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Recent Case

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TORTS—MISSOURI—INVITEE OR LICENSEE

Argus v. Michler[1]

Plaintiff Argus brought action for injuries received from falling in some oil on the driveway of a filling station operated by defendant Michler. Plaintiff, enroute home, had stepped off a bus in front of defendant's filling station, with the intent to call his wife and have her pick him up in their car. He originally intended to call from a public phone booth across the street, but seeing that it was occupied proceeded toward defendant's station to use the phone there. On the way he fell. He then went into the station, called his wife, and told her to pick him up at an ice cream shop located across the street. Plaintiff testified that he intended to do some tire shopping at the station in addition to making the phone call. Defendant testified that the phone was a pay phone which he kept there for the use of his customers on the chance that they might come in and end up buying some tires. However, he received no revenue from the phone. The trial court instructed the jury that if they found that plaintiff went on the premises for the purpose of using the telephone for a personal call and not for the mutual benefit of both himself and defendant, then the jury should find for defendant. The jury returned a verdict in favor of defendant. On appeal, *held,* affirmed. If plaintiff went on the premises of defendant for the purpose of making a phone call, he was a licensee at best. The chance that plaintiff might buy some tires was insufficient to constitute real benefit to the defendant, and thus the plaintiff was not an invitee.

The determination of the status of plaintiff as an invitee or licensee was vital because of the difference in duty owed to each by a possessor of land. The *Restatement of Torts*[2] defines the duty of a possessor of land as follows:

> A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon if, but only if, he (a) knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them, and (b) has no reason to believe that they will discover the condition or realize the risk involved therein, and (c) invites or permits them to enter or remain upon the land without exercising reasonable care (i) to make the condition reasonably safe, or (ii) to give a warning. . . .

1. 349 S.W.2d 389 (St. L. Ct. App. 1961).
2. RESTATEMENT, TORTS § 343 (1934).

This section is cited by many Missouri cases,[3] and would seem to be the accepted law of the state.

On the other hand, the duty owed a *licensee* is dependent upon the type of harm threatened. A possessor of land owes a duty of ordinary care as to affirmative conduct on the land and, of course, owes a duty to refrain from wanton or intentional injury.[4] However, even though a possessor of land owes a licensee a duty of ordinary care as to affirmative conduct, the possessor of land may assume that the licensee is alert.[5] It is generally held, moreover, that a possessor of land owes no duty to a licensee as to dangerous conditions of the land, for the licensee "takes the premises as he finds them."[6] So, in the instant case, if the plaintiff was merely a licensee, the defendant-filling station operator owed him no duty as to the oil spot, while if he was an invitee he was owed at least a duty of a warning.

The first courts in the United States which made a distinction between licensees and invitees based the distinction not upon the idea of mutual benefit, but upon express or implied invitation.[7] As the court in *Davis v. Congregational Society* asserted:

> It makes no difference that no pecuniary profit or other benefit was received or expected. . . . The fact that plaintiff comes by invitation is enough to impose the duty which lies at the foundation of this liability.[8]

In 1880, Mr. Justice Harlan, in *Bennet v. Railroad Co.*,[9] mentioned the idea of mutual advantage or common interest as a distinguishing factor between invitees and licensees. The first state case to repudiate the "express or implied invitation" distinction was *Plummer v. Dill.*[10] Judge Knowlton, speaking for the Massachusetts Supreme Judicial Court, concluded that the determining factor in classifying between a licensee and an invitee was the existence of some economic benefit to the possessor of land. Today, most courts,[11] including the jurisdiction

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3. Gruetzemacher v. Billings, 348 S.W.2d 952, 957-58 (Mo. 1961); Haire v. Stagner, 356 S.W.2d 305, 308-09 (Spr. Ct. App. 1962).

4. Menteer v. Scalzo Fruit Co., 240 Mo. 177, 144 S.W. 833 (1912); Anderson v. Welty, 334 S.W.2d 132, 137 (Spr. Ct. App. 1960).

5. Reedy v. Missouri-Kansas-Texas R.R. Co., 347 S.W.2d 111 (Mo. 1961); Sites v. Knott, 197 Mo. 684, 96 S.W. 833 (1906). *But see* Anderson v. Welty, *supra* note 4, at 138, where the court stated: "Our appellate courts repeatedly have said that one is not required to look for danger when he has no cause to anticipate it, or when danger would not exist but for the negligence of another. . . ."

6. Anderson v. Cinnamon, 365 Mo. 304, 282 S.W.2d 445 (1955) (en banc). *But see* RESTATEMENT, TORTS § 342 (1934).

7. Davis v. Congregational Society, 129 Mass. 367 (1880); Sweeny v. Old Colony Newport R.R. Co., 10 Allen (Mass.) 368 (1865).

8. *Supra* note 7, at 372.

9. 102 U.S. 577, 585 (1880).

10. 156 Mass. 426 (1892).

11. *E.g.*, Porter v. Thompson, 74 Cal. App. 2d 474, 169 P.2d 40 (1946); North Broward Hospital Dist. v. Adams, 143 So. 2d 355 (Fla. App. 1962); Etheridge Motors Inc. v. Haynie, 103 Ga. App. 676, 120 S.E.2d 317 (1961); Ellguth v. Blackstone Hotel, Inc., 408 Ill. 343, 97 N.E.2d 290 (1951); Lindelow v. Peter Kiewit Sons, Inc., 174 Neb. 1, 115 N.W.2d 776 (1962).

where the "implied or express invitation" distinction originated,[12] follow this distinction as to economic benefit. Thus the *Restatement of Torts*,[13] in full concurrence with most courts, using the word "business visitor" as synonymous with "invitee," states:

> 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.

The leading case in Missouri expounding the requirement of economic benefit is *Glaser v. Rothschild*.[14] The court in that case used the term "mutual benefit." However, it would seem from the fact situations in that case, and following cases, that some "economic benefit" is what is actually required. Since the *Glaser* case, the idea of economic benefit, rather than invitation, has grown into an integral part of the Missouri law relating to invitees, and is, consequently, the deciding factor for purposes of classification. In fact, invitation may be inferred from the existence of economic benefit.[15]

The majority of jurisdictions today look to the purpose of the visit to determine whether a person holds the status of an invitee or merely a licensee.[16] If the purpose of the visit was of some *real* benefit to the possessor of land, the person visiting will be accorded the status of an invitee[17] and, therefore, may expect a duty of ordinary care as to dangerous conditions of the land. It would seem that the term "real benefit" is synonymous with "economic benefit."

In determining whether a person is to be accorded the status of an invitee or a licensee, courts have generally gone out of their way to find some economic benefit to the possessor of land.[18] The case at hand is somewhat unusual in this respect;

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12. Zaia v. "Italia" Societa Anonyma Di Navigazione, 324 Mass. 547, 87 N.E.2d 183 (1949). The court, while seemingly basing its opinion on "express or implied invitation," stated: "There must be a real or apparent intent on the part of the invitor to benefit in a business or commercial sense. . . ." 324 Mass. at 549, 87 N.E.2d at 184.

13. RESTATEMENT, TORTS § 332 (1934). *But see* RESTATEMENT (SECOND), TORTS § 332 (Tent. Draft No. 5, April 8, 1960).

14. 221 Mo. 180, 120 S.W. 1 (1909).

15. Porchey v. Kelling, 353 Mo. 1034, 185 S.W.2d 820 (1945); Moss v. Nooter Corp., 334 S.W.2d 647, 652 (St. L. Ct. App. 1961).

16. *E.g.*, Stevenson v. Kansas City So. Ry. Co., 348 Mo. 1216, 159 S.W.2d 260 (1942).

17. Porchey v. Kelling, *supra* note 15.

18. *E.g.*, First Nat'l Bank of Birmingham v. Lowery, 263 Ala. 36, 81 So. 2d 284 (1955) (on premises of bank for purpose of changing $100 bill); Fisher v. Hardesty, 252 S.W.2d 877 (Ky. 1952) (in drug store with purpose of registering for free prizes); Spurlock v. Union Fin. Co., 363 Mo. 62, 248 S.W.2d 578 (1952) (on used car lot for purpose of looking at automobiles and purchasing one if to liking); Gilliland v. Bondurant, 332 Mo. 881, 59 S.W.2d 679 (1933) (school children on premises, at invitation of owner, for purpose of inspecting methods of operating bakery-creamery); Renfro Drug Co. v. Lewis, 149 Tex. 507, 235 S.W.2d 609 (1950). *But see* Edwards v. Lederer, 339 Ill. App. 647, 90 N.E.2d 799 (1950) (person going to back of store to get free box, held licensee); Dofner v. Branard, 236 S.W.2d 544 (Tex. Civ. App. 1951) (person who went into filling station for purpose of obtaining information held not an invitee).

the court held that if the plaintiff walked onto defendant's premises with the purpose of using the phone, the chance that he might buy some tires was too incidental to be considered a real benefit. However, many courts have found economic benefit in such incidental things as going into a filling station with the sole purpose of using the rest room,[19] in a customer's use of a rest room in stores,[20] and entering a store with the single purpose of using the phone.[21] It would seem to require more searching to find an economic benefit in those cases than in the case at hand.

The decision in the instant case may represent an attempt to check the tendency of courts to find economic benefit in an increasing number of situations. It should be remembered, however, that the instant case emanated from the St. Louis Court of Appeals. To date, the Missouri Supreme Court has shown no desire to restrict the factual situations regarding invitees.

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19. Dym v. Merit Oil Corp., 130 Conn. 585, 36 A.2d 276 (1944); Shaw v. Piper's Super Service Station, 312 Ill. App. 656, 38 N.E.2d 785 (1942).

20. Main v. Lehman, 294 Mo. 579, 243 S.W. 91 (1922); Scott v. Kline's, 284 S.W. 831 (St. L. Ct. App. 1926).

21. Ward v. Avery, 113 Conn. 394, 155 Atl. 502 (1931); Dowling v. Machean Drug Co., 248 Ill. App. 270 (1928).