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Negligence - Duties of Railroad - Landowner Toward Frequent Trespasser - Limitations on Rights of Trespasser

William D. Keeler S.Ed.
University of Michigan Law School

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NEGLIGENCE—DUTIES OF RAILROAD-LANDOWNER TOWARD FREQUENT TRESPASSER—LIMITATIONS ON RIGHTS OF TRESPASSER—The duties of a landowner toward one who enters the land without consent may no longer be determined, in many cases, by merely stating the fact that the intruder is a trespasser whose presence is unknown to the landowner. This comment will discuss an area in which the relationship of landowner and trespasser *inter se* has been greatly altered, and will deal in particular with a class of cases which serve to limit the expanded rights of the trespasser.

I. *The Traditional View: Conservatism*

The occupier of land has traditionally held a favored position in the law of negligence. The rights protected through the development of actions on the case were early subjected to special limitations imposed for the benefit of landowners. Thus, in the ordinary negligence case, the first question has been generally the degree of risk to the plaintiff involved in the actions of the defendant; if the law considered this risk unreasonable it would impose upon the defendant the duty of reasonable care. If, however, the injury happened to occur upon land owned by the defendant, then the primary consideration ceased to be the amount of risk to the plaintiff, and became the relation of the parties to each other with respect to the status of the plaintiff upon the land. The policy of the law was to give to the landowner the freest possible use of his land, and he was to be limited in this freedom only to the extent to which he voluntarily assumed limitations: by consenting to another's use of his land, or by actually inviting another onto his land.¹ In this manner was developed an almost purely conceptual or definitional approach toward consideration of the duties owed by an occupier of land to a person upon the land. The plaintiff was placed in a certain category—trespasser, licensee, or invitee—in strict accordance with the degree to which the defendant-landowner consented to his presence on the land. Once his status on the land was determined, the duties owed him by the landowner were well settled.²

¹ PROSSER, *TORTS*, §77, p. 611 (1941): “. . . in a civilization based on private ownership, it is considered a socially desirable policy to allow a man to use his own land in his own way, without the burden of watching for and protecting those who come there without permission or right.”

² Concerning the duty of a landowner to keep a lookout for a licensee on the land, however, there has been considerable disagreement. For a statement of the empirical solution to this problem, see 50 *MICH. L. REV.* 617 (1952).

II. *The Modern View: Humanitarianism*

The early cases in this area, basing themselves expressly or implicitly on the policy that the landowner is to have the freest possible use of his land, were largely unembarrassed by serious judicial consideration of another often-asserted policy argument: that society has an interest in the lives of its members. The rights of an isolated plaintiff, who had admittedly committed a legal wrong in entering the land of the defendant, were thought to be outweighed by the rights of the defendant qua landowner. With the increasing industrialization and mechanization of the uses to which land was put, the risk borne by an intruder upon land was vastly increased; and when this increased risk was coupled with a large increase in the numbers of persons intruding upon a given piece of land, many courts felt that the interests of society demanded that additional protection be given these intruders, even at the price of enlarging the duties of the landowner. Thus were born the frequent trespass cases, the typical case being the use of a railroad's right of way as a short cut by large numbers of trespassers. In such a situation various new duties were imposed upon the railroad-landowner: the duty to keep a lookout for persons upon the tracks, the duty to warn of approaching trains, the duty to use reasonable care with respect to the operation of trains³—all of these duties being imposed in light of the increased hazard to persons who may be using the tracks, without permission, for their own purposes.⁴

What is the legal status of such a person upon the tracks? If this question can be answered without prior consideration of the duties which should, from the standpoint of socially desirable policy, be imposed upon the railroad, it seems quite clear that this person is a trespasser. To hold otherwise is to say that the railroad consented, in some degree, to the use of its tracks by the public generally, and in all but the rarest case this position is completely untenable.⁵ The

³ 2 TORTS RESTATEMENT §334 (1934): "A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area thereof, is subject to liability for bodily harm there caused to them by his failure to carry on an activity involving a risk of death or serious bodily harm with reasonable care for their safety."

⁴ The extended annotation in 167 A.L.R. 1253 (1947) is titled "Duty of railroad toward persons using private crossing or commonly used footpath over or along railroad tracks."

⁵ See Eldredge, "Tort Liability to Trespassers," 12 TEMPLE L.Q. 32 at 34 et seq. (1937), for a complete and colorful destruction of the notion that the frequent trespasser has permission to enter railroad property. To the same effect see 2 TORTS RESTATEMENT §330, comment *b* (1934), which discusses the distinction between permission and toleration.

courts, however, in their struggle to find some historically sound footing on which to base liability, have commonly resorted to the fiction of classifying these intruders as licensees, finding consent where clearly none exists. Entirely new categories have sometimes been created, the most common being the "implied" license. And if a court feels that on the particular facts the trespasser should not be clothed in the various new rights, he will then be a naked, or bare, or mere licensee, if not a naked trespasser. This process of judicial invention has on occasion resulted in what may be regarded only as definitional nonsense.⁶

It is of course recognized that the importance of these cases lies not in what the intruder is called, but in the reasons for the constant struggle on the part of the courts to call him something other than what he actually is—a trespasser. These reasons are threefold:

1. As a joint result of the dangerous activity conducted by the defendant on his land and the large numbers of trespassers thereon, ordinary principles of humanity dictate a restatement of the rights of these trespassers.

2. When the trespasses are confined to a limited area of the defendant's land,⁷ the burden of watching for, warning, and using reasonable care with respect to these trespassers is lessened. Thus the courts feel that the imposition of these duties works an insignificant retreat from the policy that the landowner is to have the freest possible use of his land.⁸

⁶ "Under Iowa law there are three classes of licensees: (1) A licensee by express invitation is one who is directly invited by the owner of land to enter upon it. (2) A licensee by implied invitation is one who has been invited to enter upon land by the owner or occupier by some affirmative act done by the owner or occupant, or by appearances which justify persons generally in believing that such owner or occupant had given his consent to the public generally to enter upon or to cross over his premises. . . . (3) A 'bare licensee' is one who enters upon the land of another without objection, or by mere permission, sufferance, or acquiescence of the owner." *Chicago, G.W. Ry. Co. v. Beecher*, (8th Cir. 1945) 150 F. (2d) 394 at 401. Plaintiff, who was less than three years old, had followed a frequently used path onto the railroad tracks, and was struck by a train. *Held*, plaintiff was a licensee by implied invitation, and was owed the duties of lookout and due care, which would not have been true had plaintiff been classified a "bare" licensee.

⁷ In Pennsylvania, for instance, a person walking longitudinally on the tracks will not be owed the duties of lookout, warning, and due care, no matter how many persons customarily use such path. *Miller v. Pennsylvania R. Co.*, 350 Pa. 424, 39 A. (2d) 576 (1944). *Contra*: *Chesapeake & O. Ry. Co. v. Bailey*, 311 Ky. 725, 225 S.W. (2d) 299 (1949).

⁸ A few states regard the landowner's freedom of use in this respect as sacred, and have refused to go along with the great majority of courts in the frequent trespass cases. As examples of cases which are undoubtedly logically sound, but which seem harsh in light of the general liberality in this area, consider *Jackson v. Pennsylvania R. Co.*, 176 Md. 1, 3 A. (2d) 719 (1938), and *Willey v. Maine Central R. Co.*, 137 Me. 223, 18 A. (2d) 316 (1941).

3. It will not be denied that courts of law are not wholly unconcerned with the "equities" of parties to a lawsuit. The moral reprehensibility of the frequent trespass (ignoring, for the moment, its illegality) is certainly not great. The court is asked to place the plaintiff in a category which labels him a wrongdoer, and this in the face of evidence showing that he, and perhaps hundreds of others, had daily crossed the tracks at a certain point with the knowledge of the railroad's employees and without objection, or at least without effective interference, by the railroad. This the courts are generally unwilling to do.⁹ It is at least doubtful whether the person who habitually crosses a railroad track is conscious of committing a wrong, moral or legal. In this respect his mental state is similar to that of a child who enters railroad property with the purpose of playing on a turntable.¹⁰ At any rate, most courts have tended to treat the frequent trespasser as an innocent plaintiff who has been injured through the careless conduct of another, rather than as a wrongdoer who has been injured through a landowner's attempts to use his land in a profitable manner.¹¹

III. *Limitations on the Modern View: the "Different Purpose" Cases*

In *Shaw v. Pennsylvania Railroad Company*,¹² plaintiff, a twelve-year-old boy, was attempting to climb over one of defendant's freight trains, two of which were blocking a well-defined and commonly used footpath over the tracks, and was injured when the train started without warning. The train had stopped only momentarily in order for a switch to be thrown. Both children and adults had on prior occasions climbed over cars which blocked this path, and plaintiff testified that employees of the defendant were aware of this practice. The lower court rendered judgment for defendant non obstante veredicto.

⁹ The Wisconsin court in an early case has even gone so far as to hold the railroad estopped to deny the "license": *Brinilson v. Chicago & N. Ry. Co.*, 144 Wis. 614, 129 N.W. 664 (1911). This case is also notable in that the negligence complained of was the failure of the railroad to repair a dangerous artificial condition on the right of way.

¹⁰ See Green, "Landowner v. Intruder; Intruder v. Landowner. Basis of Responsibility in Tort," 21 MICH. L. REV. 495 (1923). This article analyzes the attractive nuisance cases and justifies them on the basis that the trespassing child is unable to appreciate the moral blameworthiness of his actions, and thus should not be dealt with as a wrongdoer. And the American Law Institute does not require, as a prerequisite to moral blamelessness, that the child be "lured" onto the land. He need not know of the existence of the dangerous condition at the time of entry. 2 TORTS RESTATEMENT §339, comment *a* (1934).

¹¹ For a recent article thoroughly documenting the modern trend away from pure definitionalism, and toward the ordinary "risk" tests for the presence of a duty, see James, "Tort Liability of Occupiers of Land: Duties Owed to Trespassers," 63 YALE L.J. 144 (1953). To the same effect see 22 So. CAL. L. REV. 318 (1949).

¹² 374 Pa. 8, 96 A. (2d) 923 (1953).

The Pennsylvania Supreme Court affirmed, the evidence of the existence of a license to cross railroad cars being considered insufficient to raise a jury question.

This recent case is an example of a class of cases in which all the elements of a typical frequent trespass case are present, but as a result of some conduct or purpose on the part of the plaintiff, recovery is denied. The following are further examples of such cases, in which the railroad is held to owe no duties to the plaintiff: the child sitting on the tracks,¹³ the drunk lying unconscious upon the ties,¹⁴ the man picking up coal from the tracks,¹⁵ the man sweeping up spilled wheat under and around the cars.¹⁶ Perhaps the most striking example of this type of case is one which occurred in Pennsylvania, a state which liberally protects the frequent trespasser who crosses over the tracks at a given point,¹⁷ but which refuses to impose the same duties as to a frequent trespasser traveling longitudinally on the tracks.¹⁸ In that case the plaintiff was walking longitudinally on the tracks and was struck by a train, evidently at the exact moment that he reached a "permissive crossing"¹⁹ over the tracks. The court said: ". . . the mere fact that a person is at a place where the railway company would owe him a duty of care if he were engaged upon a certain errand, does not establish such a duty if his presence is for a different purpose." The court added: "Certainly the interest of a longitudinal wayfarer does not change when he reaches a cross path. The railroad was indeed charged with a duty of observing care at such spots, but not care with respect to him. He can no more

¹³ *Lee's Admr. v. Hines*, 202 Ky. 240, 259 S.W. 338 (1924). Syllabus: "Persons sitting or lying on railroad track, even where its use by the public as a walkway is expected and licensed by the railroad company, are trespassers. . . ." *Accord*, *Louisville & N.R. Co. v. Byrge's Admx.*, 273 Ky. 570, 117 S.W. (2d) 585 (1938).

¹⁴ "Applying the general rule to the facts of this case, we find that when Ashlock ceased to use the right of way of the railroad company for the purpose of travel, and lay down motionless upon its ties or became unconscious and fell down, he became a trespasser. The railroad company was under no obligation to anticipate his presence in that condition." *Atlantic Coast Line R. Co. v. Gates*, 186 Va. 195 at 202, 42 S.E. (2d) 283 (1947). *Accord*, *Connelly, Admx. v. The Virginian Ry. Co.*, 124 W.Va. 254, 20 S.E. (2d) 885 (1942). *Contra*, *Carlson v. The Connecticut Co.*, 95 Conn. 724, 112 A. 646 (1921).

¹⁵ *Louisville & N.R. Co. v. Philpot's Administrator*, 215 Ky. 682, 286 S.W. 1078 (1926). Syllabus: "Trainmen owed licensee no duty if he was picking up coal on tracks instead of using them as a walkway, though place was habitually used as a walkway."

¹⁶ *Ducoulombier v. Baldwin*, (Mo. App. 1937) 101 S.W. (2d) 96.

¹⁷ Pennsylvania cases showing this liberality are discussed in Eldredge, "Tort Liability to Trespassers," 12 *TEMPLE L.Q.* 32 (1937).

¹⁸ *Miller v. Pennsylvania R. Co.*, 350 Pa. 424, 39 A. (2d) 576 (1944).

¹⁹ This is the term used by the Pennsylvania court to signify the point on the tracks at which the railroad owes to the frequent trespasser the duties of lookout, warning, and due care.

stand on its duty to others than can one who is not within the class which a statute is designed to protect."²⁰

The courts have generally held, in the "different purpose" cases, that the duties of lookout, warning, and due care are not owed by the railroad to the plaintiff,²¹ usually basing this decision on the ground that the status of the plaintiff on the land has changed from licensee to trespasser. Here too it is obvious that the importance of these cases lies not in what the plaintiff is called, but in the reasons for this judicially-decreed change of status. Justification must be found, if at all, in the light of particular fact situations.

As was noted above, an important reason for the imposition on the railroad-landowner of the duties of lookout, warning, and due care, is the increased hazard to trespassers caused by the landowner's more mechanized use of his land, coupled with a large increase in the numbers of trespassers on the land, i.e., a greater danger to a larger segment of society. The facts of a particular case may indicate to the court that the likelihood of a trespasser being within the scope of the risk created by the landowner's activity is relatively slight, either because of the hour of the day,²² or because of the extraordinary character of the trespass which would be necessary to place the trespasser within the scope of that risk.²³ To that extent one of the policy considerations—the interest of society in the lives and limbs of its members—which led to the imposition of the various duties in the ordinary frequent trespass case, is present, if at all, in a much lesser degree; and consequently a court may refuse to impose these duties. Few, however, of the "different purpose" cases may be explained on this ground.

²⁰ *Tompkins v. Erie R. Co.*, (2d Cir. 1938) 98 F. (2d) 49 at 51, 52. Is it remarkable that this famous case should be cited for so substantive a proposition?

²¹ *Contra: Burnam v. Chicago, G.W. R. Co.*, 340 Mo. 25, 100 S.W. (2d) 858 (1936); *Figard v. Pennsylvania R. Co.*, 361 Pa. 380, 65 A. (2d) 411 (1949).

²² In *Chesapeake & O. Ry. Co. v. Butcher's Admr.*, 263 Ky. 45, 91 S.W. (2d) 551 (1936), it was held that the railway company owed to the decedent no duty to maintain a lookout at three o'clock in the morning. Cf. the better reasoning in *Barron v. Baltimore & O.R. Co.*, 116 W.Va. 21 at 23, 178 S.E. 277 (1935): ". . . general rule that trainmen must exercise ordinary care, commensurate with the risk of injuring someone on the track. But as we have said so frequently, care is a relative term. . . . The requisite care would be greater during some hours (of the twenty-four) than during others. So the care exacted in a given case would depend entirely on the facts of that case."

²³ So, for instance, in *Shaw v. Pennsylvania R. Co.*, 374 Pa. 8, 96 A. (2d) 923 (1953), the court may have felt that climbing on railroad cars is such an unusual type of trespass that the railroad may reasonably operate under the assumption that no one will trespass in that manner. In view of plaintiff's apparently uncontradicted testimony that such trespasses had frequently occurred, to the knowledge of defendant's employees, such an assumption does not seem reasonable.

The most commonly stated justification for the result in the ordinary frequent trespass case is that the railroad will not be excessively burdened through the judicial requirement that its engineers look down the tracks, sound their whistles, and run more slowly at certain points on the tracks; and thus the imposition of these duties is thought not to work a significant departure from the policy that the landowner is to have the freest possible use of his land. If the due care that a plaintiff demands in a particular "different purpose" case would seriously hamper the railroad in its normal operations, constituting a very real inroad on its freedom of use, there is no doubt that one of the strongest reasons for protecting the frequent trespasser is no longer present. So, for instance, in the *Shaw* case,²⁴ the plaintiff contended that the railroad should have four men stationed to warn trespassers that they could not climb over the cars. In refusing to find that the plaintiff was a licensee, the court said: "That would be stretching the legal fiction of a permissive way or crossing to an unreasonable and unjustifiable extreme."²⁵

Granting that the above policy considerations are at times helpful in explaining the reasons for the refusal of the courts to impose upon the railroad the duties of lookout and due care, certainly not all of the "different purpose" cases are amenable to this explanation. The man picking up coal on the tracks, for example, asks merely that the same duties owing to other trespassers on the tracks at that point be owed to him. Testimony for the plaintiff in the *Shaw* case indicated that for a long time inhabitants of the area had been accustomed to climb over cars blocking the path over the tracks, and that the employees of the railroad were aware of this practice. Why was the court in that case unwilling to impose on the railroad a more limited duty than the duty of maintaining an effective lookout, such as the duty to sound a warning before moving the train? Quite evidently the courts are influenced by considerations other than the infrequency of the trespass and the added burden on the railroad.

A common type of tort situation is that in which a person enters business premises and is injured, and is later held by the courts to be a trespasser or licensee, rather than an invitee. The landowner who invites the public to enter his premises to transact business takes upon

²⁴ *Ibid.*

²⁵ *Id.* at 12. And in *Groves v. Southern Ry. Co.*, 61 Ga. App. 651, 7 S.E. (2d) 208 (1940), the court felt that the joint use by the public and the railroad of the railroad switchyards would be so inconsistent and dangerous, and so burdensome to the railroad, that it would not infer that plaintiff had been licensed to walk there.

himself extensive duties, and it seems entirely proper that these duties should not be enforced in favor of one who enters the land for a purpose inconsistent with the scope of the invitation, or who enters a portion of the land to which the invitation does not extend. In such cases it may be said generally that the extent of the duty owed is measured by the degree of consent. Without subscribing to the fiction that the railroad consents to the presence of the frequent trespasser upon its tracks, and that conversely it does not so consent to the presence of the "different purpose" trespasser, it seems that to some extent an analogy between the invitee cases and the "different purpose" cases is helpful. It is true that the railroad has not consented to the frequent trespass, but the important fact is that the law has consented for it. In the case of the invitee the question is whether the person on the land has deviated substantially from the scope of a very real consent granted by the landowner. In the "different purpose" cases the question seems to be whether the person on the land has deviated substantially from the scope of a fictional consent implied by law. In both cases the result is the same—the person on the land is no longer protected by the duties attendant upon the consent.

What is the reason for the refusal of the courts to consent, for the railroad, to the presence of the "different purpose" trespasser upon the tracks? An explanation based on the infrequency of the trespass and the added burden on the railroad is, as has been seen, incomplete. It will be remembered that one of the reasons for implying this consent in the case of the ordinary frequent trespasser is that the courts are simply unwilling to deal with him as a wrongdoer. He, in company with many others, has long been accustomed to cross the tracks at a certain point, to the knowledge of employees of the railroad; there is no doubt that it is difficult to consider his actions morally reprehensible. Consequently the courts hold that the railroad has consented to these actions. When this result is viewed in the light of the refusal of the courts to imply this consent in the case of the "different purpose" trespasser, the conclusion is inevitable that the courts are applying a sort of legal "clean hands" test to the plaintiff's actions. With much reluctance, and through the use of a completely transparent fiction, the courts have been willing to say that in certain cases a person may voluntarily enter land without the consent of the landowner and yet he will not be considered a wrongdoer. But this person is told, in effect, that he is not to assume that the courts are no longer concerned with the rights of the landowner as against frequent trespassers. The culpability of the trespass will be carefully scrutinized in each case. The

deserving trespasser has been given what amounts very nearly to a legal privilege to use another's land. He must not abuse this privilege.

IV. *Conclusions*

That a present-day court, confronted by a plaintiff who has been injured while on the land of another, is not ready to abandon all historic precedent in favor of purely equitable considerations is perhaps too obvious for comment. The first question, today as a hundred years ago, is the status of the plaintiff on the land. It is clear, however, that modern cases indicate a decrease in reliance upon "reasoning by definition," although this is apparent only from the *results* of the cases, certainly not from the language of the courts.²⁶ This indication appears most clearly in the frequent trespass cases, which virtually eliminate from consideration the fact that the plaintiff is a legal wrongdoer.

The right of the landowner to the use and enjoyment of his land is not, however, held subject to the caprice of the frequent trespasser. In part through his ability to show himself equitably entitled to protection, a very special type of trespasser has persuaded the courts to depart from the definitional approach to duty. But this departure has been in spirit only; the definitions themselves and their correlative duties stand affirmed in countless weighty precedents. Through the "different purpose" cases the courts have generally made it clear that any substantial deviation from this limited type of trespass will cause the form of the definition to be reunited with its original substance.

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²⁶ Occasionally, however, a frankly empirical approach will be employed, the fact that the plaintiff is a trespasser being completely disregarded. *St. Louis & S.F.R. Co. v. Jones*, 78 Okla. 204 at 206, 190 P. 385 (1920): "It is a sound and wholesome rule of law, humane and conservative of human life, that, without regard to the question whether the person killed or injured in the particular case was or was not a trespasser or a bare licensee upon the track of the railway company, the company is bound to exercise special care and watchfulness at any point upon its tracks, where people may be expected upon the track in considerable numbers, as, where the roadbed is constantly used by pedestrians. At such places the railway company is bound to anticipate the presence of persons on the track, to keep a reasonable lookout for them, to give warning signals, such as will apprise them of the danger of an approaching train, to moderate the speed of its train so as to enable them to escape injury. . . ." *St. Louis & S.F. R. Co. v. Jones*, 78 Okla. 204 at 206, 190 P. 385 (1920), quoting with approval ¶3 of the syllabus of the court in *Missouri K. & T. R. Co. v. Wolf*, 76 Okla. 195, 184 P. 765 (1919).