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Business Visitors

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NOTES

Business Visitors. — A business visitor has been defined in the Restatement of Torts¹ as 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.

This was undoubtedly derived from the leading case of *Indermaur v. Dames*² where the general rule was laid down that the owner or occupier of land is under an affirmative duty to protect from dangers of which he knows and those which he might discover with reasonable care, those who enter premises upon business which concerns the occupier. The court said,

“The common case is that of a customer in a shop but it is obvious that this is only one of a class; for whether the customer is merely chaffering at the time, or actually buys or not, he is, according to undoubted authority, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger of which the occupier knows or ought to know. This protection does not depend on the fact of a contract being entered into in the way of the shop keeper’s business during the stay of the customer, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper, with a view to business which concerns himself.”

When a condition is present, whether as to activities conducted upon the land or to disrepair of premises,³ the owner or occupier has the duty to use ordinary care to remedy the defect or to warn the business visitor (more commonly referred to as “invitee”) of the danger.⁴ The remedy of repair is usually more expedient in the long run, however, since that is less trouble than warning of dangers. It appears accurate enough to say that the duty is to keep premises in repair.

The problem arises as to precisely which individuals are to be included in the category of business visitor. Those that offer little difficulty may be divided into three groups: (1) places of business, (2) stores; (3) places of amusement. In these instances the courts have soundly held that the interpretation of business visitor should include visitors to establishments afore mentioned. The common example is the customer in a store,⁵ for the potential gain in such instances is not difficult to locate. The same conclusion has been reached when the patron or visitor was at a movie,⁶ hotel,⁷ filling station,⁸ restaurant,⁹ bathing beach,¹⁰ or fune-

1 Restatement of the Law of Torts, Sec. 332.

2 (1866) L.R. I C.P. 274; 14 Law Times Rep. 484.

3 Mahoney v. Great Atlantic & Pacific Tea Co. 269 Mass 459 169 N.E. 424 (1929).

4 Haefeli v. Woodruff Engineering Co., Inc., 255 N.Y. 442; 175 N.E. 123 (1931).

5 McDermott v. Sallaway, 198 Mass. 517; 21 L.R.A. (N.S.) 456.

6 Mears v. Kelley, 59 Ohio App. 159; 17 N.E. 2d 388 (1938).

7 Hotel Criswell v. Bankers Mort. Co. 128 Kansas 609; 278 P. 722 (1929).

8 Brett v. Century Petroleum Co. 302 Ill. App. 99; 23 N.E. 2d 359 (1939).

9 Holmes v. Ginter Rest. Co. 54 Fed. 2d 876 (1932).

10 Boyce v. Union Pac. Ry. Co. 8 Utah 353. 31 Pac. 450 (1892).

al home.¹¹ The rule has been extended to include patrons of a fair,¹² relatives who bring a workman his lunch,¹³ or friends and peddlers bringing a train clerk his meals.¹⁴ These decisions proceed upon the theory of pecuniary gain the occupier or owner derives, or expects to derive, from the visitor. However, if the person leaves the boundaries that he should respect, and is injured while so doing, no liability for lack of ordinary care is required. In *Southwest Cotton Co. v. Pope*¹⁵ where an agent exceeded his invitation by leaving defendant's office and began a search for him in the cotton gin and feed house, the court held that he was entitled to no more care than an ordinary licensee even though he had a right by invitation to enter the office. The same conclusion was reached by the Massachusetts court in *McNamara v. MacLean*¹⁶ where the plaintiff used the employee's toilet with the defendant's permission.

The difficulty is presented when the individual injured is not of such a nature as to enable his being placed in one of the aforementioned groups. These legal anomalies may be divided into three sections: (1) entry to perform a duty; (2) applicant for employment; and (3) the great overlapping residuary which includes the sub-sections of inspection of property, private contractors and their servants, and invitation by an employee.

Entry to Perform a Duty

It is generally held that one who is on the premises in the performance of his duty occupies the status of an invitee with respect to the obligation owed him by the owner in charge.¹⁷

Prosser said on this question:

"The courts have encountered considerable difficulty in dealing with public officers, firemen and the like, who come upon the land in the exercise of a legal privilege and the performance of a public duty. Such individuals do not fit very well into any categories which the law has established. They are not trespassers, since they are privileged to enter. The privilege is independent of any permission or license of the possessor and there is no right to exclude them."¹⁸

In *Ryan v. Chicago & N.W. Ry. Co.*¹⁹ the court held that a police officer walking on a railway right of way with a prisoner whom he had pursued onto this right of way and arrested, was neither a "trespasser" nor "licensee," but was rightfully on the right of way upon business requir-

¹¹ *Chatkin v. Talariski*, 123 Conn. 157; 193 Atl. 611.

¹² *Eastern Shore of Virginia Agricultural Ass'n v. Le Cato*, 147 Va. 885; 144 S.E. 713.

¹³ *Gallagher v. Humphrey*, 6 L.T. (N.S.) 684 (1862).

¹⁴ *Ill. Central Ry. Co. v. Hopkins*, 100 Ill. App. 594; 65 N.E. 656 (1902).

¹⁵ 25 Ariz. 364; 218 Pac. 152.

¹⁶ 302 Mass. 428; 19 N.E. (2d) 544 (1939).

¹⁷ 45C.J. 817, Sec. 226.

¹⁸ William L. Prosser, *The Law of Torts*, p. 628.

¹⁹ 315 Ill. App. 65; 42 N.E. (2d) 128 (1942).

ing his presence there and the railroad was liable for the policeman's death.

Professor Bohlen said that the cases contra to the doctrine deny recovery "since the right is based on general public necessity and is not dependent on the owner's will."²⁰ This must have been the reasoning in *Aldworth v. F. W. Woolworth Co.*²¹ where a foreman using a fire escape as a vantage point from which to fight a fire in a nearby building, was held to be a "licensee" as regards duty of the occupier of the building to him. The court was generous enough to say, however, that he was not a trespasser.

This case is contra to good reason and public policy, for by it the court established the doctrine of "let the public servant beware." Such a ruling hampers the functioning of these men to prevent spread of fire and loss of adjoining property by denying them protection under the law governing persons upon the premises by an implied invitation. The cases which hold this minority view adhere to it even in cases where the defendant or his servant was the person who summoned the police or turned in the fire alarm.

As was said by the court in *Meiers v. Fred Koch Brewery*²² when referring to a fireman entering defendant's premises,

"He was, it is true, engaged in a public service. Incidentally however, this service requires him to protect the owner's property. The interests of the latter as an individual are involved quite apart from his interest as one of the public. The fireman's purpose is connected with the business in which the occupant is engaged, although he also has higher and greater ends to serve.* * *. The plaintiff never voluntarily accepted to enter with the consequences that follow. As to him there was no consent. There was a command. Under such circumstances it is a misuse of terms to call him a bare licensee."

Application for Employment

The general law on this phase of business visitors is well summed up in *McDonough v. James Reilly Repair and Supply Company*²³ where it was held that "one who comes on the premises of another to seek employment at the invitation of the company is entitled to the exercise of ordinary care for his safety."

Some courts, however, have said that such a person occupies the position of a licensee,²⁴ but these cases do not represent the present authority. They are usually regarded as an invitee and entitled to

²⁰ Francis H. Bohlen, *The Law of Torts* p. 161.

²¹ 295 Mass. 344; 3 N.E. (2d) 1008 (1936).

²² 299 N.Y. 10; 127 N.E. 491; 13 A.L.R. 633 (1920).

²³ 90 N.Y.S. 358; 45 Misc. Rep. 334 (1904).

²⁴ *Sarmore v. Crown Point Iron Co.* 101 N.Y. 391; 4 N.E. 752; 54. Am. Rep. 718 (1886).

²⁵ *Ziegler v. Oil Country Specialties Mfg. Co.* 196 Pac. 602 (1921).

care.²⁵ It was held in *McGuire v. Bridges*,²⁶ a Canadian case, that where the person in charge of premises, in which construction work is being carried on, places thereon a notice stating that laborers are wanted, one who enters pursuant to such notice for the purpose of obtaining employment occupies, while waiting to see the person in charge of employing help, the status of an invitee. Similarly, in *Warner v. Mier Carriage and Buggy Company*,²⁷ Justice Comstock speaking for the court said that "when one of the directors of the corporation shows a man around the plant for the purpose of acquainting him with the duties of the employment he was seeking, he was not a mere licensee. Rather he was an invitee and the corporation owed him a duty to have such premises in a reasonably safe condition."

The conclusion derived for the great majority of cases is that a man should be entitled to work wherever he can find it and as long as he does not exceed the limits of the territory implied by the invitation, the concern should be held liable for any injury that overtakes the prospective employee. This is sound, for businesses should be made to bear the expense of injury to such an invitee in the same manner as it does for accidents to its employees and that is by making the buying public carry the burden by a slightly higher purchase price because of a corresponding increase in production cost.

3. Entry and Inspection of Property by Contractors and their Servants.

"A servant who enters premises on the business of his master, in which business the master and owner or occupant have a mutual interest, occupies the status of an invitee."²⁸ However, some authorities lay down the rule that "except where there are statutory provisions to the contrary, the owner of the real estate does not ordinarily owe to a person employed on his premises in the service of an independent contractor the duty to furnish a safe place to work, and for omission to do so he is not liable in damages."²⁹ This rule is opposed to the weight of authority.

In *El Paso Printing Co. v. Glick*³⁰ an officer of the defendant corporation occupying a building as lessee, requested the owner to send someone to fix a leak causing damage to goods in the basement. The plaintiff, an employee of the owner, came and was injured by the fall of a marble slab which the officer moved from its position against the wall. The court held that the plaintiff was an invitee to whom the defendant was under a duty to use ordinary care.

An even broader interpretation of this rule was applied in *Houston E. & W. T. R. Co. v. Jones*³¹ where it was held that where a railroad's agent requested the county clerk to assist in lowering the railroad's tax

26 49 Can. S.C. 632.

27 26 Ind. App. 350; 58 N.E. 554 (1900).

28 45 Corpus Juris 818 Sec. 227 "Negligence."

29 26 Cyc. 1568.

30 246 S.W. 1076; 263 S.W. 2660 (1934).

31 1 S.W. (2nd) 743 (1927).

assessment, the clerk was an invitee or business visitor at the depot and the railroad should have used ordinary care to protect him. Similarly in *Grabner v. Texas Pacific Coal & Oil Co.*³² where a miner, going into the
32 279 S.W. 550 (1925)

mine with the company's boss for the purpose of negotiating for removal of débris, became an invitee.

I believe that Thompson³³ presents the soundest rule when he said: "On the other hand, the servant of the contractor must be deemed to be on the premises of the proprietor by invitation, express or implied, and therefore owes him the same duty of guarding him against the consequences of hidden dangers on the premises that a proprietor would in any case owe a guest, a customer, or any other person coming by invitation on his premises."

This was followed in *Graham v. J. G. Brandt Shoe Co.*³⁴ wherein the court said: "there can be no doubt that plaintiff, a servant in the employ of a contractor engaged in the task of installing the water pipes was rightfully upon the premises as an invitee. This being true, no one can doubt that the law cast upon defendant the obligation to exercise ordinary care for plaintiff's safety from injury."

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³³ Thompson on Negligence Sec. 680.

³⁴ 165 Mo. App. 361: 147 S.W. 165 (1912).