

No. 20118: - Paul Huffman v. Appalachian Power Company, a Virginia Corporation Qualified to do Business in West Virginia, et al., Appalachian Power Company, a Virginia Corporation Qualified to do Business in West Virginia

Workman, Justice, dissenting in part, and concurring in part:

I concur with the majority in the law it has enunciated with respect to the standard for establishing the liability of a property owner to a trespasser.

However, as the majority points out, we have not previously had occasion to consider this particular question, so it is new law. Throughout the proceedings in this matter, APCO has contended that because defendant was a trespasser, the only duty it owed to him was to refrain from willfully and wantonly injuring him. The defendant's contention throughout has been that because APCO controls a dangerous instrumentality, it owed him a high degree of care. Since the law in the majority opinion is new law, neither party attempted to comport with it in developing a record below.

Consequently, it seems immensely unfair for the majority to proceed to determine that the defendant failed to present sufficient evidence to establish a prima facie case of liability under this standard, when neither the plaintiff (nor any other mortal) had the foggiest notion at the time of the trial that this standard would become the law of this state.

For example, the majority concludes that there was not sufficient evidence presented by

the plaintiff of constant intrusions in the area of the tower. Perhaps such evidence was available, but how would the plaintiff have known prior to the filing of the majority opinion that it would be needed to make a prima facie case? At trial, the defendant did present evidence of injuries that had occurred when persons climbed other such towers. However, to meet requirement (1) of the majority's standard, it isn't necessary to show that injuries have resulted from such intrusions.<sup>1</sup> In view of the fact that the tower in question is situate in a public recreational park, such evidence of intrusions is probably available--had the plaintiff known he was under any obligation to present it.

The majority should have remanded this case so that the plaintiff could have a fair opportunity to make a prima facie case now that the law has been enunciated on what is required. Perhaps the plaintiff would fail if given that opportunity; perhaps not. As a bottom line proposition, however, it's grossly unfair to develop a new standard of law and then tell a litigant he failed to comply with it before he knew about it. Otherwise, litigants will need their crystal balls when they go to court.

Based upon the foregoing reasons, I concur in part and dissent in part from the majority's opinion.

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<sup>1</sup>*Some evidence such as would go toward satisfying requirement (1) might not have been admissible at trial.*