



Ready for the Defense

The Distinction Between the “Frequent Trespasser” and the “Infrequent Trespasser” — What Duty Is Owed To Each

THIS MONTH’S COLUMN discusses the distinction between the “frequent trespasser” and the “infrequent trespasser” coming onto a landowner’s or local public entity’s property and sustaining injuries thereon and the legal duty owed to each. A landowner or public entity owes a duty of reasonable care to a “frequent trespasser” under the rule of *Nelson v. Northeast Illinois Regional Commuter Railroad Corp. (Metra)*, 364 Ill.App.3d 181, 845 N.E.2d 884 (1st Dist. 2006) (Railroad owed minor trespassing and walking on Metra tracks and struck by train a duty of reasonable care because she was a “frequent trespasser” — a “beaten path” trespasser — and the defense that the open and obvious danger of being hit by a train while walking on the tracks was not applicable).

But, a landowner or public entity does not owe the duty of reasonable care owed to the “frequent trespasser” under the rule of *Vega v. Northeast Illinois Regional Commuter Railroad Corporation (Metra)*, 371 Ill.App.3d 572, 863 N.E.2d 733 (1st Dist. 2007) (Railroad owed no “frequent trespasser duty of reasonable care” to a minor running in front of a train because there was no “beaten path” and no evidence of frequent trespassers and the railroad’s knowledge of trespassers at the accident location).

The decision in *Nelson v. Northeast Illinois Regional Commuter Railroad Corp. (Metra)*, 364 Ill.App.3d 181, 845 N.E.2d 884 (1st Dist. 2006), and the “frequent trespasser” theory of liability was discussed in our column of May 2006.

The Trespassing On Railroad Property Act

State statute prohibits trespassing on railroad property and right-of-way and imposes fines for its violation.

The Trespassing on Railroad Property Act states:

5/18(c) – 7503. Trespassing on Railroad Property.

- (1) Trespassing on railroad property prohibited.
- (a) General prohibition. Except as otherwise provided in paragraph (b) of this subsection, no person may:
 - (i) Walk, ride, drive or be upon or along the right of way or rail yard of a rail carrier within the State, at any place other than a public crossing;
 - (ii) Enter or be upon any railroad property; (625 ILCS 5/18(c) – 7503(l)(a)(i)(ii)).

The Vega Case Facts

On 7/26/00, Bryanna Vega, age 8, was struck by a Metra train as she ran across the railroad tracks in front of the train. She was following her two uncles, David Warren, age 13, and Malcolm Warren, age 10. She was following them to Ridge Park. There was a pedestrian crossing about one block away, but the three children crossed the tracks (two tracks — one for eastbound and one for westbound tracks) in front of the oncoming train, which was whistling and slowing when the two boys crossed.

Plaintiff contended that Metra owed Bryanna a duty of reasonable care under the “frequent trespasser theory.” The trial court granted summary judgment for Metra and the Appellate Court affirmed, finding that the 3-pronged test used to determine when the frequent trespasser rule is met and a duty of reasonable care owed was not proven.

The test used to determine when a duty is owed by a landowner to a “frequent trespasser” is this:

- (1) The existence of a so-called “beaten path” or “well-worn path” showing that trespassers were in the habit of using the path to cross the tracks.
- (2) The “constant trespassing” of persons in the habit of using the path to cross the tracks.
- (3) Evidence that the landowner knew about the path and the custom of persons to habitually use it to cross the tracks and tolerated the continued trespassing using the path.

The Appellate Court in *Vega v. Northeast Illinois Regional Commuter Railroad Corporation (Metra)*, 371 Ill.App.3d 572, 863 N.E.2d 733 (1st Dist. 2007), held that Bryanna Vega was not within the “frequent trespasser” rule — the 3-pronged test was not proven:

Here we must conclude that Metra did not owe a duty of care to Bryanna under

the frequent trespass doctrine. The cases we have reviewed show that the key facts to be alleged by plaintiffs wishing to invoke the frequent trespass doctrine in a case arising from a railroad accident include the existence of a 'beaten' or 'well-worn' path, evidence of a constant intrusion on the railroad's property by pedestrians who had a custom of crossing the right-of-way or tracks and evidence that the railroad knew of and tolerated the circumstance. We know from *Rodriguez* that the doctrine does not impose a duty where the plaintiff alleged only that adults and children 'sometimes' used a steep and weedy path to reach the railroad tracks. *Rodriguez*, 228 Ill.App.3d at 1027, 170 Ill.Dec. 708, 593 N.E.2d 597.

The evidence here showed no beaten or well-worn path. No one testified that there were constant intrusions on the right of way or that people had a custom of crossing the tracks to reach the park. The testimony of the Metra and park district witnesses that they were unaware of pedestrian crossings was uncontroverted by plaintiffs. The scant evidence relied on by plaintiffs showed only that the Warren boys 'sometimes' took a shortcut that led them across the tracks to the park. Even when viewed in the light most favorable to plaintiffs, the evidence does not support the conclusion that Metra owed Bryanna a duty under the frequent trespass exception. (863 N.E.2d at 741).

Has The Time Come For Reconsideration Or Modification Of The "Frequent Trespasser" Rule?

While the courts make a distinction between the "frequent trespasser" and the "infrequent trespasser," it would seem to be contrary to the public's interest to have a law which prohibits trespassing on railroad property (the Transportation Law prohibiting Trespassing on Railroad Property Act (625 ILCS 5/18(c) - 7503(1)(a)(i)(ii) — "no person may walk, ride, drive or be upon or along the right of way or rail yard of a rail carrier within the State, at a place other than a public crossing") and allow recovery for injuries for a person violating that law.

One of our readers called after the May 2006 column on the *Nelson v. Northeast Illinois Regional Commuter Railroad Corp. (Metra)*, 364 Ill.App.3d 181, 845 N.E.2d 884 (1st Dist. 2006), case and suggested

that it seemed like "the tail wagging the dog" to allow trespassers to form "beaten paths" compelling Metra trains to slow or stop for pedestrians choosing to cross tracks at beaten paths rather than at marked public pedestrian crossings. He suggested that weighing practical considerations, trains cannot stop quickly or swerve off of the tracks to avoid trespassers, but trespassers (though violating state statute) could readily "stop, look and listen" even before trespassing across the tracks. Perhaps those comments make a sound observation.

Do Railroad Tracks & Trains On Them Present An Open & Obvious Danger Of Which There Is No Duty To Warn?

The Illinois courts hold that a landowner or public entity has no duty to warn persons (even children allowed in public without parental supervision) coming onto property of open and obvious dangers or perils such as fire, bodies of water and falling from heights:

- (1) *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

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because such was an open and obvious danger imposing no duty to guard against).

- (2) *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).
- (3) *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).
- (4) *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 there is no duty to warn of the danger of being burned by a fire or drowning in water or falling from a building or tree, does it seem equally logical and sensible to have a rule that there is no duty to warn of the danger of being hit by a train when walking upon or crossing railroad tracks?

In an age where exercise and walking are encouraged and beneficial to health, it would seem doubly beneficial to require all persons to cross railroad tracks at public crossings: (1) a safety benefit to avoid being hit by a train; and (2) a health benefit to walk to public crossings instead of taking a short cut and avoid a little extra walking.



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