1954

*Feb.26
*March 1
*Nov. 1

THE CORPORATION OF THE CITY OF OTTAWA *(Defendant)* ..... APPELLANT;

AND

JOSEPH CHARLES DANIEL MUNROE, an infant by his next friend Bernard Munroe and the said BERNARD MUNROE *(Plaintiffs)* RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Infants—Landlord and Tenant—Child injured by fall through wash-room window—Whether allurement or trap to children—Whether child invitee or licensee.

The appellant municipality leased to the grandmother of the infant respondent, a child of four and a half years of age, an apartment situate on the 3rd floor of a building in which to alleviate the post-war housing shortage it provided "emergency shelter" to taxpayers unable to secure other accommodation. The grandmother's household included the infant and his mother and his father, the other respondent. A common wash-room was provided the several occupants on that floor. In it was a row of wash-basins set in a stand at the back of which was a counter some three feet high at right angles to, and within two feet of a large window, the sill of which was some nineteen inches from the floor. Just below the sill and parallel to it and between it and the basins was a radiator. An adult found the infant respondent and another child playing on the counter and told them to get down. Shortly after the adult left the room the infant respondent fell through the window pane to the ground below and was seriously injured. In an action claiming damages from the appellant, a jury found that the injured child was on the premises with the knowledge and permission of the appellant. That his injuries were caused by the fall through the window pane and that there was present in the wash-room a hidden danger or allurement to the infant respondent, namely the combination of radiator, basins, platform etc., adjacent to the unpro-

tected window. That the appellant knew the danger existed, and by its neglect to install protection guards on the window, failed to use reasonable care to prevent injury to the child.

Held: (Estey and Cartwright JJ. dissenting)—that there was no evidence upon which the jury could find that the structural design of the wash-room constituted a trap or concealed danger, and the action should be dismissed.

Per Kerwin C.J. and Rand J.: The duty owed by a landlord to a licensee at the invitation of the tenant is no greater than the duty owed the tenant. *Hugget* v. *Miers* [1908] 2 K.B. 278; *Cavalier* v. *Pope* [1906] A.C. 432; *Fairman* v. *Perpetual Investment Bldg. Society* [1923] A.C. 75. In the absence of a trap or hidden danger no duty is owed by the landlord to a tenant, and a licensee on the premises at the invitation of the tenant is in no better position nor can a distinction be drawn if the licensee be a child of tender years. *Dobson* v. *Horsley* [1915] 1 K.B. 634.

Per Locke J.: There was a preliminary question of law to be determined by the trial judge as to whether the evidence disclosed anything in the nature of a concealed danger which might constitute a trap (*Latham* v. *Johnson* [1913] 1 K.B. 415) which should have been answered in the negative. There was no evidence from which negligence on the part of the defendant might reasonably be inferred (*Metropolitan Ry. Co.* v. *Jackson* 3 App. Cas. 193 at 197) and the case should have been withdrawn from the jury.

Per Estey and Cartwright JJ. (dissenting): The jury, acting upon instructions to which no exception was taken and upon evidence that supported that view, found as a fact that the infant was a licensee and the "combination" constituted a trap. The case was therefore to be distinguished from *Cavalier* v. *Pope, supra, Latham* v. *Johnson, supra* and *Dobson* v. *Horsley supra,* and brought within the rule in *Lynch* v. *Nurdin* 1 Q.B. 29 followed in *Cooke* v. *Midland Great Weastern Ry. of Ireland* [1909] A.C. 238. *Glasgow Corp.* v. *Taylor* [1922] A.C. 44, *Ellis* v. *Fulham Borough Council* [1938] 1 K.B. 212, *Yachuk* v. *Oliver Blais Co. Ltd.* [1949] A.C. 386, *Williams* v. *Cardiff Corp.* [1950] 1 K.B. 514. *Gough* v. *National Coal Board* [1953] 2 All E.R. 1283 and *Hawkins v. Coulsdon* and *Purley Urban District Council* [1954] 2 W.L.R. 122 referred to.

Per Cartwright J. (dissenting): Assuming that the attention of the jury was not directed to the question whether or not it was an implied term of the license to the infant respondent to be in the wash-room that he should be accompanied by an adult and that this point was left undecided by their answers, it was the right and duty of the Court of Appeal to decide it (*The Judicature Act* (Ont.) s. 27), and that court rightly held that the license was not subject to the implied condition.

APPEAL by the defendant corporation from the judgment of the Court of Appeal for Ontario (1) which dismissed (Hogg J.A. dissenting in part) its appeal from the judgment of Spence J upon a verdict of a jury.

F. J. Hughes, Q.C. and *A. T. Hewitt* for the appellant.

R. A. Hughes, Q.C. for the respondent.

(1) [1953] O.R. 453; 3 D.L.R. 84.

1954

CITY OF OTTAWA v. MUNROE

The judgment of Kerwin C.J. and of Rand J. was delivered by:

RAND J.:—This action was brought in tort by a father and his infant child aged 4½ years against the city of Ottawa as landlord of the former's mother-in-law with whom he and his family were living, for damages resulting to the infant in falling through a window from the third storey of an emergency apartment house. On that storey was a tenant's washroom, one of the basins in which had been allocated to the tenant. The basins were set in a stand at the back of which rose a top or counter a foot or so in width to hold washing, shaving and other accessories. The counter was about three feet from the floor. The stand was placed at right angles to and within two feet of a large window. The sill of the latter was about nineteen inches above the floor. Just below the sill was a radiator or heating coil which apparently could be used by children to reach the wash basins and, it may be, climb the stand.

The child, with one or two others, was playing in the washroom and in some way, with at least one other, managed to get up on the top of the stand. While there and shortly before the accident, another tenant entered the room and seeing them there, warned them to get down and from what appeared later the companion did. The mother was in an adjoining room washing some clothes and knew the child with two other children had been playing in the hall on which the washroom opened. There was a crash of breaking glass and the little boy was found lying on the ground, about 40 feet below, gravely injured. It does not appear what happened but it is possible that in trying to get off the stand at the end near the window, or in standing on the sill or coil in the course of getting down, he lost his balance and fell against the pane which gave way.

The father, as well as another, had complained to the janitor of the danger presented by the low window in its special situation and had asked that boards be placed across the lower part to prevent just such an accident; but neither the janitor nor the tenant did anything and the hazard remained. Some time previous to the accident a woman had fallen out of the window but under what circumstances does not appear.

The jury found that there was present in the washroom a "hidden danger, allurement or enticement" consisting of a "combination of a heating radiator, pipes, basin, bracket and platform adjacent to an unprotected window", the structural elements mentioned; and the question is whether, in law, such a claim lies.

From the earliest times the courts have laid it down that a landlord vis-a-vis the tenant may lease lands or unfurnished premises in any condition in which they may be and that the tenant takes them with all their objectionable features. In *Chappell* v. *Gregory,* (1) the Master of the Rolls. Sir John Romilly, states the rule in these words:—

> But, in the absence of such promise, (to put the house in a state of repair) a man who takes a house from a lessor, takes it as it stands; it is his business to make stipulations beforehand, and if he does not, he cannot say to the lessor "This house is not in a proper condition, and you or your builder must put it into condition which makes it fit for my living in."

In *Robbins* v. *Jones,* (2) Erlie C.J., at p. 776:—

> A landlord who lets a house in a dangerous state, is not liable to the tenants, customers or guests for accidents happening during the terms; for, fraud apart, there is no law against letting a tumbledown house; and the tenant's remedy is upon his contract, if any.

And the language of Lord Atkinson in *Cavalier* v. *Pope,* (3) is to the same effect.

That being the general law in respect of the leased premises, no question would arise here were it not that the injury arose in a washroom common to the tenants of the third floor. We have no direct evidence of the person who was in possession of that room. That the landlord may have undertaken to keep it and the basins in fit condition for use might conceivably be inferred from the fact that a janitor was supplied for the building. We have no particulars of any duty in this respect or whether, generally, he had the oversight of the room. But I will assume he did have and that the legal possession of the washroom had been retained by the city.

Since the lease was made to the mother-in-law, the right of the child to be on the leased premises derives through her, arising from the fact of her sole possession. But when we

(1) (1864) 55 E.R. 631; 24 Beav. 250.
(2) (1863) 143 E.R., 15 C.B. (N.S.) 222.
(3) [1906] A.C. 428 at 432.

1954

CITY OF OTTAWA v. MUNROE

Rand J.

come to collateral privileges annexed to leased premises, other considerations must be taken into account. It is clear that involved in the right to the washroom given the tenant is the contemplated use of it by members of the tenant's family and that will include those in fact living with the tenant; but whatever their privilege, it is essentially derivative. The right to extend permission to children or others to make use of these facilities is properly looked upon as being included in what is granted to the tenant, but they are there primarily as the tenant's guests or licensees, and only in a secondary sense do relations between them and the landlord arise.

What, then, is the duty of the landlord toward the tenant, because it would appear to follow that the tenant cannot confer greater rights or privileges upon others than he possesses himself; the scope of the tenant's rights against the landlord will limit those of such licensees.

The tenant is in contractual relations with the landlord upon the terms of which she would, in this case, be entitled to rely. For example, a covenant to repair, running directly to the lessee, provides a right that is not available to any one who is not a party to that contract: *Cavalier* v. *Pope, supra.* The position of the licensees must, then, be placed upon the footing of a duty at law not higher than that which is owed by the landlord to the tenant exclusive of contractual rights which run to the tenant alone.

This limitation has been declared by the Court of Appeal of England in *Hugget* v. *Miers,* (1). There an employee of one of the tenants, in going down an unlighted staircase retained in the possession of the landlord, fell through a door and suffered injuries. In the course of holding against the claim, Sir Gorell Barnes, President, at p. 283, said:—

> If there were no such duty on the part of the landlord towards the tenants, I cannot see how there possibly could be such a duty towards an outsider who comes on the premises on the invitation of a tenant.

and at p. 284:—

> It appears impossible under the circumstances to infer in favour, of a person using the staircase by invitation of a tenant any undertaking on the part of the landlord to do what the tenants, as it would seem by arrangement with the landlord, undertake to do for themselves, and I cannot see how such a person could be in a better position in this respect than the tenant himself.

(1) [1908] 2 K.B. 278.

In this Farwell L.J. concurred:—

A member of the public using the staircase on the invitation of the tenant can (not) have a greater right than the tenant himself.

The same authority, as well as *Cavalier* v. *Pope, supra,* and *Fairman* v. *Perpetual Investment Building Society,* (1) shows also that under the general duty implied in law from the circumstances of the appurtenance, the landlord is responsible to such a person only as to a licensee, that is, one entering by the authority of the tenant takes the premises as he finds them, subject to protection against concealed dangers or traps. It is obvious that, here to the tenant as well as to her licensee there was no trap or hidden danger. What is complained of is simply certain parts of the structural design which the landlord saw fit to give to the washroom. On that state of things, the tenant could not have found any claim against the landlord, nor could an adult licensee.

Is the child in any better position? The only ground upon which this can be suggested is that what is apparent to the tenant may be a trap or an allurement to the child. Apart from the fact that the child is brought on the premises by his father, it would be a strange proposition that a landlord should be bound to alter his premises in order to make them safe for the child when they are unobjectionable as to his tenant. The answer to be given the tenant is simply that if the premises are not fit for his children he should look for others. Now that may appear to be a cold answer when premises are at a premium; but if through stress of circumstances the tenant, and a *fortiori* a tenant's licensee, must live where he can, then any special accommodation necessary for the needs of his children must, in some manner, be provided by himself. Of course not all tenants have children and children may arrive in the family at any time and it would be a *reductio ad absurdum* that the duty of the landlord in relation to the structure of his accessory accommodation should depend upon such happenings. On long leases of, say, apartments, safe today they would become dangerous tomorrow as and where and when children happened to be added to a family.

(1) [1923] A.C. 74.

1954

CITY OF OTTAWA v. MUNROE

Rand J.

On this point there is direct authority. In *Dobson* v. *Horsley,* (1), the facts were almost identical with those here. The tenant's child of 3½ years of age, while playing on steps retained in the control of the landlord, fell through an aperture of the railing owing to one of the upright bars being missing. It was argued that as to the child the stairway, the danger of which he could not appreciate, was a trap but the Court of Appeal held that no cause of action was shown. Buckley L.J. at p. 641, meeting this contention, said:—

> If this was a dangerous place, as obviously it was, the child ought not to have been there without proper protection; and the liability of the defendant cannot be enlarged by exposing him to a liability for not providing such a railing as would prevent a child from falling into the area.

In this statement Pickford L.J. concurred:—

> With regard to the question as to the child, I entirely agree with what has been said by Buckley L.J., that his age makes no difference.

Does the case gain any strength from the fact that the landlord, for instance, has knowledge that the child has played in the washroom and on the top of the stand? That can only be on the principle of the cases that have held an owner liable to a trespassing child who had been attracted by an object containing a hidden danger. But the child here was not a trespasser nor was it attracted to the room by the so-called combination of features; it was in the room as of right through the tenant, and although it bears a relation of licensee toward the landlord, I know of no consideration in law which in such a situation transfers the care of the infant from the parent to the landlord.

But the arrangement here cannot be called an allurement or trap as that term is used in the cases. The washroom and its fixtures were of ordinary design. The window was, in a sense, dangerous because it reached so near to the floor, but no one would suggest that it constituted a trap. If an ordinary table had been supplied and the child fell off and went through the window, could that also be called a trap? If the common approach was a high narrow walk without any protecting sides, would the landlord be liable when a young child, playing on it, falls off? Would his knowledge

(1) [1915] 1 K.B. 634.

that the child was accustomed to play on it make any difference? I should say no to both questions, and if that is so there is no distinction that I can see to be drawn between that and what we have before us.

The appeal must therefore be allowed and the action dismissed. If, in the face of the circumstances disclosed, the city insists on costs, they must follow the event throughout.

ESTEY J. (dissenting):—The respondent, Bernard Munroe, in this action claims damages on behalf of himself and, as next friend, of his infant son, Joseph Charles Daniel Munroe, for injuries suffered by the latter when, at the age of about four and one-half years, he fell through a third floor window in the appellant's apartment block, Wallis House.

By a lease in writing dated April 1, 1948, the appellant leased to Mrs. Caroline Dorion suite No. 29 consisting of three rooms in the said Wallis House. While not mentioned in the lease, it was understood that Mrs. Dorion and her guests would use the washroom on the third floor. In fact, one of the basins in that room was allotted to her suite. Mrs. Dorion is the mother-in-law of the respondent Bernard Munroe. The latter, with his wife and infant son, were, for some time prior to and at all times material hereto, living with Mrs. Dorion in this suite No. 29.

In the afternoon of October 19, 1949, the infant respondent, with another infant, was playing in the washroom when he fell through a pane of glass in a closed window and suffered the injuries here claimed for. Only the infant plaintiff and the other infant of tender years were, at the critical time, present in the washroom and it is, therefore, impossible to ascertain precisely what happened. Two or three minutes before the infant respondent fell, George Thomas, who occupied suite No. 31, which had a door opening into this washroom, was in the latter and saw him and another infant playing on the counter. He told them to get down and they were apparently in the course of doing so when he left the washroom. The jury evidently concluded that in doing so the infant respondent fell through the window.

This washroom, located on the south side of the corridor at the west end of the building, was for "personal washing and shaving." The window in question is one of two facing

1954

CITY OF OTTAWA v. MUNROE

Estey J.

in a southerly direction. Between these two windows there is a short space and the wash basins extend from near that space northward through the middle of the room. Immediately behind these wash basins, and used for placing toilet and shaving accessories, is what is variously described as a platform, counter, shelf or washstand (hereinafter called the counter). This counter rests upon the floor. It is eleven feet three inches in length, one foot six inches in width and two feet eleven inches in height. It commences about one foot from that part of the window through which the infant fell and extends behind and along the wash basins. Under the window is a radiator heating the room and the basin nearest to the window had been removed but, in the main, the equipment necessary to service it remained in place. The glass in the lower sash of this window is in two parts. He fell through one of these which is two feet eight inches in length and one foot six inches in width. The window itself is three feet four inches wide and the window pane described as of "ordinary light glass." The janitor deposed that the presence of the radiator and the drainage pipe, exposed since the removal of the basin, provided "good climbing" and that small children three or four years old could climb on it. The janitor, when asked "Would they go through the window?" answered "It is a dangerous window."

The respondent Bernard Munroe, some five months prior to the infant's falling through this window, in the presence of Walter Casey, another tenant, and the janitor, complained of the window here in question being dangerous to children, without a guard or other protection thereon, to Louis Nezan, who was employed by the appellant and was in charge of purchasing cleaning supplies for Wallis House and was one of the employees who might instruct the janitor to make repairs. At that time he asked "if it were possible to put any guard or railings in front of that window." He stated that when Louis Nezan asked why "I told him why I was asking, and he said he did not have time or men for that."

Walter Casey recalled the conversation and deposed that Bernard Munroe

was talking about putting some protection on the windows so that the children would not fall out and hurt themselves.

The janitor, while he recalled the occasion, could not remember what was said and Louis Nezan had no recollection of the occasion, or of any complaint in respect to the window.

The janitor, Balmore Lemire, was the attendant on the premises. He admitted that he had seen children playing in this room and upon the counter. In the course of his evidence he stated:

Q. Did you ever see children on the counter which is shown in these exhibits? A. Yes, I have seen them, and took them off myself.

Q. How often? Frequently? Were they up there a lot? A. Especially on a Saturday when they had no school, or something.

Q. What were they doing up there when you saw them? A Mostly sitting down, or else they were bending down and turning the taps on and throwing water on each other.

Q. In other words, they would lean over the taps, and have water fights on the counter? A. Yes.

Q. Were they standing up on the counter when you saw them? A. I didn't see them stand up. I saw them sitting down, and stooping down.

Q. Did you ever tell them to get off? A. Sometimes they were using hot water, and I told them we have not got enough to throw away, so I brought them down with my hand, and told them not to get on there any more.

Q. You took them down, and told them not to get on there again? A. No; it was a dangerous place to play.

In spite of the fact that the janitor had said this was a "dangerous window," when asked why he did not put a guard thereon, he replied: "Because there did not seem to be any danger there." Moreover, Louis Nezan deposed, when specifically referring to the washroom, "I did not know it as a dangerous condition" and, when asked if the presence of wash basins, coils and platform where "children were wont to get up and play" did not require some protection on the window, he replied: "I did not think it was necessary."

The jury found the infant was on the premises at Wallis House to the knowledge of and with the permission of the appellant; he suffered his injuries when he fell through a window in the washroom; the combination of the heating radiator, pipes, basins, bracket and platform adjacent to an unprotected window constituted, in the washroom, a hidden danger, an allurement or enticement to the infant plaintiff; the appellant, through its officials, knew of the danger and

1954

CITY OF OTTAWA v. MUNROE

Estey J.

did not take reasonable care to prevent injury from the hidden danger, allurement or enticement in that it failed to install protection guards on the washroom windows.

The washroom was not included in the lease and the evidence establishes that it remained at all times in the control and possession of the appellant, whose janitor regularly inspected it, as did other employees, and in this, as in the other washrooms, it would make any necessary repairs or alterations. The fact that the injury did not occur in the demised suite, but in that portion which remained in the possession of the landlord, distinguishes it from cases such as *Cavalier* v. *Pope* (1). This distinction is emphasized in a number of cases, particularly in *Sutcliffe* v. *Clients Investment Co. Ltd.* (2), where a licensee with an interest, or an invitee, was injured when a portion of a balcony not included in the lease gave way. Scrutton L.J. at p. 756 stated.

> The first question is, Did this balcony and balustrade form part of the premises demised to the tenant? Because if they were included in the demise, I do not think, as at present advised, that any action would lie against the landlords . . . The learned judge has decided the question as a matter of law, and in the circumstances I do not feel able to interfere with his decision, and so we must proceed on the assumption that not being included in the demise they remained in the possession and control of the landlords.

It is clear that the facilities of this washroom were essential to the enjoyment of the suite by Mrs. Dorion, as well as by her boarders and guests, and, as already stated, one of the basins was specifically allotted to her suite. As indicated by the foregoing evidence, children were, to the knowledge of the appellant's servant, playing in the washroom, unattended, upon a number of occasions. The finding of the jury that the infant respondent was on the premises at Wallis House to the knowledge of and with the permission of the appellant, when construed, as it must be, in relation to the evidence and the other findings, cannot be restricted to parts of Wallis House other than this washroom, but rather must include the latter.

The relationship between the infant respondent when in the washroom and the appellant is similar to that of the plaintiff in *Fairman* v. *Perpetual Investment Building*

(1) [1906] A.C. 428. (2) [1924] 2 K.B. 746.

Society (1), where, in the view of the majority, the relationship between the lodger and the landlord was that respectively of licensee and licensor. While there may be much to be said for the view expressed by Scott L.J. in *Haseldine* v. *C. A. Daw and Son Ltd.*, (2), to the effect that the expression of the majority in the *Fairman* case was but a dictum, and that the relationship in such circumstances should be that of invitee and invitor, it is unnecessary, in the present case, to determine that issue, as, in my view, upon the facts in this record, the result would be the same whether the infant be described as an invitee or a licensee.

Upon the assumption that the infant respondent was, while in the washroom, a licensee, he must accept the premises with whatever inconveniences, risks or dangers as are open and obvious. *Latham* v. *Johnson* (3). In this regard there is no distinction between an adult and a child, as emphasized in *Dobson* v. *Horsley* (4).

In the present case, however, the jury, upon instructions to which no exceptions have been taken upon this appeal, have not found the danger to be open and obvious, but, on the contrary, that the heating radiator, pipes, basins, bracket and counter constituted an allurement or enticement to the infant to climb thereon and that the combination of this equipment and the window adjacent thereto, through which, in the absence of guards or appropriate protection, a child might, as the infant plaintiff did, fall in the course of his climbing or playing upon this washroom equipment, constituted a concealed or hidden danger. When such facts are found to exist by a jury, the issue is not whether the members of an appellate court agree with the jury's finding, but whether there was evidence upon which a jury, acting judicially, might so find.

This finding brings the case within *Lynch* v. *Nurdin* (5), where an infant climber upon a cart left unattended in a public place. He fell off and suffered injuries for which damages were recovered because such a vehicle so left was to children but an attraction or an inducement to the exercise of their natural tendencies. As stated by Lord Atkinson, the principle of *Lynch* v. *Nurdin* "applies to any place

(1) [1923] A.C. 74.
(2) [1941] 2 K.B. 343.
(3) [1913] 1 K.B. 398.
(4) [1915] 1 K.B. 634.
(5) (1841) 1 Q.B. 29.

1954

CITY OF OTTAWA v. MUNROE

Estey J.

to which boys or girls have a legal right to go and may reasonably be expected to be not unlikely to frequent." *Cooke* v. *Midland Great Western Ry. of Ireland* (1).

In *Ellis* v. *Fulham Borough Council,* (2), the borough provided a paddling pool in a public park for the use of children. On the morning in question the attendant had raked out the pond for the purpose of making it safe for the children to paddle and almost immediately thereafter the infant stepped into the pond and cut his foot upon a piece of glass. On the basis that the infant was a licensee, it was held that the council knew of the danger and had taken inadequate precautions to provide against that danger. Lord Justice Greer at p. 225 stated:

> . . . the ground which I think is sufficient is that the corporation recognized the danger to the children when they stepped into this pond at the place adjoining the sand patch, but that they took inadequate measures to remove that danger which they could have prevented if they had taken adequate measures to prevent it.

The language of this statement is particularly appropriate as no doubt the infant respondent, in the present case, would not have fallen through this window pane had the appellant provided guards, or other reasonable protection. In its failure to do so it "exposed the children to a danger" which it could, by reasonable means, have removed.

In *Williams* v. *Cardiff Corporation* (3), an infant four and one-half years old, while playing on a piece of waste ground, the property of the Cardiff Corporation, rolled down a bank and was injured by broken glass and tins at the foot thereof. The corporation was held liable and Jenkins L.J. at p. 518 stated:

> From the point of view of an infant, I have no doubt that such objects, scattered about the ground, are traps or concealed dangers, whatever might be said of them from the point of view of an adult.

Romer J. at p. 519 stated:

> It is obvious, I think, that the mere presence of a grassy slope could not amount to a concealed danger, for it could be seen. What I think is equally clear on the evidence is that the presence of that slope, coupled with the presence of tins and broken glass and other material at the bottom of it, did amount, and the county court judge was right in so holding, to a concealed danger, which would result in the corporation's being liable for damage sustained by this infant plaintiff.

(1) [1909] A.C. 229 at 238. (2) [1938] 1 K.B. 212.
(3) [1950] 1 K.B. 514.

Here again it may well be said that even a child would see that if he climbed upon the equipment he might fall to the floor or on some other part thereof and, therefore, that such was an obvious and not a concealed danger. That, however, was not the issue. The infant respondent had fallen through the closed window and the jury found it was the "combination" of this alluring equipment in such proximity to the window that constituted a concealed or hidden danger.

In *Corporation of the City of Glasgow* v. *Taylor* (1), the berries were perfectly obvious to children, but it was their poisonous character that they did not appreciate and, therefore, constituted "something in the nature of a trap." Lord Atkinson at p. 53 points out:

> The defenders were, therefore, aware of the evistence of a concealed or disguised danger to which the child might be exposed when he frequented their park, a danger of which he was entirely ignorant, and could not by himself reasonably discover, yet they did nothing to protect him from that danger or even inform him of its existence.

In *Latham* v. *Johnson, supra,* where the danger was obvious, the infant did not recover, Hamilton L.J. (later Lord Sumner), however, in the course of his judgment, stated at p. 416:

> On the other hand, the allurement may arise after he has entered with leave or as of right. Then the presence in a frequented place of some object of attraction, tempting him to meddle where he ought to abstain, may well constitute a trap, and in the case of a child too young to be capable of contributory negligence it may impose full liability on the owner or occupier, if he ought, as a reasonable man, to have anticipated the presence of the child and the attractiveness and peril of the object.

These cases illustrate that a licensor ought not to have upon his premises, which children of tender years, unattended, are known to frequent, objects with which, in the exercise of their natural propensity, they will meddle and suffer injury from the concealed or hidden danger of which the licensor has knowledge. This is further illustrated by the observations of the learned Lord Justices in *Hawkins* v. *Coulsdon and Purley Urban District Council* (2), where at p. 132 Denning L.J. stated:

> I do not think that there is any difference between a child licensee and an adult licensee except that a child will meddle where an adult will not, and this fact must be taken into account in deciding whether the occupier has been negligent.

(1) [1922] 1 A.C. 44.
(2) [1954] 2 W.L.R. 122.

1954

CITY OF OTTAWA v. MUNROE

Estey J.

In the same case Somervell L.J., referring to accidents to young children, stated at p. 127:

> They are, of course, in one sense in a class apart in that, for example, no adult who choose to play with a turntable would be able to recover damages if he injured himself.

Then in Pollock on Torts, 15th Ed. at p. 406, it is stated:

> . . . an occupier who knowingly allows young children to come and play on his land must not expose them to dangers which, though manifest enough to an adult of ordinary sense, are not manifest to them.

The word "allurement," as used in this connection, is incapable of precise meaning. Whatever is attractive to children, in the sense that its presence will lead them, as here, to the exercise of their natural tendency to climb, turn on the taps and throw water at each other, provides an allurement or an enticement. If, in so doing, they suffer an injury from a concealed or a hidden danger in contrast to that which is open and obvious, then the licensor is said to have maintained a trap on his premises and may be liable in damages to an injured child. As Lord Atkinson stated in *Cooke* v. *Midland Great Western Ry. of Ireland, supra,* at p. 237:

> . . . if vehicles or machines are left by their owners, or by the agents of the owners, in any place which children and boys of this kind are rightfully entitled to frequent, and are not unlikely actually to frequent, unattended or unguarded and in such a state or position as to be calculated to attract or allure these boys or children to intermeddle with them, and to be dangerous if intermeddled with, then the owners of those machines or vehicles will be responsible in damages for injuries sustained by these juvenile intermeddlers through the negligence of the former in leaving their machines or vehicles in such places under such conditions, even though the accident causing the injury be itself brought about by the intervention of a third party, or the injured person . . .

What constitutes a trap, or a concealed or hidden danger, is a question of fact to be found by a jury upon a consideration of all the relevant facts in a particular case. In the present case, apart from any conclusion the jury might arrive at from the construction, appearance and position of the equipment in the washroom, and particularly its relation to the window, there is the evidence of the janitor that this was a "dangerous window" which, in the context, could only mean that a child climbing upon the equipment already described might slip and, as a consequence, fall through the closed window. There is also the evidence of the complaint made by Bernard Munroe when he requested a guard be

placed thereon and the answer of Louis Nezan. These, in my view, all support the verdict of the jury to the effect that this "combination" constituted a concealed or hidden danger. In the language of Hamilton L.J., in *Latham* v. *Johnson, supra,* at p. 415, this "combination" presented to the infant "an appearance of safety under circumstances cloaking a reality of danger," at least in so far as the possibility of his falling through a pane of glass in the window was concerned. That it was such is strengthened by the evidence of Louis Nezan, who was fully aware of the details of this room and failed to realize the danger to children without protection or guards on the window. The jury might well conclude that if Louis Nezan did not realize the danger children of tender years would not do so and could not be reasonably expected to do so.

We are not here concerned with how much an infant should know or realize the danger of his falling to the floor or upon another part of the equipment, or even the possibility of his falling out of the window, had it been up or open. We are concerned with whether an infant of tender years, with the window closed, would recognize or appreciate the possibility of his falling through it, as a consequence of climbing upon the equipment. The infant in *Yachuk* v. *Oliver Blais Co., Ltd.* (1), knew gasoline could be used to make a fire. In fact the boys had purchased it for that purpose. Their Lordships of the Judicial Committee, at p. 396, stated, referring to the infant plaintiff,

> He did not know, and there is no evidence that he had ever been told, that gasoline was a volatile liquid capable of producing a highly inflammable vapor likely to burst into flame if heat were brought near it.

Their Lordships then concluded:

> It is a fair inference from the evidence that it was the very property of gasoline which he neither knew, nor could be expected to know, which brought about his misadventure.

So here, however much the danger of falling may have been obvious to the infant respondent in other respects, the jury, in my view, were justified in finding that the "combination" was such as to hide or conceal from the infant the possibility of his falling through a pane of glass in a closed window.

(1) [1949] A.C. 386.

1954

CITY OF OTTAWA v. MUNROE

Estey J.

In my opinion, and with great respect to those who entertain a contrary opinion, the jury, with all the circumstances before them, had evidence upon which they might conclude, as they did, that an allurement existed and that the "combination" constituted a hidden danger to the children. It follows that the judgment entered for the plaintiff at the trial, and maintained in the Court of Appeal, should be affirmed.

The appeal should be dismissed and the judgments below affirmed.

LOCKE J.:—In *Metropolitan Ry. Co.* v. *Jackson* (1), Lord Chancellor Cains, referring to the respective functions of the Judge and the jury, said in part:—

> The Judge has to say whether any facts have been established by evidence from which negligence *may be* reasonably inferred; the jurors have to say whether from those facts, when submitted to them, negligence *ought* to be inferred.

In my opinion, there was no such evidence in the present case and it should have been withdrawn from the jury: accordingly the appeal should be allowed.

The circumstances under which the child Daniel Munroe and his parents came to be living in the suite of rooms rented by his grandmother in Wallis House are described in other reasons to be delivered in this matter, as well as the layout of the so-called wash room from one of the windows of which the child fell.

There must be determined at the outset the status of the child when in the room. According to the evidence of the father and the mother, they both considered the window, with the adjoining basins, as a danger to little children. On the day of the accident, the mother took the little boy with her to a room where she proposed to wash some pots. According to her, there were two other little children in the hall and her son remained with them and, with her consent, went with them into the wash room. Mrs. Munroe said she permitted this as she could watch them from the room in which she was working. Unfortunately, she did not do so and there is no account by any eye witness of the manner in which the child struck or fell against the pane of glass, and so to the ground below. One Thomas, a tenant

(1) (1877) 3 App. Cas. 193 at 197.

in the building, had been in the room shortly before the accident and had seen young Munroe and one of the other children on the shelf or wash stand behind the wash basins and had told them to get down. The children were apparently considered as being too young to be called as witnesses and whether the little boy slipped when getting down from the shelf on to the sill of the window, or whether, having got on to the sill, he was inadvertently pushed or fell against it while playing, is a matter of surmise.

The window, with its four panes of glass, did not differ from windows ordinarily found in rooming or apartment houses. The sill was some 18 or 19 inches from the floor and along the wall, immediately in front of it, there was an ordinary radiator of the type used for hot water or steam heating which would appear from the photographs to have been approximately 12 inches in height. A child of the age of young Munroe could thus readily climb up on the radiator and thus on to the window sill and, either from that point or perhaps directly from the radiator, up on to the wash basin and the shelf behind it. The height of the window sill from the floor was the same as that of at least some other of the windows in the building and there is no evidence to suggest that it was any lower than the window sills in the rooms in which the child lived with his parents.

The wash room was not part of the demised premises and the child's parents were not tenants. Upon the evidence it is, however, clear that they, as well as the tenant, were permitted to use one of the basins in the wash room and it was known by the janitor that children of the tenants went to the room. In the case of very young children such as young Munroe, too small to use the basins unaided, I think any licence to them to use the room should be held to have been subject to the condition that they be accompanied there by some person who could look after them, as in the case of the children whose rights were considered in *Burchell* v. *Hickisson* (1), and *Dobson* v. *Horsley* (2).

If, however, it were to be conceded that the child was a licensee in the wash room without restriction, the obligation of the owner was as it is defined in the 11th Edition of Salmond on Torts at p. 571:—

(1) (1880) 50 L.T.C.P. 101. (2) [1915] 1 K.B. 634.

1954

CITY OF OTTAWA v. MUNROE

Locke J.

Although the occupier is not bound to use any care to make the premises safe for the use of a mere licensee, he is under an obligation to give warning to such licensee of the existence of any concealed danger which exists on the premises and is known to the occupier. He is not entitled knowingly to lead even a bare licensee into a trap. By the term "concealed danger" is meant a danger which in the words of Lord Wrenbury in *Fairman's* Case (1), "is not known to the licensee or obvious to the licensee using reasonable care." . . . The licensee can recover only if he can prove that the occupier led him into a trap by permitting him to enter on premises which he, using due care on his own part, reasonably supposed to be safe.

No one has attempted to give an exhaustive definition of a trap in the sense that that expression is used in actions of this nature. The characteristics of a trap have, however, been described in a number of leading cases.

In *Latham* v. *Johnson & Nephew Ltd.* (2), Hamilton L.J. (afterwards Lord Sumner) said (p. 415) that a trap was a figure of speech not a formula, which involved the idea of concealment and surprise, of an appearance of safety under circumstances cloaking a reality of danger, and pointed out that (p. 416):—

it must be matter of law to say whether a given object can be a trap in the double sense of being fascinating and fatal.

Continuing, referring to the facts in *Latham's* case, he said:—

No strict answer has been, or perhaps ever will be, given to the question, but I am convinced that a heap of paving stones in broad daylight in a private close cannot so combine the properties of temptation and retribution as to be properly called a trap.

In considering the kind of chattel in respect of which an owner owes a duty of care to strangers, whether they are invited or only licensed, he said (p. 419):—

There is only one answer: the chattel must be something highly dangerous in itself, inherently or from the state in which its owner suffers it to be.

It is to be noted that in the same case Farwell J., who agreed that there was nothing in the nature of a trap, said (p. 407):—

If the child is too young to understand danger, the licence ought not to be held to extend to such a child unless accompanied by a competent guardian.

(1) [1923] A.C. 74.

(2) [1913] 1 K.B. 398.

In *Fairman* v. *Perpetual Investment Building Society* (1), Lord Atkinson referred to a trap as a hidden peril of the existence of which the landlord knew or ought to have known and, in referring to *Smith* v. *London and St. Katharine Docks Co.* (2), which, he said, was one of the cases not very happily styled trap cases, said that it was a good example of an unusual or covert danger of which the plaintiff knew nothing but of which the defendants were well aware. Lord Wrenbury said (p. 96) that the term implied a concealed or hidden peril.

In 23 Halsbury, at p. 584, Note (*p*), where the duty in regard to children is considered and the cases summarized, it is said:—

> The object must be dangerous in itself, inherently or from the state in which its owner suffers it to be; the object may be dangerous through being actually in motion, or liable to be easily set in motion, or poisonous or deleterious to eat or handle, or explosive, or so defective in some way as to be inherently dangerous.

In *Donovan* v. *Union Cartage Co.* (3), Acton J., in delivering the judgment of the Court, referred to *Lynch* v. *Nurdin* (4), where the defendant left his horse and cart unattended on the street and the plaintiff, a child of seven years of age, got upon the cart to play and was injured when another child started to lead the horse, saying (p. 74):—

> To extend the principle of *Lynch* v. *Nurdin* to things in no way dangerous in themselves left unattended on the street (or in other places open to the public such as parks, pleasure grounds or open spaces) would be to impose burdens of responsibility so far reaching and incalculable as to be unreasonable and intolerable. It cannot be said that, even if such things are likely to attract children, there is in them anything in the nature of a trap or a concealed peril.

There was, in my opinion, nothing in the nature of a trap in the present case. The wash basins were of the type found in all dwellings equipped with running water: the radiator which stood between the shelf behind the basins and the window was the ordinary radiator in common use and there was nothing to distinguish the window sill or the windows from those to be found in other dwellings. There was no concealed danger, even to a child such as Daniel Munroe, though the risk of falling against the window pane from the shelf or platform adjacent to it may not have been, and no doubt was not, present in his mind. If this was a

(1) [1923] A.C. 74.
(2) (1868) L.R. 3 C.P. 326.
(3) [1933] 2 K.B. 71.
(4) (1841) 1 Q.B. 30.

1954

CITY OF OTTAWA v. MUNROE

Locke J.

trap, then any window sill which a child might reach by the use of a foot stool and window looking out over an area which might be attractive to children such as a playground, or any chair or table or any step ladder upon which a small child might clamber out of curiosity and fall, could be so classified. To extend the liability of the owner or occupier of property to cases such as these would be, in my judgment, to "impose burdens of responsibility so far reaching and inculculable as to be unreasonable and intolerable."

I would allow this appeal, with costs throughout if they are demanded.

CARTWRIGHT J. (dissenting):—This is an appeal from an order of the Court of Appeal for Ontario affirming the judgment of Spence J., given in accordance with the answers of the jury, awarding damages of $9,000 to the infant respondent and $1040.50 to the adult respondent. Leave to appeal as to the judgment in favour of the adult respondent was granted by the Court of Appeal. The appellant asks that the action be dismissed *in toto* and states expressly that it does not seek a new trial. The amounts at which the damages were assessed are not questioned.

The infant respondent is the son of the adult respondent. He was born on May 25, 1945. On the afternoon of October 19, 1949, he fell through a window in a washroom on the third floor of a building in the City of Ottawa known as Wallis House and suffered serious injuries. The appellant was, at all relevant times, the lessee of this building, which was divided into fifty-four suites which were sub-let to tenants. By a written lease dated April 1, 1948, the appellant demised suite number 29 on the third floor to Mrs. Dorion who is the mother-in-law of the adult respondent and the grandmother of the infant respondent. The lease was from week to week and was still subsisting at the time of the accident. While this lease was dated April 1, 1948, Mrs. Dorion had in fact become the tenant of suite 29 some time in 1946 when she, her daughter and the respondents moved into it. Between the date on which they moved in and the date of the accident two other children were born to Mr. and Mrs. Munroe so that at the date of the accident suite 29 was occupied by Mrs. Dorion, Mr. and Mrs. Munroe and their three infant children.

The suites in Wallis House are described as "emergency shelter" provided by the appellant in an effort to alleviate the housing shortage and contained no bathrooms. There were on each floor lavatories and wash-rooms which were retained in the possession of the appellant. Permission to use one of these lavatory rooms and one of these wash-rooms in common with the tenants of several other suites was given orally to Mrs. Dorion. It is clear on the evidence that this permission extended to the Munroes as members of her "family or household", words which appear frequently in the lease and the written regulations attached thereto. It was from the wash-room which Mrs. Dorion had permission to use that the infant respondent fell.

Immediately before the infant respondent fell through the window he was in the wash-room in company with another little boy too young to give evidence. Mrs. Munroe was in the lavatory-room across the hall washing some pans and heard the crash of the breaking glass. The infant respondent was too young to give evidence. There was no eye-witness to testify as to how the accident occurred but the theory of the respondents, supported by the circumstantial evidence and accepted by the courts below, was that the infant respondent had climbed up on to a shelf which ran along behind and a little above the level of the row of four wash-basins which the room contained and had fallen from it through the window. The southerly end of this shelf was close to the window and somewhat higher than the window-sill which was one foot, seven inches from the floor. The whole situation is fully described in the evidence and illustrated in photographs filed as exhibits but it is not necessary to give a detailed description. It is sufficient to say that the jury were justified in finding, as they did, that the particular arrangement was alluring to a child of the respondent's age and constituted for him a hidden danger.

The position taken by the respondents is that the wash-room was in the occupation of the appellant, that the infant respondent was a licensee in the wash-room, that the appellant knowingly permitted the existence in the wash-room of a hidden danger or trap of a nature alluring to a child into which trap the infant respondent fell and was injured.

1954

CITY OF OTTAWA v. MUNROE

Cartwright J.

The questions put to the jury and their answers are as follows:—

Q. 1. Was the infant plaintiff on the defendant's premises at Wallis House to the knowledge of and with the permission of the defendants? Answer "Yes" or "No".

The answer is "Yes".

Q. 2. How were the injuries to the infant plaintiff caused?

Answer: By a fall through the window pane shown broken in Exhibit No. 6.

Q. 3. Was there present in the washroom a hidden danger, an allurement or enticement to the infant plaintiff? Answer "Yes" or "No".

The answer is "Yes".

Q. 4. If your answer to Question No. 3 is "Yes", describe its nature.

Answer: A combination of a heating radiator, pipes, basins, bracket and platform adjacent to an unprotected window.

Q. 5. If your answer to Question No. 3 is "Yes"; did the defendant through its officials know of the danger which existed? Answer "Yes" or "No".

The answer is "Yes".

Q. 6. If your answer to Question No. 5 is "Yes", did the defendant use reasonable care to prevent injury from the hidden danger, allurement or enticement to the infant plaintiff? Answer "Yes" or "No".

The answer is "No".

Q. 7. If your answer to Question No. 6 is "No", state in detail the manner in which the defendant failed to use such reasonable care?

The answer is "failure to install protection guards on the washroom windows."

Q. 8. Regardless of your answers to any of the above questions, at what amount do you assess the damages suffered by:

(*a*) The plaintiff, Bernard Munroe $1,040.50

(*b*) The plaintiff, Daniel Munroe 9,000.00

The main contentions of the appellant are (i) that the infant respondent was a trespasser in the wash-room at the time he was injured, and (ii) that even if he were a licensee there was no breach of the duty owed to him.

The argument that the infant respondent was a trespasser is put alternatively. It is first said that he and his parents were lodgers with Mrs. Dorion, that she had no right to keep lodgers, and therefore they had no right to be living in Wallis House at all. This argument fails on the evidence and the answer of the jury to Question 1, whatever its precise meaning, is decisive against the appellant on this point. In the appellant's factum the effect of the jury's answer on this point is put as follows:—

There was no finding by the jury that the infant Plaintiff, admittedly too young to take care of himself, was a licensee in the washroom at the material time. There was only a finding that the infant Plaintiff was a licensee in Wallis House in which there were at least 28 other private apartments.

It is said, secondly, that assuming that the infant respondent as a member of Mrs. Dorion's household was permitted to live in suite 29 and to use the washroom his license to use it was, in view of his age, subject to an implied term that he would be accompanied by an adult person capable of looking after him and that as he was admittedly not so accompanied at the time of the accident he was a trespasser.

It is essential that the question whether the infant respondent was a licensee or a trespasser be first determined. In *Robert Addie & Sons* v. *Dumbreck* (1), at pages 371 and 372 Lord Dunedin speaks of the three classes, invitees, licensees and trespassers, and continues:—

> Now the line that separates each of these three classes is an absolutely rigid line. There is no half-way house, no no-man's land between adjacent territories. When I say rigid, I mean rigid in law, When you come to the facts it may well be that there is great difficulty—such difficulty as may give rise to difference of judicial opinion—in deciding into which category a particular case falls, but a judge must decide and, having decided, then the law of that category will rule and there must be no looking to the law of the adjoining category. I cannot help thinking that the use of epithets, "bare licensee", "pure trespassers" and so on, has much to answer for in obscuring what I think is a vital proposition; that, in deciding cases of the class we are considering, the first duty of the tribunal is to fix once and for all into which of the three classes the person in question falls."

All the members of the Court of Appeal were of opinion that the answers made by the jury read as a whole amounted to a finding that the infant respondent was a licensee in the washroom on the occasion in question. With respect, I am much impressed by the submission quoted above from the factum of the appellant as to the meaning of the answer to question 1. I will assume for the purposes of this branch of the matter that the attention of the jury was not directed to the question whether or not it was an implied term of the permission to the infant respondent to be in the wash-room that he should be accompanied by an adult and that the point is left undecided by their answers. In such circumstances it became the right and duty of the Court of Appeal to decide this question of fact. Section 27 of the Ontario Judicature Act reads in part as follows:—

> 27(1) The court upon an appeal may give any judgment which ought to have been pronounced and may make such further or other order as may be deemed just.

(1) [1929] A.C. 358.

1954

CITY OF OTTAWA v. MUNROE

Cartwright J.

(2) The court shall have power to draw inferences of fact not inconsistent with any finding of the jury which is not set aside, and if satisfied that there are before the court all the materials necessary for finally determining the matters in controversy, or any of them, or for awarding any relief sought, the court may given judgment accordingly.

I think it clear from the reasons of the learned Chief Justice of Ontario, with which Aylesworth J.A. agreed, that he was of opinion that the proper finding on the evidence was that the infant respondent was a licensee in the wash-room and that his license was not subject to the implied condition contended for by the appellant. After discussing the evidence and the authorities relied on by the appellant the learned Chief Justice says in part:—

> I do not think there are any circumstances in the instant case which would justify attaching to the permission to use the wash-basin room a condition that the infant plaintiff would have to be accompanied by an adult.

I respectfully agree with this conclusion and wish to mention some of those matters in the evidence which support it. The terms of the lease to Mrs. Dorion contemplate that the demised suite will be used not only by her but also by her "family and household". The regulations attached to the lease, particularly number 4, contemplate the use of "water-closets and other water apparatus" by the lessee's "family, guests, visitors, servants or agents." The fact that the Munroes were living with Mrs. Dorion as members of her household and of course making use of the lavatory-room and wash-room was known to the appellant. The fact that not only the infant respondent but a number of other children were often in the wash-room unaccompanied by any adult and played there frequently was well known to the appellant's janitor. His evidence is that he often saw children playing on the shelf or counter and told them to get off but there is no suggestion in his evidence or that of any other witness that the janitor, or anyone else employed by or representing the appellant, ever told any child or the parent of any child that the children must not use the room unless accompanied by an older person. In default of any evidence on the point I see no reason to hold that persons of ordinary common sense would not permit a little boy of four years and five months to go unaccompanied into a wash-room on the same floor of the building as that on which the apartment in which he was living was situate. I conclude

therefore that on the day of the accident the infant respondent, although unaccompanied by any older person, was a licensee in the wash-room of which the appellant was the occupant.

What then was the duty owed by the appellant to the infant respondent? In my opinion this duty is correctly stated in the passage in Pollock on Torts adopted by Scrutton L.J. in *Liddle* v. *Yorkshire (North Riding) County Council* (1). At page 111, the learned Lord Justice said:—

> I also agree with the passage in Pollock on Torts (13th ed.), p. 544, where it is said: "Some decisions in America have gone to great lengths in favour of infant licensees and even trespassers, and have been much discussed. In England they have been followed only to this extent, that an occupier who knowingly allows young children to come and play on his land must not expose them to dangers which, though manifest enough to an adult of ordinary sense, are not manifest to them."

The passage quoted from the 13th edition of Pollock on Torts appears in the same words in the 15th edition at page 406.

It is clear from the judgments delivered in the House of Lords in *Fairman* v. *Perpetual Investment Building Society* (2) that the duty owed by the occupant of premises to a licensee thereon is at least a duty to protect him from a concealed danger actually known to the occupant and not obvious to the licensee or, in other words, to protect him from a trap existing on the premises of which the occupant knows. It is also clear from a number of authorities, including *Latham* v. *Johnson* (3) and *Glasgow Corporation* v. *Taylor* (4), which are reviewed in the recent judgment of the Court of Appeal in England in *Gough* v. *National Coal Board* (5), that a defect in premises which would not be a trap for an adult may well be so for an infant. In each case there will be a preliminary question of law whether the condition of the premises could be a trap and if this be answered in the affirmative it becomes a question of fact for the jury whether it was so.

In the case at bar, I am of opinion that it was open to the jury to find that as regards the infant respondent a trap existed in the wash-room. It is true it would not have constituted a trap for an adult person, but the arrangement

(1) [1934] 2 K.B. 101.
(2) [1923] A.C. 74.
(3) [1913] 1 K.B. 398.
(4) [1922] 1 A.C. 63.
(5) [1953] 2 All E.R. 1283.

1954

CITY OF OTTAWA v. MUNROE

Cartwright J.

described in the answer to Question 4 was just the sort of thing likely to tempt a reasonably active and adventurous child to climb to the shelf or platform and so to bring himself to the edge of an unguarded precipice.

The finding of the jury that the existence of this danger was actually known to the appellant is amply supported by the evidence.

The duty to protect a licensee from a trap can in some cases be discharged simply by the giving of a warning of the danger which is not obvious. The infant respondent was probably too young for a warning to be effective and there is no evidence that the appellant gave him any warning. Two courses, at least, remained open to the appellant. It might have forbidden the use of the room to children unaccompanied by adults or it might have installed some protective guard on the window. There is evidence that the appellant was asked to follow the latter course and that this could have been done at trifling expense. The appellant did nothing whatever. In my opinion the decision of the Court of Appeal as to the judgment in favour of the infant respondent was right. The position taken by the appellant that it does not ask for a new trial renders it unnecessary to consider the view expressed by Hogg J. A. that as regards the award to the adult respondent there should be a new trial.

Before parting with the matter I wish to mention the suggestion which has been made that the duty owed to the infant respondent as a licensee in the wash-room was in some way affected by the fact that the permission of the appellant that he should be there was given to him because he was a member of Mrs. Dorion's household. It is clear that there was no contractual relationship between him and the appellant and once it has been determined that he was neither an invitee nor a trespasser but a licensee the duty owing to him by the occupant is fixed by law and the reasons which prompted the giving of the license are irrelevant.

Reference has been made to the case of *Dobson* v. *Horsley* (1), but that case is clearly distinguishable on the facts. All members of the Court were of opinion that the condition there complained of was not a trap but an obvious danger. At page 640, Buckley L.J. said:—

> The defective railing was obvious to persons using the steps; it was no trap by the lessor.

(1) [1915] 1 K.B. 634.

Phillimore L.J. at p. 642 and Pickford L.J. at 643 expressed similar views. All members of the Court affirm the existence of the duty described by Pickford L.J. at p. 643 as the "liability, which exists in every case, not to lay a trap or to do anything to cause a concealed danger." The true ground of decision in *Dobson* v. *Horsley* appears to be either that the defect complained of did not constitute a trap even for the injured child or that the proper finding on the facts of that case was that the child had no license to be on the stairway unless accompanied by a guardian. I cannot think that Buckley L.J. or Pickford L.J. intended to assert that there cannot be a condition which constitutes a trap for a licensee who is a young child although it would not be a trap for an adult licensee, or that there may not be cases in which a young child although unaccompanied by an older person may be found to be a licensee on premises where a trap exists. Such propositions would be at variance with *Glasgow Corporation* v. *Taylor, (supra), Cooke* v. *Midland Great Western Ry.* (1), *Williams* v. *Cardiff Corporation* (2) and *Gough* v. *National Coal Board, supra.*

I would dismiss the appeal with costs.

Appeal allowed, with costs, if demanded.

Solicitor for the appellant: *G. C. Medcalf.*

Solicitors for the respondents: *Hughes & Laishley.*

---

*PRESENT: Kerwin C.J. in Chambers.

(1) [1909] A.C. 229.

(2) [1950] 1 K.B. 514.