

THE IDC MONOGRAPH:

THE “FREQUENT TRESPASS” DOCTRINE — A RULE OF LAW WHOSE TIME HAS PASSED?

SECTION 3-102(a) OF THE TORT IMMUNITY ACT – HOW MUCH IMMUNITY DID THE LEGISLATURE INTEND?



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I. INTRODUCTION

This Monograph will focus on a recent First District Appellate Court decision, a case of first impression, in which the appellate court considered two certified questions of interest to municipal defendants. These questions concerned the open and obvious danger rule and the scope of §3-102(a) of the Tort Immunity Act. The article will discuss in depth the decision in *Nelson v. Northeast Illinois Regional Commuter Railroad Corp., d/b/a METRA*, the immunities and defenses afforded local public entities under §3-102 of the Tort Immunity Act and the open and obvious danger rule as it relates to the frequent trespass doctrine.^{1,2}

In *Nelson v. Metra*, the plaintiff, Shanica Nelson, a 15-year-old minor, was struck by a METRA passenger train while trespassing on METRA's tracks. The plaintiff, Nelson, alleged that METRA was negligent in its operation of the train and by its failure to maintain fences or barriers to prevent trespassing on the railroad right-of-way and train tracks.

METRA filed a motion for summary judgment arguing two main points: 1) that METRA owed the plaintiff no duty for the open and obvious danger of being struck by a train; and 2) that it owed the plaintiff no duty because she was not an intended and permitted user of the tracks. The motion for summary judgment was denied, but two questions were certified for appeal under Supreme Court Rule 308:

1. Is the risk of crossing a railroad track on which trains may be operating an open and obvious peril for which a railroad/operator owes no duty of care, regardless of the legal status of the individual crossing the track?
2. Under §3-102(a) of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) does a local public entity's duty to exercise ordinary care to maintain its property in a reasonably safe condition for "intended and permitted users" apply only to passive conditions of the premises or does such duty also apply to activities or operations conducted on the premises by the local public entity?³

II. THE ACCIDENT IN NELSON

The plaintiff's accident occurred on September 2, 1999, as she walked home from Morgan Park High School after watching her boyfriend participate in football practice after school. The METRA tracks where the plaintiff was struck run northbound and southbound between 119th Street and 115th Street in Chicago. The neighborhood near Morgan Park High School is densely populated and the tracks run adjacent to and alongside the back yards of many single-family homes in the area. The plaintiff and her friend took a path through a grassy field toward the tracks and looked both ways down the tracks. The plaintiff saw a light from a train in the distance, but thought that it was stopped.

The plaintiff and her friend crossed the first and second set of tracks. They continued walking on the end of the railroad ties on the second set of tracks toward a point where the path continued on the other side of the tracks. The plaintiff had used this path to cross the tracks every day on her commute to and from school. As she was walking on the ends of the railroad ties, the plaintiff heard her friend yell, "watch out." The plaintiff looked over her shoulder and the train was right there, striking her.⁴

III. PROCEDURAL HISTORY

The *Nelson v. Metra* case took an unconventional route to its present point. METRA initially filed a motion for judgment on the pleadings, contending that §3-102(a) of the Tort Immunity Act immunized it from liability to the plaintiff. The trial court denied METRA's motion, but certified the same Question No. 2 involved in the late appeal for interlocutory appeal pursuant to Supreme Court Rule

308. At that time, the open and obvious danger rule was not at issue. In the first Rule 308 appeal, the appellate court entered an order granting leave to appeal, but later vacated the order, stating that the resolution of the immunity issue was premature until it was first determined whether METRA owed a duty to the plaintiff. The case was remanded for resolution of the duty issue and, if necessary, recertification of the immunity issue.

In remanding the matter to the trial court for resolution of the duty question in the first appeal, No. 1-02-1923, the appellate court, in an unpublished order under Supreme Court Rule 23, stated:

Under *Jakubowski*, a defendant owes a minor plaintiff a duty *only* if the minor plaintiff was unable to appreciate the risk of crossing the railroad track. Such a determination is fact driven, dependent upon such matters as Plaintiff's mental capacity and the frequency with which she had previously crossed the tracks and encountered the train. The record is silent as to these facts If the trial court, after further and complete proceedings, determines the defendant owed plaintiff a duty of care under *Jakubowski* or any other theory, then the trial court may, of course, revisit any applicable immunities and may recertify the question involving the applicability of §3-102(a) or any other question it feels necessary.⁵

IV. CERTIFIED QUESTION NO. 1: The Open and Obvious Danger Rule

After the case was remanded, METRA presented its motion for summary judgment, which was denied. This time, however, the trial court certified the two questions at issue. The *Nelson* court first addressed Certified Question No. 1 – the open and obvious danger rule:

The first certified question asks whether the risk of crossing a railroad track on which trains may be operated is an open and obvious peril for which a railroad/operator owes no duty of care, regardless of the legal status of the individual crossing the track.

Generally, the rule in Illinois is that a landowner owes a trespasser only the duty to refrain from wilfully or wantonly injuring him. *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 446 (1992). Plaintiff contends, though, that the facts as alleged in her complaint fall within the frequent trespass exception. Under this exception, a landowner is liable for injuries to a trespasser proximately caused by its failure to exercise reasonable care in the course of its activities, where the landowner knows, or should know, that trespassers habitually enter its land at a particular point or traverse an area of small size. *McKinnon v. Northeast Illinois Regional Commuter R.R. Corp.*, 263 Ill. App. 3d 774, 777 (1994).⁶

The appellate court in *Nelson* then explained METRA's position regarding the frequent trespass doctrine and the open and obvious peril of trespassing on the tracks.

Defendant contends that, even assuming the frequent trespass exception application applies, it owed no duty to plaintiff for the open and obvious danger of being struck by a train. In support, defendant cites the doctrine established by our supreme court in *Kahn v. James Burton Co.*, 5 Ill. 2d 614 (1955)(the *Kahn* doctrine). Under the *Kahn* doctrine, a duty will be imposed on landowners or persons in possession or control of premises for personal injuries suffered by a child on the premises if: (1) the landowner or other occupier of land knows or should know that children frequent the premises; and (2) if the cause of the child's injury was a dangerous condition on the premises. A dangerous condition "is one which is likely to cause injury to the general class of children who, by reason of their immaturity, might be incapable of appreciating

the risk involved.” The *Kahn* doctrine does not impose a duty on owners or occupiers of land to remedy conditions involving obvious risks that children would be expected to appreciate and avoid.⁷

The appellate court stated that the plaintiff brought her case under the “frequent trespasser doctrine” which is separate and distinct from the *Kahn* doctrine. The court cited to *Miller v. General Motors Corp.*,⁸ to explain the rationale behind the frequent trespass doctrine:

This exception has developed because of the concern that human safety ought to be more important than the landowner’s interest in unrestricted freedom to use his own land as he sees fit. This view is especially prevalent in cases in which the burden on the landowner and the expense in taking precautions to prevent harm are not great. If that burden is very slight, and if the risk of harm to the trespasser is correspondingly very great, some commentators have found good reason to hold the landowner liable for injuries sustained on his land by the trespasser. This rule applies mostly in the case of frequent trespass upon a limited area.

The *Miller* court further observed: [t]his duty is imposed because the burden of looking out for trespassers is not great. A typical case is the frequent use of a “beaten path” that crosses a railroad track, which is held to impose a duty of reasonable care as to the operation of trains.⁹

The appellate court in *Nelson* stated that where a landowner is aware of the presence of frequent trespassers, and a corresponding risk of danger to them, the landowner owes a duty of care to prevent harm under the frequent trespass doctrine:

The frequent trespass doctrine is focused, then, not on the trespasser’s knowledge of the risks involved, but rather on the *landowner’s* knowledge of the risks. Unlike the *Kahn* doctrine, the issue of whether the risk was open, obvious, and capable of being appreciated and avoided by the trespassers is irrelevant to the analysis under the frequent trespass doctrine; the only issue is whether the landowner appreciated the risk and was in a position to prevent harm.¹⁰

The appellate court referenced §334 of the Restatement (Second) of Torts, illustration 3, as an example of when the frequent trespass doctrine allows a plaintiff to recover:

3. The A Railway Company has knowledge of the fact that the inhabitants of the town of X have so persistently used a part of the right of way parallel to its track as a means of reaching their homes that they have worn a beaten path beside the track. This path is at a point where the tracks curve sharply, and it is so close to the tracks as to make its use dangerous while trains are passing. B, one of the inhabitants of the town of X, is walking along the path on his way home from the station. A locomotive of the A Company is driven around the curve at a high rate of speed in the same direction as that in which B is walking, without a headlight and without ringing its bell. It strikes B. The A Railway Company is subject to liability to B.¹¹

The appellate court dismissed METRA’s arguments that the frequent trespass doctrine is contrary to the Trespassing on Railroad Property Act,¹² and that the frequent trespass doctrine should be abolished. The appellate court also pointed out that METRA cited no cases holding that an open and obvious danger negates a landowner’s duty under the frequent trespass doctrine, although this is not unusual in a case of first impression. The court concluded by answering the first certified question, holding that any open and obvious risk in crossing the railroad track could not negate METRA’s duty toward the plaintiff under the frequent trespass doctrine.¹³

**V. DOES THE FREQUENT TRESPASS DOCTRINE
CONDONE TRESPASSING IN VIOLATION OF PUBLIC POLICY?**

**Should the “Frequent Trespass” Rule Be
Trumped by the “Open and Obvious Danger” Rule, Just as the
“Kahn Doctrine” is Trumped by the “Open and Obvious Danger” Rule?**

The *Nelson* decision seems to acknowledge the open and obvious risk of trespassing on railroad tracks, but shifts the burden of protecting against these risks by upholding a duty owed to the trespasser under the frequent trespass doctrine. The *Nelson* decision does not, unfortunately, resolve the conflict between the two rules of law: (1) the “open and obvious danger” rule;¹⁴ and (2) the “frequent trespasser” rule.¹⁵

There appears to be a need for clarification of the “frequent trespasser” rule because of seeming public policy concerns. Two inconsistencies require resolution. First, the Trespassing on Railroad Property Act prohibits walking on or across railroad tracks at non-designated pedestrian crosswalks, but the “frequent trespasser” rule encourages persons to create their own crosswalks, beaten paths, by frequently violating the Act. It is not sound public policy to encourage multiple violations of the Trespassing Act which allow children and adults to create their own crosswalks in the form of beaten paths which lack the protection of the railroad company’s designed, constructed, maintained and designated crosswalks. Indeed, it appears quite dangerous to our children for the courts to sanction such conduct.

Second, the public policy behind a wilful and wanton conduct standard for an “ordinary trespasser,” but an ordinary care standard for a “frequent trespasser,” appears counter-productive by encouraging multiple violations of the law, the Trespassing on Railroad Property Act. Seemingly, the more a person violates the law, the more the law protects such person.

These policy concerns suggest that the open and obvious danger of being struck and injured by a train operating on its tracks, at a place where a pedestrian has no legal right to be and where the Trespassing on Railroad Property Act prohibits her presence, should bar any claim against a railroad.

The *Kahn* Doctrine

The “*Kahn* doctrine” has a rational basis for the imposition of liability on a landowner to maintain its property in a reasonably safe condition for child trespassers: some children are too young and immature and, therefore, unable to appreciate the dangers on the property.¹⁶

But, when a child is old enough and mature enough (allowed in public unsupervised) to appreciate the danger of common, open and obvious conditions, the *Kahn* doctrine is no longer applied, but rather, is trumped by the “open and obvious danger” rule such that the landowner no longer owes a duty to the trespassing child.¹⁷

In *Kahn v. James Burton Co.*,¹⁸ the Illinois Supreme Court announced the “*Kahn* doctrine” which it defined in these words:

It is recognized, however, that an exception exists where the owner or person in possession knows, or should know, that young children habitually frequent the vicinity of a defective structure or dangerous agency existing on the land, which is likely to cause injury to them because they, by reason of their immaturity, are incapable of appreciating the risk involved, and where the expense or inconvenience of remedying the condition is slight compared to the risk to the children. In such cases there is a duty upon the owner or other person in possession and

control of the premises to exercise due care to remedy the condition or otherwise protect the children from injury resulting from it.¹⁹

The Illinois Supreme Court has determined that the open and obvious danger/no duty rule controls over and trumps any duty a landowner owes to a child trespasser in several cases, including the following:

- (1) *Corcoran v. Village of Libertyville*, 73 Ill. 2d 316, 383 N.E.2d 177 (1978) (no duty of landowner under *Kahn* doctrine to protect 3-year old who wandered away from home into ditch because peril was open and obvious).
- (2) *Cope v. Doe*, 102 Ill. 2d 278, 464 N.E.2d 1023 (1984) (apartment complex owner owed no duty under *Kahn* rule to protect 7-year old from drowning in retention pool because risk of drowning in pond an open and obvious danger).

The supreme court in *Corcoran v. Village of Libertyville*,²⁰ held that the landowner village owed no duty under the rule of *Kahn* to protect a 3-year old from drowning in a drainage ditch because the drainage ditch was an “open and obvious danger” from which the landowner had no duty to protect entrants onto its property. Explaining that the open and obvious danger rule prevailed over the *Kahn* doctrine, the supreme court in *Corcoran* reasoned:

[T]he *Kahn* principle should not be construed to impose a duty on owners or occupiers to remedy conditions the obvious risk of which children generally would be expected to appreciate and avoid. Even if an owner or occupier knows that children frequent his premises, he is not required to protect against the ever present possibility that children will injure themselves on obvious or common conditions. As this court has observed:

It is always unfortunate when a child gets injured while playing, but a person who is merely in possession and control of the property cannot be required to indemnify against every possibility of injury thereon. The responsibility for a child’s safety lies primarily with its parents, whose duty it is to see that his behavior does not involve danger to himself.

The law recognizes that children, especially those of tender age, might conceivably be injured by the most innocuous of conditions. As expressed in the comments accompanying §339 of the Restatement (Second) of Torts:

There are many dangers such as those of fire and water, or of falling from a height, which under ordinary conditions may reasonably be expected to be fully understood and appreciated by any child of an age to be allowed at large.²¹

Considering that the supreme court has held that the open and obvious danger rule prevails over and trumps the *Kahn* doctrine, it logically follows that the supreme court would also hold that the open and obvious danger rule prevails over and trumps the frequent trespass doctrine.

Frequent Trespass Doctrine

The “frequent trespasser” rule has developed gradually, and its rationale has essentially gone unchallenged, even though it has significantly less rational basis for its existence than the “*Kahn* doctrine.” The rationale for the “frequent trespasser” rule lacks the “*Kahn* doctrine” public policy of protecting children from dangerous conditions that children are too young to appreciate. That is so because the “frequent trespasser” rule applies to both children and adults.²²

The only rationale for the “frequent trespasser” rule (although the courts have never really explained the rationale, but instead, routinely applied the rule taking for granted that it is supported by a strong public policy) is that it is easier for a landowner to locate the beaten paths of frequent trespassers and to prevent the use of such beaten paths than it is for children and adults to follow the law and refrain from trespassing on the property. In the case of a railroad, the only rationale for the application of the “frequent trespasser” rule is that it is a lesser financial and personnel burden on a railroad to inspect its miles of tracks for frequent trespasser “beaten path” crossings and prevent their use than it is for children and adults to comply with the no trespassing on railroad property law found in the Trespassing on Railroad Property Act.²³

The wisdom of a rule of law which encourages disregard for the law (violating the Trespassing on Railroad Property Act) and rewards such illegal activity by imposing a duty on the landowner to catch and stop frequent trespassers seems contrary to public policy and is in need of serious re-examination.

In *Bucheleres v. Chicago Park District*, the Illinois Supreme Court set out an analysis of the rationale supporting the open and obvious danger rule, which is a no duty rule.²⁴ *Bucheleres* suggests that a condition on property which is both dangerous and open and obvious to an entrant coming onto the property itself cautions the entrant to appreciate and avoid the obvious danger. In *Bucheleres*, the supreme court summarized Illinois law with respect to the fact that landowners are not liable for open and obvious perils or risks of harm on property.

Illinois law holds that persons who own, occupy, or control and maintain land are not ordinarily required to foresee and protect against injuries from potentially dangerous conditions that are open and obvious. This court has recognized,

certainly a condition may be so blatantly obvious and in such position on the defendant’s premises that he could not reasonably be expected to anticipate that people will fail to protect themselves from any danger posed by that condition. Even in the case of children on the premises, this court has held that the owner or possessor has no duty to remedy conditions presenting obvious risks which children would generally be expected to appreciate and avoid.

In cases involving obvious and common conditions, such as fire, height, and bodies of water, the law generally assumes that persons who encounter these conditions will take care to avoid any danger inherent in such condition. The open and obvious nature of the condition itself gives caution and therefore the risk of harm is considered slight; people are expected to appreciate and avoid obvious risks.²⁵

Under the open and obvious danger/no duty rule, the only test to its applicability is whether a dangerous condition on the property is open and obvious. For example, the dangers of injury from “fire, drowning in water or falling from a height” are so well-known and obvious that a landowner owes no duty to protect an entrant onto property from such. Under the open and obvious danger rule,

the status of an entrant — invitee, licensee or trespasser — is not an issue. If a condition on the property poses an open and obvious danger, there is no duty owed to the entrant without regard to the entrant's status.

However, under the frequent trespasser rule, the status of the entrant, the knowledge of the landowner of the trespassers, the habit of persons frequently trespassing in the same area, and the determination whether the burden on the landowner to prevent trespassers is slight as compared to the risk of injury to the trespassers, are all determinative factors as to whether a duty is owed.²⁶ These frequent trespasser elements of a cause of action are, as the supreme court decisions in *Buchelers v. Chicago Park District*, and *Mt. Zion State Bank & Trust v. Consolidated Communications, Inc.* reveal, unnecessary to be considered if the danger is an open and obvious peril, known and appreciated by the entrant onto property. The common experiences of mankind reveal that the danger of being struck and injured by a train while trespassing on railroad tracks is just as open and obvious as the danger of injury from “fire, drowning in water and falling from heights,” which the supreme court holds are open and obvious dangers where no duty is owed.

In addition to the cases cited previously herein, there are a number of open and obvious danger/no duty cases which present factual settings in which the rule has been applied and that support the position that no duty should be owed to a trespasser on railroad tracks. Among those open and obvious danger cases finding no duty to the entrant on the property of the landowner are the following.

- (1) *Chareas v. Township High School District No. 214*, 195 Ill. App. 3d 540, 553 N.E.2d 23 (1st Dist. 1999) (school district owed no duty to protect plaintiff from being hit in eye with tennis ball where plaintiff was voluntarily standing inside fenced tennis court watching tennis match because such was an open and obvious danger).
- (2) *Nally v. City of Chicago*, 190 Ill. App. 3d 218, 546 N.E.2d 630 (1st Dist. 1989) (no duty owed by city to protect telephone repairman from hearing loss due to aircraft noise at O'Hare airport because being on the ground near airplanes presented an open and obvious danger of exposure to loud engine noise).
- (3) *Sollami v. Eaton*, 201 Ill. 2d 1, 772 N.E.2d 215 (2002) (homeowner owed no duty to protect plaintiff on premises injured while rocket-jumping on trampoline as peril of landing wrong and being injured was an open and obvious danger).
- (4) *Prostran v. City of Chicago*, 349 Ill. App. 3d 81, 811 N.E.2d 364 (1st Dist. 2004) (no duty owed by city to pedestrian who observed construction in alley between two sections of sidewalk and walked into the construction area, fell down and sustained injuries because the peril was an open and obvious danger).
- (5) *Jakubowski v. Alden-Bennett Construction Co.*, 327 Ill. App. 3d 627, 763 N.E.2d 790 (1st Dist. 2002) (no duty owed to 13-year old trespasser on building construction site where he stepped through the wall framing into an open stairwell from second to first floor as such was an “open and obvious danger” like fire, drowning in water and falling from a height).

If watching a tennis match inside the tennis court (*Chareas*), getting too close to airplane engines (*Nally*), rocket-jumping on a trampoline (*Sollami*), walking in an alley under construction (*Prostran*) and walking in a building under construction with stairwell openings (*Jakubowski*), were found to be open and obvious dangers against which the landowner owed no duty to protect entrants on the property, then the danger of trespassing and walking on railroad tracks and being struck by a train

should likewise, be an open and obvious danger, like fire, drowning in water and falling from a height. As such, the railroad should not owe a trespasser a duty to protect.

The facts at issue in *Jakubowski* provide a helpful example of the application of the open and obvious danger/no duty rule. In *Jakubowski*, the plaintiff, Frank Jakubowski, age 13, went onto a construction site at about 7:30 p.m. on April 30, 1997 with friends. They went up to the second floor of the building under construction to see how the work was progressing. Frank had been chased off of the site previously by the field superintendent. While on the second floor, he saw a police car driving by and ducked out of sight, stepping through wall framing and into an open stairwell, falling to the first floor and sustaining injuries.

The trial court granted summary judgment for both defendants and the appellate court affirmed, finding that neither the landowner nor the general contractor owed a duty to protect the 13-year-old trespasser from the open and obvious and common danger of an open stairwell: “[i]n the present case, the open stairwell presented an open and obvious danger of falling. Thus, neither Drexel Horizon nor Alden-Bennett had a common law duty to protect Frank from the open and obvious danger.”²⁷

The appellate court in *Jakubowski* ruled that open and obvious dangers which children, even trespassing children, are deemed to know and appreciate do not impose liability on a landowner. A landowner is not liable for such conditions because they are deemed to be “non-dangerous conditions” for child trespassers.

While certainly there are latent dangers that a child would not appreciate due to his minority, a possessor of land is free to rely upon the assumption that any child old enough to be allowed at large by his parents will appreciate certain obvious dangers or at least make his own intelligent and responsible choice concerning them.

There are many dangers, such as those of fire and water or of falling from a height, which under ordinary conditions may reasonably be expected to be fully understood and appreciated by any child of an age to be allowed at large.²⁸

More recently, the appellate court has found that a bicycle in a hallway over which the plaintiff fell, and algae on a boat dock on which the plaintiff fell, were both open and obvious dangers from which the landowner had no duty to protect. *See Belluomini v. Stratford Green Condominium Association*, 346 Ill. App. 3d 687, 805 N.E.2d 701 (2d Dist. 2004) (bicycle in condo hallway of which the plaintiff was aware was an open and obvious peril and that there was no duty to protect the plaintiff); and *Bonavia v. Rockford Flotilla, 6-1, Inc.*, 348 Ill. App. 3d 286, 808 N.E.2d 1131 (2d Dist. 2004) (algae growth on dock pier on which boater who rented dock space slipped was an “open and obvious peril” imposing no duty on dock operator to warn of or guard against).

In order to resolve the question of whether the “open and obvious danger no duty rule” trumps the “frequent trespasser” rule, is necessary to consider the two rules discussed in *McKinnon v. Northeast Illinois Regional Commuter R.R. Corp.* In *McKinnon*, METRA asserted that the plaintiff McKinnon’s complaint, pleading a negligence theory for an accident wherein decedent Kevin Spletter, an adult crossing and trespassing on METRA’s tracks, was killed when struck by a train, was insufficient. METRA contended that to state a cause of action for the death of an adult trespasser on its tracks, the complaint was required to plead wilful and wanton conduct, not mere negligence, because refraining from wilful and wanton conduct was the standard owed to adult trespassers.

The appellate court noted that there was no disagreement as to the general rule that ordinarily the duty owed a trespasser is to refrain from wilful and wanton conduct, “Plaintiffs also do not dispute the

general rule that ‘a railroad company owes no duty to a trespasser except to refrain from wantonly or willfully injuring him, and to use reasonable care to avoid injury to him after he is discovered to be in peril.’”²⁹

However, the appellate court found that the general rule did not apply to the plaintiff McKinnon because his case fell within the “frequent trespasser” exception to the general rule:

Plaintiffs argue, however, that the facts as alleged in their complaint fall under one of three exceptions to the rule of no duty to a trespasser which has come to be known as the permissive use or frequent trespass exception. . . .

Under this exception, a landowner is liable for injuries to a trespasser proximately caused by its failure to exercise reasonable care in the course of its activities, where the landowner ‘knows, or should know from the facts within his knowledge, that trespassers are in the habit of entering his land at a particular point or of traversing an area of small size.’³⁰

As used in *McKinnon*, the “frequent trespasser” exception changes the duty a landowner owes to a trespasser from a duty to refrain from wilful and wanton conduct to an ordinary trespasser to a duty of ordinary care/reasonable care owed to a frequent trespasser (a beaten path trespasser). The “frequent trespasser” exception appears to be counter-intuitive to the Trespassing on Railroad Property Act,³¹ because if enough people decide the pedestrian crossing nearest their home is inconvenient (too far to walk to), they can create one or any number of “beaten paths” and compel a railroad to owe them the same duty it owes to pedestrians using its designated crosswalks — a duty of reasonable care. Indeed, it appears that the “frequent trespasser” rule encourages the public to ignore the law, the Trespassing on Railroad Property Act, and engage in dangerous conduct — creating “beaten paths” allowing them to become “frequent trespassers” to whom the same duty as a railroad owes to invitees on its station platforms and its designated crosswalk areas is owed.

The courts do not explain the purpose of and the ramifications resulting from promulgation of the “frequent trespasser” rule. The Trespassing on Railroad Property Act is designed to prevent harm and injury to persons making it an illegal criminal offense to trespass on railroad property. The Act prevents accidents and injuries.

Although not intended to do so, the “frequent trespasser” exception to the general rule and the duty to refrain from wilful and wanton conduct to trespassers on railroad property, encourages groups of individuals to create their own railroad crossings — beaten paths. These beaten paths lack the protections of designed, planned, maintained and protected crosswalks provided by a railroad.

The “frequent trespasser exception” may have outlived its usefulness. A rule that encourages groups of persons to establish crosswalks — beaten paths — on railroad property and requires railroads to locate such beaten paths along miles and miles of track places an impossible burden on a railroad and encourages persons to ignore the law and engage in the unsafe practice of crossing railroad tracks at non-crosswalk areas.

VI. CERTIFIED QUESTION NO. 2:

Section 3-102 of the Tort Immunity Act

The *Nelson* court next addressed the second certified question, whether under §3-102(a) of the Tort Immunity Act, a local public entity’s duty to exercise ordinary care to maintain its property in a reasonably safe condition for intended and permitted users applies only to passive conditions of the

premises or does such duty also apply to activities or operations conducted on the premises by the local public entity?³²

Section 3-102(a) of the Tort Immunity Act states as follows,

§3-102(a) Except as otherwise provided in this Article, a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used, and shall not be liable for injury unless it is proven that it has actual or constructive notice of the existence of such a condition that is not reasonably safe in reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition.³³

The appellate court in *Nelson* first examined §3-106 of the Tort Immunity Act and the case of *McCuen v. Peoria Park District*,

The clear language of §3-102(a) immunizes the defendant from liability to persons who are not intended and permitted users of its property if they are injured by a “condition [of the property] that is not reasonably safe.” Defendant contends that the word “condition” encompasses activities and operations conducted on the property. We disagree. *McCuen v. Peoria Park District*, 163 Ill. 2d 125 (1994), is instructive. In *McCuen*, our Supreme Court addressed the meaning of the word “condition” as used in §3-106 of the Tort Immunity Act, which immunizes local public entities for liability and negligence based on “the existence of a condition of any public property intended or permitted to be used for recreational purposes.” While visiting a park owned and operated by the Peoria Park District, McCuen was told by a park district employee to climb onto a hayrack in order to take a mule-drawn hayrack ride. While the employee was harnessing the mules, he slapped a strap over one of the mules, causing the mule team to suddenly bolt and run off with the driverless haystack. McCuen was thrown to the ground and injured. She subsequently brought suit against the defendant park district.

The issue on appeal was whether the driverless hayrack was a “condition” of public property within the meaning of section 3-106. Our supreme court held:

We do not believe that a driverless hayrack is a condition of public property within the meaning of section 3-106. Plaintiffs do not claim that the hayrack itself was dangerous, defective or negligently maintained, only that the mule team was not handled properly by the park district employee. The handling of the mule team does not relate to the condition of the hayrack itself. If otherwise safe property is misused so that it is no longer safe, but the property itself remains unchanged, any danger presented by the property is due to the misuse of the property and not to the condition of the property.

In effect, the supreme court held that Section 3-106 immunizes defendant for liability in negligence where the property itself is unsafe, but that Section 3-106 does not immunize defendant for unsafe activities conducted upon otherwise safe property.³⁴

The appellate court in *Nelson* then applied the reasoning of the supreme court in *McCuen* to §3-102(a),

The same analysis applies to section 3-102(a), which provides that local public entities owe no duty (e.g., are immunized) for injuries arising from the unsafe “condition” of its property where

the injured party was not an intended or permitted user of the property. Section 3-102(a) provides no similar immunity for persons injured by unsafe activities conducted on the property. Thus, in answer to the certified question, section 3-102(a) immunity applies where the following two requirements are met: (1) the injured party was not an intended and permitted user of the property; and (2) the injury arose from the condition of the property. Section 3-102(a) immunity does not apply where the injuries arose from a unsafe activity conducted on otherwise safe property.³⁵

Finally, the appellate court in *Nelson* summarily dismissed METRA's contention that §3-102(a) applies to both conditions of the property and the activities occurring thereon,

Defendant contends that section 3-102(a) is a codification of the common law rule requiring a municipality to maintain its property in a reasonably safe condition, and that the common law duty to maintain property in a reasonably safe condition includes both the condition of the property and the activities occurring thereon. Therefore, defendant contends that section 3-102(a) should be construed as immunizing it for injuries to persons who are not intended and permitted users of the property, when those injuries arise from activities conducted on the property. Defendant's contention is without merit, as section 3-102(a) expressly refers only to the "condition" of the property, not to the activities thereon.³⁶

VII. DOES THE NELSON COURT'S INTERPRETATION OF SECTION 3-102(A) IMPROPERLY LIMIT THE IMMUNITIES PROVIDED TO LOCAL PUBLIC ENTITIES BY THE LEGISLATURE?

The second question in the *Nelson* case involves a matter of statutory interpretation as to the meaning of the provision in §3-102(a) of the Tort Immunity Act, which provides a local public entity must maintain its property "in a reasonably safe condition" for intended and permitted users. Does the phrase "maintain its property 'in a reasonably safe condition'" require a local public entity to maintain both the physical conditions and the activities thereon in reasonably safe condition for intended and permitted users?

Indeed, as will be discussed herein, the duty provision in §3-102(a), stating that a local public entity must maintain its property in a reasonably safe condition, is a codification of the very same duty existing at the common law.³⁷ And, the common law duty of a landowner to maintain its property in a reasonably safe condition includes both the state or condition of the property and the activities taking place thereon.³⁸

Section 3-102(a) grants a local public entity immunity from liability for injuries on the local public entity's property if persons coming onto the property are not "intended and permitted user" of the property.³⁹ Section 3-102(a)'s duty provision stating that a local public entity must maintain its property in a reasonably safe condition is no mystery. It is merely the common law duty a landowner owes to someone coming onto the premises. The meaning of this common law duty written into §3-102(a) is well-known and well-established.

The rule that a landowner owes a duty to entrants onto the property to maintain the property in a reasonably safe condition both as to the condition or state of the premises and as to the acts or activities taking place on the premises is the well-known, long-established common law rule and, as the Illinois Supreme Court has held in a number of cases, is the source of the provision in §3-102(a)'s duty of a local public entity to maintain its property in "a reasonably safe condition."⁴⁰

The words in §3-102(a) state that the duty a local public entity owes, to maintain its property in a reasonably safe condition, are a mere reiteration of the duty owed by a landowner to entrants thereon, "to maintain its property in a reasonably safe condition." The immunity provided by §3-102(a) is that

its duty to maintain its property in a reasonably safe condition is owed, not to all entrants onto its property, but only to “intended and permitted users” on its property. Thus, for example, no duty is owed to trespassers under §3-102(a).

The supreme court in *Wagner v. City of Chicago*,⁴¹ stated that, “[a]t common law, a municipality had a duty to maintain its property in a safe condition.” That duty was incorporated into §3-102(a). The *Wagner* court explained that §3-102(a) and its duty of a local public entity to maintain its property in a reasonably safe condition is merely a statutory codification of the common law rule, “[i]n that it set forth a municipality’s general duty at common law to maintain its property in a reasonably safe condition.

This limitation on the scope of the duty in section 3-102(a) is in keeping with the scope of that duty as it existed at common law. The Tort Immunity Act creates no new duties but merely codifies those existing at common law. At common law, a municipality had a duty to maintain its property in a safe condition.⁴²

Wagner’s rule that §3-102(a)’s duty reflects the common law duty owed by landowners to entrants onto the property is reiterated more recently by the supreme court in *Washington v. City of Chicago*.⁴³ Interpreting the duty owed by the City as to “intended and permitted users” of its streets under §3-102(a), the *Washington* court held that the city had a duty to maintain its median strip in a reasonably safe condition. The common law duty of a landowner is incorporated into §3-102(a), “[t]he City is subject to the Local Governmental and Governmental Employees Tort Immunity Act (the Act) (745 ILCS 10/3-102 (West 1994)). Section 3-102(a) of the Act states,

Except as otherwise provided in this Article, a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used . . .

745 ILCS 10/3-102(a) (West 1994)

This provision does not impose any new duties on municipalities. Rather, it codifies a municipality’s general duty at common law to maintain the property in a reasonably safe condition.⁴⁴

Both the common law and §3-102(a)’s statutory codification of the common law to the effect that a landowner owes a duty to maintain its property in a reasonably safe condition include the state or condition of the property itself and the activity taking place on the property. Noting that the general duty of a landowner is to maintain its premises in a reasonably safe condition and includes conditions existing on the premises and activities occurring on the premises, the supreme court in *Sollami v. Eaton* stated the rule in these words, “[t]he duty owed by Eaton to Kathleen is one of reasonable care under the circumstances regarding the state of the premises or acts done or omitted on them.”⁴⁵

The legislature, in enacting the Tort Immunity Act to protect local government from liability for certain operations of government in the providing of a multitude of services, intended to limit local government’s duty to maintain its property reasonably safe only for “intended and permitted users” of the property. However, the legislature did not intend to exclude activities taking place on local government’s property.

Finally, further support for the fact that the duty of a local public entity to maintain its property in a reasonably safe condition, both as to the state or condition of the property and to the activities or acts done thereon is found in the Illinois Premises Liability Act. (740 ILCS 130/2). The Premises Liability

Act adopts the common law duty a landowner owes to entrants onto property which is a duty of reasonable care as to the “state of the premises or acts done or omitted on them.”

Section 2 of the Act provides as follows.

The distinction under the common law between invitees and licensees as to the duty owed by an owner or occupier of any premises to such entrants is abolished.

The duty owed to such entrants is that of reasonable care under the circumstances regarding the state of the premises or acts done or omitted on them.

740 ILCS 130/2.

Therefore, it must be concluded that §3-102(a)’s duty to maintain property in a reasonably safe condition includes the state/condition of property and the activities occurring thereon. This is so because §3-102(a) is a codification of the common law rule which the supreme court holds to include the state or condition of and the activities taking place on the property.

VIII. CONCLUSION

A rule of law that encourages or condones the violation of a statute such as the Trespassing on Railroad Property Act, designed to protect the public, can only promote dangerous conduct and lead to more injury. Perhaps the frequent trespass doctrine is a concept that should be seriously re-examined, and possibly eliminated all together.

The legislature provided to local public entities various immunities and defenses under the Tort Immunity Act, recognizing the multitude of services and functions performed by local public entities, which could potentially subject them to liability. The intent of the legislature in doing so must be protected. As no words in §3-102(a) of the Tort Immunity Act suggest that it excludes “activities occurring on the property” from the duty owed by local public entities, to omit “activities occurring thereon” from the interpretation of §3-102(a) would, in effect, rewrite §3-102(a), and would not reflect the intent of the legislature.

Endnotes

¹ The Author’s firm, Judge, James & Kujawa, LLC, represented METRA in *Nelson v. Metra*, both in the trial court and on appeal. The petition for rehearing to the appellate court was recently denied and the notice of intent to appeal to the Illinois Supreme Court will be on file shortly.

² *Nelson v. Northeast Illinois Regional R.R. Corp., d/b/a METRA*, No. 1-05-0002, 2006 WL 587791 (Ill. App. 1st Dist., March 10, 2006).

³ *Nelson*, 2006 WL 587791, at *2.

⁴ *Id.* at *3.

⁵ *Nelson v. Northeast Illinois Regional R.R. Corp., d/b/a METRA*, No. 1-02-1923, First District, Sixth Division, June 3, 2003 (unpublished opinion under Supreme Court Rule 23).

⁶ *Nelson*, 2006 WL 587791, at *3.

⁷ *Id.* at *3-4.

⁸ 207 Ill. App.3d 148 (1980).

⁹ *Nelson*, 2006 WL 587791, at *4.

¹⁰ *Id.*

¹¹ Restatement (Second) of Torts, §334 at 199 (1965); *Nelson*, 2006 WL 587791, at *4.

¹² *Nelson*, 2006 WL 587791, at *5.

¹³ *Id.*

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¹⁴ *Mt. Zion State Bank & Trust v. Consolidated Communications, Inc.*, 169 Ill. 2d 110, 660 N.E.2d 863 (1995) (telephone company not liable to 6-year-old who climbed on its pedestal over a fence and drowned in a swimming pool because such was an open and obvious danger imposing no duty to guard against).

¹⁵ *McKinnon v. Northeast Illinois Regional Commuter Railroad Corp. d/b/a METRA*, 263 Ill. App. 3d 774, 635 N.E.2d 744 (1st Dist. 1994) (railroad's duty to adult trespasser to refrain from wilful and wanton conduct converted to a duty of reasonable care/ordinary care under the "frequent trespasser" rule).

¹⁶ *Kahn v. James Burton Co.*, 5 Ill. 2d 614, 126 N.E.2d 836 (1955) (landowner owes duty of reasonable care to trespassing child for a dangerous condition on property which a child is incapable of appreciating and the burden of remedying such dangerous condition is slight compared to the risk of injury to the child).

¹⁷ *Cope v. Doe*, 102 Ill. 2d 278, 464 N.E.2d 1023 (1984) (apartment complex owner owed no duty under *Kahn* rule to protect 7-year old from drowning in retention pool because risk of drowning in pond an open and obvious danger).

¹⁸ *Kahn v. James Burton Co.*, 5 Ill. 2d 614, 126 N.E.2d 836 (1955).

¹⁹ *Kahn*, 5 Ill. 2d at 625; 126 N.E.2d at 842.

²⁰ *Corcoran v. Village of Libertyville*, 73 Ill. 2d 316, 383 N.E.2d 177 (1978).

²¹ *Corcoran*, 73 Ill. 2d at 326-27; 383 N.E.2d at 180.

²² *McKinnon v. Northeast Illinois Regional Commuter Railroad Corp. d/b/a METRA*, 263 Ill. App. 3d 774, 635 N.E.2d 744 (1st Dist. 1994).

²³ 625 ILCS 5/18(c) – 7503(1)(a)(i)(ii).

²⁴ *Bucheleres v. Chicago Park District*, 171 Ill. 2d 435, 665 N.E.2d 826 (1996).

²⁵ *Bucheleres*, 171 Ill. 2d at 448; 665 N.E.2d at 832.

²⁶ *McKinnon v. Northeast Illinois Regional Commuter Railroad Corp. d/b/a METRA*, 263 Ill. App. 3d 774, 635 N.E.2d 744 (1st Dist. 1994).

²⁷ *Jakubowski v. Alden-Bennett Construction Co.*, 327 Ill. App. 3d at 636; 763 N.E. 2d at 797.

²⁸ *Jakubowski*, 327 Ill. App. 3d at 633-634; 763 N.E. 2d at 795.

²⁹ *McKinnon*, 263 Ill. App. 3d at 778; 635 N.E.2d at 748.

³⁰ *Id.*

³¹ 625 ILCS 5/18(c) – 7503(1)(a)(i)(ii).

³² *Nelson*, 2006 WL 587791, at *5.

³³ 745 ILCS 10/3-102(a).

³⁴ *Nelson*, 2006 WL 587791, at *5-6.

³⁵ *Nelson*, 2006 WL 587791, at *6.

³⁶ *Id.*

³⁷ *Washington v. City of Chicago*, 188 Ill. 2d 235, 720 N.E.2d 1030 (1999) (§3-102(a) imposes no new duties upon a local public entity, but merely is a statutory incorporation of the common law duty that a municipality owes to maintain its property in a reasonably safe condition).

³⁸ *Sollami v. Eaton*, 201 Ill. 2d 1, 772 N.E.2d 215 (2002) (duty of reasonable care owed by homeowner includes state of premises and acts done on premises — the open and obvious danger rule trumps any duty as to the activity of rocket-jumping on a trampoline).

³⁹ *Boub v. Township of Wayne*, 183 Ill. 2d 520, 702 N.E.2d 535 (1998) (bicyclist on township road and bridge not an "intended user," as required in §3-102(a) of Tort Immunity Act, and, therefore, township immune from liability pursuant to §3-102(a) of Tort Immunity Act when bike wheel caught in gap between wooden slats on township bridge causing bike to flip over and cyclist to sustain serious injuries).

⁴⁰ *Wagner v. City of Chicago*, 166 Ill. 2d 144, 651 N.E.2d 1120 (1995) (§3-102(a)'s duty of a local public entity to maintain its property in a reasonably safe condition is a statutory codification of the common law rule requiring that a municipality maintain its property in a reasonably safe condition).

⁴¹ *Id.*

⁴² *Wagner*, 166 Ill. 2d at 151; 651 N.E.2d at 1123.

⁴³ *Washington v. City of Chicago*, 188 Ill. 2d 235, 720 N.E.2d 1030 (1999).

⁴⁴ *Washington*, 188 Ill. 2d at 240; 720 N.E.2d at 1034.

⁴⁵ *Sollami v. Eaton*, 201 Ill. 2d at 15; 772 N.E.2d at 223.

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