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Article 13

Torts - Duty of Business Proprietor to Customer for Safety of Premises

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A person whose property is thus affected might have an election to ask for damages sufficient to place him in status quo, or for a mandatory injunction ordering restoration of the property to its former condition.[9]

A fine distinction between continuing tresspass and nuisance does not exist. The terms are used interchangeably but only to the extent that a continuing tresspass is a nuisance. JEROME J. DORNOFF

Torts — Duty of Business Proprietor to Customer for Safety of Premises — Plaintiff entered the defendant's restraurant for a midday meal and immediately inquired of the proprietor's wife as to the location of the restroom. Pointing to a door on the opposite side of the premises, the proprietor's wife replied, "around there". Plaintiff proceeded toward the door indicated, opened it, and fell headlong down a flight of stairs. The door was not marked and there was no sign in the restaurant indicating the location of the restroom. The trial court reasoned that there being no signs to direct the plaintiff, she assumed the risk by entering an unmarked door, and directed a verdict for the defendant. *Held:* Judgment reversed. The jury might have found that the defendant maintained a restroom on the premises as an integral part of the restaurant business and there was a general invitation to make use of it. The question of the plaintiff's contributory negligence was for the jury. *Hickman v. Dutch Treat Restaurant, 3 N.J.460, 70 Atl.(2d)764 (1950).*

Unquestionably, the plaintiff in the principle case, being a business visitor, was an invitee.[1] The invitor owes an affirmative duty to protect the invitee not only from dangers of which he knows, but also against those dangers which he might discover through the exercise of reasonable care.[2]

While it is uncontroverted that the customer of a store, while in the store proper, is an invitee,[3] the perplexing question is 'at what point does the status of an invitee change to that of a licensee, and

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[9] Irvine v. City of Oelwein, supra, note 4; Huber v. Stark et. al., 124 Wis. 359, 102 N.W. 12 (1905).

[1] Boneau v. Swift & Co., (Mo. App.), 66 S.W. (2d) 172 (1934). A person is an invitee if on the premises for a purpose connected with the business of the owner or occupant. For other definitions of 'Invitee' see also Words & Phrases.

[2] See Prosser on Torts, p. 635.

[3] Lyle v. Megerle, 270 Ky. 227, 109 S.W. (2d) 598 (1937). It will be noted in the principal case that the court dispensed with the issue of the unmarked door in this wise: "The fact that the unlocked door was not marked as the entry to the restroom is not in itself conclusive; there was no sign contrariwise and it is reasonably inferable that it was the door which the plaintiff believed (the proprietor) had indicated as the entry to the restroom." It would appear from this that a business visitor has the right to rely upon the words of the proprietor in place of a sign. But it would appear that such an invitation must be construed in the light of the nature of the business. Cf. Ftn. 11, infra.

correspondingly, when does the proprietor of a business establishment have only the duty of preventing wilful and wanton injury'.[4]

One theory is that the status of invitor - invitee rests on the economic benefits derived from the presence of the visitor.[5] Under this 'reward' theory, it follows logically that when the visitor enters those portions of the premises which serve only for his convenience, viz., a restroom, he becomes a licensee. In a Massachusetts case it was held that where the patron of a store asked and received permission to use the restroom located in the basement and was injured in a fall down the steps, although she was an invitee upon entering the store, she lost that status and was a mere licensee at the time of the fall.[6] However, in that case, the uncontradicted testimony of the proprietor was to the effect that he specifically informed the patron that the restroom was for the use of employees only. Where the patron is warned that the restroom is restricted to the use of employees, the courts are generally in accord that the patron is only a licensee.[7] It would appear that a controlling factor in such cases should be whether or not the patron entered this restricted area with the knowledge and consent, express or implied, of the proprietor. Also, where the patron fails to affirmatively show that the restroom was there for the use of customers, some courts have held that the patron is only a licensee.[8]

A second theory places the emphasis on the invitation, express or implied, which is held out to the public. This theory has a tendency to be broadly extended, and was applied in one case to a situation in which a person entered a business establishment for the purpose of using a private telephone.[9] In the Massachusetts case of *Jacobsen v. Simons*,[10] the plaintiff's niece inquired of the defendant restaurant operator as to the whereabouts of the restroom. The defendant pointed to a door and said "you go inside." Plaintiff entered the room, opened

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[4] Prosser on Torts, p. 625. A licensor is under no obligation to exercise care to make the premises safe for his reception and is under no duty toward him, except to use reasonable care to discover him and avoid injury to him in carrying on activities upon the land and to warn him of any traps which he may reasonably not discover. But Prosser also states on p. 630, "Some courts have gone so far as to say that there is no duty to a licensee other than to refrain from inflicting wilful or wanton injury upon him."

[5] Bohlen, The Basis of Affirmative Obligations in the Law of Torts, 1905, 44 Am. L. Reg. N.S. 209, 227.

[6] McNamara v. Mac Lean, 302 Mass. 428, 19 N.E. (2d) 544 (1939).

[7] Ibid. Lerner v. Hayes Bickford Lunch System, Inc., 315 Mass. 42, 51 N.E. (2d) 774 (1943).

[8] Corbett v. Spanos, 37 Cal. App. 200, 173 P. 769 (1918); M. N. Bleich & Co. v. Emmett, (Tex. Civ. App.), 295 S.W. 223 (1927); Lerner v. Hayes Bickford Lunch System, Inc., *supra*.

[9] McMullen v. M&M Hotel, 227 Ia. 1061, 290 N.W. 3 (1940). In a 5-3 decision the minority held it was a jury question whether the plaintiff was expressly invited to use the phone in the prescription room of the drugstore, ordinarily a private part of such premises.

[10] 217 Mass. 194, 104 N.E. 490 (1914).

another door and fell down the steps. The court held that the case should have been submitted to the jury on the issue as to whether the plaintiff was an invitee or licensee, saying:

> ". . .the jury could have found that the plaintiff was not only permitted, but was invited to use the defendant's toilet room. If so, the defendant owed her the duty of exercising reasonable care to see that the room and approaches by which plaintiff was to get to it were reasonably safe for her use."

The modern tendency of the courts is to extend the area of invitee liability from those portions of the premises where the actual business of the proprietor is carried on to those parts where it can reasonably be expected that the patrons will go. As a result, the proprietor's obligation to maintain the premises in a safe condition tends to extend over the entire area of his place of business.[11] In determining this area, the nature of the business carried on is of paramount importance.[12] A restroom should be included in this area where the nature of the business is such that patrons normally spend several hours before completing their business. Included in this category are department stores, taverns, bowling alleys, etc. Restaurants and stores where food is served should also be included due to the fact that use of a washroom has become an important part of the nation's pre-eating habit.

As to the question of the plaintiff's contributory negligence, the customary judicial attitude is that contributory negligence is usually a question for the jury and the courts will not decide it as one of law if the conclusion is in any way doubtful.[13]

In the case of business establishments which are open to the public generally, it would seem logical to presume as a matter of law that the proprietor maintains his restroom for the benefit of his business visitors in the absence of conspicuous signs or proof to the contrary. As a result, the patron of such a place of business is an invitee while using the restroom, and the proprietor is under the duty of exercising reasonable care to see that the room and its approaches are safe for such use.

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[11] Malolepszy v. Central Market, 143 Neb. 356, 9 N.W. (2d) 474 (1943); Brown v. Barber, 267 Tenn. App. 534, 174 S.W. (2d) 298 (1943).

[12] Malolepszy v. Central Market, *supra.*

[13] Jacobsen v. Simons, *supra;* Bingham v. Powell, 195 S.C. 238, 11 S.E. (2d) (1940); Johnson v. Pulidy, 116 Conn. 443, 165 A. 355 (1933), where the court said: "Where the plaintiff's act was instinctive as due to momentary and excusable inattention, it may not constitute contributory negligence". The Wisconsin Court in Criswell v. Seaman Body Corp., 233 Wis. 606, 290 N.W. 177 (1940), held that "a momentary diversion of attention or preoccupation. . . minimizes the degree of care required in the absence of such diversion or preoccupation, and such diversion so far excuses exercise of that degree of care ordinarily required as to make it a jury question whether such conduct is contributory negligence." In Bunce v. Grand & 6th Bldg. Inc. et al, 206 Wis. 100, 238 N.W. 867 (1931), the Wisconsin Court said: "A person entering a well-lighted public toilet is quite likely to be so engrossed in the object of his entry as not to be anticipating or looking for impediments that may cause him to stumble."