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STATUS OF THE SOCIAL GUEST: A NEW LOOK

INTRODUCTION

Persons who enter upon another's property have been classified as either trespassers, licensees, or invitees. Accordingly, each class of individuals has certain rights and privileges under the law; the trespasser has the least, the invitee has the most. Traditionally, and universally the courts have termed the social guest as a licensee.[1] More attention has been given this individual in recent years, but little has yet been done to ameliorate his position under the law. Injustices arising from the position taken by the courts can only be overcome by a discarding of the prevailing traditional views.

In determining the status of individuals coming upon another person's premises, courts have applied various tests and developed different views. What small shifts there have been in recent years have favored the social guest, but his status has yet to reach that of an invitee.

THE POSITION AS TAKEN BY THE COURTS

The social guest may suffer injury through either the "active" or "passive" negligence of his host, as well as through some willful or wanton act. "Active" negligence arises out of activities carelessly carried on by the host while the guest is in his presence. "Passive" negligence refers to injuries arising out of defective conditions in the host's premises. While an invitee has been afforded protection from all of these types of negligent acts, courts have yet to give the social guest protection from certain types of acts.

A few courts hold the narrow and unjust position that a host's only duty is to refrain from injuring the guest through willful or wanton conduct.[2] The distinction between "active" and "passive" negligence is

1. Southcote v. Stanley, 1 Hurlst & N 247, 156 Eng. Rep. 1195, 19 ENG. RUL. CAS. 60 (1856). In this case, the guest was injured by a defective glass door in the defendant's inn. The defendant knew that the door was defective but he gave no warning to the plaintiff prior to the injury. The court held that the defendant was under no liability to his guest arising out of an ordinary defect in the condition of the premises.

2. Cochran v. Aberchrombie, 118 So.2d 636 (Fla. 1960); Robinson v. Leighton, 122 Me. 309, 119 Atl. 809 (1923); Garner v. Pacific Coast Coal Co., 100 P.2d 32 (Wash. 1940); Carrol v. Spencer, 204 Md. 387, 104 A.2d 628 (1954); Colbert v. Ricker, 314 Mass. 138, 49 N.E.2d 459 (1943); Nichols v. Consolidated Dairies of Lake County, Inc., 125 Mont. 460, 239 P.2d 740 (1952); Renfro Drug Co. v. Lewis, 149 Tex. 507, 235 S.W.2d 609 (1950).

not recognized and the host is not held liable for injuries to the guest arising out of these types of acts. The social guest is in much the same position as a trespasser since his right is no more than mere sufferance on the premises of his host.[3]

Most courts recognize the distinction between "active" and "passive" negligence as well as willful or wanton conduct.[4] This view has placed the social guest in the same position as an invitee as regards the "active" negligence of the host, since the host must exercise ordinary care in carrying out his activities if he knows, or should have reason to know, that the guest is in his presence.[5]

The main distinction which remains between the social guest and the invitee, with respect to the duty owed by the host, concerns the conditions of the premises. Though the trend in cases involving "active" negligence of the host has progressed favorably for the social guest, this is not the case with "passive" negligence. The host owes to the invitee the duty of inspecting his premises for defects of which he might reasonably have knowledge.[6] In addition to inspection, the host must also exercise reasonable care in making the premises safe for the purposes of the invitation. This preparation may include either providing safety measures in dangerous areas, or warning the invitee of the existence of dangers which are not apparent or obvious.[7] On the other hand, the

3. Jones v. 20 N. Wacker Drive Building Corporation, 332 Ill. App. 382, 75 N.E.2d 400 (1947).

4. Atlantic Greyhound Corp. v. Newton, (4th Cir. 1942) 131 F.2d 845; Oettinger v. Stewart, 24 Cal.2d 133, 148 P.2d 19 (1944); Radio Cab v. Houser, 76 App. D.C. 35, 128 F.2d 604 (1942); Moore v. Ohio Oil Co., 24 Ill. App. 388 (1926); Roadman v. C. E. Johnson Motor Sales, 210 Minn. 59, 297 N.W. 166 (1941); Babcock & W. Co. v. Nolton, 58 Nev. 133, 71 P.2d 1051 (1937); Paquet v. Barker, 250 App.–Div. 771, 293 N.Y.S. 983 (1937); Dunn v. Bomberger, 213 N.C. 172, 195 S.E. 364 (1938); Davis v. Tredwell, 347 Pa. 341, 32 A.2d 411 (1943); Yamauchi v. O'neill, 38 Cal.–App. 703, 102 P.2d 365 (1940); Bradshaw v. Minter, 206 Va. 450, 143 S.E.2d 827 (1965); Oettinger v. Stewart. 24 Cal.2d 133, 148 P.2d 19, 22 (1944), quoting from PROSSER, TORTS § 78, at 456 (2d ed. 1955).

> ". . . it is now generally held that in cases resulting from *active* conduct, as distinguished from conditions of the premises, the landowner or possessor may be liable for failure to exercise ordinary care towards a licensee whose presence on the land is known to the owner or possessor." [emphasis added]

5. Laube v. Stevenson, 137 Conn. 469, 78 A.2d 693 (1951); Bradshaw v. Minter, *supra* note 4, RESTATEMENT (Second) TORTS § 341 at 929 (1958). This section states that "a possessor of land is subject to liability to licensees, whether business visitors or gratuitous licensees, for bodily harm caused to them by his failure to carry on his activities with reasonable care for their safety, unless the licensees know or from the facts known to them, should know of the possessor's activities and of the risk involved therein."

6. Smith v. Henger, 148 Tex. 456, 226 S.W.2d 425 (1950).

7. Pettyjohn & Sons v. Basham, 126 Va. 72, 100 S.E. 813 (1919). The court made the

host owes no duty to make the premises safe for the visit of his guest.[8] His only duty is to prevent defects which occur as a result of gross negligence[9] such as dangerous traps or spring guns.[10] Even in these cases, the host must have knowledge of the dangers involved before he will be held liable.[11] The host is under no duty to inspect his premises prior to the arrival of his guest; therefore, he is under no incidental duty to prepare a safe place for his guest.[12]

These duties of inspection and preparation of the premises are the discriminating features between the status of the social guest and the invitee. Without the assurance that the premises will be safe for the visit, social intercourse in communal environments is denied the security which should be required by law. To provide this protection the courts must change their position on the law from that which they now hold.

Why the Courts Have Taken This Position

The traditional view which placed the social guest in his unfavorable position was originally based upon the idea of the right of an individual to enjoy his property without outside interference.[13] A stranger took the premises as he found them and subjected himself to all the risks which the host and his family assumed.[14] Prosser recognizes the old cliché—that a person on the premises with merely a gratuitous invitation could not "look a gift horse in the mouth." [15] Over the years the courts have accepted this traditional view without question.

Two popular tests have been utilized in recent years to distinguish the social guest from the invitee. These are the "economic-benefit" test and the "invitation" test. The former relies on whether or not there is a mutual advantage involved in the relationship between the host and the individual on his premises.[16] The latter is based on the purpose underlying the giving of the invitation.[17]

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observation that the host owed a duty of prevision, preparation, and lookout to the invitee. As to the licensee, the host only owed the duty to lookout for him.

8. McNamara v. Hall, 38 Wash.2d 864, 233 P.2d 852 (1951).
9. Comeau v. Comeau, 285 Mass. 578, 189 N.E. 588 (1954).
10. Carbon v. Mackchil Realty Co., 296 N.Y. 154, 71 N.E.2d 447 (1947).
11. Vogel v. Ekert, 22 N.J. Super. 220, 91 A.2d 633 (1952).
12. McNamara v. Hall, *supra* note 8.
13. Comment, 31 Tenn. L. Rev. 485 (1964).
14. Comeau v. Comeau, *supra* note 9; Restatement, Torts § 331 (1932).
15. Prosser, *supra* note 4, § 77, at 445.
16. Restatement, Torts § 332 (1932).
17. Comment, *supra* note 13.

The test which is most rigid and has least favored the social guest is the economic-benefit test. Under this standard the purpose of the visit must or might confer some economic benefit on the host.[18] Even where he comes upon the premises by express invitation of the host, the visitor will not be an invitee unless there is some mutuality of interest between the parties.[19] Although the guest might render minor services for his host during the visit, the courts have not generally held this to be sufficient consideration to make the guest an invitee.[20] The social relationship rather than the services rendered is looked upon as the dominant aspect of the visit.[21] The courts seem to fear that deriving a benefit from every type of invitation would destroy the social guest distinction.[22] It appears that the rendering of incidental services would be the only means by which a social guest could qualify under the economic-benefit tests as an invitee, yet few cases have bestowed this status on him.[23]

Although the position of the social guest may seem hopeless in light of the economic-benefit test, many courts have declined to use it.[24] Prosser's dislike of the early *Restatement*[25] view favoring the economic-benefit test has had its effect.[26] He felt that the rendering of an economic benefit was not the essential element in determining the status of a visitor, but rather that the courts should look to the purposes for which the premises are open, whether public or private, and whether the visitor entered the premises under a reasonable assurance that the premises have been made safe for his visit.[27] This view has been accepted

18. Restatement, *supra* note 14.

19. Greenfield v. Miller, 173 Wis. 184, 180 N.W. 834 (1934); Comeau v. Comeau, *supra* note 9.

20. Lordi v. Spiotta, 133 N.J.L. 581, 45 A.2d 491 (1946); Cobb v. Clark, 265 N.C. 194, 143 S.E.2d 103 (1965).

21. Speece v. Brown, 40 Cal. Reptr. 384 (1964).

22. Cosgrave v. Malstrom, 127 N.J.L. 505, 23 A.2d 288 (1941).

23. Shepard v. Whigham, 141 S.E.2d 583 (Ga. App. 1965), (here the guest was injured while repairing a window fan for his host); McCulloch v. Horton, 102 Mont. 135, 56 P.2d 1344 (1936). In this case, the guest held a door open so that the host could drive his truck out of his garage. The guest was injured when an unlatched door on the host's truck struck him. The court stated that if the guest was not a gratuitous employee, then he was at least an invitee.

24. Laube v. Stevenson, *supra* note 5; Scheibel v. Lipton, 156 Ohio St. 308, 102 N.E.2d 453 (1951).

25. Restatement, *supra* note 14.

26. Prosser, *Business Visitors and Invitees,* 26 MINN. L. REV. 573 (1942).

27. *Id.*, at 611. Prosser's suggestions were:

> ". . . (3) When premises are thrown to the public, the occupier assumes responsibility for their safe condition toward any member of the public who

in a modified form by the second *Restatement*.[28]

The invitation test is the most appropriate means for elevating the social guest to the status of invitee, but most courts have been reluctant to recognize it as such. The visitor is immediately termed a licensee as a matter or law as soon as it is determined that he is a social guest.[29] Prosser states that the customary reason is that the guest "understands when he comes that he is to be placed on the same footing as one of the family and must take the premises as the occupier himself uses them, without any preparation." [30] Another reason is that a mere social visit is not a sufficient purpose from which the social guest can imply that the premises are in a safe condition.[31] A third view is that the social guest has only a license by permission,[32] whereas the invitee usually has a license by invitation.[33] There is no reason why the courts could not recognize that the social guest comes upon the premises with a license by invitation and therefore deserves the same protection as an invitee.[34]

Though the position of the courts has been to deny the social guest the status of an invitee, the trend may soon change this position. The courts now favor using the invitation test rather than the economic-benefit test.[35] Greater utilization of this theory may cause the ascension

may enter for the purpose for which they are open, regardless of whether he brings with him the hope of profit or "benefit".

. . . (4) When premises are not open to the public, the individual may still be entitled to protection if he enters under circumstances which give him reasonable assurance that care has been taken to make the place safe for his reception. Visits for the performance of contracts, and for other economic advantage to the occupier, usually are made upon such implied assurance. . ."

28. RESTATEMENT, *supra* note 5, § 332. 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.

29. Wolfson v. Chelist, 284 S.W.2d 447 (Mo. App. 1955); Compare, Laube v. Stevenson, *supra* note 5, J. Jennings dissent stating that the question is one of fact.

30. PROSSER, *supra* note 4, § 77 at 447.

31. Meyer v. Mitchell, 248 Minn. 397, 80 N.W.2d 450 (1957); Williams v. McSwain, 248 N.C. 13, 102 S.E.2d 464 (1958).

32. Millspaugh v. Northern Indiana Public Service Co., 104 Ind. App. 540, 12 N.E.2d 396 (1938).

33. *Ibid.*

34. Alexander v. General Fire & Assurance Corporation, 98 So.2d 730 (La. App. 1957).

35. 2 Harper & James, THE LAW OF TORTS, 1480 (1956).

of the social guest into the category of an invitee under the law. In the words of Prosser,

> The Restatement notwithstanding, the second [the 'invitation'] theory is now accepted by the great majority of the courts, and many visitors from whose presence no shadow of pecuniary benefit is to be found are held to be invitees.[36]

Why the Social Guest Should Be an Invitee

Louisiana is the only state which has actually taken the position that the social guest is an invitee. In the case of *Alexander* v. *General Fire & Accident Assurance Corporation*,[37] the plaintiff, a social guest in the defendant's home, was allowed to recover damages from an injury sustained as a result of the defendant's passive negligence. The plaintiff slipped on a loose rug in a narrow hallway between the living room and the bathroom. The court said that the plaintiff was an invitee to whom the duty owed by the host was

> ... not to insure him against the possibility of accident, but to exercise reasonable or ordinary care for his safety commensurate with the particular circumstances involved.[38]

This court condemned the traditional view that the social guest was a licensee as a matter of law because that view was based solely upon earlier concepts of the peculiar sanctity of land. The court felt that this view was both unrealistic and rigid in respect of the social guest-host relationship, saying that others have accepted this view "without sufficient realistic inquiry into whether the conduct under the particular circumstances involved an unnecessary risk to the safety of others avoidable by the exercise of due care." [39]

Other jurisdictions have voiced dissension over the classification of a social guest as a licensee but have yet to elevate him to the status of an invitee.[40] Though an Ohio court said that the social guest lay somewhere between the status of an invitee and a licensee, dicta implied that the social guest might be an invitee.[41] The host was not held to be

36. Prosser, *supra* note 4, § 78 at 455.

37. *Supra* note 34.

38. *Id.* at 732.

39. *Id.* at 733.

40. Laube v. Stevenson, *supra* note 5; Scheibel v. Lipton, *supra* note 24; Guilford v. Yale, 23 A.2d 917 (Mass. 1942).

41. Scheibel v. Lipton, *supra* note 24, at 463. The court stated "Although the host

an insurer of his guest's safety, but he was under a duty to exercise ordinary care both as to his active and passive negligence.

The law of negligence operates to shift the burden of responsibility upon the wrongdoer. Its purpose is to serve justice commensurate with the particular circumstances involved. The flexibility with which this law may be applied is the means by which just results may be found, and classifying the social guest as a licensee as a matter of law does not follow this concept of flexibility. Applying principles of negligence, the question involved is the standard of care the host owes to his guest.[42] It is more reasonable to judge the standard of care according to the facts arising out of the social guest-host relationship without first classifying the guest as a licensee as a matter of law.

The ease with which a homeowner can obtain liability insurance is one of the important reasons for discarding archaic concepts underlying the host's immunity.[43] The cost of insurance coverage is a small burden on the host compared to the costly injury which may result from his negligence. This fact refutes the argument that since both the host and guest are on the same economic level the burden should not be shifted to the host.[44] The basic problem is that the courts do not recognize insurance as a relevant issue in negligence cases. Insurance is considered a collateral matter which, when offered into evidence, is considered irrelevant, and therefore inadmissible. A more liberal view is that this type of evidence, if admitted, is not necessarily prejudicial error.[45] The Louisiana courts allow the insurance companies to be parties defendant in cases involving injury to social guests.[46] All jurisdictions should accept this practice in order that the burden of responsibility should fall upon the negligent party. Fear of rising costs of insurance premiums could be alleviated by some form of administrative control much like automobile insurance commissions. To argue that this would

is not an insurer of the safety of the guest while on the premises of the host, some duty short of that owed to a business visitor is owed to the guest. That duty of the host . . . is to exercise ordinary care not to cause injury to his guest by an act of the host or by any activity carried on by the host while the guest is on the premises. Coupled with this is the duty to warn the guest of any condition of the premises known to the host and which one of ordinary prudence and foresight in the position of the host should reasonably consider dangerous, if the host has reason to believe that the guest does not know and will not discover such dangerous conditions."

42. Comment, *supra* note 13.

43. Crittenden v. Fidelity & Casualty Co., 83 So.2d 538 (La. App. 1955).

44. 2 Harper & James, *supra* note 35.

45. Bradshaw v. Minter, *supra* note 4.

46. *Supra* note 34.

cause a flood of litigation would be in derogation of sound principles of justice, since, where the rights of an individual have been affected, the law must correct the situation.

By no means is the host an insurer of the safety of his guest.[47] To inflict such a burden on an ordinary individual would be unjust in itself. It is not intimated that the host should be held strictly liable,[48] but to require that ordinary care should be exercised by him when he engages in social intercourse with another individual is fully reasonable. This ordinary care should extend both to the host's "active" and "passive" negligence in cases where individuals are rightfully on the premises of the host.[49]

Conclusion

The trend of the courts in recent years has been to protect the welfare of the individual in many areas of law. Unfortunately, this trend has not been sufficiently extended to the social guest-host relationship. Although the host must exercise ordinary care in carrying out his activities in the presence of his guest, he is not held to the same standard of care regarding the conditions of his premises. Where an invitee is assured that the premises are in a reasonably safe condition, a social guest must take the premises as he finds them.

The traditional view that the social guest is a licensee as a matter of law must be discarded and the guest should be given the same legal status as an invitee. Social intercourse affects almost every individual in our society and some assurance should be given these individuals that they will be protected from the host's negligent act. This security can only be afforded by a new approach to the law. The invitation test should be relied on by all the courts in determining a person's status while on another's premises and extended to include the social guest as an invitee. Only by taking this approach will the courts give full protection to innocent individuals and shift the burden of responsibility on the wrongdoers.

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47. *Ibid.*

48. Marquet v. La Duke, 96 Mich. 596, 55 N.W. 1006 (1893). (Generally, where injury is caused by a dangerous animal strict liability is applied.)

49. 3 Cooley on Torts § 440 (4th ed. 1895).