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Torts--Negligence--Invitees and Licensees in Kentucky

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TORTS—NEGLIGENCE—INVITEES AND LICENSEES IN KENTUCKY

The purpose of this note is to explore that part of Kentucky torts law dealing with the liability of owners or occupiers of land for injuries sustained by others while visiting upon the premises. The approach of the Kentucky Court of Appeals to this problem has been to exact from the landholder a duty of care commensurate with the status of the visitor. In accordance with this approach, the Court has erected four status categories, those of trespasser, licensee, invitee, and insured, and has prescribed duties of care on a corresponding scale. The Court has not been too clear either in distinguishing between licensees and invitees or in stating the resultant duties of care. Since it appears that the greatest volume of litigation is concerned with the distinction between licensees and invitees and that the uncertainty is most pronounced in these cases, the scope of this note is confined to the invitee-licensee problem. This note will attempt to synthesize the decisions in this area and to state the present law insofar as the cases permit.

I

Duties of Care

A. Toward the Licensee

The language used by the Court in describing the duty owed to the licensee is often misleading. Words are repeatedly used to the effect that the landholder owes a licensee no duty whatever except to refrain from wilfully or wantonly injuring him. Taken literally, this language would force the conclusion that a licensee is in a luckless position indeed. Any right of action would have to be based upon an intentional act or upon the highest degree of negligence. The cases indicate that many appeals have been based upon such an assumption.

1 Kentucky & West Virginia Power Co. v. Stacy, 291 Ky. 325, 329, 164 S.W. 2d 537, 539 (1942).
3 The incidence of wide general statements has been extremely high in the cases dealing with the duty of care owing to a licensee. This seems to be due to the practice of verbatim repetition of statements from case to case. Although it is true that the lawyer should read the Court's decisions with strict reference to the facts of each case, it would be a substantial contribution to clarity and would no doubt reduce the volume of appealed cases if the statements made in the opinions were themselves more closely related to the facts.
However, the cases, when examined with reference to their facts, put the licensee in a much improved position.

In actuality, the Court has made duty vary according to the manner in which the injury is caused. If the proximate cause of the injury is the defective condition of the premises then the care required is rather low;\(^4\) if the cause is active negligence, however, the position of the licensee is improved.\(^5\)

In the case of injuries resulting from defects in the premises the law is unclear until related to specific facts. A few inept phrases, neither accurate nor complete, are to be found in case after case. It is often said that a licensee “takes the premises as he finds them;”\(^3\) again it has been said many times that the possessor of land owes a licensee no duty “except to refrain from wilfully or wantonly injuring him.”\(^7\) Remarks such as these have been made in cases where the issues were actually very narrow and such sweeping statements were not warranted.\(^8\)

A licensee does not really “take the premises as he finds them,” nor does the landholder’s liability begin with “wanton” or “wilful” injury. Whenever the specific question has arisen it has been held that the licensee is entitled to be told of any dangerous defects which are actually known to the possessor and unknown to the licensee, unless such defects are so obvious as to make a warning unnecessary.\(^9\) In the absence of a warning, the landholder has a duty of reasonable care to make timely repairs.

Also, if defective conditions have developed due to the landholder’s gross negligence he is held accountable even where he has no actual knowledge of the defect.\(^10\) Gross negligence is something less than

\(^4\) Kentucky & West Virginia Power Co. v. Stacy, 291 Ky. 325, 164 S.W. 2d 537 (1942); Louisville & N. R. Co. v. Page, 203 Ky. 755, 263 S.W. 20 (1924); Bales v. Louisville & N. R. Co., 176 Ky. 207, 200 S.W. 471 (1918). For an interesting discussion of the variance in duty see Beard v. Klusmeier, 158 Ky. 153, 164 S.W. 319 (1914); and cases cited note 2 supra.

\(^5\) See note 4 supra.

\(^6\) Wall v. F. W. Woolworth Co., 209 Ky. 258, 272 S.W. 730 (1925), and cases cited note 4 supra.

\(^7\) See note 2 supra.

\(^8\) In all the cases cited in note 2 supra, the injuries were caused by defective conditions in the premises; the holdings actually were concerned with passive negligence in failure to repair. Any language concerning positive acts of negligence had to be, and later is seen to be, dictum.

\(^9\) Ockerman v. Faulkner’s Garage, 261 S.W. 2d 296 (Ky. 1953) (In this case, the Court modified this duty to the extent that communication need not be made unless the landholder should reasonably anticipate that the defective condition will cause injury.); Kentucky & West Virginia Power Co. v. Stacy, 291 Ky. 325, 164 S.W. 2d 537 (1942); Sage’s Adm’r v. Creech Coal Co., 194 Ky. 415, 240 S.W. 42 (1922); Beard v. Klusmeier, 158 Ky. 153, 164 S.W. S.W. 319 (1914); Ky. Distilleries & Warehouse Co. v. Leonard, 25 Ky. Law Rep. 2046, 79 S.W. 261 (1904).

\(^10\) Scuddy Coal Co. v. Couch, 274 S.W. 2d 388 (Ky. 1954).
wantonness or wilfullness. The Court has defined wanton negligence as a degree of carelessness so high as to evince a complete disregard for human life and safety;\(^{11}\) gross negligence, however, is the absence of slight care,\(^{12}\) or the absence of such care as a man of reasonable prudence but careless habits would ordinarily use.\(^{13}\) Compared to "complete disregard for human life and safety," the conduct of a man of careless habits seems mild.

The case of *Louisville & N. R. Co. v. Snow's Adm'r*,\(^{14}\) decided in 1930, could have led to further inroads upon the landholder's position, but has seemingly failed to do so. In that case, a railroad company had built a trestle, providing in addition to its track a driveway for motor vehicles and a walkway for pedestrians. The public used the bridge for many years and continued to do so after the company abandoned the bridge and built a new one. While building the new bridge, workmen stripped out part of the floor and parts of the guardrails on the old bridge, later replacing everything except a section of one guardrail. Plaintiff fell due to the absence of the guardrail while walking across the bridge. The Court held that the railroad owed a duty of reasonable care to continue to maintain the bridge in safe repair or give adequate notice of its contrary intent. The theory stated was that one who dedicates property to public use assumes a duty of reasonable care regarding its condition, although the same result would presumably have been reached on the theory of known defects. The case did not make clear whether the plaintiff was held to be a licensee entitled to ordinary care or an invitee, making its import dubious. However, this case was later closely restricted to its facts\(^{15}\) and has received no mention in recent years.

The conclusion may be drawn that insofar as defects in the condition of land are concerned, the landholder owes to a licensee a duty to use some care (such as would be used by a reasonable man of careless habits) to keep the premises safe; he must use reasonable care to repair defects actually known to him and not to the licensee, or must warn the licensee thereof, unless the defect is obvious. There is authority to the effect that one who dedicates property to the public

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\(^{11}\) *Louisville & N. R. Co. v. George,* 279 Ky. 24, 129 S.W. 2d 986 (1939).
\(^{14}\) 235 Ky. 211, 30 S.W. 2d 885 (1930).
\(^{15}\) *Baird v. Goldberg,* 283 Ky. 558, 142 S.W. 2d 120 (1940); *Moody v. Louisville & N. R. Co.,* 239 Ky. 541, 39 S.W. 2d 988 (1931).
use, retaining the management and control of the premises, assumes a duty of reasonable care to keep it in repair.

Concerning injuries resulting from activities on the part of the possessor, as distinguished from defects in the premises, the licensee and the invitee seem to stand in the same position. The owner or occupier of land is under a duty to anticipate the presence of the licensee upon his premises and is required to use reasonable care to avoid injury to him through such acts. The Court uses the terms “active negligence” and “positive negligence” to describe this concept.

### B. Toward the Invitee

The landholder’s duty of care toward an invitee is the duty of reasonable care generally required in negligence cases; that is, the possessor must exercise such care as would be used by an ordinary reasonable man in the community under the same or similar circumstances. Proximate cause has no bearing, as in the licensee cases, upon the duty.

The “area of invitation” cases make it possible for an invitee to suddenly lose the protection of the reasonable care rule in certain instances. The area of invitation may be defined as that part of the premises which the invitee is invited to use. These cases hold that when the invitee departs from the area of invitation he is stripped of invitee status and remains a mere licensee while out of such area.

The question is objective and is decided by reference to the standard of reasonableness; the area is that area which a reasonable invitee would consider as open for his use. Thus it has been held that the sales floor of a variety store is within the area of invitation while steps leading down to a basement and set off by a small folding gate are outside the area.

### C. Conclusion as to Duties

The duty owing to a licensee upon land of another is in reality much the same as the duty owing to an invitee. Generally, the law

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16 Kentucky & West Virginia Power Co. v. Stacy, 291 Ky. 325, 164 S.W. 2d 537 (1942); Dennis’ Adm’r v. Kentucky & West Virginia Power Co., 258 Ky. 106, 79 S.W. 2d 377 (1955); Black Mountain Corp. v. Webb, 228 Ky. 281, 14 S.W. 2d 1003 (1929); Louisville & N. R. Co. v. Page, 203 Ky. 755, 263 S.W. 20 (1924); Beard v. Klusmeier, 158 Ky. 153, 164 S.W. 319 (1914).

17 Kentucky & West Virginia Power Co. v. Stacy, 291 Ky. 325, 164 S.W. 2d 537 (1942).

18 Taylor v. Koenig, 242 S.W. 2d 625 (Ky. 1951).

19 City of Madisonville v. Poole, 249 S.W. 2d 133 (Ky. 1952); Wall v. F. W. Woolworth Co., 209 Ky. 258, 272 S.W. 730 (1925); Ferguson & Palmer Co. v. Ferguson’s Adm’r, 114 S.W. 297 (Ky. 1908).

20 City of Madisonville v. Poole, 249 S.W. 2d 133 (Ky. 1952).

seems to be that the landholder owes to both the licensee and invitee a duty of reasonable care to prevent injury; however, in the case of defects in the premises, if such defects are actually unknown to the landholder, the duty owing to a licensee is not so high as that owing to an invitee. In this latter case the duty to make and keep the premises safe is one of slight care or such care as a reasonably prudent man of careless habits would use if the visitor is a licensee; the duty of reasonable, as distinguished from slight, care is owed to an invitee.

More concisely, it may be said that a landholder owes to both licensees and invitees a duty of reasonable care to avoid causing them injury, except that in the case of injuries resulting from unknown defective conditions in the premises the duty owing to a licensee is lesser, being one of slight care.

In the writer's opinion, the above statement is accurate and comprehensive. Since it has been found that broad statements tending to mitigate the duty owing to a licensee are really applicable in only one type of case, it is thought to be more realistic to state first that duties owing to licensees and invitees are generally the same and then to describe the defective conditions situation as an exception.

II

Licensee-Invitee Distinction

The Court of Appeals has said that the distinction between licensees and invitees is "often shadowy and indistinct." The fact situations covered by the cases leave a twilight area in which conjecture is the only guide. Other than this area wherein no cases have reached the Court, confusion results from frequent failure to identify the plaintiff in a case as a licensee or invitee; the Court has sometimes talked of the duty owing to "such licensee or invitee." In addition to these factors, the most recent case upon the subject is very difficult to reconcile with the stated rule. This latter case is considered so unusual and radically different from its predecessors that it will be considered alone following a discussion of prior cases.

A. The Mutual Benefit Test

The various American jurisdictions are not in accord on the question of the difference between licensees and invitees. W. L. Prosser

22 Shoffner v. Pilkerton, 292 Ky. 407, 166 S.W. 2d 870 (1943).
23 Strangely, the Court of Appeals has not yet had occasion to determine the status of a non-customer injured on business property, where a general invitation extends to the public. A large volume of litigation would be expected in this area; it may be that the minor damages resulting from falls and bumps in stores largely preclude costly appeals.
and the Restatement of Torts disagree as to what theory finds support in the majority of jurisdictions. The basic problem seems to be whether invitee status should be predicated upon invitation alone or upon benefit, or the reasonable expectation thereof, to the landholder. Prosser maintains that a sufficient basis of liability is to be found in the implied assurance of reasonable care which accompanies an invitation; the Restatement of Torts adopts the test of economic benefit, commonly called the “mutual benefit test.” Regardless of which theory is the majority view, Kentucky seems to subscribe to the test of mutual benefit.

The case of Southern Ry. in Ky. v. Goddard, decided in 1905, seems to be the first case in which the Court of Appeals clearly enunciated a rule of distinction between licensees and invitees. The injured party in that case was a person shipping horses on defendant’s railway. He fell and was injured while moving about a railroad car after dark, seeing to the loading of his horses. The Court held the shipper to be an invitee, saying:

The distinction between invitation and license is stated in Wharton on Negligence (book 1, sec. 349), as follows: “The principle appears to be that invitation is inferred where there is a common interest or mutual advantage, while license is inferred where the object is the mere pleasure or benefit of the person using it.”

The Kentucky cases since the Goddard case have consistently affirmed the mutual benefit rule. Although a recent commentator has said that the Kentucky cases are inconsistent and that case authority is to be found supporting the view that invitee status may arise from an invitation alone, such authority exists, if at all, only in the form of dictum.

25 Id. at 456; Restatement, Torts secs. 332, 343, Comment a (1934).
27 121 Ky. 567, 89 S.W. 675 (1905).
28 Id. at 574, 89 S.W. at 676.
30 The two cases relied upon to support that view do not so hold. The first of these was Leonard v. Enterprise Realty Co., 187 Ky. 578, 219 S.W. 1066 (1920). In this case, the plaintiff, a prospective tenant, visited rental property owned by the defendant on the invitation and with the consent of the defendant for the purpose of renting the property if suitable. There was no indication in this case, even in the form of dictum, that an invitation would suffice of itself to make an invitee of the visitor. On the contrary, the Court specifically restated the mutual benefit test and held the plaintiff to be an invitee on that basis. Id. at 581, 219 S.W. at 1067-68. Even so, the Court dismissed the question of status as irrelevant, holding that no negligence was shown. Clearly this was a case in which the plaintiff’s visit involved mutual benefit to the parties.
31 The other case, that of Young’s Adm’r v. Farmers and Depositors Bank, 267 Ky. 845, 103 S.W. 2d 667 (1937), squarely upholds the mutual benefit test. In that case, plaintiff was an employee of a plumber who was employed to remove water containing an explosive substance from the basement of defendant’s build-
The fact situations available for study in the reported cases indicate only one instance in which the mutual benefit test may break down. The instance occurs where the property in question has been dedicated by its owner to the public use and where the owner retains the management and control of the property. This was the situation in Louisville & N. R. Co. v. Snow's Adm'r, previously discussed in relation to the duty of care owing to a licensee. In that case a railroad company was held to a reasonable duty of care in maintaining a bridge containing a walkway and driveway for public use as well as railroad tracks. It could have been that the plaintiff was held to be a licensee entitled to a high duty of care; equally, the Court could have awarded him invitee status and applied the reasonable duty of care as to defective premises as usual. Since either construction seems supportable, the case is mentioned in both sections of this note.

B. The Scuddy Case

The recent case of Scuddy Coal Co. v. Couch came before the Court of Appeals twice. The plaintiff was riding a mule across defendant's mining property on his way to town. His home and several others were located in the hills behind the mine and he and his neighbors customarily crossed defendant's property in going to the highway. On the occasion in question plaintiff approached the narrow-gauge railroad track running from defendant's mine-opening to its coal chute. As cars of coal were then coming out of the mine on the track, defendant's foreman stopped plaintiff and told him to wait until the cars had passed before crossing. When the cars were past, the foreman told defendant to proceed across the track at a certain place, pointing to the place. In crossing, plaintiff's mule stepped on a defective tie which caused the mule to throw plaintiff, injuring him.

When the case was first appealed from the judgment for plaintiff, the Court reversed and ordered a new trial, holding that plaintiff could be no more than a licensee and that he took "the premises as he

ing. He was injured when the substance exploded. On the question of plaintiff's status, the Court said, "although not directly employed by the owner of the premises, one who enters on them by virtue of his employment to do work which his employer has contracted to do has the status of an invitee." Id. at 848, 103 S.W. 2d at 669. Here, of course, the Court was explaining plaintiff's relationship to defendant in terms of benefit. Going on to the question of duty, the Court said that, "The duty owing by an owner or person in possession to those who come on the premises by invitation . . . is . . . to use ordinary care to have the premises in a reasonably safe condition." The word "invitation" here is a legal conclusion based upon the fact of employment. Also, as in the Leonard case, the status question was held irrelevant, a peremptory instruction for defendant being upheld for lack of negligence as matter of law.

31 235 Ky. 211, 80 S.W. 2d 885 (1930).
32 Scuddy Coal Co. v. Couch, 274 S.W. 2d 388 (Ky. 1954); Scuddy Mining Co. v. Couch, 295 S.W. 553 (Ky. 1956).
found them.” Upon the new trial plaintiff again secured a verdict and the case was again appealed. Strangely, the Court distinguished its previous opinion and held the plaintiff an invitee.

In explaining the seeming conflict between the two opinions, the Court relied upon one fact which appeared in the second record and not in the first. This fact was that defendant’s foreman directed plaintiff to cross the track at a certain point; in the first record no more was shown than that the foreman delayed the plaintiff until the cars had passed, presumably then leaving him to cross wherever he pleased.

The exact import, in terms of holding, of the Scuddy case is difficult to ascertain. The Court did not elucidate its reason for placing emphasis on this single fact and did not state any general rule involving the fact. The entire question was resolved in a few lines, and the point was not abstractly discussed at all.

One thing, though, is very clear. There was no element of mutual benefit involved in the case; the mutual benefit rule was definitely not applied and had it been applied there can be no doubt that the result would have been different. It is possible that the Court construed the foreman’s acts in directing the plaintiff to cross at a particular place as conduct amounting to invitation and raised invitee status upon this basis. If this is true, then the case represents a departure from the benefit test and becomes highly important in view of the fact that the benefit test has been firmly entrenched in Kentucky for at least fifty years, since the Goddard case. As previously seen, the invitee-licensee distinction appears to be significant only in cases involving unknown defective conditions in the premises; perhaps the Court now intends to eliminate the distinction entirely. If this is the case, the lack of discussion or statement of a general rule in the Scuddy case is understandable; the indication is that the Court has decided to proceed upon this new tack with caution, and without unequivocally committing itself, a common judicial policy.

III

The Alternative Viewpoints

The desirability of a new test of distinction, one which allows invitee status to be based upon the implied assurance implicit in an invitation, is a moot point. A great deal has been written on the question and it appears that modern writers for the most part favor the invitation test.\(^3\)

\(^3\) For a discussion of the problem with references to other writers, see Prosser, Torts 453-58 (2d ed. 1955). Especially see nn. 91-2 for a rather slanted historical explanation.
The rationale of the mutual benefit test is that of *quid pro quo*. The thought is that any reasonable man would exercise a higher degree of care toward one coming upon his premises to give benefit than toward one coming for a purpose of no benefit to the landholder. Under this theory the licensee is put upon a footing substantially equal to that of the landholder himself, and the landholder is not required to exercise a higher degree of care for the licensee's safety than he exercises for his own safety. Of course, this principle will not make the landholder's position impregnable. He will be liable for ordinary negligence except in relation to defective conditions, which ordinarily would be in existence before the coming of the licensee and result from passive, not active, conduct. The difference between active and passive conduct may not seem logical, but the Court seems to feel that active conduct is more culpable. In the case of persons invited on the premises for a purpose of the landholder, the higher duty applied must stem from the view, commonly held in our society, that he who pays his way may demand and receive special consideration. The concept of consideration as giving rise to special right-duty relationships is not unusual in business law, and here it is found in torts. Whether such a basis of liability is proper seems a question which can be answered only by reference to the prevailing sense of values in a jurisdiction.

A more altruistic viewpoint inheres in the theory that a basis of liability should be found in the implied assurance which is a part of most invitations. Proponents of this view seek to hold the invitor to his promise whether consideration exists or not. This is reminiscent of the moral obligation controversy in contracts law and raises the question of how far the courts will go in requiring exemplary conduct on the part of persons who are actually not supermen but everyday humans. The extent to which one is entitled to rely upon a voluntary representation must be determined in reference to common knowledge of human nature. Again, reference to the prevailing sense of values is indicated. A factor of flexibility in the law, allowing for such reference, would be welcome.

Probably neither test is fully adequate. In jurisdictions where the mutual benefit test is applied, courts have strained the concept of benefit upon occasion, as in the cases of accidents to non-customers in business establishments, where the element of benefit has been found in the possibility of future business resulting from good will.34 On the other hand, it is difficult to justify invitee status in the case of

34 Gilliland v. Bondurant, 332 Mo. 881, 59 S.W. 2d 679 (1933); but see, Stewart v. Texas Co., 67 So. 2d 653 (Fla. 1953).
a farmer who invites a stranger to hunt upon his land; it would require a considerable stretch of imagination to say that the farmer undertook to assure the hunter of the safety of the premises. The type of invitation construed into the facts of the Scuddy case furnishes another doubtful instance; this type of invitation, if such it may be called, is more in the nature of a resigned acceptance of a bothersome visitor than an active solicitation and constitutes a poor basis for implying an assurance of safety.

IV

Conclusion

The invitee-licensee distinction is a mechanism designed to select automatically the proper duty of care owing in a given instance. This necessarily involves a wholesale imputing of stereotyped motives to different individuals in many different types of fact situations without provision for varying concepts of fairness in different communities. The cases demonstrate that no matter what test is adopted for use in making the distinction, instances frequently occur to which the results obtained from strict application of the rule are unsatisfactory. Factors which may reasonably bear upon the question of duty include benefit, assurances of safety, reasonable inferences on the part of the visitor, and standards of fair play prevalent in the particular community. These factors will inevitably vary in given fact situations and in given communities.

The law of torts as to negligence generally predicates liability upon failure to observe the standard of reasonable care in one's conduct. Where the present system classifies the visitor and applies the resulting duty of care, it would seem preferable merely to present to the fact-finder in each case the question of what duty a reasonable man would exercise under the circumstances. Thus the distinction between licensees and invitees with its resulting complications and shaded fact area would be dispensed with, and the "shadowy and indistinct" line of delineation would be no more. To hold every man to a standard of reasonable conduct under the circumstances of his particular case would be a far simpler endeavor.

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