Marquette Law Review

Volume 49
Issue 2 *November 1965*

Article 7

1965

Invitee or Licensee: Classification of Persons Invited Onto Private Premises

John P. Foley

Invitee or Licensee: Classification of Person Invited onto Private Premises: In *Schlicht v. Thesing,*[1] the court held that the fact that plaintiff was performing babysitting services at the request of the defendants was sufficient to establish her as their invitee, and not a mere social guest who would be a licensee. Plaintiff was the mother of defendant and had come to the defendant's home to babysit with her grandchildren so that defendant could be hospitalized for the delivery of an expected baby. Plaintiff was injured when she fell down the basement stairs after entering a doorway which she mistakenly believed to be another bedroom but which actually was a newly-located basement stairway. The court deemed immaterial the fact that the plaintiff's services were gratuitous.

This decision supports the recent case of *Smith v. Shuda,*[2] where plaintiff, a married daughter, was helping her mother, the defendant, paint a kitchen in defendant's home at the defendant's request. The court approved an instruction which stated the defendant's obligation to the plaintiff to be that of an invitor. In neither of these cases did the plaintiff come within the definition of a "business visitor" as set forth in the *Restatement of Torts,*[3] a condition necessary under this statement of the law to constitute the plaintiff an invitee.

The distinction between an invitee and a licensee is important because the standard of care owed to an invitee is greater than that owed to a mere licensee. The standard of care for the protection of an invitee includes a duty to warn of latent dangers of which the invitor knows, and imposes on the invitor the further duty to inspect the premises to discover possible dangerous conditions of which the invitor does not know.[4] In comparison, the licensee has no right to demand that the land be made safe for his reception, and the licensor has no obligation to inspect the premises to discover dangers which are unknown to the licensor, or to give warning or protection against conditions which are known or should be obvious to the licensee.[5]

For purposes of determining the status of a person on the premises of another, there are two principal theories which have received recognition. The *Restatement of Torts*[6] sets forth the "economic benefit" theory, which imposes the duty of affirmative care on the invitor as the price he must pay for the economic benefit he derives, or expects to derive, from the presence of the visitor.[7] In the alternative, there is the "invitation" theory, so-called because of its emphasis on the aspect

[1] 25 Wis. 2d 436, 130 N.W. 2d 763 (1964).
[2] 22 Wis. 2d 629, 126 N.W. 2d 498 (1964).
[3] RESTATEMENT, TORTS §332 (1934).
[4] Prosser, Law of Torts 402 (3d. Ed., 1964).
[5] *Id.* at page 385.
[6] *Ibid.* note 3 and §343 comment "a."
[7] *Ibid.* note 4 at page 396.

of invitation. The basis of liability is the representation to be implied from the encouragement of the invitation.[8] Professor Prosser considers this idea sound.[9]

Returning to the principal case of *Schlicht v. Thesing,*[10] we observe that the predication to the class of invitee of Mrs. Schlicht employes aspects of both theories. The benefit adheres in the providing of the babysitting service, the invitation in the request that the service be performed. There is no indication that either is subordinate to the other or less essential; they are merely both present, and in combination they constitute the plaintiff an invitee. However, because the services were gratuitous there was no business relationship, and the benefit, as previously stated, was not of the type contemplated by the "economic benefit" theory.

In *Lucas v. Barner,*[11] exactly in point with the *Schlicht Case,*[12] the court applied the "economic benefit" theory and held the plaintiff to be a licensee. This was an action against a daughter and son-in-law for injuries sustained when plaintiff, while caring for her grandsons in the defendant's home and at the request of the defendants, slipped on a loose carpet of which she was unaware and of which she had not been warned. The lower court entered judgment for plaintiff on the theory that she was a business invitee. The review court held that plaintiff was, instead, a mere licensee, there being no evidence that the parties contemplated entering into a contract or commercial relationship which would rebut the presumption that the service was gratuitous. The presumption of gratuity was raised by the fact that the plaintiff was the mother of the defendant; the court stating: "(T)he service rendered by the respondent mother was as a member of a family enjoying a normal relationship."[13] Where the service was gratuitous, the status of respondent was that of licensee. This result would presumably obtain in many jurisdictions where, to be an invitee, the person must go upon the premises of another on the business of the other or for their mutual benefit.[14]

The *Lucas case*[15] makes patently clear the fact that there is a conflict between the various jurisdictions as to the classification of a visitor, and the duty owed by the occupier dependent upon that classifica-

---

[8] *Ibid.* note 4 at page 398.
[9] Prosser, *Business Visitors and Invitees,* 26 MINN. L. REV. 573 at page 611 (1942). *Cf.* also *The Outmoded Distinction Between Licensees and Invitees,* 22 Mo. L. REV. 195.
[10] *Ibid.* note 1.
[11] 56 Wash. 2d 136, 351 P. 2d 492 (1960).
[12] *Ibid.* note 1.
[13] *Ibid.* note 11 at page 493 of unofficial reports.
[14] See 65 C.J.S. 508.
[15] *Ibid.* note 11.

tion. It is the purpose of this paper to examine the current Wisconsin position respecting this conflict.

In commencing this examination it appears appropriate to establish the known situations which have resulted in a classification of either licensee or invitee. This necessitates a review of the prior cases which discussed this point and have applied Wisconsin law. From the two Wisconsin cases previously referred to, *Schlict v. Thesing*[16] and *Smith v. Shuda*,[17] we know that an invitation coupled with a benefit of the type rendered in these cases by a person not a member of the occupier's immediate household is sufficient to constitute the person an invitee. Conversely, although a social guest is invited, and although the pleasure derived from the visit is certainly a benefit (even if not in the commercial or business conception of advantage), the social guest is a mere licensee. This has not been recently determined by the Wisconsin Supreme Court, but it is probable that this still is the law. In *Greenfield v. Miller*,[18] the plaintiff, a social guest at the home of the defendant, slipped on a small rug on a highly polished floor and injured her leg. The court commented that to be an invitee, and thereby render the invitor liable for failure to exercise ordinary care, there must be some benefit to the invitor. Plaintiff was held to be a licensee.

Also, as recently as 1959, in *Cordula v. Dietrick*,[19] where a visiting mother-in-law tripped over a garden hose lying across her son-in-law's front walk, the court quoted with approval:

> Thus all of the decisions are agreed that a social guest, however cordially he may have been invited and urged to come, is not in law an invitee, but is nothing more than a licensee, to whom the possessor owes no duty of inspection and affirmative care to make the premises safe for his visit.[20]

In *Warner v. Lieberman*,[21] applying Wisconsin law, the plaintiff social guest was also held to be a licensee. In this case the plaintiff was the sister of the defendant and a gratuitous house guest. About two weeks after commencing her visit, the plaintiff tripped over a defectively fastened leg on a chaise lounge. The defendants were not held liable for the injuries she sustained thereby. These decisions holding that a social guest is a mere licensee are in accord with the unanimous decisions of the other jurisdictions.[22]

Observable in all of the above cases is the common element of in-

[16] *Ibid.* note 1.
[17] *Ibid.* note 2.
[18] 173 Wis. 184, 180 N.W. 834 (1921).
[19] 9 Wis. 2d 211, 101 N.W. 2d 126 (1959).
[20] *Id.* at page 212, 101 N.W. 2d 126 at page 127.
[21] 253 F. 2d 99 (1958); from 154 F. Supp. 362.
[22] RESTATEMENT, TORTS, Tentative Draft No. 5 at page 55 §330 subsection h(3); ". . . the decisions thus far have been unanimous to the effect that the social guest is no more than a licensee."

vitation. Also observable in each case is the presence of some benefit to the occupier. However, the nature of the benefit varies. Is this, then, the distinguishing factor? Probably not. By only slightly altering the facts of any of the above cases, innumerable difficulties are presented. For example, in the *Warner case*,[23] where a social guest tripped over the defective chaise lounge, suppose the plaintiff was initially invited to babysit as in the *Schlicht case*,[24] but stayed on an extra day as a mere visitor. Would the duty owed to her change correspondingly with the change in her reason for being in the home of the defendant? Or suppose Mrs. Schlicht was initially on the Thesing premises as a social visitor and then, due to the importunate demands of that compendious work which did in fact precipitate the need for plaintiff's visit, defendant was forced to go to the hospital, and plaintiff to babysit with the defendant's children. Would plaintiff then be any less vulnerable to the dangers lurking behind the innocent-appearing basement door? Would plaintiff's injury be not compensible one instant and compensible the next? Consider also the case of an elderly in infirm woman who regularly employs a companion. Would this elderly woman then be an invitor of every dinner or social guest whom she invited in the companion's absence? These hypotheticals, though seemingly specious, point out the anomolous potentialities created by a rule of law making the status of one invited onto the premises of another dependent on the type of benefit enuring to the occupier, and compel a search for some other possible distinguishing factor.

Some help may be found in dicta contained in *Greefield v. Miller*,[25] where the court, in discussing the determination of status, states:

> It is difficult to lay down any general rule on the subject as applicable to all cases. The facts in each case, including the nature of the invitation, must be considered.[26]

This implies the need for an *ad hoc* determination in each case, and points up the possible importance of the nature of the invitation. Concern over the nature of the invitation is of course a restatement of the "invitation" theory, basing the duty owed by an invitor on the implications of the invitation.[27]

On the basis of this statement, it would seem that the "nature of the invitation," and the implication it carries with it, is an important consideration. However, re-examining the *Schlicht case*,[28] how much can be reasonably implied from the nature of the invitation? Is it not

---

[23] *Ibid.* note 21.
[24] *Ibid.* note 1.
[25] *Ibid.* note 18.
[26] *Ibid.* note 18 at page 189, 180 N.W. 834 at page 836.
[27] Refer to notes 8 and 9.
[28] *Ibid.* note 1.

somewhat presumptuous to assume that a husband or wife, after the wife has begun her labor, goes about the home preparing to make it safe for a babysitter? Or, in this situation, would the typical husband, upon the arrival of the sitter, calmly discuss with the sitter the possible dangerous conditions of the premises? The stronger implication, certainly, is that the invitation issues in circumstances of stress and emergency, thereby imposing on the babysitter a greater duty of circumspection.

However, this is probably not the sense of the implication referred to in the "invitation" theory. The implication is probably not intended as a factual one, but as a question of legal imposition upon an occupier who issues an invitation. This interpretation accords more smoothly with the Wisconsin cases. In the case of a social guest, there would be no implication of care being taken because there is no reason to impose the higher duty of care on the invitor in this instance.[29] But where the occupier expects to receive a benefit from the visitor there is, conversely, a reason for imposing a higher degree of care.

Remaining is the difficult problem presented when there is a change in circumstance after the arrival; say from social guest to babysitter. Relying on the implication of the invitation as construed on the basis of the degree of care the invitor can reasonably be held to, liability could be posited on either of two bases. Because of the benefit from the babysitting services it would not be unreasonable in this case to impose liability; and, in the alternative case where the visitor entered for the purpose of conferring a benefit, it would not be unreasonable to hold the occupier to a continuing maintenance of this same degree of care, even though the status of the person was changed to that of social guest. This would be in accord with the general trend of liability extension.[30]

What, then, is the current Wisconsin position? It is certain that a social guest, although invited, is not owed the same duty of care as is due to an invitee, even though in a sense there is a benefit to the invitor in both cases. On the other hand, one need not be a conventional business visitor to be an invitee. Nevertheless, it is likely that some benefit circumstantially amounting to a financial gain or saving to the

---

[29] The decided cases are in accord with the classification of a social guest as a licensee. However, there is considerable support among legal writers for the extension of the occupier's liability to social guests and for the abolition of the distinction between the duty owed to an invitee and a licensee. See 1 Palloch Mo. L. REV. 45; 22 Mo. L. REV. 186; 12 RUTGERS L. REV. 599; and Pallochi, *Torts* 697 (14th Ed., 1939).

[30] See 95 A.L.R. 2d 992, 1016: "In the field of tort laws there is observable a general trend towards the elimination of technical status positions which had the effect of insulating certain classes from liability, the tendency being to substitute for these technical rules the broad test of reasonable care under the circumstances."

possessor will be required before the visitor will be held to be an invitee. This is consistent with the logic inherent in the "invitation" theory, and finds support in the fact that no Wisconsin cases have been found where a person was held to be an invitee where some possibility of such benefit was not present. As stated in the *Greenfield case,*[31] the court, in making its determination, will look to all the circumstances, including the nature of the invitation and necessary implications to be derived therefrom. JOHN P. FOLEY

Municipal Corporations: Burden of Persuasion Required in Ordinance Violations: Defendant was found guilty of racing his automobile in violation of a city ordinance[1] which has a direct counterpart in a criminal state statute.[2] The circuit court reversed the conviction on the ground that the evidence was insufficient to sustain it. When confronted with *City of Madison v. Geier*[3] on appeal, the Wisconsin Supreme Court, in a four-to-three decision, held that when a violation of a municipal ordinance also constitutes a crime under state law it must be proved by *clear, satisfactory and convincing evidence.*

In coming to its conclusion the majority reviewed the three well-accepted burdens of proof:[4]

(1) Mere preponderance.
(2) Clear, satisfactory and convincing.
(3) Beyond a reasonable doubt.[5]

The first two are applied to civil cases—the first to the ordinary civil case and the second to those civil cases which involve fraud or criminal offenses.[6] Observing that ordinance violations have long been held to

---

[31] *Ibid.* note 18.

[1] Madison, Wis., Municipal Code §12.86.

[2] WIS. STAT. §346.94(2) (1963) providing: "Racing. No operator of a motor vehicle shall participate in any race or speed or endurance contest upon any highway."

[3] 27 Wis. 2d 687, 135 N.W. 2d 761 (1965).

[4] A precise definition of the two meanings of the phrase "burden of proof" is found in Sellers v. Kincaid, 303 Ill. 216, 155 N.E. 429 (1922). In this civil case, the clear distinction is made between (1) the duty of producing evidence as the case progresses, and (2) the duty to establish the truth of the claim by a preponderance of the evidence. One able writer, MCCORMICK ON EVIDENCE, §307 (1954), explains the former as the *burden of producing evidence* and the latter as the *burden of persuasion.* See also 9 WIGMORE, EVIDENCE, §§2485-2489 (3rd ed. 1940).

[5] The majority in the *Geier* case was therefore referring to the three measures of the jury's persuasion designated by Wigmore, *supra* note 4, §§2497-2498, as (1) mere preponderance, (2) clear, satisfactory and convincing, and (3) beyond a reasonable doubt. See also McCormick, *supra* note 4, §§318-321.

[6] Roberts v. Saukville Canning Co., 250 Wis. 112, 26 N.W. 2d 145 (1947); Poertner v. Poertner, 66 Wis. 644, 29 N.W. 386 (1886); see also McCormick, *supra* note 4, §320 and Wigmore, *supra* note 4, §2498. Clear satisfactory and convincing evidence has been held to be required in those civil cases which involve fraud, undue influence, a lost deed or will, a parol gift, an agreement for adoption or to bequeath by will, mutual mistake sufficient to justify reformation of an instrument, a parol or constructive trust, an oral contract