Maryland Law Review

Volume 3 | Issue 4 Article 5

Liability of Railroad to Intruders Crossing Its Right of Way - Jackson v. Pennsylvania R. Co.

LIABILITY OF RAILROAD TO INTRUDERS CROSSING ITS RIGHT OF WAY

Jackson v. Pennsylvania R. Co.[1]

Plaintiff-appellant sought to recover damages for personal injuries sustained when he was struck by a train of defendant-appellee. The injuries were alleged to have been received at night at a point where defendant-appellee's tracks, which border a public thoroughfare in a thickly settled community in Baltimore County, were traversed by a

[1] 3 A. (2d) 719, 120 A. L. R. 1068 (Md. 1939).

well-worn footpath. Plaintiff-appellant's amended declaration alleged that he and the public generally had for many years constantly, extensively, and notoriously used this footpath to cross the tracks to the knowledge of and without objection on the part of defendant-appellee. The negligence alleged consisted of a failure to anticipate the presence of plaintiff-appellant upon the tracks and a failure "to give reasonable adequate and timely warning either by whistle, bell, lights, lookout or other signal", although the public generally, including plaintiff-appellant, were accustomed and entitled to have such signals.

The trial court sustained a demurrer to the amended declaration and upon a refusal to amend further entered judgment of *non pros.* against plaintiff-appellant in favor of defendant-appellee for costs. On appeal, *held:* Affirmed. The declaration fails to disclose any breach of duty owed to plaintiff-appellant and is defective upon demurrer.

The decision is noteworthy as indicating the continuing tendency of the Maryland law to restrict the liability of a landowner for unintended but serious harm to intruders[2] upon his premises. The Maryland authorities[3] dealing with the liability of a landowner toward those on his land other than by invitation or inducement, in upholding the sanctity of a landowner's premises and regarding intrusion thereon as wrongdoing, bear the heavy impress of the ancient law of trespass as contrasted with the comparatively modern principles of the law of negligence.[4] In contrast to the Maryland dogma, as carried forward in the instant case, many, if not the majority, of the authorities hold that under the facts pleaded in the instant case an actionable case of negligence is stated.[5]

---

[2] The term "intruders" is here used to mean those persons voluntarily upon the land of another without the actual consent of the latter, and in whose visit he has no interest, but whose presence upon a more or less limited area thereof is tolerated and may be reasonably expected.

[3] See authorities referred to *infra, circa* notes 12 to 33.

[4] "When the comparatively modern law of negligence reached the relations of landowners to persons entering his (sic) property, it found the field occupied by this concept of the owner's right as sovereign to do what he pleased on or with his own property. The history of this subject is one of conflict between the general principles of the law of negligence and the traditional immunity of landowners." Bohlen, Studies in the Law of Torts, 163. See also, Green, *Landowner v. Intruder; Intruder v. Landowner. Basis of Responsibility in Tort* (1923) 21 Mich. L. Rev. 495.

[5] Thompson's Commentaries on Negligence (White's Supp.) Sec. 1726; 52 C. J. 555 et ff.; 20 R. C. L. 65, note 11; Elliott on Railroads (3rd Ed.) Vol. 3, Sec. 1647, notes 25-26.

The basis of responsibility in such cases is not uniformly stated. The obligation of the railroad to exercise care under such circumstances may be said to be based upon an implied consent arising through acquiescence in continued intrusion, or it may be held to arise as the legal incident of the performance of dangerous acts which are attended with the probability of serious injury.[6] It has been suggested that the obligation should not be based upon consent, but rather should be held to arise "from the probability of injury so likely and so serious that public policy requires that it be prevented even at the cost of trenching upon the traditional privileges of landowners".[7] Nevertheless, the consensual basis has played an important role in the judicial solution of the problems presented by such cases. Thus, it has been held by numerous cases that the acquiescence of the railroad company for a long time in the crossing of its tracks by pedestrians at a definite place amounts to a license and permission to cross the tracks at that point, and the railroad company thereby obligates itself to assume the duty of exercising reasonable care to prevent injury by reason of its operation to those who cross its tracks.[8] A number of decisions have held, in situations varying somewhat from that of the instant case, that an invitation will be implied under certain circumstances from acquiescence in or toleration of habitual trespasses upon railroad property.[9] It has been said that there is no true consent in these cases, and that to the extent that possessors of land have been held liable to tolerated intruders for harm caused by conduct not wilful or wanton the duties owed to trespassers have been extended by the device of calling them licensees or invitees.[10] However, other courts have disdained this technique and held that regardless of the status of the intruder, one engaged in an activity attended by great danger is required to exercise ordinary care to avoid injuring another when

[6] Green, *op. cit. supra* n. 4, 516; Bohlen, *op. cit. supra* n. 4, 62.

[7] Bohlen, *op. cit. supra* n. 4, 179.

[8] Barry v. N. Y. C. & H. R. R. Co., 92 N. Y. 289 (1883); Cahill v. Chi., M. & St. P. Ry. Co. (C. C. A. 7), 74 F. 285 (1896); Clampit v. Chi., St. P & K. C. Ry. Co., 84 Iowa 71, 50 N. W. 673 (1891); Oregon-Wash. R. & Nav. Co. v. Roman (C. C. A. 9), 293 F. 666 (1923); Felton v. Aubrey (C. C. A. 6), 74 F. 350 (1896); Lodge, et al., v. Pittsburgh & L. E. R. Co., 243 Pa. 10, 89 A. 790 (1914); Erie R. Co. v. Burke (C. C. A. 2), 214 F. 247 (1914); Jones v. Southern Ry. Co., 199 N. C. 1, 153 S. E. 637 (1930).

[9] Pomponio v. N. Y. etc. R. Co., 66 Conn. 528, 34 A. 491 (1895); Cederson v. Oregon Navigation Co., 38 Or. 343, 62 P. 637 (1900), 63 P. 763 (1901); Missouri Pac. R. Co. v. English, 187 Ark. 557, 61 S. W. (2) 445 (1933).

[10] Eldredge, *Tort Liability to Trespassers* (1937) 12 Temple L. Q. 32, 35-38.

the presence of danger to such other person is reasonably to be anticipated.[11]

This realistic method of restating the common law as to the liability of a landowner to a trespasser has been adopted by the American Law Institute in Section 334 of the Restatement of the Law of Torts. It is there said:

> "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."

A "Special Note" to Section 205 of Tentative Draft No. 4 of the Restatement of the Law of Torts (which became Section 334 of the Final Draft) succinctly states the objection to calling such intruders "licensees".

> "Persons persistently committing trespasses, upon a limited area, which the possessor does not go to the trouble or expense of stopping, are ordinarily spoken of as 'permissive licensees,' although the possessor has plainly indicated his unwillingness to permit their entry. Therefore, they cannot be 'licensees' as that term is defined in Section 200."

The Maryland law with regard to the liability of landowners toward persons on their premises other than by invitation or inducement is of a conservative nature. Any indications to the contrary existing in the Maryland decisions are believed to be the mere loose ends of an otherwise tightly woven strand of immunity. Toward trespassers who are unseen and of whose presence and peril the landowner is unaware, the landowner owes no duty except to refrain from wilful or wanton injury.[12] There is no relaxation of this rule as respects infant trespassers.[13] The

---

[11] Great Northern Ry. Co. v. Thompson (C. C. A. 9) 199 F. 395 (1912); Dent v. Bellows Falls etc. Ry. Co., 95 Vt. 523, 116 A. 83 (1922); Minot v. Railroad, 73 N. H. 317, 61 A. 509 (1905); St. Louis etc. R. Co. v. Donahoo, 82 Okla. 44, 198 P. 81 (1921); Ala. Great Southern Ry. Co. v. Guest, 144 Ala. 373, 39 So. 654 (1905); Gunn v. Felton, 108 Ky. 561, 57 S. W. 15 (1900); Troy v. Cape Fear & Yadkin Valley R. Co., 99 N. C. 298, 6 S. E. 77 (1888); Young v. Clark, 16 Utah 42, 50 Pac. 832 (1897).

[12] Susquehanna Power Co. v. Jeffress, 159 Md. 465, 150 A. 788 (1930).

[13] Mergenthaler v. Kirby, 79 Md. 182, 28 A. 1065 (1894); State, use of Alston, v. The Baltimore Fidelity Warehouse Co., 4 A. (2d) 739 (Md. 1939).

doctrine of attractive nuisance has never been applied in Maryland.[14] However, awareness of the presence or peril of a trespasser, imposes a duty upon the owner to exercise reasonable care to protect him from the consequence of his indiscretion.[15] This seems to be the only basis, other than wilful or wanton conduct, upon which liability may be imposed upon a possessor of land toward a trespasser thereon.[16]

Turning now to the liability of a landowner to those upon his premises by permission, we find that the principal Maryland cases in this field reflect the great respect that has been accorded the opinion of Chief Justice Bigelow of Massachusetts in the case of *Sweeney v. Old Colony & Newport R. R. Co.*[17] A distinction is there made between those who enter the premises of another by invitation, enticement or inducement, and those present by permission only. Toward the former a large measure of protection was accorded;[18] while the latter's position was no better than that of a trespasser.[19] It has been suggested that the term "permission" as used in the *Sweeney* case did not mean true permission, but was used to describe "a failure to prevent the entry of intruders who are perfectly aware that they are unwelcome, but whose intrusions were tolerated because there was no reason to believe they could be prevented save by onerous and burdensome precautions".[20] The classification of persons upon the land of another adopted by Chief Justice Bigelow has been largely repu-

[14] Grube v. Mayor etc. of Baltimore, 132 Md. 355, 103 A. 948 (1918); Mayor etc. of Baltimore v. DePalma, 137 Md. 179, 112 A. 277 (1920); State, use of Lease, v. Bealmear, 149 Md. 10, 130 A. 66 (1925); State, use of Potter, v. Longeley, 161 Md. 563, 158 A. 6 (1932); State, use of Lorenz, v. Machen, 164 Md. 579, 165 A. 695 (1933); State, use of Alston, v. The Baltimore Fidelity Warehouse Co., *supra* n. 13. See also, 36 A. L. R. 84.

[15] But there is no duty to exercise care to discover their presence and peril. B. & O. R. R. v. Welch, 114 Md. 536, 80 A. 170 (1911); 117 Md. 280, 83 A. 166 (1912); 120 Md. 319, 87 A. 676 (1913). See also, B. & O. R. R. v. State, use of Savington, 71 Md. 590, 18 A. 969 (1889); Anderson v. B. & O. R. R., 144 Md. 571, 573, 125 A. 393 (1924).

[16] Compare Restatement, Torts, Secs. 333 to 339. Some authorities regard the failure to exercise proper care after the discovery of the trespasser's presence and peril as wilful or wanton conduct. See Bohlen, *op. cit. supra* n. 4, 168.

[17] 92 Mass. 368, 87 Am. Dec. 644 (1865). The important influence of this opinion generally is discussed by Professor Bohlen, *op. cit. supra* n. 4, 173; and its influence upon the Maryland decisions is noted by Judge Thomas in Burke v. Md., D. & V. Ry. Co., 134 Md. 156, 161, 106 A. 353-354 (1919).

[18] "The possessor was required not only to conduct his activities with reasonable care for the safety of his invitee, but also to exercise reasonable care to provide a safe place for his reception." Explanatory notes to Section 202 Tentative Draft No. 4 of Restatement, Torts.

[19] *Ibid.*

[20] *Ibid.*

diated even in the State of its origin, and the landowner's interest or lack of interest in the visit has become the criterion of the extent of his obligation to persons upon his premises.[21] Thus the Restatement of Torts classifies those present upon a landowner's premises as trespassers or licensees.[22] For the purpose of distinguishing the duties owed to various members of the latter class, it is subdivided into "gratuitous licensees" and "business visitors".[23] In like manner, and for the same purpose, "business visitors" are further subdivided into two classes: (1) "patrons", i. e., persons invited or permitted to come upon the land for a purpose directly or indirectly connected with the business which the possessor conducts thereon; and (2) "those who come upon the land for a purpose which is connected with their own business which itself is directly or indirectly connected with any purpose, business or otherwise, for which the possessor used the land."[24] The distinction between invitation and permission is immaterial in determining the extent of the possessor's obligation.[25] The term "permission" as used in the Restatement is entirely different in meaning from that term as it seems to have been used in the *Sweeney* case.[26]

Several of the earlier Maryland cases will serve to illustrate the controlling importance which was accorded the distinction and classification made in the *Sweeney* case. *Maenner v. Carroll*,[27] although not citing the *Sweeney* case, adopts the same method of approach in a similar situation. In *B. & O. R. Co. v. Rose*[28] the *Sweeney* case was relied upon to establish a right of recovery upon the theory of invitation, allurement or inducement on the part of the property owner. Permission was said to bestow no rights in *Benson v. Baltimore Traction Co.*[29] which quoted copiously from the *Sweeney* case. Upon this foundation the Maryland law developed, and the distinction between invitation or inducement on the one hand and permission or

---

[21] *Ibid*, and see Bohlen, *op. cit. supra* n. 4, 174.
[22] Restatement, Torts, Secs. 329, 330.
[23] *Ibid*, Secs. 331, 332.
[24] *Ibid*, Sec. 332, Comment a.
[25] *Ibid*, Sec. 330, Comment a.
[26] See note 20, *supra*, and Restatement, Torts, Sec. 330, Comment b.
[27] 46 Md. 193 (1877).
[28] 65 Md. 485, 4 A. 899 (1881).
[29] 77 Md. 535, 26 A. 973 (1893). Here the plaintiff was present with the actual permission of the owner but he was a mere guest in whose visit the owner had no interest.

license on the other persisted.[30] The ground of liability to licensees in Maryland is often stated to be a "trap, or something like fraud".[31] The fundamental distinction between harm caused to a licensee by the *active conduct* of a possessor on the land, and harm arising out of the *physical condition* of the land, while perhaps implicit in the Maryland cases, has not been applied.[32] Firemen, or members of the salvage corps, are treated as licensees and the general Maryland rule applies.[33]

The Court of Appeals, in recent cases involving the liability of a possessor of land, has cited with approval certain sections of the Restatement of Torts.[34] At the same time, reliance is placed on the earlier Maryland cases, which employ a different terminology and classification than the Restatement; although their results are not in all instances contrary to its conclusions. A recent case is interesting as indicating a possible departure from the old classification in favor of the Restatement's method of approach. In *Recreation Centre Corp. v. Zimmerman*[35] the plaintiff, a nonpaying spectator permissively present at the defendant's bowling establishment, was injured, while descending a stand of seats there provided for spectators, due to an abnormal drop from an aisle to one of the steps. The Court of Appeals held that an invitation to use the stand might be implied, and said that although free spectators might be desired in such establishments for business advantages to the proprietors, it was questionable under the evidence whether the plaintiff could be considered as anything but a gratuitous licensee. The question involved was the legal sufficiency of the evidence and the Court found it unnecessary to determine whether a proprietor's duty was the same toward all licensees, saying that toward a guest the proprietor

[30] The persistence of the classification of Chief Justice Bigelow may be noted in Weidman v. Consol. Gas, Elec. L. & P. Co., 158 Md. 39, 148 A. 270 (1930). Cases such as Kalus v. Bass, 122 Md. 467, 472, 89 A. 731 (1914) limit the invitation or inducement from common interest or mutual advantage of the visit along the lines previously mentioned. See note 21, *supra*.

[31] Brinkmeyer v. United Iron & Metal Co., 168 Md. 149, 177 A. 171 (1935).

[32] This distinction is commonly referred to as the distinction between active and passive negligence. That such a distinction exists in licensee cases is noted in Burke v. Md., D. & Va. Ry. Co., *supra* n. 17, but the Court preferred to adhere to the invitation doctrine. Cf. 49 A. L. R. 778 and Restatement, Torts, Sec. 341 (this section cited in dictum in Beverly Beach Club, Inc. v. Marron, 172 Md. 471, 192 A. 278 (1937).

[33] Steinwedel v. Hilbert, 149 Md. 121, 131 A. 44 (1925); cf. Restatement, Torts, Sec. 345.

[34] Consult the appropriate pages of *The Restatement in The Courts* (3rd Ed.).

[35] 172 Md. 309, 191 A. 233 (1937).

must take precautions to prevent injury on the accommodations provided from a danger known to the proprietor but which, as he should realize, a guest exercising due care might not perceive. Although the case may be reconciled with previous decisions, it should be noted that while it is said that an invitation might be implied, the plaintiff's position is considered to be that of a licensee to whom the proprietor was responsible, and, more importantly, the general rule of liability to licensees as previously stated in the Maryland decisions is not expressly stated.

It is not unnatural, in view of the history of the Maryland law with regard to the liability of landowners to those on their premises, that the Court should refuse in the instant case to follow Section 334 of the Restatement of Torts. The rule there announced is based upon the proposition that society is primarily interested in the preservation free from injury of its chief asset, the health and well being of its members; while the decisions of our Court of Appeals consider a landowner's right to exclusive dominion over his property as being of equal if not greater social desirability. In addition, where, as in the instant case, the landowner is making a use of his property which concerns the public, the social value of that use must be considered. This consideration seems to have been the controlling factor in the instant case.[36] There is much to be said for each point of view and the final determination as to which policy shall predominate is entirely a matter of opinion. However, conceding, in the abstract, the force of the policy adopted by the Court of Appeals, the particular application of it to the alleged facts of the case is fairly open to criticism. It should be importantly noted that in essence the complaint involved was that the railroad had allegedly failed to comply with precautions it had voluntarily undertaken, presumably without interference with its duties as a public carrier. When considered in this light, the argument of the Court in support of its position loses much of its force.

The opinion also disappoints in two other respects. First it fails to distinguish between users of longitudinal paths and those crossing a railroad's right of way at a definite place.[37] Since paths along a railroad's right of

[36] See the quotation from Elliott on Railroads in the opinion of the Court, 3 A. (2d) 719, 722, and also the Court's discussion at page 724.

[37] This distinction was involved in the recent case of Erie R. R. Co. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188 (1938); and is indirectly responsible for the abolition of the doctrine of Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865 (1842).

way may extend for a great distance, to impose a duty upon the railroad to exercise care toward the users of such paths results in a burden upon it greatly in excess of that arising from the duty to exercise care toward those crossing the railroad at a definite point. Indeed, the section of Elliott on Railroads quoted in part by the Court indicates that the argument there advanced is intended to be applicable primarily to longitudinal paths.[38]

Secondly, it ignores what was apparently an important allegation in support of the plaintiff's point of view. As has been previously stated the burden of the declaration was that the precautions which were allegedly taken in the past by the railroad were not observed at the time of the injury. The portion of the declaration relating to this point is summarized at the outset of the opinion,[39] yet the statement is later made that "there is alleged no change in the premises and its use".[40] While the Court could be expected to adopt the view that such a user of railroad property would not be entitled to special protection, and would have to use the path subject to the customary movement and operation of trains, the allegations as to the failure to observe the precautions alleged to have been customarily taken in the past, might well be considered as a distinguishing factor in this case sufficient to entitle them to discussion.[41] The case has drawn the criticism of another commentator on the basis of the policy adopted.[42]

---

[38] Elliott on Railroads (3rd Ed.) Vol. 3, Sec. 1788. The Maryland cases relied upon by the Court may be distinguished on the ground that, unlike the present case, they did not involve the existence of definite places of crossing in a populous community. Indeed, in P. W. & B. R. R. Co. v. Fronk, 67 Md. 339, 347, 10 Atl. 204 (1887) the Court in a dictum recognized that in Barry v. N. Y. C. & H. R. R. Co., *supra* n. 8, which was practically identical in its facts with the instant case, there was sufficient evidence of negligence to be submitted to a jury.

[39] 3 A. (2d) 721 (Md. 1939).

[40] 3 A. (2d) 724 (Md. 1939).

[41] To the effect that customary signals must be maintained, see 52 C. J. 230, Elliott, *op. cit. supra* n. 5. Compare Penna. R. Co. v. Yingling, 148 Md. 169, 177, 129 A. 36 (1925).

[42] See Note (1939) 37 Mich. L. Rev. 1149-1150.