# MISSOURI PACIFIC RAILROAD COMPANY *v.* ENGLISH

4-3033

Opinion delivered June 12, 1933.

1. NEGLIGENCE—UNSAFE PREMISES—INVITATION.—The owner or occupant of land who by invitation, express or implied, induces another to come upon the premises for a lawful purpose is liable to a person injured, while using due care, on account of the unsafe condition of the land, known to such owner but not to the other, and negligently permitted to exist without timely notice to the public or to those likely to act upon the invitation.
2. NEGLIGENCE—INVITATION TO USE PREMISES.—While an invitation to use premises will not ordinarily be implied from the fact that the owner acquiesced in or tolerated trespasses thereon, if he permitted persons generally to use a way under such circumstances as to induce a belief that it is public in character, he owes to persons availing themselves thereof the duty due to those who come upon the premises by invitation.
3. RAILROADS—DUTY TO MAINTAIN FOOT BRIDGE.—Where a railroad company for many years maintained a foot bridge across a ravine along its track for convenience of pedestrians, it was required to use ordinary care in maintaining the bridge.
4. DAMAGES—INJURIES TO MINOR.—An award of $200 to the father of an injured minor was not excessive where he expended $100 for doctor's bills and medicine.
5. DAMAGES—PERSONAL INJURIES.—An award of $300 to a 16-year-old girl, who received serious and probably permanent injuries in falling through a defective bridge, *held* not excessive.

Appeal from Crawford Circuit Court; *J. O. Kincannon,* Judge; affirmed.

STATEMENT BY THE COURT.

These consolidated cases were instituted by appellees against appellant in the Crawford Circuit Court to compensate an injury received by Lydia English, a minor, under the following circumstances.

Lydia English is 16 years of age and is the daughter of Lee English; she resided with her father in Oklahoma near Greenwood Junction on appellant's lines of railroad; on the date of the injury Lydia English had gone to the home of one Carter who resided in a small house on appellant's right-of-way in the village of Greenwood Junction. Appellant has and maintains a depot in this village, and the Carter home is some 400 feet west of

the depot. Between the Carter home and the depot a ravine passes under the railroad tracks, and a foot bridge is maintained by appellant adjacent to the railroad bridge and tracks for the accommodation of pedestrians. This bridge was built some 30 or 40 years ago and has been maintained up to the present time for use. Lydia English, after performing the errand at the Carter home, undertook to walk over this foot bridge going in the direction of the depot, and she stepped upon a rotten and decayed plank in the bridge which broke through, and she received the injuries from which she complains.

These suits were prosecuted by appellees upon the theory that Lydia English was an invitee upon the bridge, and that it was the duty of appellant to keep and maintain this bridge in a reasonably safe condition for pedestrians. Appellant defended the suits upon the theory that Lydia English was a trespasser, or at most a licensee, and that it owed her no duty other than not to wantonly or wilfully injure her.

Practically the uncontradicted testimony in the case shows that this bridge upon which Lydia English was injured has been in constant use by the public at large for 30 or 40 years and this to the knowledge of all the officials of the railroad company in charge of the company's business in that locality. No warning or signs were posted warning against the use of this bridge by the public. At the close of the testimony in the case, appellant requested the court to direct the jury to return a verdict in its behalf; the court refused this request, and submitted the issues to the jury, which found for appellees.

*Thos. B. Pryor* and *W. L. Curtis,* for appellant.

*Partain & Agee,* for appellee.

JOHNSON, C. J., (after stating the facts). The principal cause of complaint is that the court erred in refusing to direct a verdict in behalf of appellant. This is based upon the theory that Lydia English was a trespasser or at most a licensee, and the case of *Barnett* v. *St. L. & S. F. Ry. Co.,* 140 Okla. 19, 282 P. 120, is relied upon to sustain this theory.

The facts in the Barnett case were that plaintiff was walking along a pathway near the track of the defendant which had been used by the public for a long number of years with the knowledge and acquiescence of the railroad company, and that while he was on this pathway the defendant wrongfully backed one of its trains against the plaintiff and thereby injured him. On the trial of the case, plaintiff abandoned this theory and introduced testimony only to the effect that he was a deputy United States marshal and rightfully upon the premises. This testimony was objected to at the time of its introduction, and the trial court sustained a demurrer to this evidence, which was affirmed by the Supreme Court of Oklahoma. It will thus be seen that the Barnett case, cited *supra,* is no authority for the position here assumed by appellant under the laws of Oklahoma.

It is next insisted on behalf of appellant that this case is ruled by *Texas O. & E. R. Co.* v. *McCarroll,* 80 Okla. 282, 195 Pac. 139. The facts in this case were that appellant was riding on the pilot step of an engine by invitation of the watchman. The undisputed testimony showed that the watchman had no authority to invite appellant to ride upon the pilot step. The Supreme Court of Oklahoma held that appellant was neither a licensee or invitee but a trespasser, and therefore plaintiff could not recover. Certainly it cannot be seriously contended that this case is authority for the position here assumed by appellant.

It is next insisted that this case is ruled by *A. T. & S. T. Ry. Co.* v. *Cogswell,* 23 Okla. 184, 99 Pac. 923, 20 L. R. A. (N. S.) 837. The facts in this case were that plaintiff went to the depot of the defendant to meet a passenger and while upon the platform he stepped through a hole in the platform and was injured. Plaintiff had no business with the company, but went there merely to meet a passenger on private business. In this case the company contended that plaintiff was a mere licensee, but the Supreme Court of Oklahoma held that under these facts the jury was warranted in finding that there was an implied invitation on the part of the rail-

road company and that the jury was warranted in finding in favor of the plaintiff.

No Oklahoma case has been cited on this appeal which should control, as a matter of law, the finding of the jury in this case.

The doctrine applicable to the facts of this case is stated concisely in the case of *Bennett* v. *L. & N. Ry. Co.*, 102 U. S. 577, 26 Law Ed. 235, wherein the court held: "That the owner or occupant of land who by invitation, expressed or implied, induces or leads others to come upon his premises, for any lawful purpose, is liable in damages to such persons, they using due care, for injury occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and was negligently suffered to exist without timely notice to the public or to those who were likely to act upon such invitation."

Again, in 20 R. C. L., par. 57, page 64, the rule is stated as follows: "While an invitation to go upon premises will not be implied, ordinarily, from the fact that the owner or occupant has acquiesced in or tolerated trespasses thereon, many decisions have recognized an exception in case of a way across lands or structures thereon. If the owner or occupant has permitted persons generally to use or establish a way under such circumstances as to induce a belief that it is public in character, he owes to persons availing themselves thereof the duty due to those who come upon premises by invitation."

In the recent case of *Louisville & N. Ry. Co.* v. *Snow*, 235 Ky. 211, 30 S. W. (2d) 85, the Kentucky Court held: "The decedent was not an invitee in the technical sense that one going upon the premises of another to their mutual advantage is an invitee, but the facts of this case bring it within the class of cases in which the doctrine has been recognized and applied that, when the owner, by his conduct, has induced a party to use a private way in the belief that it is open for the use of the public, the duty is imposed upon him of maintaining the way in a reasonably safe condition. Where one by his conduct has in-

duced the public to use a way in the belief that it is a street or public way, which all have a right to use, and where they suppose they will be safe, the liability should be co-extensive with the inducement or implied invitation."

The doctrine, as announced in the case cited *supra,* has been applied by this court in the case of *St. L. I. M. & S. Ry. Co.* v. *Dooley,* 77 Ark. 561, 92 S. W. 789, wherein the court held: "The bare permission of the owner of private grounds to persons to enter upon his premises does not render him liable for injuries received by them on account of the condition of the premises. But, if he expressly or impliedly invites, induces, or leads them to come upon his premises, he is liable in damages to them (they using due care) for injuries occasioned by the unsafe condition of the premises, if such condition was the result of his failure to use ordinary care to prevent it, and he failed to give timely notice thereof to them or the public. This principle is applicable to the case before us. If the appellant constructed the steps and expressly or impliedly invited, induced or let persons to cross the same, it is liable in damages to them for injuries occasioned by the unsafe condition thereof, if it was the result of the failure to use ordinary care to keep the same in safe condition. If it was unwilling to incur this liability, it could have avoided it by removing the steps or giving timely notice of the condition to such persons or the public."

The rule as announced in the Dooley case cited, *supra,* is supported by the great weight of American authority. No Oklahoma case has been cited announcing any different rule. The jury in the instant case was fully warranted in finding that the maintenance of the foot bridge by the appellant for a long number of years and its constant and perpetual use by the public, as a way, with full knowledge and tacit acquiescence of appellant, was an implied invitation for its continued use, and that appellant was required to use ordinary care in keeping and maintaining same for such purpose. Therefore, we conclude that the case was properly submitted to the jury

for its consideration, and its findings that Lydia English was an invitee is supported by the evidence.

The jury returned a verdict in favor of Lee English, the father of Lydia English, for $200; it also returned a verdict in favor of appellee, Lydia English, for $3,000. It is insisted on this appeal that these awards are excessive. We cannot agree. The testimony shows that Lee English expended for doctor's bill, medicine, etc., almost $100; therefore, unquestionably, a verdict for $200 in his behalf would not be excessive. The testimony in behalf of appellee, Lydia English, was to the effect that her injury was serious and probably permanent. We cannot say, as a matter of law, that $3,000 was an excessive award.

Let the judgments be affirmed.