Chapter 4

A CASE SEQUENCE

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

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

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

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

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

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

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

purpose. And every narrative is insistent in its demand for its prescriptive point, its moral. History and literature cannot escape their location in a normative universe, nor can prescription, even when embodied in a legal text, escape its origin and its end in experience, in the narratives that are the trajectories plotted upon material reality by our imaginations. * * *

The codes that relate our normative system to our social constructions of reality and to our visions of what the world might be are narrative. The very imposition of a normative force upon a state of affairs, real or imagined, is the act of creating narrative. The various genres of narrative — history, fiction, tragedy, comedy — are alike in their being the account of states of affairs affected by a normative force field. To live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the "is" and the "ought," but the "is," the "ought," and the "what might be." Narrative so integrates these domains. Narratives are models through which we study and experience transformations that result when a given simplified state of affairs is made to pass through the force field of a similarly simplified set of norms.

The intelligibility of normative behavior inheres in the communal character of the narratives that provide the context of that behavior. Any person who lived an entirely idiosyncratic normative life would be quite mad. The part that you or I choose to play may be singular, but the fact that we can locate it in a common "script" renders it "sane" — a warrant that we share a *nomos*.[4]

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

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

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

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

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[4] Cover, *supra* note 2, at 4–10. *See also* the excerpt from Dworkin's *Law as Interpretation*, *infra* pages 170–71.

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

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

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

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

Judgment and order affirmed.

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

NOTES AND QUESTIONS

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

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

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

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

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

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[10] *See supra* pages 78–81.

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

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

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

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

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

McFARLAND, J.

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

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

[11] *See supra* pages 13–14.

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

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

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

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

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

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

The judgment and order appealed from are affirmed.

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

NOTES AND QUESTIONS

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

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

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

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

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

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

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

(a) The costs of requiring fences or other protective measures would outweigh the benefits.

(b) Boys will be boys, and so protective measures are in any event impossible.

(c) It would be unjust to make the landowner the insurer of trespassers on her land.

(d) It would be unjust to permit parents to externalize the costs of looking after their children.

(e) Right or wrong, "the law" does not allow recovery here.

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

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

is it does it matter if unimportant...

SANCHEZ v. EAST CONTRA COSTA IRRIGATION CO.

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

LANGDON, J.

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

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

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

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

The judgment is affirmed.

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

NOTES AND QUESTIONS

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

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

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

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

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

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

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

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

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

Professor Schauer has written:

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