Washington Law Review

Volume 42 | Number 1

10-1-1966

Visitor Responding to Public Invitation Classified as Invitee

anon

accomplish and the criteria which must be met before a municipality may issue its general obligation bonds. Passage of legislation providing for such a procedure would permit a municipality to plan financing projects according to specific standards promulgated by the state legislature. For example, where development of recreational facilities is an important aspect of a state's economy, a legislature could declare that municipal development of such facilities would serve a "public purpose." Limitations on the type of facilities and on the methods of financing would provide additional guidance to a municipality which would also consider the plan in light of the designated standards and policies.[20] While judicial scrutiny would still be the final step, such a procedure as suggested would provide a sounder basis for application of the public purpose doctrine and minimize the prospect of summary invalidation of municipal financing proposals.

VISITOR RESPONDING TO PUBLIC INVITATION CLASSIFIED AS INVITEE

Defendant savings and loan association invited local community groups to use, without charge, a room and adjoining kitchen facilities on its premises for meetings. Plaintiff was injured on defendant's premises while walking to a meeting of her organization scheduled for this room. Plaintiff sued for damages; defendant's motion to dismiss was granted. On appeal, the Washington Supreme Court reversed the order of dismissal and remanded. *Held:* When the public is invited to use premises under circumstances implying an assurance of reasonable care, any visitor responding to that invitation is an "invitee" owed an affirmative duty of reasonable care by the owner or occupier, whether or not economic benefit may be derived from the visit. *McKinnon v. Washington Fed. Sav. & Loan Ass'n,* 68 Wash. Dec. 2d 640, 414 P.2d 773 (1966).

During the nineteenth century the common law evolved the categories of trespasser, licensee, and invitee for persons going on land of another.[1] In Washington a land owner or occupier owes an invitee an

[20] A similar recommendation was made by a commentator on the limitations on municipal indebtedness in Utah. Elimination of all restrictions on municipal indebtedness present in the state constitution was advocated, followed by creation by the legislature of a State Department of Local Government. This department would have broad powers over financing plans of municipal corporations. See Note, *Constitutional Restrictions Upon Municipal Indebtedness,* 1966 UTAH L. REV. 462, 487.

[1] See Comment, 10 ALA. L. REV. 369, 371-76 (1958); Annot., 95 A.L.R.2d 992, 995-96 (1964).

affirmative duty of reasonable care under the circumstances,[2] whereas he owes a trespasser or licensee a duty only to refrain from wilful or wanton injury.[3] Two tests have been used to determine whether a visitor is an invitee or licensee: the "economic benefit test" which emphasizes the subjective purpose of the visit; and the "invitation test" which emphasizes the nature of the invitation.[4] Washington early adopted the economic benefit test[5] and has continued to use it exclusively.[6] The *Restatement (Second), Torts* suggests use of both tests.[7] The principal case is the first Washington decision[8] specifically to adopt the invitation test of the *Restatement (Second), Torts,* and

---

[2] Hartman v. Port of Seattle, 63 Wn. 2d 879, 389 P.2d 669 (1964); DeHeer v. Seattle Post-Intelligencer, 60 Wn. 2d 122, 372 P.2d 193 (1962).

[3] Martin v. Hauser, 299 F.2d 338, 339 (9th Cir. 1962) (applying Washington law).

The respective duties owed to trespassers and licensees are distinguishable by certain exceptions wherein a licensee is owed a duty of reasonable care. See Potts v. Amis, 62 Wn. 2d 777, 384 P.2d 825 (1963) (licensee owed reasonable care with respect to dangerous activities, as distinguished from conditions, on the premises); Ward v. Thompson, 57 Wn. 2d 655, 359 P.2d 143 (1961), 37 WASH. L. REV. 250 (1962) (licensee owed reasonable care with respect to dangerous instrumentalities on the premises). See also Christensen v. Weyerhaeuser Timber Co., 16 Wn. 2d 424, 432, 133 P.2d 797, 800 (1943); Comment, 39 WASH. L. REV. 345, 346-50 (1964).

A majority of jurisdictions differentiate these respective duties by requiring that an occupant warn a licensee of unreasonable risks of which the occupant has knowledge. See PROSSER, TORTS 389-91 (3d ed. 1964) [hereinafter cited as PROSSER]; Seavey, *Principles of Torts,* 56 HARV. L. REV. 72, 80 (1942). However, in Washington there is apparently no duty to warn a licensee. See Porter v. Ferguson, 53 Wn. 2d 693, 336 P.2d 133 (1959); Dotson v. Haddock, 46 Wn. 2d 52, 58-61, 278 P.2d 338, 341-43 (1955).

[4] See 2 HARPER & JAMES, TORTS 1478-80 (1956) [hereinafter cited as HARPER & JAMES]; PROSSER 395-401.

[5] Gasch v. Rounds, 93 Wash. 317, 160 Pac. 962 (1916). Introduction of the economic benefit test into the United States is generally attributed to Plummer v. Dill, 156 Mass. 426, 31 N.E. 128 (1892), although that case may have been misinterpreted. See Prosser, *Business Visitors and Invitees,* 26 MINN. L. REV. 573, 604 (1942).

[6] See, *e.g.,* Dotson v. Haddock, 46 Wn. 2d 52, 278 P.2d 338 (1955); Shock v. Ringling Bros. and Barnum & Bailey Combined Shows, 5 Wn. 2d 599, 105 P.2d 838 (1940); Garner v. Pacific Coast Coal Co., 3 Wn. 2d 143, 100 P.2d 32 (1940).

[7] § 332 (1965):

> Invitee Defined
>
> (1) An invitee is either a public invitee or a business visitor.
>
> (2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.
>
> (3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.

The "public invitee" category is an addition to the "business visitor" category contained in RESTATEMENT, TORTS § 332 (1934).

[8] Two early Washington decisions appeared to apply the invitation test. See Hanson v. Spokane Valley Land & Water Co., 58 Wash. 6, 107 Pac. 863 (1910); Collins v. Hazel Lumber Co., 54 Wash. 524, 103 Pac. 798 (1909). These cases were subsequently explained as examples of an exception to the economic benefit test which provides that one who extends or maintains what appears to be a public

place an affirmative duty of care upon an occupier when no elements of economic benefit were present in the visit.[9]

The court in the principal case recognized the recurring judicial practice of using "rhetorical gymnastics" to find sufficient pecuniary benefit in the facts of a case to fulfill the economic benefit test. It sought to avoid this practice, and still reach a "just" result, by emphasizing the nature of the invitation rather than the subjective purpose of the visit. Following the suggestion of *Restatement (Second), Torts*[10] and commentators,[11] the court redefined the invitee category to include persons responding to a public invitation, but limited this extension by requiring that the invitation assure that reasonable care had been taken to prepare for the visitor. Thus, in adopting the invitation test, Washington added an alternative to the economic benefit test as a means of classifying a visitor as an invitee.

To qualify as an invitee under the economic benefit test, the purpose for which a visitor enters another's premises must be of actual or potential pecuniary benefit to the occupier.[12] There must be some real or supposed mutuality of interest between the parties.[13] Prior to the principal case, visitors on another's premises by permission or invitation who did not present the possibility of economic benefit were classified as licensees.[14] Because an occupier owes a licensee a duty only to refrain from wilful or wanton injury,[15] classification of a plaintiff visitor as a licensee was often tantamount to denying recovery.[16] In an effort to ameliorate this result, courts have developed exceptions to the economic benefit test[17] or strained facts to come within it.[18]

roadway owes a duty of reasonable care to those who use it. See Dotson v. Haddock, 46 Wn. 2d 52, 56, 278 P.2d 338, 340 (1955); RESTATEMENT, TORTS § 367 (1934).

[9] The invitation test was adverted to in Ward v. Thompson, 57 Wn. 2d 655, 359 P.2d 143 (1961), 37 WASH. L. REV. 250 (1962); however, as there were elements of pecuniary benefit present, the invitation test was not necessary to the decision. See McKinnon v. Washington Fed. Sav. & Loan Ass'n, 68 Wash. Dec. 2d 640, 414 P.2d 773, 777 (1966).

[10] See RESTATEMENT (SECOND), TORTS § 332 (1965).

[11] See 2 HARPER & JAMES 1478-80; PROSSER 394-401.

[12] Dotson v. Haddock, 46 Wn. 2d 52, 55, 278 P.2d 338, 340 (1955).

[13] Christensen v. Weyerhaeuser Timber Co., 16 Wn. 2d 424, 432, 133 P.2d 797, 801 (1943).

[14] See Shock v. Ringling Bros. and Barnum & Baily Combined Shows, 5 Wn. 2d 599, 605, 105 P.2d 838, 841 (1940).

[15] Deffland v. Spokane Portland Cement Co., 26 Wn. 2d 891, 903, 176 P.2d 311, 318 (1947).

[16] See 37 WASH. L. REV. 250, 252 (1962).

[17] The guest of a tenant in an office building, apartment, or hotel is an invitee vis-à-vis the owner. *E.g.*, Holm v. Investment & Sec. Co., 195 Wash. 52, 79 P.2d 708 (1938). One accompanying an invitee to a store is himself an invitee regardless of his motivation. See PROSSER 397. *But cf.* Gasch v. Rounds, 93 Wash. 317, 160 Pac. 962 (1916). A traveller on what reasonably appears to be a public road is an invitee even though the road is privately maintained on private property. See note

Such treatment reveals a basic inadequacy in the economic benefit test. When used alone, the test not only fails to explain many decisions reached under it, but it affords no satisfactory basis for prediction.[19]

A general goal of the law of landowner liability should be to conform the duties imposed upon an occupier to a visitor's reasonable expectations.[20] If this goal is met, and the occupier adheres to his duty, the visitor should not be misled by expecting preparations for his safety which have not been taken. In many situations, however, the duty of care imposed upon an occupier by the economic benefit test will not conform to the visitor's expectations. A person entering an office building to use a public mailbox, or entering a bank to obtain a form, expects that reasonable safety precautions have been taken; yet he would be a licensee under the economic benefit test, exempting the occupier from a duty of reasonable care.[21] Application of the economic benefit test to a customer, however, results in conformity between the duties imposed upon an occupier and a visitor's expectations.[22] The customer expects and is entitled to reasonable preparation of the premises for his presence. This conformity, however, is coincidental. The customer's expectation of reasonable care arises from the nature of the invitation extended him rather than from an understanding of the economic benefit test, which imposes affirmative obligations only in return for some consideration.[23]

The economic benefit test also bears little relation to an occupier's perception of foreseeable injury. Because he normally will be aware of both invitees and licensees, injury to either is equally foreseeable. A variation in his duty accurately reflects variation in foreseeable injury only if a licensee may be expected to exercise greater care for

8 *supra*. A duty of reasonable care may be owed to children, generally, regardless of whether they would be traditionally classified as trespassers, licensees, or invitees. See Sherman v. City of Seattle, 57 Wn. 2d 233, 356 P.2d 316 (1960).

[18] See, *e.g.*, Kalinowski v. YWCA, 17 Wn. 2d 380, 135 P.2d 852 (1943) (volunteer worker supervising dance held invitee vis-à-vis YWCA); Heckman v. Sisters of Charity, 5 Wn. 2d 699, 106 P.2d 593 (1940) (nonpaying guest at graduation ceremony of a charitable nursing school held an invitee).

[19] See James, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 YALE L.J. 605, 616-19 (1954).

[20] See Harper, in *Laube v. Stevenson: A Discussion*, 25 CONN. B.J. 123, at 133-34 (1951); Honre, in *Laube v. Stevenson: A Discussion*, 25 CONN. B.J. 123, at 134 (1951).

[21] See Brosnan v. Koufman, 294 Mass. 495, 2 N.E.2d 441 (1936); Cobb v. First Nat'l Bank, 58 Ga. App. 160, 198 S.E. 111 (1938). In Washington, economic benefit does not arise solely from good will. See Barrett v. Faltico, 117 F. Supp. 95, 99 (E.D. Wash. 1953).

[22] A purchaser or potential purchaser in a store is an invitee under the economic benefit test. Barnes v. J. C. Penney Co., 190 Wash. 633, 70 P.2d 311 (1937).

[23] 2 HARPER & JAMES 1478. See Bohlen, *The Basis of Affirmative Obligations in the Law of Tort*, 53 U. PA. L. REV. 209 (1905).

his own safety. However, because classification as a licensee under the economic benefit test may not conform to expectations of the visitor, it is possible that he will not exercise this greater care.

The invitation test adopted in the principal case bases liability upon a representation to a visitor that reasonable care has been exercised in preparing the premises for those invited.[24] There are two elements in the test: first, the visitor must be invited; and second, there must be some representation to that visitor that reasonable care has been taken for his safety. An invitation may be either express or implied, but must be more than passive permission to use the premises.[25] A representation of safety is usually implied—either from a public invitation, or from improvements made on the premises.[26] If either requirement is not met, and a visitor cannot qualify under the economic benefit test, he will be a licensee.

In jurisdictions where it has been adopted, the invitation test has received limited application. A social guest is still considered a licensee[27] under the rationale that, even though invited, he impliedly agrees to accept the premises as found, rather than rely upon an assurance that reasonable care has been taken for his safety.[28] Furthermore, application of the invitation test is limited in the *Restatement (Second), Torts*[29] and the majority of cases[30] to visitors responding to "public" invitations.

There appears to be no reason why the invitation test could not be applied where the invitation is limited to an individual. The test is not based upon the social or business purpose of a visit, but upon the nature of an invitation and whether it carries an assurance of safety.

[24] See PROSSER 398; RESTATEMENT (SECOND), TORTS § 332 (1965), quoted in note 7 *supra*.

[25] RESTATEMENT (SECOND), TORTS § 332, comment *b* (1965).

[26] "When a landowner tacitly permits the boys of the town to play ball on his vacant lot they are licensees only; but if he installs playground equipment and posts a sign saying that the lot is open free to all children, there is then a public invitation, and those who enter in response to it are invitees." RESTATEMENT (SECOND), TORTS § 332, comment *d* (1965). *Cf.* Geigel v. New York City Housing Authority, 225 N.Y.S.2d 891, 893 (Sup. Ct.) *aff'd*, 17 App. Div. 2d 838, 233 N.Y.S.2d 257 (1962).

[27] 2 HARPER & JAMES 1479-80.

For Washington social guest cases under the economic benefit rule see, *e.g.*, Lucas v. Barner, 56 Wn. 2d 136, 351 P.2d 492 (1960); Porter v. Ferguson, 53 Wn. 2d 693, 336 P.2d 133 (1959); McNamara v. Hall, 38 Wn. 2d 864, 233 P.2d 852 (1951).

[28] RESTATEMENT (SECOND), TORTS § 330, comment *h* (1965).

There has been considerable discussion whether this rationale actually reflects the expectations of the parties. See Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573, 603-04 (1942); James, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 YALE L.J. 605, 611-12 (1954). See generally *Laube v. Stevenson: A Discussion*, 25 CONN. B.J. 123 (1951).

[29] § 332 (1965).

[30] See 2 HARPER & JAMES 1480.

In many instances this assurance is implicit in the personal relationship between an occupier and visitor, whether or not the visitor is a member of an invited public. [31] The Washington court apparently recognized this in *Ward v. Thompson.*[32] Plaintiff in that case was invited by defendant to visit defendant's home construction site. While at the site, defendant asked plaintiff to ascend a scaffold with him and assist in construction, assuring him that the scaffold was safe. The scaffold collapsed, injuring plaintiff. The court noted that plaintiff would be an invitee under either the economic benefit or invitation test. In suggesting the use of the invitation test in this context, the court necessarily implied that an individual visitor could qualify as an invitee when assured of the occupier's due care even in the absence of a public invitation. Use of the invitation test should not be precluded by the absence of public invitation; rather the court should determine in each case whether an assurance of due care was made.

The trend in American tort law is toward a general negligence principle in all fields,[33] requiring that one exercise reasonable care to forestall foreseeable injury to another.[34] Expansion of the general negligence principle has created conflicts with traditional duty limitations on owners and occupiers of land.[35] This is reflected in decisions requiring that reasonable care be exercised toward licensees in an increasing number of circumstances,[36] and refusing to extend the traditional categories to new situations.[37] Limited landowner liability originated in feudal times and stems from ancient theories of landowner sovereignty.[38] Today urban property is divided into small,

[31] See generally, Prosser, *Business Visitors and Invitees,* 26 MINN. L. REV. 573, 602-11 (1942).

[32] 57 Wn. 2d 655, 359 P.2d 143 (1961), 37 WASH. L. REV. 250 (1962).

[33] See James, *Inroads on Old Tort Concepts,* 14 NACCA L.J. 226, 228-31 (1954).

[34] A classic statement of the general negligence principle is found in Heaven v. Pender, 11 Q.B.D. 503, 509 (C.A. 1883):

> [W]henever one person is placed by circumstances in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

[35] See Taylor v. New Jersey Highway Authority, 22 N.J. 454, 126 A.2d 313, 317 (1956).

[36] A licensee is owed a duty of reasonable care with respect to dangerous activities of the occupier, and dangerous instrumentalities on the premises. See note 3 *supra.* See also exceptions listed in note 17 *supra.*

[37] See, *e.g.,* Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959) (Supreme Court refused to apply traditional categories in admiralty law); Mills v. Orcas Power & Light Co., 56 Wn. 2d 807, 355 P.2d 781 (1960) (refusal to apply traditional categories of trespasser, licensee, and invitee to low flying aircraft).

[38] See James, *Inroads on Old Tort Concepts,* 14 NACCA L.J. 226 (1954); Note, 37 WASH. L. REV. 250, 251 (1962).

easily policed lots. An urban property owner may expect numerous and varied visitors. Furthermore, the advent of insurance allows spreading of liability risks over a large portion of society.[39] These facts raise compelling reasons why limitations on landowner liability, designed to solve problems of a social system long disappeared, should be abandoned in favor of a comprehensive general negligence rule.[40]

The invitation test is not consistent with general negligence theories because it limits occupier liability until the limitations are affirmatively relinquished by an occupier's assurance of reasonable care.[41] In contrast, a general negligence rule would create an immediate duty to prevent foreseeable risks. Without an assurance of reasonable care, many visitors would be classified as licensees under the invitation test when they would otherwise be owed a duty of reasonable care under general negligence principles.

The invitation test, however, does reflect general negligence principles more than the economic benefit test, because it expands the

[39] See Comment, 7 W. & M. L. REV. 313, 319 (1966); *cf.* EHRENZWEIG, NEGLIGENCE WITHOUT FAULT 42 (1951); James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948).

For a discussion of the impact of liability insurance on the social guest rule, see James, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 YALE L.J. 605, 611-12 (1954).

[40] *Cf.* Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630-31 (1959).

There may be some reluctance to apply the general negligence rule to a trespasser, perhaps because he is a wrongdoer. See Green, *Landowner v. Intruder; Intruder v. Landowner: Basis of Responsibility in Tort*, 21 MICH. L. REV. 495, 502-03 (1923). Courts, however, have shown a willingness to require higher duties of care to habitual trespassers whose presence is foreseeable. See, *e.g.*, Bohlen, *The Duty of a Landowner Towards Those Entering His Premises of Their Own Right*, 69 U. PA. L. REV. 237, 250-51 (1921). An occupier would not owe an affirmative duty of care to an unforeseen trespasser under general negligence principles.

New Jersey apparently abondoned the traditional categories and adopted the general negligence test in Taylor v. New Jersey Highway Authority, 22 N.J. 454, 126 A.2d 313 (1956), and Simmel v. New Jersey Co-op. Co., 47 N.J. Super. 509, 136 A.2d 301, *rev'd on other grounds*, 28 N.J. 1, 143 A.2d 521 (1957); however, the court retreated from this position in Snyder v. I. Jay Realty Co., 30 N.J. 303, 153 A.2d 1, 5 (1959):

> We believe that adherence to the traditional classifications is desirable in that it lends a reasonable degree of predictability to this area of the law. These classifications also aid in the proper distribution of trial functions between judge and jury, wherein the latter determines only disputed questions of fact.

It has been argued that this refusal to abandon limited duty concepts represents judicial reluctance to surrender control of the decision-making process to the jury. See Green, in *Laube v. Stevenson: A Discussion*, 25 CONN. B.J. 123, at 138 (1951).

[41] "The duty of a possessor to adult persons who enter the land is wholly self-imposed." Seavey, *Principles of Torts*, 56 HARV. L. REV. 72, 80 (1942).

The basis of liability under the invitation test is similar to the tort doctrine that one undertaking a gratuitous service must use reasonable care in completing that service. *Compare* Allen v. Yazoo & Miss. V.R.R., 111 Miss. 267, 71 So. 386 (1916) (construction of steps over railroad crossing held implied public invitation), *with* Erie R.R. v. Stewart, 40 F.2d 855 (6th Cir. 1930) (railroad's voluntary employment of watchman at crossing created duty of due care to those relying on this practice).

class of visitors to whom reasonable care is owed.[42] Furthermore, the test more adequately reflects foreseeability, a vital element of a general negligence rule. Occupier foreseeability of risk is partially dependent upon visitors' reasonable expectations, because these expectations influence the likelihood of a visitor's presence and care taken for his own safety. The invitation test accurately reflects such visitor's reasonable expectations by correlating the occupier's duty to the nature of the invitation.[43] Use of the invitation test as an alternative method of determining an occupier's duty will result in closer relation of the law of landowner liability to general negligence principles, and should prevent many of the strained and unpredictable results under exclusive use of the economic benefit test. The conformity with general negligence principles, however, is still incomplete, representing an appropriate area for further judicial reform.[44]

DECEPTIVE ADVERTISING AND INCONSISTENT GUARANTEES

Respondent, a national retailer of general merchandise, inserted in guarantee certificates accompanying some of its products conditions and limitations not disclosed in guarantees contained in newspaper advertisements. The Federal Trade Commission charged respondent with a violation of section 5 of the Federal Trade Commission Act for making false and misleading representations.[1] Respondent asserted that whenever a customer made a claim guarantees were honored as advertised without regard to conditions and limitations contained in the certificates. On appeal to the Commission, the hearing examiner's initial decision dismissing the complaint was reversed, and a final order

[42] The reasonable care owed to an invitee in Washington, however, is not the same as that owed under general negligence principles; there is no duty to protect a Washington invitee from open and obvious dangers. Caron v. Grays Harbor County, 18 Wn. 2d 397, 139 P.2d 626 (1943). The Washington rule should be changed to require a duty of protection if an occupier foresees that a visitor will fail to protect himself from the danger. See RESTATEMENT (SECOND), TORTS §§ 343, 343A (1965).

[43] See James, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 YALE L.J. 605, 620-21 (1954).

[44] See Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265, 309-10 (1963).

[1] Federal Trade Commission Act, § 5(A)(1), 52 Stat. 111 (1938), 15 U.S.C. § 45(a) (1964), amending 38 Stat. 719 (1914), provides: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

The Commission also charged respondent with engaging in unfair methods of competition in violation of § 5.