shift foreman?
A. Yes.

Q. What is his name?
A. Mr. Chaplin.

Q. You say that on occasions you did see children in various places on the company property?
A. That is correct.

Q. You mentioned seeing them in the vicinity of the conveyor?
A. Yes.

Q. How far would that be from the back shunt?
A. Probably 300 yards.

Q. And did you also see them on the dumps, sliding lown the dunps? (Objected to.)

Q. Did you ever see children playing on any dumps on the property?
A. On a fines dump, yes.

Q. There were a number of fines dumps, weren't there?
A. That is correct.

Q. Whereabouts on the company property were these fines dumps?
A. Well, one was facing the main office; the other one was on the back shunt. This was at the end of the railway line. These were the only fines dumps that were being used.

Q. So, you saw them playing on the fines dump near the office?
A. Yes.

Q. Or on the back shunt?
A. On the fines, near the dump -

Q. What were they doing on the fines dump near the office?
A. They were sliding down the fines. Sometimes they used a sheet of iron and made a sled out of it.

Q. Did you see that on more than one occasion
A. Yes, on a couple of occasions I noted it and chased them away.

Q. They were not doing any harm. (Objected to.)

Q. Were they interfering with the company works at that stage?
A. No.

Q. Was that a work day you chased them away, when you saw them?
A. Yes.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Pearson, T. 20th May 1970 (continued)

Q. Not a weekend when there was no work going on?
A. No, I could not then -

Q. Have you any children?
A. Three.

Q. What ages are they?
A. 21, 19, 17½.

Q. Well, do you know where Granny's Chair is?
A. Where?

Q. Granny's Chair is?
A. Granny's Chair?

Q. Yes.
A. I cannot say that I do.

Q. How long have you been living in South Marulan?
A. Six years.

Q. In 1967 you told us you heard some orders being given to Mr. Cluny?
A. That is correct.

Q. Was there any mention in those orders about Les Cooper's fence?
A. It could have been but I cannot recollect it.

Q. Wasn't that the reason given for the no more dumping on the western side of the back shunt?
A. Not that I can recall. It may have been.

Q. Well, wasn't that the reason given rather than something to do with the power line?
A. No, I believe it was the power line, that this was being considered.

Q. Well, was the power line mentioned?
A. It may have been.

Q. You cannot recall one way or the other?
A. Not specifically, no.

Q. And you cannot recall whether Les Cooper's fence was mentioned or not?
A. Well, Mr. Cooper's fence has been mentioned on several occasions.

Q. And up until when this conversation occurred had you noticed any dumping continuing on this back shunt area?
A. No, I had not.

Q. Is it part of your duty to supervise this area?
A. No.

Q. You are not working down that lower section; you are at the quarry site, is that right?
A. Yes.

Q. This area was at the top level or higher level?
A. Yes.

Q. And did you have a look at the power line, yourself, when you heard this conversation?
A. No, I had no cause to go there.

Q. Where did the conversation take place?
A. This is something I could not even be sure of. It may have been at the main office. It may have been at the foreman's office, down the bottom, in the bottom level of the quarry.

Q. You are not very clear either as to the place, the time or the content of the conversation, is that the position?
A. That is correct.

RE-EXAMINATION

MR. McGREGOR: Q. You have told us, as I understand you, that you saw children on that fines dump and only that fines dump which is near the office, is that right?
A. That is correct.

Q. Will you look at those photographs that are shown to you, exhibits "A1" to "A3", and see if the fines dumps are in those photographs?
A. Yes, I think I can pick it out.

Q. Which one have you got?
A. This one. (Indicating.)

Q. That is Exhibit "A3"?
A. Yes.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Pearson, T. 20th May 1970 (continued)

Q. Whereabouts are you indicating?
A. They would be sliding down this side of the fines, just facing the main office.

Q. Does that one show it?
A. No.

MR. McGREGOR: It happens to be on Exhibit "A3" at the point where there is an arrow already pointing down. (Shown to jury.)

Q. How far would that be from the back shunt, from the end of the back shunt where this accident happened?
A. 600 or 700 yards.

(Witness retired.)

Evidence of Creswick, R.S. 20th May 1970

ROY SEPTIMUS CRESWICK
Sworn, examined as under:

MR. McGREGOR: Q. Your name is Roy Septimus Creswick?
A. Yes.

Q. And your address?
A. 68 Charlotte Street, Ashfield.

Q. And you were formerly the welfare and safety officer employed by the defendant company?
A. Yes.

Q. And for how many years did you hold that job?
A. Nearly nine years.

Q. And were you in that position in 1967 ?
A. Yes.

Q. And 1966, for that matter?
A. Yes.

Q. When did you join the company's staff?
A. In 1961.

Q. And was there in 1967 a process of organising the employees into safety groups for the purpose of lectures or discussions?
A. In what year?

Q. In 1966 and 1967?
A. No, that started years before that.

Q. Was it in existence in 1966 and 1967?
A. Yes.

Q. When had it started?
A. It started in 1961 or earlier.

Q. And was it confined to any one group of employees or were all employees in one or other groups?
A. Well, there were six different groups including truck drivers and quarry staff.

Q. And in those groups were matters discussed relating to safety of company operations?
A. Yes.

Q. And was there any instruction given to employees who were also fathers?
A. Yes, the subject of home safety was mentioned whenever possible.

Q. Well, what were they told; I am not talking about how the fathers themselves behaved on the works, but what else were they told. (Objected to; allowed.)

Q. Well, what were the fathers told?
A. There were occasions when the children came near the working area and the fathers concerned were told that they should not be there, and when necessary I and other foremen told the children to clear out.

Q. And apart from those meetings was there a work instructions about children being on the works?
A. There was a very definite instruction.

Q. And what was that to do?
A. That they should not be near the works; they should remain within the precincts of the village.

Q. And from time to time have you, yourself, spoken to children on the works area?
A. Yes, I have.

Q. Did you know the Cooper children?
A. Yes.

Q. Had you ever spoken to any of those?
A. Yes, I had.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins, J. Evidence of Creswick, R.S. 20th May 1970 (continued)

Q. Telling them to do what?
A. To go back to their village or their playground. There were plenty of playing facilities in the village, and they had no right to be near the railway line or near the working area.

Q. Whereabouts have you seen them?
A. Well, it was mainly near the railway line east of the loading bins and down towards the back shunt and further up towards what we know as the fettlers' shed.

Q. Have you ever seen any children at all on the back shunt down where the accident happened to young Rodney Cooper?
A. No, never.

Q. And apart from those areas that you mentioned, have you seen children from time to time in the works area, over the nine years that you were there?
A. Yes.

Q. And what did you do every time you saw such children?
A. Well, I told them to go away.

Q. You knew this area; you are not employed at the company any more, are you?
A. No.

Q. And you knew this area including the area where the bins are, down to and including the back shunt?
A. Yes.

Q. And around the lower quarry area?
A. Yes.

Q. And up to the fines dump and the rear of the office?
A. Yes.

Q. Did you know that total area?
A. Yes.

Q. By the way, was some of it fenced?
A. Yes, there was a portion fenced. The fines dump, as we know it - there was a fence cutting off or protecting anyone from falling over the edge between the fines dump - there is a road

going down to the spares dump. Now, there is a fence going right down along there to protect anyone there, from going over.

Q. Well, was there any fencing anywhere else around this works area?
A. Yes, there was fencing on the western side down in the valley, and up around too. That was mainly for stock purposes. There was quite a lot of fencing there.

Q. Was there a fence completely around the total works area?
A. No, not totally.

Q. Supposing you had attempted to put a fence around there would there be any problem?
A. Yes, there would be a great problem on the eastern side; you would have the Shoalhaven Gorge there, and it would be impossible to fence that section. That is a natural barrier.

Q. What about the actual works area; if you had attempted to put posts in the ground, what would have been the problem?
A. I do not think there would be any actual problem of putting the posts in.

Q. What about the other part, down below, on the west and south?
A. The terrain is extremely rocky in places.

Q. You mentioned the fence near the fines area?
A. Yes.

Q, Can you see that area in Exhibit "A1" that I show you? (Shown to witness).
A. Yes.

Q. Where is the area in which you describe there having been a fence?
A. This is a village. (Indicating.)

Q. You point to that area in the middle of the photograph on the left side?
A. Yes, where there was an old quarry. (Shown to jury.)

Q. There was a fence, was there not, at the back of some of these buildings here in the bottom right-hand corner?
A. Yes, that is the railway line.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Creswick, R.S. 20th May 1970

(continued)

Q. What are those places there?
A. They are the houses in the village.

Q. They are in the bottom righthand corner?
A. Yes.

Q. You spoke about speaking to some of the Cooper children; did you ever speak to Mr. Cooper about his children?
A. Yes.

Q. What did you say to him? (Objected to; allowed.)

Q. What did you say to him?
A. I told him one or however many were involved were too close to the railway line area and were where they should not have been, and I told them to clear off home.

HIS HONOUR: Q. Was that speaking to Mr. Cooper or to the children?
A. Speaking to Mr. Cooper.

Q. You told him to tell his children to clear off?
A. Yes.

CROSS-EXAMINATION

MR. LOVEDAY: Q. Were you the only safety officer at South Marulan employed by the company?
A. Yes.

Q. May I take it that your duties were concerned with seeing to and trying to minimise any danger that might threaten the men, or indeed anyone?
A. Yes.

Q. Any dangerous situation that occurred?
A. Yes.

Q. It was your duty to attend to that, is that right, that is provided you knew about it?
A. If I saw a hazard I reported it to the superintendent or the foreman.

Q. I do not mean that you personally had to get to work and eradicate it, but it was your duty to try and eradicate hazards?
A. Yes.

Q. Or arrange for them to be eradicated, is that so?
A. Yes.

Q. And I suppose it was the usual practice, was it, for you to be told about any hazard or danger?
A. Yes, I was always - or mostly I was informed of any hazards.

Q. Did anyone tell you about a hazard of a 33,000 volt electricity line in close proximity to the slope of the dump?
A. No.

Q. Did you know about this dangerous situation only after - (Objected to.)

Q. Well, did you know about a power line being close to the slope of a dump before the accident happened to Rodney Cooper?
A. I knew of the 33,000 power line, but I was transferred to Berrima approximately a year before this incident occurred, but I was still safety officer at Marulan in as much as I conducted all the safety meetings and I attended to any follow up matters regarding safety.

Q. Do you mean to say you were not at South Marulan in the year 1967?
A. No, I was at Berrima.

Q. Was there any safety officer at South Marulan in 1967?
A. Not at South Marulan. I did the work from Berrima.

Q. You did the work from Berrima?
A. Yes.

Q. Well, whether you did the work from Berrima or not, you were the safety officer?
A. Yes.

Q. Well, did anyone tell you of a dangerous situation with a 33,000 volt electricity line?
A. No.

Q. Did you have a look at it after the accident?
A. Yes, I had a look at it later.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Creswick, R.S. 20th May 1970 (continued)

Q. When did you first see it?
A. It would be a couple of days after.

Q. And when you saw it what, if anything, had been done to render it less dangerous?
A. Well, the area had been marked off.

Q. What, with signs, "Danger"?
A. Yes.

Q. And something - what, like a fence, was it?
A. Yes.

Q. Anything else at that time? 10
A. No, I do not think so, I cannot remember clearly.

Q. If your attention had been drawn to it beforehand would you have taken some measures? (Objected to; allowed.)
A. I would have spoken to the quarry superintendent.

Q. What, with a view to getting something done?
A. Yes.

Q. And was part of your duty to see not only to 20
the safety of the employees but the safety of children or children of employees, people that might come in on the works, sort of thing?
A. Yes, if they walked on the works it was definitely my duty to see that they were hunted away from the place. They were not supposed to be there, but part of the safety programme included the safety at home, and we tried -

Q. If you had known about this dangerous situation of the power line, would you have done 30
something about that? - (Objected to.)

HIS HONOUR: Wait until we hear what the question is before you object, and then I will rule on it.

MR. LOVEDAY: Q. Would you have done something about the protecting of children of employees. (Objected to.)

Q. Would you have done something about protecting the children of employees? (Objected to; withdrawn.)

Q. If you had known that there was a 33,000 volt line close by - by close, I mean four, five or six feet, in the vicinity - from the slope, would you have done something about protecting children of employees? (Objected to.)

HIS HONOUR: I do not follow that question.

MR. LOVEDAY: Q. If you had known that this 33,000 volt power line was approximately in the same position as when you saw it two days after the accident, if you had known of that situation before the accident, would you have done something to protect children of employees. (Objected to; rejected.)

Q. If you had known that there was a power line, 33,000 volt power line within touching distance of a dump slope, would you have done something to keep people away from it? (Objected to; allowed.)
A. Yes, I would have spoken with the quarry superintendent.

Q. Is that all?
A. Well, I was immediately responsible to him, and that is the logical line of communication.

Q. What, with a view to having it fenced off or protected or something?
A. Well, to take whatever action he thought.

Q. To take whatever action he thought?
A. Yes, and any proper recommendation I may have had to offer.

Q. You would have had some recommendation yourself, would you?
A. Most likely I would have.

Q. Well, would your recommendation have included fencing the area off? (Objected to.)

HIS HONOUR: What is that going to?

MR. LOVEDAY: Only whether there was reckless behaviour, on this second count.

HIS HONOUR: He said he was not there; he had not been there for years.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Creswick, R.S. 20th May 1970 (continued)

MR. LOVEDAY: He said he was the safety officer.

HIS HONOUR: I will disallow the question.

MR. LOVEDAY: Q. You were asked about various fences?
A. Yes.

Q. There was in fact no fence between the village and the working area, was there?
A. No.

Q. And there was no practical difficulty in building such a fence, was there?
A. None at all.

Q. Do you say that you spoke to Mr. Cooper?
A. Yes.

Q. When was this?
A. I had spoken with Mr. Cooper on several occasions.

Q. Well, when was the last occasion before the accident?
A. I could not define that clearly, but I have spoken with Mr. Cooper on several occasions because of his children being there.

Q. You told us you had spoken on several occasions; when was the first of those occasions and when was the last occasion?
A. Say, between 1962 and 1965.

Q. Between 1962 and 1965?
A. Yes.

Q. And those were the only times you spoke to him, were they, or was that the first of the occasions?
A. I could have spoken probably in 1966, although the children did not seem to worry so much around about 1966.

Q. What do you mean by that, that the children were frequently on the area between 1962 and 1965?
A. Well, it was just that way; they were there but when we kept hunting them - there was a foreman involved, of course -

Q. In 1962 which of the Cooper children did you hunt?
A. The eldest, Russell, I think, and Rodney - the two.

Q. Russell and Rodney?
A. They were members of groups, and the groups varied from, say, three, it could be three to a dozen, in different groups.

Q. In 1962, is this what you are talking about?
A. Yes, 1962.

Q. Well, in 1962 Russell and Rodney were about 7 and 8?
A. That is right. Yes they were only young boys.

Q. Where were they?
A. Down near the railway line, east of the bins, that is on the village side, of course.

Q. On the back shunt side also?
A. No, generally on the eastern side, towards the back shunt end. The back shunt is on the southern end, but they were on the eastern side, down playing near the railway trucks.

Q. Playing near the railway trucks, near the back shunt end?
A. Yes.

Q. How far from where the accident occurred?
A. It would be at least 300 to 400 yards.

Q. And that was in 1962?
A. Yes.

Q. And in 1966 and 1967 you were not at the area at all except for meetings or something, is that what you say?
A. In 1966 I was there for the first half of the year, and after I went to Berrima I went up regularly, mostly every week, and we used to have monthly safety meetings, every month.

Q. But this was only during the week, on week days, was it?
A. That is right.

Q. You were not there at weekends?
A. No.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Creswick, R.S. 20th May 1970 (continued)

Q. So, you are not able to say?
A. No, I am not.

Q. What happend at weekends?
A. No.

Q. And when you were hunting children off, this was while work was going on, wasn't it?
A. Yes.

Q. On week days?
A. Yes, week days.

Q. It was different, of course, when the works were closed down, except for routine maintenance, at weekends?
A. There was no production, of course.

Q. No production and no danger in ordinary circumstances?
A. No.

Q. And you did not think it necessary to keep children off at weekends, as a safety officer, did you?
A. No, I did not. I did not always go out there.

Q. Well, nothing was done to keep children off at weekends, was there?
A. No.

Q. There was no person whose duty it was to keep children off at weekends, is that right?
A. Yes, there was no one there.

Q. And there were, I suppose, in the village at that time, about 80 children, about 40 at South Marulan school and probably just as many at Goulburn High School?
A. I do not know the number of children.

Q. Would that be about right?
A. I do not know what the enrolment of South Marulan would be. Probably between 40 and 50. I would not be sure of that.

Q. There would be just as many children going to high school, I suppose?
A. There would not be that many - a smaller proportion.

Q. Well, during week days, of course, when production was going on there would be plenty of workmen and plenty of activity in the working area?
A. Yes.

Q. That is when you were concerned particularly to keep children out of the area?
A. Yes.

Q. But you took no steps to keep them out of the area at weekends, is that right?
A. If the foremen were on duty, it was the standing order from the quarry superintendent that any strangers should be told to leave the area.

Q. Any strangers?
A. Yes, or children.

Q. Well, just a moment -
A. And there are foremen working at some time during the weekend, mostly maintenance foremen.

Q. Was the order any strangers or children?
A. Well, quite a number of people, tourists, came along the quarry.

Q. Well, the order was to keep them out of the area in case they stole something too?
A. Well, it was a general order.

Q. But children of employees were not strangers, were they?
A. No.

Q. There was no order about them, was there?
A. Yes. Well there has always been a standing order that they should not go near the quarry.

Q. Not near the quarry?
A. Well, near the working area.

Q. The quarry is the place where there are cliffs, blasting and dangerous precipices is that right?
A. Yes.

Q. That is a dangerous place?
A. Yes.

Q. Well, there has always been an area that they should not go down to, in that area?
A. Yes.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Creswick, R.S. 20th May 1970 (continued)

Q. That is much lower than the back shunt area, isn't it?
A. Yes.

Q. But there was never any order, was there, that children should not go around or should keep out of the top area, at least when the works were closed down at weekends?
A. Well, they were supposed never to go near the railway line, even if the railway line was not operating.

Q. Leave out the railway line and the quarry - and perhaps the bins - those are the only areas you were concerned about at weekends, weren't they?
A. Yes.

RE-EXAMINATION

MR. McGREGOR: Q. Did your work take you on some sort of patrol at weekends?
A. I beg your pardon?

Q. Was it part of your duty to go on a patrol at weekends?
A. When I was at the quarry I worked almost every Saturday.

Q. Well, when you were there did you then order children off from the working area?
A. Yes, when I was there I always did.

Q. You told us this, that you were not there after the first half of 1966; do you remember saying that?
A. Yes.

Q. That you were moved to Berrima?
A. Yes.

Q. And after that you came back to safety meetings?
A. Yes.

Q. Does that mean that your observation of children in this area ceased at the end of June or thereabouts, 1966?
A. Well, the immediate supervision would, because I was not there.

Q. Now you use this expression "Children were not so much a worry" or "Not a worry so much in 1966." Do you remember that?
A. Yes.

Q. Had you noticed that there was an improvement on the number of children who trespassed or came on to this property? (Objected to.)

Q. Who came on to the working area in 1966?
A. Yes, the children generally seemed to get the message, that they were not supposed to be in those particular areas.

Q. And was that noticeable in 1965 also?
A. Yes.

Q. When did this improvement start?
A. About the end of 1964 or 1965, the beginning of 1965.

Q. So that from then on there were less and less children on this working area?
A. Yes, there were fewer there.

Q. Can you remember the last time that you saw Cooper children on the working area?
A. No, I have no clear recollection.

Q. Well, you say you saw them between 1962 and 1965?
A. Yes.

Q. Was that intended to be an estimation of the first and the last time, or what?
A. Yes, it is an estimate.

Q. Do you know what was called the Mess Hut?
A. Yes.

Q. Was that at one time when you were there ever used for Sunday School?
A. No, not in my time. Religious services were conducted in the village hall, but I understand before my time some religious services were conducted in what was known as the Mess Hut.

Q. In your time where was Sunday School conducted, what building?
A. In the village hall.

In the Supreme Court of New South Wales

No. 3

Transcript of Evidence of Witnesses before Collins J. Evidence of Creswick, R.S. 20th May 1970 (continued)

Q. Is that in the area where the houses are?
A. Yes, it is approximately in the middle of the village.

(Witness retired.)

MR. McGREGOR: That is the case for the defendant.

CASE IN REPLY

Evidence of Cooper, P.A. 20th May 1970

PETER ALPHONSUS COOPER
Sworn and examined as under:

MR. LOVEDAY: Q. Is your name Peter Alphonsus Cooper?
A. Yes.

Q. Do you reside at South Marulan?
A. Yes.

Q. Are you a labourer employed by the defendant company, Southern Portland Cement Limited?
A. Yes.

Q. And you are the father of the plaintiff, Rodney John Cooper?
A. Yes.

Q. For how long have you been working at South Marulan?
A. 19 years.

Q. You know Mr. Creswick?
A. Yes.

Q. It has been suggested that there was a conversation in which Mr. Creswick spoke to you about your children, in particular your children being on the working area; do you recall any such conversation?
A. He never ever spoke to me once while I have been working there.

Q. In particular, did anyone speak to you, telling you that you should keep your children out of the area of the company property?
A. No, not once.

Q. On the contrary, was anything said to you about being allowed to be there? (Objected to; allowed.)

Q. Was anything said about allowing them to be there? (Objected to.)
A. No.

Q. Did you have a conversation with Mr. Cluny at any time?
A. The only time Mr. Cluny said to me - (Objected to.)

Q. Were you present at any meetings of the company, any safety meetings at any time?
A. They used to have meetings down there concerning the men, like, accidents on the job and that.

Q. At any time did anyone from the company tell you that your children should be kept out of the working area of the company? (Objected to.)
A. Not once.

MR. McGREGOR: No questions.

(Witness retired.)

MR. LOVEDAY: That is all the evidence.

MR. McGREGOR: We have some legal submissions. We move for a verdict on all grounds.

(Jury retired.)

In the Supreme Court of New South Wales

No. 4

Summing up of Collins, J. 21st May 1970

No. 4

SUMMING UP OF COLLINS, J.

IN THE SUPREME COURT OF NEW SOUTH WALES

IN CAUSES

CORAM: COLLINS, J.

And a jury of four.

Thursday, 21st May, 1970

COOPER

-v-

SOUTHERN PORTLAND CEMENT LIMITED

HIS HONOUR: Gentlemen of the jury: as learned counsel have told you, you are the judges of the fact of this case. It is your duty and responsibility to come to a decision on whether or not the plaintiff is entitled to a verdict and, if he is, how much damages he should receive. It is for you, therefore, to decide what evidence you accept and what you reject. It is for you to come to a decision on the facts in accordance with the legal principles I give you. You are called here from your various occupations to perform a very important function. You are urged to bring to your assistance your knowledge of life, your understanding of human nature, your understanding of the values that obtain in this community, your sound judgment and your common sense. All these attributes are looked upon as the main contribution that four gentlemen such as yourselves constituting a jury, can make to the administration of justice in this State.

As you are the judges of the facts, you should not permit yourselves to be influenced in any way by any statement or opinion I express on any question of fact - unless, of course, you agree with it. I have not the slightest intention of seeking to influence you. I will have to deal with the facts, but I shall not deal with them at any great length. If I seem to

be leaning one way or another on any question of fact, remember it is your duty and your responsibility to try the case.

I am the judge of the law, and that implies that I have a number of duties, which I hope I shall continue to perform as I have performed them during the course of this case.

First of all, I have to deal with all legal questions which arise. I have to rule on the admissibility of evidence. Whether evidence is admissible or not is a question of law. On numerous occasions in this case, as you know, objections have been taken to evidence and I have ruled whether evidence is admissible or not. That does not imply that I have any opinion on whether the evidence that I admit, where I have admitted evidence, is credible or of weight; those are matters entirely for you. I have to instruct you in this summing-up on the legal principles that apply, and that I will shortly do. Then I have to arrive at a decision on whether or not various claims which the plaintiff made at the outset of this case are legally valid.

You will remember that Mr. Loveday opened the case to you last Monday morning on the basis that the plaintiff is entitled to succeed in five different ways. You know that yesterday, after argument by learned Queen's Counsel on either side, Mr. Loveday of Queen's Counsel for the plaintiff and Mr. McGregor of Queen's Counsel for the defendant, I ruled that four of the ways in which the plaintiff sought redress were not open to him; and consequently that only one cause of action was available. In doing that - and after I had done it - I made it clear that I was not deciding any question of fact whatever; I was merely deciding the law, and where I was discussing the cause of action, I was leaving to you, I only dealt with views that were possible for you to accept or reject; I was not advocating the acceptance or rejection of any of those views I adverted to. Because certain causes of action were, by my direction to you, eliminated from the case, it means that some of the evidence that was given in relation to those causes of action is no longer relevant, but I do not think that that will cause you any trouble.

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No. 4

Summing up of Collins, J. 21st May 1970 (continued)

The action is based on the legal wrong of negligence. Negligence inherently is a breach of duty to take reasonable care. Each case must be looked at in the light of its own circumstances and even though some of the things which were admissible only in a strict sense on causes of action which I have directed should no longer be put to you, nevertheless, generally speaking, that evidence was evidence of the surrounding circumstances in this case. As I say, the plaintiff has brought his action claiming that he was injured by the negligence of the defendant, that is to say that the defendant was in breach of its duty to take reasonable care for his safety, in the circumstances of the case. The onus of establishing that contention is on the plaintiff. It is for the plaintiff to persuade your judgment on the evidence you accept that he was injured through the negligence of the defendant. It is not for the defendant to establish that he was not negligent. He who alleges must prove, is the general rule - and certainly is the rule that applies in this case. The plaintiff alleges, he must prove to your satisfaction that he was injured through the negligence of the defendant.

This is a civil case, and the standard of proof in a civil case is this, that there must be a balance of evidence or probabilities in favour of the party who carries the onus of proof. It is not required, as Mr. Loveday pointed out to you, that the standard of proof that is required in a criminal case be attained. I have no doubt you know, either from your experience or from your reading, that the Crown does not establish the guilt of an accused person unless it establishes that guilt to the satisfaction of the court, beyond reasonable doubt. That is a very high standard of proof. But in a civil case it is sufficient if the plaintiff persuades the tribunal that his contention is more probably correct than not. So, you are entitled to have a look at the probabilities of the matter, and if you feel that on the evidence or on the probabilities there is a slight but perceptible balance in favour of the plaintiff, he has discharged the onus of proof. Of course, if the balance is the other way he has not discharged the onus of proof, and the verdict must be for the defendant. And there is a third

possible situation in which you as the jury may come to the conclusion that the matter is left in a complete equal balance - that there is no balance of testimony, no balance of probability one way or the other - in that situation the plaintiff also fails. He is required to show a balance of probability of testimony in favour of his contention that he was injured through the negligence of the defendant.

The defendant is a company and a company is a legal entity. Nevertheless, where knowledge is required, where notice is required, knowledge and care and notice can be imputed to a company, but it must be imputed to the company through its officers. The company can only act through its officers. And therefore, essentially, when you are talking of the lack of reasonable care of a company, you are speaking of lack of reasonable care of the employees of the company, the officers and officials of the company. And where you are required to give notice to a company, you can only fulfil that by giving notice to the officers and employees of the company. The company was the occupier of the quarry premises; the plaintiff is a boy of thirteen, who was on the premises and was injured by a condition of a part of the premises. The duty owed by the occupier of premises to a boy who is on the premises without any legal right to be there is well established, and the plaintiff must show a breach of this well established duty.

The occupier of premises is bound by a duty to take reasonable care to protect children from risk to which they are exposed by a dangerous condition of part of the premises if that part of the premises constitutes an allurement to children to enter on to the premises and approach that dangerous part. The part must be dangerous in the sense that it is a concealed danger or a trap. Its existence and dangerous quality must be known to this occupier of the premises and unknown and not obvious to the children. Further, it should be known to the occupier that there is a likelihood that there will be in or near the premises children who will be subject to the allurement and who will in fact be allured by it. The word "allurement" is a traditional word. What is a thing that is alluring to children? - something

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(continued)

that is attractive to children, something that attracts them to approach it and perhaps play about it or approach it in any other way. The contentions of learned counsel have been put to you in regard to this claim by the plaintiff that there was a breach of the duty that I have put before you. And if we go through that statement of that breach of duty again, examining the various contentions that counsel have put before you, I think it will be unnecessary for me to do any more. I think it will be quite unnecessary for me to deal with the evidence in the detail that learned counsel have or to read you extracts from the evidence. If you will permit me to say so, you have taken an obviously keen interest in the case since it started, and I think the facts have been sufficiently examined by learned counsel in their addresses. I only propose to deal with the facts in a broad way. Of course, there is always the danger of over-concentration on detail or on parts and losing sight of the situation as a whole. You must remember the whole of the background of this happening, the fact that the quarry existed alongside a village, that the village was completely connected to the quarry, not with any other thing; it was a mining village attached to this quarry; it was remote and situated in a part of the country which - at least judging by the photographs - does not appear to be very attractive.

It was a small isolated sort of place, and yet there were a number of school children there who, at weekends, sought their amusement as best they could. Then there were the physical features of the quarry itself. There was the fact that on week days - and very often on Saturdays - production was taking place, and even on Sundays there may be maintenance going on.

Then you have the background of the evidence - if you accept it - that the schoolmaster, and indeed officials of the company, from time to time warned children of dangers inherent in the village and on the works, and also - if you accept it - that children were quite often warned to keep away from the premises, and indeed ordered off the premises.

It is against that background and the

background of the evidence also, that on Sundays, despite these prohibitions, children - being children and apt to the sin of disobedience - wandered on to the premises either to cross over them or to play on them and that, if you accept the evidence again, that there was an attraction in what has been called the dumps where waste material is put in with the heap in such a way that slopes were formed and the children, again if you accept the evidence, liked to play on these slopes, rolling stones down them, running up and down them or using pieces of steel in such a way that they could indulge in the sport that is called tobogganing. I do not know how much of this evidence you accept and how much you reject, but undoubtedly you must accept part of it, on one view that has been put to you. It is your duty now, against that background, to examine what I have put to you.

The occupier of premises is bound to take reasonable care. The law is not so unreal as to demand of any human being or institution perfect care; but having regard to all the circumstances, the duty is to take reasonable care and a failure to take reasonable care is a breach of that duty and is called - as I have already told you - negligence.

The occupier is under a duty to protect children. This duty of care, in the circumstances of this accident, is only in favour of children. Because it is considered - and you might think realistically so, - that children, being children, might be lured or attracted on to premises where they have no right to be, where an adult would not be so lured or attracted, or if there were an allurement or attraction he would be expected to reject that allurement or attraction.

Did this slope constitute an allurement? You have heard the arguments of Mr. Loveday on this point. He said that in this village at that time, the children, on the evidence he asks you to accept, did like to play and were attracted to these slopes, to use them in the way the evidence indicates.

Mr. McGregor, on the other hand, points out to you that there is no evidence that any children ever played on this particular slope. The only

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person who ever made reference to a child ever being on that slope was the plaintiff himself, who said that he had been there only on one previous occasion and that was the day before. And he asks you to say that whatever is the situation about these slopes, this particular slope was not an allurement. In reply, Mr. Loveday says that this is taking too narrow a view of the evidence - and the evidence of some of the witnesses - is that this slope had been recently altered by the fact that the heaps that were there for it for some time had been pushed over in the last days of that particular week, and he asks you to say that that may have constituted the allurement in this situation that did not exist before.

The part of the premises must be dangerous in the sense that the danger was a concealed danger, that it constituted, in effect, a trap. Well, on this matter Mr. Loveday asks you to say without any great hesitation that the presence of an unguarded uninsulated electric wire carrying 33,000 volts within four or five feet of a slope, which he claimed was an allurement to children, was clearly a trap and a concealed danger. There were no warnings, no guards, and the wire was in easy reach of any person who was playing on this slope - any children - I should say, who were playing on the slope, and as I understand it, Mr. McGregor did not advance any arguments to the contrary.

Then its existence and dangerous quality must be known to the occupier. Here, Mr. Loveday put to you that this danger must have been known to the occupier; it was on the defendant's own premises and the danger had been created by the activities of the company in dumping soil to the extent that the edge of the soil on the slope was brought so close to the wire that employees of the company engaged in the very operation must have known of the existence and the quality of the danger. He asks you also to accept the evidence of Mr. Cosgrove, that it was an estimated five feet from the slope for quite a period before. And if you do not accept that evidence, he asks you to accept the evidence of Mr. Howard, the mine superintendent, who recognised the potential danger, but that according to Mr. Howard it was not five feet from the slope but a considerably greater distance away from the slope on the Thursday, and he took

immediate steps to have that wire removed. Unfortunately, the wire was not removed before the Sunday, when the plaintiff came in contact with it. Mr. McGregor asks you to say that in all the circumstances the knowledge of the danger was not to be imputed to the company because something went wrong after the Thursday when the danger was only potential and not actual, and that the company had, through its officers and servants and employees, really no knowledge that the wire was so approximate to the edge of the slope.

(Short adjournment.)

The other matter is - and this again, I think, is one of those obvious matters that Mr. McGregor made no submissions about - that the danger must be unknown and not obvious to the child. Well, you have heard the description of the situation, and you might think a child of thirteen would not appreciate that the wire hanging in proximity to the edge of a slope was a potentially lethal wire.

Then, as I told you, it must be known or at least be foreseeable and foreseen by the occupier that there was a likelihood that there would be in or near the premises children who would be subject to the allurement that existed on the premises. Again, it is idle to give illustrations of other situations. You bear the situation in mind here of the village, its locality: its proximity to the works and all the other evidence about how children had conducted themselves in and about and near these premises over the weekends for years before the accident. And also, as I told you, it must be foreseeable by the occupier that this part would be an allurement to children. Again you find the danger of becoming repetitive. You have the evidence - if you accept it - that children did pass over or go to various spots on the works premises, and you have the evidence that on other dumps children did play, whether they were tobogganing or rolling stones or doing other things. So much depends on what you find the situation to be. But to whatever you find the situation to be you apply the principle I have given you and you ask yourselves: "Has the plaintiff established - in the way I indicated - that he met with his injury as a result of the breach of duty on the part of the defendant?"

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Summing up of Collins, J. 21st May 1970 (continued)

If you are not so satisfield, the verdict is for the defendant. If you are so satisfied, then you are required to assess what damages should be paid to the plaintiff.

Now on this aspect of the case Mr. McGregor made no submissions to you at all. Mr. Loveday was the only counsel to put submissions. I seems to me that he put them to you in a fair and moderate way, and, of course, moderation is the criterion of an award of damages in a case such as this.

You are the judges of the facts on the issue of damages, just as you are on the issue of negligence, It is for you to hold the scales of justice evenly between the parties. The amount to be awarded by way of damages should be just and fair and reasonable to both sides; it should be just and fair and reasonable from the point of view of the person who is to obtain damages, and it should be just and fair and reasonable from the point of view of the person who is to pay them. The first principle, therefore, is that this judicial act is to arrive at a sum which is fair and just to both sides.

Damages are given - and this is the second principle - by way of compensation. You may wonder what is the point of that observation, but what I want to emphasise is that there is no question of punishment involved; there is no question of punitive damages in a case such as this. Damages are given to compensate for the injuries suffered, not to punish for the wrong done.

Thirdly, damages are given once and for all. This is an important - or the most important - direction. There is no question in a case such as this of awarding interim payments. You cannot order that the plaintiff be paid in income.

You cannot order that he be paid a sum which is compensation up to the present time or, if you like, until he is twenty-one, or some other period, and then ask that the matter be brought forward for review in the light of the then-existing circumstances. You must deal with the problem of the plaintiff's future today, and you must deal

with it once and for all. The plaintiff is entitled to damages not only for what he has lost and suffered in the past but what he will lose and suffer in the future. I will leave that principle and go to the fourth and then come back to the third one again, because the fourth principle is useful when you deal with the third.

The fourth principle is this: the onus of proof is on the plaintiff on the question of damages just as it is on the question of liability. There are, as you know, no arguments before you from the defendant on this question of damages, and it may well be that the situation is so plain that no matter is called for, but nevertheless there is a question of interpretation of damages. There is a question of the extent of the injury, the way in which it will affect the plaintiff in the future. Dealing with the future, of course, is on one view an impossible task. If you were required to be certain or if you were required to find that a certain event will or will not happen, and you were required to make that finding on the basis of proof beyond reasonable doubt, you could not enter upon your inquiry. But as the onus of proof on this issue is the same onus that lies on the plaintiff on the issue of negligence then you know that you are entitled to go on the probabilities, and that makes your task so much easier.

Referring now to the third principle, in as much as you have to deal with the future, you are entitled to go on the probabilities. Really it is like an exercise in subtraction. You are entitled to approach it in this way; what would this boy's future probably have been if he had not met with this injury? He had, of course, not established a pattern of life. He was only thirteen when he met with the injury. Very often - in most cases, you might think - a man of, say, thirty-five has his pattern of life well established he has been following the same occupation for a number of years; he is either in a skilled trade or in commerce or industry, and it is fairly easy to judge what his future will be. He may be a man who has prospects of advancement. He may be a man who has no prospect of advancement. All those factors can be taken into account. But it is very difficult with a boy who is injured at

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(continued)

the age of thirteen. However, there is some evidence before you that may give you some idea of what the plaintiff's future would have been if he had not met with this injury. It is accepted on all hands that he is not a very intelligent lad; he is not the type of person who could earn his living by his intellectual prowess. He is not a person who would have gone on to tertiary education. Rather, it is suggested by way of illustration that his way of life would have been much the same as that of his two brothers who have left school, one a labourer in an abattoir; the other an assistant in a petrol station. If you agree with that then you can have some idea of what his life would have been without the injury, and then what a handicap that injury will be to him. I am dealing, you see, with the question of his capacity to earn his living, and generally speaking, the conventional approach to damages in a case such as this is to deal with the injury that he suffered to two broad capacities; the capacity to earn one's living and the capacity to enjoy one's life.

Here it is claimed by the plaintiff that there has been a serious injury to the plaintiff's capacity to earn his living having regard to his makeup, and a serious injury to his capacity to enjoy his life. There are certain outgoings which you will have to consider. The agreed sum of medical and hospital expenses to date was given to you by Mr. Loveday, and it was $4,000. Those are the outgoings in the past. There is evidence before you that he will continue to have outgoings in the future. It is suggested that he will return to Mount Wilga. It is also put to you that continually he will have to replace the prosthesis or artificial arm, and they cost about $500 and their life is about four years, although the dress hand is replaced once every twelve to twenty-four months and the cost of them is about $74.

As Mr. Loveday said, he is getting the damages today, and so you do not work out by mere multiplication the number of hands that you think he will have in his life and multiply that by the cost of the hands. He is getting the money today and he can make use of it. So, there must be a discount even on this basis of the amount that he

will be required to pay so long as he lives, if he continues to use these artificial hands.

But reverting to the broad issues of the injury to his capacity to earn his living and the injury to his capacity to enjoy his life, little can be said. To use the lawyer's phrase, the thing speaks for itself. You have seen the lad; you have seen the arm. You have photographs of the shoulder and you have photographs of the various scars.

What is proper compensation to give him for the injury to his earning capacity? What is proper compensation to give him for the mutilation, for the disfigurement, the upset, the mental anguish that he has suffered and will continue to suffer as a result of this injury? You can only approach it in a broad way. Sir Garfield Barwick, Chief Justice of Australia, said that in these cases the approach should be a global one. You take the problem as a whole, and without going into great refinements, without seeking to isolate every aspect of the case, you ask yourselves, taking a broad approach, looking at the problem as a whole: what is a proper sum as between the parties to award this boy - this boy - a sum that is compensation for the whole of the effects of the injury in the past and in the future?

I must say that I am at a loss to help you any further with this problem, which is an obvious sort of one. I direct your attention to Mr. Loveday's fair and moderate arguments on this aspect, but the problem is for you to solve if you find that this is a case in which the plaintiff is entitled to damages.

I thought you might be interested in what will become of the damages when you award them - if you do award them. What happens is that, first of all, $4,000 is paid to the person who is entitled to that sum. Then the rest is given to the Public Trustee who invests it on behalf of the plaintiff, and as he requires money for maintenance or for the purchase of further arms or to pay Mount Wilga, then those payments are made by the Public Trustee. Then at the age of twenty-one he is entitled to receive the money, himself, and I have no doubt his solicitor would advise him very carefully as to

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what should be done with it. I do not know whether this is a matter of interest to you but often juries are worried about what happens to money awarded to an infant plaintiff.

Is there any other matter you wish me to deal with?

MR. LOVEDAY: Your Honour said that the company is responsible for the acts of the officers of the company. I think Your Honour said at another stage, "employees", but I think Your Honour meant "officers" in the sense of officers and employees.

HIS HONOUR: I did not want to limit it to administrative officers. If the company sells cement, of course, somebody in the company arranges the sale but the employees of the company go down to the quarry and do the work -

MR. McGREGOR: I have a number of matters.

HIS HONOUR: Do they concern any errors or omissions in the summing-up?

MR. McGREGOR: I think I had better leave it until the jury retires.

HIS HONOUR: I now formally ask you to retire and consider your verdict.

(At 11.55 a.m. the jury retired to consider its verdict.)

MR. McGREGOR: First of all I assume I have the benefit of those matters I have already put - because they are in the transcript?

HIS HONOUR: Yes.

MR. McGREGOR: Would Your Honour direct the jury as follows - some of these are in a sense repetitious but they are available because they have some bearing on other directions; the company is not responsible for any action of a servant who caused the condition of proximity of the slope to the wire in breach of express instructions to refrain from pushing fines over the edge.

HIS HONOUR: I refuse that.

MR. McGREGOR: Even the pushing over and raising of the ground level is not of itself negligence. The action has to be construed or judged against a background of known use of or resort to the area by children trespassing; the time that the relocation of the wire was to be undertaken on Mr. Howard's arrangements.

HIS HONOUR: I refuse that.

MR. McGREGOR: The company is only liable to the plaintiff if to its knowledge, there was a great likelihood of children trespassers, including the plaintiff, coming on the area of the back shunt; with that knowledge it recklessly or wantonly produced or continued a state of danger in that area and in disregard of the trespassers presence.

HIS HONOUR: I refuse that, but I have already dealt with it, I think.

MR. McGREGOR: From the failure of the plaintiff to give evidence through his playmates, the jury are entitled to infer that nothing they could have said would have added to the likelihood of there being children trespassers in the area near the wire.

HIS HONOUR: I do not think I will call the jury back to tell them that. I think that is more a matter of common sense. I thought you dealt with it very adequately in your address. I think it is an argument really. I won't recall them just for that.

MR. McGREGOR: The jury are entitled to regard the playing in the area and the seizing of the wire as carelessness, and if they consider the plaintiff was careless for his own safety, there should be a verdict for the defendant.

HIS HONOUR: You did not mention negligence on the part of the plaintiff at all at any time in the case. Certainly not in your address, nor did Mr. Loveday in his address. You failed to do so. What on earth are you asking me to do?

MR. McGREGOR: Give the direction I have sought.

HIS HONOUR: I will not. I will not give a

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direction on contributory negligence in a case which has lasted three days and in which counsel never adverted to the question from start to finish. If I gave such a direction I would have to explain to the jury how it applies. I would have to consider what arguments could be used in favour of the contributory negligence and what could be used against it, and I do not think that is any part of the function of a judge where counsel have not adverted to the matter until after the jury have retired, and I certainly and emphatically refuse to do so.

MR. McGREGOR: My cross-examination contains that.

HIS HONOUR: You did not say a word to the effect that the plaintiff was negligent, from start to finish. You did not suggest it to him; you did not address on it.

MR. McGREGOR: I cross-examined the witness Smith, about that the wire was visible I put it to him that he knew it was dangerous, and Your Honour rejected the question. I do not canvass your ruling, I merely mention these matters to you to say it is wrong to suggest that I did not refer to the matter at all.

HIS HONOUR: You did not mention the aspect of the carelessness of the plaintiff at any time in your closing address.

MR. MCGREGOR: I have not disputed that.

HIS HONOUR: You never adverted to any issue of carelessness or negligence on the plaintiff's own part, from start to finish in your address. I think it is to be deprecated that you should ask for a direction such as that in view of the way you have conducted the case.

MR. McGREGOR: I ask next that Your Honour direct the jury that there is no evidence that the slope was an allurement to the plaintiff.

HIS HONOUR: I cannot do that.

MR. McGREGOR: And I ask Your Honour to therefore withdraw the direction given in relation to allurement.

HIS HONOUR: No, I won't do that.

MR. McGREGOR: We submit it has no place in the case where the plaintiff is a trespasser.

HIS HONOUR: We have debated all that.

MR. McGREGOR: Will Your Honour direct the jury that the defendant could not be liable to the plaintiff unless they find that it, acting reasonably, should have foreseen the incident and not merely the presence of where the plaintiff was injured.

HIS HONOUR: I won't give that direction.

MR McGREGOR: Further, we submit that Your Honour should tell the jury that the wire is not such an article as could be described either as a trap or a concealed wire.

HIS HONOUR: You could not just limit it to the one circumstance; it is the circumstance and the nature of the wire and its proximity to the slope.

MR. McGREGOR: I was merely addressing myself to traps and concealment.

HIS HONOUR: I won't give that direction.

MR. McGREGOR: On the question of knowledge we submit that you should direct the jury that any knowledge of matters affecting the company's responsibility would only be the knowledge of those persons who had sufficient authority in the hierarchy to bind the company, and that would certainly not include the ordinary employees in the sense of a person without some position of authority.

HIS HONOUR: That is such a wide thing that I do not know how to deal with it. Can you particularise?

MR. McGREGOR: Yes, I can. We called Mr. Howard, we called Mr. Pearson, Mr. Creswick and Mr. Chaplin and we proved that they were the only four men, with the exception of Mr. Cluny, whose absence was explained here and each one of them deposed to the fact - and as far as I know there was no real contest about it, but I stand corrected on that -

In the Supreme Court of New South Wales

No. 4

Summing up of Collins, J. 21st May 1972 (continued)

that they had never seen a child on the back shunt. Each one deposed that they always told children to leave, and that being so the question of foreseeability is reduced or has to be considered in the light of the likelihood of the presence of trespassers; it has to be considered in that light.

HIS HONOUR: I won't give that direction.

MR. McGREGOR: Then on the question of damages.

HIS HONOUR: Can I hear you on damages when you did not address on damages? 10

MR. McGREGOR: Yes.

HIS HONOUR: Why?

MR. McGREGOR: Whether I addressed or not, those directions are capable of being put -

HIS HONOUR: You are quite right. What do you ask me to do?

MR. McGREGOR: Your Honour said that Mr. Loveday was fair and moderate in his mentioning of damages, but in his address he put to the jury 20 figures relating to the boarding of the plaintiff at Mount Wilga. He also put an actuarial sum which was either $24,000 or $28,000.

MR. LOVEDAY: I did not put actuarial sums.

MR. McGREGOR: You certainly put $24,000 or $28,000 and those figures were put without any qualification as to taxation in the case of actuarial sums or cost of living or earning it in the case of any earnings.

HIS HONOUR: None of which matters you put to the 30 jury yourself. I am not going to find arguments for counsel who won't address on an issue.

MR. McGREGOR: How could I anticipate he was going to put something which leaves out a most important element, and then the direction that this will be fair and moderate -

HIS HONOUR: What is your application?

MR. McGREGOR: My application is this that the jury may well take to the jury room the accolade that they are entitled to regard board at Mount Wilga as a sum without deductions or as a sum disregarding the cost of living at Mount Wilga, and taxation.

HIS HONOUR: These are arguments that you did not put to the jury.

MR. McGREGOR: None of these arguments were available to me after the plaintiff's counsel address.

HIS HONOUR: They never are if the defendant goes into evidence. The defendant invariably anticipates and puts these postulations to the jury.

MR. McGREGOR: Your Honour said he was fair and moderate.

HIS HONOUR: He was in general. I am not going to be put in the position of saying that I thought Mr. Loveday was unfair and immoderate. I thought he was fair and moderate.

MR. McGREGOR: I am only concerned with the fact that it would lead this jury to believe that these figures are completely acceptable, and they are not.

HIS HONOUR: I do not think there is any legal matter that arises here. I think you want me to put arguments to the jury on the question of damages.

MR. McGREGOR: I am only concerned with directions.

HIS HONOUR: The only direction you want me to give is that Mr. Loveday was not fair and moderate in his approach on damages.

MR. McGREGOR: It was the subject of notetaking: those figures were written down, and they were there with the assistance of Your Honour's endorsement of them; nevertheless that is the direction I ask for.

Then Your Honour said in relation to the out-of-pockets that they were an agreed sum. They are not an agreed sum. They are a sum which was put as being the total amount of out-of-pockets, and I do not seek to quarrel with the arithmetic, but I do not agree that sum is payable in this case.

In the Supreme Court of New South Wales

No. 4

Summing up of Collins, J. 21st May 1970 (continued)

HIS HONOUR: But I raised this question with you yesterday, and I asked you.

MR. McGREGOR: And I agreed that the sum was correctly put.

HIS HONOUR: What are you asking me to do?

MR. McGREGOR: I ask you to say that they are not agreed - that the defendant should pay them.

HIS HONOUR: I do not know what that means. You told me yesterday they are an agreed sum but now you ask me to tell the jury - what am I to tell them? I do not understand what you mean to say -?

MR. McGREGOR: With respect, I think you do understand what I am putting.

HIS HONOUR: I will have you put out of Court if you are impertinent. You withdraw that remark. You withdraw that remark or I will hear you no more.

MR. McGREGOR: I have nothing to withdraw.

HIS HONOUR: Very well, I will now adjourn.

(Short adjournment.)

MR. McGREGOR: I withdraw the last remark I made.

HIS HONOUR: I am glad you withdraw it and I thank you.

MR. McGREGOR: What I wanted you to understand was that the agreement was as to the arithmetic but not as to the liability, and therefore I would wish Your Honour to withdraw the direction and say that the defendant contests its liability to pay that or any other sum.

HIS HONOUR: It was equivocal, the way it was stated on p.65 of the transcript. When I came on the Bench yesterday I asked you was that right, but my question and your answer do not appear in the transcript.

MR. McGREGOR: That is true, you did ask me. I do not precisely remember the words you used, but I

answered that the arithmetic was correct. What I was trying to do was to avoid any statement which might have sounded like concurrence in front of persons who are not used to judging.

HIS HONOUR: I put this to you, I think, that you objected to the detail of the amounts but you did not dispute the total. That is what I thought I put to you.

MR. McGREGOR: I am still not disputing the total.

HIS HONOUR: But you are disputing that it is payable.

MR. McGREGOR: Yes.

HIS HONOUR: Well, I certainly did not understand that -

MR. McGREGOR: What I mean is that the total could only be payable if the defendant was liable, and therefore the use Your Honour made of the word "agreed" in the summing-up might be construed by this jury as an acceptance of the plaintiff -

HIS HONOUR: That the defendant is liable at least for $4,000.

MR. LOVEDAY: I do not think the jury could possibly have understood that. I only say this because bringing them back for this sort of suggestion gives some further emphasis to it. It is undesirable for a number of reasons: firstly, it suggests that there is perhaps some further question of liability that Your Honour has doubts about; secondly, it highlights an amount of $4,000 which is of no great significance in the totality of this claim. I am very clear on what Your Honour said. It could not be suggested that in the summing-up Your Honour was suggesting that the plaintiff was entitled to the sum of $4,000 in any event.

HIS HONOUR: I think you are right. I said that if they do not find liability, verdict for the defendant, and that is the end of the case. If they do find for the plaintiff they assess the damages and they include that sum. I won't recall them for that. Is there any other matter?

MR. McGREGOR: Nothing else.

In the Supreme Court of New South Wales

No. 4

Verdict of the Jury
21st May 1970
(continued)

(At 12.35 p.m. the jury returned with a verdict for the plaintiff for the sum of $56,880. On His Honour's direction, the jury returned a verdict for the defendant on the first, second, fourth and fifth counts. His Honour granted a stay of proceedings for 28 days on the usual terms.)

Court of Appeal

No. 5

Notice of Appeal
9th June 1970

No. 5

NOTICE OF APPEAL

IN THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL
No. 8786 of 1967

BETWEEN:

RODNEY JOHN COOPER
an infant by his next friend
ALPHONSUS COOPER
Plaintiff

- and -

SOUTHERN PORTLAND CEMENT LIMITED
Defendant

Name of Appellant: Southern Portland Cement Limited.

Name of Respondent: Rodney John Cooper.

Court from which the Appeal is brought: The Supreme Court of New South Wales.

Name of the Judge of the Court from which the Appeal is brought: Mr. Justice Wilfred Herbert Collins.

Day or days of hearing at first instance: 18th to 21st May, 1970.

Whether the Appeal is against the whole or part only of the Order, Decree, Judgment or Verdict: Whole.

Order, Decree, Judgment or Verdict sought to be set aside: Verdict for the Plaintiff for $56,880.00.

Orders sought in lieu thereof: A verdict for the Defendant, or, alternatively a new trial of the action or, alternatively a new trial of the action limited to damages.

GROUNDS OF APPEAL:

1. That His Honour was in error in holding that there was evidence of breach of duty by the defendant.

2. That His Honour should have directed a verdict in favour of the defendant in respect of the third count.

3. That as there was no evidence that there was a likelihood of children being in the vicinity of any danger there was no evidence of breach of duty by the defendant.

4. That as there was no evidence that there was an extreme likelihood of children being in the vicinity of any danger there was no evidence of breach of duty by the defendant.

5. That as there was no evidence that the defendant had recklessly created or continued any danger there was no evidence of breach of duty by the defendant.

6. That as there was no evidence that the defendant knew of the existence of the children upon the defendant's premises and there was no evidence of or from which it could be inferred that there was an extreme likelihood of children being in the vicinity of any danger and there was no evidence that the defendant had ecklessly created or continued any danger there was no evidence of breach of duty by the defendant and accordingly His Honour should have directed a verdict for the defendant.

7. That His Honour was in error in holding that there was evidence that the defendant knew of the existence of any danger on the "back shunt".

In the Supreme Court of New South Wales Court of Appeal

No. 5

Notice of Appeal 9th June 1970 (continued)

8. That His Honour was in error in holding that the knowledge of the existence and quality of any danger by any employee of the defendant was sufficient to bind the defendant.

9. That His Honour should have held that in order to constitute the knowledge of the defendant it would be necessary to establish that knowledge in any employee of the defendant company who held a position of authority such that his knowledge and acts would bind the company.

10. That His Honour was in error in directing the jury that the duty owed by an occupier to an infant who was upon the land without legal right was a duty to take reasonable care to protect the infant from a risk to which he was exposed by a dangerous condition of part of the premises if that danger had both the quality of an allurement and a concealed trap and if the occupier knew of the dangerous quality of the trap and there was a likelihood of children in the vicinity subject to the allurement.

11. That His Honour should have directed the jury that in order to find the defendant liable they would have to be satisfied that the defendant either had knowledge of the presence of the plaintiff in the vicinity of the danger or, alternatively there was an extreme likelihood of the presence of the plaintiff in that vicinity and that with that knowledge the defendant had recklessly created or continued a danger.

12. That His Honour was in error in rejecting the following question asked of the witness Smith:

> "And you avoided it because you thought it might be dangerous?"

13. That His Honour was in error in refusing to direct the jury that there was evidence of contributory negligence.

14. That His Honour was in error in refusing to direct the jury that the defendant was not responsible for any action of any servant who caused the condition of proximity of the slope to the wire and thus created any danger in breach of express instructions.

15. That His Honour was in error in refusing to direct the jury that the defendant was only liable to the plaintiff if to its knowledge there was a great likelihood of children trespassers including the plaintiff coming onto the area of the "back shunt" and that with that knowledge it recklessly or wantonly produced or continued a state of danger in that area and in disregard of the plaintiff trespasser's presence.

16. That His Honour was in error in holding that there was evidence that the slope of the "back shunt" was an allurement to children and the plaintiff.

17. That His Honour should have held that there was no evidence that the slope of the "back shunt" was an allurement to children including the plaintiff or that any danger could properly be described as a "trap".

18. That His Honour should have directed the jury that there was no evidence that the slope was an allurement to the plaintiff.

19. That the damages awarded were excessive, and so large as to be a wholly erroneous assessment of any amount to which the plaintiff was entitled.

DATED this 9th day of June, 1970.

R. L. PARKER
H. D. McLachlan Chilton & Co.,
Solicitors for the Appellant.

No. 6

NOTICE OF CROSS-APPEAL

IN THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL
No. 8786 of 1967

BETWEEN:

RODNEY JOHN COOPER
an infant by his next friend
ALPHONSUS COOPER Plaintiff

In the Supreme Court of New South Wales Court of Appeal

No. 6

Notice of Cross-Appeal 12th June 1970

(continued)

- and -

SOUTHERN PORTLAND CEMENT LIMITED Defendant

Name of Respondent: Rodney John Cooper.

Name of Appellant: Southern Portland Cement Limited.

Court from which the Appeal is brought: The Supreme Court of New South Wales.

Name of the Judge of the Court from which the Appeal is brought: Mr. Justice Wilfred Herbert Collins.

Day or days of hearing at first instance: 18th to 21st May, 1970.

Whether the Appeal is against the whole or part only of the Order, Decree, Judgment or Verdict: Part.

Order, Decree, Judgment or Verdict sought to be set aside: Verdict by direction for the Defendant on the First, Second, Fourth and Fifth Counts of the Declaration.

Orders sought in lieu thereof: New trial of the action on the First, Second, Fourth and Fifth counts of the Declaration.

GROUNDS OF CROSS APPEAL:

1. His Honour was in error in holding that there was no evidence upon which the jury were entitled to hold that the Plaintiff was a licensee of the Defendant.

2. His Honour was in error in holding that there was no evidence that the Defendant had been guilty of reckless disregard for the safety of the Plaintiff and therefore no basis on which the second count in the Declaration could be left for the determination of the jury.

3. His Honour was in error in holding that the statutory duty imposed by the Mines Inspection Act and referred to in the fourth count of the Declaration did not give rise to a cause of action when the Plaintiff was injured as a result of a breach of that duty.

4. His Honour was in error in holding that the said statutory duty did not arise so as to give rise to any correlative rights to persons who might be trespassers.

5. His Honour was in error in holding that the statutory duty imposed by the Mines Inspection Act and referred to in the fifth count of the Declaration did not give rise to a cause of action when the Plaintiff was injured as a result of a breach of that duty.

6. His Honour was in error in holding that the said statutory duty did not arise so as to give rise to any correlative rights to persons who might be trespassers.

7. His Honour was in error in holding that there was no evidence on which the jury could find that the "conductors" referred to in the fifth count of the Declaration were placed less than 18 feet above the ground.

8. His Honour was in error in withdrawing the first, second, fourth and fifth counts of the Declaration from the jury.

DATED this 12th day of June, 1970.

CECIL O'DEA

J.J. Carroll, Cecil O'Dea & Co.,
Solicitors for the Appellant,
82 Elizabeth Street,
SYDNEY, 2000.

In the Supreme Court of New South Wales Court of Appeal

No. 7

Judgment 2nd July 1971

No. 7

JUDGMENT

IN THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL
No. 8786 of 1967

CORAM: ASPREY, J.A.
HOLMES, J.A.
TAYLOR, A-J.A.

Friday, 2nd July, 1971

COOPER v. SOUTHERN PORTLAND CEMENT LIMITED

JUDGMENT

ASPREY, J.A.: In this case the Court was constituted by my brother Taylor, my brother Holmes and myself.

I am of the opinion that the defendant's appeal should be allowed and that the verdict for the plaintiff upon the third count should be set aside and verdict thereon entered for the defendant. The plaintiff's cross-appeal should be dismissed. The plaintiff should be ordered to pay the defendant's costs of the trial and of this appeal and the cross-appeal but should have the appropriate certificate under the Suitors' Fund Act. I publish my reasons.

My brother Holmes is of the opinion that the orders which I have proposed should be made and I publish His Honour's reasons.

My brother Taylor is of the opinion that the verdict for the plaintiff upon the third count should be set aside and the cross-appeal should be dismissed, that there should be a new trial of the action and the costs of the appeal should abide the outcome of the new trial. I publish His Honour's reasons.

Accordingly, by majority, the order of the Court is as I have stated it to be.

No. 8

REASONS FOR JUDGMENT OF ASPREY, J.A.

In the Supreme Court of New South Wales Court of Appeal

No. 8

Reasons for Judgment of Asprey, J.A. 2nd July 1971

ASPREY, J.A.: This is an appeal by the defendant from the verdict of a jury in favour of the plaintiff in the trial of an action held before Collins, J. in May 1970. The plaintiff, a boy aged 13½ at the time of his accident, was injured on the premises of the defendant on Sunday, 30th July 1967. The plaintiff sued the defendant upon five counts. At the close of the evidence Counsel for the defendant moved for a verdict to be directed for the defendant on all counts. The learned trial judge directed a verdict for the defendant on counts 1, 2, 4 and 5. The third count, which was left to the jury, alleged "that at all relevant times the defendant was the occupier of certain premises and there was on the said premises a certain pile of rubble which was alluring to children and such as was likely to induce the presence on the said premises of children and the plaintiff was a child who was on the said premises and was allured by the said heap of rubble and thereupon the defendant by itself its servants and agents was so careless negligent and unskilful in and about allowing the said pile of rubble to be in close proximity to a high tension electricity line that the plaintiff sustained the injuries and suffered the damage more particularly set out in the first count hereof". The damage set out in the first count was the usual allegation of damage in a claim for personal injury. The jury returned a verdict for the plaintiff upon the third count in the sum of $56,880. The defendant has appealed upon a number of grounds to which I will subsequently refer but in the forefront of this appeal questions were raised as to the nature of duty owed by the defendant to the plaintiff in the circumstances of this particular case. The plaintiff has cross-appealed upon the grounds that the trial Judge was in error in withdrawing the first, second, fourth and fifth counts from the jury and was in error in holding that there was no evidence upon which the jury were entitled to find that the plaintiff was a licensee of the defendant. His Honour had directed the jury that at the particular place where the plaintiff was on the defendant's premises when he met with his accident he was without any legal right to be there.

In the Supreme Court of New South Wales Court of Appeal

No. 8

Reasons for Judgment of Asprey, J.A. 2nd July, 1971

(continued)

In his accident the plaintiff, as the result of coming into contact with an electrical high tension wire, lost his right arm at the shoulder and met with a number of severe scars and other injuries and, if sympathy were to be the touchstone by which this appeal were to be decided, there could be no question as to its result. However, pressing as humanitarian impulses are (cf. Salmond on Torts 15th Edn. pp.366-367), I must now turn to the facts.

The defendant carried on the business of quarrying for limestone on premises which it leased in the southern countryside of New South Wales at a place known as South Marulan which is some seven miles from the township of Marulan and some 22 miles from Goulburn. The ordinary working period was from Monday to Saturday and maintenance work was almost invariably carried out on Sundays. The precise acreage and boundaries of the lands which it leases were not given in evidence but from photographic exhibits it is plain that the demised premises are very large in area and situate in a remote part of the country. The area is mountainous and through a gorge flows the Shoalhaven River. The lands leased by the defendant appear in the main to be unfenced but in the nature of the terrain that would seem obviously to be an impractical task to perform. Parts of the demised premises are described as the "work areas" of the defendant. From photographs in evidence (Exs. "A1", "A2", and "A3") these "work areas" can be seen and defined in sections of the land which have been cleared of trees and scrub. These consist (inter alia) of an open-cut quarry from which the limestone rocks are extracted. After going through various processes such as blasting and crushing, the treated material is conveyed up a hill to a plateau and there placed in loading bins by means of a lengthy structure which contains conveyor belts. Into the premises there has been constructed a railway line which connects with the main Government north-south line and upon this line railway trucks are brought in to the defendant's premises and loaded with the material prepared at the plant. When a sufficient number of trucks have been loaded they are coupled to an engine which then moves them on to the Government line and thence to their destination. There is an administration block containing

offices for the running of the defendant's works. Of the number of employees employed by the defendant at its works at South Marulan, in all about 140, some live at Marulan whilst others live upon the demised lands in company houses with their wives and children. Also there are buildings which are used as a mess hall and a community hall, a school for younger children of the families who live on the defendant's premises at South Marulan, and an oval for use as a playing and recreation field.

As is commonly the case in industrial operations carried out in remote areas in the N.S.W. countryside, electric power was conveyed to the premises over a long distance by a high voltage main line strung between a series of poles. In this case the poles were spaced throughout the mountainous country, the electricity being supplied to the defendant from the electricity undertaking of the Southern Tablelands County Council situated at a considerable distance south of the defendant's premises. The evidence does not disclose who owns the poles or who located and erected them in their various positions but there is some evidence from which it may be inferred that this work was carried out by the Southern Tablelands County Council. The poles had been in their positions for some six years at least prior to the accident on 30th July 1967. The electrical power supplied to the defendant by this means was in the order of 33,000 volts and was broken down by means of a transformer on the defendant's premises.

When the limestone had been placed by means of the conveyor in the loading bins which were on the western side of the premises, railway trucks brought in from the Government railway line were placed in position on a section of land which ran up an incline to the south of the bins. This incline which carried the railway line had been constructed and built up by the placement of material and it sloped away on both its eastern and western sides and to the south at its end. After a guard's van had been stationed on the railway line at buffers at the most southerly point of the incline, a number of trucks were then run back until a train of trucks was built up. In the course of the work of loading the train, trucks were then "gravitated" or allowed to run

In the Supreme Court of New South Wales Appeal Court

No. 8

Reasons for Judgment of Asprey, J.A. 2nd July 1971 (continued)

back down the incline and stop underneath the bins so that the operation of filling the trucks could take place. The built-up area where the buffers were placed and the guard's van and empty trucks were positioned for gravitation to the loading bins is described as the work area of the "back shunt", It is at the very southern section of the defendant's premises.

Originally a train of trucks could be accommodated on the back shunt but later the trucks supplied to the defendant were increased in size and, in order to enable a train of conventional size made up of the larger trucks to be accommodated there, the defendant found it necessary to increase the length of the railway line and, accordingly, to extend the back shunt further to the south. This the defendant did by dumping material, which was of too low a quality for conversion to cement, over its southern end, gradually to build it up and extend it in length. This activity started early in 1967 and, as the back shunt was extended to the south in this fashion, it moved towards the electrical power lines which came in obliquely from the south towards the slope at the south western end of the back shunt.

Other building work was going on at the defendant's works in 1967, namely, the erection of new lime-burning kilns adjacent to and on the western side of the loading bins. The defendant originally decided to relocate perhaps two electric poles to allow the extension of the back shunt to proceed but this had to be reconsidered in relation to the construction of the new kilns which required the removal of a power line. Consequently, early in 1967 a survey was undertaken of the existing power line. The poles were in poor condition and needed replacement and the alignment and the direction of the power line no longer served its original purpose. A further decision was taken by the defendant that the power line as originally constructed should be pulled down and a new power line built to serve both the new and old plants. This project was deferred to enable it to be determined what power line requirements there would be in the changing circumstances of the defendant's works.

Early in 1967 the power line would have been at least 20 feet above ground level and King, a foreman electrician called by the plaintiff, said that had he walked down the slope in February 1967 he would have come no closer to the power line by some 6' to 8' at his nearest approach to it and it would have been 12' to 14' above his head. The defendant commenced to extend the back shunt as far as it could consistent with the power line in the position of its original construction. Some two months prior to 30th July 1967 Howard, the executive officer of the defendant at South Marulan, instructed one Clooney, the defendant's general quarry foreman, to cease dumping material on the western side of the back shunt, that is to say, on its slope which was approached by the power line. An employee called by the plaintiff, one Cosgrove, who had been engaged in dumping over the back shunt area stated that Clooney had instructed him not to dump any further material in this location. King said that he was instructed by Howard to keep a close watch on the tipping of the material in relation to the power line and King saw the instructions written in the "tip book" when Howard gave the instructions that there was to be no further tipping at this point. Howard had also given instructions to place truck loads of dump material on the surface of the back shunt on the western side so that further dumping of material over the end of the back shunt on the western side could not physically be carried out. Howard also ordered that what has been termed a "dump stop" be placed on the edge of the far south eastern corner of the back shunt. The purpose of placing the "dump stop" on the south eastern corner was to indicate to employees that any tipping was to be done only over the south-eastern corner because it was a standing instruction that no tipping could be done over an edge unless the "dump stop" was there. The dumping of further material over the south eastern side of the slope would not have brought the back shunt in any greater proximity to the power line. Howard stated that he inspected the area and saw that his instructions had in fact been carried out and that it was physically impossible to do any further tipping over the south western corner by reason of the presence of the dumps some 12 or 15 feet high which formed a physical barrier. King stated that he inspected the location some three times a

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Reasons for Judgment of Asprey, J.A. 2nd July 1971 (continued)

week up to the date of the accident and that a few days before the accident the power line appeared to be 6' to 8' away from the dump.

On Thursday, 27th July 1967 Howard went to the area of the back shunt, saw that the "dump stop" had been moved from the south western area but he observed that the power line appeared to be closer to the back shunt than he had previously seen it. He also thought that it was out of the reach of anyone who might walk down the south western slope but he considered that it was closer than it should have been. There was evidence from which it could be inferred that some employee, contrary to instructions, had recently pushed over the western end of the slope the dumps of material which had been placed there as a barrier and that the power line was but four to five feet above the level of the western slope at one particular point, namely, practically at the southernmost end of the back shunt. King said that on the Thursday or Friday prior to the accident there was still a clearance of some six to eight feet. It was never discovered who was responsible, contrary to instructions, for pushing the dump material over the western edge of the end of the back shunt. On Thursday, 27th July 1967 Howard decided that the power line could not remain where it was, went to the head office of the Company at Berrima and obtained authority to have the power line moved as a matter of urgency. On Friday, 28th July 1967 he spoke to the Clerk of the Southern Tablelands County Council and requested the Council to relocate the power line as a matter of urgency. It was agreed that employees of the County Council would carry out this work at the site on Monday, 31st July 1967.

The plaintiff was a child of one of the defendant's employees who resided with his family at one of the company houses at the northern end of the defendant's premises. After lunch on Sunday, 30th July 1967, the plaintiff with his younger brother aged 12 went to a place in South Marulan known as "Granny's Chair" where the plaintiff stated that he used to play most of the time. Granny's Chair is not on the defendant's lands but is at the back of South Marulan and appears to be an area where the children regularly played. He played there for about an hour and

started for home when he met three other boys, one being another brother aged 9, another boy Gutzke also aged 9 and one Kevin Smith aged about 12. The five boys then started to walk towards what he described as "the sandhills". According to the plaintiff they walked for some hundreds of yards alongside the railway line on the area of the back shunt. What he referred to as "the sandhills" to which they proposed to go on that Sunday afternoon was in fact the slope leading down from the southern end of the back shunt on its western side. Although at one point in his evidence he estimated that this particular sandhill was about a hundred yards from Granny's Chair it is obvious from the photographic exhibits (A2) that the distance is very considerably greater than one hundred yards and this is inconsistent with his own statement as to his walking alongside the railway line; the distance could be up to one-third of a mile according to one of the plaintiff's witnesses. There was another dumping area, towards the northern end of the Company's premises and this apparently was also described by the boys as "sandhills". Apparently the boys used to run down the side of this latter dump and climb it again or use a sheet of tin as a toboggan and slide down it.

When the five boys including the plaintiff re-entered the defendant's premises and proceeded to the back shunt on that afternoon they did not see any of the employees at that place. The plaintiff said he ran up and down the slope but he could not remember how he came to be injured. The accident occurred at the southern extremity of the slope and at the only position on the slope where it was possible for contact with the power line to be made. Kevin Smith also gave evidence for the plaintiff but he did not observe how the plaintiff's arm had come into contact with the powerline. The boys had rolled some rocks down the slope. The slope was difficult to traverse. Its vertical height was estimated to be some 60 to 70 feet and its sloping surface estimated to be between 80 to 100 feet and because of the very steep face which contained a quantity of clay which had sealed and set it was quite dangerous to walk down. Whether the plaintiff stumbled and threw out his arm to save himself and thus brought it into contact with the powerline or whether he grabbed hold of the power line for some other purpose will remain a mystery.

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Reasons for Judgment of Asprey, J.A. 2nd July 1971 (continued)

In my opinion the first approach to be made to the problem which this case presents is to ascertain whether upon the evidence the plaintiff, when he entered upon the work area of the back shunt, was, in relation to the defendant as the occupier, a licensee or a trespasser. As I have stated above, the plaintiff lived with his father, mother and brothers in a company house on the lands leased by the defendant and prior to the accident had attended the South Marulan Public School in the building provided for that purpose by the defendant. In the year of the accident he was in first year at Goulburn High School. In his evidence-in-chief the plaintiff gave this evidence:

"Q. At the weekends what did you normally do?
A. I used to go rabbit trapping.

Q. Where was it you would go rabbit trapping?
A. At the back of the quarry."

This location would appear from the photographic exhibits to be in the scrub away from the work areas of the defendant but it does not appear whether it was on the defendant's lands or not. The evidence proceeded:

"Q. Where else did you go?
A. Wingha."

It is not suggested that Wingha is on the defendant's premises.

"Q. Was there anywhere else you went? On week-ends where did you play normally?
A. I used to play over at Granny's Chair most of the time.

Q. Where was that in relation to your home?
A. Nearly half a mile."

It is common ground that Granny's Chair is not on the defendant's lands.

"Q. Where else did you play on the weekend?
A. At my mate's place."

This would presumably be in one of the other company houses.

"Q. Did you play anywhere on the Company's property? (Objected to - question allowed.)
A. No, we never played in the Company's ground much.

Q, Much?
A. Yes.

Q. What do you mean by "much"?
A. We never went there very often.

Q. When you did go there where did you play?
A. We were just walking through.

Q. You would walk through the Company's property, would you?
A. Yes.

Q. Would you had thought very often?
A. Not very often.

Q. Did you ever play anywhere on the Company's property?
A. No."

Again in his evidence-in-chief, after describing how he and the other boys started to walk towards the "sandhills" (meaning the slope of the back shunt) he gave this evidence:

"Q. Had you ever been up to the sandhills before?
A. I went there the day before.

Q. Had you ever played in the sandhills?
A, Not very much.

Q. What do you mean by "very much"?
A. I would only play there one day.

Q. Had you played on any other sandhills in that area?
A. Yes, I played on a few of them."

It is clear from this evidence that the plaintiff had never been to the slopes of the back shunt except, possibly, on the Saturday immediately before the day of his injury. I say "possibly" because, from the context of the evidence of both the plaintiff and Kevin Smith, the boys refer indiscriminately to slopes made by dumped material

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as "sandhills" and there is more than one such "sandhill". He was not asked whether he played on the Saturday before his accident on the "sandhill" constituted by the back shunt or whether he went there in company with other boys or alone. In its context the question asked of him which elicited the answer that he went "there" the day before has some ambiguity in it, especially to a boy. When the plaintiff said that he never played "anywhere on the Company's property", this statement, in conjunction with his assertion that he had, though not very often, walked through "the Company's property" but had played on the "other sandhills" (which is on the land leased by the defendant) indicates clearly enough that in the plaintiff's mind the "Company's property" means the work areas of the defendant (see also the evidence of both Kevin Smith and Cosgrove later herein). The "other sandhills" is obviously the slope of material identified in the evidence of Kevin Smith.

Kevin Smith said that he had never been to this particular "sandhill" at the back shunt before the day of the accident to the plaintiff. He said that he used to play in the sandhills "further up from where we were here" (i.e. further up from where they were on the day of the accident). The "sandhill" which Kevin Smith refers to as "further up" was marked by him on photograph (Ex. A1) and is to the north of the quarry back towards the company houses and is at a considerable distance from the area of the back shunt. Kevin Smith said that he knew that the back shunt area and its slope was "Company property" and that the headmaster had in lectures said that they were to stay away from "Company property" and that they were not to go near the back shunt.

One Cosgrove, a truck driver employed by the defendant said that he had often seen children playing in the heaps of "fines" before the accident. These heaps are what has been referred to as "sandhills". He gave this evidence:

"Q. Before the accident did you ever see any children playing in these heaps?
A. Yes, on the other side I have seen children playing around there, on many occasions.

Q. And how far from the heap of fines or the heap where the accident occurred were these other heaps where you have seen children playing?
A. It would be roughly half a mile away, on the other side, back towards the other side of the works."

This clearly refers to the "sandhill" marked with a line on the photograph exhibit "A1" by Kevin Smith.

One Gutzke, an electrician employed by the defendant, gave this evidence:

"Q. At weekends where did the boys - and girls for that matter - who lived in the village play; this is before the accident to Rodney?
A. I do not really know. They used to play around there. We have got an oval and they played on the oval. Anywhere where boys will find something to play with I should imagine.

Q. Where did you see them playing. Did you see them playing on Company property?
A. Well, this is very difficult to answer because we live at the company.

Q. Perhaps I should distinguish between company property and area covered by the workings?
A. Well actually I have seen these boys playing, like, near the workings but not down actually on the workings.

Q. Not on the quarry face, down below?
A. No.

Q. What about on the dumps, up at the top?
A. Well, I have seen boys playing at the back, behind my place, on the dump. This is a mullock heap.

Q. Has that got any fines in it?
A. Yes, it is all fines."

The dump behind his house is the "sandhill" indicated by Kevin Smith on the photograph Ex."A1". This is made plain by him under cross-examination because when it was suggested that this situation was 300 yards away from the place where the

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accident happened Gutzke replied: "No, it would be further than that where I saw these children play is a dump completely isolated from this area at all, almost completely behind my house ..... Well, this is on the residential side of the quarry where the houses themselves are; it would be 300 or 400 yards away from that dump in particular where the boy got hurt." Gutzke's son was in the group of five boys on the day when the plaintiff met with his injury. He said that he did not recollect ever telling his son to keep away from the working area because he took it for granted. He said: "I thought they would not go down there."

The plaintiff's mother said the children used to play on the sandheap but she also identified that situation as the one marked by Kevin Smith with a line on photograph Ex. "A1". Mr. Bushell, the headmaster of the South Marulan Public School which had been attended by the plaintiff said that in both general assembly and in class (attended by the plaintiff) he had delivered safety lectures to the children after he had been approached by Howard and by Creswick the defendant's safety officer, and he described to them an area which was an area of great danger to them as an out-of-bounds area. The headmaster said that this area, which he marked by a line on the photograph (Ex. "A1"), included that portion of the defendant's premises which included the back shunt. Howard had issued instructions to the employees that the children were not to be allowed in the work areas and, apart from the time when he visited the back shunt area on the day of the accident, Howard had never seen children in the area of the back shunt. He had occasionally seen children around the area of the office and rarely in the actual quarry workings. On these occasions he said that he would go to the children, tell them why they should not be there and make sure that they got out of the area. Other employee, Weston (shift foreman), Pearson (face foreman) and Creswick (safety officer) also gave evidence. None of these men had ever seen children in the area of the back shunt. On occasions when they had seen children in other parts of the work areas they had sent them away.

It has been argued in this case that the plaintiff was upon the area of the back shunt in

the capacity of a licensee. "A licensee enters with the consent of the occupier but for purposes in which the occupier has no direct or indirect material interest or concern" - Lipman v. Clendinnen 46 C.L.R.550 per Dixon, J. at p. 556. The occupier's permission may take the form of an invitation extended to some person either expressly or impliedly. It is not suggested in this case that any express permission was granted to the children either directly or through the medium of their parents to play in the work areas of the defendant either on week-days or week-ends. The question then arises whether there is evidence upon which a finding would be justified that they had an implied permission to be on the back shunt area. A license could be implied in favour of a person who otherwise would be a trespasser by means of evidence of entries upon the land in question albeit without permission coupled with evidence of both knowledge and a sufficient course of tolerance of the entries on the part of the occupier from which his permission to enter and remain is reasonably to be inferred. In Liddle v. North Riding of Yorkshire County Council (1934) 2 K.B. 101 Scrutton, L.J. at p.112 said: "The invitation might be implied from knowledge that children frequented the land without interference." But as Devlin, J. said in Phipps v. Rochester Corporation (1955) 1 Q.B.450 at p.455: "Knowledge is not of itself enough to constitute a licence. There is a distinction between toleration and permission." In Robert Addie and Sons (Collieries) Limited v. Dumbreck (1929) A.C.358 at pp.372-373 Viscount Dunedin said: "Judgments on this class of case are so numerous that it is impossible to review them all, and a mere citation of a string of authorities is inimical to clear decision, but there are certainly to be found among them expressions which would countenance the idea against which I wish to raise my protest; that, unless a proprietor takes such measures as effectually to stop trespassers, the trespasser becomes a licensee ..... There is no duty on a proprietor to fence his land against the world under sanction that, if he does not, those who come over it become licensees. Of course a proprietor may do nothing at all to prevent people coming over his lands and they may come so often that permission will be held to be implied, or he may do something, but that something so half-

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heartedly as to be equivalent to doing nothing ... but 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."

Further, in the absence of the ingredients of knowledge in the occupier of the frequenting of his lands and his continued inaction, repetition of the trespass confers no licence (Edwards v. Railway Executive (1952) A.C.737 at p.746); and one who enters upon the land of another without realising the fact that he is a trespasser is none the less a trespasser (Conway v. George Wimpey & Co. Ltd. (1951) 2 K.B.266 at p.273). Tolerance is not established by showing merely that the occupier did not take every possible step to keep the intruders out (Edwards v. Railway Executive (supra) per Lord Goddard at pp.746-747; Commissioner for Railways (N.S.W.) v. Cardy 104 C.L.R.274 per Menzies, J. at pp.305-306); and tolerance sufficient to establish an implied assent in cases of this kind should not be lightly inferred (Edwards v. Railway Executive (supra) per Lord Porter at p.743; Cardy's Case (supra) per Menzies, J. at pp.305-306).

There may be a question whether or not the evidence in this case would be sufficient to prove such a degree of tolerance of the children playing on the sandhill marked by Kevin Smith on photograph Ex. "A1" as to establish a licence, but there is no evidence that the children ever entered the area of the back shunt except the evidence of the plaintiff of his possible one visit there the day before his accident. Even if the evidence were sufficient to enable a finding that the defendant had knowledge of and exhibited such a tolerance of the playing by children on the "sandhill" marked by Kevin Smith in photograph Ex. "A1" (which was at a considerable distance from the area of the back shunt slope) as to amount to a permission on the part of the defendant for the children to use that particular "sandhill" as a playground, that could not sustain a finding that permission had been granted by the defendant for the children to roam at will into other parts of the defendant's property which constituted work areas. The boys (including the plaintiff) had not only been told that the back shunt was an out of

bounds portion of the property but it was, even to a boy of 13½ years of age, obviously a work area by reason of the presence of the buffers and the railway line which led from them down to the bins. It was a built-up area and clearly defined by the nature of its construction. The onus was on the plaintiff to show that he was a licensee at the place where the accident occurred and this onus is not discharged by evidence that he may have had permission to be at some other place on the premises (Cardy's Case (supra) per Menzies, J. at pp.306-307). The facts proved in this case are markedly different from those in such cases as Cardy's Case (supra) where there was evidence that, for years before the accident to the boy in question in that case, he and other children had habitually played on the Commissioner's lands and adults frequented them and the Commissioner was well aware of this fact. There was a regular means of access to the area in question by a path which led from certain public streets to other streets and dwellings and over which members of the public passed and re-passed and walked about the land upon which the children habitually played when the Commissioner was dumping material as well as at other times. The evidence disclosed that the use of the land where the accident occurred by the public was long established and notorious.

Accordingly, I am of the opinion that, as (i) there is no evidence in this case of children, including the plaintiff, frequenting the area of the back shunt and as (ii) it follows that there cannot be any knowledge in the defendant of such occurrences, any question of an implied licence cannot (subject to the next matter with which I propose to deal) play any part in this case.

There are present in this case problems arising out of the fact that the plaintiff was a boy of 13½ yearsof age and out of what has been referred to as "allurement". What is meant by "allurement"? With respect, I agree with what Windeyer, J. has had to say upon this subject in Cardy's Case (supra at p.326) where he cites Lord Goddard's observation (with which Lord Reid agreed) in Edwards v. Railway Executive (supra at p.747) that an allurement "only means a form of invitation". There appears to me to be more than one category of allurement (see Latham v. Johnson &

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Nephew Ltd. (1913) 1 K.B. 398 per Hamilton, L.J. as Lord Sumner then was at pp.415-416.) Firstly, there is the allurement which legitimately takes the form of an implied invitation to enter the premises themselves and is presented in such circumstances as to encourage the belief that the occupier of the premises has given his tacit permission for the entry. Examples of this kind of invitation have been given by Lord Sumner (see Latham v. Johnson & Nephew Ltd. (1913) 1 K.B. 398 at p.410) as the open door of the shop for the possible customer and the open gate of the goods yard for the visiting goods carter. So far as children are concerned, examples may be given of public parks botanical gardens and areas set apart for regular use as playgrounds. Having tacitly invited or "allured" the children to enter into such places, the occupier is liable if they are injured by some hidden danger or trap thereon within the area of the invitation (Cardy's Case (supra) per Menzies, J. at pp.306-307; David Jones (Canberra) Pty. Ltd. v. Stone 44 A.L.J.R. 320 per Barwick, C.J. at p.323 and per Walsh, J. at p.326). Secondly, there is the so-called "allurement" which, quite unrealistically, has been thought to impute or imply permission on the part of the occupier for entry upon his lands. As Menzies, J. said in Cardy's Case (supra at p.303) "there is something quite incongruous about treating as an implied licensee one whose presence on the land was against the will of an occupier in the sense that, had the occupier been asked, he would almost certainly have refused permission to come upon his land". This "allurement" is something within the occupier's land which simply takes the form of arousing the curiosity of children. Boys, like cats, are full of curiosity. An allurement to them can be constituted by almost any object or place within the occupier's premises and there can be no limit set upon what will attract a boy to it. By and large such objects or places may be found in many areas be they private gardens or business premises. Only a poor imagination can fail to supply a number of examples (and see Hardy v. Central London Railway (1920) 3 K.B.459 per Scrutton, L.J. at pp.472-473). But merely because an occupier has something within his land which turns out to be attractive to some child or other passing by does not elevate that thing into an invitation for the child to enter the premises

upon the basis that he has the tacit permission of the occupier to do so. As Lord Sumner said in Latham v. Johnson & Nephew Ltd. (supra at pp.415-416): "'Allurements', too, is a vague term. It may only refer to the circumstances under which the injured child entered the close. Here it is hard to see how infantile temptations can give rights, however much they may excuse peccadilloes. A child will be a trespasser still, if he goes on private ground without leave or right, however natural it may have been for him to do so." Whether the judicial impulse be humanitarian or draconic, if I understand the authorities correctly, the common law does not place in the category of licensees a child who, merely attracted by some object or place within the occupier's premises which he chances to espy, enters without permission express or implied. It makes no difference whether the person who enters without the occupier's consent is a child or an adult. He is still an unwanted intruder; he is a trespasser (Robert Addie & Sons (Collieries) v. Dumbreck (1929) A.C. 358 at p.376; Thompson v. Bankstown Municipal Council 87 C.L.R. 619 per Dixon, C.J. and Williams, J. at pp.627-628; Cardy's Case (Supra) per Dixon, C.J. at pp.627-628; Commissioner for Railways v. Quinlan (1964) A.C. 1054 at pp.1083-1084).

Quinlan's Case (supra) decided that the duty owed by the occupier of property to a trespasser thereon is not to injure the trespasser wilfully or to do any wilful act in disregard of ordinary humanity towards him. There must be some act done with deliberate intention of doing harm or at least some act done with reckless disregard of the presence of the trespasser. Liability for an act injuring a trespasser can be imposed on the occupier of property even although the occupier has not actual knowledge of the trespasser's presence. Viscount Radcliffe (at pp.1078, 1077) said: "It is true that an occupier can be treated as having knowledge of a trespasser's presence, even though the latter is not visibly before his eyes at the time when the act that causes injury is done. He can be in a position in which he 'as good as' knows that the other is there ..... It must be stressed, however, that the knowledge that is here material is knowledge in the occupier sufficient to impose upon him the duty not to be wilful or reckless towards the man to whom otherwise

he would owe no duty at all; and such knowledge is something a great deal more concrete than a mere warning of likelihood. The presence, if it is to be treated as anticipated, must be 'extremely likely', to use Lord Buckmaster's words in the Excelsior Wire Rope Company's Case (1930) A.C.404, 410. There was great likelihood, not to say certainty, of boys and others coming upon the site and per Dixon, C.J. in Commissioner of Railways (N.S.W.) v. Cardy (supra at p.286) the trespasser must be one whose coming is 'expected or foreseen'. In the same case Windeyer, J. says that 'the occupier's immunity from actions by trespassers may be qualified if he knows that they are or very probably may be present'. This is the same thing as was said by Evatt, J. in Barton's Case 49 C.L.R.114, 35, "As a general rule the plaintiff must show that the occupier knew of the actual, or, at least, the very probable, presence of the trespasser on his land at the very time when some activity fraught with danger to the trespasser was being continued'. In their lordships opinion, if an occupier is being charged with breach of duty towards a trespasser in not giving him warning of some dangerous activity as is conducted on the occupier's premises and by which the trespasser has been injured, the law requires that the occupier's knowledge of the other's presence at the material time should be established in some such terms as those quoted above." See also Commissioner for Railways v. McDermott (1967) 1 A.C.169 at p.190.

What then is the duty which the defendant owed to the plaintiff in the present case? Cardy's Case (supra) was conducted at the trial on the basis of the plaintiff's contention that he was a licensee (see 59 S.R.230). On the appeal to the High Court two of the learned Judges (Dixon, C.J. and Fullagar, J.) held that the child-plaintiff in that case was not a licensee but a trespasser, two (McTiernan and Windeyer, JJ.) held that there was evidence to support the finding that he was a licensee. Menzies, J. dealt with the case on the basis that, as the plaintiff fought his case on the footing that he was a licensee, he would so regard it for the purposes of his judgment. The Privy Council in Quinlan's Case (supra) clearly thought that it was correct to regard the plaintiff in Cardy's Case as a trespasser but the reasoning of Fullagar, J. to the effect that a trespasser could

be treated on the "neighbour" principle was rejected as was also the test referred to in Videan v. British Transport Commission (1963) 2 Q.B. 650 that an occupier's duty to a trespasser can be determined by what is called "the foreseeability test". Their lordships in Quinlan's Case (supra at p.1083) referred briefly to the facts in Cardy's Case (supra) and in so doing stated: "A pathway that was freely used by pedestrians ran along side of this tip, and people, particularly children, frequently visited the tip despite 'casual and intermittent warnings' by railway servants". They continued:

> "The circumstances seemed to place the case squarely among those 'children's cases,' in which an occupier who had placed a dangerous "allurement" on his land is liable for injury caused by it to a straying child. In any accepted use of the word the ash-tip, with its burning interior, was a 'trap' or an 'unusual and hidden danger'. A considerable portion of the court's full learned judgments is devoted to the question whether it was necessary or possible to describe the boy, playing on the surface of the tip, as a licensee, and their Lordships are at one with Dixon C.J. in his exposition of the unreality of this description as applied to children in several previous authorities. Nor, as he says, is it necessary to resort to this categorization to give them the legal remedy that is felt to be their due. Children's cases in this context do unavoidably introduce considerations that do not apply where the sufferer of injury is an adult; and those conceptions of licence or permission, which may be highly relevant for the determination of the adult's rights, are virtually without meaning, at any rate as applied to small children."

The precise meaning and effect of this particular passage has been found difficult to understand (cf. Winfield: Torts 8th Edn. p.199 note 10; Millner: Negligence in Modern Law (1961) p.49 note 4; Fleming: Torts 4th Edn. pp.408-411; Clerk & Lindsell; Torts 13th Edn. para.1059; Victorian Railway Commissioners v. Seal (1966) V.R.107 at p.130). In this situation I can only

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hope to attempt to avoid offence to judicial precedent binding upon me.

These matters appear to me to flow from the two passages cited from Quinlan's Case (supra). Firstly, the defendant Commissioner in Cardy's Case (supra) could be held to have possessed the knowledge that it was "extremely likely" or that there was "a great likelihood, not to say certainty" of young children coming upon that part of the premises where the tip was located. Secondly, where that situation appertains, there is no need to establish the existence of any form of invitation to explain their presence on the land. In this connection, if the tip was an "allurement" to children, as it was described in Cardy's Case (supra at pp.289, 299, 309), its attractiveness was relevant, not as an invitation to a child to enter as a licensee, but as some evidence of knowledge in the mind of the Commissioner of the extreme likelihood of the presence of the children upon the tip itself although in the role of trespassers. Dixon, C.J. said at p.286: "Upon the facts of the present case the responsible servants of the defendant Commissioner must have been aware of the great likelihood, not to say certainty, of boys and others coming upon the site of the tip." Thirdly, the tip in which the burning ashes were concealed was a "trap" for these children of whom the plaintiff was one. Fourthly, given the fact of knowledge of that particular category and the fact of the concealed danger a duty of care lay upon the Commissioner "to warn those who came or to exclude them or avert the danger" (Dixon, C.J. at p.286). On this basis the "decision" in Cardy's Case could be approved by the Privy Council within the ambits of its own opinion in Quinlan's Case for it cited with evident approval the views expressed by Dixon, C.J. (in Cardy's Case at pp. 285-286) in a passage (pp.1083-1084) which reads: "The Chief Justice evidently reconciles it with the regular definition of an occupier's liability where he says: 'Such a recognition of liability by no means involves the imposition upon occupiers of premises of a liability for want of care for the safety of trespassers .... The rule remains that a man trespasses at his own risk and the occupier is under no duty to him except to refrain from intentional or wanton harm to him. But it

recognizes that nevertheless a duty exists where to the knowledge of the occupier premises are frequented by strangers or are openly used by other people and the occupier actively creates a specific peril seriously menacing their safety or continues it in existence'."

If the "child trespasser" cases were to be reviewed in the light of the foregoing principles I believe that the actual result in many of them, apart from Addie's Case, could be reconciled on this basis even if their reasoning does not accord with that contained in Quinlan's Case (supra). In the latest of them, Herrington v. British Railways Board (1971) 1 All E.R.897, there was knowledge of an extreme likelihood of the presence of the children at the danger spot and if, as Viscount Radcliffe said in Quinlan's Case (supra at p.1084) the general formula laid down in Addie's Case "may embrace an extensive and, it may be, an expanding interpretation of what is wanton or reckless conduct towards a trespasser in any given situation, and, in the case of children, it will not preclude full weight being given to any reckless lack of care involved in allowing things naturally dangerous to them to be accessible in their vicinity", in Herrington's Case the failure, with that knowledge, to fence off the live electrified rail could constitute reckless disregard of the plaintiff whose presence the Railways Board as good as knew was there. It is to be hoped that there will soon be a clarification by a Court of high authority in this sphere of the law. Quinlan's Case (supra) was not itself a child-trespasser case and the recent case of David Jones (Canberra) Pty. Ltd. v. Stone (supra) possessed ingredients which are certainly not present in the instant case.

In the present case the learned trial Judge, in dealing with the third count, although treating the plaintiff as a trespasser upon the back shunt, described to the jury the defendant's duty towards him as one which arose when it was known to the occupier that there is a "likelihood" that there will be in or near the premises children who will be subject to the allurement and who will in fact be allured by it. Later in his summing up he said: "The occupier of premises is bound to take reasonable care and a failure to take reasonable care is a breach of that duty. The occupier is under a

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duty to protect children." He also said: "As I told you, it must be known or at least be foreseeable and foreseen by the occupier that there was a likelihood that there would be in or near the premises children who would be subject to the allurement that existed on the premises ... It must be foreseeable by the occupier that this part would be an allurement to children." In the light of Quinlan's Case (supra) these directions do not correctly state the defendant's duty towards the plaintiff. The allegations in the third count are inapplicable to the plaintiff as a trespasser and I am of the opinion that a verdict should have been directed for the defendant upon that count. If the plaintiff were to succeed, then, in my opinion, his case would have to be brought within the second count which is the subject of the cross-appeal and it is to the question whether there is evidence to support the second count that I shall now turn.

The second count appears to be based upon some of the expressions used in Quinlan's Case (supra). The substantial question is whether there is evidence fit to be submitted to a jury of the ingredients of the formula which, in light of Quinlan's Case (supra), seems to me to have been postulated as necessary to attach liability upon a defendant occupier where the injured plaintiff is a trespassing child. It is not and could not be suggested that the plaintiff's injury was wilfully inflicted. Thus, before one can come to the question whether his injury was caused by conduct on the part of the defendant in reckless disregard of the plaintiff's presence, there must be in the case evidence from which reasonable men may draw the inference that the defendant had knowledge of his presence in the sense in which that knowledge is referred to in Quinlan's Case where it was said (supra at p.1076) that "knowledge is a question of fact: such a fact is a very different thing from the objective question whether there was a reasonable likelihood of someone being present at the relevant time and place and whether a person ought to have foreseen that likelihood". The knowledge which is required of a defendant in these circumstances is not that the plaintiff was actually visible to the defendant but something "a great deal more concrete than a mere warning of the likelihood" of the

plaintiff's presence is required. His presence must be one that is "extremely likely" to the defendant or there must be "a great likelihood, not to say certainty" of the plaintiff's presence in the mind of the defendant (see Quinlan's Case (supra) at p.1077).

In the present case the situation is that the plaintiff was a licensee as regards certain parts of the land occupied by the defendant and a trespasser if he intruded upon other parts, namely, work areas. It differs from those cases in which the evidence permits a finding that a child is licensed to use the whole of the subject land (cf. Cardy's Case (supra per Windeyer, J. at pp.325-326). Where the land occupied is small in area and the evidence is that the occupier is well aware that children frequently enter upon a part of that land the conclusion may be open that their presence in all parts of the premises is a matter of extreme likelihood to the occupier and especially would their presence on some particular part of this small area be almost a certainty if that part contained an object or place alluring to a child. On the other hand, where the area is very large and the evidence is that the occupier's knowledge is limited to an awareness that children frequent a part only of his land, such evidence may not permit a conclusion to be drawn that he had the requisite knowledge that it was extremely likely that they would intrude upon other parts of it. In some cases it may very well be a question of degree and thus the state of the occupier's knowledge a question of fact for the jury. Relevant to this question in addition to the size and nature of the land occupied, may include such matters as whether warnings that such other parts were forbidden to be entered upon had been given to the child and, in such case, whether to the knowledge of the occupier the warnings had been disregarded upon a sufficient number of occasions to enable it to be said that they were of no real significance in assessing his state of knowledge. But the plaintiff's own lack of awareness that he had no right to be on the particular part of the land is, of course, a fact of no relevance to the question whether or not the occupier would as good as know that he would be there unless, perhaps, there was also evidence both that the occupier had knowledge of the child's presence there on some

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occasion or occasions and that the child was unaware that he was on land out of bound to him. The onus would lie upon the plaintiff to adduce evidence that the occupier's knowledge was of the nature indicated. The absence of warnings in a given case may tend to show that the child was unaware of his trespass but, of itself, it is no proof that there was to the knowledge of the occupier an extreme likelihood of his presence on land where he had no right to be.

In the present case the evidence shows that the plaintiff and other children of the defendant's employees could be regarded as licensees in respect of parts of the northern end of the defendant's premises where, for instance, their homes, school, community hall, the oval and the access roads to those places and like others were situated. It is possible that that situation might even apply to the sandhills on the northern part of the property at the rear of the company houses. On the work areas at the southern part of the premises the children were undoubtedly trespassers. There was no evidence that they ever played on these work areas and if they were seen to be nearby they were "hunted away". In relation to the work area of the back shunt there is no evidence at all that any children ever frequented the area and the only evidence of the presence of children at any time in that area is the one possible visit of the plaintiff on the day previous to the accident to which I have already referred. There is no evidence that that visit, if it took place was known to the defendant. There is evidence that children were instructed not to go into these areas and through the medium of the headmaster of the school, whose evidence was neither contradicted nor challenged in cross-examination in this regard, they were told that these areas, which included the back shunt work area, were "out-of-bounds". Whilst there was a realization on the part of the defendant on the Thursday before the accident on the Sunday of the possible danger of the proximity of the high tension wire to the surface of the western slope on the back shunt area, there appears to me to be no evidence whatever to enable a finding of fact to be made by a jury that the defendant had even a warning of the likelihood of the presence of children upon the back shunt let alone of an

extreme or great likelihood, not to say certainty, that between that Thursday and the following Monday when the pole was to be shifted by the Council's employees children would be present there and thus in risk of injury. Accordingly, I am of the opinion that there was no evidence fit to be submitted to the jury under the second count and that for these reasons the direction of a verdict for the defendant on the second count should not be disturbed.

The fourth and fifth counts of the declaration are allegations of the breach by the defendant of statutory duties and are based on provisions of the Mines Inspection Act 1901-1962. The fourth count alleges a breach of paragraph (f)(xvii) of Rule (56) and the fifth count alleges a breach of paragraph (g)(xvi)(b) of section 55 of that Act. It appears to me to be very doubtful whether this Act has any application to the facts of this case despite the definition of "mine" which includes a "quarry" and the definition itself of "quarry" in section 4(1) as the slope of the back shunt or even the back shunt itself whilst used for the purpose of positioning the empty railway trucks was not a place on which any product of the quarry was stacked, stored or treated and that was the location of the only pole or conductor alleged to offend the provisions of the Act. A breach of Rules (24) and (25) of section 55 has been held to afford a cause of action at the suit of an employee injured in consequence of breaches thereof (see Duff v. Lake George Mines Pty. Ltd. 60 S.R.83). But, assuming breaches of the statutory obligations respectively set forth in counts 4 and 5 on the part of the defendant and assuming also that such breaches were causally connected with the injury received by the plaintiff, the question arises whether section 55 of the statute was intended to protect persons falling within the category of the plaintiff. This is a question which must be answered by an examination of the statute to ascertain whether the plaintiff belonged to the particular class of individuals whom the statute was intended to protect (Sovar v. Henry Lane Pty. Ltd. 116 C.L.R. 397). Although in the Act there are references to a "person" (see, for example, section 55 Rule (2)(v)) and the Act may be held to protect persons other than employees of the "owner" of the

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mine (see section 4(1); and cf. Massey-Harris-Ferguson (Manufacturing) Ltd. v. Piper (1956) 2 Q.B. 396; Quilty v. Bellambi Coal Co. Pty. Ltd. 67 S.R. 193; Canadian Pacific Steamships Ltd. v. Bryers (1958) A.C.485), nevertheless, upon a true construction of the Act, the reference to a "person" cannot be of entirely general application (see Wigley v. British Vinegars Ltd. (1964) A.C.307 per Viscount Kilmuir at p.324 with whose opinion all their Lordships agreed). In my opinion, upon the true construction of this Act, it can be said that it could not possibly afford a cause of action to a trespasser and accordingly I am of the opinion that the learned trial Judge was correct in directing a verdict for the defendant upon the fourth and fifth counts.

The first count is a count based upon the plaintiff being a licensee and I have already expressed the view that a finding that the plaintiff was a licensee was not open upon the evidence in this case. Accordingly, I think that the learned trial Judge was correct in directing a verdict for the defendant on the first count.

Whilst every regret must be felt for the unfortunate plaintiff in this case for the reasons which I have given I am of the opinion that the defendant's appeal should be allowed and that the verdict for the plaintiff upon the third count should be set aside and verdict thereon entered for the defendant. The plaintiff's cross-appeal should be dismissed. The plaintiff should be ordered to pay the defendant costs of the trial and of this appeal and the cross-appeal but should have the appropriate certificate under the Suitors Fund Act.

I certify that this and the 28 preceding pages are a true copy of the reasons for Judgment of His Honour Mr. Justice Asprey.

Dated 2nd July, 1971.

Jean Duguid
Associate.

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Reasons for Judgment of Holmes, J.A. 2nd July 1971

REASONS FOR JUDGMENT OF HOLMES, J.A.

HOLMES J.A.: In this case the plaintiff, through his next friend, sued the defendant upon a number of counts, the details of which I will subsequently relate.

The plaintiff lived with his parents at South Marulan. South Marulan really consisted only of the works of the defendant company and of residences of a number of men (together with their wives and families) employed by the company at their works. The house in which the plaintiff lived with his parents was on company property. To get out of the house to go anywhere, even onto the street, he would still be on company property. Indeed the local school was on company property and furthermore a mess-hall was used as a Sunday School and the plaintiff, together with others, would have to traverse company property to get to either of these places.

The area of the company's works is not stated but from the photographs we have been shown, including an aerial photograph, it is indicated clearly enough that the company property extended over many acres.

The company was engaged in quarrying limestone and crushing it, the crushed limestone would be taken by conveyor belt to certain bins on the property and dropped from the bins into railway trucks underneath them. The trucks were on a slight incline down to what was called the "back shunt". This land sloped so that by releasing the brakes the loaded trucks could travel down the "back shunt". When there were sufficient trucks filled with crushed limestone an engine would come in and the trucks would be taken along railway lines in the company's property to join up with the Main Southern Line and taken to another place some miles away where the limestone would be further crushed and became cement. The land of the company does not appear to have been fenced and indeed natural barriers would have, at least on one side, been sufficient delineation of the extent of the company's property.

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It is clear that on some part of the property the children, including the plaintiff, would not have been trespassers, but obviously on some other parts of the property they must have been trespassers because their presence was forbidden and they could not assert any right to go upon those parts. Some of the forbidden parts are perfectly obvious, such as the crushing area, the quarry, the conveyor belt, the bins and probably the railway lines. The company used trucks to transport some of the spoil which was worthless from the point of view of cement making and this was variously described in the evidence as "fines" and, when heaped in a particular spot, at any rate, was known as the "sandhills". The company had evidently two dumping spots, one of which was in the middle of its land away from the quarry, away from the railway lines and away from the crushing plant, the conveyor belt and the bins. Children were known to use this area as a place on which they could slide, usually by getting a piece of tin, turning up one end, and tobogganing down the slope, particularly when the sand or "fines" were newly dumped.

The company also had a second place in which it dumped "fines" or sand and this is most conveniently described as an extension of the "back shunt". However the evidence did not indicate that the children ever went near this area and used it for the tobogganing purpose, at least until the fatal day. Of course at the beginning of the dumping process the "fines" would have been close to the end of the railway line and clearly within the forbidden area. As time went on the "back shunt" was extended by dumping but the children do not appear to have used this area at all during that time. On the Thursday prior to the accident it was seen that the dumping for the "back shunt" was getting to the power lines which came into the property for the use of the company, and no doubt everybody else who was there, and which at that point carried 33,000 volts. It was ordered that no further material should be dumped over the side of the "back shunt" but that heaps of material should be placed around the edges so that trucks would not tip any more matter over the side, and this in fact was done. Some further dumping was carried out on the other side and a metal stop, which was used to prevent the trucks getting too

near the edge, was moved to that side for that purpose. On the Thursday preceding the melancholy accident on the Sunday, the chief executive officer of the defendant company got in touch with the local electricity authority with a view to either having the lines moved or acting as contractors to the electricity authority and moving the lines itself. At this stage there was no danger from the lines which were sufficiently far away from the ground underneath them or the ground running beside them so as not to present a hazard to anyone. Between the Thursday and the Saturday night some person in the employ of the company, but otherwise unknown, was sent to remove the metal stop used by the trucks. This could only be done by means of a front-end loader, since it was a big and heavy metal object. The driver apparently as was customary when he saw heaps of sand dumped as they had been, pushed them over the side. This had the effect of bringing one part of the slope of the "back shunt" within about five feet of the line carrying the 33,000 volts. This line did not run parallel to the "back shunt" but it did at one point as I have said come within about five feet of it although at other points it was further away since it was at an angle tangentially to the "back shunt".

On the Sunday following these events the plaintiff and other children were playing both on and off the defendant company's property. It is obvious that there were not many places for young children to play as this was a very isolated place and the only clearing seems to have been on the company's property. However after visiting some places off the company's property some of the children, including the plaintiff, came to this area. The evidence was that they had never been there before, except possibly one or two of them on the previous day. They threw rocks down the slope and slid down it, whether tobogganing or just sliding is not clear. On the way back the plaintiff, (there is no evidence as to what in fact happened), must have put his hand upon the wire carrying this high voltage, as a result of which his right arm was completely incinerated and he suffered many other injuries, the details of which need not for the moment be discussed. The plaintiff by his next friend sued the defendant in various counts, based upon licence and invitation

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Reasons for Judgment of Holmes, J.A. 2nd July 1971

(continued)

and negligence, as well as counts based upon alleged breaches of the Mines Regulation Act. At the end of the evidence counsel for the defendant company moved for a verdict by direction for the defendant in respect of all counts. His Honour the trial Judge heard argument upon these matters and eventually directed a verdict for the defendant upon all of the counts in the declaration other than the third count which he allowed to go to the jury. The third count alleged that the defendant was the occupier of the premises and that on the premises a certain pile of rubble which was alluring to children and such as was likely to induce the presence on the said premises of children, and plaintiff was a child who was on the said premises and was allured by the said heap of rubble and thereupon the defendant was so careless etc. in and about allowing the said pile of rubble to be in close proximity to a high tension electricity line that the plaintiff sustained the injuries and the damage to which I have made reference.

That the premises in the particular situation were dangerous there is no doubt and there was plenty of evidence from the very fact of the injuries which happened to the plaintiff that they were dangerous. However as was pointed out by Scrutton, L.J. in Liddle v Yorkshire C.C., 1934 2 K.B. 101 at 110, and is quoted in Salmond on Torts, 14th Ed at p.406:

> "There has been 'some conflict both in the United States and in England between a view which may be called the 'humanitarian' view, that a child which has no knowledge or discretion to make it capable of contributory negligence must be guarded by the landowner on whose ground it is allowed or tempted to enter, and the 'hard' or 'Draconian' view, that a child must trespass at its own risk and, if is so young as not to appreciate what it is doing, it is for its parents, and not for the landowner on whose land it enters without invitation, to protect it.'"

Indeed this present case bears a very close resemblance to Edwards v. The Railway Executive, 1952 A.C. 737, and this case can only be distinguished from Edwads v. The Railway Executive, (supra) if

it can be said on the evidence that a jury could find that the place where the children were and this accident occurred was an allurement to children. There was no evidence that they had ever used it before for this purpose and if one gets away from the word "allurement" which certainly has a long history behind it from the days of Lynch v. Nurdin, 1841 1 Q.B. 29, and in the situation of the present case due regard is paid to the circumstance that the children were rightfully and lawfully upon certain parts of the defendant company's land (they lived there) and that they had to cross parts of the company's land to go to school, to go to Sunday School and even to go anywhere, it did not follow that at all points on the company's land they were entitled to go. At some points they must have been trespassers. Indeed warnings were given to them when they were near the company's actual works, warnings were given by means of lectures from the headmaster of the school, which were it is true mainly directed towards safety and it was known that the children were prone to toboggan down one of the sandhills or dumps. That is to say that a particular sandhill was specially attractive to children and of course it could be inferred that any such place might ultimately become attractive to children and in that sense constitute an allurement. But in no case of the many which have been cited and to which I do not find it necessary, having regard to the review of the cases in Quinlan v. Commissioner for Railways, 1964 A.C. 1054, to discuss them in detail. I simply say this, that in the last-mentioned case approval was given to the decision in Robert Addie & Sons (Collieries) Ltd. v. Dumbreck, 1929 A.C. 358, in which it was held that there was no duty owing to the boy trespasser, being a boy of four years of age, who had come in to the place at which he was injured. The different decision in Excelsior Wire Rope Co. v. Callan, 1930 A.C. 404, is obvious. The definition of the duty which was accepted by Viscount Radcliffe in Quinlan's Case came from a judgment of Hamilton, L.J. in Latham v. R. Johnson & Nephew Ltd., 1913 1 K.B. 398 at 411:

> "The owner of the property is under a duty not to injure the trespasser wilfully; 'not to do a wilful act in reckless disregard of ordinary humanity towards him'; but otherwise a man 'trespasses at his own risk'".

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His Lordship made certain comments upon the rule as stated and said:

> "First it is plain that what is intended is an exclusive or comprehensive definition of the duty. Indeed, there would be no point in it if it were not, It follows then that, so long as the relationship of occupier and trespasser is or continues to be a relevant description of the relationship between the person who injures or brings about injury and the person who is injured - an important qualification - the occupier's duty is limited in the accepted terms. It is so limited because the character of trespassing is such that the law does not think it just to require the occupier to speculate about or to foresee the movements of a trespasser and this is equally true whether the trespasser fills the unsympathetic part of the burglar or the sympathetic part of the traveller who has lost his way."
> (at p.1074)

The second comment His Lordship made is:

> "The formula in terms covers activities of the occupier on his land and cannot legitimately be regarded as confined to the situation where injury arises from what is sometimes called the 'static condition' of the land. The main point of it is to prescribe, not merely that a trespasser must take the land as he finds it, but also that he must take the occupier's activities as he finds them, subject to the restriction that the occupier must not wilfully or recklessly conduct them to his harm." (at p.1075)

The third comment made by His Lordship is that:

> "The formula does not ignore the significance of knowledge in affecting the relationship between occupier and trespasser .....
> A man can hardly act wilfully or recklessly with regard to another unless he knows that that other is present or has reason to believe that he is there. But the knowledge required to set up any duty at all in the occupier is his personal knowledge of the

other's presence! (at p.1075 and reference is then made to what was said by Dixon, J., as he then was, in Barton's Case, 49 C.L.R. 114 at 131)

Insofar as the occupier is said to be in a position as good as knowing that the trespasser is there is pointed out as bearing directly on the recklessness of the act. But, as is said in another part of the judgment, as is stressed, the knowledge that is material is knowledge in the occupier sufficient to impose upon him the duty not to be wilful or reckless towards the man to whom otherwise he would owe no duty at all; and such knowledge is something a great deal more concrete than a mere warning of likelihood. The presence if it is to be treated as anticipated must be "extremely likely" or as Dixon, C.J. said in Cardy's Case, 104 C.L.R. 274 at 286:

> "Great likelihood not to say certainty of boys and others coming upon the site".

Approval is also given to what Windeyer, J. said in the same case namely:

> "The occupier's immunity from action by trespassers may be qualified if he knows that they are or very probably may be present."

And that is equated with what Evatt, J. said in Barton's Case, (supra) at p.135.

The passages to which I have referred made it clear in my mind that there was no evidence upon which this count could be left to the jury and with great respect to His Honour simply to treat it as a matter in which an allurement arose and not to have regard to the primary circumstance that allurement or not the plaintiff was in this situation a trespasser was wrong.

Since writing the above I have read the judgment of Asprey, J.A. with which I am in substantial agreement. Furthermore I have read the decision in Herrington v. British Railways Board (1971) 2 W.L.R. 477. I can feel very strongly the reaction of Salmon, L.J. in that case to the authorities but Quinlan's Case (supra) must be the authority in this Court.

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I should add that in all of the cases in which the child has recovered he has come from outside the occupier's premises, he has been known to be there or the likelihood of his being there has or should have been anticipated. But the position now is that since Quinlan's Case the rule relating to trespassers is applied strictly. The exception (if it be one) is that the occupier must know of the trespasser's presence or act in reckless disregard of that presence or expected presence.

I agree with the learned trial Judge that there is no evidence to support the counts based on common law negligence or on occupier's liability to an invitee or licensee.

The remaining counts raised questions of the liability of the defendant for breach of certain regulations contained in the Mines Regulation Act, but I have some doubt whether these provisions gave rise to a private right of action. A civil remedy in proper cases is provided by the common law at any rate to all persons other than trespassers and this would suggest that no right of action is given to an individual for breach of the provisions of the Mines Regulation Act in question (Phillips v. Brittania Hygenic Laundry Co., (1923) 2 K.B. 832 per Atkins, L.J., as he then was, at p.842). See also the approval of this view in Tan Chye Choo v. Chong Kew Moi, 1970 1. W.L.R.147 at p.154 by the Privy Council. Furthermore the line was not company property and though on one view the breach of the Act (if any) was brought about by the activity of the defendant in bringing the line closer to the land than was permissible, the duty which arose was either provided by the common law in the way I have stated or was a matter for the electricity authority (which owned the line) and the company, which may have committed a breach of the Act. However this is not a matter which arises in this case.

I agree with the orders proposed by Asprey, J.A.

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No.10

Reasons for Judgment of Taylor, A-J.A. 2nd July 1971

REASONS FOR JUDGMENT OF TAYLOR, A-J.A.

TAYLOR, A-J.A.: This is an appeal by the defendant from the verdict of a jury awarding the plaintiff damages of $56,880. The principal ground of appeal was that a verdict should have been directed for the defendant since the evidence did not disclose any legal basis for a finding of liability.

The defendant company operates a quarry and crushing plant at South Marulan for the purpose of manufacturing cement. The plaintiff was injured when he came in contact with a power line carrying 33,000 volts of electricity on an area where the defendant was extending portion of a railway line on its premises. For this purpose it was dumping "fines", a gravel-like material, the residue from the crushing of limestone, to raise the height of the land to the existing level of the railway track.

The area and extent of the company's operation and the situation of the various work areas are set out in the judgment of Asprey, J.A., which I have had the advantage of reading and it is not necessary here to repeat them. It is sufficient for my purposes to state the following facts.

The plaintiff was thirteen and a half years of age when he was injured on 30th July, 1967. His father worked for the company and he and his family lived in one of a number of houses provided by the company on its land for its employees. The plaintiff's parents had lived in the house for nineteen years. He had lived there all his life. The whole of the area known as South Marulan, is some seven miles from Marulan. On the company's land there is a school. At the time of this accident there were forty-eight pupils attending it. Other more senior pupils who lived in the area went daily to the Goulburn High School. In addition there were provided on the company's land a playing oval, a bowling green for the adults and a Sunday School was held in the mess hall or the village hall, as it was called. Access to all these was through the company's property. There were no fences, apart from the fences around the houses and a fence separating a property belonging to a man named Cooper - not related to the plaintiff -

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Reasons for Judgment of Taylor, A-J.A. 2nd July 1971 (continued)

from the company's land. The works area of the company, that is, the quarry itself, the place where limestone was crushed, the loading bins, the railway lines and the shunting areas were not separated by any barriers from the village, as the housing area was known, or from the rest of the company's extensive area. There were used in and around the works areas very large Euclid trucks, front-end loaders and other machinery. Rail trucks were kept on the lines until they were loaded and a train made up. The material in these trucks was conveyed to Berrima where it was made into cement.

The plant operated, in the main, two shifts. For some time in 1967 it worked a six day week, Monday to Saturday. No work was done on Sundays, but on that day maintenance of the plant was carried out. There were no signs on any part of the area forbidding children or strangers to enter. Some parts of the company's operations would have been obviously out of bounds to children of the plaintiff's age, at least during working hours.

The headmaster of the school (there were two teachers) addressed the pupils on safety measures. They were not to play on the roads, to be careful at the change of shift, not to go to certain areas, particularly the railway line and other areas which were out of bounds to them. Included in these was the "back shunt" area as it was being developed. That is the area where the plaintiff was injured. The company was extending the railway line which was used to hold the trucks by dumping fines, waste material which and in the ordinary course would have been dumped in various parts of the area. A previous dump of fines was known as the "sand hills" and was used by children as playing area. They climbed to the top and ran or slid down the slope using pieces of corrugated iron or other suitable material.

To extend the railway line large trucks of fines were brought close to the edge of the dump where they were tipped. The material was left in heaps near the edge to be pushed down the slope by a front-end loader leaving a flat, level surface with a sloping front to the ground level. As this area was extended on one side it advanced towards a high tension cable suspended on poles at

a height of twenty to twenty-five feet from the ground. This was the electric power supply for the company's plant. The plan for the extensions of the area involved raising the level to a height above the cable. This was to be removed and the line of electricity into the company's plant re-routed.

The children during the weekends played on and off the company's premises. One of their favourite play places was a rock formation known as "granny's chair". To reach this they would cross the railway line and go off the company's property. Coming back from this area they could be within some three or four hundred yards of the face of the extensions to the back shunt area. Some of the boys, including the plaintiff, set traps for rabbits. This was done both on and off the company's property. It was possible to get to the back shunt area without crossing the railway line.

The plaintiff had played on the face of the dump in the area where he was injured on the day before. None of the children called as witnesses in the case had played there before, and the employees called in the defendant's case said they had never seen any children play in that area prior to the accident.

The plaintiff was injured on a Sunday. He said that he and other boys had gone to the area of the extensions of the back shunt to play. From the top of the slope to the bottom of the bank was a distance of some hundred feet. They had played at throwing rocks to the bottom and running up and down the slope. During one of these excursions the plaintiff in some fashion came in contact with the electric high tension cable with his right hand or arm. There was a mark on the cable that indicated this. He was found lying at the bottom of the slope some seventy or eighty feet away from the mark. He had no recollection of the accident and neither he nor any of his friends were aware that there was a high tension cable close to the surface of the slope on which they were playing. There were no indicators or signs on the cable or in the area to say that it was a live cable. As a result of his injuries the plaintiff had his right arm

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Reasons for Judgment of Taylor, A-J.A. 2nd July 1971 (continued)

amputated through the shoulder joint.

The appellant company contended that when he came on this area of their land the plaintiff was a trespasser. Mr. McGregor, Q.C., counsel for the company, both before the trial Judge and before this Court relied on the decision of the Privy Council in Quinlan's case, Commissioner for Railways v. Quinlan (1964) A.C. 1054. That decision, he contended, binding on this Court, reaffirmed the law as to an occupier's liability to children who were trespassers as laid down in Addie & Sons (Collieries) Limited v. Dumbreck (1929) A.C. 354:

> "There must be found injury due to some unlawful acts involving something more than the absence of reasonable care. There must be some act done with deliberate intention of doing harm or at least some act done with reckless disregard of the presence of the trespasser."

The first question to be determined is the duty, if any, owed by the defendant company to the plaintiff at the time he was injured. I do not accept that this is to be determined solely by regarding the defendant as the occupier of the land on which the plaintiff was hurt and determining the category to which the plaintiff belonged when he entered the land.

The company, no doubt, for reasons that were to its advantage, provided houses for its employees and their families within the area and adjacent to the places where it carried on its operations. In doing this it necessarily accepted that there would be living in the area numbers of children of all ages, that they would go to school, to the playing oval, to the Sunday School and to areas on the company's land and beyond the company's land to play, to explore, to trap rabbits and generally to do all the things, expected and unexpected, that children, when not at home or at school, would do to amuse themselves in a remote area. The attractions which the area offered were somewhat different from those in towns and cities. They were country children who would obtain their recreation and amusement in the areas surrounding their homes. The operation of the plant, these

large vehicles, blasting in the quarry, railway lines and trucks, dams and water tanks were in many respects both dangerous and attractive to children who were thus exposed to injury that would not have existed had they lived away from the area. Here the children lived in the area and nothing separated them from the railway lines, the roads and areas used by the large trucks, the quarry itself, the actual work place and the access roads.

The company recognized that the children were thus exposed to the risk of injury, and through the headmaster of the school those children of school age were given regular instructions in safety precautions. They were, as I have indicated, to be careful of change of shifts, not to play on the roads, not to go to certain areas that were dangerous, they were to keep off the railway lines and away from the quarry face.

In accepting that these children were always present within the area of its operations, there arose, in my opinion, a duty of care on the part of the company to them. They were in fact and in law its neighbours and to them it owed a general duty of care. They stood in such proximity to the operations carried on by the company as to give rise to that duty on principles ennunciated by Atkin, L.J., in Donoghue v. Stevenson (1932) A.C. 562 at p.580:

> "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

Since the duty arose because of the proximity of the children to the operations and the area in which they were carried on and since this was the extra hazard that was involved in the children living in the area, I would define the duty as an obligation on the part of the company to take reasonable care for the safety of these children

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in the carrying on of its operations. To see, as far as was reasonably possible, that they were protected from the hazards of living in the area of its operations. This being the duty, it was for the jury to say whether or not the defendant breached the duty and if as a result the plaintiff received his injuries.

If at the time the plaintiff was injured he was on this area without the defendant's permission and hence a trespasser, he can maintain his action, by relying on a breach of duty that I have earlier indicated, since this duty arose not from his presence on the land where he was injured but from other circumstances. Dixon, C.J. and Williams, J. in Thompson v. The Bankstown Council, 87 C.L.R. 619 at p.628:

> "A man or child may be infringing upon another's possession of land or goods at the time he is injured and it will be no bar to his recovery, if otherwise he can make out the constituent elements of a cause of action. That is shown, if proof were needed, by Excelsior Wire Rope Co. Limited v. Callan (1930) A.C. 404; Mourton v. Poulter (1930) 2 K.B. 183; and Buckland v. Guildford Gas Light & Coke Co. (1949) 1 K.B. 410. Indeed it is logically possible to add Glasgow Corporation v. Taylor (1922) 1 A.C. 44; for the child there, when she plucked the fatal berries from the belladonna shrub, committed a technical trespass, according at all events to the English common law. "The child had no right to pluck the berries, but the corporation had no right to tempt the child to its death or to expose it to temptation regardless of consequences": per Lord Sumner (1922) 1 A.C. at p.64. It is not a question whether a trespass by the plaintiff took place at the time of or even as part of the occasion of his injury. The question is whether the breach of duty of which he complains is one which arises out of the defendant's occupation or control of property, of 'premises' or a 'structure'. If that be the case, then it is true that he will look in vain for a duty of care towards him as to the state or condition of the 'premises' or 'structure' when the character in which he

comes into the area of the occupation or control giving rise to the duty is that of a trespasser."

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Kitto, J. was of the same opinion. At p.642 he said:

"The respondent's contention appears to assume that the rule of law which defines the limits of the duty owed by an occupier to a trespasser goes so far as to provide the occupier with an effective answer to any assertion by the trespasser that during the period of the trespass the occupier owed him a duty of care. The assumption is unwarranted, for the rule is concerned only with the incidents which the law attaches to the specific relation of occupier and trespasser. It demands, as Lord Uthwatt said in Read v. J. Lyons & Co. Limited (1947) A.C. 156 at p.185, a standard of conduct which a reasonably-minded occupier with due regard to his own interests might well agree to be fair and a trespasser might in a civilized community reasonably expect. It would be a mis-conception of the rule to regard it as precluding the application of the general principle of M'Alister (or Donoghue) v. Stevenson (1932) A.C. 562, to a case where an occupier, in addition to being an occupier, stands in some other relation to a trespasser so that the latter is not only a trespasser but is also the occupier's neighbour, in Lord Atkin's sense of the word: see Transport Commissioners of New South Wales v. Barton (1933) 49 C.L.R. at pp.122, 127 et seq. The facts of the case must therefore be further examined for the purpose of considering whether there was another relation between the parties giving rise to such a duty of care that the jury could properly find a breach of it to have been a cause of the appellant's injuries."

This statement was the subject of some criticism by the Privy Council in Quinlan's case, Quinlan v. The Commissioner for Railways (1964) A.C. 1054 at p.1080. In Cardy's case, Cardy v. The Commissioner for Railways 104 C.L.R. 274 at p.316 Windeyer, J.

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expressed views to the same effect:

> "The duty of the occupier is, however, rooted at bottom in his duty to his neighbour in Lord Atkin's sense. For, as Dixon, J., as he then was said, in Lipman v. Clendinnen (1932) 46 C.L.R. 550, "The circumstance which annexes to occupation the duty of care, when it exists, is the presence or proximity of others upon or to the premises occupied. It is because the safety of such persons may be endangered that the obligation of care arises." The formulary rules really do no more than state what the law has determined a reasonable man must do to discharge a duty of care arising in particular circumstances. And they are decisive only in casew where the plaintiff's case is founded upon the duty of the defendant as occupier for the safety of his premises. A plaintiff who can rely on a duty of care arising in particular circumstances, is not to be defeated merely because the defendant is the occupier of the land on which he came to harm. His presence upon the land and the circumstances in which he came there may be merely elements in a total situation from which a duty of care arises and not the foundation of the defendant's duty of care. As Taylor, J. expressed it in Commissioner for Railways (N.S.W.) v. Hooper (1954) 89 C.L.R. 486, "circumstances may arise, unrelated to questions of the safety of the occupied premises, in which the obligations of the occupier for both negligent acts of commission and omission fall to be determined in accordance with the general principles of liability for negligence."

The matter was recently considered in the High Court, see David Jones (Canberra) Pty Limited v. Stone, 44 A.L.J.R. at 320. The Chief Justice approved of the statement of Fullagar, J. in Commissioner for Railways v. Anderson, 105 C.L.R. 42 at p.56, where he said that the rules laid down in Indermaur v. Dames were but part of the law of negligence. His views and the views of Walsh, J. are summarized in the headnote:

> "Although the rules laid down in Indermaur v. Dames 1866 L.R. 1C.P. 274 are but part of the

law of negligence, when the only basis put forward for the existence of a duty of care is the occupancy of the premises to which a person, including in that term an infant, has come, that case is definitive of the duty of care owed by the occupier. A wider duty may be owed where there are other circumstances."

The Chief Justice at p.323 said:

"Before parting with the matter I ought to point out that the existence of a duty founded upon occupancy of premises does not preclude the co-existence of a wider duty founded upon other circumstances. Thus in what I have written I do not exclude the possibility that in other circumstances there may be other and wider duties toward a child than those which I have described arising out of the facts in this case. For example, if there was within the store some feature well calculated to cause a child to break from its mother's care and control with the possibility of some injury to the child which might have been foreseen there may be a separate distinct duty on the part of the appellant to take due care for the safety of the child. Such a case does not arise here. The duty in this case depends solely upon the appellant's occupancy of the premises and in particular of the escalators."

Walsh, J., at p.325 had this to say:

"When a very young child complains of injury alleged to have been caused by the breach of a duty of care owed by an occupier of premises, special problems may be encountered in seeking to apply to such a claim the principles which have been established for determining what is the relevant duty of care owed by the occupier and what may be required of him in the fulfilment of that duty. Nevertheless, I am of the opinion that in general, and leaving aside situations in which there may be 'another relevant relationship' in the sense in which that expression was used in Commissioner for Railways v. McDermott (1967) 1 A.C. 169 at

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p.187, the liability of an occupier of premises to a person who has entered upon them and has been injured must depend, whether that person be an adult or a child, upon a breach of a duty of care arising out of the defendant's occupation of the premises and the presence on them of that person. The principles according to which a plaintiff seeking to establish a breach of such a duty of care must first be assigned to his proper place in the 'fixed classification of the capacities or characters in which enter upon premises occupied by others', the case then being governed 'by the standard of duty assigned to that class' (Lipman v. Clendinnen (1932) 46 C.L.R. 550 at p.55 are to be applied when the plaintiff is a young child, but in the application of them it is necessary to take into account the propensities of children and their inability to perceive and to avoid potential sources of danger to them. The course has not been taken by the courts, when confronted in such cases with the difficulties of applying these principles, of holding them to be inapplicable and resorting to a different approach to the questions of whether the occupier was or was not under a duty of care and what was the standard of care required if the duty existed. The courts have sought to apply the established rules concerning the duties of occupiers, when dealing with children who in different characters come upon lands of the occupiers. But for the purpose of determining in which class a child plaintiff should be placed and in what manner the rules for measuring the occupier's duty should be applied, it has been found necessary to formulate some special concept, such as those of 'allurement', of an implied licence to enter and of a conditional licence to enter."

These statements sufficient dispose of the contention that the effect of the decision of the Privy Council in Quinlan's case is that where a person is injured on the land of another his rights against the occupier of that land are to be determined only by the category in which he came upon the land - invitee, licensee or trespasser - and

that the entrant injured in these circumstances cannot rely on the breach of any other duty owed to him from some other relationship.

See Commissioner of Railways v McDermott (1967) 1 A.C. 170 at 186-187. It is there pointed out that occupation of premises is a ground of liability when a person is injured thereon and not a ground of exemption from liability. At page 187 this appears:

> "But there is no exemption from any other duty of care which may have arisen from other elements in the situation creating an additional relationship between the two persons concerned."

In the instant case there was in my opinion such a duty. The question then is, was there evidence upon which the jury could find that the plaintiff's injuries resulted from a breach of that duty?

There was evidence from which the jury could find that the high tension cable carrying 33,000 volts was three to five feet from the surface of the slope at the time of the accident. An employee who went to the rescue of the plaintiff said that he was five feet five inches tall and that he had to duck down to get under it. Another employee who went to the scene of the accident described the wires thus:

> "Q. Did you notice those high tension wires then?
> A. Yes, I saw the wires straight away.
>
> Q. Where were they in relation to the dump, how far off the dump?
> A. How far off the dump?
>
> Q. How far away from the dump?
> A. This would be very hard to say. It would be three feet, three feet six. I could not be accurate but it was about that."

Originally the high tension cable had been twenty-five feet above the ground surface. As the dump was pushed outwards this distance decreased. By

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February 1967 the twenty-five feet had been reduced to fourteen feet and this was reported to the quarry superintendent. By May the line was some twelve feet from the dumped material and this was reported in writing to the superintendent. Some few days before the accident the distance was six to eight feet. The distance of the surface was reported about once a week. No signs were ever put in the area to indicate the danger from the cable, nor to fence off the danger area. According to another witness, about two months before the accident the dump was moving out closer to the wires. He estimated the distance at five feet, and that was reported to the foreman. There was evidence from the defendant's employees that when the cable was still some twelve feet away from the surface instructions were given to cease dumping material on that side of the back shunt, to put a number of loads of material on the edge so that trucks could not dump any more, to remove the dump stop used by the trucks and to leave heaps on the edge immediately above the lowest part of the cable as a barrier. Despite this, the wires were observed on the Thursday before the accident to be closer. On the Sunday of the accident this barrier to trucks had disappeared. Contrary to instructions it had been pushed down the slope by an employee using a front-end loader in the same manner as all other loads had been dealt with.

It was for the jury to say whether or not they accepted that this was done contrary to instructions and without knowledge on the part of responsible officers. They may have thought it an unlikely tale. The incontrovertible fact was that on the day of the accident for a distance of some six or eight feet horizontally this line was within three or four feet of the surface of the slope. The jury could accept the fact that the plaintiff was there on the Saturday. It seems a fair inference that, no work being done on that day, the condition of the line on the Sunday was the same as it would have been on the Friday.

The defendant's case was that children were prohibited from going into the work areas. They had not been known to play in this area before and no senior officer of the company knew or had any reason to believe that they would come to this particular area.

All this was a matter for the jury. It involved questions of foreseeability of the possibility of injury and of reasonable conduct. It was open to the jury to find that the defendant was in breach of his duty in failing to keep this high tension wire at all times insulated by a safe distance from the surface of the land; having regard to the high voltage carried, contact with this cable could result only in death or terrible injury, and it was open to the jury to hold that the defendant had a duty to make it virtually impossible for children to go into the area. This was not a matter, the jury might have concluded, which could be dealt with by warnings, if indeed any warnings had been given.

The jury, however, were not called upon to consider this case, Indeed it was not a case that was pleaded in any separate count. It could, I think, have been raised under the second count. All counts other than the third were taken from the jury. This count was as follows:

> "And for a third count the plaintiff sues the defendant as aforesaid for that at all relevant times the defendant was the occupier of certain premises and there was on the said premises a certain pile of rubble which was alluring to children and such as was likely to induce the presence on the subject premises of children and the plaintiff was a child who was on the said premises and was allured by the said heap of rubble and thereupon the defendant by itself, its servants and agents was so careless and negligent and unskilful in and about allowing the said pile of rubble to be in close proximity to a high tension electricity line that the plaintiff sustained injuries and suffered the damage more particularly set out in the first count hereof."

The learned trial Judge put the case to the jury on the basis that the plaintiff was a trespasser and the question for them was, had the defendant by the presence of an allurement on its property, which was a danger known to it and not obvious to the children and thus a trap, created a situation where it was under a duty to take reasonable care

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to protect the children. At p.221 of the Appeal Book he said this:

> "The occupier of premises is bound by a duty to take reasonable care to protect children from risk to which they are exposed by a dangerous condition of part of the premises if that part of the premises constitutes an allurement to children to enter on to premises and approach that dangerous part. The part must be dangerous in the sense that it is a concealed danger or a trap. Its existence and dangerous quality must be known to the occupier of the premises and unknown and not obvious to the children. Further it should be known to the occupier that there is a likelihood that there will be in or near the premises children who will be subject to the allurement and who will in fact be allured by it."

The defendant, accepting that the plaintiff was, as the Judge told the jury, a trespasser, contended that it could not be liable unless the company knew that there was an extreme likelihood that children would be on the land where the danger existed and acted with reckless disregard of their presence in creating the danger or failing to take steps to prevent it. Of neither of these matters it contended was there any evidence capable of supporting a finding adverse to it.

The jury should not have been told that the plaintiff was a trespasser. It was for them to determine whether on the occasion when he entered this land and met with these injuries he was a licensee or a trespasser. It is beyond dispute that he was at least a licensee of all those parts of the defendant's area which he necessarily used in his comings and goings about his daily affairs, including the weekends. In the absence of any barriers, fences or notices he would be entitled to go onto such parts of the area other than those expressly forbidden to him and those which to a boy of his age and intelligence were clearly places to which he ought not go. His own intelligence would tell him no doubt that he was not to go into the office. He could safely assume that he was entitled to play on sandhills as indeed he had at times when there was no one working in

the vicinity, no trucks operating there. The defendant relied for his being a trespasser on the fact that he had been expressly forbidden to go into the area of the back shunt. But this was a matter about which there was dispute. The boy said that he had never been told that by the schoolmaster or by anybody else. The schoolmaster's assertions as to what he had told the school, which would include the boy if he was there, were that he was directing attention to safety and he indicated certain areas to which they were not to go. There was no precise definition of the boundary of these areas. They were referred to in vague terms, the particular one in question being described as the "back shunt" area. Nor was it made clear that this prohibition was one that applied on Sundays when the trucks were not working in this area and indeed there was no work being carried on in the area at all other than maintenance. These instructions and what they conveyed were matters to be determined by the jury and it is not a case where the defendant could say that boys had been hunted away from this area when found there. It was the defendant's case that it had never known any of the boys to be in the area. Since one sandhill is very much like another from the point of view of a child wishing to play on it there would not be any reason for a boy supposing that if he was allowed to play on one lot of sandhills he would be debarred from playing on other sandhills if there was no work proceeding at the time, no trucks, no front-end loader and no men in the area. All this was a matter for the jury and it was open for them to come to the conclusion on the evidence in this case, that there was no prohibition to the boy going to this area to play on the sandhills on a Sunday when no work was taking place. These children were not prisoners, they were entitled and the company recognized that they were entitled to go out from their area to the lands nearby including the non-work areas. In the absence of any defined roadways or pathways they could make their way through the company's property. When this boy was on the boundary of the back shunt area with the non-work area, wherever that was, he was lawfully there.

Let it be assumed, however, that he was a trespasser. His case, in my opinion, was to be determined in accordance with statements of the

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law applicable to child trespassers by Dixon, C.J., in Cardy's case, subject to the effect of the decision in Quinlan's case:

> "The rule remains that a man trespasses at his own risk and the occupier is under no duty to him except to refrain from intentional or wanton harm to him, but it recognizes that nevertheless a duty exists where to the knowledge of the occupier premises are frequented by strangers or are openly used by other people and the occupier actively creates a specific peril seriously menacing their safety or continues it in existence. The duty may be limited to perils of which the persons so using the premises are unaware and which they are unlikely to expect and guard against. The duty is measured by the nature of the danger or peril but it may, according to circumstances, be sufficiently discharged by warning of the danger, by taking steps to exclude the intruder or by removal or reduction of the danger." p.286.

Later he said:

> "In principle a duty of care should rest on a man to safeguard others from a grave danger of serious harm if knowingly he has created the danger or is responsible for its continued existence and is aware of the likelihood of others coming into proximity of the danger and has the means of preventing it or averting the danger or of bringing it to their knowledge." p.286.

Earlier in his judgment when defining the source of the inference that a duty arose in the case of a child trespasser on premises where a danger existed, he said:

> "The truth is that the real source of the inference that a duty arose must be sought elsewhere. It is to be found in a combination of factors. These are the dangers which attend the use of the premises, the circumstances that the premises are so used or frequented and that in spite of the knowledge which the occupier has or perhaps ought to have of that fact and of the

description of persons who use or frequent the premises he exposes them to the danger and takes no precaution to safeguard them. In other words, it is not upon the reality of a consent or licence consisting in the voluntary grant of a gratuitous benefit or advantage that the duty in such a case is founded. The real source is an implication that is made." p.281.

The learned trial Judge left the matter to the jury in accordance with what he conceived to be the law laid down in Cardy's case. For the jury to find a verdict for the plaintiff there had to be acceptable evidence:

1. That the defendant had on its premises actively created a serious peril.

2. That this was done on premises which were frequented by strangers or openly used by others.

3. That the peril was of such a nature that persons so using the premises would be unaware of it and unlikely to expect it or to guard against it.

4. The defendant company had not taken any measures by warning, taking steps to exclude the child or by removal or reduction of the peril.

(1) That the defendant company had created on its land a serious peril does not need elaboration. They had brought to within the reach of a child an electric high tension cable carrying 33,000 volts of electricity, contact with which would kill or mutilate. They had positioned it on the slope of an area which was a natural play place for children.

(2) It would be sufficient if there was a likelihood of children coming to the place where the peril was. That people used the area in the past fixes the occupier at the time he created the peril with knowledge that there is a likelihood of people coming to the place who may be harmed. On this the jury were entitled to consider the nature and extent of the use that was made of the company's premises by these children. Whilst it is true that

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there is not any evidence that at least prior to the Saturday any child had been known to employees of the defendant company to play on this particular area and although this area was a works area, the question of whether or not there was a likelihood of children being there on this Sunday does not depend, in my opinion, upon establishing that children had previously been there to the knowledge of the defendant company's employees. On this question it is relevant that this was a sandhill, a dumping area for fines, and on such areas children had been known to play since the areas were there. It was a Sunday and the children would be playing and seeking their amusements on and off the company's land, passing through it to go to other places and there were no barriers or signs which would in any way deter a child or children from playing on this area. The nature of the area and the facilities that it afforded for playing similar to other areas in which they played, its attractiveness to children with its long, steep and perhaps dangerous slope are all matters to be taken into account by the jury and their totality afforded a basis for a finding that there was a likelihood when this peril was created that children would encounter it.

(3) That the peril was one of which a person coming on the premises was unaware or unlikely to expect or to guard against does not need elaboration. Not only children but adults would not expect to find a cable carrying electricity of this order within three to five feet of the ground.

(4) The last matter does not call for discussion. If the duty was to safeguard children who might come onto this area from the peril they had created the short answer is that the defendant company did nothing.

It was submitted that we were bound to decide this question in accordance with the decision of the Privy Council in Quinlan's case, Quinlan v. The Commissioner for Railways (1964) A.C. 1054. In that case the Privy Council approved the decision of the High Court in Cardy's case. This, they said, was one of the "children's cases". The occupier had placed a dangerous allurement on his land and was liable for the injury caused by it to a straying child. The ash pit with its burning

interior was a trap or an unusual and hidden danger. Children's cases, they said, in such a context do unavoidably introduce considerations that do not apply where the sufferer of injury is an adult. What is allurement to a child, and being so, imposed by itself a measure of responsibility, is not an allurement to an adult, and those conceptions of licence or permission which may be highly relevant for the determination of the adult's rights are virtually without meaning at any rate as applied to small children. After referring to Dixon, C.J.'s statement to the effect that the rule recognises that nevertheless a duty exists where, to the knowledge of the occupier, premises are frequented by strangers or openly used by other people and the occupier actively creates a specific peril seriously menacing their safety or continues it in existence, the judgment continued, p.1084, "Their Lordships take it that in such a situation it is to be presumed that the occupier's conduct is so callous as to be capable of constituting wanton or intentional harm and no doubt in such circumstances it could be so regarded."

Quinlan's case has been much criticised, see Herrington v. British Railways Board (1971) 2 W.L.R. 477. It seems clear from that case that the Court of Appeal in England do not propose to follow it.

I find the decision one of some difficulty. It seems to say that all trespassers are to be treated alike by the law, the occupier's duty being:

> "The owner of the property is under a duty not to injure the trespasser wilfully. Not to do a wilful act in reckless disregard of ordinary humanity towards him but otherwise a man trespasses at his own risk."

This is the statement of Hamilton, L.J. as to the common law, Latham v. R. Johnson & Nephew Limited (1913) 1 K.B. 398. It further decides that this duty is an exclusive and comprehensive duty. At the same time it recognises that actual knowledge of the presence of the trespasser is not necessary. It is sufficient if he "as good as" knows of his presence. But of this imputed knowledge it says

there must be an extreme likelihood. It must be more than a mere likelihood. It approves the statement of Mr. Justice Windeyer from Cardy's case:

> "The occupier's immunity from actions by trespassers may be qualified if he knows that they are or very probably may be present."

It seems then that the test may vary. It recognizes that the duty to adults and to children is different:

> "Children's cases in this context do unavoidably introduce considerations that do not apply where the sufferer or injured is an adult. What is allurement to a child and being so imposes by itself a measure of responsibility is not an allurement to an adult and those conceptions of licence or permission which may be highly relevant for the determination of the adults rights are virtually without meaning at any rate as applied to small children." p.1083.

I think I must accept that Quinlan's case re-imposes as the obligation of the occupier to a child trespasser that he must not act with reckless disregard of the trespasser's presence. It also requires that there be, if imputed knowledge is relied upon, something more than a mere likelihood of the presence of the child. But what amounts to "very probable" or "an extreme likelihood" is a question to be determined by the circumstances. One matter to be taken into account will be the nature of the allurement.

This is the way the matter was dealt with by the Victorian Full Court, see Commissioner of Railways v. Seal (1966) V.R. 107. In that case the jury had found in answer to a specific question that the defendant was guilty of wanton or reckless disregard of the infant plaintiff's safety. In Herrington's case (Herrington v. British Railways Board (1971) 2 W.L.R. 477), "reckless disregard" for a trespasser's safety was recognised as the test of an occupier's liability to a child trespasser.

The Lord Justices differed as to the meaning to be given to "reckless disregard". Lord Justice Salmon thought that recklessness in the context of

the Addie line of cases was akin to wilfully causing injury and it was different in kind from recklessness or mere carelessness whatever its degree. Lord Justice Edmund Davies' view was that the carelessness exhibited by an occupier in relation to trespassers can be so gross as to amount to reckless disregard, of their safety, within the meaning of Addie's case. Lord Justice Cross thought that in the context in which it was used in Addie's case it simply amounted to gross negligence.

In the present case, the jury were told there had to be a likelihood of the presence of the child and I think that a proper test in the circumstances. The question then is, is there evidence on which the jury could find that there was a reckless disregard of the child's safety? In my opinion there was, having regard to the facts earlier set out.

There is, in my view, evidence upon which the jury could arrive at the verdict that they did. However, that does not conclude the matter. The jury did not have their minds directed to the question of reckless disregard. The Judge himself took from the jury the second count because he was of the opinion that there was no material on which the jury could find reckless disregard. There were, in my opinion, other matters in which the summing up was defective. His Honour's direction to the jury that the occupier's duty was to take reasonable care to protect the infant from a risk to which he was exposed by a dangerous condition of part of the premises was, I think, not in accordance with Quinlan's case. I have already indicated that the jury should not have been told that the plaintiff was a trespasser. On the plaintiff's side I think his Honour was in error in taking the first and second counts from the jury. So far as the fourth and fifth counts are concerned, on the view that the plaintiff was a trespasser, they were rightly taken from the jury. But if this question was answered by the jury to the contrary, that he was not a trespasser, then I think these counts should have been left to the jury, In the result, in my opinion, regrettable though it may be, there should be a new trial of the action and the cost of this appeal should abide the event or rather the ultimate outcome of the new trial.

In the Supreme Court of New South Wales Court of Appeal

No.11

Order 2nd July 1971

No. 11

ORDER

IN THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL
No. 8786 of 1967

BETWEEN:

RODNEY JOHN COOPER an infant by his next friend PETER ALPHONSUS COOPER

Respondent (Plaintiff)

AND

SOUTHERN PORTLAND CEMENT LIMITED

Appellant (Defendant)

the Second day of July, One thousand nine hundred and seventy one.

This Appeal coming on for Hearing the 19th and 20th days of May, 1971 WHEREUPON AND UPON READING, the Appeal Books AND UPON HEARING Mr. D.G. McGregor of Queen's Counsel with whom was Mr. J R. Clark of Counsel for the Appellant and Mr. R.F. Loveday of Queen's Counsel, with him was Mr. R.B. Murphy of Counsel for the Respondent, IT WAS ORDERED that the matter stand for Judgment and the same standing in the list this day IT IS ORDERED that the Appeal herein be and the same is allowed verdict for the Plaintiff on the third count be set aside IT IS FURTHER ORDERED that the Cross Appeal be and the same is dismissed AND IT IS FURTHER ORDERED that the costs of the Appellant of and incidental to this Appeal and of the Trial are to be paid by the Respondent to the Appellant or his Solicitors AND IT IS FURTHER ORDERED that the Respondent is to have a Certificate under the Suitor's Fund Act.

By the Court

For the Registrar
Chief Clerk.

No. 12

In the High Court of Australia New South Wales Registry

No.12

Notice of Appeal 21st July 1971

NOTICE OF APPEAL

IN THE HIGH COURT OF AUSTRALIA
NEW SOUTH WALES REGISTRY
No. of 1971

ON APPEAL from the Supreme Court of New South Wales Court of Appeal

BETWEEN RODNEY JOHN COOPER
an infant by his next friend
PETER ALPHONSUS COOPER
(Plaintiff) Appellant

AND SOUTHERN PORTLAND CEMENT LIMITED
(Defendant) Respondent

TAKE NOTICE that the Appellant herein appeals to the High Court of Australia against the whole of the judgment of the Supreme Court of New South Wales Court of Appeal of the 2nd day of July, 1971 WHEREBY the said Court on appeal to it by the abovenamed Respondent against the verdict for the Plaintiff upon the third count of the Declaration in the action allowed the said appeal, set aside the said verdict and entered a verdict thereon for the Defendant AND on a cross-appeal to it by the abovenamed Appellant against a verdict entered for the Defendant in the action on the first, second, fourth and fifth counts of the Declaration dismissed the said appeal AND ordered that the Plaintiff pay the Defendant's costs of the trial and of the appeal but stated that the Plaintiff should have the appropriate certificate under the Suitors Fund Act UPON the following grounds:

1. That the Court was in error in allowing the appeal.

2. That the Court was in error in dismissing the cross-appeal.

3. That the Court was in error in holding that there was no evidence that the Plaintiff was on the premises as a licensee of the Defendant.

In the High Court of Australia New South Wales Registry

No.12

Notice of Appeal 21st July 1971 (continued)

4. That the Court was in error in holding that there was no evidence that to the knowledge of the Defendant there was an extreme likelihood of the presence of children on the Defendant's premises.

5. That the Court was in error in holding that there was no evidence that the Defendant had acted in reckless disregard of the presence or expected presence of children on its premises.

6. That the Court was in error in not holding that there was evidence that the Defendant should have foreseen that the Plaintiff might be induced to come upon the Defendant's premises by the presence of an allurement on those premises and that he might be thereby injured by a concealed danger created by the Defendant on the premises and that the Defendant had failed to take reasonable steps to protect the Plaintiff from such danger.

7. That the Court was in error in not holding that the Defendant having been responsible for bringing a dangerous substance namely high voltage electricity into proximity to the Plaintiff was under a duty to take reasonable steps to deny the Plaintiff access to the danger or otherwise prevent harm to him from it and that there had been a breach of that duty.

8. That the Court was in error in not holding that the Defendant in all the circumstances of the case was under a duty to take reasonable care for the safety of the Plaintiff in the carrying on of its operations and that there had been a breach of that duty.

AND FURTHER TAKE NOTICE that the Appellant seeks an order setting aside the judgment and order of the Court of Appeal of the Supreme Court of New South Wales AND seeks an order directing that the verdict entered by the Trial Judge be restored OR ALTERNATIVELY that there be a new trial of this action AND FURTHER seeks an order that the Respondent pay to the Appellant the costs of this appeal and the costs of the proceedings in the Supreme Court of New South Wales Court of Appeal

AND that such further or other provisions be made as to the Court may seem meet.

DATED this 21st day of July 1971.

MICHAEL O'DEA

Solicitor for the Appellant

This Notice of Appeal is filed by Messrs. J.J. Carroll, Cecil O'Dea & Co., Solicitors of 82 Elizabeth Street, Sydney the Solicitors for the abovenamed Appellant.

In the High Court of Australia New South Wales Registry

No.12

Notice of Appeal 21st July 1971 (continued)

TO: The Registrar of the High Court of Australia, New South Wales Registry.

AND TO: Southern Portland Cement Limited the abovenamed Respondent.

AND TO: its Solicitors Messrs. H.D. McLachlan Chilton & Co., 16-20 Bridge Street, Sydney.

AND TO: The Registrar of the Court of Appeal

No. 13

No.13

Reasons for Judgment of Barwick, C.J. 29th March 1972

REASONS FOR JUDGMENT OF BARWICK C.J.

BARWICK, C.J.: This appeal, brought by a plaintiff in an action at law in the Supreme Court of New South Wales against a decision, by majority of the Court of Appeal Division of that Court, entering a verdict for the defendant in the action, raises the question whether the defendant, an occupier of land, may be held, in the circumstances, to be liable to a trespasser upon that land, and if so on what basis, for injuries received there by the trespasser as the result of acts and omissions which, but for the relationship of occupier and trespasser, could be held to amount to negligence on the part of the defendant.

The appellant sued the respondent in five counts. By the first count he alleged that he was on the respondent's land with the leave and licence of the respondent and that there was on the land a concealed danger or trap the existence of which the respondent well knew and which caused injury to the appellant.

In the High Court of Australia New South Wales Registry

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Reasons for Judgment of Barwick, C.J. 29th March 1972

(continued)

By the second count the appellant alleged that the respondent's premises were frequented by "strangers" and openly used by other people and that there was, to the knowledge of the respondent, a great likelihood of boys and other persons coming and being upon the premises and that in those circumstances the respondent recklessly created and continued in existence a specific peril seriously menacing the safety of the said persons and that the appellant was a boy who came on to the said premises and in the vicinity of the said peril and thereby sustained injury.

By the third count the appellant alleged that there was on the respondent's premises a heap of rubble which constituted an allurement to children, was negligently allowed to be in close proximity to a high tension electricity line, and which in fact allured the appellant upon the said land whereby he became injured.

By the fourth and fifth counts the appellant alleged breaches of certain provisions of the Mines Inspection Act, 1901-1968 of the State of New South Wales.

The learned trial judge, who presided at the trial of the action with a jury of four persons, allowed only the third count to go to the jury directing a verdict for the respondent on all the other counts. Upon an appeal by the respondent to the Court of Appeal Division of the Supreme Court the verdict which the jury returned for the appellant on the third count for the sum of $56,880 was set aside and a verdict entered on that count for the respondent. A cross appeal by the appellant against the entry of the verdict for the respondent on each of the other counts was dismissed.

Upon the appeal to this Court the appellant has not sought to have the verdict for the respondent on the fourth and fifth counts set aside, but has sought an order that the verdict and judgment for the respondent on the third count be set aside and the verdict of the jury restored. In default of such an order the appellant seeks an order that the verdicts for the respondent on the first and second counts at the trial be set aside and that there be a new trial on the issues raised by those counts.

The evidence given before the jury could support, in my opinion, the following view of the facts of the matter. The respondent conducts in a fairly remote part of the southern highlands of New South Wales a limestone quarry. The limestone rock is quarried at a face, elevated to crushers where it is crushed and the limestone itself separated from the sand and other materials with which it is found in the quarry. The limestone after crushing is carried by conveyor to bins from which it is gravitated to railway trucks which pass beneath the bins. The trucks, when full, are taken to the respondent's cement works at another site in the southern highlands by locomotives of the New South Wales Government Railways. As trucks are filled under the bins they are moved by manpower on rails which run south of the bins to a point where buffers prevent their further movement. When enough trucks have been filled to make up a train of appropriate length they are removed by locomotives as I have indicated. The respondent over past years has used the sandy spoil or waste from the crushing and separation of the limestone to make an extensive platform which is considerably higher than the surrounding ground which otherwise remains in its natural partly timbered condition.

During the year 1967 the respondent desired to lengthen the rail which ran from the base of the bins southwards, so as to accommodate a greater number of trucks filled with limestone and thus to constitute a longer train for movement by locomotives. To do this it increased the area of what I have called a platform by tipping more of the sandy spoil, sometimes referred to in the discussion of the case as "fines", in the area south of the bins. In this way an extension of the platform for a width of about one hundred feet was built increasingly higher, though itself level, than the surrounding country whose natural fall was to the south. On this extension of the platform the length of rail running from beneath the bins was extended. The whole length of the rail from the bins south was referred to as the "back shunt". The western boundary of the respondent's land ran close to the margin of the extended platform of which I have spoken. As the platform was increased in length and width by the tipping of further sandy material the spoil in fact extended beyond the limit of this fence; in other words, went through it, burying it to some extent.

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Reasons for Judgment of Barwick, C.J. 29th March 1972

(continued)

Approaching the respondent's land on the west was a high tension electrical transmission line owned and operated by an electricity county council. The line had been erected on wooden poles so that the uninsulated wires were originally some twenty feet above the natural level of the land below them. The transmission line came towards the boundary of the respondent's land at what was said to be an angle of the order of 15 degrees to that boundary. The transmission line apparently crossed the boundary of the respondent's land towards its southern extremity. As the transmission line closed on the boundary of the respondent's land the spoil, tipped to raise the extended platform, passed underneath the transmission line. The distance between the face of the batter formed by the tipped material as it came to rest and the uninsulated wire of the transmission line was thus progressively decreased. Before the occurrence with which this appeal is concerned, the respondent had become aware that a dangerous situation was being created by the extension in this manner of the platform and had in fact taken steps pending the relocation of the transmission line to prevent further tipping of material which, if tipped, would have the effect of further decreasing the distance from the face of the batter and the overhead wires. However, this endeavour on the part of the respondent proved ineffective and further material was deposited beneath the line of the transmission wires so that, on the day in question and at the point with which the case became concerned, the distance from the face of the batter to the uninsulated transmission line carrying electricity of 33,000 volts was such that a boy of thirteen and a half in a crouched position could put his hand on the bare wire. The distance was of the order of five feet or less.

There was adjacent to the quarry, the platform, the bins and the railway line, a village in which the employees of the respondent were housed. It is referred to in the evidence as a "company village." It consisted of some 35 to 40 houses connected with the platform and the structures used in the separation and loading operations by what appears to be a gravel or dirt surfaced road. Between the village and the face of the platform on the north-east side there was bushland in its

natural condition. From photographs tendered in evidence it was virtually open savannah country. No fences separated the platform and working areas from the village.

Children of the employees were accustomed to play about this platform, certainly on its north-east side, and they were accustomed to cross it in order to play in the bushland of another person's property which abutted on the west side of the respondent's property. The play in this other person's property was round a rocky area which the children knew as "granny's castle" as well as rabbitting in an area which was south of Granny's castle, and approximately west or a little north of west of the area of the respondent's property with which this case is concerned. One form of play by the children was to toboggan down the slope formed by the tipping of spoil in the course of making the platform. When first tipped, the sandy material was loose and probably quite suitable either for sliding or tobogganing down or for the common youthful prank of rolling stones or rocks down it in order to see how far from the toe of the batter they would go. After weather had attacked the face of the batter it became harder, corrugated or gullied so as to be less suitable for at least some of these forms of play.

Some of the employees of the respondent kept goats, presumably for their milk. These were tethered on the western side of the employer's property and at least some of them if not all of them were depastured within the boundary of the respondent's land. To attend to the goats, as apparently the children did for their parents, they would cross the platform and railway line which lay between the village and the point where the goats were tethered.

It was said that the children were forbidden to go near the workings which were identified in the evidence as the quarry area. Their school teacher had instructed them that they must not go into certain parts of the property on the weekend or, perhaps for that matter, at all. There was no evidence that the children had ever been seen on the face of the batter formed by tipping material in the area of the back shunt though they had been seen by the respondent's employees on other parts of the platform.

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Reasons for Judgment of Barwick, C.J. 29th March 1972 (continued)

The appellant, the son of an employee of the respondent, and other boys, children of employees, on the day before the occurrence out of which the action has arisen, went into the area of the back shunt and were playing on the batter there formed by the tipped sandy spoil. They also did so on the day of the occurrence. But at least the appellant had not played at this place before the first of these days. At some stage on these days the boys had tobogganed down the slope formed by the freshly tipped material and at the time of the accident to the appellant, he and some of the boys with him had been rolling stones down that batter, thereafter clambering down its face to see where the stones had come to rest. The appellant, a lad of thirteen and a half, was clambering back up the batter when, as well as can be gathered, he slipped to his knees and put his hand on the electrified wire and was very seriously injured.

As I have indicated, the only basis of action which was allowed to be considered by the jury was that the site of the accident constituted an allurement to children which had been effective to bring the appellant to the spot and that the respondent had been negligent in its conduct in not having taken steps to protect the appellant and other children from the peril in the nature of a concealed danger or trap which the proximity to the ground of the highly charged wire could undoubtedly be held to constitute. After verdict, having regard to the summing up of the trial judge, it can be taken that the jury were of opinion that the situation was one of danger and called for some reasonable steps to protect persons who might be likely to come into contact with the wire, that the batter formed by the tipped sandy material was attractive to children at play, that the appellant had in fact been attracted to it by its alluring quality, and that the failure on the part of the respondent to take any steps to avoid injury to children who might be allured to the site was negligent.

The learned trial Judge in summing up to the jury said this:

> "The company was the occupier of the quarry premises; the plaintiff is a boy of thirteen, who was on the premises and was injured by a

condition of a part of the premises. The duty owed by the occupier of premises to a boy who is on the premises without any legal right to be there is well established, and the plaintiff must show a breach of this well established duty.

The occupier of premises is bound by a duty to take reasonable care to protect children from risk to which they are exposed by a dangerous condition of part of the premises if that part of the premises constitutes an allurement to children to enter on to the premises and approach that dangerous part. The part must be dangerous in the sense that it is a concealed danger or a trap. Its existence and dangerous quality must be known to this occupier of the premises and unknown and not obvious to the children. Further, it should be known to the occupier that there is a likelihood that there will be in or near the premises children who will be subject to the allurement and who will in fact be allured to it. The word "allurement" is a traditional word. What is a thing that is alluring to children? - something that is attractive to children, something that attracts them to approach it and perhaps play about it or approach it in any other way ... You must remember the whole of the background of this happening, the fact that the quarry existed alongside a village; that the village was completely connected to the quarry; not with any other thing; it was a mining village attached to this quarry; it was remote and situated in a part of the country which - at least judging by the photographs - does not appear to be very attractive. It was a small isolated sort of place, and yet there were a number of school children there who, at weekends, sought their amusement as best they could."

It will be observed that the summing up contained elements which were not expressed in the count, though it might be possible to regard them as being implied in it. I shall return to this feature of the case at a later stage.

The situation which undoubtedly the respondent

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Reasons for Judgment of Barwick, C.J. 29th March 1972

(continued)

had created, and which clearly could be held to be highly dangerous to humans, and particularly to children who came to the vicinity, was the proximity of the bare high tension wire to the unnatural level of the soil brought about by the tipping of the sandy spoil. In this case, unlike other decided cases, the respondent was not a distributor of electricity and did not bring the high voltage current to the site. Here the respondent brought the land surface within human range of the electricity thus creating a situation of lethal proximity.

The third count upon which the jury has passed was based on the presence on the land of an allurement which attracted the appellant to the respondent's land where he was hurt. The count and the trial judge's summing up seem to have treated the allurement as itself a source of duty in the respondent towards the appellant if the respondent knew of the likelihood that children would respond to the allurement and be present in the area where the appellant was injured. Doubtless the pleader was encouraged to express the count in the terms he used by expressions to be found in Commissioner for Railways v. Quinlan (1964) A.C. 1054 (Quinlan's Case), a decision of the Privy Council which is central to the resolution of the present appeal. But having regard to the presence of the first count of the declaration and his refusal to allow it to go before the jury, it would seem that the judge did not regard the effective allurement as the equivalent of a permission to come to the alluring place. Questions will later arise as to the precise "status" of an "allurement" in this area of alleged liability, and as to what can be taken from the jury's verdict on this count having regard to the summing up. Meantime, I will discuss the matter on the footing that the appellant was a trespasser on the respondent's land and that the respondent had created thereon the situation I have described. Later, I shall consider what is the effect of the findings that the appellant was attracted to the place where he was injured by its alluring quality, that the proximity of the electric transmission line to the surface of the batter constituted a concealed danger and that the respondent was aware of the dangerous quality of that proximity. Finally, I shall consider whether the first count of the declaration ought to have been left to the

jury on the footing that it would have been open to them to have found upon the evidence that the appellant was at the place where he was injured by the leave and licence of the respondent.

It might be as well at the outset to observe that this Court is bound by the actual decision of a case by the Privy Council and by the principles by which that decision is essentially supported, that is to say, by the basic reasons for its decision. The Court is not bound by the decisions of the Court of Appeal of England or of the House of Lords though, as we have said, the utmost respect will be paid to them and we will not lightly differ from what the House of Lords decides. In hearing an appeal from an Australian Court which involves matters governed by the common law, the Judicial Committee is declaring the common law for Australia which is not necessarily the as the common law in the United Kingdom - see Australian Consolidated Press Limited v. Uren (1967) 117 C.L.R. 221. Thus, the trend of decisions in this Court is relevant, particularly as, in actions involving the common law brought by a resident of one State against a resident of another, this is the final Court of Appeal - see Constitution s. 75(iv) and Privy Council (Limitation of Appeals) Act, 1968 (Cth).

By the decision in Quinlan's Case, a case not between residents of different States, we are bound. Thus the commencing point for the consideration of this case, on the footing that the appellant was a trespasser on the land occupied by the respondent, must begin with that case. The actual decision was that the Railway Commissioner was not liable to the trespasser for failure adequately to warn him of the approach of a train of whose approach, because of the terrain, he might be, and, apparently, was in fact, unaware. The reason for the decision was that the case was one of trespasser and occupier of land and nothing more. In that situation there was an adherence to the principle laid down in Robert Addie & Sons (Collieries) Ltd. v. Dumbreck (1929) A.C. 358 (Addie's Case).

A proper sense of justice has always denied that there is an absolute rule that the occupier of land owes no duty whatever to a trespasser.

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(continued)

He is said to come upon the land at his own risk - taking the land and all that is upon it as he finds it. But it seems always to have been recognised that humanity as a handmaiden to justice requires considerable modification of an absolute irresponsibility of the occupier based on his proprietorship or control of the land. He must do no wilful harm to the trespasser of whose presence he is aware. Knowledge of facts and circumstances upon which it would be reasonable to expect the presence of a trespasser, so that the occupier as good as knows of that presence, will be accounted as actual knowledge. Reckless disregard of that presence, or perhaps callous indifference to it, will rank with wilful conduct to attract liability. Mantraps may not be laid with impunity; nor may spring guns be set because they are directed to trespassers whose presence on the land is expected. Concessions must necessarily be made to trespassing juveniles. I leave on one side the mechanisms by which the concessions are made. But these denials of a rule of absolute irresponsibility have been made in the name of common humanity. With the increased availability of lethal substances and their use in activities upon land and structures, the traditional solicitude on the part of the law for human life and safety might well have led directly to further modification of the rule as to the liability of an occupier towards a trespasser. A court might well be thought to be in line with the traditional use of a sense of humanity in imposing directly upon the occupier, as such, some liability in relation to humanly dangerous situations created by him. But so far this has not been done authoritatively so far as this Court is concerned.

The moot point in this case is whether an occupier, who introduces or maintains upon his land a thing or substance highly dangerous to humans, or to some class or group of humans or creates a situation highly dangerous to humans or to such class or group, on his land, owes a duty, and if so of what kind, to persons who may come upon his land and suffer injury by the thing, substance, or situation, and of whose likely presence on the land he knows or, on the facts and circumstances known to him, ought to be taken to know.

It seems to me from reading their Lordships' advice in Quinlan's Case that they did not consider that a steam locomotive driven at speeds of 20 to 25 miles per hour, was inherently and highly dangerous to mankind, so that common humanity could be thought to place upon the operator of the railway service the need to consider who was likely to be or to come into its path at a place where its approach was neither visible nor appreciable. Thus, the case was regarded as one in which the only relationship between the parties was merely that of an occupier of land and trespasser thereon; in other words, that that was the relevant relationship in relation to the injured man's claim for damages. The duty to which that relationship gave rise was regarded as settled in the terms used by the House of Lords in Addie's Case. The Commissioner was not in breach of that duty.

The reasons of their Lordships for their advice in that case have created problems to which commentators have referred. It is not my purpose to canvass such matters. It is sufficient that I should express my own view as to what may be decided in this case conformably with their Lordships' decision. The trend of decisions in this Court was observed by their Lordships but not entirely affirmed. Perhaps one of the questions which their reasons raise is the extent to which, and the basis on which, this Court's decisions were accepted. But I think it is clear that their Lordships approved this Court's decision in Thompson v. The Council of The Municipality of Bankstown (1952) 87 C.L.R. 619 (Thompson's Case). The Court there decided that an electricity distributing authority which brought electricity at a lethal voltage into the proximity of a public place was liable to a youth who, in the course of the unlawful use of a pole owned by that authority and without its permission, suffered injury by contact with electricity because of that authority's failure adequately by reasonable maintenance to prevent the possibility of that contact. Their Lordships' approval of that decision is, in my opinion, of paramount significance in resolving the present case.

Having carefully studied them I do not read their Lordships' reasons whilst denying that the doctrine in Addie's Case be confined to the

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(continued)

condition of the land itself, as treating the nature of an activity carried on by the occupier on his land as irrelevant when considering whether a trespasser has a cause of action. I think that those reasons contemplate that the nature of such an activity may in some circumstances be such as to raise a larger and different duty towards a person coming upon the land without invitation or permission than that laid down in Addie's Case, though, with great respect to the noble Lord who prepared them, I cannot say that I feel absolutely certain of their Lordships' views in this connection. After all, as they saw the facts, the case before their Lordships was one of occupier and trespasser and nothing more. They were concerned to express the limits of the duty of the occupier in those circumstances. Any reference to the possibility of other duties arising out of other relationships was only made, as I read the reasons, in commenting upon expressions which their Lordships took to be attempts to formulate the duty of an occupier who stood in no other capacity or relationship to a person trespassing upon his land. In that connection, however, their Lordships in affirming the statement of that duty by the House of Lords in Addie's Case do seem to concede that if the situation which the occupier creates on his land is highly dangerous but not apparent to human beings coming upon the land, a failure to take reasonable steps to prevent that situation from causing harm to persons who to the knowledge of the occupier are likely, or at any rate highly likely, to come upon the land can be accounted "so callous as to be capable of constituting wanton or intentional harm" (see p.1084 of the report); for thus, at that point, their Lordships seem to explain their acceptance of this Court's decision in Commissioner of Railways (N.S.W.) v. Cardy (1959) 104 C.L.R. 274 (Cardy's Case). However, it may be that that acceptance was also placed on "the ash tip, with its burning interior", being at once, having regard to its location, a dangerous allurement to straying children and a trap or an unusual hidden danger (p. 1083 of the report), a view which seemingly prompted the terms of the third count in this case.

But at p.1081 of the report their Lordships say this:-

"... for the moment it is sufficient to say that their Lordships cannot find any line of reasoning by which the limited duty that an occupier owes to a trespasser can co-exist with the wider general duty of care appropriate to the Donaghue v. Stevenson formula: and, if the relation of occupier and trespasser is to be displaced by 'some other relation', as may happen, the grounds upon which that displacement can be held to occur must admit of reasonably precise definition, otherwise the task of charging juries as to what the law requires or allows will become virtually incapable of formulation."

When affirming the decision of this Court in Thompson's Case, their Lordships described it as "one of those in which the court, for sufficient reason, is able to hold that, as regards the accident and the injury caused, the relation of occupier and trespasser does not bear upon the situation of the parties. The reason there held sufficient was that the corporation was maintaining on and over a public place a highly dangerous electric transmission system in a defective condition." (p.1080 of the report). Thought their Lordships do not expressly say so in this connection, I would infer that what they did say was said on the assumption that the relationship of occupier and trespasser was relevantly capable of existing in the case of a structure such as the electric light pole. In the long run, though critical of such an extension of the doctrines relating to land, I assumed so much in Munnings and Another v. Hydro-Electric Commission (1971) 45 A.L.J.R. 378. Their Lordships' expression "does not bear upon the situation of the parties", with due respect, is far from self-explanatory, but I read it as meaning in its context that the relationship of occupier and trespasser was not the relationship relevant to the circumstances of the injury. Consequently, it seems to me that in affirming the decision in Thompson's Case, their Lordships were conceding that though the defendant be in fact the occupier of the land or structure on which the plaintiff receives his injuries when he has no right to be upon it, there can be an obligation of care on the part of the defendant which is larger than the duty of an occupier towards a trespasser where no other factors are

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(continued)

present. The precise extent of that obligation need not presently be expressed; though, as their Lordships point out, the nature of the relationship must be defined with reasonable precision. The importance at the moment of the endorsement of the decision in Thompson's Case is, in my opinion, that the occupier defendant was liable to a trespassing plaintiff, because, presumably, the relation of occupier and trespasser was not the relevant relationship of the parties. To use their Lordships' expression, the relation of occupier and trespasser had been "displaced by 'some other relation'" so far as it was necessary to consider whether a duty to the person trespassing had not been performed. The parties had not ceased in fact or in law to be occupier and trespasser in relation to the pole but that relationship did "not bear upon the situation of the parties" in connection with the injury received. No doubt the proximity of the pole to a public place assisted to justify the conclusion that the state of the electrical wiring was a danger to humans and perhaps also assisted the conclusion that the Council ought to have expected the presence of people at or about the pole. It did not establish either the Council's knowledge or expectation of the presence of the plaintiff on the pole.

Of course, whilst the relationship of occupier and trespasser is the relevant relationship, the obligation of an occupier can not be enlarged by supposing some co-existing relationship. That other relationship must "displace" that of occupier and trespasser so as to be the relevant relationship. In my opinion, it was because their Lordships thought Sir Frank Kitto to be attempting to extend the duty of an occupier whilst treating the relationship of occupier and trespasser as the relationship relevant to the receipt of injury, that criticism was offered of what he had written in Thompson's Case. See the report of Quinlan's Case pp. 1080-1081. But, with due respect, I think this a misreading of what Sir Frank Kitto said. As I read the passage in question from Thompson's Case, the case supposed was one in which, again to use their Lordships' language, the relationship of occupier and trespasser, though of course continuing in fact, was "displaced" by the other relationship derived in

all the circumstances from the nature of the thing, activity, or situation brought or created by the occupier and the expectation of the presence of the injured person or of a group or class of persons of whom he was one. The emphasis by their Lordships on the difference in the facts of the two cases confirms me in my conclusion that the reasons given in Quinlan's Case do not deny the possibility of a person who is an occupier coming under a duty towards a person who is a trespasser different from the duty expressed in Addie's Case, if the relevant relationship of the parties is not simply that of occupier and trespasser. If the plaintiff can sue the defendant only in his capacity of occupier and because he is the occupier, Addie's Case, as currently expounded by the Privy Council, will determine the existence and extent of any duty to the plaintiff. But that proposition does not deny that in relation to injuries received or damage done there can be another relationship which determines the rights of the parties.

Thus, whilst in Quinlan's Case there was a refusal to enlarge the duty of a person who was no more than an occupier towards a trespasser beyond those traditionally expressed in Addie's Case, room was left to displace the relevance of that relationship of occupier and trespasser by another relationship which grew out of the demands of humanity. The bringing of a lethal substance into the proximity of persons expected to be present does suggest a relationship which in common humanity calls for the imposition of a duty of care. It is the high potential of danger to humans or to a class or group of humans which, it seems to me, excites humanity in the circumstances. Of course, to speak of a high potential of danger is to introduce questions of degree. But that is no novelty in the development of the common law, particularly in the area of negligence. Nor, in my opinion, does it lack precision, either in expression, or in its possible application. The range of substance and of situations which will qualify as having a high potential of danger to humans will, perhaps, extend as technology advances. Their identification by the Courts is not a task of a kind to which they are unused. Whether or not a high as distict from some lesser degree of danger will always be essential need not now be decided: for in this case the voltage

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carried by the uninsulated transmission line was lethal.

It is noticeable that in Quinlan's Case, there seems to have been some recognition of the fact that a highly dangerous situation might have to be fitted into the "Addie" formula. Thus, the result in Cardy's Case is, at one time, attributed to a callousness to be treated as wilful or intentional vis a vis the trespasser. So to relax the apparent rigidity of the "Addie" formula by its generous application would seem to me to introduce undesirable imprecision and uncertainty. On the other hand, to displace a relationship of occupier and trespasser by a relationship deriving from the highly dangerous thing, substance or situation brought or created upon the land is, in my opinion, in line with the development of the common law, and the place the criterion of common humanity has so far taken in denying irresponsibility of an occupier towards a trespasser.

Once the relationship of occupier and trespasser is displaced as the relevant relationship one is not limited, in my opinion, to the requirement of actual knowledge of the presence of the trespasser, or of its equivalent. That requirement is of the essence of the Addie formula. The displacing relationship, stemming from the highly dangerous thing, substance or situation, depends, it seems, on the proximate presence of the person likely to be injured by that thing, substance or situation. Thus, the expectation actual or imputed of that proximate presence on the part of the occupier bringing the thing or substance or creating the situation on the land seems logically to be the remaining element in the creation of a duty. If the source of danger is proximate to a public place the nature of that place may provide the expectation of the presence there of persons to whom the thing, substance or situation is likely to be injurious. If the source of danger is proximate to a place where persons are known to resort, though not a public place, again that place may provide in the circumstances the necessary expectation. But clearly, these are not the only instances, or types of instance, in which an expectation of the presence of persons can be attributed. That expectation can be concluded in many other factual situations. In Munnings v. The Hydro Electric Commission (supra) the use of the

adjacent land as a playground to the knowledge of the Electricity Authority's officers was enough in that case to infer the necessary expectation of the presence of people such as the plaintiff. In British Railways Board v. Herrington (1972) 2 W.L.R. 537 (Herrington's Case) the position of the railway line between two meadows where children were known to play apparently was enough to justify the conclusion that the presence of children on the railway premises was to be expected if no adequate fence was maintained.

The question in this case, granted the creation by the respondent of the situation highly dangerous to humans, or to a group or class of them, is whether the presence of the children on the back shunt in the proximity of the transmission line was to be expected by the respondent. If it was, the displacing relationship, in my opinion, would arise and the respondent would owe a particular duty of care for breach of which an action could be maintained. The expectation as I have indicated can, in my opinion, be actual or imputed from the facts and circumstances of the case.

I am inclined to think that, because the duty to one's neighbour is styled a general duty of care, it is likely to be thought too large to impose upon a defendant who is an occupier but who has assumed the relationship stemming from the creation of a highly dangerous situation. That duty, in my opinion, would appear to be more specific and limited, namely, to take reasonable steps to prevent harm ensuing to the plaintiff from that dangerous situation as, for example, by adequately maintained fencing, or to enable him to avoid that harm as, for example, by providing a warning. So stated, I realise the duty in the circumstances is little, if at all, different from the acts required of a person who was not an occupier but otherwise in the same circumstances. Of course, the particular acts for which the performance of such a duty may call will vary with the circumstances. The ability of the occupier creating the danger to minimise or avert its consequences will be one of those circumstances. But here no such questions arise. The respondent created the situation. It was aware of its potential for serious harm and it had ample resources to have coped with the situation. It did nothing.

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At this point I should like to say something of the recent decision of the House of Lords in Herrington's Case. I have been favoured with a print of their Lordships' reasons. I am not at liberty, of course, to prefer that decision, or their Lordships' reasons therefor, to the decision or reasons in Quinlan's Case. Nor may I treat the decision of the House of Lords as qualifying or in any part overruling Quinlan's Case. But, as I read their Lordships' reasons, they did not regard their decision as inconsistent with Quinlan's Case. Thus, a brief discussion of Herrington's Case as illustrative of the limits of Quinlan's Case is not out of place.

It was decided in Herrington's Case that the operators of a railway service by means of a third electrically activated rail at ground level came under a duty in the circumstances to maintain a fence between their property on which the rails were laid and the area of land adjacent thereto on which children were known to play. A fence placed by the railway operators on the boundary of their land having been allowed to fall into disrepair, a child stepped through or over it, reached the live rail and was injured thereby. There was really no evidence on which it could be held that the railway operators knew that the child was on their property or that children were coming upon that property at the place where the child was injured. There was some evidence that those operators had knowledge that children had come on to the railway line at some other point which, as far as I can see, was unrelated to the area in which the injury was received.

The child was a trespasser on the railway operators' land. There was no question of allurement or permission, actual or inferred. Yet a verdict for the child was sustained. It was sustained, as it seems to me, because the placement of the live rail at ground level on insecurely fenced land created a highly dangerous situation for humans or at any rate for the group or class of them of whom the child was one. Consequently, the railway operators, in the circumstances, came under a duty to take reasonable steps to avoid injury to those whom they should expect to come upon their property if it were unfenced. This is not the place for a discussion of the various

speeches of their Lordships in support of the result I have mentioned. But none of their Lordships, though of course not bound by it, seems to me to regard the reasoning of Quinlan's Case as standing athwart his path to that conclusion. Consequently, I find nothing in their speeches to lead me to think that I am in error in thinking that Quinlan's Case does not deny the possible existence of a liability in the respondent to the appellant in this case, treating the appellant as a trespasser, any question of allurement apart.

Having regard to the close similarity in their essential structure of the facts in this case to those in Cardy's Case, it may be possible to resolve this case by treating it as precisely covered by the decision in Cardy's Case, the result of which was accepted in Quinlan's Case. But I am not prepared to do so. Further, it may be possible to conclude that the failure of the respondent to do anything to avoid injury from contact with the bare electrically charged wire to persons whose presence at the site of the accident to the appellant ought to have been expected was "so callous as to be capable of constituting wanton or intentional harm" within an unqualified application of the principle laid down in Addie's Case. But I am not prepared to so resolve the case, though it might be possible to regard the respondent's inactivity in the matter as reckless, I would not so hold.

In my opinion, the relevant relationship of these parties was not necessarily that of occupier of land and trespasser thereon. It could be held to be the relationship of a person who had created on his land a situation highly dangerous to mankind and a person whose presence on the land was expected or to be expected by the creator of the situation. The question whether, on the evidence, the presence of the appellant at the point of danger was to be expected can be dealt with as I deal with the question whether there was any evidence that the appellant was at that place with the permission of the respondent, a matter pertinent to the first count of the appellant's declaration and to which I now turn. If there was such evidence, clearly there was evidence on which it could have been held that the appellant's presence on the land at the particular location was to be expected.

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I should observe at the outset, in this connection, that there is a difference between liberality in finding that actual, though inferred, permission has been given and imputing a permission which was not in fact given. I do not regard the latter in any case as warranted. Ample warrant for the former is to be found in the facts of the decided cases.

I think there was evidence from which the jury could conclude that the children of the respondent's employees, living in the "company" village in its remote situation, were free, so far as the respondent was concerned, to play on any part of the platform or its slopes, putting aside for one moment the new slope at the back shunt, except the actual quarry workings: and that they did so to the knowledge of the respondent through various of its employees. Further, the evidence, in my opinion, would have warranted the conclusion that the children were free to cross the platform in order to reach the places on Cooper's property, the property on the west of the respondent's property, which for present purposes may be regarded as their playground, both granny's castle and the rabbiting area; also that they were free to cross the platform to attend to the goats. Apart from the quarry workings and the proximity of the power line to the extended platform there would seem, so far as appears, to have been little danger to children using the platform. It may be thought natural for the children in such a remote place to play on and around the platform, either as an occupation for its own sake or as incidental to crossing the platform to reach granny's castle, the rabbiting area or the place where the goats were tethered. Indeed, in my opinion, it might be thought to be something to be expected of them. It could also be concluded that it would be natural for children to wander upon the platform as they made across it. The "sandhills" as the children rather illuminatingly called the slopes of the platform, could be thought to be readymade playgrounds in the circumstances in which these children found themselves and likely to attract them to play upon them in the way in which children, according to the evidence, did in fact play, that is to say, by running up and down them or rolling stones down them or tobogganing down them with an improvised toboggan made of corrugated

iron. The attractiveness of these "sandhills" for these purposes was at its greatest when the material had been newly tipped over the edge. Probably they lost their attraction progressively as the face of the batter became hardened by weather and gullied by rain. There was no reason, which I can appreciate, why the "sandhill" on the western side of the platform should be any less attractive to the children as a play area than one on the eastern side. No doubt the latter would be more proximate to the village but the other would be more proximate to the playing areas in Cooper's property, granny's castle and the rabbiting ground. And it might be thought that the newer slope was more attractive to the children than a weathered slope. Of course, the fact that prior to the relevant time they had not played on or around the back shunt is a fact for consideration but not a conclusive fact.

The absence of fences, the position of the platform between the village and the places to which the children went to play or to attend to the goats kept by their parents, the isolated nature of the whole situation, the nature of the platform and its marginal batters, the knowledge that the children did play on the platform and its batters, and did cross it to go to granny's castle, the rabbiting ground and the place where the goats were tethered, all furnish evidence, in my opinion, from which it could be inferred that the respondent acquiesced in the use by the children of the platform and the batters for play and for passage to and fro their other playing grounds, that is to say, there was room on the evidence to infer, as distinct from impute, permission on the part of the respondent for the children to do these things.

The evidence would be sufficient, in my opinion, to enable the permission to be inferred as extending to the batters on the western side of the platform including the batters newly formed in the course of extending the back shunt. Indeed, I can see no ground upon which it could be said that if there were permission to use the platform for play and for passage that any part of it must be held to be excluded from the permission, with the exception of the working areas of the quarry. If it were concluded that the respondent had given permission to the children to play and

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to pass over the platform and its batters, its duty to its permittees, at the very lowest, could in this case attract liability for the subsequent injury to the child. The situation of great danger was one not appreciable by the children and certainly was one into which they could stumble by inadvertence in the course of play. The danger in general was known to and appreciated by the respondent. Therefore, there was evidence, in my opinion, to support the first count which ought to have been submitted to the jury.

But even if permission thus to use the platform is not inferred, there is, in my opinion, evidence on which it could be found that the respondent, having regard to the nature and extent of the danger, ought to have expected the children to come within its range, particularly if the attractiveness of the newly formed batter on the western side is accepted as a fact. I include the nature and extent of the danger in this conclusion because these features call for thought to be given to the question whether persons are likely to be injured by it. In my opinion, the so-called "allurement" of the "sandhills" may be taken into account both in deciding whether or not permission was given to use the platform and its batter and whether or not the presence of the injured person, or of the class of whom he formed one, ought in all the circumstances to have been expected at or about the place where the appellant received his injury.

In my opinion, an allurement on the occupier's land does not itself give rise to a cause of action if it leads a child to trespass, though it might be said that in explaining their acceptance of Cardy's Case their Lordships might seem to regard the allurement, if the ashtip became effective in that respect, to have given a right of action. As I remarked earlier, the appellant's pleader seems to have taken such a view, for the third count, and indeed the summing up, is founded mainly on the allurement of the place where the appellant sustained injury. However, holding the opinion which I do, I would not support the third count as drawn or as treated by the trial judge in summing up. The trial judge, in the portion of his summing up which I have set out, expanded the count, though still leaving the allurement as the source of a

duty to protect the children who might be allured to the situation of danger.

But the matter does not end there. After verdict, bearing in mind the summing up, it must be taken that the jury found that the respondent had created a situation of danger on its land. That situation was the proximity of the surface of the batter of the platform to the uninsulated high voltage transmission line. That situation of danger could only be regarded as highly dangerous to human life and safety. Then, the jury must be taken to have found that the respondent knew of the existence and dangerous quality of what they must have concluded as a concealed trap as far as children were concerned. Further, because the place of the danger was attractive to children seeking their amusement in the remote area where they lived, and having regard to the terms of the summing up, the jury must have concluded that the respondent must have known that it was likely that children would be attracted to the place of danger. In my opinion, that finding in the circumstances of the case is the equivalent of a finding that the presence of the children in the area was to be expected by the respondent. Upon the possible view of the facts, which I have already indicated, there was, in my opinion, sufficient evidence to support such findings. They are sufficient, in my opinion, to support a verdict against the respondent on the footing that, having created a situation highly dangerous to human life, the proximate presence of children was to be expected by it, with the consequence that the respondent owed the appellant a duty to take reasonable steps to prevent the appellant suffering injury by that highly dangerous situation. If there was any duty, there can be no question that the respondent failed to perform it.

Therefore, because of the findings inherent in it, and upon the basis I have indicated, I would not disturb the verdict of the jury. A comparable course taken in Cardy's Case does not seem to have excited criticism in the Privy Council in Quinlan's Case.

In my opinion, the appeal should be allowed and the verdict of the jury restored.

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REASONS FOR JUDGMENT OF McTIERNAN J.

McTIERNAN, J.: In my opinion the appeal should be allowed and the verdict of the jury on the third count should be restored. It is said by the count: the defendant was the occupier of premises and there was on them a pile of rubble which was alluring to children and such as was likely to induce the presence on the said premises of children and the plaintiff was a child who was on the said premises and was allured by the said heap of rubble and thereupon the defendant by itself its servants and agents was so careless negligent and unskilful in and about allowing the said pile of rubble to be in close proximity to a high tension electricity line that the plaintiff sustained the injuries and suffered the damage more particularly set out in the first count hereof. The salient features of the evidence before the jury are stated by the Chief Justice in his judgment. The trial judge gave directions to the jury as follows: "The company (respondent) was the occupier of the quarry premises; the plaintiff (appellant) is a boy of thirteen, who was on the premises and was injured by a condition of a part of the premises. The duty owed by the occupier of premises to a boy who is on the premises without any legal right to be there is well established, and the plaintiff must show a breach of this well established duty. The occupier of premises is bound by a duty to take reasonable care to protect children from risk to which they are exposed by a dangerous condition of part of the premises if that part of the premises constitutes an allurement to children to enter on to the premises and approach that dangerous part. The part must be dangerous in the sense that it is a concealed danger of a trap. Its existence and dangerous quality must be known to this occupier of the premises and unknown and not obvious to the children. Further, it should be known to the occupier that there is a likelihood that there will be in or near the premises children who will be subject to the allurement and who will in fact be allured by it. The word 'allurement' is a traditional word. What is a thing that is alluring to children? - something that is attractive to children, something that attracts them to approach

it and perhaps play about it or approach it in any other way .... It was a small isolated sort of place, and yet there were a number of school children there who, at week-ends, sought their amusement as best they could. Then there were the physical features of the quarry itself. There was the fact that on week days - and very often on Saturdays - production was taking place, and even on Sundays there may be maintenance going on. Then you have the background of the evidence - if you accept it - that the schoolmaster, and indeed officials of the company, from time to time warned children of dangers inherent in the village and on the works, and also - if you accept it - that children were quite often warned to keep away from the premises, and indeed ordered off the premises. It is against that background and the background of the evidence also, that on Sundays, despite these prohibitions, children - being children and apt to the sin of disobedience - wandered on to the premises either to cross over them or to play on them and that, if you accept the evidence again, that there was an attraction in what has been called the dumps where waste material is put in with the heap in such a way that slopes were formed and the children, again if you accept the evidence, liked to play on these slopes, rolling stones down them, running up and down them or using pieces of steel in such a way that they could indulge in the sport that is called tobogganing. I do not know how much of this evidence you accept and how much you reject, but undoubtedly you must accept part of it, on one view that has been put to you. It is your duty now, against that background to examine what I have put to you. The occupier of premises is bound to take reasonable care. The law is not so unreal as to demand of any human being or institution perfect care; but having regard to all the circumstances, the duty is to take reasonable care and a failure to take reasonable care is a breach of that duty and is called - as I have already told you - negligence. The occupier is under a duty to protect children. This duty of care, in the circumstances of this accident, is only in favour of children. Because it is considered - and you might think realistically so, - that children, being children, might be lured or attracted on to premises where they have no right to be, where an adult would not be so lured or attracted, or if there were an

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allurement or attraction he would be expected to reject that allurement or attraction. Did this slope constitute an allurement? You have heard the arguments of Mr. Loveday (for the plaintiff) on this point. He said that in this village at that time, the children, on the evidence he asks you to accept, did like to play and were attracted to these slopes, to use them in the way the evidence indicates .... The part of the premises must be dangerous in the sense that the danger was a concealed danger; that it constituted, in effect, a trap. Well, on this matter Mr. Loveday asks you to say without any great hesitation that the presence of an unguarded uninsulated electric wire carrying 33,000 volts within four or five feet of a slope, which he claimed was an allurement to children, was clearly a trap and a concealed danger. There were no warnings, no guards, and the wire was in easy reach of any person who was playing on this slope - any children - I should say, who were playing on the slope, and as I understand it, Mr. McGregor (for the defendant) did not advance any arguments to the contrary. Then its existence and dangerous quality must be known to the occupier. Here, Mr. Loveday put to you that this danger must have been known to the occupier; it was on the defendant's own premises and the danger had been created by the activities of the company in dumping soil to the extent that the edge of the soil on the slope was brought so close to the wire that employees of the company engaged in the very operation must have known of the existence and the quality of the danger. He asks you also to accept the evidence of Mr. Cosgrove, that it was an estimated five feet from the slope for quite a period before. And if you do not accept that evidence, he asks you to accept the evidence of Mr. Howard, the mine superintendent, who recognised the potential danger, but that according to Mr. Howard it was not five feet from the slope but a considerably greater distance away from the slope on the Thursday, and he took immediate steps to have that wire removed. Unfortunately, the wire was not removed before the Sunday, when the plaintiff came in contact with it. Mr. McGregor asks you to say that in all the circumstances the knowledge of the danger was not to be imputed to the company because something went wrong after the Thursday when the danger was only potential and not actual, and that the company had, through its officers and servants

and employees, really no knowledge that the wire was so approximate to the edge of the slope. The other matter is - and this again, I think, is one of those obvious matters that Mr. McGregor made no submissions about - that the danger must be unknown and not obvious to the child. Well, you have heard the description of the situation, and you might think a child of thirteen would not appreciate that the wire hanging in proximity to the edge of a slope was a potentially lethal wire. Then, as I told you, it must be known or at least be foreseeable and foreseen by the occupier that there was a likelihood that there would be in or near the premises children who would be subject to the allurement that existed on the premises. Again, it is idle to give illustrations of other situations. You bear the situation in mind here of the village, its locality: its proximity to the works and all the other evidence about how children had conducted themselves in and about and near these premises over the week-ends for years before the accident. And also, as I told you, it must be foreseeable by the occupier that this part would be an allurement to children. Again you find the danger of becoming repetitive. You have the evidence - if you accept it - that children did pass over or go to various spots on the works premises; and you have the evidence that on other dumps children did play, whether they were tobogganing or rolling stones or doing other things. So much depends on what you find the situation to be. But to whatever you find the situation to be you apply the principle I have given you and you ask yourselves: 'Has the plaintiff established - in the way I indicated - that he met with his injury as a result of the breach of duty on the part of the defendant?' If you are not so satisfied, the verdict is for the defendant". There was evidence on which the jury could find for the plaintiff on every allegation made by the third count.

The reasons of Asprey J.A., and of Holmes,J.A. also, for deciding that the verdict of the jury on this count should be set aside were that the plaintiff or any other boy with whom he was playing had no licence or permission to be at the place where the accident happened. Their Honours took the view that there was no evidence fit for the jury to consider that the permission which children living in houses on the premises had to roam over

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the premises, extended to the place where the accident happened; and further, they took the view that evidence adduced for the company showed that such permission did not extend to the place where the accident happened. Taylor A.J.A. took the view that there was evidence on which the jury could reasonably find, if the issue had been left to them, that the scope of the permission enjoyed by the children to ramble over the premises would have extended to the place where the accident happened. I agree with Asprey J.A. and Holmes J.A., so far as this question is concerned.

A second reason why Asprey J.A. and Holmes J.A. decided that the verdict of the jury on the third count could not stand was that the trial judge did not give to the jury any direction in accordance with the formulation, in a passage in the judgment of the Judicial Committee in the case of Commissioner for Railways v. Quinlan [1964] A.C.1054, at p.1084 (hereinafter referred to as Quinlan's Case), of a principle so far as it is expressed to be applicable to children. The passage is as follows: "If on the evidence a plaintiff is a trespasser, a person present without right or licence, the occupier's duty to him is determined by the general formula as laid down in Addie's Case. That formula may embrace an extensive and, it may be, an expanding interpretation of what is wanton or reckless conduct towards a trespasser in any given situation, and, in the case of children, it will not preclude full weight being given to any reckless lack of care involved in allowing things naturally dangerous to them to be accessible in their vicinity".

The summing up of the trial judge in the case, the subject of the present appeal, does not use the words "reckless lack of care" in relation to the issue raised (by the third count), namely, that the defendant allowed the "pile of rubble to be in close proximity to a high tension electricity line".

The count contains no categorisation of the plaintiff other than he "was a child who was on the said premises". In referring to Commissioner for Railways (N.S.W.) v. Cardy (1960) 104 C.L.R. 274 (hereinafter referred to as Cardy's Case), the Judicial Committee said in Quinlan's Case, at p.1083,

"Their Lordships do not demur at all to the decision that was come to in this case". They continued, "A boy of 14 sustained grievous injuries by burning from sinking his feet through the crust of an ash-tip, which contained a mass of red hot material. A pathway that was freely used by pedestrians ran along one side of this tip, and people, particularly children, frequently visited the tip despite 'casual and intermittent warnings' by railway servants. It was held that the defendant was liable in damages to the injured boy. The circumstances seemed to place the case squarely among those 'children's cases,' in which an occupier who had placed a dangerous 'allurement' on his land is liable for injury caused by it to a straying child. In any accepted use of the word the ash-tip, with its burning interior, was a 'trap' or an 'unusual and hidden danger.' A considerable portion of the court's full and learned judgments is devoted to the question whether it was necessary or possible to describe the boy, playing on the surface of the tip, as a licensee, and their Lordships are at one with Dixon C.J. in his exposition of the unreality of this description as applied to children in several previous authorities. Nor, as he says, is it necessary to resort to this categorisation to give them the legal remedy that is felt to be their due. Children's cases in this context do unavoidably introduce considerations that do not apply where the sufferer of injury is an adult. What is allurement to a child and, being so, imposes by itself a measure of responsibility, is not an allurement to an adult: and those conceptions of licence or permission, which may be highly relevant for the determination of the adult's rights, are virtually without meaning, at any rate as applied to small children".

The term "a straying child" seems to me to be an apt description of the plaintiff in the present case, when he was at the place where he was injured, if he could not be described as a licensee or permittee.

In Cardy's Case, at pp.288-289, it is said: "The respondent" (the boy Cardy) "and a brother aged twelve years went through an entrance on the southern boundary, which the jury could find was always open, and proceeded by a road into the land

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from which a path led in the direction of the dump area. They strayed from this path to the heap of ashes and rubbish and went up its steep side, which was ten feet high. As stated above, when the respondent was scrambling down that side of the heap his feet sank into hot ashes beneath the surface and were badly burned. Only the respondent was injured. Neither the dump area nor the heap itself was fenced, and it was, on the evidence, easily accessible, over vacant ground, from the path. The jury could find that there was nothing in the appearance of the heap of ashes and rubbish which the boys climbed to indicate that beneath its surface there were hot ashes. The appellant conceded in argument that it was possible that the ashes which burned the respondent's feet were hot when deposited by its workmen on the heap. If the jury considered that the tacit permission to enter and walk over the land extended to climbing this heap they could find that the appellant did not take the proper measure of care due by an occupier to a licensee to protect the respondent from the danger he encountered. But I would not go as far as holding that a grown-up person, even though he could claim that he had tacit permission to walk about the dump area, could also rightly claim that the permission extended to climbing the heap of ashes and rubbish on which the respondent was injured. In my opinion, the verdict can be sustained on the basis that the respondent was not a trespasser on the land and the heap of ashes and rubbish was an allurement to a boy of his age. It is well-known propensity of boys of the respondent's age to go up a bank, heap or mound which is at a place where they come to play and is accessible to them. This heap was not a natural formation of ground but an artificial construction on the land and it could be an allurement in the legal sense for children. In my opinion, it was clearly open to the jury to find the respondent followed instincts, generally natural to boys of his age, by going up the side of this heap of ashes and rubbish on which he was injured".

In my opinion the passage referring to Cardy's Case, quoted above from the judgment of the Judicial Committee in Quinlan's Case, has an impact on the case of Robert Addie and Sons (Collieries) Limited v. Dumbreck [1929] A.C. 358 (Addie's Case), as a source of the common law to be applied in Australia in order to decide a case in which a

child sues an occupier on a cause of action analogous to that pleaded by the third count of the plaintiff's declaration in the present case. In Addie's Case [1929] A.C., at p. 376, Viscount Dunedin said: "The truth is that in cases of trespass there can be no difference in the case of children and adults, because if there is no duty to take care that cannot vary according to who is the trespasser. It is quite otherwise in the case of licensees, because there you are brought into contact with what is known as trap and allurement ... but obviously what is allurement and a trap to a child is not so to an adult ...." "In the present case" Viscount Dunedin continued "had the child been a licensee I would have held the defenders liable; secus if the complainer had been an adult". In my opinion it follows from the approval of the Judicial Committee in Quinlan's Case of the decision of the High Court in Cardy's Case that the plaintiff in the present case was entitled to recover damages against the defendant company on proof of the allegations in the third count, even though he could not be categorised as a licensee or invitee but could be categorised as a trespasser, if it were permissible to resort to categorisation in the case of a boy of the plaintiff's age.

As regards the omission from the summing up of the words "reckless lack of care" (see passage quoted above from Quinlan's Case, at p.1084), this omission, in fact, resulted in misdirection of the jury. If the directions to the jury, suggested by counsel for the respondent, as being prescribed by that decision had been given to the jury, I think it would be right to presume they would have found as they did for the plaintiff on the third count. It appears from the judgment of their Lordships in Quinlan's Case, at pp.1086-87 that they anxiously considered whether "it is right that this unhappy litigation should be further prolonged by an order that the action should be tried once more. On the first occasion the respondent obtained a verdict on the ground that he entered on the crossing as a licensee, that this verdict was upset on appeal because there was no evidence of any such licence. On this occasion he has obtained a verdict on the ground that, though he was himself a trespasser, the appellant had sufficient notice of the likelihood of his presence to owe him a duty of care,

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which was breached by the locomotive engine not giving sufficient warning by whistle before it approached the crossing". Having regard to the evidence in the instant case of the means of ingress available to straying children, into the place at which the accident happened and the circumstances of the accident, I think that justice requires that the verdict on the third count be restored rather than that a new trial of that count be had.

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REASONS FOR JUDGMENT OF MENZIES J.

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MENZIES, J.: The appellant is an infant who was thirteen years of age when, on Sunday, 30th July 1967, he suffered the very severe injuries which gave rise to the proceedings in which this appeal arises. He was electrocuted when, in some unexplained way, he touched a high tension electric cable suspended from poles at a height of about five feet above the rear slope of an artificial sand hill upon the defendant's property at South Marulan. This sand hill carries a railway line which forms a "back shunt" down which railway trucks can move by the force of gravitation to bins to which limestone is carried by elevators after having been quarried and crushed. The sand hill and back shunt form, therefore, part of the defendant's works for the convenient loading of limestone into railway trucks for transport from South Marulan.

South Marulan is a country township established by the defendant for the purpose of its business. In addition to the defendant's works there are there 35 to 40 houses, a school, a store and some recreational facilities. Electricity is brought to the area from the electricity undertaking of the Southern Tablelands County Council.

The defendant, in 1967, was in the course of extending the back shunt by tipping sand or "fines" from motor trucks down the rear of the sand hill. In doing this the level of the sand hill was raised under a power line carrying 33,000 volts. The poles originally carried the power line some 20 feet above the ground surface below it but the

management had noti□ed that with the extension of the back shunt the new slope had become dangerously close to the power line and had prohibited further tipping at that place. To discourage tipping piles of fines had been left at the top of the slope. Arrangements were also being made for the relocation of the power line and this would have been carried out during the week following 30th July 1967. Despite the prohibition against further tipping some employee of the defendant had, a day or two before 30th July, pushed the fines, forming the heaps at the top of the slope, down the slope and under the power line, thus bringing the power line to within easy reach of a person upon the slope at the point where the accident occurred. Unquestionably this created a situation of extreme peril for anyone upon the slope in the vicinity of the power line. The peril was, of course, the greater for any such person who was not aware that the power line was carrying electricity at high voltage.

The plaintiff is the son of an employee of the defendant who lived in one of its houses at South Marulan. On the afternoon of Sunday, 30th July 1967, the plaintiff, in company with some other boys, went to the back shunt to play. It was while he was playing there that the plaintiff was electrocuted by contact with the power line.

Although it would be going too far upon the evidence to say that it could be found that boys like the plaintiff had the free run of the defendant's land at South Marulan, there is evidence to support the conclusion that they were accorded a good deal of freedom. This was necessarily so. South Marulan was the home township of those who lived there; they were on the defendant's land when they were in their houses; they stepped out of doors on to the defendant's land; they were upon the defendant's land when at school, when shopping, when visiting one another, when playing around their homes. Precautions were taken, including the giving of warnings at school about keeping away from the works, and from time to time boys had been ordered away from various places. There was some evidence that the back shunt was one of the places that was out of bounds and there was no evidence that it was a place at which boys were wont to play. The plaintiff's own evidence was that he had been

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only once on the back shunt before 30th July 1967 and that was on the previous day. There was no evidence that the defendant's management knew that the back shunt was a place where boys did, or were likely to, resort. There were, however, no notices warning against going on to the back shunt or of the danger constituted by the low hanging power cable. Furthermore, the back shunt did adjoin an area outside the defendant's land where boys were accustomed to play. There was evidence that boys did slide down other slopes upon the defendant's land that had a gradient like the rear of the back shunt but were less suitable for sliding, for, while the other slopes were weathered and hard, the rear of the back shunt was fresh and soft.

The plaintiff sued in a number of counts, three of which are of significance upon this appeal. Of these the first was as a licensee upon the land of the defendant occupier for breach of duty as a licensor; the second was as a trespasser upon the land of the defendant occupier whose presence was known to the occupier and who was injured by reckless disregard of his safety; the remaining count was as a child allured by the defendant occupier to the rear of the back shunt which was highly dangerous by reason of the negligence of the defendant in allowing the line carrying electricity at high tension to be within range of a person upon the slope.

The learned judge at the trial took from the jury the first and second of the counts which I have just mentioned. The first on the ground that there was no evidence that the plaintiff was a licensee. The second on the ground that there was no evidence that the defendant had recklessly disregarded the safety of persons upon the rear slope of the back shunt. The remaining count (which I will for convenience call "the Cardy Count" for it was clearly enough based upon the decision of this Court in Commissioner for Railways (N.S.W.) v. Cardy (1960-61) 104 C.L.R. 274) was left to the jury who returned a verdict for the plaintiff for $56,880. The defendant appealed against this verdict; the plaintiff cross-appealed alleging error on the part of the learned trial judge in holding (1) that there was no evidence upon which the jury were entitled to hold that the plaintiff was a licensee of the defendant, and (2) that there

was no evidence that the defendant had been guilty of reckless disregard of the safety of the plaintiff, and in taking these counts from the jury. The Court of Appeal of the Supreme Court of New South Wales allowed the appeal and set aside the verdict and dismissed the cross-appeal. The plaintiff has appealed to this Court against both orders and seeks the restoration of the verdict in his favour, or, alternatively, a new trial of the action. I propose to consider first whether the jury's verdict upon the "Cardy" count should be restored. For the purposes of this consideration it must be accepted that at the time when, and at the place where, the plaintiff suffered his injuries he was a trespasser upon land occupied by the defendant.

Recent decisions of the House of Lords, the Privy Council and of this Court relating to claims by trespassers against occupiers of land for injury suffered thereon have all proceeded upon the footing that Robert Addie and Sons (Collieries) Limited v. Dumbreck (1929) A.C. 358, which established the law governing the duty owed by a person as an occupier of land to a trespasser upon that land, is still applicable. The rule is, in short, that the trespasser goes upon the land of another at his own risk; an occupier is under no duty to protect a trespasser; the only duty owed by an occupier to a trespasser is not to injure him intentionally or to act recklessly or culpably, giving no thought to his safety. That this is still accepted as the law is evident from Cardy's case. See the statement of Dixon C.J. at p.286. "The rule remains that a man trespasses at his own risk and the occupier is under no duty to him except to refrain from intentional or wanton harm to him". See too Windeyer J. at pp.318-319. This is recognised too in Commissioner for Railways v. Quinlan (1964) A.C. 1054 at pp.1072-1074, and British Railways Board v. Herrington (A.P.) (1972) 2 W.L.R. 537 per Lords Reid and Wilberforce. Nevertheless, despite recognition of the binding force of the decision of the House of Lords in Addie's case, the decisions in Cardy's case and Herrington's case would indicate that there has been some further development. Otherwise neither case could have been decided as it was. In each case an occupier of land was held liable in negligence to a child who was trespassing on the defendant's land without

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any finding that the injury suffered was caused intentionally or recklessly. It seems to me that these decisions of necessity import the existence of some duty of care owed by an occupier of land to a trespasser in some circumstances. The problem, as I see it, is to define this duty.

Perhaps there is advantage in starting with some negative propositions.

The first is that the law does not impose upon an occupier of land a higher duty towards a trespasser in circumstances that the occupier is aware that trespassing is likely, than is owed to one whom the occupier knows to be trespassing. To do this would be absurd. If an occupier of land is shooting across his own land at a target which he has erected and he sees a trespasser upon his land he is not entitled to make the trespasser another target, i.e. to harm him intentionally; or recklessly to fire at his target when the trespasser is seen to be in the line of fire, i.e. to act recklessly towards, or with culpable disregard of, the known trespasser. If, however, the person is trespassing unbeknown to the occupier and happens to get into the line of fire and is shot, the occupier is under no wider duty whether or not he knew that persons were likely to trespass on his land. If he had no reason to think that trespassing was likely it would be difficult to prove recklessness or culpability; if he did know of this likelihood, the general rule is that recklessness or culpability would still have to be found in order to establish liability to the trespasser. The mere likelihood of trespass cannot, therefore, impose a higher liability upon an occupier of land to an unknown trespasser than that which is owed by an occupier to a known trespasser. This was stated by Bramwell B. in Degg v. Midland Railway Company (1857) 1 H. & N. 773 at pp.780-782 in a passage approved in Commissioner for Railways v. Quinlan (supra) at pp. 1071 and 1072. See too at p.1085.

Secondly, an occupier does not owe a trespasser what may be described as a general duty of care as formulated in Donoghue v. Stevenson (1932) A.C. 562 at p. 580, whether or not the occupier knows of the trespassing. See Cardy's case per Dixon C.J. at p. 286; Quinlan's case at pp. 1070,

1078, 1081 and 1084; and Herrington's case where Lord Morris said, at p. 556, "... it cannot be said that the Railway Board owed a common duty of care to the young boy in the present case ..."; and Lord Wilberforce said, at p. 564, "There is no principle ... to be deduced from Donoghue v. Stevenson which throws any particular light upon the legal rights and duties that arise when a trespasser is injured ..."; and Lord Pearson said, at p. 573, "... the unknown and merely possible trespasser is not a 'neighbour' in the sense in which that word 'neighbour' was used by Lord Atkin in Donoghue v. Stevenson, and the occupier owes to such a trespasser no duty to take precautions for his safety". Earlier in Grand Trunk Railway Company of Canada v. Walter C. Barnett (1911) A.C. 361 at p. 370, Lord Robson for the Privy Council emphasized the difference between an absence of reasonable care and "a wilful or reckless disregard of ordinary humanity". Later cases have given no countenance to approximating these different duties.

Thirdly, the clear distinction which the law makes between the duty of an occupier of land to one who is a licensee upon that land, and to one who is a trespasser upon that land, is not to be blurred either (1) by using adjectives such as "bare" licensee or "pure" trespasser. See Addie's case per Viscount Dunedin at pp. 371-372, or (2) by the imputation of permission to a trespasser; Edwards v. Railway Executive (1952) A.C. 737; Cardy's case per Dixon C.J. at p. 283, per Fullagar J. at pp. 292-293, and per Windeyer J. at pp. 324-325; and Quinlan's case at pp. 1083-1084.

The foregoing negative propositions seem to be well established but difficulties are encountered when moving from the negative to the positive. It is therefore with less assurance that I proceed to state what seems to me to have been established positively.

First, the cases where the rigour of the law as stated in Addie's case has been relaxed are cases where the trespassers have been children. Cardy's case and Herrington's case are instances. It is difficult to be sure how this human element has been given legal significance. Upon grounds of

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logic it is tempting to treat the circumstance that the plaintiff trespasser is a young child as merely a circumstance affecting the culpability of an occupier who creates a hazard upon his land which he knows does, or is likely to, attract children to their peril. Nevertheless I resist this temptation for the reason that those judges who have emphasised that the trespasser was a child have done so in the course of formulating a duty of care owed to such a person by an occupier of land. See, for instance, Cardy's case at p. 299 per Fullagar J., Quinlan's case at p.1083, and Herrington's case where Lord Reid said, at p.545, "Child trespassers have for a very long time presented to the Courts an almost insoluble problem. ... Legal principles cannot solve the problem. How far occupiers are to be required by law to take steps to safeguard such children must be a matter of public policy." and Lord Morris said, at pp.556-7, "The general law remains that one who trespasses does so at his peril. But in the present case there were a number of special circumstances - (a) the place where the fence was faulty was near to a public path and public ground; (b) a child might easily pass through the fence; (c) if a child did pass through and go on to the track he would be in grave danger of death or serious bodily harm; (d) a child might not realise the risk involved in touching the live rail or being in a place where a train might pass at speed. Because of these circumstances (all of them well known and obvious) there was, in my view, a duty which, while not amounting to the duty of care which an occupier owes to a visitor, would be a duty to take such steps as common sense or common humanity would dictate". Furthermore, I doubt whether logic is the instrument whereby this branch of the law is being developed. It is perhaps more likely that the significance of extreme youth lies in the conjunction of the well known readiness of children to be attracted to what is dangerous and in their lack of appreciation of the danger. Furthermore it may be thought less humane to create jeopardy for children than for adults.

Secondly, the relaxation of the rigour of the rule in Addie's case has occurred in cases where the occupier has created a situation of extreme danger upon his land. Cardy's case and Herrington's case are again striking examples of this.

Thirdly, in some cases where the relaxation of the rule has occured there has been a conjunction of great danger with what has been described as "allurement", i.e. that, what is dangerous is also attractive to potential trespassers, particularly children. The best instance of this is Cardy's case. See at p. 299 per Fullagar J., and at p. 326 per Windeyer J.

Fourthly, the cases in which a child trespasser has succeeded in claims against an occupier of land are cases where the danger that has been created was not obvious to young children. See again Cardy's case and Herrington's case.

Fifthly, it is not merely that what has been, or is being, done on the land is likely to cause minor injury. It is something that was likely to cause great harm. This element has been emphasized in Cardy's case and Herrington's case. This may be related to the element of "humanity" which, as will be seen, is now explicitly recognized as an element of potential liability.

Of the many decided cases relevant to the problem now before us I propose to say something about five.

The first is not a recent case. It is The Transport Commissioner of New South Wales v. Barton (1933) 49 C.L.R. 114. Addie's case was followed, and was followed in circumstances and in a manner not unlike that adopted by the Privy Council in Quinlan's case. Furthermore, in the judgment of Dixon J. there is to be found a passage which I regard as a precurser of what his Honour said years later in Cardy's case. In Barton's case the duty of a railway authority, running a train service on a line through unfenced land, towards those grazing stock on land adjacent to the line in relation to an animal injured while straying on the line was stated to be that of an occupier of land to a trespassing animal, viz. not to inflict injury upon it intentionally or recklessly to disregard its presence. In the course of his judgment Dixon J. said at pp. 131-132:

> "But all attempts have failed in the past to fix upon a standard of conduct, an external standard at any rate, which requires less

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than due care in the circumstances and more than abstention from intentional harm. I think that in relation to the persons and property of trespassers it will not be found possible to formulate an ascertainable standard of such a character. With reference to the safety and security of the premises, I think the occupier is under no higher duty to a trespasser than to refrain from causing intentional harm without a justification such as the prevention by reasonable means of trespass. With reference to positive acts likely to cause harm to others, I think the occupier's duty depends upon knowledge of the presence of the trespasser on his property, and is measured by the care which a reasonable man would take in all the circumstances including the gravity and likelihood of the probable injury, the character of the intrusion, the nature of the activities causing the danger and the consequences to the occupier of attempting to avoid all injury."

This was, I think, early recognition that Addie's case was susceptible of development.

In Edwards and Anor. v. Railway Executive (1952) A.C 737, a boy, trespassing on a railway line, was injured by a train. He sued the owner of the railway for injuries which he sustained but the House of Lords, after rejecting the contention that he was a licensee, decided that the railway owner was not liable to the plaintiff as a trespasser because there was no evidence of wilful or reckless behaviour on the part of the motorman driving the train. Addie's case was applied. In later cases it has been emphasized that the Railway Executive were not at fault in maintaining fencing to exclude trespassers. Here, I think, lay the principal distinction between Edwards' case and Herrington's case.

In Cardy's case the infant trespasser succeeded on the footing that the Commissioner for Railways was in breach of a duty described by Dixon C.J., at p. 286, as follows:

"In principle a duty of care should rest on a man to safeguard others from a grave danger of serious harm if knowingly he has

> created the danger or is responsible for its continued existence and is aware of the likelihood of others coming into proximity of the danger and has the means of preventing it or of averting the danger or of bringing it to their knowledge."

The step which it seems to me was taken here in advance of his Honour's formulation in Barton's case is that, whereas in Barton's case it was st stated that knowledge of the presence of a trespasser was an element necessary for liability on the part of the occupier, in Cardy's case the occupier's awareness of the likelihood of strangers coming to the danger was regarded as enough. It is to be noted that the duty is stated in terms significantly narrower than those to be found in Donoghue v. Stevenson (1932) A.C. 562. It is, I think, clear that the Chief Justice was stating a duty of a special character within the category of negligence, viz. "to safeguard others from a grave danger of serious harm" from a situation for which the defendant is knowingly responsible.

The decision in Cardy's case was accepted by the Privy Council in Quinlan's case, and to that case I now turn. The decision is, of course, of critical importance. The trespasser there was an adult who was run down by a train upon a private level crossing. The jury had been instructed that, if they came to the conclusion that the Commissioner was aware of the likelihood of people using the crossing, he owed a general duty to the plaintiff as a member of the public to take reasonable precautions for his safety. This direction the Privy Council said was in error. The duty owed by the Commissioner to the plaintiff was stated in the terms of Addie's case. It was said that to adopt the opinion that "given a course of trespassing by members of the public and knowledge of it by the defendant's servants, his (i.e. the Commissioner's) duty of care towards a trespasser became equivalent to the duty of care owed to members of the public properly using a public level crossing" would be in error. Their Lordships said, at pp. 1084-1085:

> "What the law does not admit, however, is that a trespasser, while incapable of being described otherwise than as a trespasser,

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should be elevated to the status of an ordinary member of the public to whom, if rightfully present, the occupier owes duties of foresight and reasonable care. It does not alter a trespasser's description merely to christen him a 'neighbour'. If this additional duty of care were to be thought to be imposed upon the occupier by the circumstance that, to his knowledge, there is likelihood of the trespasser's presence on the land - and it does not seem that any other circumstance is regarded as critical for the purpose - their Lordships consider that the law, as established, would not so much be applied or developed as contradicted."

For present purposes the chief importance of Quinlan's case is the acceptance of the decision in Cardy's case as stating a principle consistent with the Privy Council's rejection of identifying trespassers with "neighbours" resorting to public places. It was argued for the respondent here, and argued with a force, having regard to what was said in their Lordships' opinion at p. 1084, that Cardy's case was accepted by the Privy Council as a case where the occupier had shown reckless disregard of the plaintiff trespasser. Cardy's case in the High Court, however, was not decided on this ground, and, upon the whole, I am not satisfied that the Privy Council accepted it merely upon that narrow ground. Two statements of their Lordships, at p. 1083, are of great significance:

> "The circumstances seemed to place the case squarely among those 'children's cases,' in which an occupier who had placed a dangerous 'allurement' on his land is liable for injury caused by it to a straying child."

and

> "Children's cases in this context do unavoidably introduce considerations that do not apply where the sufferer of injury is an adult. What is allurement to a child and, being so, imposes by itself a measure of responsibility, is not an allurement to an adult: and those conceptions of licence or permission, which may be highly relevant for the determination of the adult's rights, are virtually without meaning, at any rate as applied to small children."

If these passages indicate the ground upon which the Privy Council accepted Cardy's case, Quinlan's case affords no reason for not applying Cardy's case here.

Finally, there is Herrington's case where the House of Lords, after reviewing all the earlier authorities, decided that the British Railways Board did owe a duty of care that was broken to a child of six who was injured by contact with an electrified rail to which he came, through a gap in the fence maintained by the defendant on the boundary between a National Trust property open to the public and the defendant's railway line. The Board was at fault in not keeping the fence in good order.

A close study of Herrington's case has left me with the conviction that Addie's case ought no longer to be regarded as an exhaustive statement of the law governing the duties of an occupier of land to a trespasser upon his land. This follows, not only from certain statements either expressly rejecting Addie's case as such an exhaustive statement or formulating propositions different from that to be derived from Addie's case. It follows from the actual decision itself. The law as stated in Addie's case has been modified or at least developed. The development is, I think, that an occupier of land, who is responsible for creating or maintaining thereon something which is very dangerous, is bound to act in a humane way towards trespassers who he knows will, or will probably, come upon his land, and who, unless reasonable precautions are taken for their protection, are likely thereto suffer serious harm. Whether, in a particular case, it is probable that strangers will trespass and the extent of the precautions to be taken for the protection of trespassers demands upon a comprehensive examination of all the relevant circumstances. In the case of a child trespasser it is highly relevant that the danger would be attractive for children in the neighbourhood of the land and would not be obvious to them. The development as so stated is not, I think, essentially different from that formulated earlier by Dixon C.J. in Cardy's case and which I have already cited when that statement is read in the factual setting that existed in that case. The decision in Herrington's case is, I think, in line with the acceptance of Cardy's case by the Privy Council in Quinlan's case.

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I have made no reference to the cases of Thompson v. The Council of the Municipality of Bankstown (1952-53) 87 C.L.R. 619; Munnings and Another v. Hydro-Electric Commission (1971) 45 A.L.J.R. 378; or Excelsior Wire Rope Company Limited v. Callan and Others (1930) A.C. 404. This omission is deliberate and I should explain it. It appears to me that there is still a significant difference between the duty owed by an occupier of land to a trespasser - which is the matter here under consideration - and that owed by a person who does not occupy land on which he is responsible for a situation of danger and to which he knows that strangers will, or are likely to, resort - such as was the case in both Thompson v. The Council of the Municipality of Bankstown and Munnings and Another v. Hydro-Electric Commission. So far as Excelsior Wire Rope Company Limited v. Callan and Others is concerned, I consider that what Dixon C.J. said in Barton's case at pp.129-130 and in Cardy's case at p.284 is correct, i.e. it was decided on the footing that the defendant was not an occupier.

Accordingly, I propose to apply the formulation of Dixon C.J. in Cardy's case to decide this appeal. Here the acts of the defendant did create a situation of grave danger of serious harm; this situation could have been averted. Finally there was some evidence upon which it might be found that the defendant was aware of the likelihood of persons coming within the proximity of the danger. The precautions taken, although inadequate to keep people away, showed a recognition that people could be expected to go there. Furthermore, the fact that the back shunt was part of the area to which those who lived in the area might resort, was known.

In these circumstances I do not think that the verdict of the jury should have been disturbed by the Court of Appeal and I would allow the appeal and restore that verdict.

This conclusion makes it unnecessary to reach a final conclusion upon the rejection by the Court of Appeal of the plaintiff's cross-appeal. However, I think I should say that I have found no evidence of reckless unconcern by the management of the defendant about the danger which had arisen. The management was concerned and took some, although inadequate, precautions to lessen that danger until

the line could be resited. I am, however, disposed to think that, in the very special circumstances already stated, it would have been open to the jury to find that the plaintiff was on the back shunt with the leave of the defendant. The leave to be upon the defendant's premises which the plaintiff unquestionably had, was leave of a general nature and I think that, on the evidence, it could have been found that the plaintiff was not trespassing when he was playing upon the back shunt. However this may be, I consider that the appeal should be allowed on the other ground and the verdict of the jury in favour of the plaintiff restored.

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REASONS FOR JUDGMENT OF WALSH J.

WALSH, J.: In the judgments of other members of the Court in this appeal accounts are given of the facts of which evidence was given at the trial of the action and of the manner in which the case for the appellant was left to the jury. Because of the importance that I attach to the question whether the place where the appellant sustained his injuries was, or was in close proximity to, a place to which children had permission from the respondent to come, or a place which could be found by the jury to have been known to be frequented by children or other members of the public, I shall refer myself to some features of the evidence that bear upon that question. But otherwise I shall seek to avoid a repetition of the statements of the facts which are contained in other judgments.

If the question of the liability of the respondent to compensate the appellant for his injuries ought to be determined by the application of the established rules that define the extent of the duty which an occupier of land owes to a trespasser, I am of opinion that the evidence failed to establish that there was any breach of duty for which the respondent could be held liable. In Commissioner for Railways v. Quinlan [1964] A.C. 1054 at p. 1072, it was stated that the contents and limits of that duty "have been laid down in words that do not seem to admit of such qualification or to invite the skill of the amplifier".

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Their Lordships proceeded, by means of citation from earlier authorities, to expound what they called (at p.1074) "the accepted formulation of the occupier's duty to a trespasser". It will be convenient for the sake of brevity to refer to that formulation as "the Addie formula". I think that I may state its essential elements in the following way. There is a duty not to injure a trespasser wilfully. There is a duty not to act recklessly with regard to the safety of a trespasser whom the occupier knows to be present. The "knowledge" required by the rule just stated must be actual personal knowledge of the other person's presence, or, alternatively, it must be knowledge of the existence of an extreme likelihood of the presence of a trespasser, so that it may be said that the occupier "as good as knows" that someone else is there. There must be "something a great deal more concrete than a mere warning of likelihood"; see Quinlan's Case [1964] A.C. at p. 1077. These rules apply to activities on the land as well as to its static condition. They constitute "an exclusive or comprehensive definition" of the duty.

I do not need to attempt a detailed examination of what is meant by saying that there is a duty not to act recklessly, or as it has sometimes been expressed, a duty not to act with a wanton or reckless disregard for another's safety. But it is proper to refer, as this is a case of injury to a child, to the following statement concerning what may be embraced within the general formula laid down in Robert Addie and Sons (Collieries), Limited v. Dumbreck [1929] A.C. 358 and adopted in Quinlan's Case. In the latter case (at p. 1084) their Lordships said "That formula may embrace an extensive and, it may be, an expanding interpretation of what is wanton or reckless conduct towards a trespasser in any given situation, and, in the case of children, it will not preclude full weight being given to any reckless lack of care involved in allowing things naturally dangerous to them to be accessible in their vicinity". But however extensive may be the interpretation that is given to what is wanton or reckless conduct, I am of opinion that the evidence given at the trial could not support a finding that the respondent, through its servants, was guilty of conduct that warranted that description. It is true that any

human contact with the transmission line which was above the respondent's land would be extremely dangerous and if the situation had been that trespassers were known to be in the habit of coming to a place where such contact would be possible, it could have been found, I think, that so long as that danger continued, a failure to take any step to prevent their access to that place or to warn them of the peril constituted wanton or reckless conduct. But it is plain, in my opinion, that the question of the "recklessness" of the conduct of the respondent's servants is closely bound up with the question of their knowledge (in the extended sense of that term explained in Quinlan's Case) of the presence of trespassers. On the evidence I think it was clear that the servants for whom the respondent was responsible could not have seen it to be a matter of extreme likelihood that at the relevant time trespassers could come to the place where they would be in danger of contact with the wires.

Having regard to the terms in which, in Quinlan's Case, the Addie formula was expounded, I do not think that it would be proper for this Court to substitute, for the test of knowledge of the "extreme probability" of the presence of trespassers, the modified test proposed by Lord Reid in British Railways Board v. Herrington [1972] 2 W.L.R. 537 at p. 547, when he referred to an occupier who knew that there was "a substantial probability" that trespassers would come or any other test still less stringent suggested in the speeches of their Lordships in that case. But even if the formula were modified in any of those ways that would not assist the appellant since, in my opinion, there could not be in this case an inference of such a likelihood as would satisfy such a modified test. At the most, it could have been found that the respondent's servants may have realised that the coming of trespassers was a possibility. But the evidence, upon any reasonable view of it, indicated in my opinion that this was improbable rather than probable.

I am of opinion, therefore, that if the appellant was entitled to have his case submitted to the jury this must have been because he was entitled, upon findings that might reasonably have been made, to succeed upon some ground of liability

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in the respondent other than a breach of the duty ordinarily owed by an occupier of land to a trespasser. It becomes necessary to consider the following questions: (1) Was the appellant, at the relevant time and place, a trespasser on the respondent's land or was he a licensee? (2) Assuming that the circumstances were such that no finding would have been open, in the case of an adult person, as to the capacity in which he was then and there present, except that he was a trespasser, is the appellant nevertheless entitled to maintain that the respondent could have been found to have been in breach of a duty of care, different from that owed to an adult trespasser, by reason of the fact that he was a child or of the facts that he was a child and had been "allured" to the place where he was injured? (3) Could the respondent have been found liable for a breach of a duty of care not arising out of any relationship of occupier of land to entrant thereon but out of a different relationship, which was in the circumstances the relevant one by which the claim of the appellant to damages should be determined?

I have stated three separate questions. They are not completely separate and distinct questions, but nevertheless I think it will be convenient to examine each of them in turn.

There is no evidence at all that there was any express grant of permission made on behalf of the respondent to the appellant or to any other children to go on or near the "back shunt" area upon which the accident occurred, either on week days or at weekends. There is a good deal of evidence that children, including the appellant, were told that they were forbidden to do so and that the area was out of bounds for them. But for present purposes we are not concerned so much with the strength or weakness of rebutting evidence as with the existence of evidence upon which an affirmative finding could be made that permission had been given. In my opinion it is in accordance with authority, and would be clear apart from authority, that in order to establish a consent or licence to be in or near the place in which a danger has been encountered, it is not enough to show that the plaintiff has been permitted to be in some other part of the land occupied by the

defendant. Accordingly when the question is asked whether it could be found that the appellant had permission to be in the back shunt area, it is not possible to say that such permission may be inferred from the fact that he lived in a house situated on the respondent's land. There was evidence of some use by children of the defendant's land at places not in the immediate vicinity of the village in which they lived. I am prepared to assume that, at a place which was described as the "sandhills", situated at a considerable distance from the back shunt area, children played from time to time. There was evidence also that children, including the appellant, passed across the respondent's land and across the railway line, at a considerable distance to the north of the back shunt area. I am willing to make the further assumption, although I think its validity is doubtful, that there was sufficient acquiescence by the respondent in the use of the sandhills mentioned above and in that passage across the land to enable a finding to be made that the respondent permitted such use and passage. The foregoing assumptions do not provide, in my opinion, a sufficient basis for any inference that children were permitted to be in the area of the back shunt.

I recognize that in some cases the question now being considered may give rise, as Professor Fleming observed in his Law of Torts, 4th Ed., P. 410, to "nice problems of demarcation". But in this case it seems clear to me that a conclusion was not open that the appellant was in the back shunt area with the permission of the respondent. I have taken into account the absence of fences marking off the works area from the rest of the respondent's land. But in all the circumstances I cannot think that the absence of fences was an indication that the respondent acquiesced in the roaming of children over the whole of the large area of land which it owned, and, in particular, that it acquiesced in their presence in the area of the back shunt.

If an occupier has a small area of land and the circumstances are such that it may be found that other persons have been invited or permitted to be on one part of the land, it may often be easy to conclude that they have permission also to be on the rest of the land. But in this case the

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land of the respondent extended over a large area. The houses where employees and their families lived were a substantial distance away from the back shunt area. So were the "sandhills" on which children used to play by sliding down them. So far as the slope of the back shunt was concerned, there was no evidence that children had ever been there before the accident, except the evidence of the appellant that he had been there once only, that is to say, on the day before the accident occurred. The boy, Kevin Smith, who was called as a witness, said that he had never been there before. The witness, Cosgrove, said he had often seen children playing on the heaps of fines described as sand-hills which, according to his estimate, were half a mile away from the place where the accident occurred. In the light those circumstances, I am of opinion that the evidence that children were in the habit of being on other parts of the respondent's land cannot provide any basis, either for an inference that the respondent had given its consent to the presence of children on the back shunt area, or, for an inference that the respondent's servants knew or believed that there was a likelihood of children being in that area.

In the foregoing discussion I have been dealing with the question whether there was evidence upon which it could have been found by way of inference from proved facts that there was an actual licence to the appellant to be in the back shunt area. I think that a finding that there was such a licence was not open and I do not think that in the present state of the authorities there is any warrant for resorting to an imputed or constructive licence by means of which liability may be attached to the respondent, if it be found to have failed in the duty of care which it would have owed to a licensee. The observations of Dixon C.J. in Commissioner for Railways (N.S.W.) v. Cardy (1960) 104 C.L.R. 274 at p. 280, coupled with the comment upon those observations made in Quinlan's Case [1964] A.C. at p. 1083, seems to require an abandonment of the notion that in circumstances which do not really support a finding of actual consent, a child may yet be entitled to put his case, as Windeyer J. phrased it in Cardy's Case (1960) 104 C.L.R. at p. 325, on "the conventional basis that he should be considered a licensee".

It is important to notice a consequence which flows from the abandonment of that notion. The cases in which children were found to be licensees, in circumstances in which the licence could not really be other than a fictional licence, were frequently, if not always, cases in which "allurement" played a prominent part. It was because a child was "allured" that it was thought that although otherwise he would have had to be classed as a trespasser, he could be treated as a licensee. If we abandon that approach we are required to consider what significance, if any, is now to be attached to the existence of an allurement in determining whether or not the occupier is to be held liable. This is a problem to which I have sought to give expression in the second of the questions for consideration formulated above. By way of further explanation of that question, I should say that at this point I am still leaving aside the question whether the appellant is entitled to rely on a relationship other than his relationship as an entrant upon the relevant area of the respondent's land to the respondent as occupier of that area. I am concerned to enquire whether within the limits of the last-mentioned relationship, there is room for a view that there was owed to the appellant, assumed not to be either an invitee or a licensee, a duty differing from that defined in the Addie formula. The conclusion I have reached is that the question must be given a negative answer.

I think it follows from that conclusion that the third count of the appellant's declaration, which was the only count which the learned trial judge left to the jury, did not contain allegations of facts sufficient to create in the respondent the duty of care of which the respondent is alleged in the count to have been in breach. It is to be observed that the count contains no allegations as to the capacity in which the appellant was on the land. It states that there was a pile of rubble, which was alluring to children and was such as to induce the presence of children. It states that the appellant was a child who was on the premises and was allured by the pile of rubble. The breach of duty alleged is that the respondent was careless in allowing the pile of rubble to be in close proximity to a high tension electricity line. I think that it may

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readily be supposed that in framing this count the pleader was hopeful of supporting it by means of the paragraph in Quinlan's Case /1964/ A.C. at p.1083, which refers to "children's cases" and to "allurement" and which includes a statement to the effect that it is not necessary to resort to the categorisation of children as licensees "to give them the legal remedy that is felt to be their due". It is stated also in that paragraph that what is allurement to a child "imposes by itself a measure of responsibility". I have found this a difficult passage. I am not alone in that. But after a consideration of the whole of the reasons given by their Lordships, I cannot accept the view that the passage means that whenever there is on land something which is alluring to children and a child is allured by it, the occupier must be held to have had such a duty of care towards that child that carelessness in allowing a danger to exist there would constitute a breach of the duty. The inclusion in the count of the allegation that the thing which was alluring was likely to induce the presence of children seems to me to be no more than a paraphrase of the word "alluring". In my opinion, it would not accord with the authorities to hold that such a duty is imposed upon the occupier by the facts that I have mentioned, regardless of the lack of any consent express or inferred to the presence of children and regardless not only of the lack of any actual knowledge that children resort frequently to the area in which the danger exists, but also of the lack of any circumstances from which it could be inferred that the occupier had reason to believe that it was very likely, or at all likely, that they would resort to that area.

In his summing up to the jury the learned trial judge said that he was leaving to them only one cause of action. Later his Honour said: "The duty owed by the occupier of premises to a boy who is on the premises without any legal right to be there is well established, and the plaintiff must show a breach of this well established duty". From that statement it appears that the learned judge was discussing the duty owed by an occupier of premises, not a duty arising from

some other relationship; and he was discussing this duty on the basis that the plaintiff had no legal right to be where he was when he was injured. His Honour then stated the relevant duty in the following terms:

> "The occupier of premises is bound by a duty to take reasonable care to protect children from risk to which they are exposed by a dangerous condition of part of the premises if that part of the premises constitutes an allurement to children to enter on to the premises and approach that dangerous part. The part must be dangerous in the sense that it is a concealed danger or a trap. Its existence and dangerous quality must be known to this occupier of the premises and unknown and not obvious to the children. Further, it should be known to the occupier that there is a likelihood that there will be in or near the premises children who will be subject to the allurement and who will in fact be allured by it".

The factual elements which according to that statement were required in order to establish liability went beyond what is alleged in the third count. But apart from any question as to the sufficiency of the pleading, it appears that his Honour's view was that if in a part of an occupier's premises there is a dangerous condition and that part of the premises constitutes an allurement to children to enter on to the premises and to approach the dangerous part, then to a child who, thus allured, does approach the dangerous part of the premises, although the child is not a licensee and has no right to be there, the occupier has a like duty to that which he would have to a licensee. But his Honour added that it must be known to the occupier that it is likely that there will be in or near the premises children who will be subject to the allurement. In my opinion, it could not have been found on the evidence in this case that that condition was satisfied. It is true that the reference to the likelihood of children being in or near a dangerous part of the premises imports into the condition an indefinite element, but I think that it could not have been found in this case that children were likely to be so near as to be affected by the allurement. Be that as it may, I think that there is a more important objection to this part of the summing up. I am not able to accept the view

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of the law which is basic to the directions to which I have referred, although I think that that view does gain some support from the paragraph in Quinlan's Case (at p.1083) to which I have referred. But it is, in my opinion, denied by what follows that paragraph and by the explanation that their Lordships give to a passage quoted from the judgment of Dixon C.J. in Cardy's Case (1960) 104 C.L.R. 274, at pp. 285, 286. The cases of the allurement of children in which liability has been held to exist are there treated by their Lordships as applications of the principle that an occupier is liable for injury to trespassers whose presence is known or of whose presence there is an extreme likelihood, if the occupier's conduct is capable of being described as wanton or reckless. See Clerk and Lindsell on Torts, 13th Ed., par. 1059. In my opinion, Mr. Glass of counsel for the respondent was right in submitting that Quinlan's case did not set up a separate rule of liability relating to children subjected to an allurement to a danger, but treated the allowing of dangerous things attractive to children to be accessible, in places known to be frequented by children or so situated that it is extremely probable that children will come to them, as an important circumstance in the application of the general formula laid down in Addie's Case. I think, as others have thought (see, for example, Victorian Railways Commissioners v. Seal /1966/ V.R. 107 at pp. 130 - 132), that there is a difficulty in accommodating the acceptance by their Lordships of the decision in Cardy's Case (to which I shall refer again) to the principles upon which there is an emphatic insistence in Quinlan's Case. But, in my opinion, that difficulty does not provide a justification for treating Cardy's Case as authority for any legal proposition which conflicts with the principles clearly stated in Quinlan's Case. I think that consistently with those principles the only way in which the decision in Cardy's Case can be supported is to treat it as a case in which there was wanton or reckless conduct on the part of the defendant. See Fleming, 4th Ed., pp. 410-411.

I turn to the third question which I posed above. Here, it is necessary to consider how one should apply, in the circumstances of this case, the principle stated positively in Quinlan's Case (at p. 1074) that "the accepted formulation of the occupier's duty to a trespasser" is intended to be an exclusive or comprehensive definition of the duty, together with the "important qualification" of that principle which their Lordships mentioned. The qualification was that the occupier's duty was limited in accordance with the Addie formula "so long as the relationship of occupier and trespasser is or continues to be a relevant description of the relationship between the person who injures or brings about injury and the person who is injured". Later (at p. 1080), in approving the decision in Thompson v. Bankstown Corporation (1953) 87 C.L.R. 619, their Lordships said of it "It was one of those (cases) in which the court, for sufficient reason, is able to hold that, as regards the accident and the injury caused, the relation of occupier and trespasser does not bear upon the situation of the parties". At this point, it seems to me that their Lordships were describing a factual situation in which the one party remains an occupier and the other remains a trespasser, but in which although that relation still exists, it does not bear upon their situation, "as regards the accident and the injury caused". When (at p. 1081) their Lordships spoke of the relation of occupier and trespasser as being "displaced" by some other relation they did not mean, in my opinion, that the former relation had ceased to exist, for example, by the trespasser receiving permission to remain on the land. They meant that the relation is displaced in the sense that some other relation has taken its place as that which is relevant, in a legal sense, for the determination of the rights and liabilities of the parties. But their Lordships stressed the point that this could be held to occur only when the grounds for so holding admitted of "reasonably precise definition". Their Lordships were at pains to make it clear that it is not enough, in order to displace the relationship, to describe the party injured as a "neighbour" of the other party, in Lord Atkin's sense of the word.

The question which must now be considered is whether it is permissible to find in the evidence in this case any ground for holding that there was "some other relation" between the parties, which gave rise

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to a duty of care which could be found to have been broken. In my opinion, it is not permissible to do so. It is not sufficient for this purpose, in my opinion, that the danger to any person who came into contact with the high tension wire was of a high degree and that the respondent permitted such a danger to exist at a place where access to it was possible. There are not, in this case, any facts additional to those just stated which are, in my opinion, relevant to the question under consideration. I cannot regard it as being in accordance with the principles enunciated in Addie's Case, as confirmed in Quinlan's Case, to say that the application of the formula may be excluded where the condition of the premises is "extremely" dangerous or "highly" dangerous, but not where it is dangerous in some smaller degree. I do not mean that the degree of the danger is irrelevant. But I cannot accept it as being itself a decisive fact, which is sufficient to create a special relationship which "displaces" that of occupier and trespasser.

The case of Thompson v. Bankstown Corporation (supra) was approved by the Privy Council. But it is distinguishable from this case. One ground of distinction which, if accepted, would set apart both that case and the case of Munnings v. Hydro-Electric Commission (1971) 45 A.L.J.R. 378 from the present case is that in each of the earlier cases the plaintiff was not a trespasser upon land occupied by the defendant and for that reason, although he may have been in a technical sense a trespasser upon a pole belonging to the defendant, he was not considered to be affected at all by the rules contained in the Addie formula. Such a view was expressed in Munnings' Case by the Chief Justice at p. 380 and by Menzies J. at p. 384. See also the judgment of Windeyer J. at p. 387. It was for the same reason that Menzies J. regarded the case of Excelsior Wire Rope Company Limited v. Callan /1930/ A.C. 404, as being in no way inconsistent with Addie's Case. His Honour's explanation of what has sometimes been thought to be a conflict between those two cases accords with the opinions stated by Sir Owen Dixon in

The Transport Commissioners of New South Wales v. Barton (1933) 49 C.L.R. 114 at p. 129 and again in Cardy's Case (1960) 104 C.L.R. 274 at p. 284. But a quite different distinction between the two English cases, suggested by Scrutton L.J. in Mourton v. Poulter [1930] 2 K.B. 183 at p. 190, was accepted by the Privy Council in Quinlan's Case (at p. 1076). On that view the difference between the two cases was a difference as to the recklessness of the acts by which the injuries were caused. But in order to distinguish the present case from Thompson's Case and from Munnings' Case it is not necessary, in my opinion, to decide whether it is correct to say that Addie formula had no bearing on the facts in the latter cases for the reason that the injured persons did not come as trespassers on to the lands of the occupiers. For there is another reason for which, in my opinion, it could be held in those cases, but not in this case, that another "relevant relationship" existed between the parties. All three cases have in common the fact that injury was caused by contact with electric wires which were under the control of the defendants. But in the other cases the land above which the wires were placed and from which access to them could be obtained was land upon which the public had a right, or were regarded as having a right, to be and upon which that right was regularly exercised. In Thompson's Case it was a public highway. In Munnings' Case the children were regarded as having a right to be on the land no different, for relevant purposes, from the public right which existed in Thompson's Case. It is this positive feature, consisting of the right in the plaintiffs to be on the land that is, in my opinion, a sufficient ground of distinction between those cases and this case. In my opinion, that is of more significance than the negative feature that it was not the land of the defendants upon which the plaintiffs came to harm. In the statement in Quinlan's Case (at p. 1080) of the reason which was held sufficient in Thompson's Case for the conclusion that the relationship of occupier and trespasser did not bear on the situation of the parties the words "on and over a public place" are, in my opinion, of cardinal importance. The same idea is expressed in Munnings' Case (1971) 45 A.L.J.R. 378, in which the Chief Justice (at p. 381) referred to the bringing of a dangerous substance "into proximity of members of the public". Menzies J. (at p. 385) referred to the pole being "in a place of public

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resort" and Gibbs J. (at p. 398) said that the pole stood in a place which "was in fact a public place open to all and a place where children were accustomed to play without any hindrance or dissuasion". In the present case it would have been impossible upon the evidence to apply those descriptions to the place where the danger existed.

I have not found it easy to solve the problem which, in my opinion, is created by Cardy's Case and the treatment of it in Quinlan's Case. But after much consideration of that problem, I have reached the conclusion that I cannot treat Cardy's Case as authority for the proposition that in the circumstances of the present case the respondent owed to the appellant a duty, based upon another relevant relationship, which duty was more extensive than that of an occupier of land to a trespasser on that land. My reason for that conclusion has already been indicated. If it had stood alone, the paragraph which appears at p. 1083 in Quinlan's Case might have been interpreted as treating Cardy's Case as one which stood quite outside the principles relating to the duty of an occupier of land to a trespasser and which depended upon a special duty owed to children by an occupier of land who has on his land both an allurement and a hidden danger. But, as I have said earlier, when the whole of the reasons of their Lordships are considered, the decision in Cardy's Case must be taken to have been accepted as one which could be justified upon the application of the Addie formula to the facts, because the conduct of the defendant could have been properly found to have amounted to a reckless disregard for the safety of persons who frequented and openly used a place in which there was a serious hidden danger. I am of opinion that, thus understood, the decision in Cardy's Case cannot be of any real assistance to the appellant. It does not warrant the view that the circumstances of the present case gave rise to a different relationship which displaced that of occupier and trespasser.

I feel no satisfaction in coming to that conclusion. The view that I have taken about

the way in which Cardy's Case must be explained since the decision in Quinlan's Case has not been adopted without hesitation. In my respectful opinion it assigns to Cardy's Case a basis not in conformity with the reasons given by those who decided it. In my opinion, it is only by doing that that their Lordships could have reconciled their acceptance of the decision of Cardy's Case with their strict insistence upon the rules which, according to the main thesis of the judgment, are applicable to adult trespassers and child trespassers alike. Nevertheless, I have felt constrained to apply those rules in the present case.

In the case of British Railways Board v. Herrington, which I mentioned earlier, there are statements which can only be regarded as departures from, rather than mere developments of, the law as formulated in Addie's Case. But I do not think that I am at liberty to give effect to anything contained in Herrington's Case which is inconsistent with the law as laid down in Quinlan's Case. For example, Lord Pearson expressed the opinion (/1972/ 2 W.L.R. at p. 575), that the rule in Addie's Case has been rendered obsolete by changes in physical and social conditions and has become an encumbrance impeding the proper development of the law. I do not think that I am free to adopt that view. The same observation applies to other passages in the reasons of their Lordships in Herrington's Case.

The conclusions that I have stated have the necessary consequence that in my opinion the appellant was not entitled to have left to the jury any of the counts with which the appeal is concerned.

In my opinion the appeal should be dismissed.

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No.17

Order allowing Appeal

5th May 1972

No. 17

ORDER ALLOWING APPEAL

IN THE HIGH COURT OF AUSTRALIA

No. 69 of 1971

NEW SOUTH WALES REGISTRY

ON APPEAL from the Supreme Court of New South Wales (Court of Appeal Division)

BETWEEN

RODNEY JOHN COOPER an infant by his next friend PETER ALPHONSUS COOPER

Appellant (Plaintiff)

AND

SOUTHERN PORTLAND CEMENT LIMITED

Respondent (Defendant)

BEFORE THEIR HONOURS THE CHIEF JUSTICE SIR GARFIELD BARWICK, MR. JUSTICE McTIERNAN, MR. JUSTICE MENZIES, MR. JUSTICE OWEN AND MR. JUSTICE WALSH.

FRIDAY, the 5th DAY OF MAY 1972.

THIS APPEAL from the whole of the judgment and order of the Supreme Court of New South Wales (Court of Appeal Division) given and made the 2nd day of July, 1971 coming on for hearing before this Court at Sydney on the 27th, 28th, and 29th days of March, 1972 UPON READING the transcript record of proceedings herein AND UPON HEARING Mr. F.S. McAlary of Queen's Counsel with whom was Mr. R.B. Murphy of Counsel for the Appellant and Mr. H.H. Glass of Queen's Counsel, with him was Mr. M.J.R. Clarke of Counsel for the Respondent THIS COURT DID ORDER on the said 29th day of March, 1972 that this appeal should stand for judgment and the same standing for judgment this day accordingly at Sydney THIS COURT DOTH ORDER that this appeal be and the same is hereby allowed AND THIS COURT DOTH FURTHER ORDER that the order of the Supreme Court of New South Wales (Court of Appeal Division) be set aside AND in lieu thereof THIS COURT DOTH ORDER that the

appeal to the said Supreme Court of New South Wales (Court of Appeal Division) be dismissed with costs AND THIS COURT DOTH FURTHER ORDER it be referred to the proper officer of this Court to tax and certify the costs of the Appellant of this appeal and that such costs when so taxed and certified be paid by the Respondent to the Appellant or to his Solicitors Messrs. Carroll and O'Dea AND THIS COURT DOTH BY CONSENT FURTHER ORDER that the sum of One hundred dollars ($100) paid into Court as security for the costs of this appeal be paid out to the Appellant or to his said Solicitors Messrs. Carroll and O'Dea.

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Order allowing Appeal

5th May 1972

(continued)

BY THE COURT

H. Cannon

District Registrar

No. 18

In the Privy Council

No.18

Order granting Special Leave to Appeal to Her Majesty in Council

14th November 1972

ORDER GRANTING SPECIAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

AT THE COURT AT BUCKINGHAM PALACE

the 14th day of November 1972

PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 30th day of October 1972 in the words following viz:-

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Southern Portland Cement Limited in the matter of an Appeal from the High Court of Australia between the Petitioner and Rodney John Cooper Respondent setting forth that the Petitioner prays for special leave to appeal from so much of a Judgment of the High Court of Australia dated the 5th May 1972 as upheld an Appeal by the Respondent from a

In the Privy Council

No.18

Order granting Special Leave to Appeal to Her Majesty in Council

14th November 1972

(continued)

Judgment of the Court of Appeal of the Supreme Court of New South Wales dated the 2nd July 1971 upon an Appeal by the Petitioner from the verdict of a jury in favour of the Respondent in the sum of $56,880.00 given on the 21st May 1970 in an action heard in the Supreme Court of New South Wales:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute its Appeal against the Judgment of the High Court of Australia dated the 5th May 1972 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs:

"AND Their Lordships do further report to Your Majesty that the authenticated copy under seal of the Record produced by the Petitioner upon the hearing of the Petition ought to be accepted (subject to any objection that may be taken thereto by the Respondent) as the Record proper to be laid before Your Majesty on the hearing of the Appeal."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

W. G. AGNEW

IN THE PRIVY COUNCIL No. 32 of 1972

O N A P P E A L

FROM THE HIGH COURT OF AUSTRALIA NEW SOUTH WALES REGISTRY

B E T W E E N :

SOUTHERN PORTLAND CEMENT LIMITED — Appellant

- and -

RODNEY JOHN COOPER
AN INFANT by his Next Friend
PETER ALPHONSUS COOPER — Respondent

RECORD OF PROCEEDINGS

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