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The Liability of a Possessor of Land in Missouri to Persons Injured While on the Land

GLENN AVANN McCLEARY*

It is more than academic interest which justifies a brief reference to the position of owners and occupiers of land at old common law with relation to those who were injured on the land, because in that traditional position lies the background for the approach in determining the present liability of a possessor of land to these persons. It is not that a possessor of land today occupies the same position in the eyes of the law that the old feudal owner enjoyed; his present liability is the result of a gradual encroachment on his traditional position. The owner at old common law was considered to be sovereign over his land and could use his own land in any way that he pleased. It is said that "the King's law stopped at the boundary of the owner's sovereign territory except in felonies and trespass actions, which were originally punitive and extensions of the appeals for felonies to violent misdemeanors."¹ The modern law of negligence, which governs one's rights and duties with respect to most situations, has had an exceptionally difficult time in being applied to the relations of the possessor to persons coming on the land. This is due to that entrenched position of the possessor under the older concepts of property law in which the petty sovereign could use his land as he pleased. "The history of the subject," says Professor Bohlen, "is one of conflict between the general principles of the law of negligence and the traditional immunity of landowners."² In almost every well reasoned case in which the liability of a possessor is sought to be established, the court will consider the argument as to how far such liability is encroaching upon the traditional position of the possessor. This is in such complete contrast to the approach in applying principles of negligence to injuries resulting from conduct by one who is not a possessor of land, as, for example, in the automobile accident cases. In the latter, the modern principles of negligence found a field in which no other principles of liability or of non-liability had developed to govern such conduct.

Because this subject has been developed from the property point of view, it is natural to deal first with those persons who are on the premises without right and then proceed to a discussion of those who are privileged to come on the land, either from the owner's consent or by a rule of law. Those persons

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1. BOHLEN, *STUDIES IN THE LAW OF TORTS* (1929) 163. The purpose of this paper is not to review the decisions in an effort to find out what the courts have held, but to show the general pattern as devised by the courts and how it came to be what it is, and to examine the reasoning of the past to see whether it fits into the present conceptions of tort liability.

2. BOHLEN, *op. cit. supra* note 1.

standing in some special relationship to the landowner, such as master and servant, and landlord and tenant, are not included in this discussion.³ From the standpoint of the possessor the injuries will be grouped into two classes: those caused by some condition of the premises, and those resulting from some affirmative conduct on the part of the possessor. In each situation the first problem is to classify the injured plaintiff according to his status while on the land and, after such classification, to determine the extent of the duty, if any, which the possessor owes to persons having that particular status as to injuries resulting either from the condition of the premises or from activities carried on upon the land.

TRESPASSERS

A trespasser has been defined as "a person who enters land in the possession of another without a privilege to do so created by the possessor's consent or otherwise."⁴ His status is determined by the fact that he is on the land without the consent of the possessor, and, therefore, without right to be there.⁵ The law does not require the possessor to keep the premises in a reasonably safe condition or to warn of any perils, or to conduct himself with reference to his activities so as not to endanger this casual trespasser,⁶ although the same conduct by one who is neither the possessor nor one enjoying the immunities of the possessor would entail liability under the general principles of negligence.⁷ To so restrict a possessor in the enjoyment and use of his land in favor of one on the premises without his consent would require an entirely different attitude toward both the possessor and the desirability of land holding.⁸ From the common law conception of rights and privileges arising out

3. The writer has annotated the *RESTATEMENT* of the *LAW* of *TORTS* with the Missouri decisions. In this discussion, where the decisions do not support the *RESTATEMENT*, an effort will be made to point out the extent of the difference in treatment. In most instances the cases support the *RESTATEMENT* and no attention will be called, therefore, to the latter.

4. *RESTATEMENT, TORTS* (1934) §329.

5. For a collection of Missouri cases embodying this concept see *Mo. DIG.* (1930) tit. *NEGLIGENCE*, §§32, 33, in which the court had to determine whether one of the parties was a trespasser, licensee, or invitee. A similar classification is found in cases against railroads for injuries received, *ibid.* tit. *RAILROADS*, §§273½-277, 358-359, 369.

6. For the many Missouri decisions in which this general principle of non-liability is recognized, see *Mo. DIG.* (1930) tit. *NEGLIGENCE*, §§32, 33; *ibid.* tit. *RAILROADS*, §§273½-277, 358, 359, 369.

7. *RESTATEMENT, TORTS* (1934) §386 provides: "Any person, except the possessor of land or a member of his household or a licensee acting on his behalf, who creates or maintains upon the land a structure or other artificial condition which he should realize as involving an unreasonable risk of death or serious bodily injury to others whom he should recognize as likely to be upon the land, is subject to liability for bodily harm thereby caused to them, irrespective of whether they are lawfully upon the land, by the consent of the possessor or otherwise, or are trespassers as between themselves and the possessor." See Missouri decisions collected in *Mo. DIG.* (1930) tit. *ELECTRICITY*, §15(1). As to negligent conduct by trespassers toward others on the land, see *RESTATEMENT, TORTS* (1934) §381.

8. "... but, to assert a proposition stronger than these, against the owner of property, were to deny his dominion over it and compel him to use it, not for his own, but for the public convenience." *Schmidt v. Kansas City Distilling Co.*, 90 *Mo.* 284, 1 *S. W.* 865 (1886).

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of the possession of land, it is unthinkable that the one whose presence is wrongful can increase the responsibility of a possessor and require him to prepare a safe place for the wrongdoer or give him warning. This is not regarded as a penalty to the trespasser but as merely the policy of the law from the position of the occupant.

In many instances, the court, in denying a recovery to the trespasser, has used language which seems to base the result in contributory negligence. This presupposes a duty on the part of the possessor and, therefore, by implication clouds the real issue as to whether or not the possessor actually owed a duty or not.⁹

On the other hand a trespasser is not an outlaw and the possessor cannot set traps for the purpose of injuring him upon the principle which governs all intentional wrongs.¹⁰ This was the first inroad on the possessor's unlimited right to do what he pleased within his own domain, and at old common law he was only punished criminally. As a hang-over to this day, the "liability is stated in terms which require the existence of a substantially criminal state of mind. The phraseology differs, but all require that the landowner shall not inflict intentional, wanton or wilful injury upon a trespasser."¹¹

When the trespasser's presence has been discovered or, from facts within the knowledge of the possessor should have been discovered, the possessor must conduct himself with regard for the safety of the trespasser.¹² Here, the failure to act with such regard constitutes a misfeasance. The duty, as frequently expressed by the courts, is to refrain from inflicting wanton and wilful injury.¹³ Although the liability so stated seems to require a "substantially criminal state of mind," lack of care to avoid injuring the trespasser after knowledge of his presence is usually regarded as wanton and wilful. The terminology is that of the period before the modern tort of negligence when the liability was stated in terms requiring substantially a criminal

9. For example, see *Carrier v. Mo. Pac. R. Co.*, 175 Mo. 477, 74 S. W. 1002 (1903).

10. See *Kelly v. Benas*, 217 Mo. 1, 116 S. W. 557 (1909).

11. BOHLEN, *op. cit. supra* note 1, at 164. The early writs were intended to protect both the interests of the crown in its peace and good order as well as the interests of the individuals aggrieved. As certain writs lost their criminal usage and became means for effecting private remedies, they "retained many traces of its (their) originally punitive function; and though forms of action are no longer of controlling importance the principles which determine the liabilities, which under common law pleading were enforced by the action of trespass, still remain in many essentials identical with those which determine whether similar acts are punishable criminally." *RESTATEMENT, TORTS, COMMENTARIES (TREATISE No. 1) 7-11.*

12. The usual cases are those involving railroads, many of which are collected in *Mo. DIG. (1930) tit. RAILROADS, §376.*

13. The courts in this country have expressed the duty in one of two ways, sometimes referred to as the Massachusetts and Michigan rules. The former, which follows the language of the text, is applied by the majority of courts. The latter gives the seen or known trespasser the protection of ordinary care on the part of the possessor, the usual test for liability for injuries sustained through negligence. The two rules are discussed by Peaslee, *Duty to Seen Trespassers* (1914) 27 *HARV. L. REV.* 403.

state of mind.¹⁴ In the Missouri case of *Everett v. Railroad Company*,¹⁵ the court said, "The mere fact that the petition charges that the injury was wilfully and wantonly caused by the agents and servants in charge of the train will not prevent a recovery, provided the evidence shows that the injury was the result of their negligence and carelessness. The charge of wilfulness is sustained by proof of negligence." While such interpretation may make clear the extent of the duty in the cases where set forth, as in this case, without such interpretation in most cases, the language is confusing and misleading.¹⁶

Instances where liability is imposed for activities dangerous to known trespassers are found principally in the railroad case, although the principle applies to other possessors. The possessor in such instances is entitled to expect that after warning the trespasser the latter will yield precedence to him and avoid the danger.¹⁷ There is no duty on the part of the possessor to discontinue his activities unless he should realize that a warning will not be effective, as in cases where the trespasser is incapable of appreciating the warning or of avoiding the injury.¹⁸ Furthermore, the possessor is entitled to expect the trespasser to be on the alert for dangers. In *Carrier v. Railroad Company*,¹⁹ on a demurrer to the evidence the court said: "Moreover, even if the engineer had seen deceased within the line of danger from the approaching train, he had the right to presume that he was in possession of all his faculties, was a prudent man having due regard for his own safety from the approaching train, 'that he would be on the lookout for it, and would step out of its way as it approached him, and leave the way clear, and hence there would be no necessity for stopping the train on his account. . . . This would have been the conclusion of an ordinary prudent manager of the movement of such train, and the defendant's servants thus managing the train in question can not be convicted of willful, reckless or wanton disregard of human life in not stopping the train before it reached the place where plaintiff was struck, because foresooth he proved to be an imprudent person without proper regard for his own safety, and did not step out of the way of the train, as he might easily have done, as he would have been reasonably expected to do. The demurrer to the evidence ought to have been sustained.'" While possessors, if they are railroads, are required in some states by decision or statute to keep a look-out for trespassers, the Missouri decisions

14. For historical explanation, see BOHLEN, *op. cit. supra* note 1, at 162; Bohlen, *The Duty of a Landowner toward those entering his Premises of their own Right* (1921) 69 U. OF PA. L. REV. 237.

15. 214 Mo. 54, 112 S. W. 486 (1908).

16. Not infrequently the two expressions of liability are stated in alternative language as though meant to mean the same thing.

17. See cases collected in Mo. DIG. (1930) tit. RAILROADS, §377.

18. *Ibid.*

19. *Carrier v. Mo. Pac. R. Co.*, 175 Mo. 470, 74 S. W. 1002 (1903), cited note 9, *supra*. Many other cases to the same effect are collected in Mo. DIG. (1930) tit. RAILROADS, §377.

do not impose such a requirement.²⁰ The above principles apply whether the trespasser is an infant or an adult, except in the assumption that children will realize the danger and avoid it, or unless the possessor has such knowledge of physical defects or mental deficiencies of adult trespassers which would likewise prevent the normal reaction.²¹

At no place in the development of the liability of a possessor of land are the modern social principles of negligence more clearly approximated, as over against the traditional rights of the possessor in the unrestricted use of his land, than in the cases involving infant trespassers. In addition to the risks for which the possessor is responsible to adult trespassers, many courts protect the child trespasser against many additional dangers. The courts giving this added protection are not in accord as to the extent of the duty.²² Since this liability is approached entirely from social policy and not from concepts of property law, it may be well to notice the extreme advance as a standard with which to compare the decisions of our state. The *Restatement* represents such an advance and states the liability as follows: "A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains on the land, if (a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and (b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily injury to such children, and (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and (d) the utility to the possessor of maintaining the condition is slight compared to the risk to young children involved therein."²³

In the first place an examination should be made of the theory or theories of the courts recognizing liability to infant trespassers where the injury results from a condition of the premises.²⁴ In order to avoid the difficulty presented by the rule that a possessor owes no duty to trespassers other than to

20. *Frye v. St. L. I. M. & S. R. Co.*, 200 Mo. 377, 98 S. W. 566 (1906); *Barker v. H. & S. J. R. Co.*, 98 Mo. 50, 11 S. W. 254 (1888); *Williams v. K. C. S. & M. R. Co.*, 96 Mo. 275, 9 S. W. 573 (1888).

21. *Williams v. K. C. S. & M. R. Co.*, 96 Mo. 275, 9 S. W. 573 (1888), cited note 20, *supra* (children); *Jackson v. K. C. Ft. S. & M. R. Co.*, 157 Mo. 621, 58 S. W. 32 (1900) (mental condition); *Carrier v. Mo. Pac. R. Co.*, 175 Mo. 470, 74 S. W. 1002 (1903), cited note 19, *supra*, and *Candee v. K. C. & I. R. T. R. Co.*, 130 Mo. 142, 31 S. W. 1029 (1895) (physical disabilities).

22. For an exhaustive treatment of the cases, see 36 A. L. R. 34, 45 A. L. R. 982, 53 A. L. R. 1344, and 60 A. L. R. 1444.

23. *RESTATEMENT, TORTS* (1934) §339.

24. These theories with full citation to authorities are collected in the A. L. R. notes, cited note 22, *supra*. The theories presented in the Missouri decisions are collected in 36 A. L. R. 87.

refrain from wilful and wanton injury, it has been held in many cases that the attractiveness of the premises, or of the dangerous instrumentality, to children of tender years, is to be considered as an "implied invitation," which takes children out of the category of trespassers, and puts them in the category of invitees, toward whom the owner of the premises or instrumentality owes the duty of ordinary care. A theory sometimes advanced as a ground for liability is that the attractive danger which children of tender years are incapable of comprehending is, as to them, a trap or concealed danger. In other cases it has been suggested that the injuries sustained by a trespassing child may be considered as having been intentionally inflicted. Another theory is that the child is not to be regarded as a trespasser because of his tender years. But the better reasoned cases have adopted what seems to be the most satisfactory basis for liability, namely, that one who has reason to anticipate injury to another from conditions for which he is responsible, and which he can readily avert, is under a duty, based upon considerations of humanity, to take reasonable precautions against such injury. This is the theory adopted by the *Restatement* and is the application of principles of negligence.

The reason frequently given in the Missouri decisions is that of implied invitation.²⁵ In an excellent opinion in *Buddy v. Union Terminal Railroad Co.*,²⁶ the fallacy of such a theory was pointed out. It was stated that the "attractive nuisance" doctrine is *sui generis*, resting solely upon the humane sentiment of putting humanity above property. The same idea has been well expressed in the following: "There seems to be but one reason for the 'turntable' doctrine although other theories are advanced by courts. This is that it is good policy to impose the duty. All other reasoning seems open to objection. Despite all precautions of parents, the state, and the landowner himself, a child will trespass upon private property and will often be injured. So, it may be reasonable to require an owner to take certain precautions although the children are, in a strict sense, trespassers. Since each maimed and crippled child is a liability to society as well as a suffering, handicapped human being, and since, ordinarily, the dangerous condition can be guarded, it is not too great a burden to require the owner to provide a reasonable safeguard, or give effective warnings."²⁷

The courts of Missouri were not swept off their feet in applying the principles of "attractive nuisance", as was the case of many courts, and it is impossible to predict in just what situations our courts will apply the doctrine. Liability for injuries received from turntables is clearly recognized, but beyond

25. *Kelly v. Benas*, 217 Mo. 1, 116 S. W. 557 (1909); *Berry v. St. L. M. & S. R. Co.*, 214 Mo. 593, 114 S. W. 27 (1908).

26. 276 Mo. 276, 207 S. W. 821 (1918).

27. Note (1923) 26 U. OF MO. BULL. L. SER. 32.

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that the doctrine has been applied with little success.²⁸ The application of the doctrine has been denied to injuries received from electric wires, pools and ponds, railway cars, ice on pond, smoldering fires, lumber pile, pipe unloaded in street, and other types of cases.²⁹ The Missouri courts have remarked on several occasions that the doctrine is not to be extended beyond the turntable cases.³⁰ The question may very plausibly be raised whether Missouri courts place infant trespassers in a separate class or whether all trespassers, infant and adult, are owed the same duties by a possessor except in cases involving turntables.³¹ In this respect our courts are in accord with the trend of decisions in other states. The proposal by the *Restatement of the Law of Torts* may check this tendency by starting a new line of decisions grounded on pure negligence principles and stripped of the fictional theories of the doctrine of attractive nuisance. In other jurisdictions, the courts have refused to give infant trespassers any more protection than that given to adult trespassers, approaching the question entirely from the property point of view.³²

LICENSEES

A licensee is one who comes on the premises for his own purpose and with the consent of the possessor.³³ A licensee differs from a trespasser in the fact

28. Illustrative of the attitude of the Missouri courts against extending the doctrine, see vigorous opinions in *Kelly v. Benas* 217 Mo. 1, 116 S. W. 557 (1909); *Buddy v. Union Term. R. Co.*, 276 Mo. 276, 207 S. W. 821 (1918) and more recent cases cited *infra* note 30.

29. The Missouri cases are annotated in 36 A. L. R. 87, 45 A. L. R. 984, 53 A. L. R. 1348, 60 A. L. R. 1447.

30. For recent cases refusing to extend the doctrine, see *Howard v. St. J. T. Co.*, 316 Mo. 317, 289 S. W. 597 (1926) (and cases cited); *Shannon v. K. C. L. & P. Co.*, 315 Mo. 1136, 287 S. W. 1031 (1926) (and cases cited); *State ex rel. K. C. L. & P. Co. v. Trimble*, 315 Mo. 32, 285 S. W. 455 (1926); and cases cited *supra* note 28.

31. See *Barney v. H. & St. J. R. Co.*, 126 Mo. 372, 28 S. W. 1069 (1895).

32. For the authorities, see collection of cases in A. L. R., *supra* note 22. This position is set forth in the leading case of *Ryan v. Towar*, 128 Mich. 463, 87 N. W. 644 (1901): "We have only to add that every man who leaves a wheelbarrow, or lawnmower, or spade, upon his lawn; a rake with its sharp teeth pointing upward, upon the ground, or leaning against a fence; a bed of mortar prepared for use in his new house; a wagon in his barnyard, upon which children may climb, and from which they may fall; or who turns in his lot a kicking horse or a cow with calf—does so at the risk of having the question of his negligence left to a sympathetic jury. How far does this rule go? Must his barn door, and the usual apertures through which the accumulations of the stable are thrown, be kept locked and fastened, lest twelve-year-old boys get in and be hurt by the animals, or by climbing into the haymow and falling from the beams? May a man keep a ladder or a grindstone or a scythe or a plow or a reaper without danger of being called upon to reward trespassing children, whose parents owe and may be presumed to perform the duty of restraint? Does the new rule go still further and make it necessary for a man to fence his gravel pit or quarry? And if so, will an ordinary fence do, in view of the known propensity and ability of boys to climb fences? Can a man safely nowadays own a small lake or fish pond? and must he guard ravines and precipices upon his land? Such is the evolution of the law, less than twenty years after the decision of *Railroad Company v. Stout*, when with due deference, we think some courts left the solid ground of the rule, that trespassers cannot recover for injuries received and due merely to negligence of the persons trespassed upon."

33. The best exposition of a licensee is found in the majority and dissenting opinions in the leading case of *Glaser v. Rothschild*, 221 Mo. 180, 120 S. W. 1 (1909) (but the plaintiff

that he has the consent of the possessor to be on the land. It is immaterial whether the consent is in the form of an invitation proceeding from the possessor or of permission given upon the request of the licensee.³⁴ This consent may be expressly or impliedly given through conduct which gives the other party reason to believe that the consent is given and a reasonable man would so interpret such acts. Since the privilege to be on the land is for the licensee's own benefit and purpose, he must take the premises in Missouri in the condition in which he finds them. He has no reason to expect that the possessor will make any preparation for his use of the premises.³⁵ In this respect he is no better off than a trespasser. But if there is a change in the condition of the premises which makes them less safe than at the time of granting the permission and which the licensee will not likely discover, a duty is owed to warn.³⁶

As to affirmative conduct or activities which are dangerous to licensees a possessor is liable if he fails to carry on his activities without reasonable care for the safety of the licensees.³⁷ But this is no limitation on the right of the

was held to be an invitee or business guest). In *Savage v. C. R. I. & P. R. Co.*, 328 Mo. 44, 40 S. W. (2d) 628 (1931), it is said that "an invitee is one who is on the railroad premises for the company's interest and benefit, as well as his own; while a licensee is one who, being neither a passenger, servant, nor trespasser, nor standing in any contractual relation to the company, is expressly or impliedly permitted by the company to come on its premises for his own convenience or gratification."

34. The Missouri cases make much of the distinction between a permitted and an invited licensee. An analysis of the decisions shows clearly that the status of an invitee is reserved to those on the premises for the benefit of the possessor or for their mutual benefit, and regardless from which person the initiative came. Thus the term "invited licensee" in Missouri has a very technical meaning. It would seem, therefore, that a license for the sole benefit of the licensee would make the holder a permitted licensee regardless of whether it originated in permission or invitation, that is, regardless of whether the possessor or the licensee took the initiative in establishing the license. For a more complete discussion relative to invited persons, see *infra* p. 58.

35. *Glaser v. Rothschild*, 221 Mo. 180, 120 S. W. 1 (1909). In this case it was said: "The general rule is that the owner or occupier lies under no duty to protect those who go upon the premises as volunteers or merely with his express or tacit permission from motives of curiosity or private convenience in no way connected with business or other relations with the owner or occupier. . . . A bare licensee (barring wantonness or some form of intentional wrong or active negligence by the owner or occupier) takes the premises as he finds them. His fix is likened unto that of one who, buying lands, buys stones; or, buying beef, buys bones, or borrowing a coat, takes it with holes in and buttons off—that is, in the use of his bare license he takes upon himself the risk of perils from defects in the premises. Mere permission without more involves 'leave and license,' but bestows no right to care. If A give B leave to hunt mushrooms for his table in A's field, and B fall into a ditch or uncovered pit, and is harmed, no duty was raised, no breach is made and hence no action lies. As put by way of illustration in the books, suppose A owns a sea view, a cliff, and gives B permission to walk on the edge of the cliff for pleasure or air, it would be absurd to contend that such leave cast on A the burden of fencing the cliff to keep B from falling off."

36. *Wheeler v. St. J. S. & T. Co.*, 66 Mo. App. 260 (1896). See cases annotated in 20 A. L. R. 202.

37. See the leading case of *Ahnfeld v. Wabash R. Co.*, 212 Mo. 280, 111 S. W. 95 (1908) (citing many Missouri decisions). Other cases are collected in Mo. DIG. (1930) tit. RAILROADS, §356.

possessor fully to enjoy his land because he has partially surrendered this enjoyment by giving his consent to the person who has come on his land. Since the presence of the licensee on the land is for his own benefit, the possessor is entitled to expect the licensee to be on the alert to discover dangers.³⁸ Therefore, the duty applies to those dangers which the licensee does not know or will not discover for himself. Furthermore, a warning of the nature of the activities is all that the possessor must give to answer the requirement of reasonable care. With such knowledge the licensee may then determine whether to run the risks involved. A warning will not be a sufficient exercise of reasonable care if, to the knowledge of the possessor, the licensee does not hear the warning or does not realize the extent of the danger.³⁹

The tendency of the cases in a few jurisdictions is to impose an affirmative obligation to make the premises safe or to warn of hidden dangers even though the dangers are due to conditions of the premises and not the result of activities carried on on the land.⁴⁰ The *Restatement*, following this tendency in the law of negligence as to licensees, makes a possessor liable for harm caused by a natural or artificial condition on the premises of the possessor, if the possessor "(a) knows of the condition and realizes that it involves an unreasonable risk to them and has reason to believe that they will not discover the condition or realize the risk, and (b) permits them to enter or remain upon the land, without exercising care (i) to make the condition safe, or (ii) to warn them of the condition and the risk involved therein."⁴¹ The reasoning of the courts which impose this duty to at least warn the licensee of known dangers which an alert licensee will not likely discover or realize the risk of, is that the possessor gave his consent to him to visit the premises, and he must, therefore, assume a certain amount of care to prevent injuries; and while it is true that this does impose on the possessor a duty which was unknown in the early law, yet it is not undesirable or unreasonable in view of the fact that he willingly gave his consent. He voluntarily has established this relationship between the licensee and himself, and out of the desire to preserve life the imposition of such a duty seems not too severe.

There is one class of persons often injured while on the premises of the possessor which raises considerable difficulty in classification. The courts have designated them as "licensees by acquiescence" or "permissive licensees",

38. See *Sites v. Knott & Swinney, Receivers*, 197 Mo. 684, 96 S. W. 206 (1906).

39. *Ahnfeld v. Wabash R. Co.*, 212 Mo. 280, 111 S. W. 95 (1908); *Mo. Dig.* (1930) tit. RAILROAD, §356.

40. 17 L. R. A. (n. s.) 916; *HARPER, LAW OF TORTS* (1933) §95.

41. *RESTATEMENT, TORTS* (1934) §329. This section was quoted with approval in *Smith v. Southwest Mo. R. Co.*, 333 Mo. 313, 62 S. W. (2d) 761 (1933). The court seems to have considered in its holding that the plaintiff was more than a gratuitous licensee. Because of the long settled doctrine in Missouri *contra*, it cannot be supposed that this case overrules a long list of authorities without at least considering that fact. For the Missouri authorities which hold *contra* to the principle as stated in this Section, see the collection of cases in *Mo. Dig.* (1930) tit. NEGLIGENCE, §32; *ibid.* tit. RAILROADS, §358.

but they are in fact persons who persistently commit trespasses upon a limited area and as to whom the possessor has not gone to the trouble or expense of stopping.⁴² The courts do not impose a duty to warn such persons of hidden dangers on the land; the only liability is for bodily harm caused by an activity carried on by the possessor, where he knows or from facts within his knowledge should know of their constant intrusions at a particular place.

If the social interest in the preservation of the lives of members of the public demands some protection to persons intruding in this manner there is no serious objection in requiring the possessor to give a reasonable warning as to his affirmative conduct to those persons whose trespasses are repeated and known to the occupier. But should such persons be classified as "licensees" or as "trespassers" of a special type? The most usual type of case is that involving persons who have brought actions for injuries received from a train while these persons were crossing railway tracks or using a pathway along the tracks to the knowledge of the company.⁴³ To place some restrictions upon the possessor in the manner which he uses his premises in favor of those to whom he has consented to coming on the land and, therefore, has voluntarily surrendered some liberty in using this area while they are upon it to avoid injuring them is much different than to impose the same restrictions upon possessors merely because they have not gone to the trouble or expense to keep these persons from repeating their trespassing. Such a restriction "is not created by any act expressing his will to suffer it, but imposed upon him by the wrongful acts of the intruders and his mere failure to take active steps to prevent them."⁴⁴ Undoubtedly, the explanation for classifying such

42. Many cases, in which a railroad company permits the public to use its track as passways at places other than public crossings, are collected in Mo. DIG. (1930) tit. RAILROADS, §356.

43. "Instruction 5 undertook to distinguish between a licensee and a trespasser within the purview of the issues, and in doing so it told the jury that, in order for them to find that the deceased was a licensee and not a trespasser, they must find that defendant's track at the place where he was struck had heretofore been, and was then, constantly used by pedestrians to such an extent that the use thereof had become notorious, and that the defendant knew of such use and consented thereto. In requiring the jury to find that the use of the track was so extensive as to have become notorious, the instruction placed an unwarranted burden on the plaintiff. If the public indiscriminately had been, prior to the time of the deceased's injury, and then was, using the track as a footway with the knowledge and consent of the defendant, then deceased had an implied license to so use it, even though the use by the public was not so extensive as to have become notorious. In order to show that the public had impliedly been given a license by a railroad company to use its track as a passway, so far as the same is pertinent in cases of this kind, it is necessary to show the public use itself, the knowledge of the company thereof, and its consent thereto. These latter elements ordinarily cannot be established by direct proof, but must be inferred, if they exist, from other facts, as, for example, the long acquiescence of the company in the open, known, free, continuous, and extensive use of its track by the public as a footway. In such case, however, it is only necessary to bring knowledge of such use home to the railroad company. It may or may not be notorious." *Rice v. Jefferson City Bridge & Transit Co.*, 216 S. W. 746 (Mo. 1919).

44. BOHLEN, *op. cit. supra* note 1, at 176.

constant intruders over a particular area as licensees is the desire to give protection without destroying the symmetry of the common law.⁴⁵ The common law knew only two types of adult trespassers—casual and known. Here was a class of persons who, on the facts, fell into a different group. To gain the protection desired and at the same time retain the common law classification of persons on the land of another, it was easier to apply the designation of “licensee by acquiescence” than to invent a new class of trespasser who was to receive more protection than the casual trespasser. Professor Bohlen sums up the holding of the courts as follows: “Many if not the majority of jurisdictions hold that, if there has been intrusion sufficiently habitual to make its repetition not merely possible but probable, upon a definite area by a class sufficiently numerous to make the danger substantial, the public interest in the preservation of its most valuable asset, the life and limbs of its members, requires the owner to forego his privilege to consider only the safety of those to whom he throws his land and demands that he shall refrain from doing, without notice, acts outside of his ordinary and normal use of his land, which create new and concealed dangers thereon. This duty may be similar or identical to that owed to persons actually permitted to come on the premises for their own purposes. But it does not arise from the owner’s consent, but from the probability of injury so likely and so serious that public policy requires that it be prevented even at the cost of trenching upon the traditional privileges of landowners.”⁴⁶

The *Restatement* makes a highly desirable change in the classification in this type of case by calling these persons “constant trespassers upon a limited area.”⁴⁷ The liability is stated: “A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a particular place thereon, is subject to liability for bodily harm there caused by his failure to carry on the activity involving a risk of death or serious

45. This idea was set forth clearly in *Ahnfeld v. Wabash R. Co.*, 212 Mo. 280, 111 S. W. 95 (1908), in which the court said: “It is immaterial as to how you denominate the persons who use the track, whether it is said they were invited by the railroad company or whether it is said they were licensees, or whether it was a habit and custom to use the track, or whether you denominate them as trespassers; the controlling fact is whether there has been such use of the track as a passway or footpath by the public as to afford reasonable grounds to the operatives of the train upon such track to expect or anticipate the presence of persons so near the railroad track as to endanger them. A careful consideration of all the cases to which our attention has been directed and of which counsel so earnestly complain, will clearly demonstrate that in their last analysis the final conclusion is predicated and the rule announced upon the main fact that the operatives of the railway company at certain points along its railway had reasonable grounds, by reason of the continuous use of the track at that point by the public, to expect or anticipate the presence of persons so near the railroad track at such points as to endanger them; hence, followed the just, fair and reasonable rule that under such circumstances it would be the duty of the operatives to keep a lookout for the presence of such persons and to use ordinary care and caution in avoiding any injury to them.”

46. BOHLEN, *op. cit. supra* note 1, at 179.

47. RESTATEMENT, TORTS (1934) §334.

bodily injury with reasonable care for their safety.” Thus the fundamental distinction between licensees and trespassers is kept clear.

Another special class of persons who may enter the land of the possessor consists of those who are privileged by law to enter for a public or private purpose and, of course, without the consent of the possessor. Although this question has not been before the courts of Missouri a discussion of the principles seems desirable at this point. The usual occurrences which involve persons of this class are found in cases concerning injuries received on the premises by policemen and firemen while performing their public duties.⁴⁸ It is clear that these persons are not trespassers, yet it cannot be said that the possessor has consented to their entrance.⁴⁹ In fact, the possessor never considers the condition of his premises from the position that, while it is in that condition, a fire might break out and the fireman be called or a policeman may have occasion to chase a felon across the premises in an effort to arrest him. It cannot be said that the possessor has invited them.⁵⁰ Invitation would be difficult to find where the fire is on neighboring property or where an officer is pursuing a thief from the scene of a crime a mile away; and, furthermore, an invitation may be withdrawn. Neither can it be said that he permitted them to enter because his refusal of consent would not deprive the firemen or police of their privilege and duty to enter. On the other hand, these public officers are commanded to perform such duties in the interests of the public. Since they are on the premises in the larger social interest it would seem desirable to give them a certain amount of protection from dangerous conditions existing on the premises.⁵¹ While they are not logically licensees, they should have at least the same degree of protection. In almost all jurisdictions, in the absence of statute or ordinance, they are classified as bare licensees, to whom the occupant owes no greater duty than to refrain from the infliction of wilful and wanton injury in his affirmative conduct.⁵²

While the *Restatement* gives a separate classification to these persons

48. See collection of cases in 13 A. L. R. 637. But the principle would seem to include any person who is privileged by law to enter the land of another as, for example, those entering under the privilege to protect and preserve life or property, to recapture chattels, and other applications.

49. Cf. analysis in *Gibson v. Leonard*, 143 Ill. 182, 32 N. E. 182 (1892), and *Meiers v. Fred Koch Brewery*, 229 N. Y. 10, 127 N. E. 491 (1920) (both cases involving firemen).

50. And it has been held that it makes no difference that the possessor has called the firemen since the firemen are performing their public duties and do not become invitees. *Lunt v. Post Printing & Pub. Co.*, 48 Colo. 316, 110 Pac. 203 (1910). But a policeman gained the status of an invitee when called by the possessor in *Learoyd v. Godfrey*, 138 Mass. 315 (1885).

51. *Meiers v. Fred Koch Brewery*, 229 N. Y. 10, 127 N. E. 491 (1920).

52. The cases are collected in 13 A. L. R. 637. Cf. *Finnegan v. Fall River Gas Works*, 159 Mass. 311, 34 N. E. 523 (1893), and *Kennedy v. Heisen*, 182 Ill. App. 200 (1913) (in which the possessor was held liable to garbage collectors employed by a municipality); *Toomey v. Sanborn*, 146 Mass. 28, 14 N. E. 921 (1888); *Pickwick v. McCauliffe*, 193 Mass. 70, 78 N. E. 730 (1906).

entering in the exercise of a privilege and independent of the possessor's consent, the liability is the same as that extended to gratuitous licensees, which is considerably greater than most courts have been willing to give. The liability is stated as follows: "A possessor of land is subject to liability for bodily harm caused by a natural or artificial condition thereon to others who are privileged to enter the land for a public or private purpose, irrespective of his consent, if he (a) knows that they are upon the land or are likely to enter it in the exercise of their privilege, and (b) knows of the condition and realizes that it involves an unreasonable risk to them and has no reason to believe that they will discover the condition or realize the risk, and (c) fails to exercise reasonable care (i) to make the condition reasonably safe or (ii) to warn them of the condition and the risk involved therein."⁵³ Until the possessor has knowledge of their presence upon the land it would seem that liability should be imposed under the above statement only for injuries received from dangerous conditions in the normal approaches of which the possessor has knowledge and has no reason to believe that they will discover or realize the risk involved. It is only at such points that it can be said the possessor knows they are likely to enter, for he has indicated that it is to be so used by those who have a right to enter.⁵⁴ "It would be an obviously unreasonable burden to impose on land-owners to require them to keep the whole of their premises in such condition as to make every part of it safe for those whose unusual and exceptional right of entry may never accrue. The broad range of such a duty, the impossibility of forecasting the precise point to which the officer's duties may call him, the infrequency of his probable visits, all clearly preclude the idea that the balance of social benefit can require such a serious restriction on the owner's use of his land, or justify the imposition of such a burden on his exchequer to prevent so vague a risk of so improbable an injury."⁵⁵ It would seem from the nature of the liability as imposed under the *Restatement* that as to dangerous conditions elsewhere than in the usual approaches the possessor would also owe a duty to warn when he discovers the presence of these officers on the premises but not, of course, until then. But, as already pointed out, the *Restatement*, while having the support of social policy, finds little support in the decisions on this question.

There is another class of persons who fall within the status of licensees and, therefore, fall outside the protection which would seem should be due

53. RESTATEMENT, TORTS (1934) §345.

54. In *Meiers v. Fred Koch Brewery*, 229 N. Y. 10, 127 N. E. 491 (1920), a possessor of property was held liable for injuries sustained by a fireman on a driveway leading to defendant's barn which was burning. The theory of the decision is that the fireman might assume that a driveway, prepared by the defendant for the use of those having business with him, was safe; that the driveway was adapted and designed to be used as plaintiff fireman was using it; and that the fireman was not a licensee or a trespasser, but was rightfully on the premises, and a duty of reasonable care was owed to him.

55. BOHLEN, *supra* note 1, at 193.

them. In this group are social guests. It would seem that in the usual case such visits may very well be to the mutual advantage of the parties, although not in the commercial or business conception of advantage. It is customary for possessors to prepare as carefully, if not more carefully, for social guests as for business guests; furthermore, the social guest has reasons to believe that his host will either make conditions on the premises safe or at least warn of hidden dangers. In this century there is no reason for the courts to take the position that a social guest should not sue his host. Although there is no direct authority in Missouri,⁵⁶ the courts elsewhere do not regard the benefit or advantage to such social relations as sufficient basis for the imposition of affirmative legal obligations with respect to the condition of the premises. This is true even though the guests were given a special invitation. The only duty owed to such guests is in respect to the possessor's affirmative conduct.⁵⁷ Under the principles of the *Restatement* the responsibility to licensees would be quite properly extended as in the case of licensees generally.⁵⁸

BUSINESS GUESTS

There are many *dicta* in the cases and, at one time, it was held in a number of jurisdictions that the classification between persons lawfully on the premises depended upon the fact as to whether such persons were invited or merely permitted and, if they were invited, the duty on the part of the possessor to protect from dangers was considerably enlarged.⁵⁹ But this classification has yielded to one based on the distinction between those on the premises for their own advantage or whether there is a common interest or mutual advantage.⁶⁰ The leading case in Missouri makes the classification depend upon the nature of the errand which brings the stranger upon the possessor's premises but at the same time it retains the terminology of "invited" and "permitted". In *Glaser v. Rothschild*,⁶¹ the basis of classification is set forth: "The general rule is that the owner or occupier lies under no duty to protect those who go upon the premises as volunteers or merely with his express or tacit permission from motives of curiosity or private convenience in no way connected with business or other relations with the owner or occupier. A bare licensee (barring wantonness or some form of intentional wrong or active negligence by the owner or occupier) takes the premises as he finds them. His fix is likened unto that of one who, buying lands, buys stones; or, buying beef, buys bones; or borrowing a coat, takes it with holes in and buttons off—that is, in the use of

56. See *McLaughlin v. Marlatt*, 296 Mo. 656, 245 S. W. 548 (1922).

57. What authority there is on this question is found in the collection of cases in 12 A. L. R. 987, and 60 A. L. R. 108.

58. See discussion p. 53.

59. Professor Bohlen attributes this unfortunate classification to the opinion of Chief Justice Bigelow in *Sweeny v. Old Colony & N. R. Co.*, 92 Mass. 368, 87 Am. Dec. 644 (1865).

60. *Glaser v. Rothschild*, 221 Mo. 180, 120 S. W. 1 (1909); *Savage v. C. R. I. & P. R. Co.*, 328 Mo. 44, 40 S. W. (2d) 628 (1931).

61. 221 Mo. 180, 120 S. W. 1 (1909).

his bare license he takes on himself the risk of perils from defects in the premises. Mere permission without more involves 'leave and license,' but bestows no right to care. If A gives B leave to hunt mushrooms for his table in A's field, and B falls into a ditch, or uncovered pit, and is harmed, no duty was raised, no breach is made and, hence, no action lies. As put by way of illustration in the books, suppose A owns a sea-view, a cliff, and gives B permission to walk on the edge of the cliff for pleasure or air, it would be absurd to contend that such leave cast on A the burden of fencing the cliff to keep B from falling off. But the situation with reference to liability radically changes when the owner invites the use of his premises for purposes connected with his benefit, pleasure and convenience. That change calls into play other rules of law in order to do full and refined justice. The rule applicable to that change is that a licensee who goes upon the premises of another by that other's invitation and for that other's purposes is no longer a bare licensee. He becomes an invitee and the duty to take ordinary care to prevent his injury is at once raised and for the breach of that duty an action lies." Thus, the important fact for purposes of classification is the purpose of the visit and not whether there was in fact an invitation. The latter fact is inferred from the existence of the former. The nature of the use to which the land is put is sufficient to show an invitation as, for example, stores and shops.⁶² Thus the use of the word "invitee" is confusing and misleading as the concept is confined to describe those persons on the land for a purpose directly or indirectly connected with some business advantage to the possessor and the absence or presence of an invitation in fact makes no difference in the status.

Likewise, in the case of licensees on the premises for their own advantage, our courts designate them as "permitted" with no emphasis made of whether or not the license was sought by the licensee or whether it was the result of an invitation for the licensor. There can be no legal value in asking which party took the initiative. Thus, the fact that a social guest was invited would not raise him into the class of "invitees."⁶³ The *Restatement* has avoided this confusion resulting from the unfortunate selection of terms by classifying these two groups into gratuitous licensees and business visitors.⁶⁴

The duty which a possessor owes to persons coming on the premises for the mutual benefit of both parties includes not only the protection which is owed to trespassers and licensees, but certain additional protection against hazards. Since the business guest knows that the possessor is to be benefitted by his visit, he is entitled to expect that reasonable care will be exercised to discover existing dangers and these dangers made safe or, at least, a warning

62. For an illustrative case which cites many Missouri decisions, see Kennedy v. Phillips, 319 Mo. 573, 5 S. W. (2d) 33 (1928).

63. See the cases pertaining to social guests, *supra* note 57.

64. RESTATEMENT, TORTS (1934) §§201, 202.

will be given to enable the visitor to determine whether to enter the premises.⁶⁵ For this reason the business guest is not required to be so alert to discover those defects which the licensee must discover in those jurisdictions which impose liability as stated by the *Restatement*.⁶⁶ This is important from two points of view: first, in determining whether the defect falls within the duty to make safe or to warn; and second, in determining contributory negligence. This protection extends to acts of third persons on the premises if the possessor in the exercise of due care could have foreseen an unreasonable risk of injury and could have guarded against it, and to acts of servants and independent contractors.⁶⁷

But one invited to come on the premises for the purpose of the possessor does not obtain the right to roam at will, without further invitation, to out of the way places on the premises, disconnected from, and in no way pertaining to the business at hand. In going to other parts of the land, the business visitor becomes a trespasser or licensee, depending whether he goes to these parts with or without the consent of the possessor.⁶⁸

Thus the law pertaining to the rights and duties of a possessor of land, having for its roots the traditional position of the possessor which recognized the right of a petty sovereign to use his land as he pleased and to determine for himself in what condition he would keep the premises, is developing rights and duties founded in the modern principles of tort law. This change of approach to the problems of liability of a possessor of land emphasizes the interest of society in preserving the safety of its members, but recognizing at the same time the legitimate interests of possessors to the use of their land. He is still free to use his land more or less as he pleases within reasonable limits. No one can say that his liability as established in the most advanced cases is so severe on him as to make it undesirable to possess property. Except for the sporadic desire to protect children, this development has been slow but steady. At the present time the allocation of the various hazards represents the general community judgment of fairness to both parties.

65. Many Missouri cases are collected in Mo. DIG. (1930) tit. NEGLIGENCE, §§ 32, 48; *ibid.* tit. RAILROADS, §§274-275; *ibid.* tit. THEATRES AND SHOWS, §6.

66. HARPER, LAW OF TORTS (1933) §95; RESTATEMENT, TORTS (1934) §329; 17 L. R. A. (n. s.) 916.

67. As to injuries caused by third persons which were foreseeable, see *Murrell v. Smith*, 152 Mo. App. 95, 133 S. W. 76 (1910), and cases collected in Mo. DIG. (1930) tit. CARRIERS, §284; as to acts of independent contractors, see *Dagley v. Nat'l Clock & Suit Co.*, 224 Mo. App. 61, 22 S. W. (2d) 892 (1929), and 23 A. L. R. 1009; as to liability for conduct of concessionaires, see *Hollis v. Kansas City Retail Merchants' Ass'n.*, 205 Mo. 508, 103 S. W. 32 (1907), and *Roark v. Elec. Park Amusement Co.*, 209 Mo. App. 638, 241 S. W. 651 (1922).

68. See cases collected in Mo. DIG. (1930) tit. NEGLIGENCE, §32 (3).