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notice of right to sue, and by the relaxation of the requirement that an action "be commenced" within 90 days after receiving notice of the right of action. These various collateral requirements have not received uniform treatment, however, and the courts are currently divided on many major issues. Nevertheless, the decisions of the courts construing the jurisdictional prerequisites to private actions under Title VII indicate a liberal trend in favor of the charging party.

MICHAEL E. KAEMMERER

OWNER'S AND OCCUPIER'S LIABILITY TO ENTRANTS ON PROPERTY IN MISSOURI

I. INTRODUCTION

E, an entrant, goes on the property of *O*, an owner or occupier of property, and is injured while on the property. *E* claims that his injury stemmed from *O*'s negligence. This simple factual situation has frustrated attorneys and legal writers since modern negligence law first began intruding on the feudal concept that "the owner was sovereign within his own boundaries and as such might do what he pleased on or with his own domain."¹ This conflict has left the law in this area in a state of uncertainty and confusion.² Some states have progressed to the point where any feudal immunity which property owners may have formerly enjoyed has been eliminated; all *E v. O* type cases are submitted under general negligence principles.³ In other jurisdictions the remnants of the property owner's immunity are evidenced in the common law classification of entrants as trespassers, licensees, and invitees, and the differing standards of care which the owner must exercise toward each of them. Missouri, as indicated in the Missouri Approved Jury Instructions (hereinafter referred to as MAI),⁴ and the majority of American jurisdictions continue to follow the latter approach.⁵ These common law classifications and the concomitant standards of care have also been applied to cases involving entrants on,⁶

1. F. BOHLEN, *STUDIES IN THE LAW OF TORTS* 163 (1929). See also 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* 1432 (1956).

2. F. BOHLEN, *STUDIES IN THE LAW OF TORTS* 163 (1929).

3. See, e.g., *Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97, 105 (D.C. Cir. 1972); *Rowland v. Christian*, 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 104, 443 P.2d 561, 568 (1968); *Mile High Fence Co. v. Radovich*, 175 Colo. 537, 546, 489 P.2d 308, 314 (1971); *Pickard v. City and County of Honolulu*, 51 Haw. 134, 135, 452 P.2d 445, 446 (1969); *Mounsey v. Ellard*, 297 N.E.2d 43, 52, 53 (Mass. 1973); *Peterson v. Balach*, 294 Minn. 161, 164, 199 N.W.2d 639, 642, (1972); *Mariorenzi v. Joseph Di Ponte, Inc.*, 333 A.2d 127 (R.I. 1975).

4. Mo. Approved Instr. ch. 22 (1969), as amended, (1973 Supp.).

5. W. PROSSER, *LAW OF TORTS* § 58, at 357 (4th ed. 1971).

6. See, e.g., *McVicar v. W.R. Arthur & Company*, 312 S.W.2d 805, 812 (Mo. 1958) (involving a trespasser on defendant's truck seeking to recover for de-

and those injured by, dangerous conditions of personal property⁷ as well as real property.

The purpose of this comment is to point out some of the problems a Missouri entrant who is a trespasser, licensee, or invitee will have in recovering from a possessor of property on which the entrant was injured. It will pay special attention to the MAI in these cases. It will not discuss the status of a tenant nor cases involving injuries on public sidewalks. Some of the generalizations are merely an attempt to organize what is otherwise a confused area of the law, and, before reliance is placed on these generalizations, a thorough study of the facts of each case should be made.

II. THE ACTIVE-PASSIVE DISTINCTION

In evaluating the factual situation where *E* was injured while on *O*'s property, the initial problem is to determine whether *E*'s injury was caused by the active or passive negligence of *O*. Generally,

active negligence means negligence occurring in connection with activities conducted on the premises; whereas passive negligence means that which causes danger by reason of the physical condition of the premises.⁸

The passive negligence referred to is generally a possessor's failure either to remedy a dangerous condition or to warn the entrant of the same.⁹ Where a particular case involves *active* conduct which results in injury to an entrant, the possessor will be liable if he knew or should have known the entrant was on the property and failed to exercise ordinary care toward the entrant.¹⁰ However, where the injury results from *passive* conduct of the possessor, his liability depends upon whether the entrant was a trespasser, licensee, or invitee.¹¹ As will later be seen, entrants in certain situations have no submissible cases against the possessor with respect to passive conduct because of a legally conferred immunity.

Although general definitions of active and passive conduct are helpful, presenting the complete picture requires examination of the cases. *Cupp v. Montgomery*¹² involved a plaintiff injured while helping the defendant seed his back yard. The injury resulted from the plaintiff slipping on mud

defendant's active negligence). See also *Day v. Mayberry*, 421 S.W.2d 34 (Spr. Mo. App. 1967).

7. See, e.g., *Enloe v. Pittsburgh Plate Glass Co.*, 427 S.W.2d 519 (Mo. 1968) (plaintiff injured by defendant's fork lift which was defective and caused the premises to be in a dangerous condition).

8. *Arbogast v. Terminal R.R. Ass'n of St. Louis*, 452 S.W.2d 81, 84 (Mo. En Banc 1970). See also *Heald v. Cox*, 480 S.W.2d 107, 109 (Mo. App., D.K.C. 1972); *Cunningham v. Hayes*, 463 S.W.2d 555, 559-60 (K.C. Mo. App. 1971); *Cupp v. Montgomery*, 408 S.W.2d 353, 356 (St. L. Mo. App. 1966).

9. See, e.g., RESTATEMENT (SECOND) LAW OF TORTS § 342 (1965).

10. *Cunningham v. Hayes*, 463 S.W.2d 555, 560 (K.C. Mo. App. 1971).

11. See pt. IV of this comment, *infra*.

12. 408 S.W.2d 353 (St. L. Mo. App. 1966). For an excellent discussion of this case, see *Atterbury, Torts—Landowners Liability to a Licensee—Active-Passive Negligence Distinction*, 33 MO. L. REV. 93 (1968).

which had been tracked by the defendant onto his back porch *while the plaintiff was on the premises*.¹³ The court held that these facts constituted active negligence on the part of the defendant.¹⁴ This result stems from the view that creation of a new danger after the plaintiff has entered the premises constitutes active negligence.¹⁵ In *Cunningham v. Hayes*¹⁶ the plaintiff was injured when a car hoisted by a wrecker at the defendant's salvage yard fell on the plaintiff. Here again the active negligence, hoisting the car, occurred after the plaintiff had entered the premises. Again, the court characterized this as active negligence. In both cases the defendant contended that the plaintiff was at best a licensee and that he therefore was subject to a lower standard of care regarding liability for injuries caused by conditions of the land and defendant's passive conduct in failing to warn of the condition or remedy it.¹⁷ Had the court found that these injuries were the result of passive negligence of the defendants, the plaintiffs would have had more difficult cases and perhaps would have been unable to recover.¹⁸

Of course, there are many cases where active negligence is more obvious than either *Cupp v. Montgomery* or *Cunningham v. Hayes*. For example, it is not hard to accept a finding that a case involves active negligence where the owner of the property loses his footing while cutting wood in a brush pile and falls onto and injures an entrant,¹⁹ nor where the owner invites or permits an entrant to use a horse with a dangerous proclivity without insuring that the entrant is aware of that fact.²⁰

By way of contrast, it is helpful to consider cases which do not find active negligence. Many are, to say the least, confusing. In *Brozovich v. Brozovich*²¹ the plaintiff was helping his father unload the father's automobile when a shotgun which the father had placed in the seat of the car discharged, injuring the plaintiff. Plaintiff submitted his case to the jury on an active negligence theory. The specification of negligence he alleged was the active conduct of the father in placing the loaded shotgun in

13. 408 S.W.2d at 354-55.

14. *Id.* at 357.

15. *Id.* at 356.

16. 463 S.W.2d 555 (K.C. Mo. App. 1971).

17. *Cunningham v. Hayes*, 463 S.W.2d 555, 559 (K.C. Mo. App. 1971); *Cupp v. Montgomery*, 408 S.W.2d 353, 355 (St. L. Mo. App. 1966).

18. *See Ziegler v. Elms*, 388 S.W.2d 839 (Mo. 1965). *But see Cunningham v. Hayes*, 463 S.W.2d 555 (K.C. Mo. App. 1971), where the court said:

The courts have encountered some difficulty in rationally adapting these static classifications to the dynamic and complex personal and economic relationships of an industrial, urban age. Our own courts have met this difficulty by perpetuating the terminology of classification "long employed by the profession and by the courts," *while at the same time freely transcending such common-law categories (and thus, the concomitant standard of care) when the justice of the case required.*

Id. at 559 (emphasis added) (citations omitted).

19. *Penberthy v. Penberthy*, 505 S.W.2d 122, 126 (Mo. App., D. St. L. 1973).

20. *Heald v. Cox*, 480 S.W.2d 107, 109 (Mo. App., D.K.C. 1972).

21. 429 S.W.2d 330 (K.C. Mo. App. 1968).

the car without telling the plaintiff of its presence.²² The appellate court held that the case should have been submitted under a passive negligence theory—*i.e.*, failure to warn of a dangerous condition,²³ and reversed for failure to do so.²⁴ In *Blackburn v. Katz Drug Company*²⁵ the plaintiff was struck and injured by a freight cart being pushed by the defendant's employee. The plaintiff was entering an intersection of two aisles in the defendant's store when the freight cart entered the intersection from the other aisle and struck her. The court approved an instruction submitting the case on a passive negligence theory, based on the defendant's failure to remedy or warn of a dangerous condition.²⁶ The dangerous condition was the combination of merchandise stacked so high on the racks along the aisle that it obstructed the plaintiff's view of the intersecting aisle and the conduct of the defendant's employee in pushing the freight cart into the intersection.²⁷ From this case one might conclude that where an existing condition is made dangerous by an activity conducted on the premises, the plaintiff should proceed on a passive negligence theory (defendant's failure to remedy or warn of the condition) rather than an active negligence theory (the activity which made the condition dangerous).

Just as there are cases which obviously involve active negligence, there are those which obviously do not. In *Ziegler v. Elms*²⁸ the plaintiff was injured when he fell on the defendant's stairway. The plaintiff appealed from a directed verdict granted on the basis that the plaintiff was a licensee and that the evidence presented was insufficient to submit a case of passive negligence.²⁹ The appellate court rejected the plaintiff's argument that evidence as to the method by which the defendant installed and maintained the metal stair nosing plus the defendant's failure to warn the plaintiff of its loose condition made a submissible case of active negligence.³⁰ The court went on to say that the evidence was insufficient to establish that the defendant's installation and maintenance of the nosing was negligent, and that failure to warn *alone* was not active negligence.³¹ This finding is logically acceptable, as are findings that there is no active negligence involved where the only evidence of negligence is the property owner's

22. *Id.* at 333. The instruction used was MAI 17.01. The specification of negligence submitted in the instruction was:

First, defendant placed [active] a loaded shotgun among tools in the back seat of his car and failed to warn [passive] plaintiff of the presence thereof.

23. *Id.* The court suggested that MAI 22.03 was the proper instruction to use. The Committee's Comments to MAI 22.03 indicate that this instruction is to be used for cases involving injuries caused by dangerous conditions on the property.

24. *Id.*

25. 520 S.W.2d 668 (Mo. App., D. Spr. 1975).

26. *Id.* at 670, 673. The instruction involved was MAI 22.03. See note 23 *supra*.

27. *Id.* at 672.

28. 388 S.W.2d 839 (Mo. 1965).

29. The law as to a possessor's liability to licensees for passive negligence was subsequently changed in *Wells v. Goforth*, 443 S.W.2d 155 (Mo. En Banc 1969).

30. 388 S.W.2d at 841.

31. *Id.* at 842.

failure to warn firemen of a defective porch,³² or that a possessor allowed his dog to create a dangerous condition by leaving an old shoe on the defendant's steps which caused the plaintiff's fall.³³

These cases illustrate that although some cases are easily characterized as either active or passive negligence cases, such characterization is difficult in cases where both active conduct of the possessor and a condition of the property which the possessor failed to make safe or warn the plaintiff of are involved. In summary, a case involves active negligence if the activity either directly causes the entrant's injury or creates a *new* and dangerous condition after the entrant has come onto the property. Where, however, the case involves only a dangerous condition of the property or where the activity involved makes a *pre-existing* condition dangerous, and where in either alternative the possessor fails to warn of the dangerous condition, then the case is a passive negligence case.

III. JURY INSTRUCTIONS IN THE ACTIVE NEGLIGENCE CASE

Assuming our case of *E v. O* involves the active negligence of *O*, what effect will this have on the way *E* will prove and submit his case?

First, it should be noted that in many non-landowner negligence cases the verdict directing instructions used will be patterned after MAI 17.01 or 17.02.³⁴ MAI 17.01 and 17.02 instruct the jurors to return a verdict for the plaintiff if they believe: first, that the defendant committed the act(s) alleged; second, that the defendant was thereby negligent; and third, that as a direct result of such negligence, the plaintiff sustained damage. These are the basic elements of establishing negligence as a basis for recovery.

These instructions may require certain modifications where the plaintiff is injured while an entrant on the defendant's property. In *McVicar v. W.R. Arthur & Company*³⁵ the court said:

[T]he broad general rule is that the possessor . . . is not liable for harm to trespassers caused by . . . his failure . . . to carry on his activities so as not to endanger them. . . . [O]ne of the exceptions is that if the *presence of the trespasser is discovered*, . . . the pos-

32. *Anderson v. Cinnamon*, 365 Mo. 304, 282 S.W.2d 445 (En Banc 1955). *But see* *Blackburn v. Katz Drug Co.*, 520 S.W.2d 668 (Mo. App., D. Spr. 1975) (active conduct plus failure to warn held passive negligence).

33. *Carr v. Brooks*, 356 S.W.2d 293, 299 (Spr. Mo. App. 1962). It is interesting to note that the shoe was placed on the steps after plaintiff had entered the premises. Under *Cupp v. Montgomery*, this may have justified a finding of active negligence though this point was not argued on appeal. For a similar case, see *Wolfson v. Chelist*, 278 S.W.2d 39 (St. L. Mo. App. 1955), *rev'd*, 284 S.W.2d 447 (Mo. 1955).

34. These instructions are under the chapter containing instructions for use in motor vehicle cases. However, instructions 17.01 and 17.02 submit cases involving single and multiple negligent acts respectively and are easily modified for cases submitting negligent acts of the defendant which do not concern use of motor vehicles.

35. 312 S.W.2d 805 (Mo. 1958).

essor is commonly required to exercise ordinary care . . . for his safety as to any active operations the possessor may carry on.³⁶

Day v. Mayberry,³⁷ citing the rule set forth in *McVicar*, noted that where a suit involved a trespasser-plaintiff injured by the possessor's active negligence, the plaintiff must prove the possessor was aware of his presence on the property.³⁸ The verdict directing instruction submitted to the jury had been patterned after MAI 17.01 and did not require a finding that the defendant was aware of the plaintiff's presence. The appellate court held that on retrial the verdict directing instruction should require such a finding.³⁹ From this it may be concluded that, if in dispute, the defendant's knowledge of the trespasser-plaintiff's presence must be submitted as an extra element of the normal negligence instruction under MAI 17.01. This additional element may be unnecessary. The second element of MAI 17.01 requires that the jury find the defendant's conduct negligent. The jury must look to the facts and circumstances of each case to determine if the defendant's conduct was negligent. In a trespasser case, one of the circumstances the jury will consider is whether the defendant was aware of the plaintiff-trespasser's presence. Submitting the case without the additional element is merely asking the jury to determine negligence based on foreseeability and reasonable conduct under the circumstances. Furthermore, if the additional element is required in a trespasser-active negligence case, it can be argued that there should be a similar requirement in licensee and invitee cases.⁴⁰ Despite this argument, in light of *Day v. Mayberry*, it would be dangerous to overlook the problem and submit the case to the jury absent the additional element.

It would at first appear that one of the distinct advantages in an entrant characterizing his case as an active negligence case is that he would not be required to prove freedom from contributory negligence, as he is arguably required to do in passive negligence cases.⁴¹ However, the cases

36. *Id.* at 812. See also *Penberthy v. Penberthy*, 505 S.W.2d 122 (Mo. App., D. St. L. 1973); *Heald v. Cox*, 480 S.W.2d 107 (Mo. App., D.K.C. 1972).

37. 421 S.W.2d 34 (Spr. Mo. App. 1967).

38. *Id.* at 40.

39. *Id.* at 41. See also *Stevens v. Mo. Pac. R.R. Co.*, 355 S.W.2d 122, 131 (Mo. 1962).

40. The extra element in licensee or invitee cases would be different, however. See *Cunningham v. Hayes*, 463 S.W.2d 555 (K.C. Mo. App. 1971).

[I]n cases involving injury 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 or should reasonably be known to the owner or possessor.

Id. at 560 (emphasis added). This indicates that the extra element in a licensee case would be to the effect that the defendant knew or should have known of the plaintiff's presence. For a similar rule regarding invitees, see *Penberthy v. Penberthy*, 505 S.W.2d 122, 126 (Mo. App., D. St. L. 1973). See also *Arbogast v. Terminal R.R. Ass'n of St. Louis*, 453 S.W.2d 81, 84 (Mo. 1970).

41. See Mo. Approved Instr. § 22.03 (1969); Mo. Approved Instr. § 22.07 (1973 Supp.) (passive negligence cases in which invitees and licensees are injured by a dangerous condition on defendant's property).

of *Cupp v. Montgomery* and *Cunningham v. Hayes* present a problem. Both were active negligence cases⁴² but could be characterized as borderline active-passive negligence, because in each the defendant's active conduct created, or contributed to, a condition dangerous to the plaintiff. The court in *Cunningham* stated that, even though a possessor may be liable for his active negligence, "no actionable duty is established against a possessor in such cases in the absence of evidence that the dangerous condition, although known to the possessor-defendant, was unknown to the plaintiff."⁴³ This would appear to require that an entrant-plaintiff prove, and that instructions in active negligence cases require the jury to find, that the defendant knew of the condition and that plaintiff did not.⁴⁴ The only authority cited by the court in *Cunningham* was *Cupp v. Montgomery*.⁴⁵ The appellate court in *Cupp* reversed a verdict for the plaintiff because he failed to include an element in his jury instructions requiring the jury to find that the defendant knew of the dangerous condition and that the plaintiff did not.⁴⁶ These two cases indicate that in active negligence cases involving a condition created by the possessor's active conduct, there is an extra element which must be proved and submitted to the jury.

The problem with this conclusion is that the cases cited by the court in *Cupp* were both *passive* negligence cases.⁴⁷ The element of the possessor's knowledge and the entrant's lack of it are logically more acceptable in a passive negligence case. The passive negligence submitted in such a case is the possessor's failure to make a dangerous condition reasonably safe for the entrant or his failure to warn the entrant of the condition.⁴⁸ Before a possessor should be required to warn of a dangerous condition, it makes sense that he should know of it or at least that in the exercise of ordinary care he should have been aware of it. Additionally, there is no reason to give a warning to an entrant who knew of the dangerous condition. This logic breaks down when the case concerns active negligence of the possessor. Other cases involving a defendant's active conduct do not require such a finding⁴⁹ and it is submitted there is no logical reason why it should be an element of an entrant-plaintiff's case.⁵⁰ This reasoning was accepted by

42. See text accompanying notes 12-16 *supra*.

43. 463 S.W.2d 555, 560 (K.C. Mo. App. 1971).

44. This requirement is at least logically related to contributory negligence. If the plaintiff fails to prove he did not know of the condition, then it must be assumed he knew of it. If he did know of the condition, then his recovery for an injury therefrom is barred as it would be were he contributorily negligent.

45. *Cunningham v. Hayes*, 463 S.W.2d 555, 560 (K.C. Mo. App. 1971).

46. 408 S.W.2d 353, 360-61 (St. L. Mo. App. 1966).

47. *Id.*

48. See, e.g., Mo. Approved Instr. § 22.03 (1969); Mo. Approved Instr. § 22.07 (1973 Supp.).

49. See generally Mo. Approved Instr. ch. 22 (1969), as amended, (1973 Supp.).

50. *Contra*, RESTATEMENT (SECOND) OF TORTS § 343A (1), comment e (1965): If [the invitee] knows the actual conditions, and the activities carried on, and the dangers involved in either, he is free to make an intelligent

the same court which decided *Cupp* in *Penberthy v. Penberthy*.⁵¹ In *Penberthy*, plaintiff was helping his brother cut up a brush pile on the brother's farm. In the process the brother-defendant negligently slipped and fell onto the plaintiff, knocking him down and injuring him. The plaintiff submitted his active negligence case to the jury in an instruction patterned after MAI 17.01⁵² without requiring the jury to find that the defendant had knowledge of the danger his activity created and that the plaintiff lacked such knowledge.⁵³ *Penberthy*, however, involved purely active conduct of the possessor which directly resulted in plaintiff's injury. *Penberthy* is distinguishable from *Cupp* and *Cunningham*, which were labeled active negligence cases, but where the possessor's active conduct created or contributed to a dangerous condition of the property. The court in *Penberthy* recognized this distinction and decided the case on the particular facts involved.⁵⁴ Therefore, even after *Penberthy*, it appears that the entrant-plaintiff must incorporate this element in his verdict-directing instruction and present evidence of it in cases where the activity of defendant creates, or contributes to, a condition which injures the plaintiff.

IV. JURY INSTRUCTIONS IN PASSIVE NEGLIGENCE CASES

A. Determining the Status of the Entrant

Assuming our case of *E v. O* involves the passive negligence of *O*, the first inquiry is to determine whether *E* is a trespasser, a licensee, or an invitee. This determination will dictate what evidence *E* must produce at trial to present a submissible case and also what jury instructions are appropriate. The court in *Cunningham v. Hayes*⁵⁵ pointed out that an entrant's status as a trespasser, licensee, or invitee depends upon his relationship to the possessor, and stated:

If the entry was without consent or other privilege given by the possessor, the entrant is a trespasser; if with express or implied consent, but for the entrant's own purposes, he is a licensee; and if the entry was for some real benefit to the possessor, then the entrant is an invitee. . . .⁵⁶

Although a broad definition is helpful, it is necessary to look to the cases to determine the proper category for each particular entrant. In *Porchey v. Kelling*⁵⁷ the plaintiff, without the owner-defendant's express consent, was taking a "short-cut" across the defendant's property when he

choice as to whether the advantage to be gained is sufficient to justify him in incurring the risk by entering or remaining on the land.

Id. (emphasis added).

51. 505 S.W.2d 122 (Mo. App., D. St. L. 1973).

52. *Id.* at 128.

53. *Id.* at 130.

54. *Id.* at 129.

55. 463 S.W.2d 555 (K.C. Mo. App. 1971).

56. *Id.* at 558.

57. 353 Mo. 1034, 185 S.W.2d 820 (1945).

fell into an open excavation and was injured. Without more the plaintiff would appear to be a trespasser. However, the evidence indicated this "short-cut" was frequently used by the general public and that the defendant acquiesced in this use. The court thought this constituted implied consent and held that the plaintiff was a licensee.⁵⁸ The court said: "An entrance made by sufferance, expressed or implied, distinguishes the licensee from the trespasser. . . ."⁵⁹

The distinction between licensees and invitees is often very difficult to draw. The distinction turns largely upon the nature of the business which brought the entrant upon the premises.⁶⁰ Where there is express or implied consent to enter, but the entrant's purpose is solely for his own benefit, the entrant will be a licensee.⁶¹ Where there is consent by the possessor in the form of an express or implied invitation *in the legal sense* and the entrant comes upon the land pursuant to this invitation, he is an invitee.⁶² An invitation *in the legal sense* in some jurisdictions, including Missouri, is one in which the possessor invites the entrant to come upon the premises for the possessor's benefit or for the mutual benefit of both.⁶³ Under this view, the benefit must usually be a real or prospective economic benefit, as distinguished from one of pleasure or convenience.⁶⁴ In the majority of other jurisdictions an invitation *in the legal sense* is one given in a manner which implies that the premises are in a safe condition for the entrant.⁶⁵ In *Wolfson v. Chelist*,⁶⁶ however, the Supreme Court of Missouri held that a social guest is a licensee and not an invitee. The court said that although the plaintiff entered pursuant to an invitation from the possessor and for their mutual benefit, the benefit was not a *material*

58. *Id.* at 1040, 185 S.W.2d at 822.

59. *Id.* at 1041, 185 S.W.2d at 823. See also *Brady v. Terminal R. R. Ass'n of St. Louis*, 340 Mo. 841, 850, 102 S.W.2d 903, 907 (En Banc 1937).

60. *Connole v. Floyd Plant Food Co.*, 96 S.W.2d 655, 657 (St. L. Mo. App. 1936); *Boneau v. Swift & Co.*, 66 S.W.2d 172, 175 (St. L. Mo. App. 1934).

61. See, e.g., *Wolfson v. Chelist*, 284 S.W.2d 447 (Mo. 1955); W. PROSSER, LAW OF TORTS § 60, at 376 (4th ed. 1971).

62. See *Wolfson v. Chelist*, 284 S.W.2d 447, 450 (Mo. 1955); *Gruhalla v. George Moeller Constr. Co.*, 391 S.W.2d 585, 592 (St. L. Mo. App. 1965); *Moss v. Nooter Corp.*, 344 S.W.2d 647, 652 (St. L. Mo. App. 1961).

63. See *Gilmore v. Kansas City Terminal Ry. Co.*, 421 S.W.2d 520, 522 (K.C. Mo. App. 1967); *Twine v. Norris Grain Co.*, 241 Mo. App. 7, 15-20, 226 S.W.2d 415, 420-23 (K.C. Ct. App. 1950).

64. See *Claridge v. Watson Terrace Christian Church*, 457 S.W.2d 785, 788 (Mo. En Banc 1970); *Richey v. Kemper*, 392 S.W.2d 266, 268 (Mo. 1965); *Kennedy v. Phillips*, 319 Mo. 573, 585-86, 5 S.W.2d 33, 38 (1928); W. PROSSER, LAW OF TORTS § 61, at 386-87 (4th ed. 1971); RESTATEMENT, LAW OF TORTS § 343, comment a (1934); Annot., 95 A.L.R.2d 992 (1964).

65. W. PROSSER, LAW OF TORTS § 61, at 388-89 (4th ed. 1971). Prosser states that this view of the invitation is accepted by a majority of courts. *Accord*, RESTATEMENT (SECOND) OF TORTS § 332(2), comment (1965) (creating a new type of invitee, the public invitee).

66. 284 S.W.2d 447 (Mo. 1955). See also *Gruhalla v. George Moeller Constr. Co.*, 391 S.W.2d 585 (St. L. Mo. App. 1965).

benefit, but rather a social one.⁶⁷ In *Happy v. Walz*⁶⁸ the court held that a customer who enters a store with the motive of shopping for merchandise is an invitee. All the requirements of the invitee status are met in such a case; there is an implied invitation by the possessor to the general public to enter for the possessor's economic or material benefit. However, *Argus v. Michler*⁶⁹ held that where the plaintiff had entered the defendant's gas station for the purpose of using the telephone, he was only a licensee, because his purpose was "solely for his 'own convenience' and certainly in no way connected with the business . . . of the owner. . . ."⁷⁰ The distinction between persons who enter to shop and those who enter to use the telephone is narrow and can lead to a harsh result where an invitee would be entitled to recover and a less favored licensee would not.⁷¹ If the so-called economic benefit theory in Missouri were replaced with the view taken by most jurisdictions and the *Restatement (Second) of Torts*⁷²—that where the premises are held out by the possessor as being open to the public, the requirement of an invitation in the legal sense is satisfied—entrants onto such premises would be invitees, entitled to the invitee's favored status, regardless of their purpose in entering.

Once it is determined which status *E* had when he entered *O*'s property, inquiry should be made whether *E*'s status changed while he was on the premises. Where an invitee enters the premises under an invitation *in the legal sense*, he is bound to stay within the limits of his invitation.⁷³ If he exceeds the time, space, or use limitations⁷⁴ of his invitation, the entrant may fall into the less favored status of a licensee⁷⁵ or even a trespasser.⁷⁶ The test whether these limitations have been exceeded is to determine if an entrant of the plaintiff's status would normally be expected to be *where* he was *when* he was injured.⁷⁷ Thus, in *Moss v. Nooter Corpora-*

67. 284 S.W.2d at 450.

68. 358 Mo. 56, 61-62, 213 S.W.2d 410, 414-15 (1948).

69. 349 S.W.2d 389, 391-93 (St. L. Mo. App. 1961).

70. *Id.* at 393. See also Annot., 93 A.L.R.2d 784 (1964). Where, however, the telephone itself is held out as being for use of customers the result is contrary. *Main v. Lehman*, 294 Mo. 579, 243 S.W. 91 (1922).

71. The plaintiff in *Argus v. Michler* was denied recovery on this very basis. It should be noted that since *Wells v. Goforth*, 443 S.W.2d 155 (Mo. En Banc 1969), the distinction is less important in view of the greater protection afforded the licensee.

72. RESTATEMENT (SECOND) OF TORTS § 332 (2) (1965).

73. *Watson v. St. Joseph Coal Mining Co.*, 331 Mo. 475, 479, 53 S.W.2d 895, 897 (1932); *Glaser v. Rothschild*, 221 Mo. 180, 187-94, 120 S.W. 1, 3-6 (1909); *Anderson v. Welty*, 334 S.W.2d 132, 136 (Spr. Mo. App. 1960).

74. See *Watson v. St. Joseph Coal Mining Co.*, 222 Mo. App. 718, 5 S.W.2d 122 (K.C. Ct. App. 1928), *aff'd*, 331 Mo. 475, 53 S.W.2d 895 (1932).

75. See *Gruetzemacher v. Billings*, 348 S.W.2d 952, 959 (Mo. 1961); *Moss v. Nooter Corp.*, 344 S.W.2d 647, 653-54 (St. L. Mo. App. 1961).

76. See *Docoulombiev v. Baldwin*, 101 S.W.2d 96, 101 (Spr. Mo. App. 1937); *Wyatt v. Kansas City Terminal Ry. Co.*, 229 Mo. App. 179, 74 S.W.2d 51 (K.C. Ct. App. 1934).

77. See *Davidson v. Int'l Shoe Co.*, 427 S.W.2d 421 (Mo. 1968); *Moss v. Nooter Corp.*, 344 S.W.2d 647 (St. L. Mo. App. 1961).

tion⁷⁸ the court found that, although plaintiff delivery truck driver was an invitee when he entered the premises to deliver materials, his status changed to that of a licensee when he wandered from the loading dock area into a storage area in search of one of the defendant's employees. The court stated that the plaintiff had exceeded the limits of his invitation because his presence in that area could not have been reasonably anticipated by the defendant.⁷⁹ In *Davidson v. Int'l Shoe Co.*,⁸⁰ the court determined that a delivery truck driver had not exceeded his invitation by going to a different area of the defendant's premises to get a drink of water, and was therefore still an invitee when he was injured. Dictating this result was the fact that the defendant had implicitly invited truck drivers making deliveries to use the drinking fountain so that they would be close at hand while the trucks were being unloaded.⁸¹

If *E's* status is in dispute, it is necessary to know whether the judge or jury will ultimately make this determination. In *Stoepelman v. Hays-Fendler Const. Co.*⁸² the defendant contended that the plaintiff's verdict directing instruction was erroneous because it failed to require the jury to determine plaintiff's status at the time he was injured. The court stated: "The determination as to the status plaintiff occupies was not one of fact for the jury to determine but is one of law for the court to determine in submitting the case."⁸³ However, this is not always the case. In *Stoepelman* the plaintiff was an employee of the defendant's tenant, a fact which was undisputed. Because the jury is a fact finder, this left the court free to determine for itself what the plaintiff's status was, based upon the undisputed facts, and then to determine whether the plaintiff's evidence made a submissible case based on that status. However, where the facts which establish the plaintiff's status are in dispute, the determination of status should be for the jury.⁸⁴ Therefore, in passive negligence cases if the facts which determine status are in dispute, the verdict directing instruction applicable to the particular case must be modified by adding an element

78. 344 S.W.2d 647 (St. L. Mo. App. 1961).

79. *Id.* at 652. See also *Gayer v. J.C. Penney Co.*, 326 S.W.2d 413 (St. L. Mo. App. 1959) (plaintiff-customer's status changed from invitee to licensee when he strayed into defendant's storeroom and was injured).

80. 427 S.W.2d 421 (Mo. 1968).

81. *Id.* at 423. See also *Glaser v. Rothschild*, 221 Mo. 180, 120 S.W. 1 (1909).

82. 437 S.W.2d 143 (St. L. Mo. App. 1968).

83. *Id.* at 149.

84. *Friend v. Gem Int'l, Inc.*, 476 S.W.2d 134 (St. L. Mo. App. 1971). The court stated:

Defendant asserts that this relationship [status] was a disputed issue of fact. But the evidence which went to the establishment of this relationship was not disputed. The only dispute was over the application of the law to those facts. Therefore, a finding of the relationship of Gem and Biederman [defendant and plaintiff's employer] in the instruction was not required. The determination of the status of plaintiff at the time of her injury was for the court to determine.

Id. at 140.

which requires the jury to find that the plaintiff was of a status necessary for him to recovery.⁸⁵

There are two possible methods for submitting this additional element to the jury. These are best illustrated by an example. In our hypothetical case of *E v. O*, *E* contends he was an invitee when injured on *O*'s premises. *E* has given conflicting testimony at trial as to his motive for entering. On direct examination he testified that he went into *O*'s store to shop around but on cross-examination he admits it was a hot day and he only stayed in *O*'s store long enough to get a drink of water and was leaving when injured. If his purpose was to shop he was an invitee, but if his purpose was to get a drink he was only a licensee. The proper verdict directing instruction for an invitee in passive negligence cases in Missouri is MAI 22.03. This instruction does not include an element which requires the jury to find that the plaintiff was an invitee when injured.⁸⁶ Rather, it assumes the court has held as a matter of law that the plaintiff was an invitee or that it was admitted by the defendant. In our hypothetical, however, the facts establishing the plaintiff's status are in dispute and the defendant is entitled to have the jury resolve this dispute.

The first method which may be used is to insert an element into MAI 22.03 so that it begins:

Your verdict must be for the plaintiff if you believe: First, plaintiff was an invitee when injured, and Second, . . .

The balance of the instruction would include the five elements set forth in MAI 22.03. If this method is used, the term "invitee" should be defined following the verdict director or, if also used in other instructions, defined in a separate instruction.⁸⁷

The other method of submitting the status issue to the jury would be to insert an element in the verdict director defining the term "invitee" without using that term. Using our hypothetical facts, MAI 22.03 would begin:

Your verdict must be for the plaintiff if you believe: First, plaintiff was upon defendant's premises upon furtherance of defendant's business when he was injured, and Second, . . .⁸⁸

85. *Claridge v. Watson Terrace Christian Church*, 457 S.W.2d 785, 787 (Mo. En Banc 1970); *Bollman v. Kark Rendering Plant*, 418 S.W.2d 39, 49 (Mo. 1967).

86. See Mo. Approved Instr. § 22.03 (1969).

87. See *Claridge v. Watson Terrace Christian Church*, 457 S.W.2d 785, 787 (Mo. En Banc 1970).

88. The language for this element was taken from the verdict directing instruction in *Bollman v. Kark Rendering Plant*, 418 S.W.2d 39, 49 (Mo. 1967). The phrase "upon defendant's premises upon furtherance of defendant's business" was not, however, submitted as a separate element of the verdict director. Instead, it was combined in the first element of MAI 22.03 which first hypothesized that a dangerous condition existed and that as a result of which "the [property] was not reasonably safe for the use by persons upon defendant's premises upon furtherance of defendant's business." (Emphasis added). The defendant contended that the jury could have returned a verdict for the plaintiff upon finding that the defendant failed to exercise care as to persons upon defendant's premises

Either method can easily be adapted to whatever status the plaintiff claims by using an appropriate definition in conjunction with the proper modification of the verdict director.

Once the issue of the entrant's status is determined, the next question is whether the entrant has made a submissible case of passive negligence for that status.

1. Trespassers

A trespasser injured by a dangerous condition on an owner's property is the most disfavored plaintiff in the passive negligence cases. *McVicar v. W.R. Arthur & Company*⁸⁹ stated the general rule:

[T]he possessor of land is not liable for harm to trespassers caused by either [the possessor's] failure to put his land in a reasonably safe condition for their reception, or to carry on his activities so as to not endanger them.⁹⁰

The reason for this rule is not based on the fact that a trespasser is a wrongdoer, but rather on the view that his presence cannot be anticipated; therefore, the possessor cannot be expected to take precautions for a trespasser's safety.⁹¹

The Missouri exceptions to this general rule of "non-liability to trespassers" may be classified into six categories. First, as previously noted, if the trespasser's presence becomes known, his status is immaterial as far as the possessor's liability for activities which the possessor conducts on the premises.⁹²

The second exception is that if the possessor willfully or wantonly injures a trespasser, he will be held liable.⁹³ The facts necessary to establish willful and wanton conduct toward a trespasser by the possessor are not well established in Missouri. However, it could safely be assumed that hidden traps or spring guns intentionally set to injure trespassers would

in furtherance of defendant's business without finding that plaintiff was a member of that class. The court upheld the instruction but only because the defendant conversed plaintiff's status by saying "your verdict must be for defendant if you believe plaintiff undertook to [use the property which was in a dangerous condition] for his own purpose, pleasure, or curiosity without the consent of defendant." The court indicated that the verdict directing instruction and the converse instruction, *combined*, adequately submitted the issue of plaintiff's status to the jury. Although the Missouri Supreme Court Committee on Jury Instructions cites *Bollman* as an example of how to submit plaintiff's status, it is suggested that this is a dangerous way to do so and that the two methods suggested in the text of this comment more properly present the issue.

89. 312 S.W.2d 805 (Mo. 1958).

90. *Id.* at 812.

91. *Id.*

92. See pt. III of this comment, *supra*. See also *Stevens v. Mo. Pac. R.R. Co.*, 355 S.W.2d 122, 128-29 (Mo. 1962); *Daniel v. Artesian Ice & Cold Storage Co.*, 45 S.W.2d 548, 551 (K.C. Mo. App. 1931).

93. *Blavatt v. Union Electric Light & Power Co.*, 335 Mo. 151, 155, 71 S.W.2d 736, 738 (1934); *Kelly v. Benas*, 217 Mo. 1, 9, 116 S.W. 557, 559 (1909); *Wyatt v. Kansas City Terminal Ry. Co.*, 229 Mo. App. 179, 190, 74 S.W.2d 51, 57-58 (K.C. Ct. App. 1934).

fulfill the requirement.⁹⁴ Furthermore, it would seem that failure to at least warn a *known* trespasser of a hidden danger which he is obviously about to encounter would fit within this exception, particularly if the possible harm would be loss of life or serious injury.⁹⁵

Another exception is the attractive nuisance doctrine. This doctrine results in liability to a child trespasser where injuries were sustained from a dangerous artificial condition or instrumentality maintained on the property, where the possessor "knows or should know that the place is one upon which children are likely to trespass and that the condition is one with which they are likely to meddle."⁹⁶

The fourth exception may be termed the explosives exception. This exception has two separate parts. The first part of the exception is related to the attractive nuisance doctrine. Where the possessor stores or handles explosives or explosive devices, as distinguished from detonating the explosives, if he could reasonably anticipate the presence of a child trespasser on the premises, the possessor must use ordinary care to insure that these children do not obtain possession of the explosive devices and injure themselves. Failure to exercise ordinary care in this respect will result in liability despite the child's status as a trespasser.⁹⁷ In Missouri those who intentionally conduct blasting operations are strictly liable for injuries inflicted by such operations.⁹⁸ Out of this rule can be found the second part of the explosives exceptions, which states that the trespasser's status as such, be he adult or child, discovered or not, does not prevent him from recovering under this rule.

The fifth exception is where the possessor maintains an artificial dangerous condition near a public thoroughfare. The possessor is liable for injuries to inadvertent trespassers who stray from the thoroughfare

94. See cases cited note 93 *supra*.

95. No Missouri court has decided this issue. However, RESTATEMENT (SECOND) LAW OF TORTS § 337 (1965) specifically recognizes this as a basis for recovery by trespassers of whose presence the possessor knows or should know.

96. *Anderson v. Cahill*, 485 S.W.2d 76, 78 (Mo. 1972), quoting RESTATEMENT OF TORTS § 339 (a), comment (1934). *Anderson* held that an injured child is no longer required to prove that the dangerous condition attracted him to trespass in the first instance, as had been required under prior Missouri law. See also *Salanski v. Enright*, 452 S.W.2d 143 (Mo. 1970); *Burditt, Attractive Nuisance—The Increasing Burden of Land Ownership*, 36 Mo. L. Rev. 244 (1971). For a discussion of prior Missouri law regarding the attractive nuisance doctrine, see *Prewitt, The Attractive Nuisance Doctrine in Missouri*, 29 Mo. L. Rev. 24 (1964).

After *Salanski* and *Anderson*, the Missouri Supreme Court Committee on Jury Instructions failed to modify MAI 22.01, the attractive nuisance instruction, to correspond with the change in the law. The instruction refers to an artificial condition "which attracted plaintiff to it." This is ambiguous, but it could certainly be interpreted as requiring a plaintiff to prove that he was attracted onto the land in the first instance by the artificial injury-producing condition. If this is the case, MAI 22.01 misstates the law.

97. *Stevens v. Mo. Pac. R.R. Co.*, 355 S.W.2d 122, 128 (Mo. 1962); *Paisley v. Liebowits*, 347 S.W.2d 178, 183 (Mo. 1916); *Boyer v. Guidicy Marble, Terrazzo & Tile Co.*, 246 S.W.2d 742, 745-48 (Mo. 1952).

98. *Summers v. Tavern Rock Sand Co.*, 315 S.W.2d 201, 203 (Mo. 1958).

and who, in the exercise of ordinary care, are injured by that condition.⁹⁹ This exception is based on the view that the possessor should reasonably anticipate that users of the thoroughfare will occasionally trespass and that he should therefore take steps to avoid their injury.¹⁰⁰

The last exception to the rule of non-liability to trespassers is the so-called "duty of lookout" exception which applies to railroads. It provides that where trespassers habitually use a particular path or are habitually located in a particular area, the railroad must look out for them and conduct their activities with regard for their safety.¹⁰¹

It is interesting to note the similarities between these exceptions. Aside from active negligence trespasser cases, which have already been discussed, a study of the exceptions to the "non-liability to trespassers" rule reveals two common themes. For the exceptions to apply, it is generally required that the possessor know of, or at least could reasonably anticipate, the trespasser's presence. It is also generally required that there be some evidence of the possessor's knowledge of the condition and the trespasser's lack of such knowledge.¹⁰² This is important because the cases, taken as a whole, say that the injured trespasser has the burden of proof on these requirements. Failure to introduce evidence on these requirements will mean the trespasser has failed to make a submissible case.

These two requirements must also be incorporated in the jury instruction in trespasser cases. MAI instructions are provided for only two of the exceptions to the rule of non-liability to trespassers. These are MAI 22.01, which submits an attractive nuisance case, and MAI 22.02 which submits a case based on maintenance of a dangerous condition near a public thoroughfare. Both instructions include elements which meet these requirements, but they do so in a roundabout way.¹⁰³ In cases

99. See, e.g., *Wells v. Henry W. Kuhs Realty Co.*, 269 S.W.2d 761, 767-68 (Mo. 1954). See also McCleary, *The Possessor's Responsibilities As To Trees*, 29 Mo. L. REV. 159, 166-73 (1964) (noting that defective trees, although not "artificial," may give rise to liability to passers-by).

100. *Wells v. Henry W. Kuhs Realty Co.*, 269 S.W.2d 761, 767-68 (Mo. 1954).

101. See, e.g., *Ahnefeld v. Wabash R.R. Co.*, 212 Mo. 280, 300, 111 S.W. 95, 99 (1908).

102. Cf. *Stevens v. Mo. Pac. R.R. Co.*, 355 S.W.2d 122, 128 (Mo. 1962); *Hull v. Gillioz*, 344 Mo. 1227, 1234-37, 130 S.W.2d 623, 627-28 (1939); *Day v. Mayberry*, 421 S.W.2d 34, 40-41 (Spr. Mo. App. 1967).

103. See Mo. Approved Instr. ch. 22 (1969). In regard to the requirement that defendant knew of, or should have anticipated, the trespasser's presence, MAI 22.01 requires the jury to find that the defendant knew or should have known children would be attracted to the condition. MAI 22.02 requires the jury to find that a condition was so close to the thoroughfare that it posed a danger to those using the thoroughfare and that the defendant knew or should have known of this danger. The only way to find the defendant knew or should have known of this danger would be to find that the defendant knew or should have known that those using the thoroughfare may trespass and be injured by the condition. In regard to the requirement that the possessor have some knowledge of the condition, MAI 22.01 and MAI 22.02 both require that the jury find the defendant maintained a dangerous condition and knew or should have known that it was dangerous to the type of trespasser covered by the particular instruction, that is, children and users of thoroughfares, respectively. The requirement that the trespasser

involving exceptions not specifically provided for in MAI, the verdict directing instruction used should include these requirements if they are in dispute.

2. Licensees

Prior to *Wells v. Goforth*,¹⁰⁴ licensees in Missouri were entitled to no more protection than trespassers. The general rule for a possessor's liability to licensees was: "[T]he possessor of land is under no duty to such person to make the premises safe or to warn of dangerous conditions thereon. . . ."¹⁰⁵ The exceptions to this rule were identical with the exceptions in the trespasser cases,¹⁰⁶ except that the exception relating to willful and wanton conduct toward a trespasser is broader in the case of a licensee by allowing recovery in cases where the possessor failed to warn of a hidden *ultrahazardous condition, trap, or pitfall* of which he had knowledge.¹⁰⁷

In *Wells v. Goforth* the Missouri Supreme Court expressed dissatisfaction with the law regarding liability to licensees injured by the passive negligence of the possessor.¹⁰⁸ The case involved a social guest licensee injured by a fall on the defendant's icy porch. The court concluded that under the then-existing law, the plaintiff would not have been entitled to recover.¹⁰⁹ This motivated the court to overrule prior Missouri case law and adopt the view expressed in the first *Restatement of Torts* for passive negligence cases involving licensees, which provides:

lack knowledge of the dangerous condition is more difficult to find in these instructions. This requirement is not found so much in the instructions as it is in the nature of the cases to which the instructions apply. Both MAI 22.01 and MAI 22.02 are only applied to cases where the plaintiff is in a category of persons who normally would be unaware of the condition, or at least unaware of the danger involved. MAI 22.01 is applied only to child trespassers. The reason children are allowed to recover under this instruction is that children are more often unaware of the dangers involved in a particular hazard than adults would be. For the trespasser to recover under MAI 22.02, it is required that the jury find the condition was so close to the public thoroughfare that it posed a danger to persons using the thoroughfare, even though they were exercising ordinary care for their own safety. A trespasser *with knowledge of the dangerous condition* who nonetheless exposed himself to that danger could not be found to have been exercising ordinary care.

104. 443 S.W.2d 155 (Mo. En Banc 1969), noted in Pennington, *Missouri Abrogates the "No Duty" Rule As To Social Guests: Restatement (First) Adopted*, 35 Mo. L. Rev. 252 (1970).

105. *Richey v. Kemper*, 392 S.W.2d 266, 268 (Mo. 1965). See also *Anderson v. Cinnamon*, 365 Mo. 304, 308, 282 S.W.2d 445, 447 (1955); *Porchy v. Kelling*, 353 Mo. 1034, 1035, 185 S.W.2d 820, 822 (1945).

106. See *Richey v. Kemper*, 392 S.W.2d 266, 268 (Mo. 1965); *Bichsel v. Blumhost*, 429 S.W.2d 301, 303 (K.C. Mo. App. 1968). The court in *Bichsel* listed the exceptions to the rule that the licensee takes the premises as he finds them. The exceptions listed precisely parallel those discussed in connection with trespassers.

107. *Gilliland v. Bondurant*, 332 Mo. 881, 897, 59 S.W.2d 679, 687 (1932). This exception was explained in *Anderson v. Cinnamon*, 365 Mo. 304, 308, 282 S.W.2d 445, 447-48 (1955). This explanation appears to make this exception merely an expansion of the explosives exception.

108. 443 S.W.2d 155, 158 (Mo. En Banc 1969).

109. *Id.* at 157.

A possessor of land is subject to liability for bodily harm caused to gratuitous licensees by a natural or artificial condition thereon if, but only if, he (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) invites or permits them to enter or remain upon the land, without exercising reasonable care (i) to make the condition reasonably safe, or (ii) to warn them of the condition and the risk involved therein.¹¹⁰

The court in *Wells* specifically rejected the position of the *Restatement (Second) of Torts*, which would hold the possessor liable for a licensee's injuries resulting from conditions of which the possessor knew or had reason to know.¹¹¹ The court said it did not believe the possessor should be liable to licensees unless he *actually* knew of the condition.¹¹² Another difference between the two *Restatements* concerns the knowledge of the plaintiff as to the condition. When the first *Restatement* was adopted in *Wells* this element was neither discussed nor in issue. The *Restatement (Second)* contains a clause not present in the first *Restatement*, which states that liability will attach if "the licensees do not know or have reason to know of the condition and the risk involved."¹¹³ This apparently means that under the *Restatement (Second)* the licensee-plaintiff must produce evidence that he was unaware of the condition, and that in the exercise of ordinary care he would not have become aware of it, in order to establish a submissible case. This is tantamount to requiring the licensee to prove freedom from contributory negligence with respect to lookout. The first *Restatement*, however, which *Wells* did adopt, does not include such an element. This would indicate that freedom from contributory negligence with respect to lookout is not an element of the licensee's case in a jurisdiction which follows all of the first *Restatement*.¹¹⁴ Because the Missouri court did not discuss this element when it adopted the first *Restatement* in *Wells*, it may be open to question whether Missouri has really made a considered choice between the two *Restatements* on this issue.

Although the first *Restatement* does not contain a clause specifically requiring the plaintiff to show freedom from contributory negligence with

110. RESTATEMENT OF TORTS § 342 (1934).

111. RESTATEMENT (SECOND) LAW OF TORTS § 342 (1965).

112. *Wells v. Goforth*, 443 S.W.2d 155, 158 (Mo. En Banc 1969).

113. RESTATEMENT (SECOND) LAW OF TORTS § 342, clause c (1965).

114. In *Arbogast v. Terminal R.R. Ass'n of St. Louis*, 452 S.W.2d 81, 84 (Mo. 1970), the court stated that the rule set forth in *Wells v. Goforth* was limited by section 340 of the first *Restatement*. Section 340 provides that a possessor is not liable to licensees if they knew of the condition and realized the danger. The significance of this may be that those elements set forth in section 342 are the essential elements of a licensee's case and that what is set forth in section 340 is an affirmative defense. The first *Restatement*, however, is not clear on this. MAI 22.07, however, contains an optional clause available in licensee cases which provides for submission of an affirmative defense. In negligence cases the most obvious defense is contributory negligence.

respect to lookout, it does contain a related clause. Both *Restatements* require proof that the possessor knew or should have known that the licensee would not discover the condition or the fact that it was dangerous.¹¹⁵ At first, this may seem to require the same element as discussed above. It is possible to construe this requirement as covering both the plaintiff's lack of knowledge and the defendant's knowledge thereof. However, if this interpretation is valid, then the specific clause as to plaintiff's knowledge in the *Restatement (Second)* would be surplusage. Perhaps the only logical explanation is that this element refers only to the type of danger involved. This is to say that the danger must be in the nature of a hidden danger, trap, snare, or pitfall not discoverable by a licensee exercising ordinary care. The problem with this explanation is the argument that it may be contributory negligence for a licensee not to see an open and obvious danger.¹¹⁶

If it is accepted that this element concerns the nature of the condition and not the conduct of the plaintiff with respect to lookout, it must nevertheless be recognized that the latter issue will usually be in the case by way of the affirmative defense of contributory negligence. Thus, the real issue boils down to whether plaintiff or defendant has the burden of proof on this issue. Further, even if plaintiff does not have the burden of proof on plaintiff's lookout, the same evidence that the plaintiff will introduce to make his case with respect to the nature of the condition (obvious or hidden) is likely to be the primary evidence of the defendant as to whether plaintiff was looking—*i.e.*, the condition was obvious, plaintiff did not see it; therefore, he must not have been looking.

The 1973 revisions to MAI contain a verdict directing instruction for passive negligence cases involving injured licensees. This instruction, MAI 22.07, purports to require the jury to find those elements of the licensee's case as set forth in the first *Restatement* adopted in *Wells v. Goforth*. For the licensee to recover under this instruction the third element requires the jury to find:

[D]efendant knew or in the exercise of ordinary care should have known that plaintiff did not know or by using ordinary care could not have discovered that such condition was not reasonably safe, and . . .¹¹⁷

This instruction is at best ambiguous and at worst a misstatement of the law. As previously discussed, it is unclear in Missouri whether the licensee must prove freedom from contributory negligence with respect to lookout.

115. The exact wording of the two versions of the *Restatement* differ, but their meaning is the same. The first *Restatement* says the possessor must have "reason to believe they [licensees] will not discover the condition or realize the risk." *RESTATEMENT OF TORTS* § 342 (a) (1934). The *Restatement (Second)* says the possessor "should expect that they [licensees] will not discover or realize the danger." *RESTATEMENT (SECOND) LAW OF TORTS* § 342 (a) (1965).

116. *Combellick v. Rooks*, 401 S.W.2d 460, 463 (Mo. En Banc 1966); *Fehlbaum v. Newhouse Broadcasting Corp.*, 483 S.W.2d 664, 665 (Mo. App., D. St. L. 1972).

117. Mo. Approved Instr. § 22.07 (1973).

If proper lookout is an element of the plaintiff's case, this instruction assumes a fact in dispute—*i.e.*, that plaintiff did not know or by using ordinary care could not have discovered that such condition was not reasonably safe. This would be prejudicial to the defendant because it fails to require the jury to make a separate finding that plaintiff could not have discovered the condition in the exercise of ordinary care. It allows the jury to assume the licensee's freedom from contributory negligence with respect to lookout. If, on the other hand, a licensee is not required to prove his freedom from contributory negligence and this element is included only to show the nature of the condition, then this paragraph of the instruction is very likely to be misleading. This language could reasonably be construed by a jury as requiring a finding as to plaintiff's lookout. Using language about what plaintiff could reasonably see in order to describe the condition is likely to mislead anyone except the most sophisticated reader.

This instruction leaves the licensee in a difficult position. If he uses MAI 22.07 and obtains a verdict, it will be subject to reversal on appeal if it is determined that the instruction is prejudicial to the defendant because it assumes a fact in dispute. If, however, the licensee fails to use the instruction and uses one which he believes is a more correct submission of his case under *Wells v. Goforth*, then any verdict he obtains is subject to reversal, because the Missouri Rules of Civil Procedure require that if there is an applicable instruction in MAI, it must be used "to the exclusion of any other on the same subject."¹¹⁸

These problems are highlighted when the licensee instruction is compared with the invitee instruction, MAI 22.03, discussed in the next section of this comment.¹¹⁹

3. Invitees

The Missouri rule as to invitees was set forth in *Harbourn v. Katz Drug Company*.¹²⁰ This case adopted the rule of the first *Restatement of Torts* which provides:

A possessor of land is subject to liability for bodily harm caused to business visitors [invitees] by a natural or artificial condition

118. Mo. SUP. CT. R. 70.01 (b) (1964).

119. It might be argued that the reason that MAI 22.07 does not submit the plaintiff's lookout is because this issue is a question of law for the court to decide. Should the judge decide against the plaintiff on this issue, then the plaintiff has not made a submissible case and the judge would not give the instruction. Under this approach, the problem comes down to whether it is more advantageous to have this issue decided by the jury (as must be done under MAI 22.03 in invitee cases) or by the judge (as would be done under MAI 22.07 in licensee cases). This too may be oversimplifying the situation because the invitee must jump this hurdle twice. Before MAI 22.03 is given, the judge must decide if the invitee has made a submissible case on the issue of his freedom from contributory negligence. Once the judge decides that the invitee has made a submissible case, the jury must then decide whether the invitee in fact could not have discovered the dangerous condition.

120. 318 S.W.2d 226 (Mo. 1958).

thereon if, but only if, he (a) knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them, and (b) has no reason to believe that they will discover the condition or realize the risk involved therein, and (c) invites or permits them to remain upon the land without exercising reasonable care (i) to make the condition reasonably safe, or (ii) to give a warning adequate to enable them to avoid the harm. . . .¹²¹

This is similar to the rule adopted for licensees in *Wells v. Goforth*, except that a possessor is liable to an invitee for injuries from conditions about which the possessor should know, as well as those of which he has actual knowledge.

The problem again arises with regard to whether the first *Restatement* requires the invitee to prove freedom from contributory negligence as to lookout. Obviously, the Missouri Supreme Court Committee on Jury Instructions thinks it does. In MAI 22.03, which invitees must use, the second element requires that the jury find that "plaintiff did not know and by using ordinary care could not have known of this condition. . . ."¹²²

A question arises as to where this element comes from. Neither the first *Restatement's* section on licensees nor the section on invitees specifically includes such an element. MAI 22.07 for licensees, which is based on the first *Restatement*, likewise does not include such a requirement. Why then does MAI 22.03 for invitees, based on a similar provision of the first *Restatement*, include this paragraph? The difference in the two instructions is even more difficult to explain when one realizes that the language of the first *Restatement* on invitees and licensees varies only with respect to defendant's knowledge of the dangerous condition. The difference between the two instructions is also inconsistent with the traditionally accepted view that a licensee is a less favored status than an invitee, because these instructions require the invitee to prove his freedom from contributory negligence with respect to lookout, but do not require the licensee to do so. It is possible that this paragraph of the instruction was derived from a provision of the first *Restatement* which relates to the type of danger involved and which was not intended to require any finding with respect to plaintiff's contributory negligence.

The court in *Harbourn* thought there was a difference between contributory negligence and the requirement in the first *Restatement* that the possessor must have no reason to believe that the invitee would discover the condition or realize the risk. The court in that case, citing numerous Missouri cases, said:

[T]he duty to keep premises safe for invitees applies only to defects or conditions which are in the nature of *hidden dangers, traps, snares, pitfalls* and the like, in that they are not known to the invitee, and would not be observed by him in the exercise of or-

121. *Id.* at 228. See RESTATEMENT OF TORTS § 343 (1934).

122. Mo. Approved Instr. § 22.03 (1969).

dinary care.*** Therefore an owner or occupier is not liable for injuries resulting from *open and obvious* conditions which are or should be as well known to the invitee as to the owner.¹²³

The *Harbourn* court recognized that if the condition was open and obvious, the plaintiff had failed to make a submissible case of passive negligence. Furthermore, the court stated that if the condition was not open and obvious, an invitee may still be denied recovery if, under the particular facts, it is found that the invitee was contributorily negligent in not seeing or avoiding the dangerous condition.¹²⁴ If there is a difference between these two issues, MAI 22.03 does not distinguish between them and therefore may not be a correct statement of the law.

Other cases involving invitees and passive negligence have used these elements interchangeably. In *Moran v. Hartenbach*¹²⁵ the evidence established that the danger was open and obvious as a matter of law, and that the invitee-plaintiff had not presented a submissible case. The court was inclined to hold the plaintiff contributorily negligent as a matter of law on the basis of the same facts that established the condition as open and obvious, but said:

[W]hether [the invitee] was careful or not, or whether [the invitee's] conduct was contributory negligence or not, makes no real difference, because there is no evidence to show that defendant was guilty of any negligence. . . .¹²⁶

Moran seems to recognize the distinction between the danger being an open and obvious one and the invitee's contributory negligence, but at the same time recognizes that it is actually a distinction without a difference. *Hokanson v. Joplin Rendering Company*¹²⁷ at first appears to establish that the necessary element of an invitee's case is that the danger was not obvious, rather than the plaintiff's freedom from contributory negli-

123. 318 S.W.2d 226, 229 (Mo. 1958) (emphasis added) (citations omitted). See also *Dixon v. General Grocery Co.*, 293 S.W.2d 415 (Mo. 1956); *Douglas v. Douglas*, 255 S.W.2d 756 (Mo. 1953); *Stoll v. First Nat'l Bank of Independence*, 345 Mo. 582, 134 S.W.2d 97 (1939).

124. 318 S.W.2d at 230-32. In *Harbourn* the plaintiff-invitee tripped over a set of scales between the entrance and locked exit doors of defendant's store. She saw the scales when she entered the store but tripped over them as she was leaving. She had tried to use the locked exit doors and finding them locked, proceeded to leave by the entrance doors and tripped over the scale after turning in their direction. The court said whether the condition was so open and obvious that the plaintiff could not recover was for the jury. Also, whether she was contributorily negligent in not avoiding the scales was for the jury.

125. 423 S.W.2d 53 (St. L. Mo. App. 1967).

126. *Id.* at 57-58. See also *Dixon v. General Grocery Co.*, 293 S.W.2d 415 (Mo. 1956), where the court stated:

[W]here the danger is obvious or known to the invitee he consents to the risk and the inviter owes no duty. In other instances the danger may be discovered by the exercise of due care and the defense of contributory negligence is available.

Id. at 419.

127. 509 S.W.2d 107 (Mo. 1974).

gence. However, the *Hokanson* court ended up confusing the problem by stating that the basis of liability in passive negligence cases is the possessor's superior knowledge of the injury-producing condition; thus, if the injured invitee actually knew of the condition or in the exercise of ordinary care should have known of it, then the possessor will not be liable for failure to warn of its existence.¹²⁸ In *Burch v. Moore's Super Market, Inc.*¹²⁹ the court said that an invitee is contributorily negligent as a matter of law only where the condition "was so obvious and glaring that a reasonably prudent person would not have used the [property] in the manner in which plaintiff used it."¹³⁰ These cases indicate that the law on this element of the invitee's case (and since *Wells v. Goforth*, of the licensee's case also), is confusing and ambiguous. Missouri courts should attempt to clarify this ambiguity and reform the applicable jury instructions in both cases to clearly express the law, whatever it may be.

As previously noted, the primary difference between licensee and invitee passive negligence cases is that the licensee must show the possessor had actual knowledge of the condition while the invitee must only show the possessor knew, or in the exercise of ordinary care should have known, of the condition.¹³¹ MAI 22.03 and 22.07 correctly reflect this difference. Missouri law seems clear on what evidence is necessary to establish actual or constructive knowledge of the injury-producing condition. Where there is direct or circumstantial evidence that the defendant actually knew of the condition or that he or his agents created or constructed the condition, his actual knowledge of the condition and its danger is sufficiently established to allow the licensee or invitee to submit his case to the jury.¹³² To constitute constructive knowledge the plaintiff must establish that the condition existed long enough, so that in the exercise of ordinary care the possessor had an opportunity to discover the condition and warn of, or remedy, it.¹³³

V. CONCLUSION

In our case of *E v. O* it is clear that the entrant must overcome many stumbling blocks. To summarize, the entrant must first determine if his case is an active or passive negligence case, which is often difficult to do. If he submits his case under the wrong theory he will be subject to reversal

128. *Id.* at 110.

129. 397 S.W.2d 590, 594 (Mo. 1965).

130. *Id.* at 594.

131. See text accompanying note 116 *supra*.

132. *Gilpin v. Gerbes Supermarket, Inc.*, 446 S.W.2d 615, 619 (Mo. En Banc 1969); *Ward v. Temple Stephens Co.*, 418 S.W.2d 935, 938 (Mo. 1967); *Pagano v. Kolbrener, Inc.*, 469 S.W.2d 745, 748-49 (St. L. Mo. App. 1971).

133. *Ward v. Temple Stephens Co.*, 418 S.W.2d 935, 938 (Mo. 1967); *Lance v. Van Winkle*, 358 Mo. 143, 148, 213 S.W.2d 401, 402 (1948); *Robinson v. Great Atlantic & Pacific Tea Co.*, 347 Mo. 421, 425, 147 S.W.2d 648, 650 (1941); *Pagano v. Kolbrener, Inc.*, 469 S.W.2d 745, 748-49 (St. L. Mo. App. 1971); *Trabue v. Fields*, 433 S.W.2d 48, 50 (K.C. Mo. App. 1968); *McElroy v. S.S. Kresge Co.*, 244 S.W.2d 425, 428 (K.C. Mo. App. 1951).

if he prevails at trial. If he proceeds under an active negligence theory he has a problem in determining if there are extra elements required under the rules of *Day v. Mayberry* or *Cunningham v. Hayes*. If he proceeds under a passive negligence theory, he must first determine his status at the time of injury. The entrant must then decide, keeping his status in mind, what evidence he must produce to make a submissible case and make a decision as to what verdict directing instruction to use.

Missouri case law has left several questions unsatisfactorily answered:

1. What distinguishes active from passive negligence cases?
2. What extra elements in an active negligence case involving a dangerous condition of property are required over and above those required in ordinary negligence cases?
3. In passive negligence cases involving licensees or invitees, is freedom from contributory negligence an element of the plaintiff's case or is it only necessary for the plaintiff to show that the condition complained of was a hidden danger?
4. Are the Missouri Approved Instructions on licensees and invitees correct expressions of the law?
5. If the only difference between licensee and invitee cases is that the defendant in a licensee case must have actual knowledge of the condition and in the invitee case must have actual or constructive knowledge of the condition, then why do the Missouri Approved Instructions applicable in these cases differ in other respects?

It is suggested that rather than attempting to answer these questions and to reconcile the case law, there is a simpler and more logical solution. As noted at the beginning of this comment, several jurisdictions have eliminated the classifications of entrants on land and allow all cases involving injuries to entrants to be submitted under general negligence principles.¹³⁴ This would indeed be a progressive step. However, in other areas of negligence law, the decision whether particular acts or omissions constitute negligence has traditionally rested with the jury. It is submitted that this would be the best approach for this area of Missouri tort law. Owners and occupiers of property would then be bound to exercise reasonable care toward entrants on their property in all circumstances, a concept that does not seem unreasonable. A particular possessor would be found liable if his conduct, under the principles of foreseeability and acceptable behavior, was found to be unreasonable and negligent in light of all the circumstances of the case. If the jury finds his conduct was not unreasonable, then he would not be held liable. Looking at the plethora of rules and exceptions which have developed in the cases, it appears that this has been the goal of Missouri courts all along.

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134. See text accompanying note 3 *supra*.