

TORT LIABILITY OF OCCUPIERS OF LAND: DUTIES OWED  
TO LICENSEES AND INVITEES\*

FLEMING JAMES, JR.†

BEFORE the *Torts Restatement*,<sup>1</sup> a licensee was usually thought of as a man who, for his own purposes only, had the occupier's bare permission to enter land. He was often called a "bare," "naked," or "mere" licensee, and stood between the trespasser on one hand and the invitee on the other.<sup>2</sup> As a mere matter of language, however, the term "licensee" may be used appropriately to describe all those who enter land with the express or implied-in-fact consent of the occupier. This would include those entering to serve the occupier's interest alone, to serve an interest mutual to both occupier and entrant, or to serve the entrant's purposes only. It would include all those who had an invitation of one sort or another, as well as those who had nothing more than permission. The *Restatement* chose this broad use of the term "licensee."<sup>3</sup> By doing so, it did not mean, however, to reject the familiar division between "licensee" and "invitee"; rather it substituted the terms "gratuitous licensee" and "business visitor," on the ground that these terms contained a more accurate reference to the proper basis for subdividing its broad licensee category.<sup>4</sup> We shall use the older terminology, partly because it is still more familiar in the profession and partly because we disagree with the substantive grounds that impelled the use of the newer terms.

The distinction between licensee and trespasser is commonly said to turn on the presence or absence of permission to enter.<sup>5</sup> But while permission or consent may still be vital in areas of the law more directly and appropriately

---

\*For Professor James' recent analysis of the occupier's duty to trespassers, see 63 YALE L.J. 144 (1953).

†Lafayette S. Foster Professor of Law, Yale Law School. The author gratefully acknowledges the assistance rendered by Mr. Daniel M. Singer, Class of 1954, Yale Law School.

1. RESTATEMENT, TORTS §§ 330-2 (1934).

2. See, e.g., PROSSER, *Business Visitors and Invitees*, 26 MINN. L. REV. 573 (1942); POLLOCK, TORTS 406 *et seq.* (14th ed. 1939); SALMOND, TORTS § 129 (10th ed. 1945); 1 THOMPSON, NEGLIGENCE c. 35 (1901); 65 C.J.S., NEGLIGENCE 431, 503 (1950).

This usage carried no suggestion, of course, that invitees lacked permission to enter.

3. See note 1 *supra*; RESTATEMENT, TORTS, EXPLANATORY NOTES § 202, comments (Tent. Draft No. 4, 1929); PROSSER, *supra* note 2, at 574.

4. See PROSSER, TORTS 637-40 (1941).

5. See authorities cited note 2 *supra*.

concerned with protecting the occupier's exclusive possession, it is losing its hold as the significant touchstone of his liability for personal injury.<sup>6</sup> And, since likelihood of presence, with its consequent probability of harm, is becoming increasingly recognized as the proper basis of liability, it is not surprising to find that the duties to licensees correspond pretty closely to the duties to known or constant trespassers under the more liberal cases.<sup>7</sup> Some differences, however, still persist.

### *Condition of Premises:*

As in the case of trespassers, the occupier's duties to licensees are most curtailed where a mere condition of the premises is the source of harm. "An owner of land," it has been said, "ordinarily owes no duty to a licensee, any more than he does to a trespasser, to keep his premises in a safe condition, because the licensee or trespasser must take the premises as he finds them and assumes the risk of any dangers arising out of their condition."<sup>8</sup> Thus the occupier need not inspect the premises to discover defects or other dangerous conditions.<sup>9</sup> If, however, he learns of such a condition and should realize that it is unreasonably dangerous to a licensee, and if the occupier "cannot reasonably assume that the licensee knows [of the condition], or by a reasonable use of his faculties would observe" it, then the occupier is under the duty to use due care to avoid the injury, either by removing the danger or by giving reasonable warning of its presence.<sup>10</sup> He would not, of course, be negligent if he failed to take such precautions where it could not reasonably be anticipated that the licensee would encounter the danger;<sup>11</sup> nor if he might reasonably assume that the licensee, knowing he has no right to expect

6. See James, *Tort Liability of Occupiers of Land: Duties Owed to Trespassers*, 63 YALE L.J. 144, 180-2 (1953) (hereinafter cited as *Tort Liability of Occupiers I*).

7. *Ibid.* See also RESTATEMENT, TORTS §§ 334, 335 (1934) (indicating liberal attitude toward known or constant trespassers).

8. *Hayes v. New Britain Gas Light Co.*, 121 Conn. 356, 357-8, 185 Atl. 170, 171 (1936). See also *Laube v. Stevenson*, 137 Conn. 469, 474, 78 A.2d 693, 696 (1951); *Deacy v. McDonnell*, 131 Conn. 101, 103, 38 A.2d 181, 183 (1944).

9. This certainly is the general form of statement and the general rule. RESTATEMENT, TORTS § 342, comment *c* (1934). In connection with trespassers, however, if the potential danger from defendant's appliances is very great, there seems to be a tendency to require inspection. See James, *Tort Liability of Occupiers I*, 63 YALE L.J. 144, 157 n.75, 172 (1953). Surely no less a duty would be owed to licensees.

Since the exemption—as matter of law in all cases—from any obligation to inspect is no part of the general law of negligence, but rather is a part of the immunity (from that law) accorded to land ownership, it is likely to yield increasingly in extreme cases.

10. *Laube v. Stevenson*, 137 Conn. 469, 474, 78 A.2d 693, 696 (1951). See also cases cited notes 15, 19, 25, 26, 27 *infra*; Note, 25 A.L.R.2d 598, 602 (1952); RESTATEMENT, TORTS § 342 (1934).

11. See *Laube v. Stevenson*, 137 Conn. 469, 78 A.2d 693 (1951); *Indian Ref. Co. v. Mobley*, 134 Ky. 822, 121 S.W. 657 (1909); *Scheibel v. Lipton*, 156 Ohio St. 308, 102 N.E.2d 453 (1951); *Weaver v. Carnegie Steel Co.*, 223 Pa. 238, 72 Atl. 552 (1909).

premises to be prepared for his safety, would observe the danger;<sup>12</sup> nor in the absence of reasonable time or opportunity to take the precaution.<sup>13</sup>

In judging these matters, all the circumstances must be considered. Thus the frequency with which a licensee may be expected to avail himself of the license;<sup>14</sup> whether he may be expected to be in a certain place or follow a recognized path<sup>15</sup> rather than roam at large,<sup>16</sup> and if so, the proximity of that place or path to the danger; whether the nature of the premises would lead the licensee to expect more or less lurking danger;<sup>17</sup> and many other factors<sup>18</sup> would bear on the question of what, if any, precautions reasonable care would require. As a general rule, more precautions are apt to be required where premises have been arranged for the entry of more or less unidentified segments of the public,<sup>19</sup> or where a permissive well-defined way or path is involved,<sup>20</sup> than where the danger exists in ordinary private premises<sup>21</sup> like homes and farms, or in those parts of business and industrial premises that are not arranged or generally intended for the reception of outsiders.<sup>22</sup>

Even where the occupier knows of a danger, he owes the licensee no duty of precaution if the danger is perfectly obvious. This rule has sometimes

12. See *Sanders v. Brown*, 73 Ariz. 116, 238 P.2d 941 (1951); *Gudwin v. Gudwin*, 14 Conn. Supp. 147 (1946); *Weaver v. Carnegie Steel Co.*, *supra* note 11.

13. The occupier has no liability even to an invitee if he has no reasonable opportunity to take effective precautions to protect the invitee from the source of danger. See note 158 *infra*.

14. Cf. James, *Tort Liability of Occupiers I*, 63 YALE L.J. 144, 178 *et seq.* (1953).

15. See *Olderman v. Bridgeport-City Trust Co.*, 125 Conn. 177, 4 A.2d 646 (1939); *Morrison v. Carpenter*, 179 Mich. 207, 146 N.W. 106 (1914); cases collected in Notes, ANN. CAS. 1915D 326; 20 A.L.R. 202 (1922).

16. See, *e.g.*, *Douglas v. Bergland*, 216 Mich. 380, 185 N.W. 819 (1921). Cf. cases cited note 11 *supra*.

17. As would be true, for example, when people visit a manufacturing plant or a railroad yard for curiosity or for educational purposes. See, *e.g.*, *Myers v. Gulf Public Service Co.*, 15 La. App. 589, 132 So. 416 (1931) (with full treatment of authorities); *Benson v. Baltimore Traction Co.*, 77 Md. 535, 26 Atl. 973 (1893); *Gilliland v. Bondurant*, 59 S.W.2d 679 (Mo. 1933); *Weaver v. Carnegie Steel Co.*, 223 Pa. 238, 72 Atl. 552 (1909).

18. *E.g.*, the time of day or night when the visit would be likely. *Sherman v. Maine Cent. R.R.*, 110 Me. 228, 85 Atl. 755 (1913).

19. See *Ward v. Avery*, 113 Conn. 394, 155 Atl. 502 (1931) (shoe store); *Recreation Centre Corp. v. Zimmerman*, 172 Md. 309, 191 Atl. 233 (1937) (seats for spectators at bowling alley); cf. *Carlisle v. J. Weingarten, Inc.*, 137 Tex. 220, 152 S.W.2d 1073 (1941); see also Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573 (1942); Note, 17 TEXAS L. REV. 503 (1939).

20. See cases cited note 15 *supra*.

21. See, *e.g.*, *Sanders v. Brown*, 73 Ariz. 116, 238 P.2d 941 (1951); *Laube v. Stevenson*, 137 Conn. 469, 78 A.2d 693 (1951); *Lubenow v. Cook*, 137 Conn. 611, 79 A.2d 826 (1951); *Gudwin v. Gudwin*, 14 Conn. Supp. 147 (1946); *Curren v. O'Connor*, 279 App. Div. 1018, 111 N.Y.S.2d 714 (1952); *Scheibel v. Lipton*, 156 Ohio 303, 102 N.E.2d 453 (1951); cases collected in Note, 25 A.L.R.2d 598 (1952).

22. See, *e.g.*, cases cited note 17 *supra*; *Indian Ref. Co. v. Mobley*, 134 Ky. 822, 121 S.W. 657 (1909).

been put as a duty to warn the licensee of a known "trap," and some of the older cases considered a condition a trap only if it was highly dangerous and very much concealed. Holmes, for instance, once said that "[a]n open hole, which is not covered otherwise than by the darkness of night, is a danger which a licensee must avoid at his peril."<sup>23</sup> Something of this attitude still prevails in the trespasser cases.<sup>24</sup> In the case of licensees, however, most courts today extend the occupier's duty to any danger that the licensee cannot reasonably be expected to observe and avoid. Thus, for example, licensees have recovered for harm caused by an unexpected step down in the dark,<sup>25</sup> a pile of building material left on a private road,<sup>26</sup> and an unguarded excavation in or near a path.<sup>27</sup>

Another difference between the duties owed to trespassers and to licensees concerns natural conditions of premises. Here, the occupier probably owes no duty whatever to a trespasser.<sup>28</sup> But he must take reasonable precautions to prevent injury to a licensee if the natural conditions constitute a known, concealed trap.<sup>29</sup>

The licensee must show defendant's knowledge of the dangerous pitfall, whether it be natural condition or arrangement of premises. He may of course do so circumstantially, even over defendant's denial. Thus he may show that defendant took some precaution,<sup>30</sup> or that he made an inspection which would

23. *Reardon v. Thompson*, 149 Mass. 267, 268, 21 N.E. 369, 370 (1889). See *Sherman v. Maine Cent. R.R.*, 110 Me. 228, 229, 85 Atl. 755, 756 (1913); 38 AM. JUR., Negligence § 105 (1941). Cf. *Fox v. Warner-Quinlan Asphalt Co.*, 204 N.Y. 240, 97 N.E. 497 (1912). The New York Court of Appeals has recently restated the proposition that "towards mere trespassers or bare licensees the rule is well settled that the only duty owing to them by the owner or occupier of land is to abstain from inflicting intentional, wanton or wilful injuries unless he maintains some hidden engine of destruction, such as spring guns or kindred devices, upon his property." *Carbone v. Mackchil Realty Co.*, 296 N.Y. 154, 158-9, 71 N.E.2d 447, 448-9 (1947).

24. See James, *Tort Liability of Occupiers I*, 63 YALE L.J. 144, 156, 157 (1953).

25. *Deacy v. McDonnell*, 131 Conn. 101, 38 A.2d 181 (1944). Cf. *Olderman v. Bridgeport-City Trust Co.*, 125 Conn. 177, 4 A.2d 646 (1939) (hose reel left in path); James, *Assumption of Risk*, 61 YALE L.J. 141, 158 (1952).

26. *Corby v. Hill*, 4 C.B.N.S. \*556 (1858).

27. *Morrison v. Carpenter*, 179 Mich. 207, 146 N.W. 106 (1914); *John v. Reick-McJunkin Dairy Co.*, 281 Pa. 543, 127 Atl. 143 (1924). Cf. *Jones v. Southern Ry.*, 199 N.C. 1, 153 S.E. 637 (1930) (placing loose dirt and stones to fill holes made in roadbed at point where permissive path crossed it); cases collected in Note, 20 A.L.R. 202, 204 (1924). In *Corby v. Hill*, *supra* note 26, at \*567, Willes, J., said, "One who comes upon another's land by the owner's permission or invitation has a right to expect that the owner will not dig a pit thereon, or permit another to dig a pit thereon, so that persons lawfully coming there may receive injury."

28. See James, *Tort Liability of Occupiers I*, 63 YALE L.J. 144, 158 (1953).

29. RESTATEMENT, TORTS § 342, comments *d, f* (1934). See *Smith v. Windsor R. & C. Co.*, 78 Colo. 169, 240 Pac. 332 (1925), 82 Colo. 497, 261 Pac. 872 (1927), 88 Colo. 422, 298 Pac. 646 (1931), 92 Colo. 464, 21 P.2d 1116 (1933); cf. *Kittle v. State*, 245 App. Div. 401, 284 N.Y. Supp. 657 (1935), *aff'd*, 272 N.Y. 420, 3 N.E.2d 850 (1936).

30. Cf. *Jones v. Parry*, 2 Esp. 483 (N.P. 1796) ("Defendant shewed a knowledge that the animal was fierce . . . by the precaution he used to tie him up."); 2 WIGMORE, EVIDENCE § 282 (3d ed. 1940).

have been likely to disclose the dangerous condition to him.<sup>31</sup> If he shows that defendant created the dangerous condition, that will suffice.<sup>32</sup> While plaintiff must show defendant's actual knowledge of the condition, defendant will be held to appreciate its danger if a reasonable man would do so.<sup>33</sup>

An interesting question is posed if defendant created a condition which was not dangerous at the time but which would foreseeably become dangerous. Any structure will deteriorate in time unless maintained, and it seems clear that more than this must be shown to charge the occupier with knowledge. Yet, if the deterioration becomes more imminent in time and more inevitable in fact, a point will be reached when actual knowledge of the danger at one time may be inferred from knowledge of the condition of potential danger at an earlier time.<sup>34</sup> A man who digs a hole by day is held to know that the darkness of night will conceal it. This approach to the problem of proof is often overlooked.

A licensee's recovery is also facilitated if it can be shown that the dangerous condition of the premises involved a change made in conditions after the license had been given.<sup>35</sup> In the first place the making of such change will usually show knowledge by the occupier of the danger.<sup>36</sup> Secondly, since

31. Wigmore lists four kinds of "circumstances (events or things) which may point forward to the probability" that a defendant had knowledge of a condition: (1) the direct exposure of the fact to his senses; (2) the express making of a communication to him of the condition; (3) the reputation in the community on the subject; (4) the intrinsic quality of the condition (as likely to lead to its perception). 2 WIGMORE, EVIDENCE §§ 245, 252 (3d ed. 1940).

32. See *Ward v. Avery*, 113 Conn. 394, 155 Atl. 502 (1931); *Olderman v. Bridgeport-City Trust Co.*, 125 Conn. 177, 4 A.2d 646 (1939).

33. The *Restatement* suggests that defendant must have not only actual knowledge of the condition, but actual realization also of the danger it involves. RESTATEMENT, TORTS § 342(a) (1934). There seems to be no reason for according this special tenderness to the landowner, if the condition is one whose dangers the ordinary person should realize. In the *Avery* case, *supra* note 32, the condition was a slippery waxed floor and the court said defendant "must be presumed to have known" the danger from this.

34. See *McCabe v. Cohen*, 294 N.Y. 522, 63 N.E.2d 88 (1945) (vendor of real estate held liable on basis of knowledge that fire escapes were "at a point where further corrosion would make them dangerous"). The similarity between the theories of recovery in that case and in the situation under discussion may be seen by comparing RESTATEMENT, TORTS § 342 (1934), *with id.* § 353.

Compare the *McCabe* case, *supra*, with *Garner v. Pacific Coast C. Co.*, 3 Wash.2d 143, 100 P.2d 32 (1940) (defendant's knowledge of the possibility of subterranean fires in a coal dump was held not to satisfy the requirement that it know of a concealed peril to a licensee).

35. *Corby v. Hill*, 4 C.B.N.S. \*556 (1858); *Atlantic Greyhound Corp. v. Newton*, 131 F.2d 845 (4th Cir. 1942); *Olderman v. Bridgeport-City Trust Co.*, 125 Conn. 177, 4 A.2d 646 (1939); *Morrison v. Carpenter*, 179 Mich. 207, 146 N.W. 106 (1914); *Jones v. Southern Ry.*, 199 N.C. 1, 153 S.E. 637 (1930); *John v. Reick-McJunkin Dairy Co.*, 231 Pa. 543, 127 Atl. 143 (1924); Note, 20 A.L.R. 202 (1922). Cf. *James, Tort Liability of Occupiers I*, 63 YALE L.J. 144, 176 (1953) (change of condition of premises after trespasser's presence becomes known or anticipated).

36. See cases cited note 32 *supra*.

people tend to rely on the continuation of a condition once known, the fact of change will often make the condition more dangerous and less likely to be observed by a licensee. For the same reason the change will reduce the likelihood of contributory negligence.<sup>37</sup> Moreover, it will also make it easier for courts to find an active intervention, rather than a mere failure to act.

*Active Intervention:*

There are a good many dicta<sup>38</sup>—mostly in older cases—and some holdings<sup>39</sup> to the effect that the occupier of land owes the bare licensee no greater duty than to refrain from intentional, or wilful or wanton, misconduct towards him. "The prevailing view is to the contrary, however, and it is now generally held that in cases involving injury resulting from *active conduct*, as distinguished from conditions of the premises, the landowner or possessor may be liable for failure to exercise ordinary care towards a licensee whose presence on the land is known or should reasonably be known to the owner or possessor."<sup>40</sup>

The statement just quoted suggests that no duty of care might be owed to a licensee whose presence is not known nor reasonably to be known. But, in speaking of licensees, Bohlen has said: "All are to be expected; no act may be done which threatens any of them."<sup>41</sup> And surely it may be foreseen in a general way that permission given will be availed of. Probably the best way to look at the matter is to say, with Bohlen, that the occupier, in his active conduct, owes the duty of care to all licensees, but to recognize that such duty may not require the taking of precautions as to activity which involves no unreasonable likelihood of harm. So if, as a matter of fact, the presence of a licensee is not to be foreseen at any given time or place, the carrying on of activities there without precautions, *e.g.*, lookout or warning, cannot be

37. See *John v. Reick-McJunkin Dairy Co.*, 281 Pa. 543, 127 Atl. 143 (1943); *cf.* remarks of Willes, J., in *Corby v. Hill*, quoted *supra* note 27.

The interrelationship of negligence and contributory negligence in these situations is provocatively treated in Malone, *Contributory Negligence and the Landowner Cases*, 29 MINN. L. REV. 61 (1945).

38. See, *e.g.*, California cases cited in *Oettinger v. Stewart*, 24 Cal.2d 133, 137, 148 P.2d 19, 21 (1944); *Carbone v. Mackchil Realty Co.*, 296 N.Y. 154, 158-9, 71 N.E.2d 447, 448-9 (1947); *Hannan v. Ehrlich*, 102 Ohio St. 176, 186, 131 N.E. 504, 507 (1921). See 45 C.J., Negligence § 201 (1928); 20 R.C.L., Negligence § 53 (1918); Note, 156 A.L.R. 1226 n.1 (1945) (discussion of New York cases containing this proposition).

39. *O'Brien v. Union Freight R.R.*, 209 Mass. 449, 95 N.E. 861 (1911); *Pooles v. Boston & M.R.R.*, 328 Mass. 165, 102 N.E.2d 433 (1951); *Sohn v. Katz*, 112 N.J.L. 106, 169 Atl. 838 (1934); Note, 28 B.U.L. Rev. 360 (1948). *Cf.* *McNamara v. Hall*, 38 Wash.2d 864, 233 P.2d 852 (1951); *King v. Patrylow*, 15 N.J. Super. 429, 83 A.2d 639 (1951); *Boyd v. International S. & R. Co.*, 22 N.J. Super. 1, 91 A.2d 508 (1952).

40. *Oettinger v. Stewart*, 24 Cal.2d 133, 138, 148 P.2d 19, 22 (1944) (emphasis added), citing RESTATEMENT, TORTS § 341 (1934); PROSSER, TORTS 630 (1941); 45 C.J., Negligence 803-05 (1928). See also Notes, 49 A.L.R. 778 (1927); 156 *id.* 1226 (1945); cases cited note 35 *supra*.

41. BOHLEN, STUDIES IN THE LAW OF TORTS 61 (1926).

said to be negligent as to him. There is the duty, but no breach of it in fact. At any rate, there is well-nigh universal agreement that the duty of care is owed to licensees whose presence is to be expected.<sup>42</sup> And, of course, the duty of care to the licensee whose presence is actually known is clear.<sup>43</sup>

### THE SOCIAL GUEST

Before examining more broadly the distinctions made between licensee and invitee, the case of the social guest deserves separate treatment, if only for the semantic difficulty it has caused. Here is an invitee who is not an invitee.<sup>44</sup>

If plaintiff is a social guest in defendant's home, the great weight of Anglo-American authority classifies him as a bare licensee, even though he was expressly invited.<sup>45</sup> This classification is often invoked to deny the host's liability for harm caused by a concealed danger that he did not know of, but which would have been discoverable by inspection. Thus, in a recent New Jersey case, a guest was injured by the collapse of a bench she was sitting on. She showed that this was one of several pieces of outdoor furniture which defendant had had made several years before and had left to weather without paint or creosote so that they rotted. Plaintiff claimed that the rotten bench was a trap. The court thought it might be, but denied recovery because there was no showing that defendant knew of the condition, and no duty to the guest to acquire such knowledge.<sup>46</sup>

Such a limitation of duty probably conforms to people's reasonable expectations in the ordinary host-guest situation. If the host is the kind of person who does not inspect and maintain his property on his own account, the guest scarcely expects an exception to be made on the occasion of his visit. In this country, moreover, where most social contact is among people who are on a similar economic footing, the host is usually in no better position

---

42. See sources cited in James, *Tort Liability of Occupiers I*, 63 YALE L.J. 144, 178, 179, 181 (1953); notes 35, 40 *supra*. But cf. cases cited note 39 *supra*.

43. Once a person's presence becomes known, the significance of the classifications largely disappears, and he is owed the duty of reasonable care (as to activities) whatever his status on the land. Peaslee, *Duty to Secure Trespassers*, 27 HARV. L. REV. 403 (1914); RESTATEMENT, TORTS § 341, comment c (1934). This does not mean, however, that the plaintiff's status may have no bearing on what conduct defendant may reasonably expect of him. *Id.*, comment d.

44. See Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573, 578, 603-05 (1942).

45. *E.g.*, *Southcote v. Stanley*, 1 H. & N. 247 (Ex. 1856); *Sanders v. Brown*, 73 Ariz. 116, 238 P.2d 941 (1951); *Laube v. Stevenson*, 137 Conn. 469, 78 A.2d 693 (1951); *Comeau v. Comeau*, 285 Mass. 578, 189 N.E. 588 (1934); *Vogel v. Eckert*, 22 N.J. Super. 220, 91 A.2d 633 (1952); *Curren v. O'Connor*, 279 App. Div. 1018, 111 N.Y.S.2d 714 (1952); cases collected in Note, 25 A.L.R.2d 598 (1952).

46. *Vogel v. Eckert*, *supra* note 45, at 223, 91 A.2d at 634. Cf. *McNamara v. Hall*, 38 Wash.2d 864, 233 P.2d 852 (1951).

than the guest to absorb or distribute the loss. Perhaps for these reasons, suits were rare in these circumstances until a few years ago. Their increased frequency recently may reflect the spread of insurance to cover liability in this situation.<sup>47</sup> If such insurance becomes more prevalent, it may in time affect the matter of duty. In the meantime the pressure to change at this point is not likely to be very great. It is true that a recent Ohio case has broken from tradition and refused to classify the social guest as a mere licensee.<sup>48</sup> The opinion shows insight into the arbitrary and rigid character of the present classifications, and would sensibly treat social guests as a class by themselves, not to be assimilated to either "licensees" or "invitees." When it comes to define the duties owed to this new class, however, the court describes precisely those which most states prescribe in favor of a licensee.

#### INVITEES

The occupier is commonly said to owe greater duties to his invitees than to licensees, notably with respect to inspection and discovery of latent dangers on his land.<sup>49</sup> Before analyzing the difference in duties, we shall take up the question of what constitutes an invitee. There are two tests currently in vogue, and considerable controversy surrounds the matter.<sup>50</sup> For convenience we shall call one the "economic benefit" test and the other the "invitation" test. In a great number of situations, these two tests will yield the same result, but they do not overlap each other completely. The adoption of either test alone will exclude from the class of invitees some entrants who would qualify as invitees under the other test. The actual course of decisions has been towards broadening the class of invitees.<sup>51</sup> It is submitted that under the prevailing rule today, plaintiff may, and should be, classified as an invitee if either the economic benefit or the invitation theory is satisfied.

The economic benefit theory proceeds on the assumption that affirmative obligations are imposed on people only in return for some consideration or benefit. Any obligation to discover latent dangerous conditions of the premises is regarded as an affirmative one, and the consideration for imposing it is sought in the economic advantage—actual or potential—of the plaintiff's visit to the occupier's own interest.

"It is not the fact of invitation, nor of the knowledge of the probability of the customer's presence which this implies which raises

47. Compare the great number of recent cases, many of them involving suits between members of the same family, in Note, 25 A.L.R.2d 598 (1952), with the "dearth of authority" in Notes, 12 A.L.R. 987 (1921); 92 *id.* 1005 (1934).

48. Scheibel v. Lipton, 156 Ohio St. 308, 102 N.E.2d 453 (1951).

49. See James, *Tort Liability of Occupiers I*, 63 YALE L.J. 144, 145-6 (1953); also see page 621 *et seq. infra*. Compare RESTATEMENT, TORTS § 342, comment c (1934) (gratuitous licensee), with *id.* § 343(a), comment a (business visitor).

50. See PROSSER, TORTS 637-40 (1941); James, *supra* note 49, at 145.

51. *E.g.*, see cases cited notes 74-8, 80, 81, 187 *infra*.

the duty, but the purpose of the visit and the occupier's interest therein."<sup>52</sup>

This view has had the support of a good many writers<sup>53</sup> and much judicial opinion.<sup>54</sup> It is strongly reflected in the *Restatement*.<sup>55</sup> Indeed it may be said that most, if not all, courts are willing to regard a visitor as an invitee on the basis of the economic benefit conferred upon the occupier by the visit.<sup>56</sup> The test is often useful to plaintiffs injured on ordinary private property (*e.g.*, farms/or homes) or on parts of business premises not arranged for the reception of outsiders.<sup>57</sup> The controversy lies in the claim to exclusive validity made for the economic benefit test by some of its proponents.<sup>58</sup>

The invitation test does not deny that "invitation" may be based on economic benefit, but it does not regard that as essential. Rather it bases "invitation" on the fact that the occupier by his arrangement of the premises or other conduct has led the entrant to believe "that [the premises] were intended to be used by visitors"<sup>59</sup> for the purpose which this entrant was pursuing, "and that such use was not only acquiesced in by the owner [or possessor], but that it was in accordance with the intention and design with which the way or place was adapted and prepared. . . ."<sup>60</sup> Even an express

52. BOHLEN, *STUDIES IN THE LAW OF TORTS* 54 (1926). This thought is carefully developed in Bohlen, *The Basis of Affirmative Obligations in the Law of Tort*, 53 U. of P.A. L. REV. 209, 237, 337 (1905), reprinted in BOHLEN, *op. cit. supra*, at 33. Bohlen bases his argument in part on the cases of (1) the social guest and (2) the young child, accompanying a business visitor, who was held to be a mere licensee in *Burchell v. Hicliason*, 50 L.J.C.P. 101 (1880). The great weight of current American authority, however, would disagree with the *Burchell* case. See note 74 *infra* and accompanying text; RESTATEMENT, TORTS § 332, comment *d* (1934).

53. BOHLEN, *op. cit. supra* note 52, at 33 *et seq.*; CAMPBELL, NEGLIGENCE 29-30 (1871); CHARLESWORTH, THE LAW OF NEGLIGENCE 181 *et seq.* (2d ed. 1947); HARPER, LAW OF TORTS § 98 (1933); SALMOND, LAW OF TORTS § 162 (11th ed. 1953).

54. The case law development is traced in Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573, 576-85 (1942).

55. RESTATEMENT, TORTS § 332 (1934): "A business visitor is a person who is invited or permitted to enter or remain on land in the possession of another for a purpose directly or indirectly connected with business dealings between them." See also *id.* § 343, comments *a*, *b*; RESTATEMENT, TORTS, EXPLANATORY NOTES § 202, comments *a*, *g* (Tent. Draft No. 4, 1929).

56. See text at notes 67, 68 *infra*.

57. See cases cited notes 68, 69, 115 *infra*.

58. See authorities cited note 53 *supra*.

59. *Sweeny v. Old Colony & Newport R.R.*, 92 Mass. 368, 373, 87 Am. Dec. 644, 648 (1865). See also *Guilford v. Yale University*, 128 Conn. 449, 452-4, 23 A.2d 917, 918-19 (1942).

60. *Sweeny v. Old Colony & Newport R.R.*, 92 Mass. 368, 373-4, 87 Am. Dec. 644, 648 (1865). In *Bennett v. Louisville & N.R.R.*, 102 U.S. 577, 580 (1881), the Court, quoting COOLEY, TORTS 605 (1880), stated: "[W]hen one expressly or by implication invites others to come upon his premises, whether for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end

invitation might not raise such expectations, however. This test is not, for instance, invoked in favor of social guests in the ordinary private home.<sup>61</sup> It has been applied particularly when premises were prepared for the public or a segment of it.<sup>62</sup>

The invitation test became somewhat discredited among legal writers during the first part of the present century<sup>63</sup> and, no doubt because of the influence and prestige of Bohlen (who acted as reporter), the American Law Institute rejected it in the *Restatement*.<sup>64</sup> Courts, however, have remained more hospitable than commentators to the test,<sup>65</sup> and it now seems to be coming back into its own in all circles of legal thought.<sup>66</sup> This is as it should be, for the test has merit and deserves acceptance because it accounts more satisfactorily than the economic benefit test for many of the actual decisions holding the plaintiff to be an invitee.

Many situations, to be sure, may be adequately explained on either basis. Thus the customer in the store, service station or bank, the guest in the hotel

he must exercise ordinary care and prudence to render the premises reasonably safe for the visit." See also *Flint River Cotton Mills v. Colley*, 71 Ga. App. 288, 291, 30 S.E.2d 426, 428 (1944): "Mutuality of interest does not mean that there must be a commercial business transaction between the parties, but merely that each party is moved by a lawful purpose or interest in the object and subject-matter of the invitation. The enterprise must be mutual to the extent that each party is lawfully interested therein, or that there is a common interest or mutual advantage involved." (Emphasis added.)

61. See text at page 611 *supra*. Prosser, *supra* note 54, at 585, comments: "'Invitation' is today a much discredited word, if only because a private social guest is invited, and yet is not in the legal sense an 'invitee.'"

62. See, *e.g.*, cases cited notes 65, 67, 74-8, 80-1 *infra*.

63. See sources cited notes 52-5 *supra*; Prosser, *supra* note 54, at 574 (1942).

64. See note 55 *supra*.

By straining the notion of economic benefit to absurd lengths, however, the *Restatement* would make the class of invitees liberally broad. See *RESTATEMENT, TORTS* § 332, comments *b, c, d* (1934), which find economic benefit under the circumstances described in the text at notes 74-8 *infra*. See *Renfro Drug Co. v. Lewis*, 149 Tex. 507, 235 S.W.2d 609 (1950) (person using store for shortcut an invitee on authority of *Restatement*).

65. See, *e.g.*, *St. Louis, I.M. & S. Ry. v. Dooley*, 77 Ark. 561, 92 S.W. 789 (1906); *Baltimore & Ohio Southwestern R.R. v. Slaughter*, 167 Ind. 330, 79 N.E. 186 (1906); *Davis v. Congregational Society of Jamaica Plain*, 129 Mass. 367 (1880); *Sweeny v. Old Colony & Newport R.R.*, 92 Mass. 368, 87 Am. Dec. 644 (1865); *Allen v. Yazoo & Miss. Valley R.R.*, 111 Miss. 267, 71 So. 386 (1916); *Kruntorad v. Chicago, R.I. & P. Ry.*, 111 Neb. 753, 197 N.W. 611 (1924); *Black v. Central R.R.*, 85 N.J.L. 197, 89 Atl. 24 (1913); *Hanson v. Spokane Valley Land & Water Co.*, 58 Wash. 6, 107 Pac. 863 (1910).

66. See *Guilford v. Yale University*, 128 Conn. 449, 452, 23 A.2d 917, 918 (1942); *Sulhoff v. Everett*, 235 Iowa 396, 401, 16 N.W.2d 737, 740 (1944) (provided that invitation is not social, "[t]he receiver of an express invitation to come upon the premises is an invitee without any evidence that the visit will directly benefit the invitor."); Prosser, *supra* note 54, wherein he repudiates his earlier view expressed in *PROSSER, TORTS* 626-30, 635-42 (1941); *SHULMAN & JAMES, CASES AND MATERIALS ON TORTS* 536-9 (2d ed. 1952). See also *Marsh, The History and Comparative Law of Invitees, Licensees and Trespassers*, 69 L.Q. REV. 182, 359 (1953); *Comment*, 22 TEXAS L. REV. 489, 496 n.21 (1944).

or the passenger at the railroad station, the patron at the restaurant, theatre or other place of amusement, the patient in the doctor's waiting room or the client in the lawyer's office, would all be classified as invitees by either test.<sup>67</sup>

In other cases there has been no arrangement of the premises so as to induce entry, and the significant factor is the economic benefit conferred on the occupier by the visit.<sup>68</sup> The purpose of the visit induces in the mind of the entrant reasonable expectations of safety. This is true of the independent contractor (*e.g.*, to make repairs), his employees and subcontractors, the delivery man, and the person summoned to transact business with the occupier, whether the premises be arranged for business or for dwelling purposes. All such visitors are treated as invitees and these results are perhaps more readily explained by the economic benefit than by the invitation theory.<sup>69</sup> But this

---

67. *Holmes v. Ginter Restaurant Co.*, 54 F.2d 876 (1st Cir. 1932) (restaurant); *Glowacki v. A. J. Bayless Markets, Inc.*, 263 P.2d 799 (Ariz. 1953) (food market); *Braun v. Vallade*, 33 Cal. App. 279, 164 Pac. 904 (1917) (saloon); *Murphey v. Ellis*, 81 Ga. App. 743, 59 S.E.2d 774 (1950) (grocery market); *Harral v. Kent Corp.*, 163 Kan. 322, 212 P.2d 356 (1949) (hotel); *Huber v. American Drug Stores*, 19 La. App. 430, 140 So. 120 (1932) (store); *Dickey v. Hochschild, Kohn & Co.*, 157 Md. 448, 146 Atl. 282 (1929) (department store); *McKone v. Michigan Cent. R.R.*, 51 Mich. 601, 17 N.W. 74 (1883) (railway station); *Klugherz v. Chicago, M. & St. P. Ry.*, 90 Minn. 17, 95 N.W. 586 (1903) (same); *Smith v. Sears Roebuck & Co.*, 84 S.W.2d 414 (Mo. App. 1935) (store); *Doss v. Missouri, K. & T.R.R.*, 59 Mo. 27, 21 Am. Rep. 371 (1875) (railway station); *Finnegan v. Goerke Co.*, 106 N.J.L. 59, 147 Atl. 442 (1929) (department store); *Stark v. Great A. & P. Tea Co.*, 102 N.J.L. 694, 133 Atl. 172 (1926) (food store); *Coston v. Skyland Hotel, Inc.*, 231 N.C. 546, 57 S.E.2d 793 (1950) (hotel); *Maehlman v. Reuben Realty Co.*, 32 Ohio App. 54, 166 N.E. 920 (1928) (bathing beach); *Durning v. Hyman*, 286 Pa. 376, 133 Atl. 568 (1926) (movie theater); *Knight v. Moore*, 179 Va. 139, 18 S.E.2d 266 (1942) (bathing beach).

On the distinctive and varied treatment of spectators at baseball parks, hockey rinks, race tracks, etc., see *Barrett v. Faltico*, 117 F. Supp. 95 (E.D. Wash. 1953); *Malone, Contributory Negligence and the Landowner Cases*, 29 MINN. L. REV. 61, 74-80, 83-91 (1945); *James, Assumption of Risk*, 61 YALE L.J. 141, 148-9, 161-2 (1952).

68. *Indermaur v. Dames, L.R.* 1 C.P. 274 (1866); *Moore v. Southwestern Sash & Door Co.*, 71 Ariz. 418, 228 P.2d 993 (1951); *Turnipseed v. Hoffman*, 23 Cal.2d 532, 144 P.2d 797 (1944); *Elzey v. Boston Metals Co.*, 189 Md. 566, 56 A.2d 692 (1948); *McCulloch v. Horton*, 102 Mont. 135, 56 P.2d 1344 (1936); *Pierce v. Whitcomb*, 48 Vt. 127 (1875).

In the *Moore*, *Elzey*, and *Pierce* cases plaintiff did not recover even though he was classed as an invitee.

69. *National Brands, Inc. v. Norton Tire Co.*, 150 Fla. 349, 7 So.2d 456 (1942) (tire salesman, summoned to take order, injured at defendant-buyer's place of business); *McCarthy v. Hiers*, 81 Ga. App. 365, 59 S.E.2d 22 (1950) (independent contractor); *Nabors v. Atlanta Biltmore Corp.*, 77 Ga. App. 730, 49 S.E.2d 688 (1948) (ice delivery man); *Fort v. Reid Ice Cream Co.*, 98 N.J.L. 559, 119 Atl. 638 (1923) (son of independent contractor working on defendant's property delivered materials to father; held invitee as to owner-defendant). See cases cited note 57 *supra*.

In these cases, however, arrangement of the premises may be relevant as bearing on the area of invitation. See *Williamson v. Neitzel*, 45 Idaho 39, 260 Pac. 689 (1927); *Mazy v. Loveland*, 133 Minn. 210, 158 N.W. 44 (1916); *Carey v. Gray*, 98 N.J.L. 217, 119 Atl. 176 (1922); *Furey v. N.Y. Central & Hudson River R.R.*, 67 N.J.L. 270, 51 Atl. 505 (1902). See pages 619-20 *infra*.

does not tend to impair the validity of the invitation theory, because the latter does not purport to be exclusive.

On the other hand, there are cases in which the economic benefit theory must be strained—sometimes to the breaking point—to account for decisions regularly made by the courts. One class of these cases involves employees of public utilities,<sup>70</sup> and such public officials or employees as tax collectors, inspectors, census takers, and postmen,<sup>71</sup> all of whom are invitees. Some of these visitors do come in connection with transactions which may be of overall benefit to the occupier, but their particular visit often represents an aspect of the matter which is a burden to him, such as unwanted government regulation and payment of bills or taxes. They are like the customer who is returning merchandise, or complaining about it, to the store.<sup>72</sup> While these burdens may sometimes be viewed as indirectly incidental to an economic benefit, it seems much more to the point that “such people know that the occupier is required by law to receive them, and so have reason to believe that their coming is anticipated, and that the premises are ready for their reception.”<sup>73</sup>

Other cases holding that plaintiff is an invitee reveal the inadequacy of the economic benefit theory. A friend or child accompanying a customer to the store is himself an invitee.<sup>74</sup> So is the person who goes with another to the railroad station to see him off;<sup>75</sup> the man who goes to the bank to change

70. *E.g.*, *Sheffield Co. v. Phillips*, 69 Ga. App. 41, 24 S.E.2d 834 (1943) (meter reader); *Toomey v. Sanborn*, 146 Mass. 28, 14 N.E. 921 (1888) (garbage collector).

71. See *Glassbrook v. Manhi Realty Corp.*, 279 App. Div. 711, 108 N.Y.S.2d 652 (4th Dep't 1951) (census taker); cases cited notes 162-3 *infra*.

72. Or the customer coming back to get a purse or a coat left at the store. *H. L. Green v. Bobbitt*, 99 F.2d 281 (4th Cir. 1938); *Sulhoff v. Everett*, 235 Iowa 396, 16 N.W.2d 737 (1944).

73. *Prosser*, *supra* note 54, at 609.

In some of these cases defendant is not “required by law to receive” the visitor. But in all of them the visitor knows that the owner expects to receive them, and this should be the gist of the matter.

74. *Hecht Co. v. Jacobsen*, 180 F.2d 13 (D.C. Cir. 1950); *Briggs v. John Yeon Co.*, 168 Ore. 239, 122 P.2d 444 (1942); *Carlisle v. J. Weingarten, Inc.*, 137 Tex. 220, 152 S.W.2d 1073 (1941). *Contra*: *Fleckenstein v. Great A. & P. Tea Co.*, 91 N.J.L. 145, 102 Atl. 700 (1917). But New Jersey seems virtually to have overruled *Fleckenstein* in recent cases. See, *e.g.*, *Walec v. Jersey State Electric Co.*, 125 N.J.L. 90, 13 A.2d 301 (Sup. Ct. 1940); *Lewin v. Ohrbach's, Inc.*, 14 N.J. Super. 193, 82 A.2d 4 (1951); *Murphey v. Kelly*, 100 A.2d 558 (N.J. Super. 1953), and cases cited.

For the early English view, see *Burchell v. Hickisson*, 50 L.J.C.P. 101 (1880), denying recovery where a four-year old child accompanying his sister on her business errand was considered a licensee. See note 52 *supra*.

75. *N.Y., Chicago & St. L.R.R. v. Mushrush*, 11 Ind. App. 192, 37 N.E. 954 (1894); *Doss v. Missouri, K. & T.R.R.*, 59 Mo. 27, 21 Am. Rep. 371 (1875); *A.T. & S.F. Ry. v. Cogswell*, 23 Okla. 181, 99 Pac. 923 (1909). *Cf.* *St. Louis, I.M. & S. Ry. v. Fairbairn*, 48 Ark. 491, 4 S.W. 50 (1887) (plaintiff accompanied farmer to station to read him notice of stock killed by railroad, posted there pursuant to statute). *But cf.* *Gillis v.*

a five dollar bill;<sup>76</sup> and the man who goes to buy at a store which has gone out of business.<sup>77</sup> So may be the sometime customer who wants simply to use the phone or the toilet this time.<sup>78</sup> If benefit is conferred on the occupier by such a visit, it is on bases more tenuous than those which often may be found in the case of a social guest.<sup>79</sup> The absence of such benefit becomes even clearer when the occupier is not in business for profit. Nevertheless, the visitor at a free public lecture or library, the patron at a public play-

Pennsylvania R.R., 59 Pa. St. 129, 98 Am. Dec. 317 (1868) (recovery denied plaintiff injured by crowd gathered to see President Johnson at "whistlestop").

In *Klugherz v. Chicago, M. & St. P. Ry.*, 90 Minn. 17, 95 N.W. 586 (1903), the court granted recovery to plaintiff injured on platform while transacting private business with a passenger preparing to board a train: "We are unable to see why the duty of the railroad company to the public should be confined to those having strictly business relations with the company. There is no reasonable distinction between the rights of a person visiting the premises for the purpose of escorting another to a departing train, and the rights of one who goes there for the purpose of talking with a departing person on a business matter. There is a wide difference between the use of the premises with such motives and those of idle curiosity and merely to kill time." *Id.* at 21-2, 95 N.W. at 587.

See cases collected in Note, 11 A.L.R.2d 1075 (1950).

76. *American Nat. Bank v. Wolfe*, 22 Tenn. App. 642, 125 S.W.2d 193 (1938). *Contra*: *Cobb v. First Nat. Bank of Atlanta*, 58 Ga. App. 160, 198 S.E. 111 (1938) (plaintiff entered bank to obtain blank promissory note).

77. *Kallum v. Wheeler*, 129 Tex. 74, 101 S.W.2d 225 (1937) (state barber examiner injured on passageway to unoccupied office to which he had been misdirected); *cf. Lewis-Kures v. E. R. Walsh & Co.*, 102 F.2d 42 (2d Cir. 1939) (plaintiff trying to mail letter in abandoned United States post office may be invitee vis-a-vis demolition contractor, but no unreasonable danger); *Schmidt v. G. H. Hurd Realty Co.*, 170 Minn. 322, 212 N.W. 903 (1927) (not yet open for business; plaintiff may be invitee but injured outside area of invitation). See *Rasmussen v. National Tea Co.*, 304 Ill. App. 353, 26 N.E.2d 523 (1940) (lessor of building where rummage sale in preparation liable to plaintiff who fell down steps day before sale began).

78. *Campbell v. Weathers*, 153 Kan. 316, 111 P.2d 72 (1941). The court refused as a matter of law to restrict the invitee category to persons actually buying, noting that women often shop all day without making any purchase, and that people are often induced to purchase by advertising inside a store. *Id.* at 322, 111 P.2d at 76. But the court concluded: "Of course, if it appears a person had no intention of presently or in the future becoming a customer he could not be held to be an invitee, as there would be no basis for any thought of mutual benefit." *Ibid.* See also *Dym v. Merit Oil Corp.*, 130 Conn. 585, 36 A.2d 276 (1944); *Coston v. Skyland Hotel, Inc.*, 231 N.C. 546, 57 S.E.2d 793 (1950); *Renfro Drug Co. v. Lewis*, 149 Tex. 507, 235 S.W.2d 609 (1950); Note, 23 A.L.R.2d 1135 (1952). *But cf. Brosnan v. Koufman*, 294 Mass. 495, 2 N.E.2d 441 (1936) (denying recovery to plaintiff who took shortcut through building to use mailbox in lobby). Classifying entrants in the manner of the *Campbell* and *Brosnan* cases, *supra*, may encourage plaintiffs to be less than ingenuous in their testimony on their reasons for entering a particular building or store. SHULMAN & JAMES, CASES AND MATERIALS ON TORTS 531 (2d ed. 1952).

79. Thus the fact that a friend or relative performs household services or goes on errands for the occupier does not make him an invitee, even where the favor to the occupier is the occasion for the visit. *Lubenow v. Cook*, 137 Conn. 611, 79 A.2d 826 (1951); *Cosgrave v. Malstrom*, 127 N.J.L. 505, 23 A.2d 288 (1941).

ground or swimming pool, the old grad at reunion headquarters furnished by the university, and the person seeking a pass at the appropriate office in order to visit Oak Ridge reservation for his own purposes, have all been held invitees.<sup>80</sup> These cases can be reasonably explained only by the invitation theory, as can the cases involving an apparent extension of the highway. If a man arranges part of his land so that it looks like a continuation of the public sidewalk or roadway, a traveler who takes it for such is an invitee though his entry onto the private land confers no benefit whatever on its possessor.<sup>81</sup>

Moreover, the invitation test accounts more satisfactorily than the economic benefit test for many of the decisions holding that plaintiff is not an invitee. Here again many cases fit both theories. The loiterer at the railroad station, the spectator using a private platform to view a parade, and the pedestrian short-cutting through the lobby of a corner office building confer no benefit on the occupier.<sup>82</sup> Nor does the entrant have any reason to believe

80. *Davis v. Central Congregational Society of Jamaica Plain*, 129 Mass. 367, 372 (1880) (plaintiff injured leaving meeting of religious society of which she was not a member): "It makes no difference that no pecuniary profit or other benefit was received or expected by the society. The fact that the plaintiff comes by invitation is enough. . . ." See also *Dorsey v. Chautauqua Institution*, 203 App. Div. 251, 253, 196 N.Y. Supp. 798, 800 (4th Dep't 1922) (seven-year old boy drowned in vat on free recreational area): "The boy was not on the defendant's premises on its business. He was not going to see his father, who worked there; neither was he going to the store [on the playground]. He was there on the premises solely for the purpose of playing. . . ."; *Phillips v. United States*, 102 F. Supp. 943 (E.D. Tenn. 1952) (visitor seeking pass at Oak Ridge); *Rovegno v. San Jose Knights of Columbus Hall Ass'n*, 108 Cal. App. 591, 291 Pac. 848 (1930) (600 members regularly use swimming pool "at their own risk"; same care required as for public pool); *Guilford v. Yale University*, 128 Conn. 449, 23 A.2d 917 (1942) (old grad injured at reunion headquarters); *Howe v. Ohmart*, 7 Ind. App. 32, 33 N.E. 466 (1893) (townsman invited to literary society meeting in college building): "He who uses a building for certain purposes must keep it in a reasonably safe condition for all who visit the building for the purpose of transacting the ordinary business there. . . ." *Id.* at 38-9, 33 N.E. at 468. On the use of the term "business" to connote ordinary intercourse or affairs rather than in its strictly pecuniary sense, see Prosser, *supra* note 54, at 584.

See also *Edwards v. Hollywood Canteen*, 27 Cal.2d 802, 167 P.2d 729 (1946) (plaintiff-volunteer hostess at servicemen's club injured by overenthusiastic jitterbug); *Kallnowski v. Young Women's Christian Ass'n*, 17 Wash.2d 380, 135 P.2d 852 (1943) (plaintiff-volunteer chaperone at YWCA dance held invitee, but denied recovery because of failure to show defendant's negligence); Note, 28 A.L.R.2d 612 (1953).

81. *Crogan v. Schiele*, 53 Conn. 186, 1 Atl. 899 (1885); *Leighton v. Dean*, 117 Me. 40, 102 Atl. 565 (1917); *Holmes v. Drew*, 151 Mass. 578, 25 N.E. 22 (1890); *Allen v. Yazoo & Miss. Valley R.R.*, 111 Miss. 267, 71 So. 386 (1916); *Black v. Central R.R.*, 85 N.J.L. 197, 89 Atl. 24 (1913); *Beck v. Carter*, 68 N.Y. 283, 23 Am. Rep. 175 (1877); *Reddington v. Getchell*, 40 R.I. 463, 101 Atl. 123 (1917). *But cf.* *Conroy v. Allston Storage Warehouse Inc.*, 292 Mass. 133, 197 N.E. 454 (1935); *Stevens v. Nichols*, 155 Mass. 472, 29 N.E. 1150 (1892).

82. *Brosnan v. Koufman*, 294 Mass. 495, 2 N.E.2d 441 (1936) (plaintiff taking short-cut through office building); *Plummer v. Dill*, 156 Mass. 426, 31 N.E. 128 (1892) (plain-

that his visit is "in accordance with the intention and design with which the way or place was adapted and prepared."<sup>83</sup> On the other hand, a salesman who fails to make a sale confers the same economic benefit on a housewife as on a manufacturer. Yet he is a licensee at the house<sup>84</sup> and an invitee at the factory office.<sup>85</sup> Similarly, a customer who wants to use the toilet confers the same economic benefit on a corner grocery store as on a department store. Yet he is merely a licensee in using a toilet obviously kept for the convenience of the occupier and his employees,<sup>86</sup> but an invitee where the toilet gives the appearance of being open to the public.<sup>87</sup>

Even if plaintiff is conceded to be an invitee, there may be limits to the *area* of his invitation, and these limits are generally worked out in terms of the invitation theory. The customer at a shoe store looking for shoes is conferring an economic benefit on the owner whether he is waiting in the aisle for a clerk or looking for shoes behind the counter or in the storeroom. Yet in the last two cases he is not an invitee<sup>88</sup> since he is not "upon a part of the

tiff in search of her own servant in defendant's building); *Reardon v. Thompson*, 149 Mass. 267, 21 N.E. 369 (1889) (plaintiff taking shortcut between two private houses); *Gibbs v. Southern Ry.*, 200 N.C. 49, 156 S.E. 138 (1930) (loiterer in railway station); *Pittsburgh, Ft. Wayne & Chicago Ry. v. Bingham*, 29 Ohio St. 364 (1876) (same); *Galveston Oil Co. v. Morton*, 70 Tex. 400, 7 S.W. 756 (1888) (plaintiff visiting employee of defendant on personal business). See also *East Hill Cemetery Co. v. Thompson*, 53 Ind. App. 417, 97 N.E. 1036 (1912) (plaintiff strolling through cemetery for pleasure denied recovery); *Gillis v. Pennsylvania R.R.*, 59 Pa. St. 129, 93 Am. Dec. 317 (1868).

*But cf.* *Renfro Drug Co. v. Lewis*, 149 Tex. 507, 235 S.W.2d 609 (1950); RESTATEMENT, TORTS § 332, comment *c* (1934) ("where the shopkeeper permits his shop to be used as a shortcut . . . those so using it are business visitors"). See cases collected in Note, 23 A.L.R.2d 1135 (1952).

83. *Sweeny v. Old Colony & Newport R.R.*, 92 Mass. 368, 373-4, 87 Am. Dec. 644, 648 (1865).

84. *Stacy v. Shapiro*, 212 App. Div. 723, 209 N.Y. Supp. 305 (1st Dep't 1925) (peddler); *Reuter v. Kenmore Bldg. Co.*, 153 Misc. 646, 276 N.Y. Supp. 545 (City Ct. 1934) (same). *Cf.* *Novis v. Hugh Nawn Contracting Co.*, 206 Mass. 58, 91 N.E. 836 (1910) (newsboy soliciting sales from defendant's employees).

85. *C. R. Anthony Co. v. Williams*, 185 Okla. 564, 94 P.2d 836 (1939) (salesman soliciting orders at defendant-buyer's place of business); *Hartman v. Miller*, 143 Pa. Super. 143, 17 A.2d 652 (1941) (same). See also *Zeigler v. Oil Country Specialties Mfg. Co.*, 108 Kan. 589, 196 Pac. 603 (1921) (plaintiff seeking employment at plant); *Brigman v. Fiske-Carter Construction Co.*, 192 N.C. 791, 136 S.E. 125 (1926) (same). *But cf.* *Larmore v. Crown Point Iron Co.*, 101 N.Y. 391, 4 N.E. 752 (1886) (plaintiff seeking employment from defendant not an invitee if neither prospect of a job nor inducement to enter upon land); *Indian Refining Co. v. Mobley*, 134 Ky. 822, 121 S.W. 657 (1909) (person soliciting insurance from defendant's employees not an invitee).

86. *Glaser v. Rothschild*, 106 Mo. App. 418, 80 S.W. 332 (1904).

87. See *Campbell v. Weathers*, 153 Kan. 316, 319-22, 111 P.2d 72, 75-6 (1941).

88. See *Nelson v. F. W. Woolworth & Co.*, 211 Iowa 592, 596-8, 231 N.W. 665, 667 (1930); *MacDonough v. F. W. Woolworth Co.*, 91 N.J.L. 677, 678, 103 Atl. 74 (1918). *Cf.* *Carey v. Gray*, 98 N.J.L. 217, 119 Atl. 176 (1922) (plaintiff disinfecting house at night used outside privy because indoor privy was out of order; held not within scope of invitation); *Furey v. N.Y. Central & Hudson River R.R.*, 67 N.J.L. 270, 51 Atl. 505 (1902)

land upon which the possessor gives the other reason to believe his presence is permitted or desired because of its connection with the business or affairs of the possessor and which as such is held open to the other as a business visitor."<sup>89</sup> If, on the other hand, defendant arranges part of his premises, leading a visitor reasonably to think they are included in the area of invitation, he will be held as an invitor as to that part even though he did not mean to invite the plaintiff to it.<sup>90</sup> If, for example, a door leading to the basement from the back of a barroom is so situated and of such appearance that it is likely to be taken for a door to the toilet, a customer will be treated as within the scope of his invitation in mistakenly using that door,<sup>91</sup> although it is perfectly clear that no interest of the proprietor is served by this deviation from the scope he meant his invitation to have. If the area of invitation can thus be expanded or contracted by an arrangement of the premises giving the appearance of invitation or the reverse, there seems to be no valid reason why the invitation itself cannot depend upon such an appearance of things.<sup>92</sup>

The invitation theory serves well the broad principles of negligence. To be sure, the development of the invitation concept here may have reflected in part the same respect for land ownership and the owner's right of exclusive possession that was noted in the case of trespassers.<sup>93</sup> And perhaps consent

---

(independent contractor painting outside of car shed not within scope of invitation when injured on railway tracks). See also *Schmidt v. Bauer*, 80 Cal. 565, 22 Pac. 256 (1889); *Hickman v. First Nat. Bank of Great Falls*, 112 Mont. 398, 117 P.2d 275 (1941). Cf. *Robinson v. Leighton*, 122 Me. 309, 119 Atl. 809 (1923) (lessee-plaintiff held outside scope of invitation in using fire escape as veranda for a smoke; no showing of knowledge or acquiescence by defendant-lessor or his servants); *Roessler v. O'Brien*, 119 Colo. 222, 201 P.2d 901 (1949) (similar). But see *Muth v. W. P. Lahey's, Inc.*, 61 N.W.2d 619 (Mich. 1953) (customer told by clerk to look for shoes on shelves still an invitee while doing so). See also cases cited last paragraph of note 69 *supra*.

89. RESTATEMENT, TORTS § 343, comment *b* (1934). See *Firfer v. United States*, 208 F.2d 524, 528 (D.C. Cir. 1953) (plaintiffs taking shortcut to parking lot from Jefferson Memorial fell into hole on grassy plot surrounding Memorial): "[W]hen the accident happened [plaintiffs] were not in a place where the public was invited and welcomed. The grassy plot was inaccessible to the public in any normal and ordinary manner." See also *Phillips v. Library Co. of Burlington*, 55 N.J.L. 307, 315-17, 27 Atl. 478, 481-2 (1893).

90. *Morris v. Granato*, 133 Conn. 295, 50 A.2d 416 (1946); *Bunnell v. Waterbury Hospital*, 103 Conn. 520, 131 Atl. 501 (1925) (door in cloak room of public assembly hall mistaken for door to toilet); *Hall v. Boise Payette Lumber Co.*, 63 Idaho 686, 125 P.2d 311 (1942) (door to basement looked like door to other room); *Morgenstern v. Sheer*, 145 Md. 208, 125 Atl. 790 (1924) (door to elevator shaft looked like factory entrance); *Plewes v. City of Lancaster*, 171 Pa. Super. 312, 90 A.2d 279 (1952) (airport so lighted that obstructed portion mistaken for landing strip). But see *Morong v. Spofford*, 218 Mass. 50, 105 N.E. 454 (1914).

A problem may also arise as to how long an acknowledged invitee retains that favored status. *Hickman v. First Nat. Bank of Great Falls*, 112 Mont. 398, 117 P.2d 275 (1941).

91. *Morris v. Granato*, *supra* note 90.

92. See text at note 81 *supra*.

93. *James, Tort Liability of Occupiers I*, 63 YALE L.J. 144, 146-8 (1953); see also EHRENZWEIG, NEGLIGENCE WITHOUT FAULT (1951).

or invitation to enter is just as much beside the point here as in the attractive nuisance<sup>94</sup> and constant trespasser<sup>95</sup> cases. But invitation is to be found on an objective basis,<sup>96</sup> and here the facts which would make people think they were invited would make their presence more likely, and would also put them off their guard for lurking dangers. Consequently, these facts are intimately connected with the foreseeable probability of harm that spells negligence.

The occupier's duty to the invitee is one of due care under all circumstances. If plaintiff is an invitee at the time and place of his injury, the occupier, of course, owes him all the duties he owes to trespassers and licensees. Thus the occupier must use care not to injure plaintiff by negligent activity,<sup>97</sup> and also to warn him of latent perils actually known to the occupier.<sup>98</sup> In addition, the occupier owes the duty of care to inspect his premises and to discover dangerous conditions.<sup>99</sup> This is the most prominent difference between the rights of invitees and those of licensees,<sup>100</sup> and its prominence has sometimes obscured<sup>101</sup> the fact that the invitor's duty of reasonable inspection is only part of a larger duty of reasonable care to make the premises reasonably safe. As in negligence cases generally, the invitor may be held even though there was no default in inspection, if the injury may be traced to faulty construction<sup>102</sup> or other negligence in creating the dangerous condition,<sup>103</sup> or to the

---

94. James, *supra* note 93, at 161 *et seq.*

95. See James, *supra* note 93, at 178 *et seq.*; PROSSER, TORTS 616-17 (1941).

96. RESTATEMENT, TORTS § 332, comment *b* (1934), and cases cited notes 90, 91 *supra*. See James, *The Qualities of the Reasonable Man in Negligence Cases*, 16 Mo. L. REV. 1 (1951).

97. RESTATEMENT, TORTS § 341 (1934).

98. *Johnston v. De La Guerra Properties, Inc.*, 28 Cal.2d 394, 170 P.2d 5 (1946); *Straight v. B. F. Goodrich Co.*, 354 Pa. 391, 47 A.2d 605 (1946). See *Puleo v. H. E. Moss & Co.*, 159 F.2d 842, 845 (2d Cir. 1947).

99. *Dickey v. Hochschild, Kohn & Co.*, 157 Md. 448, 146 Atl. 282 (1929); *Stark v. Great A. & P. Tea Co.*, 102 N.J.L. 694, 133 Atl. 172 (1926); *Maehlman v. Reuben Realty Co.*, 32 Ohio App. 54, 166 N.E. 920 (1928); *Durning v. Hyman*, 286 Pa. 376, 133 Atl. 568 (1926); *Kallum v. Wheeler*, 129 Tex. 74, 101 S.W.2d 225 (1937); CHARLESWORTH, *op. cit. supra* note 53, at 186, 187; HARPER, LAW OF TORTS 226 (1933); RESTATEMENT, TORTS § 343, comment *a* (1934).

100. RESTATEMENT, TORTS § 343, comment *a* (1934), states that this is the only particular "in which one who holds his land open for the reception of business visitors is under a greater duty in respect to its physical condition than a possessor who holds his land open to the visits of a gratuitous licensee."

101. See, *e.g.*, the argument by defendants' counsel in *Rose v. Melody Lane of Wilshire*, 39 Cal.2d 481, 485, 247 P.2d 335, 337 (1952). See also *Magnolia Petroleum Co. v. Barnes*, 198 Okla. 406, 179 P.2d 132 (1947); *Clark v. Glosser Bros. Dep't Store, Inc.*, 156 Pa. Super. 193, 39 A.2d 733 (1944).

102. *Rose v. Melody Lane of Wilshire*, 39 Cal.2d 481, 247 P.2d 335 (1952); *Magnolia Petroleum Co. v. Barnes*, 198 Okla. 406, 179 P.2d 132 (1947).

103. *E.g.*, *Clark v. Glosser Bros. Dep't Stores, Inc.*, 156 Pa. Super. 193, 39 A.2d 733 (1944). Plaintiff, a customer, tripped on tapes in department store aisle. Defendant urged lack of constructive notice. Said the court: "That was unnecessary. . . . [T]he injuries sustained by [plaintiff] were due to the direct negligence of the defendant's employes in

failure to take reasonable precautions to protect invitees from dangers foreseeably attendant on the arrangement<sup>104</sup> or the use<sup>105</sup> of the premises. Thus, in a recent California case,<sup>106</sup> plaintiff was hurt by falling when his swivel stool at a cocktail bar broke. Defendant showed that the break was caused by metal fatigue in a pin that held the seat in place, that inspection had been careful and regular, and that the defect might escape the most careful inspection. The court held, however, that the jury might find the very likelihood of such an undiscoverable defect called for a bigger pin in the first place, or perhaps "an additional pin or other safety device."<sup>107</sup>

Once an occupier has learned of dangerous conditions on his premises, a serious question arises as to whether he may—as matter of law under all circumstances—discharge all further duty to his invitees by simply giving

throwing the tapes in the aisles or not taking reasonable precautions to prevent their falling to the floor. . . ." *Id.* at 195-6, 39 A.2d at 734.

104. *Johnston v. De La Guerra Properties, Inc.*, 28 Cal.2d 394, 170 P.2d 5 (1946); *Donahoo v. Kress House Moving Corp.*, 25 Cal.2d 237, 153 P.2d 349 (1944); *Kmiotek v. Anast*, 350 Pa. 593, 39 A.2d 923 (1944).

105. Thus the occupier owes his invitee the duty of care to afford him reasonable protection against foreseeable dangerous conduct by third persons. See, e.g., *Taylor v. Pennsylvania Co.*, 50 Fed. 755 (C.C.N.D. Ohio 1892) (carrier liable for failure to provide adequate protection against surging of crowd at excursion); *Consineau v. Muskegon Tr. & L. Co.*, 145 Mich. 314, 108 N.W. 720 (1906) (similar); *Schwartzman v. Lloyd*, 82 F.2d 822 (D.C. Cir. 1936) (crowd at advertised sale pushed plaintiff against window); *Greeley v. Miller's Inc.*, 111 Conn. 584, 150 Atl. 500 (1930) (similar); *In re Sabbatino & Co.*, 150 F.2d 101 (2d Cir. 1945) (failure to prevent excited and drunken person from getting hold of gun). *But cf.* *F. W. Woolworth & Co. v. Conboy*, 170 Fed. 934 (8th Cir. 1909); *Fenasci v. S. H. Kress & Co.*, 17 La. App. 170, 134 So. 779 (1931); *Lord v. Sherer Dry Goods Co.*, 205 Mass. 1, 90 N.E. 1153 (1910). See *Harper & Kime, The Duty to Control the Conduct of Another*, 43 YALE L.J. 886 (1934); *James, Scope of Duty in Negligence Cases*, 47 NW. U.L. REV. 778, 809 *et seq.* (1953); *Note*, 20 A.L.R.2d 8 (1951); *RESTATEMENT, TORTS* § 348 (1934). *Cf. id.* § 344.

106. *Rose v. Melody Lane of Wilshire*, 39 Cal.2d 481, 247 P.2d 335 (1952).

107. *Id.* at 485, 247 P.2d at 338.

Since the invitee, because of the breadth of the duty owed to him, may take advantage of negligence towards him either in the construction, maintenance, or use of the premises, the doctrine of *res ipsa loquitur* is often available to him. *Stanford v. Richmond Chase Co.*, 263 P.2d 108 (Cal. App. 1953); *Van Staveren v. F. W. Woolworth Co.*, 102 A.2d 59 (N.J. App. Div. 1954); *Griffen v. Manice*, 166 N.Y. 188, 59 N.E. 925 (1901); *Gillilan v. Portland Crematorium Ass'n*, 120 Ore. 286, 249 Pac. 627 (1926). See *Montgomery-Ward v. Sewell*, 205 F.2d 463 (5th Cir. 1953) (doctrine not available if prerequisites for its application are not met). It is rarely, if ever, available to licensees or trespassers, since they cannot in general take advantage of negligently defective conditions of the premises, and the mere happening of an accident would rarely point to the kind of showing they must make in order to recover. See *Galbraith v. Busch*, 267 N.Y. 230, 196 N.E. 36 (1935); *Arthur v. Standard Eng. Co.*, 193 F.2d 903 (D.C. Cir. 1951); *James, Proof of the Breach in Negligence Cases*, 37 VA. L. REV. 179, 204 (1951). *But see* *Jaffe, Res Ipsa Loquitur Vindicated*, 1 BUFF. L. REV. 1 (1951) (persuasive suggestion that if the facts surrounding any given accident point with sufficient force to negligent conduct, then a breach of duty might be shown to a licensee or constant trespasser).

them "a warning adequate to enable them to avoid the harm."<sup>108</sup> A good many authorities, including the *Restatement*, take the position that he may.<sup>109</sup> But this proposition is a highly doubtful one both on principle and authority. The alternative would be a requirement of due care to make the conditions reasonably safe—a requirement which might well be satisfied by warning or obviousness in any given case,<sup>110</sup> but which would not be so satisfied invariably. Discussion of the issue of adequate warning has sometimes been hopelessly beclouded by confusing the strands of different legal doctrines—defendant's duty, plaintiff's contributory negligence, and assumption of risk—which run through the problem.<sup>111</sup>

### *Defendant's Duty:*

People can hurt themselves on almost any condition of the premises. That is certainly true of an ordinary flight of stairs. But it takes more than this to make a condition *unreasonably* dangerous. If people who are likely to encounter a condition may be expected to take perfectly good care of themselves without further precautions, then the condition is not unreasonably dangerous because the likelihood of harm is slight. This is true of the flight of ordinary stairs in a usual place in the daylight.<sup>112</sup> It is also true of ordinary curbing

108. RESTATEMENT, TORTS § 343(c) (iii) (1934). The statement in the text is followed and qualified by the words: "without relinquishing any of the services which they are entitled to receive, if the possessor is a public utility." The special duties of public utilities are treated in *id.* §§ 347-8. See pages 632-3 *infra*, on the duties owed by a landlord with respect to common hallway and approaches, and those owed by a municipality with respect to the condition of the highways.

Correlative to § 343 is § 340 which excludes liability to licensees (including business visitors) for harm from a condition "if they know of the condition and realize the risk involved therein."

109. See note 108 *supra*, and cases cited notes 135-6 *infra*.

110. See cases cited notes 112-115 *infra*. Cf. *Elzey v. Boston Metals Co.*, 189 Md. 566, 56 A.2d 692 (1948) (plaintiff and brother were allowed to board an unlighted ship which was being dismantled, in order to inspect machinery which they considered buying; defendant discharged duty to them, so far as danger from open hatch was concerned, by furnishing them with flashlights; contributory negligence an alternative ground of decision); *Valles v. Peoples-Pittsburgh Trust Co.*, 339 Pa. 33, 13 A.2d 19 (1940) (owner of building employed independent contractor to do work in basement; duty to latter's employees discharged by warning of presence and danger of pipes containing ammonia).

111. See, *e.g.*, *Meyers v. Paro Realty & M. Co.*, 128 Conn. 249, 21 A.2d 379 (1941); *Blangrund v. Paulk*, 203 S.W.2d 947 (Tex. Civ. App. 1947); *Caron v. Grays Harbor County*, 18 Wash.2d 397, 139 P.2d 626 (1943); 65 C.J.S., *Negligence* § 50 (1950). See illuminating discussion in Keeton, *Personal Injuries Resulting from Open and Obvious Conditions*, 100 U. OF PA. L. REV. 629, 631-3 (1952).

112. See, *e.g.*, *Hunnewell v. Haskell*, 174 Mass. 557, 55 N.E. 320 (1899); *Boyd v. Logan Jones Dry Goods Co.*, 340 Mo. 1100, 104 S.W.2d 348 (1937); *Berquist v. F. W. Woolworth Co.*, 91 N.H. 428, 21 A.2d 169, 726 (1941); *Houston Nat. Bank v. Adair*, 146 Tex. 387, 207 S.W.2d 374 (1948); *Dooley v. Economy Store, Inc.*, 109 Vt. 139, 194 Atl. 375 (1937); Comment, 5 BAYLOR L. REV. 176 (1953).

along a sidewalk,<sup>113</sup> doors or windows in a house, counters in a store, stones and slopes in a New England field, and countless other things which are common in our everyday experience.<sup>114</sup> It may also be true of less common and obvious conditions which lurk in a place where visitors would expect to find such dangers.<sup>115</sup> The ordinary person can use or encounter all of these things safely if he is fully aware of their presence at the time. And if they have no unusual features and are in a place where he would naturally look for them,<sup>116</sup> he may be expected to take care of himself if they are plainly visible. In such cases it is enough if the condition is obvious, or is made obvious (*e.g.*, by illumination).<sup>117</sup> The knowledge of the condition

113. *Cf.* *Brooks v. Sears Roebuck & Co.*, 302 Mass. 184, 19 N.E.2d 39 (1939) (wooden curbs in parking lot).

114. See, *e.g.*, *Home Public Mkt. v. Newrock*, 111 Colo. 428, 142 P.2d 272 (1943) (swinging doors); *Todd v. S. S. Kresge Co.*, 303 Ill. App. 89, 24 N.E.2d 899 (1939) (swinging doors); *Chew v. Paramount-Richards Theatres, Inc.*, 14 So.2d 583 (La. App. 1943) (gently sloping floor of foyer); *Leticq v. Denholm & McKay Co.*, 328 Mass. 120, 102 N.E.2d 86 (1951) (foot measure and foot stool in front of seats in shoe department); *Greenfield v. Freedman*, 328 Mass. 272, 103 N.E.2d 242 (1952) (leaves on sidewalk); *Sheridan v. Great A. & P. Tea Co.*, 353 Pa. 11, 44 A.2d 280 (1945) (double entrance door, both opening inwards, neither marked as entrance or exit); *Hild v. Montgomery*, 342 Pa. 42, 20 A.2d 228 (1941) (ramp in garage too narrow to accommodate both car and man).

115. See, *e.g.*, *Elzey v. Boston Metals Co.*, 189 Md. 566, 56 A.2d 692 (1948) (open hatchway on unlighted ship being dismantled); *O'Hanley v. Norwood*, 315 Mass. 440, 53 N.E.2d 3 (1944) (protruding jack handle in filling station yard); *Boyce v. Brewington*, 49 N.M. 107, 158 P.2d 124 (1945) (door opening on to dark stairway in house for sale being shown to prospective customer); *McCreery v. Westmoreland Farm Bureau Co-op Ass'n*, 357 Pa. 567, 55 A.2d 399 (1947) (moving machinery in grinding mill).

116. Compare open hatchway in *Elzey v. Boston Metals Co.*, 189 Md. 566, 56 A.2d 692 (1948) (on ship being dismantled; recovery denied), with open trap door in *Johnson v. Rulon*, 363 Pa. 585, 70 A.2d 325 (1950) (in front of restaurant counter; recovery granted). Compare bread box protruding into the grocery store entrance way, *McCarthy v. Great A. & P. Tea Co.*, 292 Mass. 526, 198 N.E. 757 (1935) (recovery granted), with the lawnmower protruding into the hardware store aisle, *Adriance v. Henry Duncan Corp.*, 291 Mass. 202, 196 N.E. 906 (1935) (recovery denied). Compare vestibule's floor made slippery by customers during rain, *Curtis v. Traders Nat. Bank*, 314 Ky. 765, 237 S.W.2d 76 (1951) (recovery denied), with similar condition of an aisle inside a store, *Lyle v. Megerle*, 270 Ky. 227, 109 S.W.2d 598 (1937) (recovery granted). See *Leticq v. Denholm & McKay Co.*, 328 Mass. 120, 121-2, 102 N.E.2d 86, 88 (1951); RESTATEMENT, TORTS § 343, comment *e* (1934).

Even where the source of injury is a condition of the general type that people would expect to find where it is, unreasonable danger may lurk in some unusual aspect of the condition, such as excessive slipperiness of a floor, *Ward v. Avery*, 113 Conn. 394, 155 Atl. 502 (1931); *Western Union Tel. Co. v. McDavitt*, 257 S.W.2d 319 (Tex. Civ. App. 1953); or unusual steepness of a ramp immediately outside an exit door, *San Antonio Hermann Sons Home Ass'n v. Harvey*, 256 S.W.2d 906 (Tex. Civ. App. 1953); or sharp corner edge of a store counter. *Sanitary Grocery Co. v. Steinbrecher*, 183 Va. 495, 32 S.E.2d 685. (1945).

117. *Elzey v. Boston Metals Co.*, *supra* note 116 (plaintiff furnished with flashlight).

removes the sting of unreasonableness from any danger that lies in it, and obviousness may be relied on to supply knowledge. Hence the obvious character of the condition is incompatible with negligence in maintaining it. If plaintiff happens to be hurt by the condition, he is barred from recovery by lack of defendant's negligence towards him, no matter how careful plaintiff himself may have been. If an invitee has a cramp at the head of a flight of stairs and falls down it, his own freedom from fault will not help him to a recovery.

On the other hand, the fact that a condition is obvious—*i.e.*, it would be clearly visible to one whose attention is directed to it—does not always remove all unreasonable danger. It may fail to do so in two lines of cases. In one line of cases, people would not in fact expect to find the condition where it is,<sup>118</sup> or they are likely to have their attention distracted as they approach it,<sup>119</sup> or, for some other reason, they are in fact not likely to see it, though

118. The customer in a store, for instance, generally expects that the aisles and passage ways open to customers are free from obstructions, pitfalls, and slippery spots. Since this is so, clearly visible conditions may often be unreasonably dangerous to the customer because he is in fact not likely to observe them. *Surface v. Safeway Stores, Inc.*, 169 F.2d 937 (8th Cir. 1948) (floor of aisle wet from mopping); *Winebarger v. Fee*, 305 Ky. 814, 205 S.W.2d 1010 (1947) (same); *Lyle v. Megerle*, 270 Ky. 227, 109 S.W.2d 598 (1937) (wet tile floor in store); *Williamson v. Derry Electric Co.*, 89 N.H. 216, 196 Atl. 265 (1938) (office floor waxed and wet); *Cheney v. S. Kann Sons & Co.*, 37 F. Supp. 493 (D.D.C. 1941) (unexpected steps in aisle); *Hodge v. Weinstock Lubin & Co.*, 109 Cal. App. 393, 293 Pac. 80 (1930) (6-inch platform at base of counter, extending into aisle); *Delmore v. Polinsky*, 132 Conn. 28, 42 A.2d 349 (1945) (stairway in aisle near counters); *Walgreen Texas Co. v. Shivers*, 137 Tex. 493, 154 S.W.2d 625 (1941) (counter stools on platform raised 9 $\frac{3}{4}$ " above general floor level); *J. Weingarten, Inc. v. Brockman*, 134 Tex. 451, 135 S.W.2d 698 (1940) (few inches change in level in approach to store); *McCarthy v. Great A. & P. Tea Co.*, 292 Mass. 526, 193 N.E. 757 (1935) (box protruding into store entranceway); *Sanitary Grocery Co. v. Steinbrecher*, 183 Va. 495, 32 S.E.2d 685 (1945) (sharp corner of counter); *Johnson v. Rulon*, 363 Pa. 585, 70 A.2d 325 (1950) (open trap door in floor in front of restaurant counter). See also Keeton, *Personal Injuries Resulting from Open and Obvious Conditions*, 100 U. OF PA. L. REV. 629 (1952); Malone, *Contributory Negligence and the Landowner Cases*, 29 MINN. L. REV. 61 (1945); Comment, 5 BAYLOR L. REV. 176 (1953).

Not all courts are willing to regard such obvious conditions as unreasonable dangers. See, *e.g.*, *Mautino v. Sutter Hospital Ass'n*, 211 Cal. 556, 296 Pac. 76 (1931) (slippery floor); *Russell v. Liggett Drug Co.*, 153 S.W.2d 231 (Tex. Civ. App. 1941) (slippery store floor); *Simmonds v. Penn Fruit Co.*, 354 Pa. 154, 47 A.2d 231 (1946) (platform of weighing scale protruding into aisle). Compare *Cheney*, *supra*, with *Tehan v. Freed*, 261 App. Div. 969, 25 N.Y.S.2d 882 (2d Dep't 1941). Compare *Walgreen*, *supra*, with *Matson v. Tip Top Grocery Co.*, 151 Fla. 247, 9 So.2d 366 (1942).

119. See *Cheney v. S. Kann Sons & Co.*; *Hodge v. Weinstock Lubin & Co.*; *Johnson v. Rulon*, all *supra* note 118. The Pennsylvania cases use the term "attention-arrester" to describe distracting displays or signs. *Johnson v. Rulon*, *supra* note 118, 2 ALA. L. REV. 373 (1950). For cases denying significance to attention arresters, see *Knight v. Travelers Ins. Co.*, 32 So.2d 508 (La. App. 1947); *Boyle v. Preketes*, 262 Mich. 629, 247 N.W. 763 (1933); *Cates v. Evans*, 142 S.W.2d 654 (Mo. App. 1940); *Tehan v. Freed*, *supra* note 118.

it could be readily and safely avoided if they did.<sup>120</sup> There may be negligence in creating or maintaining such a condition even though it is physically obvious; slight obstructions to travel on a sidewalk,<sup>121</sup> an unexpected step in a store aisle<sup>122</sup> or between a passenger elevator and the landing furnish examples. Under the circumstances of any particular case, an additional warning may, as a matter of fact, suffice to remove the danger, as where a customer, not hurried by crowds or some emergency, and in possession of his faculties, is told to "watch his step" or "step up" at the appropriate time. When this is the case, the warning satisfies the requirement of due care and is incompatible with defendant's negligence. Here again, plaintiff's recovery would be prevented by that fact no matter how careful he was.

In the second line of cases the condition of danger is such that it cannot be encountered with reasonable safety even if the danger is known and appreciated. An icy flight of stairs or sidewalk,<sup>123</sup> a slippery floor,<sup>124</sup> a defective crosswalk,<sup>125</sup> or a walkway near an exposed high tension wire<sup>126</sup> may furnish

120. *E.g.*, *Hodge v. Weinstock, Lubin & Co.*, *supra* note 118 (presence of a crowd); *Wood v. Tri-States Theater Corp.*, 237 Iowa 799, 23 N.W.2d 843 (1946) (same); *Walgreen Texas Co. v. Shivers*, *supra* note 118 (plaintiff had just turned round on her stool and was getting off it); *Nicolls v. Scranton Club*, 208 F.2d 874 (3d Cir. 1954) (plaintiff was following a bellhop, and they were both carrying heavy luggage); *Webel v. Yale University*, 125 Conn. 515, 7 A.2d 215 (1939) (plaintiff encountered a step down immediately upon opening a door); *Johnson v. Pulidy*, 110 Conn. 443, 165 Atl. 355 (1933) (top of a flight of stairs was only 30" from the desk where people paid their meal checks); *Delmore v. Polinsky*, *supra* note 118 (the stairs were near place where salesgirls wrapped up packages); *Groener v. F. W. Woolworth Co.*, 131 N.J.L. 311, 36 A.2d 398 (1944) (stairs near rack where customers would reach for merchandise).

*Compare Webel, supra*, and *San Antonio Hermann Sons Home Ass'n v. Harvey*, 256 S.W.2d 906 (Tex. Civ. App. 1953) (ramp immediately outside of door; recovery granted), *with Sterns v. Highland Hotel Co.*, 307 Mass. 90, 29 N.E.2d 721 (1940) (steps immediately outside of door; recovery denied), and *Cates v. Evans*, 142 S.W.2d 654 (Mo. App. 1940) (same).

121. See *Beckwith v. Town of Stratford*, 129 Conn. 506, 29 A.2d 775 (1942); *Loughran v. City of New York*, 298 N.Y. 320, 83 N.E.2d 136 (1948), 15 BROOKLYN L. REV. 318 (1949). *Cf. Lavoie v. Antupit*, 138 Conn. 422, 85 A.2d 900 (1951) (orange peels on private walk).

122. *E.g.*, *Hodge v. Weinstock, Lubin & Co.*, 109 Cal. App. 393, 293 Pac. 80 (1930) (platform raised 6" above floor level and protruding 1 or 2 feet into aisle beyond counter). See also the *Cheney, Delmore, Walgreen Texas, Weingarten*, and *McCarthy* cases, *supra* note 118.

123. *Congdon v. City of Norwich*, 37 Conn. 414 (1870); *McCracken v. Curwensville Borough*, 309 Pa. 98, 163 Atl. 217 (1932) (icy highway).

124. *Ward v. Avery*, 113 Conn. 394, 155 Atl. 502 (1931); *Williamson v. Derry Electric Co.*, 89 N.H. 216, 196 Atl. 265 (1938); *Western Union Tel. Co. v. McDavitt*, 257 S.W.2d 319 (Tex. Civ. App. 1953).

125. *Nichols v. Town of Laurens*, 96 Iowa 388, 65 N.W. 335 (1895); *Campion v. City of Rochester*, 202 Minn. 136, 277 N.W. 422 (1938); *Williams v. City of New York*, 214 N.Y. 259, 108 N.E. 448 (1915).

126. *Southern Pac. Co. v. McCready*, 47 F.2d 673 (9th Cir. 1931); *Revels v. Southern Cal. Edison Co.*, 113 Cal. App. 2d 673, 248 P.2d 986 (1952); *Reboni v. Case Bros.*,

examples. So may the less dangerous kind of condition if surrounding circumstances are likely to force plaintiff upon it, or if, for any other reason, his knowledge is not likely to be a protection against danger.<sup>127</sup> It is in these situations that the bite of the *Restatement's* "adequate warning" rule is felt. Here, if people are in fact likely to encounter the danger, the duty of reasonable care to make conditions reasonably safe is not satisfied by a simple warning; the probability of harm in spite of such a precaution is still unreasonably great. And the books are full of cases in which defendants, owing such a duty, are held liable for creating or maintaining a perfectly obvious danger of which plaintiffs are fully aware.<sup>128</sup> The *Restatement*, however, would deny liability here<sup>129</sup> because the occupier need not invite visitors, and if he does, he may condition the invitation on any terms he chooses, so long as there is full disclosure of them. If the invitee wishes to come on those terms, he assumes the risk.<sup>130</sup>

---

Inc., 137 Conn. 501, 78 A.2d 887 (1951); *West Texas Utilities Co. v. Renner*, 32 S.W.2d 264 (Tex. Civ. App. 1930).

127. As where plaintiff slips, *Mitchell v. Barton & Co.*, 126 Wash. 232, 217 Pac. 993 (1923), or is pushed into danger by a crowd, *cf. Schwartzman v. Lloyd*, 82 F.2d 822 (D.C. Cir. 1936), is precipitated into it by the fright of his horse, *Cage v. Franklin Twp.*, 8 Pa. Super. 89 (1898), or by the skidding of his automobile, *McCracken v. Curwensville Borough*, 309 Pa. 98, 163 Atl. 217 (1932). These situations will have a bearing on contributory negligence, but they will also bear directly on the reasonableness of defendant's precautions.

128. See, *e.g.*, *Clayards v. Dethick*, 12 Q.B. 439 (1848); *Congdon v. City of Norwich*, 37 Conn. 414 (1870); *Gibson v. Hoppman*, 108 Conn. 401, 143 Atl. 635 (1928); *Nichols v. Town of Laurens*, 96 Iowa 388, 65 N.W. 335 (1895); *Dillehay v. Minor*, 188 Iowa 37, 175 N.W. 838 (1920); *Roman v. King*, 289 Mo. 641, 233 S.W. 161 (1921); *McCracken v. Curwensville Borough*, 309 Pa. 98, 163 Atl. 217 (1932); *James, Assumption of Risk*, 61 YALE L.J. 141, 144-6 (1952).

129. The *Restatement* rule expressly denies the occupier's liability to the invitee who has knowledge and appreciation of the condition of danger. RESTATEMENT, TORTS § 340 (1934). And it declares the occupier's duty may be satisfied by reasonable care to warn. *Id.* § 342(b) (ii). It does not expressly state that the occupier's duty is satisfied if the condition, though in fact unknown, is obvious to the invitee. This proposition seems to be implied by the *Restatement*, however, since an obvious danger—at least if it is obvious enough—is generally held to carry its own warning. See, *e.g.*, cases cited notes 112-115 *supra*. Courts have therefore quite naturally construed the *Restatement* as relieving the invitor from any duties with respect to obvious conditions. See, *e.g.*, *City of Drumright v. Moore*, 197 Okla. 306, 170 P.2d 230 (1946); *Simmonds v. Penn Fruit Co.*, 354 Pa. 154, 47 A.2d 231 (1946).

130. The denial of liability to an invitee for obvious defects has sometimes been put on a different ground. Thus the California court has said: "The true ground of liability is the proprietor's superior knowledge of [the conditions on his land]." *Mautino v. Sutter Hosp. Ass'n*, 211 Cal. 556, 561, 296 Pac. 76, 78 (1931); 38 AM. JUR., Negligence § 97 (1941); Keeton, *Personal Injuries Resulting from Open and Obvious Conditions*, 100 U. OF PA. L. REV. 629, 634 (1952). *Cf.* RESTATEMENT, TORTS § 340, comment c (1934); *id.* § 347, comment a (distinguishing public utility). It would follow that where the occupier's knowledge is not superior, he would not be liable. But if the quoted statement means that the reason for the occupier's duty to use care is his superior knowledge, it holds no water. An occupier's superior knowledge or means of knowledge creates no duty to trespassers

The *Restatement* view is wrong in policy. The law has never freed land-ownership or possession from all restrictions or obligations imposed in the social interest. The possessor's duty to use care towards those outside the land is of long standing.<sup>131</sup> And many obligations are imposed for the benefit of people who voluntarily come upon the land. For the invitee, the occupier must make reasonable inspection and give warning of hidden perils.<sup>132</sup> Why should his duty stop at this point short of reasonable care? It might be said to be a matter of reasonable expectation: the invitee expects the premises to be prepared for him only up to the point where he knows they are not. But this should not be conclusive. Reasonable expectations may raise duties, but they should not always limit them.<sup>133</sup> The gist of the matter is unreasonable probability of harm in fact. And when that is great enough in spite of full disclosure, it is carrying the quasi-sovereignty of the landowner pretty far to let him ignore it to the risk of life and limb.<sup>134</sup>

So far as authority goes, the orthodox theory is getting to be a pretty feeble reed for defendants to lean on. It is still frequently stated,<sup>135</sup> though often by

and only a limited one to licensees. On the other hand, a public utility owes a full duty of care to its patrons, a city to its highway travelers, a landlord to his tenants in the use of a common approach, even where defendant's knowledge is not superior. The duty of care is imposed by society to protect its members from unreasonable risk of harm upon those whose (presumably beneficial) ownership or control of premises puts them in a strategic position to remedy dangerous conditions therein. Given such a duty, the superior knowledge of one of the parties is *one factor* to be considered in determining whether under all the circumstances unreasonable risk of harm is to be foreseen. Even where knowledge of the condition is equal, however, the party who has control of the condition may be negligent in failing to remedy it. See cases cited notes 123-5, 127-8 *supra*; Keeton, *Personal Injuries Resulting from Open and Obvious Conditions*, 100 U. OF PA. L. REV. 629 (1952).

Of course the occupier's duty to his invitee is not, under the *Restatement* rule, a full duty of care. The duty is limited to acquainting the invitee with the dangerous condition (*i.e.*, making the knowledge of the parties equal). This curtailment of duty rests on history and on the questionable policy of encouraging unfettered use of land by immunities from liability. But here again the basis of defendant's truncated duty is not his superior knowledge, but his ownership and control of the unreasonably dangerous condition. Under this rule the occupier's superior knowledge might properly be called a *condition of liability*, but it is not a reason or justification either for the occupier's duty or for the limitation put upon it.

131. HARPER, LAW OF TORTS §§ 85-7, 100, 102 (1933).

132. See note 99 *supra*.

133. In all the cases cited note 128 *supra*, for instance, the successful plaintiff could not have reasonably expected the condition to be without peril.

134. See BOHLEN, STUDIES IN THE LAW OF TORTS 163 (1926); *cf.* James, *supra* note 93, at 146-8, 151.

135. See, *e.g.*, *Funari v. Gravem-Inglis Baking Co.*, 40 Cal. App. 2d 25, 104 P.2d 44 (1940); *Mautino v. Sutter Hosp. Ass'n*, 211 Cal. 556, 296 Pac. 76 (1931); *Paubel v. Hitz*, 339 Mo. 274, 96 S.W.2d 369 (1936); *Caron v. Grays Harbor County*, 18 Wash.2d 397, 139 P.2d 626 (1943); 38 AM. JUR., Negligence § 97 (1941); 65 C.J.S., Negligence § 50 (1950).

way of dictum.<sup>136</sup> On the other hand, some cases have simply—though unostentatiously—broken with tradition and held defendant liable to an invitee in spite of his knowledge of the danger, when the danger was great enough and could have been feasibly remedied.<sup>137</sup> Other cases stress either the reasonable assumptions of safety which the invitee may make<sup>138</sup> or the likelihood

136. It is often found in cases where knowledge of the defect removes unreasonable danger, and hence removes negligence. See cases cited notes 112-115 *supra*.

It is also often found in cases dealing with spectators at sporting events. See, e.g., *Barrett v. Faltico*, 117 F. Supp. 95 (E.D. Wash. 1953); cases cited in James, *Assumption of Risk*, 61 *YALE L.J.* 141, 148, 149 (1953). In the baseball cases, the decisions largely represent a judgment that the ordinary arrangement of stands is reasonably safe. The same is true of hockey cases where liability is denied. Perhaps, however, the auto racing cases do not lend themselves to such an explanation. See Keeton, *Personal Injuries Resulting from Open and Obvious Conditions*, 100 *U. OF PA. L. REV.* 629 (1952); Malone, *Contributory Negligence and the Landowner Cases*, 29 *MINN. L. REV.* 61, 74-80 (1945).

137. *Swift & Co. v. Schuster*, 192 F.2d 615 (10th Cir. 1951) (jury allowed to find the condition—no step for ascending and descending a 22-inch platform—a breach of duty towards plaintiff, a government inspector, though he was perfectly familiar with it). There was a dissent. See Note, 27 *NOTRE DAME LAW.* 468 (1952).

In *Williamson v. Derry Electric Co.*, 89 N.H. 216, 196 Atl. 265 (1938), plaintiff fell on a waxed office floor slippery when wet. Defendant asked for an instruction "that it was liable only if due care would have informed it that the plaintiff was exposed to an undue danger which it had no reason to believe she would appreciate." *Id.* at 218, 196 Atl. at 266. Refusal to give this instruction was upheld. The court said that the apparent nature of the danger would bear on the question of defendant's negligence but would not be conclusive of due care. "The invitation to enter a dangerous place was extended, and the responsibility for the danger was not, as matter of law, discharged by the plaintiff's notice and appreciation of it." *Ibid.* And again: "The duty to protect [plaintiff] was not necessarily shifted to a duty of her own to protect herself by reason of her appreciation of the danger." *Id.* at 218, 196 Atl. at 267. The duties would be concurrent. While defendant here was a public utility, this fact is not mentioned by the court. Indeed, it does not appear whether plaintiff came as a patron of a public utility (and so entitled to enter as of right) or in some other capacity (e.g., looking for work). At any rate the court expressly deals with her "invitation to enter," and does not, contrary to *RESTATEMENT, TORTS* § 347, comment *a* (1934), rest the duty on her right to enter without regard to the occupier's consent.

In *Mitchell v. Barton & Co.*, 126 Wash. 232, 217 Pac. 993 (1923) plaintiff, a meat inspector, was injured when he slipped into the blades of a fan. Plaintiff knew of the condition and was holding his hand in front of the fan to test the air current it made. A jury finding of negligence was upheld.

In *McCready v. Southern Pac. Co.*, 26 F.2d 569 (9th Cir. 1928), plaintiff, an independent contractor's employee, was hurt by contact with high tension wires. Defendant claimed that its only duty was to warn, but the court answered that it did "not recognize it to be a universal rule that an owner who invites the public upon his premises for business or pleasure may, in the absence of reasonable necessity, maintain thereon dangerous agencies, as wires charged with deadly currents of electricity, in such places as to endanger life and limb, and escape liability by maintaining danger signals or otherwise advising the public." 26 F.2d at 570. See also *Revels v. Southern Cal. Edison Co.*, 113 Cal. App. 2d 673, 248 P.2d 986 (1952); *Reboni v. Case Bros., Inc.*, 137 Conn. 501, 78 A.2d 887 (1951).

138. See cases cited first paragraph of note 118 *supra*.

that his attention will be distracted,<sup>139</sup> in order to cut down the notion of what is obvious or the adequacy of warning. And the latter is often a jury question even under the *Restatement* rule. It is not surprising, then, that relatively few decisions have depended on the *Restatement* rule alone for denying liability.<sup>140</sup>

### *Contributory Negligence:*

In cases where the invitee's recovery has been denied, contributory negligence has often played an important role,<sup>141</sup> and is sometimes hopelessly confused with the duty issue. If contributory negligence would always bar an invitee who was injured by a condition of the premises which he knew and appreciated, the confusion would do little practical harm. Also it would make little difference whether the *Restatement* rule or the rule of ordinary negligence were adopted to prescribe the invitor's duty.

But there are several situations in which a plaintiff will not be barred by contributory negligence although he encountered a known danger. For one, even though he is negligent, he will not necessarily be barred if a comparative or proportional negligence statute is in effect.<sup>142</sup> For another, it is not necessarily negligent for a plaintiff knowingly and deliberately to encounter a danger which it is negligent for defendant to maintain. Thus a traveler may knowingly use a defective sidewalk,<sup>143</sup> or a tenant a defective common stairway,<sup>144</sup> without being negligent if the use was reasonable under all the circumstances. We simply cannot go about in life without constantly running into dangers that other people have unreasonably put up to us. And finally, even where it would be negligent to encounter deliberately the known danger, plaintiff may not be negligent (1) if he was pushed against it by someone else, or (2) if there was a sudden emergency, or (3) if he slipped (without negligence) and so came in contact with it,<sup>145</sup> or (4) if he was in the charge of some-

139. See cases cited note 119 *supra*. For other cases tending to undermine the *Restatement* rule, see note 120 *supra*.

140. Most of the decisions denying liability are rested equally on the ground of contributory negligence, *Curtis v. Traders Nat. Bank*, 314 Ky. 765, 237 S.W.2d 76 (1951); *Price v. Taylor Co.*, 302 Ky. 736, 196 S.W.2d 312 (1946); *Tehan v. Freed*, 261 App. Div. 969, 25 N.Y.S.2d 882 (2d Dep't 1941); *Simmonds v. Penn Fruit Co.*, 354 Pa. 154, 47 A.2d 231 (1946), or represent situations where the condition is not unreasonably dangerous. See cases cited notes 112-114 *supra*, and the spectator cases referred to in note 136 *supra*. Most of the cases cited *supra* note 135, with the possible exception of *Paubel v. Hitz*, can be explained on one or the other of these grounds.

141. See note 140 *supra*.

142. See Prosser, *Comparative Negligence*, 41 CALIF. L. REV. 1, 51 MICH. L. REV. 465 (1953); James, *Contributory Negligence*, 62 YALE L.J. 691, 733 (1953).

143. See *Nichols v. Town of Laurens*, 96 Iowa 388, 65 N.W. 335 (1895); *Campion v. City of Rochester*, 202 Minn. 136, 277 N.W. 422 (1938).

144. See *Gibson v. Hoppman*, 108 Conn. 401, 143 Atl. 635 (1928); *Roman v. King*, 289 Mo. 641, 233 S.W. 161 (1921); cases cited note 128 *supra*. See also James, *Assumption of Risk*, 61 YALE L.J. 141, 144, 145 (1952).

145. See cases cited note 127 *supra*.

one whose negligence was not imputed to him, as where the danger on defendant's land was deliberately encountered by the driver of a taxi in which plaintiff was riding.<sup>146</sup>

These situations show that the invitee will not always be barred by his self-exposure to known dangers on the premises. This means that the *Restatement* rule will sometimes bar a plaintiff, who has not been negligent, from recovery against a defendant who has acquainted the plaintiff with the condition which would be negligent towards him if a full duty of care were owed.

#### *Assumption of Risk:*

Perhaps a word should be said about the concept of assumption of risk in these cases. It is often mentioned in case and comment,<sup>147</sup> but it contributes nothing except ambiguity and confusion to a discussion of the occupier's liability. Sometimes it is used to refer to the plaintiff's unreasonable self-exposure to a known danger.<sup>148</sup> This is simply a form of contributory negligence. Sometimes it is used to describe the notion that an invitee must accept the obvious conditions on which the invitation is offered, whether or not they constitute unreasonable dangers.<sup>149</sup> This is simply a backhanded way of stating the *Restatement* rule. In this context at least, there is no *tertium quid* to which the concept of assumed risk may validly apply. Attempts to find one simply obfuscate the issue.<sup>150</sup>

146. See James, *Imputed Contributory Negligence*, 14 L.A. L. REV. 340 (1954).

147. See, e.g., *Meyers v. Paro Realty & M. Co.*, 128 Conn. 249, 21 A.2d 379 (1941); *Smith v. City of Cuyahoga Falls*, 73 Ohio App. 22, 53 N.E.2d 670 (1943); *Caron v. Grays Harbor County*, 18 Wash.2d 397, 139 P.2d 626 (1943). See Keeton, *supra* note 136; Comments, 5 BAYLOR L. REV. 161, 176 (1953).

148. See *Wallace v. Great A. & P. Tea Co.*, 85 F. Supp. 296 (N.D.W. Va. 1949); the *Smith* and *Caron* cases, *supra* note 147.

149. In the typical baseball spectator case, these dangers are not unreasonable and the proprietor is not negligent in maintaining the condition. See note 136 *supra*. In cases like *Paubel v. Hitz*, 339 Mo. 274, 96 S.W.2d 369 (1936), the condition is unreasonably dangerous and the *Restatement* rule has the effect of "excusing a defendant whose negligent conduct caused injury to the plaintiff." Keeton, *Personal Injuries Resulting from Open and Obvious Conditions*, 100 U. OF PA. L. REV. 629, 633 (1952).

150. See *Meyers v. Paro Realty & M. Co.*, *supra* note 147; Comment, 5 BAYLOR L. REV. 161, 165 (1953); Comment, *id.* at 176. Keeton, too, suggests that the defense "serves a purpose here, not served by the limitation of the defendant's duty," because even where the occupier negligently fails to warn of a latent peril, he will be exonerated "if the visitor should become aware of the danger." Keeton, *supra* note 149, at 634. But defendant's duty under the *Restatement* is only to warn, and such a duty is not owed to those who know. Or if defendant breached this duty before plaintiff's discovery, the breach can no longer be a proximate cause of the injury. As Malone has said: "If the duty to warn were in all cases an adequate substitute for the duty to prepare, . . . all the so-called voluntary assumption of risk cases where the business guest encounters a known peril could be easily rationalized as instances where failure of the management . . . to warn was not a cause in fact of the injury." Malone, *Contributory Negligence and the Landowner Cases*, 29 MINN. L. REV. 61, 83 n.45 (1945).

## PERSONS ENTERING PREMISES AS OF RIGHT

The person who enters defendant's premises as of right does not fit very neatly into any of the above categories. By definition he is not a trespasser.<sup>151</sup> And a right to enter also stands on a footing different from the privilege which the occupier is free to withhold or to give by invitation or permission. This does not mean that visitors in their own right should all be accorded the same treatment. They are not, and probably should not be. Rather it casts further doubt on the utility of the present system of fairly rigid classifications.

*Entrants Classified as Invitees:*

The plaintiff's right to enter premises may be derived from the defendant's own act or agreement. This includes cases in which defendant is a common carrier or other public utility, devoting part of its premises to the use of its patrons (of whom plaintiff is one),<sup>152</sup> or in which defendant has leased different parts of his premises, giving his tenants the right to use common hallways, appurtenances, and approaches which remain in his possession.<sup>153</sup> Such visitors are treated as invitees,<sup>154</sup> with this important exception: the occupier does not satisfy his duty to these invitees by merely warning them of the danger, unless by doing so he renders the condition reasonably safe for their use.<sup>155</sup> His duty is the full one to use reasonable care under all the circumstances.

This does not mean that the occupier is an insurer of the safety of his premises.<sup>156</sup> Even if a condition has in fact proven dangerous by injuring plaintiff, defendant will not be held liable (1) if the condition was not unreasonably dangerous to those with knowledge of it, and due care was used to bring that knowledge home,<sup>157</sup> or (2) if the condition, though unreasonably dangerous, could not have been prevented or removed by the exercise of

151. See *Shypulski v. Waldorf Paper Products Co.*, 232 Minn. 394, 396-7, 45 N.W.2d 549, 550-51 (1951). See also James, *Tort Liability of Occupiers I*, 63 YALE L.J. 144 (1953); RESTATEMENT, TORTS § 329, comment *b* (1934).

152. 10 AM. JUR., Carriers § 1032 (1937); 13 C.J.S., Carriers § 530 (1939); RESTATEMENT, TORTS § 347 (1934).

153. RESTATEMENT, TORTS § 360 (1934). The tenant's licensees and invitees generally stand *as to the landlord* in the tenant's shoes, so that the landlord may owe a tenant's social guest a higher duty than he owes to his own business visitor. *Id.*, comments *a, b*.

154. See 32 AM. JUR., Landlord & Tenant §§ 652 *et seq.*, 662, 665 (1941); 52 C.J.S., Landlord & Tenant § 417(b) (1947); authorities cited notes 152-3 *supra*.

155. See ELDREDGE, MODERN TORT PROBLEMS 120-21 (1941); RESTATEMENT, TORTS §§ 343(c) (ii); 347, comment *a*; 360, comments *a, b* (1934); Notes, 25 A.L.R.2d 364, 444, 496 (1952).

156. See 38 AM. JUR., Negligence §§ 92, 291 (1941); 65 C.J.S., Negligence § 74 (1950).

157. See, *e.g.*, *Alsup v. Saratoga Hotel, Inc.*, 71 Idaho 229, 229 P.2d 985 (1951); cases cited notes 112-115 *supra*.

reasonable care,<sup>158</sup> or (3) if the occupier has temporarily and reasonably removed the place of danger from the use of visitors, has taken reasonable precautions to guard them from the danger by warning or otherwise, and has provided such alternative facilities as are reasonable under the circumstances,<sup>159</sup> or (4) if the visitor is barred by contributory negligence.<sup>160</sup> In short, the occupier's liability in these cases is closely analogous to that of a municipality towards highway travelers with reference to its sidewalks and streets.<sup>161</sup>

There is a miscellaneous group of public employees who enter the land in connection with governmental services performed for the occupier,<sup>162</sup> or with governmental regulation of the occupier's business.<sup>163</sup> Such visitors are generally assimilated to invitees,<sup>164</sup> without noting the distinction just mentioned for utility patrons or tenants.<sup>165</sup> Classification of these public employees as invitees is reasoned in terms of the economic benefit theory.<sup>166</sup>

158. *Uchman v. Polish Nat. Home, Inc.*, 116 N.E.2d 145 (Mass. 1953) (banana peel); *Adcock v. Sattler's Inc.*, 127 N.Y.S.2d 412 (App. Div. 4th Dep't 1954) (same). See James, *Proof of the Breach in Negligence Cases*, 37 VA. L. REV. 179, 191 (1951).

159. This situation is analogous to that of a state's closing of a highway for repairs. See *Jones v. Collins*, 177 Mass. 444, 59 N.E. 64 (1901); *Johnson v. New York*, 208 N.Y. 77, 101 N.E. 691 (1913); *Fenske v. Kramp Construction Co.*, 207 Wisc. 397, 241 N.W. 349 (1932). Cf. *Phillips v. Library Co. of Burlington*, 55 N.J.L. 307, 317-19, 27 Atl. 478, 481-2 (1893).

160. Or, of course, if any other essential element of a tort action, e.g., proximate cause, is lacking, or any adequate defense exists, e.g., release, statute of limitations.

161. See 25 AM. JUR., Highways §§ 348, 373 (1940); 63 C.J.S., Municipal Corporations §§ 782, 802-03 (1950).

162. *Sheffield Co. v. Phillips*, 69 Ga. App. 41, 24 S.E.2d 834 (1943) (meter reader); *Sutton v. Penn.*, 238 Ill. App. 182 (1925) (United States postman); *Toomey v. Sanborn*, 146 Mass. 28, 14 N.E. 921 (1888) (garbage collector); *Paubel v. Hitz*, 339 Mo. 274, 96 S.W.2d 369 (1936) (United States postman).

163. *Swift & Co. v. Schuster*, 192 F.2d 615 (10th Cir. 1951) (meat inspector); *Miller v. Pacific Constructors, Inc.*, 68 Cal. App. 2d 529, 157 P.2d 57 (1945) (United States Bureau of Reclamation inspector); *Fred Howland, Inc. v. Morris*, 143 Fla. 189, 196 So. 472 (1940) (building inspector); *Anderson & Nelson Dist. Co. v. Hair*, 103 Ky. 196, 44 S.W. 658 (1898) (United States revenue officer); *Jennings v. Industrial Paper Stock Co.*, 248 S.W.2d 43 (Mo. App. 1952) (public health inspector); *Boneau v. Swift & Co.*, 66 S.W.2d 172 (Mo. App. 1934) (live stock inspector). See generally cases collected in Note, 128 A.L.R. 1021 (1940).

164. See cases cited notes 162-3 *supra*. And the occupier is not liable for dangerous conditions if he gives adequate warning. See text at page 623 *supra*. In *Paubel v. Hitz*, 339 Mo. 274, 96 S.W.2d 369 (1936), a postman was denied recovery for an obvious danger on the reasoning familiar in invitee cases, while in *Swift & Co. v. Schuster*, 192 F.2d 615 (10th Cir. 1951), a meat inspector was allowed recovery for such a danger because the court rejected the *Restatement's* assumption of risk approach to invitee cases generally. In neither case was there any mention of the defendant's legal duty to receive such a visitor.

165. See text at note 155 *supra*.

166. See *Jennings v. Industrial Paper Stock Co.*, 248 S.W.2d 43, 46 (Mo. App. 1952) ("The basis for the holding, as stated in almost all of [these] cases, is that the services

Thus a Florida court, in distinguishing cases of policemen and firemen, has said: "A building inspector, while his presence is in part a necessity, is present also by virtue of an implied contractual relationship with the city, wherein the city grants a permit to build, provided the city, through its authorized agents, is allowed to make detailed inspections of the component parts of the building as they are assembled. The inspector is on the premises for a purpose connected with the business in which the owner or occupant is engaged."<sup>167</sup>

It is unrealistic to contend that there is any economic benefit arising out of an implied contract in these cases. The functions of the building inspector, revenue agent, or health inspector are thrust upon the occupier by the compulsion of law as an unsought and often resented price of building or of doing business. The freedom of choice to admit or exclude the visitor that is so essential to ordinary invitation is entirely lacking; the only benefit that accrues to the occupier is the fruit of compulsion. The building inspector, for example, serves the paramount public interest, and any benefit to the occupier is secondary or incidental to that. It does no harm to call these visitors invitees, however, since the classification extends to them the protection of the duty of care which is warranted by the likelihood of their presence.<sup>168</sup>

#### *Entrants Classified as Licensees:*

Policemen and firemen, on the other hand, are generally treated as licensees and not as invitees, even if the occupier has summoned them to protect himself or his property.<sup>169</sup> These officers owe a duty to the public to apprehend criminals or extinguish fires; the right to enter private property is a part of that duty, and does not depend on the private summons. Indeed, if the conditions for the exercise of the public duty exist, the occupier would not be privileged to exclude the officer. Quite properly, therefore, courts have found no invitation.<sup>170</sup> But they have classified these officers as licensees,<sup>171</sup> and

---

rendered are beneficial to the defendant as well as to the public; that there is a mutuality of interest. . .").

Contrast this notion of mutual as well as public benefit with that in the police and firemen cases, pages 634-8 *infra*.

167. *Fred Howland, Inc. v. Morris*, 143 Fla. 189, 199-200, 196 So. 472, 476 (1940).

168. See *Meiers v. Fred Koch Brewery*, 229 N.Y. 10, 16, 127 N.E. 491, 492-3 (1920).

169. *Lunt v. Post Printing & Pub. Co.*, 48 Colo. 316, 110 Pac. 203 (1910) (fireman); *Carroll v. Hemenway*, 315 Mass. 45, 51 N.E.2d 952 (1943) (policeman); *Wynn v. Sullivan*, 294 Mass. 562, 3 N.E.2d 236 (1936) (same); *Hamilton v. Minneapolis Desk Mfg. Co.*, 78 Minn. 3, 80 N.W. 693 (1899) (fireman). See generally cases collected in Notes, 13 A.L.R. 637 (1921); 141 *id.* 584 (1942). See also Bohlen, *The Duty of a Landowner Towards Those Entering His Premises of Their Own Right*, 69 U. OF PA. L. REV. 142, 237, 340 (1921), reprinted in BOHLEN, *STUDIES IN THE LAW OF TORTS* 156 (1926); *RESTATEMENT, TORTS* §§ 345, 346 (1934); Comment, 35 MICH. L. REV. 1157 (1937).

170. See *Shypulski v. Waldorf Paper Products Co.*, 232 Minn. 394, 45 N.W.2d 549 (1951), and cases cited therein; authorities cited note 169 *supra*. See also *Meiers v. Fred Koch Brewery*, 229 N.Y. 10, 127 N.E. 491 (1920).

171. See cases cited note 169 *supra*.

Compare *Blatt v. McBarron*, 161 Mass. 21, 36 N.E. 468 (1894) (process server mis-

while it may be a tolerable figure of speech to refer to a license-in-law, there is no more actual consent in these cases than there is invitation. And when there is, the occasional consent like the occasional invitation is legally insignificant.<sup>172</sup> Even if there were good reason to construct a class of visitors on the basis of the occupier's consent, therefore, there would be no better conceptual reason than a poor figure of speech for putting policemen and firemen into that class.

There are, however, other reasons besides the concepts of consent and invitation that may point to limited liability in these cases. One that the courts have stressed is the infrequency of visits by policemen and firemen, and the unpredictability of the time and place of their visits. A duty to make all the premises reasonably safe for them all the time would therefore be a severe burden.<sup>173</sup>

The force of this argument is weakened by pointing out that whatever merit it has would be accommodated by the rule of reason in the negligence concept.<sup>174</sup> The duty of reasonable care would not require a severe burden of extensive preparation, but only reasonable precautions against foreseeably unreasonable danger. Dangers need not be removed from places where they are not likely to be encountered, and pitfalls are not unreasonable dangers in places where visitors may be expected to find and avoid them.<sup>175</sup> Moreover, if the dangerous condition is located on a part of the premises prepared for the reception of invitees,<sup>176</sup> it already involves a breach of duty.

A Colorado court<sup>177</sup> has reasoned that the high public duties of these officers should not be complicated by reciprocal private rights that might create confusion and conflicts of interest in the officer's mind.<sup>178</sup> The obligation to compensate injured officers is a public one "of providing generously, in some proper way by public taxation" for injury or death in the line of duty.<sup>179</sup> The first part of this argument seems highly unrealistic; it is more

---

takenly entering wrong premises is a trespasser), *with* Kallum v. Wheeler, 129 Tex. 74, 101 S.W.2d 225 (1937) (barber examiner mistakenly entering wrong passageway is an invitee).

172. *Smith v. Twin State Gas & Electric Co.*, 83 N.H. 439, 446, 144 Atl. 57, 60-1 (1928) ("It is difficult to perceive how the landowner is entitled, by force of the law as to licensees, to protection from liability for defective conditions to a fireman, who enters his premises for the purpose of giving him protection. And there is much force in the reasoning in *Meiers v. Brewery*, 229 N.Y. 10, which holds that firemen are neither licensees nor invitees of the owner of the premises. . . , their right of entry being given by law regardless of the owner's attitude about it."); cases cited note 187 *infra*.

173. See *Shypulski v. Waldorf Paper Products Co.*, 232 Minn. 394, 397, 45 N.W.2d 549, 551 (1951); BOHLEN, *STUDIES IN THE LAW OF TORTS* 193-4 (1926).

174. See *Meiers v. Fred Koch Brewery*, 229 N.Y. 10, 16, 127 N.E. 491, 493 (1920); James, *Nature of Negligence*, 3 UTAH L. REV. 275 (1953).

175. See *Paubel v. Hitz*, 339 Mo. 274, 96 S.W.2d 369 (1936); text at notes 112-118 *supra*.

176. See *Meiers v. Fred Koch Brewery*, 229 N.Y. 10, 127 N.E. 491 (1920). See also HARPER, *LAW OF TORTS* 224-5 (1933).

177. *Lunt v. Post Printing & Pub. Co.*, 48 Colo. 316, 110 Pac. 203 (1910).

178. *Id.* at 337-8, 110 Pac. at 210.

179. *Ibid.*

than doubtful that the contemplation of tort recovery would play any appreciable part in the mind of an officer set on catching a thief or putting out a fire. The second part of the argument, however, deserves serious consideration. The public obligation to compensate certainly does exist. Moreover, there is very good reason to feel that such compensation, as far as it goes, should supplant tort liability, just as workmen's compensation does, and for very much the same reason. But compensation by way of damages far exceeds the limited amounts payable under any present or likely future system of public compensation.<sup>180</sup> If tort liability exists, therefore, the officer should not be prevented from recovering from the tortfeasor the amount by which tort damages exceed compensation.<sup>181</sup>

As another reason for limiting liability, it has been suggested that landowners would be deterred from calling policemen or firemen if their tort liability were extended.<sup>182</sup> But surely this suggestion has no weight. It is inconceivable that an occupier—even if he knew the extent of his legal duties in the case of a possible hypothetical injury—would be deterred by so nebulous a thought when the threat to his life or his property is imminent enough for him to call a policeman or turn in an alarm. People do not stop milk and grocery deliveries or refrain from having their roofs repaired because of the possible liability to invitees.

A final possible reason for limiting liability is particularly applicable to firemen. An occupier's negligence in starting a fire affords no ground of recovery for the fireman who is hurt while fighting it.<sup>183</sup> If the person injured is the owner of property threatened by the fire,<sup>184</sup> or a mere volunteer,<sup>185</sup> he

180. For schedules of benefits receivable under workmen's compensation statutes, see 2 LARSON, *THE LAW OF WORKMEN'S COMPENSATION* App. B, tables 8-11 (1952). Jury verdicts in negligence cases are often far more than \$10,000, which is about the average maximum recovery permitted under workmen's compensation. See Belli, *The Adequate Award*, 39 CALIF. L. REV. 1 (1951); CLARK & SHULMAN, *A STUDY OF LAW ADMINISTRATION IN CONNECTICUT* 32 *et seq.* (1937).

Each volume of the *NACCA Law Journal* contains a section listing verdicts or awards exceeding \$50,000. See, *e.g.*, 12 NACCA L.J. 264 *et seq.* (1953).

181. The injured employee generally has a right to recover from the tortfeasor the excess of the damage beyond his workmen's compensation payments. 2 LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 71.20 (1952). See James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U.L. REV. 537, 544 *et seq.* (1952).

182. See *Shypulski v. Waldorf Paper Products Co.*, 232 Minn. 394, 397-8, 45 N.W.2d 549, 551 (1951); *Suttie v. Sun Oil Co.*, 15 Pa. D. & C. 3, 5-6 (1931).

183. *Eckert v. Refiners Oil Co.*, 17 Ohio App. 221 (1923); *Cities Service Oil Co. v. Dixon*, 14 Ohio Law Abstracts 203 (1932); *Suttie v. Sun Oil Co.*, 15 Pa. D. & C. 3 (1931). *But cf.* *Houston Belt & Terminal Ry. v. O'Leary*, 136 S.W. 601 (Tex. Civ. App. 1911) (negligent handling of car of fireworks which started fire and led to explosions continuing after fireman's presence, held to constitute active negligence to fireman).

184. *Illinois Cent. R.R. v. Siler*, 229 Ill. 390, 82 N.E. 362 (1907); *St. Louis-S.F.R.R. v. Ginn*, 264 P.2d 351 (Okla. 1953); 22 AM. JUR., *Fires* § 40 (1939).

185. *Liming v. Illinois Cent. R.R.*, 81 Iowa 246, 47 N.W. 66 (1890); 22 AM. JUR., *Fires* § 40 (1939).

may recover from one who negligently set the fire. So, if recovery is to be denied to the fireman in all cases, it must be on some basis other than the absence of probable harm, proximate cause, or the other elements of an ordinary negligence action. It may be urged that the defendant as a taxpayer has paid his pro rata share for fire protection and that the compensation for injuries incurred in fighting fires, even those negligently set, should be considered a part of the cost of fire protection and paid out of the funds towards which he has already contributed. This argument would put the occupier in somewhat the same position as the insured employer under workmen's compensation,<sup>186</sup> though the analogy does not seem close enough to justify the result.

In other situations in which policemen and firemen are called licensees, the more liberal decisions have in fact substantially afforded them the protection of specific duties which do not vary greatly from those required by reasonable care.<sup>187</sup> The occupier must, of course, refrain from intentionally or wantonly injuring such officers,<sup>188</sup> and probably from any active negligence towards them.<sup>189</sup> And while there is no duty to prepare premises generally for the possible presence of officers, or to discover dangers that may lurk therein,<sup>190</sup> a statute may create a specific duty (*e.g.*, not to keep more than a specified quantity of explosives<sup>191</sup>). If a court finds that officers are within the protection of the statute, its breach may afford them a ground of recovery.<sup>192</sup> Moreover, the occupier has been held liable for failing to use care

---

186. See 2 LARSON, *THE LAW OF WORKMEN'S COMPENSATION* §71.00 *et seq.* (1952); 1 SCHNEIDER, *WORKMEN'S COMPENSATION* §§ 90, 98 (3d ed. 1941). See also James, *Social Insurance and Tort Liability: The Problems of Alternative Remedies*, 27 N.Y.U.L. REV. 537, 543 *et seq.* (1952).

187. See *Ryan v. Chicago & N.W. Ry.*, 315 Ill. App. 65, 42 N.E.2d 128 (1942); *Meiers v. Fred Koch Brewery*, 229 N.Y. 10, 127 N.E. 491 (1920); RESTATEMENT, TORTS § 345 (1934). Cf. *Shypulski v. Waldorf Paper Products Co.*, 232 Minn. 394, 45 N.W.2d 549 (1951).

188. This follows from the classification of police officers and firemen at least as licensees. See page 610 *supra*. And it is conceded by even the most reactionary decisions. See *Shypulski v. Waldorf Paper Products Co.*, 232 Minn. 394, 399, 45 N.W.2d 549, 552 (1951) (citing cases); cases cited note 194 *infra*.

189. *Ryan v. Chicago & N.W. Ry.*, 315 Ill. App. 65, 42 N.E.2d 128 (1942); *Houston Belt & Terminal Ry. v. O'Leary*, 136 S.W. 601 (Tex. Civ. App. 1911) (described *supra* note 183).

190. *Lunt v. Post Printing & Pub. Co.*, 48 Colo. 316, 110 Pac. 203 (1910) (nitric acid in printing plant); *Todd v. Armour & Co.*, 44 Ga. App. 609, 162 S.E. 394 (1931) (unguarded stair well some distance from sidewalk); *Pincock v. McCoy*, 48 Idaho 227, 281 Pac. 371 (1929) (unprotected hatchway in rear of building); *Gibson v. Leonard*, 143 Ill. 182, 32 N.E. 182 (1892) (freight elevator out of order); *Woodruff v. Bowen*, 136 Ind. 431, 34 N.E. 1113 (1893) (roof of building); *Steinwedel v. Hilbert*, 149 Md. 121, 131 Atl. 44 (1925) (open elevator shaft in interior of premises); *Mulcrone v. Wagner*, 212 Minn. 478, 4 N.W.2d 97 (1942) (step in employee's stairway); *Burroughs Adding Mach. Co. v. Fryar*, 132 Tenn. 612, 179 S.W. 127 (1915) (transom in interior of premises).

191. See, *e.g.*, 4A MASS. L. ANN. c. 148, §§ 9, 13, 23 (1950).

192. Compare *Bandosz v. A. Daigger & Co.*, 255 Ill. App. 494 (1930) (violation of ordinance regulating storage of explosives basis for defendant's liability to fireman);

to warn an officer of concealed perils known to the occupier.<sup>193</sup> Some of the older cases suggest that this would be so only if the failure was wanton or wilful,<sup>194</sup> but insistence on this is giving way as to licensees generally.<sup>195</sup> Finally, some cases require the occupier to use care to keep those parts of the premises which they have prepared for invitees reasonably safe for officers as well as for invitees.<sup>196</sup>

These specific rules for policemen and firemen all fit in, more or less, with general concepts of negligence—at least if such visitors are afforded the protection of a full duty of care in places where invitees are to be expected.<sup>197</sup> This is as it should be. All officers, inspectors as well as policemen and firemen, derive their right of entry from law and not from either the consent or the invitation of the occupier. The protection accorded to such a visitor should therefore be prescribed by law to fit the circumstances of the visit, and not governed blindly by a false analogy to invitation or consent.

*Maloney v. Hearst Hotels Corp.*, 274 N.Y. 106, 8 N.E.2d 296 (1937) (same), *with Aldworth v. F. W. Woolworth Co.*, 295 Mass. 344, 3 N.E.2d 1008 (1936) (statute requiring fire escapes to be kept in good repair found not to benefit fireman standing thereon to fight blaze on adjoining property). See also *Cameron v. Kenyon-Connell Commercial Co.*, 22 Mont. 312, 56 Pac. 358 (1899); *Campbell v. Pure Oil Co.*, 15 N.J. Misc. 723, 194 Atl. 873 (Sup. Ct. 1937).

*Compare Parker v. Barnard*, 135 Mass. 116 (1882) (violation of statute requiring protection of elevator shaft basis for liability to policeman), *with Carroll v. Hemenway*, 315 Mass. 45, 46, 51 N.E.2d 952, 953 (1943) (*Parker, supra*, overruled; no liability because no violation of common law duty).

193. *James v. Cities Service Oil Co.*, 66 Ohio App. 87, 31 N.E.2d 872 (1939); *Jenkins v. 313-321 West 37th St. Corp.*, 284 N.Y. 397, 31 N.E.2d 503 (1940); *Shypulski v. Waldorf Paper Products Co.*, 232 Minn. 394, 45 N.W.2d 549 (1951). See also *Smith v. Twin State Gas & Electric Co.*, 83 N.H. 439, 144 Atl. 57, 783 (1928).

194. *Lunt v. Post Printing & Pub. Co.*, 48 Colo. 316, 329-35, 110 Pac. 203, 207-09 (1910); *Aldworth v. F. W. Woolworth Co.*, 295 Mass. 344, 347, 3 N.E.2d 1008, 1010 (1936).

195. See page 610 *supra*.

196. See cases cited note 197 *infra*. Few if any of the cases denying liability have dealt with this situation, but their language is often broad enough to deny liability here also. See cases cited note 190 *supra*. *Cf. Aldworth v. F. W. Woolworth Co.*, 295 Mass. 344, 3 N.E.2d 1008 (1936) (no liability to fireman for defect in fire escape).

197. See RESTATEMENT, TORTS §345 (1934); BOHLEN, STUDIES IN THE LAW OF TORTS 161 (1926); *Meiers v. Fred Koch Brewery*, 229 N.Y. 10, 127 N.E. 491 (1920) (reasonable care under all the circumstances); see *Shypulski v. Waldorf Paper Products Co.*, 232 Minn. 394, 398-9, 45 N.W.2d 549, 552 (1951) (duty to warn). *Cf. Ryan v. Chicago & N.W. Ry.*, 315 Ill. App. 65, 42 N.E.2d 128 (1942) (plaintiff-policeman negligently run down by train after arresting thief chased into railroad yards; defendant's duty was that of reasonable care). See also James, *Accident Liability: Some Wartime Developments*, 55 YALE L.J. 365, 385-6 (1946).