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## THE DUTY OF POSSESSORS OF LAND IN WISCONSIN TO LICENSEES, SOCIAL GUESTS AND BUSINESS GUESTS

A mere licensee coming upon the land of another must take the premises as he finds them. But the possessor of land owes a licensee a duty to warn him of dangerous conditions of which the possessor knows and which are not obvious or otherwise known to the licensee. Also, the occupant of the premises must refrain from active negligence towards a licensee.<sup>1</sup>

Thus, in the case of *Muench v. Heinemann*,<sup>2</sup> recovery for injury was denied when a pulley fell while the plaintiff was using an elevator. The plaintiff had been permitted to enter the defendant's building to distribute milk to the latter's employees. It was decided that the mere fact that the plaintiff was accustomed to use the elevator either by direction or permission did not alter his position as a mere licensee. But the Supreme Court of Wisconsin has held that the omission to observe and repair a loose plank over a steam pit contained in a breakwater constituted active negligence on the part of a railroad to a licensee.<sup>3</sup> The plaintiff was held a licensee because he was using the breakwater as a footpath and as a member of the public which long had been permitted to use it in such a manner. The condition of the place made the pit a dangerous trap to persons on the premises. To a mere licensee there is no duty to repair traps or pitfalls unless the possessor has knowledge of them. Here, the court said that there was a duty to discover the pitfall. Such a duty is not ordinarily imposed in favor of a mere licensee. However, the condition was in existence for some time and the defendant railroad probably could be presumed to have had knowledge of the defect. The licensor is bound not to render the premises more dangerous without notifying the licensee of such increased danger or, at least, giving warning of such conditions reasonably calculated to reach the licensee.<sup>4</sup>

Tolerated trespassers are put on the plane of licensees whose presence the land occupier is under a duty to anticipate if he knows they are likely to come on the premises at a given time and place, and especially does this duty exist if the occupier is engaged in an activity dangerous to life or limb.<sup>5</sup> Such trespassers crossing the defendant's railroad tracks at an unauthorized place, but which long had been

<sup>1</sup> *Brinilson v. Chicago and Northwestern Railway Co.*, 144 Wis. 614, 129 N.W. 664 (1911).

<sup>2</sup> 119 Wis. 441, 96 N.W. 800 (1903). But see Safe Place Statute, WIS. STAT. (1939) § 101.06.

<sup>3</sup> *Supra* note 1.

<sup>4</sup> *Taylor v. Northern Coal & Dock Co.*, 161 Wis. 223, 152 N.W. 465 (1915).

<sup>5</sup> *Davis v. Chicago and Northwestern Railway Co.*, 58 Wis. 646, 17 N.W. 406 (1883).

used as a crossing, were treated as licensees in *Johnson v. Lake Superior Terminal and Transfer Co.*<sup>6</sup> In that case a train was being backed, and for that reason the engineer could not keep as effective a lookout as when the train was being pulled. But there was a duty, the court held, to keep a careful lookout for persons likely to be on the track. Because of the reversed direction of the train compliance with this duty required a lookout in addition to the members of the engine crew. Failure to provide such lookout was a violation of duty to a tolerated trespasser run down by the train.

But when a licensee goes beyond the scope of his license he becomes a trespasser as to whom there is no duty to make the premises safe and no duty to warn of danger in a place where his presence is not expected. Thus, an employee of a contractor working on the outside of a building, and who, during the noon hour for his own amusement wandered through the building and was injured while using an elevator, was held to be a trespasser towards whom the defendant had violated no duty.<sup>7</sup>

Trespassing children have sometimes been regarded as "invitees" by reason of the fact that they were lured to the premises because of some attractive but dangerous condition upon them. In many jurisdictions, including Wisconsin, such trespassing children have been given special consideration not accorded to adult trespassers. "He who maintains an object or condition liable to attract children of tender years to interfere therewith, under such circumstances as to be chargeable with knowledge that they may probably so interfere, to their personal injury, breaches his duty as to ordinary care not to imperil their safety."<sup>8</sup> But the Wisconsin Supreme Court has not applied the attractive nuisance doctrine to all situations involving danger to children. Thus, where a nine-year-old boy was injured while playing brakeman on railroad cars the court said: "We do not consider that a train of railroad cars on a track can be classed with turntables and like machinery as alluring and attractive to children, so as to put the burden on railroad companies to carefully guard them against dangers."<sup>9</sup> The Wisconsin Supreme Court has refused to apply the doctrine in the case of a raft in a municipal pond.<sup>10</sup> And in *Bonniwell v. Milwaukee Light, Heat and Traction Co.*,<sup>11</sup> where an eleven-year-old boy was electrocuted after climbing to the top of a tower carrying high voltage current, it

<sup>6</sup> 86 Wis. 64, 56 N.W. 161 (1893).

<sup>7</sup> *Klemens v. Morrow Milling Co.*, 171 Wis. 614, 177 N.W. 903 (1920).

<sup>8</sup> *Kelly v. Southern Wisconsin Railroad Co.*, 152 Wis. 328, 140 N.W. 60 (1913); *Meyer v. Menominee and Marinette L. & T. Co.*, 151 Wis. 279, 138 N.W. 1008 (1912).

<sup>9</sup> *Wendorf v. Director General of R. R.*, 173 Wis. 53, 180 N.W. 128 (1920).

<sup>10</sup> *Fiel v. Racine*, 203 Wis. 149, 233 N.W. 611 (1930).

<sup>11</sup> 174 Wis. 1, 182 N.W. 468 (1921).

was held that no duty had been violated by the electric company, since it was not reasonably to be anticipated that a trespassing child would get into such a position of danger, and since furthermore the danger was obvious to a child of eleven years.

In so far as there exists a special duty with respect to trespassing children, such duty is based predominantly on the fact that certain hazards cannot be appreciated by children of tender years. Any alluring features which the hazardous condition may possess are significant chiefly to the extent that they give to the defendant reason to expect the presence of children, and, as has been noted, even adult trespassers are entitled to special consideration when their presence in a given zone of danger is known to the possessor of the premises.

Generally, a person who comes upon the premises of another as a social guest is said to be on a slightly higher plane than that of a mere licensee. But although the visit may be of "mutual" advantage to the parties, the law does not regard the benefit or advantage incident to such social relations as sufficient basis for the imposition of affirmative legal obligations. The guest need only be warned of concealed hazards of which the host has knowledge and which he realizes constitute unreasonable risks. The host must not be guilty of any misfeasance after his guest has come upon the premises; but there is no affirmative obligation to use care to discover defects in the premises or repair them for the safety of the gratuitous visitor.<sup>12</sup>

In the widely discussed case of *Greenfield v. Miller*,<sup>13</sup> the Wisconsin court said that the relationship of host and guest was that of licensor and licensee. The plaintiff, who had been invited to spend two days at the recently finished home of the defendant, slipped on a small rug placed on a highly polished floor. The plaintiff had contended that it was the duty of the defendant to have warned her of the slippery condition of the floor or to have fastened the rugs so that they would not slip. The court directed a verdict for the defendant and, on appeal, the judgment was affirmed. The court said: "Where a guest is invited to come onto the premises of the host for social or benevolent purposes only, the relation thus created is one of licensor and licensee and the rule of ordinary care does not apply."

In *Gorr v. Mittlestadt*<sup>14</sup> the plaintiff, pursuant to an invitation, express or implied, drove up the driveway of the defendant's premises, as was his custom, in a carriage drawn by one horse. The driveway was situated twenty feet from an open cellar, the intervening space being occupied by a grass plot and piles of stones. The horse became fright-

<sup>12</sup> HARPER, LAW OF TORTS, Section 96.

<sup>13</sup> 173 Wis. 184, 180 N.W. 834, 12 A.L.R. 982 (1921).

<sup>14</sup> 96 Wis. 296, 71 N.W. 656 (1897).

ened and backed up until the carriage, its occupants and the horse were thrown into the cellar. It was held that a verdict should have been directed for the defendant. Said the court: "In the case of a mere permission by one for another to use his premises, no duty to guard the latter from danger of personal injury exists. Such permission only gives a right to enjoy the premises for such use as the licensee finds them. But where the owner of land invites another expressly or by implication to come upon his land, as by passing over a private way thereon, a different rule applies. He owes to such other the positive duty to use ordinary care to maintain such way in a reasonably safe condition for such use by persons in the exercise of ordinary care." The plaintiff was considered to be out of the class mentioned in the quotation. He was not within the customarily traveled way when the injury occurred.

The possessor of lands owes the highest duty to those persons who come upon the premises in the capacity of a business guest. Here, emphasis is placed upon the mutual benefit derived from the relationship. The possessor is bound to use ordinary care in keeping the usual space for business safe for the access of all persons exercising ordinary care in coming there at seasonable hours by invitation, express or implied, or for any purpose beneficial to the possessor.<sup>15</sup> Persons included in this class are: customers in shops, patrons in banks, patrons in restaurants, persons attending public exhibitions, workmen called to perform work by the possessor of the premises, and employees.<sup>16</sup>

The case of *Hupfer v. National Distilling Co.*<sup>17</sup> is an excellent illustration of the duty owing a business visitor. While the plaintiff was standing upon a platform stirring slop preparatory to letting it run into a container which he brought to cart home his purchase, the vat containing the slop burst and he was scalded. Although the defendant had a regular employee whose duty it was to stir the slops, it had been the practice to allow the customers to do their own stirring. The defendant contended that the plaintiff was a mere licensee and that there was no duty to make the premises safe or discover any defect in the vat. In giving judgment to the plaintiff, the court said that mere permission or license does not imply invitation. When that fact alone appears, the permitted person is a mere licensee. But when it is shown that the permitted person enters on the premises in the ordinary way to transact business with the licensor, or when the object of his visit is one in which there is mutuality of interest, he is a business guest. The court further said that the plaintiff was lured into the place of danger by

<sup>15</sup> *Borowski v. Schulz*, 112 Wis. 415, 88 N.W. 236 (1901).

<sup>16</sup> *Supra* note 12, Section 98.

<sup>17</sup> 114 Wis. 279, 90 N.W. 191, 33 L.R.A. (n.s.) 359 (1902).

reason of his business with the defendant and he was still in the position of a business guest when he was stirring the slop. And the Wisconsin court has held that a plaintiff was entitled to be treated as a business guest in an action against a defendant as to whom there was no mutuality of interest. A coal dealer left a hole uncovered after delivering coal in a garage of which the plaintiff was a customer. The coal dealer was held liable to the plaintiff who was injured when he fell into the hole as he was entering the garage.<sup>18</sup>

In *Lehman v. Amsterdam Coffee Co.*<sup>19</sup> a storekeeper was held liable for injuries sustained by a customer. There the plaintiff customer, at dusk, was examining merchandise located in the storage part of the store under an implied or express invitation. While so doing, she was injured when she fell down a stairway which was visible only from the rear of the room. In the decision it was pointed out that an open stairway or hatchway in the storage part ordinarily cannot be called a trap or snare but that, in this situation, it might well be said that it was a trap or snare of whose existence under the circumstances the rules of ordinary care would require that an invited person be warned.

It must be noted, however, that the possessor of the premises does not insure the safety of the business guest when he goes to a part of the premises not considered to be necessary for the transaction of the business involved. A contractor who was in a building for the purpose of making a bid on plastering certain unfinished rooms was held to have exceeded his invitation and gone beyond the scope of his business when he thrust his head or hands through a window into an elevator shaft.<sup>20</sup>

Employees are related in such a manner to their employers that they can be classified in the group of business guests. However, section 101.06 of the Wisconsin Statutes, commonly known as the safe-place statute, lays down the degree of care required of employers. The statute requires that the employer make the premises safe for the performance of acts which he knows or reasonably should know are going to be performed there.<sup>21</sup>

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<sup>18</sup> *Campbell v. Sutliff*, 193 Wis. 370, 214 N.W. 374, 53 A.L.R. 771 (1927).

<sup>19</sup> 146 Wis. 213, 131 N.W. 362 (1911).

<sup>20</sup> *Peake v. Buell*, 90 Wis. 508, 63 N.W. 1053, 48 Am. St. Rep. 946 (1895).

<sup>21</sup> *Neitzke v. Kraft-Phenix Dairies, Inc.*, 214 Wis. 441, 253 N.W. 579 (1934); *Mullen v. Larson-Morgan Co.*, 212 Wis. 52, 249 N.W. 67 (1933); *Sandeen v. Willow River Power Co.*, 214 Wis. 166, 252 N.W. 706 (1934); *Cermak v. Milwaukee Air Pump Co.*, 192 Wis. 44, 211 N.W. 354 (1927); See also, *The Wisconsin Safe Place Statute*, WIS. LAW REV., Vol. 1939 P. 314.