

Liability of a Landowner to Habitual Trespassers^{*}

Estate of Aaron Zimmerman v. SEPTA & Amtrak
168 F.3d 680 (1999)
U.S. Court of Appeals, Third Circuit
No. 98-1631

Argued Jan. 28, 1999

Decided Feb. 26, 1999

*By Jeff Feirick, Legal Research Assistant
July 5, 1999*

Facts:

On August 6, 1994, in Philadelphia, PA, eyewitnesses observed Aaron Zimmerman climb a concrete wall and an iron fence to gain access to the general area enclosing railroad tracks on which commuter trains travel. This section of railroad tracks extends from 20th Street to 30th Street. There are several small signs stating "Danger: Live Wires" on the concrete wall adjacent to the track area at and around the bridge on 20th Street. One sign also includes the message "Keep Off."

At midday, Zimmerman climbed to the top of a metal structure, which is approximately twenty-five feet tall and mounted in an upright position on a concrete foundation that supports a catenary at the top. A catenary is an arrangement of wires on a large steel framework. The wires connect the catenaries and carry high-voltage electricity to provide electric propulsion power for trains. While seated on the catenary crossbar, Zimmerman unfortunately received a fatal electrical shock.

* * The Agricultural Law Resource and Reference Center provides the highest-quality educational programs, information, and materials to those involved or interested in the agricultural industry. The center is a unique resource that addresses current and emerging issues affecting agriculture.

The purpose of this publication is to provide an overview of this issue. The material is general and educational in nature and is not intended to be legal advice. If you need legal advice, seek the aid of an agricultural law attorney in your area.

The plaintiffs produced evidence that homeless people would enter the track area. Graffiti covered the inside wall nearby where Zimmerman was electrocuted. Paths led from John F. Kennedy Boulevard toward the track areas. One witness wrote that he informed the police of people climbing the fence and entering the area. Another witness wrote that homeless people were in the track area "all the time" and that police periodically chased them away. However, there was no evidence that people climbed the catenary before Zimmerman's portentous ascent.

Zimmerman was a 23 year old male with a history of mental problems. He suffered from bipolar disorder and plaintiffs' argued that Zimmerman could not fully comprehend the danger he faced. The administratrix for the victim's estate, and the mother of the victim, brought a state-court wrongful death and survival action. The action alleged that the negligence of SEPTA, as the owner of the property, and Amtrak, as the electricity supplier, caused Zimmerman's death. Amtrak removed the action to the U.S. District Court for the Eastern District of PA, and the judge granted summary judgment for the defendants. The plaintiff's appealed to the U.S. Court of Appeals, Third Circuit.

Status of Entrant Upon the Land

The status of care that a possessor of land owes to an entrant upon the land depends upon whether the entrant is a trespasser, licensee, or an invitee. Trude v. Martin, 442 Pa. Super. 614, 624, 660 A.2d 626, 630 (1995).

Trespasser: The Restatement (Second) of Torts § 329 defines a trespasser as "a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise." See also Oswald v. Hausman, 378 Pa. Super. 245, 253, 548 A.2d 594, 598 (1998). A trespasser can only recover if the defendants were guilty of willful or wanton misconduct. Dudley v. USX Corp., 414 Pa. Super. 160, 606 A.2d 916 (1992).

Willful misconduct is "conduct of such a nature that the actor desired to bring about the result that followed or at least was aware that it was substantially certain to follow." Id.

Wanton misconduct refers to "conduct wherein the actor intentionally performs an act of an unreasonable character in disregard to a risk known to him or so obvious that he must be taken to have been aware of it and so great as to make it highly probable that harm would follow." Id.

Licensee: In contrast, a licensee is "a person who is privileged to enter or remain on the land only by virtue of the possessor's consent." § 330 of the Restatement; see also Oswald, 378 Pa. Super. At 254, 548 A.2d at 599.

Section 342 of the Restatement (Second) of Torts (1965) discusses the special liability of possessors of land to licensees. "A possessor of land is subject to liability for physical harm caused to licensee by a condition on the land if, but only if,
(a) the possessor knows or has reason to know of the condition and should realize that it

involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and

(b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and

(c) the licensee does not know or have reason to know of the condition and the risk involved.

Invitee: Finally, an invitee is described as follows:

(1) An invitee is either a public invitee or a business invitee.

(2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.

(3) A business invitee is a person who is invited to remain on land for a purpose directly or indirectly connected with the business dealings with the possessor of the land. Palange v. Philadelphia Law Dept., 433 Pa. Super. 373, 640 A.2d 1305 (1994), citing Restatement (Second) of Torts § 332 (1965).

The duty owed to a business invitee is the highest duty owed to any entrant upon the land. Crotty v. Reading Industries, 237 Pa. Superior. 1, 345 A.2d 259 (1975). The landowner is under an affirmative duty to protect a business visitor not only against known dangers but also against those which might be discovered with reasonable care. Id.

Trespasser, Licensee, or Invitee?

Zimmerman's status at the site of his injury played a crucial role in determining the degree of care SEPTA and Amtrak owed Zimmerman. If defendants could prove Zimmerman had the status of a trespasser at the time of his injury, he could only recover if the defendants were guilty of willful or wanton misconduct. Dudley, at 916.

The plaintiffs claimed that Zimmerman was a licensee because the defendants permitted Zimmerman and other homeless people to enter and remain in the track area. The plaintiffs further argued that the defendants gave Zimmerman implied consent to be in the track area because they were aware that it was foreseeable for a homeless person to be in that area. The plaintiffs' theory seeks to turn every foreseeable trespasser into a licensee. However, the law recognizes that a foreseeable trespasser is still a trespasser. Oswald v. Hausman, 378 Pa. Super. 245, 548 A.2d 594, 598-599 (1988) (distinguishing foreseeable trespassers from licensees).

The evidence the plaintiffs submitted to show that people entered the track area also established that SEPTA utilized police to attempt to eject unauthorized persons from the track area. The evidence proved that SEPTA did not acquiesce to the entry and use of the track area by persons who were not performing railroad-related work. Consequently, even if knowledge of people's presence on the land could create implied consent to use the land, a reasonable fact finder must conclude that SEPTA did not give Zimmerman implied permission to enter and remain in the track area.

Failure to Warn

The plaintiff's allege that insufficient warning of the wires' danger despite the regular trespassing on to the track area amounted to wanton misconduct. Although SEPTA was aware, or should have been aware, that trespassers entered and remained in the track area, SEPTA had no knowledge that trespassers climbed the catenary structure. Wanton misconduct is ordinarily accompanied by a conscious indifference to the consequences and only exists where the danger to plaintiff is realized and is so recklessly disregarded that there is at least a willingness to inflict injury, in not the actual intent to do the same. Dudley, 606 A.2d at 922. Plaintiffs submitted no evidence that anyone had climbed the structure or had been electrocuted on it before Zimmerman. Consequently, the risk of electrocution from climbing the catenary was not so great that more warning signs were required. SEPTA did not commit wanton misconduct by allegedly inadequately posting warning signs pertaining to the electrical wires' danger.

Mental State of the Trespasser

The plaintiffs claim that the child trespasser exception should apply in this case because, although Zimmerman was twenty-three years old when he was electrocuted, he suffered from a mental disorder and could not fully comprehend the danger her faced. The child trespasser exception, also known as the attractive nuisance doctrine, is limited to instances in which children unlawfully enter or remain on land. The law does not impose upon owners and possessors of land a higher duty to protect from injury adults with emotional disorders.

Precedential Value of the Opinions of the Federal Courts of Appeals

The holding of this case must be viewed in light of its relative worth. State courts have discretion to choose to follow, or choose to ignore a lower federal court decision. The U.S. Supreme Court has never ruled on the issue of whether a state court must follow a decision from a lower federal court case or can deliberately refuses to follow it. This issue may never surface because a review by the Supreme Court will result in an independent determination on the merits of a case, and not in a holding that the state was or was not required to adhere to the lower federal court ruling. Donna M. Dever, Dewey v. R.J. Reynolds Tobacco Company: A Change in Cigarette Labels in New Jersey?, 36 Vill. L. Rev. 689, 708.

Conclusion:

In Pennsylvania, the status of an entrant upon the land of another depends on whether the entrant is a trespasser, licensee, or invitee. Each class of entrant carries a different liability level. Zimmerman's status was that of a trespasser. SEPTA the property owner knew of homeless people trespassing on its property and attempted to enforce the no trespassing rule through police involvement.

Zimmerman, a twenty-three year old adult should have realized the inherent danger of climbing a twenty-five foot electrical tower. The court held additional warning signs would not have averted the tragedy. SEPTA and Amtrak's conduct did not rise to the

level of wanton and willful misconduct. The Court of Appeals for the Third Circuit agreed with the lower federal court and granted summary judgment for the defendant.