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Torts--Duty Owed Invitee and Licensee (Pedro v. Newman, 277 App. Div. 567 (1st Dep't 1950))

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defendant in the first action. The fact that the defendant may have represented other interests in addition to those derived from PRC Pictures was held immaterial.

In the determination of state law a federal court may not depart from what a lower state court announces as law unless convinced that a higher court of the state would decide otherwise.[23] It is submitted that the court was justified in refusing to adopt the strict *identity of party* test of the *Breen* case in view of its clash with the broad and liberal construction given to Section 23 by the Court of Appeals in the *Gaines* case.[24]

TORTS—DUTY OWED INVITEE AND LICENSEE.—Plaintiff stumbled and fell over a stone block while walking through an alleyway used in connection with defendant's bus terminal. Defendant was in possession of the alleyway under a lease wherein he agreed to promote the maximum flow of traffic through the terminal and passageway leading thereto. The objective of such promotion was to increase business in the stores, luncheonette and other concessions bordering upon and leading into the terminal, the alleys and arcade. Pedestrians to reach the stores in the terminal used the alleyway where the operative facts occurred. *Held,* judgment for plaintiff affirmed. Because of the provision in the lease to encourage business in the alleyway, plaintiff, a pedestrian, is an invitee or business guest and not a bare licensee or trespasser. *Pedro v. Newman,* 277 App. Div. 567, 101 N.Y.S. 2d 146 (1st Dep't 1950).

A business visitor or invitee is a person who is invited or permitted to enter or remain upon land for a purpose which directly or indirectly concerns the business of the occupier.[1] A licensee, on the other hand, is a person who is privileged to enter upon land merely by virtue of the possessor's consent.[2] The occupier of land must extend reasonable care to an invitee[3] as to activities[4] or con-

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[23] West v. American Telephone and Telegraph Company, 311 U. S. 223 (1940).

[24] "The statute is designed to insure to the diligent suitor the right to a hearing in court till he reaches a judgment on the merits. Its broad and liberal purpose is not to be frittered away by any narrow construction." Gaines v. City of New York, 215 N. Y. 533, 539, 109 N. E. 594, 596 (1915).

[1] Heskell v. Auburn L., H. & P. Co., 209 N. Y. 86, 102 N. E. 540 (1913); RESTATEMENT, TORTS § 332 (1934); PROSSER, TORTS 635 (1941).

[2] Meyer v. Pleshkopf, 277 N. Y. 576, 13 N. E. 777 (1938); RESTATEMENT, TORTS § 330 (1934); PROSSER, TORTS 625 (1941).

[3] Dorsey v. Chautauqua Institution, 203 App. Div. 251, 196 N. Y. Supp. 798 (4th Dep't 1922); RESTATEMENT, TORTS § 341 (1934).

[4] *See* Stelter v. Cordes, 146 App. Div. 300, 130 N. Y. Supp. 688 (2d Dep't 1911); RESTATEMENT, TORTS § 341 (1934).

ditions [5] on the land of which the occupier is or ought to be aware,[6] by warning him [7] or making the premises safe for him.[8] But he is not to be considered an insurer of the invitee's safety.[9] As to a licensee, no affirmative duty of care is owed.[10] Conversely stated, injury may not be inflicted through active negligence [11] or intentional harm.[12] No liability, however, is incurred to either a licensee or invitee, where the condition is known and the risk is realized by him.[13] The physical area of responsibility to the invitee extends from the entrance [14] to the exit [15] of the premises and includes those parts to which an invitee may reasonably be expected to go for business purposes.[16]

The duty to the invitee is arbitrarily imposed upon the landowner as a price for the possible economic gain to be conferred by the incomer.[17] A second theory bases this affirmative duty of care owed to invitees upon an implied representation that the premises have

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[5] Sullivan v. New York Telephone Co., 157 App. Div. 642, 142 N. Y. Supp. 735 (1st Dep't 1913), *aff'd*, 215 N. Y. 678, 109 N. E. 1067 (1915).

[6] Paubel v. Hitz, 339 Mo. 274, 96 S. W. 2d 369 (1936). Superior knowledge on the part of the possessor is necessary for the invitee to recover.

[7] Hamblet v. Buffalo Library Garage Co., 222 App. Div. 335, 225 N. Y. Supp. 716 (4th Dep't 1927); RESTATEMENT, TORTS § 341 (1934).

[8] Royer v. Najarian, 60 R. I. 368, 198 Atl. 562 (1938); Indermaur v. Dames, L. R. 1 C. P. 274 (1866); RESTATEMENT, TORTS § 343 (1934).

[9] F. W. Woolworth Co. v. Williams, 41 F. 2d 970 (D. C. Cir. 1930); S S. Kresge Co. v. Fader, 116 Ohio St. 718, 158 N. E. 174 (1927); Engdal v Owl Drug Co., 183 Wash. 100, 48 P. 2d 232 (1935); Tyron v. Chalmers, 205 App. Div. 816, 200 N. Y. Supp. 362 (3d Dep't 1923); Hollander v. Hudson, 152 App. Div. 131, 136 N. Y. Supp. 594 (1st Dep't 1912).

[10] Carbone v. Mackchil Realty Corp., 296 N. Y. 154, 71 N. E. 2d 447 (1947); Breeze v. City of New York, 275 N. Y. 528, 11 N. E. 2d 327 (1937) (landowner not liable to licensee for mere defect in the premises); Vaughan v. Transit Development Co., 222 N. Y. 79, 118 N. E. 219 (1914) (no duty of active vigilance); Walsh v. Fitchburg R. R., 145 N. Y. 301, 39 N. E. 1068 (1895).

[11] Zaia v. Lalex Realty Corp., 287 N. Y. 689, 39 N. E. 2d 300 (1942); Byrne v. N. Y. Cent. R. R., 104 N. Y. 362, 10 N. E. 539 (1887).

[12] Weitzmann v. Barber Asphalt Co., 190 N. Y. 452, 83 N. E. 477 (1908). The only duty owed licensees by owners of land is to refrain from inflicting wanton or wilfull injuries. Fox v. Warner-Quinlan Asphalt Co., 204 N. Y. 240, 97 N. E. 497 (1912).

[13] See note 6 *supra*. Postman delivering mail had full knowledge of the slippery condition of the runway to defendant's establishment by observation and no oral warning could increase his knowledge. RESTATEMENT, TORTS § 340 (1934).

[14] Downing v. Merchants' Nat. Bank, 192 Iowa 1250, 184 N. W. 722 (1921); Hochschild v. Cecil, 131 Md. 70, 101 Atl. 700 (1917); Norton v. Chandler & Co., 221 Mass. 99, 108 N. E. 897 (1915).

[15] Nersiff v. Worcester County Institution For Savings, 264 Mass. 228, 162 N. E. 349 (1928); Carr v. W. T. Grant Co., 188 Minn. 216, 246 N. W. 743 (1933); Royer v. Najarian, 60 R. I. 368, 198 Atl. 562 (1938).

[16] H. L. Green Co. v. Bobbitt, 99 F. 2d 281 (4th Cir. 1938); McNally v. Oakwood, 210 App. Div. 612, 206 N. Y. Supp. 759 (4th Dep't 1924), *aff'd*, 240 N. Y. 600, 148 N. E. 722 (1925).

[17] PROSSER, TORTS 637 (1941); McNiece & Thornton, *Affirmative Duties in Tort*, 58 YALE L. J. 1275 (1949).

been made safe by the landowner for those persons invited to enter to further a purpose of the landowner.[18]

In applying these definitions the courts have found that among those considered to be invitees are: government employees such as inspectors[19] and collectors;[20] vendors delivering their merchandise;[21] those visiting patients in a hospital;[22] persons meeting[23] or seeing off friends or relatives on a train or boat;[24] customers in a store[25] whether intending to purchase,[26] merely shopping,[27] or returning for a lost article;[28] friends accompanying a customer;[29] garage patrons[30] and those accompanying them;[31] prospective tenants[32] and purchasers[33] of houses inspecting the premises and fa-

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[18] PROSSER, TORTS 638 (1941); McNiece & Thornton, *supra* note 17.

[19] Gilchrist v. Eustrom, 69 Fed. 794 (8th Cir. 1895) (grain inspector on ship); Anderson & Nelson Distilling Co. v. Hair, 103 Ky. 196, 44 S. W. 658 (1898) (revenue inspector); Low v. Grand Trunk Ry., 72 Me. 313 (1881) (customs inspector).

[20] Toomey v. Sanborn, 146 Mass. 28, 14 N. E. 921 (1888) (city employee collecting garbage and offal).

[21] Noyes v. Des Moines Club, 178 Iowa 815, 160 N. W. 215 (1916); Adams v. Misena Realty Co., 239 App. Div. 633, 267 N. Y. Supp. 869 (1st Dep't 1933); Miller v. Brewster, 32 App. Div. 559, 53 N. Y. Supp. 1 (4th Dep't 1898). *Cf.* Judson v. American Ry. Express Co., 242 Mass. 269, 136 N. E. 103 (1922) (calling for a package at an express office); Kulka v. Nemirovsky, 314 Pa. 134, 170 Atl. 261 (1934) (buyer removing purchased machinery from seller's premises).

[22] Greenfield v. Hospital Ass'n of City of Schenectady, 258 App. Div. 352, 16 N. Y. S. 2d 729 (3d Dep't 1940).

[23] Fournier v. New York, N. H. & H. R., 286 Mass. 7, 189 N. E. 574 (1934); Atchison, T. & S. F. Ry. v. Cogswell, 23 Okla. 181, 99 Pac. 923 (1909).

[24] Hutchins v. Penobscot Bay & River Steamboat Co., 110 Me. 369, 86 Atl. 250 (1913); Powell v. Great Lakes Transit Corp., 152 Minn. 90, 188 N. W. 61 (1922). *Contra:* Galveston, H. & S. A. Ry. v. Matzdorf, 102 Tex. 42, 112 S. W. 1036 (1908).

[25] Newell v. K. & D. Jewelry Co., 119 Conn. 332, 176 Atl. 405 (1935); Moore v. American Stores Co., 169 Md. 541, 182 Atl. 436 (1936); J. C. Penney Co. v. Evans, 172 Miss. 900, 160 So. 779 (1935); Markman v. Fred P. Bell Stores Co., 285 Pa. 378, 132 Atl. 178 (1926); Schroeder v. Great Atlantic & Pacific Tea Co., 220 Wis. 642, 265 N. W. 559 (1936); Vigder v. Silverman, 171 N. Y. Supp. 393 (Sup. Ct. 1918). *Cf.* Bennett v. Railroad Co., 102 U. S. 577 (1880) (steamboat passenger).

[26] Tryon v. Chalmers, 205 App. Div. 816, 200 N. Y. Supp. 362 (3d Dep't 1923). *Cf.* Braun v. Vallade, 33 Cal. App. 279, 164 Pac. 904 (1917) (plaintiff originally entered only with intent of using toilet but then afterwards became a customer).

[27] MacDonough v. F. W. Woolworth, 91 N. J. L. 677, 103 Atl. 74 (1918). *Cf.* Riganis v. Mottu, 156 Md. 340, 144 Atl. 355 (1929).

[28] H. L. Green Co. v. Bobbitt, 99 F. 2d 281 (4th Cir. 1938).

[29] Kennedy v. Phillips, 319 Mo. 573, 5 S. W. 2d 33 (1928).

[30] Humblet v. Buffalo Library Garage Co., 222 App. Div. 335, 225 N. Y. Supp. 716 (4th Dep't 1927).

[31] Warner v. Lucy, 207 App. Div. 241, 201 N. Y. Supp. 658 (3d Dep't 1923), *aff'd without opinion*, 238 N. Y. 638, 144 N. E. 924 (1924).

[32] Eggen v. Hickman, 274 Ky. 550, 119 S. W. 2d 633 (1938); Serota v. Salmansohn, 256 Mass. 224, 152 N. E. 242 (1926); Brown v. Davenport Holding Co., 134 Neb. 455, 279 N. W. 161 (1938).

[33] Bonello v. Powell, 223 S. W. 1075 (Mo. App. 1920).

cilities; those using public telephones.[34] Included too as an invitee is: a milkman;[35] an air raid warden;[36] a postman;[37] an interior decorator[38] and a contractor[39] while working on a house; a person going upon the premises to read the details of a "to-let" sign posted on a building.[40]

Establishments deemed to owe their patrons the care due invitees because of the nature of the activities conducted number among them: a restaurant;[41] a skating rink;[42] an athletic stadium;[43] a bank;[44] a theatre;[45] a bathing beach;[46] a fair ground;[47] a bath house;[48] a park;[49] a bowling alley;[50] a public picnic.[51]

Coming within the category of a licensee is: a salesman;[52] a

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[34] Haley v. Deer, 135 Neb. 459, 282 N. W. 389 (1938); Sullivan v. New York Telephone Co., 157 App. Div. 642, 142 N. Y. Supp. 735 (1st Dep't 1913). *Accord:* Ward v. Avery, 113 Conn. 394, 155 Atl. 502 (1931) (plaintiff permitted to use private phone of store).

[35] Moretti v. Gulino, 272 App. Div. 1026, 73 N. Y. S. 2d 684 (2d Dep't 1947), *aff'd*, 297 N. Y. 869 (1948).

[36] *See* Field v. Manufacturers Trust Co., 185 Misc. 886, 889, 57 N. Y. S. 2d 740, 743 (Sup. Ct. 1945), *rev'd*, 271 App. Div. 226, 62 N. Y. S. 2d 716 (1st Dep't 1946) (reversed because of immunities of War Emergency Act), *aff'd*, 296 N. Y. 972, 73 N. E. 2d 559 (1947).

[37] Paubel v. Hitz, 339 Mo. 274, 96 S. W. 2d 369 (1936).

[38] Hollander v. Hudson, 152 App. Div. 131, 136 N. Y. Supp. 594 (1st Dep't 1912).

[39] Ellington v. Ricks, 179 N. C. 686, 102 S. E. 510 (1920).

[40] Fogarty v. Bogart, 59 App. Div. 114, 69 N. Y. Supp. 47 (2d Dep't 1901) (even though instructions on the sign directed the reader to apply elsewhere).

[41] Holmes v. Ginter Restaurant Co., 54 F. 2d 876 (1st Cir. 1932).

[42] *See* Shields v. Van Kelton Amusement Corp., 228 N. Y. 396, 397, 127 N. E. 261 (1920).

[43] Scott v. University of Michigan Athletic Ass'n, 152 Mich. 684, 116 N. W. 624 (1908) (football stadium); Crane v. Kansas City Baseball & Exhibition Co., 168 Mo. App. 301, 153 S. W. 1076 (1913).

[44] Sinn v. Farmers' Deposit Sav. Bank, 300 Pa. 85, 150 Atl. 163 (1930); Howlett v. Dorchester Trust Co., 256 Mass. 544, 152 N. E. 895 (1926) (child accompanying mother making a deposit in the bank also considered to be an invitee).

[45] Knapp v. Connecticut Theatrical Corp., 122 Conn. 413, 190 Atl. 291 (1937); Durning v. Hyman, 286 Pa. 376, 133 Atl. 568 (1926).

[46] Brotherton v. Manhattan Beach Imp. Co., 48 Neb. 563, 67 N. W. 479 (1896); Boyce v. Union Pac. Ry., 8 Utah 353, 31 Pac. 450 (1892).

[47] Smith v. Cumberland County Agr. Society, 163 N. C. 346, 79 S. E. 632 (1913); Dunn v. Brown County Agricultural Soc'y, 46 Ohio St. 93, 18 N. E. 496 (1888).

[48] Radin v. State of New York, 192 Misc. 247, 80 N. Y. S. 2d 189 (Ct. of Cl. 1948).

[49] Indianapolis Street Ry. v. Dawson, 31 Ind. App. 605, 68 N. E. 909 (1903) (park offering a free concert); Brown v. Rhoades, 126 Me. 186, 137 Atl. 58 (1927) (amusement park); Dorsey v. Chautauqua Institution, 203 App. Div. 251, 196 N. Y. Supp. 798 (4th Dep't 1922) (a recreation park where no charge is made in the off season).

[50] *See* Stelter v. Cordes, 146 App. Div. 300, 130 N. Y. Supp. 688 (2d Dep't 1911).

[51] Mastad v. Swedish Brethren, 83 Minn. 40, 85 N. W. 913 (1901).

[52] Norris v. Hugh Nawn Contracting Co., 206 Mass. 58, 91 N. E. 886 (1910) (paper boy invited by defendant's employees); Reuter v. Kenmore

continuous user of a railroad crossing;[53] a house guest;[54] a child accompanying a parent making purchases in a store;[55] a student visiting a factory on a tour.[56] Among those also only entitled to the care owed a licensee is one who: uses a toilet by permission;[57] seeks employment;[58] visits defendant's employees socially[59] or to collect a debt[60] or to solicit business from them[61] or to deliver their lunch;[62] visits a tenant of an office building on his own business.[63]

The present inclination is to hold persons encouraging ingression on their property for purposes of their own to a duty comparable to that owed an invitee. Consequently, it would appear that the principal case would have been decided for the plaintiff even without the court's emphasis on the "traffic promotion" clause in the lease.[64]

Building Co., 153 Misc. 646, 276 N. Y. Supp. 545 (City Ct. of N. Y. 1934); Wolf v. Hotel Operating Associates, Inc., 180 N. Y Supp. 547 (1st Dep't 1920). *Accord,* Stacy v. Shapiro, 212 App. Div. 723, 209 N. Y. Supp. 305 (1st Dep't 1925) (distributing free coupons).

[53] Byrne v. N. Y. C. & H. R. R. R., 104 N. Y. 362, 10 N. E. 539 (1887); Barry v. N. Y. C. & H. R. R. R., 92 N. Y. 289 (1883).

[54] Comeau v. Comeau, 285 Mass. 578, 189 N. E. 588 (1934); Page v. Murphy, 194 Minn. 607, 261 N. W. 443 (1935); Lewis v. Dear, 120 N. J. L. 244, 198 Atl. 887 (1938); Rushton v. Winters, 331 Pa. 78, 200 Atl. 60 (1938); Roth v. Prudential Life Ins. Co., 266 App. Div. 872, 42 N. Y. S. 2d 592 (2d Dep't 1943); Bugeja v. Butze, 26 N. Y. S. 2d 989 (Sup. Ct. 1941), *appeal granted,* 262 App. Div. 756, 28 N. Y. S. 2d 716 (1941). *But see* Green v. Green, 212 App. Div. 381, 208 N. Y. Supp. 689 (1st Dep't 1925) (invitor of a guest owes no greater degree of care than a storekeeper owes his customer).

[55] Petree v. Davidson-Paxon-Stokes Co., 30 Ga. App. 490, 118 S. E. 697 (1923); Carlisle v. J. Weingarten, Inc., 120 S. W. 2d 886 (Tex. 1938).

[56] Benson v. Baltimore Traction Co., 77 Md. 535, 26 Atl. 973 (1893). *Contra:* Gilliland v. Bondurant, 332 Mo. 881, 59 S. W. 2d 679 (1933) (the visit of the class to defendant's plant was not merely occasional but part of a long established and continued custom).

[57] Kneiser v. Belasco-Blackwood Co., 22 Cal. App. 205, 133 Pac. 989 (1915); Vaughan v. Transit Development Co., 222 N. Y. 79, 118 N. E. 219 (1917).

[58] Larmore v. Crown Point Iron Co., 101 N. Y. 391, 4 N. E. 752 (1886). *See* McDonough v. Reilly Repair, Etc., Co., 45 Misc. 334, 335, 90 N. Y. Supp. 358, 359 (Sup. Ct. 1904) (where plaintiff is invited by defendant in regard to employment he is regarded as an invitee).

[59] Dixon v. Swift, 98 Me. 207, 56 Atl. 761 (1903); Ridley v. National Casket Co., 161 N. Y. Supp. 444 (Sup. Ct. 1916) (even where permission granted to visit employees); Woolwine's Adm'r v. Chesapeake & O. R. R., 36 W. Va. 329, 15 S. E. 81 (1892).

[60] Berlin Mills Co. v. Croteau, 88 Fed. 860 (1st Cir. 1898).

[61] Indian Refining Co. v. Mobley, 134 Ky. 822, 121 S. W. 657 (1909).

[62] Gotch v. K. & B. Packing & Provision Co., 93 Colo. 276, 25 P. 2d 719 (1933); Fitzpatrick v. Cumberland Glass Mfg. Co., 61 N. J. L. 378, 39 Atl. 675 (1898). *Contra:* Illinois Cent. R. R. v. Hopkins, 200 Ill. 122, 65 N. E. 656 (1902); Bustillos v. Southeastern Portland Cement Co., 211 S. W. 929 (Tex. 1919) (bringing employees' meals with consent of employer considered to be of benefit to employer).

[63] Jones v. Asa G. Candler, Inc., 22 Ga. App. 717, 97 S. E. 112 (1918); Konick v. Champneys, 108 Wash. 35, 183 Pac. 75 (1919) (apartment house).

[64] Baker v. Seneca Hotel Corp., 265 App. Div. 41, 37 N. Y. S. 2d 819 (4th Dep't 1942) (plaintiff held to be an invitee though passing through an arcade on her own business).