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Land Occupier's Liability to Trespassers

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ceived and retained the proceeds from the unauthorized conduct,[149] or has invoked judicial process to confirm such action.[150]

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Land Occupier's Liability to Trespassers

In recent times, the traditional rule that a land occupier is liable to a trespasser only if the land occupier is guilty of flagrant misconduct has been considerably altered. Although the trespasser still cannot recover for many injuries for which a person lawfully upon the premises can recover, the courts have imposed certain duties upon land occupiers to avoid injuring trespassers. It is the purpose of this Comment to analyze these duties.[1]

The trespasser is a person whose presence upon land is without any claim of right secured by the permission of the occupier.[2] The occupier's permission may extend only to a portion of the premises. Thus a person, lawfully upon the premises by virtue of the occupier's consent, will nevertheless be considered a trespasser by entering into that part of the premises that he is not authorized to enter.[3]

The degree of care required of the occupier to trespassers is considerably less than what is owed to those lawfully on the premises.[4] This partial immunity from liability to trespassers

149. Simon v. Barnett, 169 La. 642, 125 So. 743 (1930); Culverhouse v. Marx, 39 La. Ann. 809 (1887); Beau v. Drew, 15 La. Ann. 461 (1860); Campbell v. McKnight, Gunby's Dec. 44 (2d Cir. 1885).

150. Housing Authority of New Orleans v. Henry Ericsson Co., 197 La. 732, 2 So.2d 195 (1941) (applied to court to confirm arbitration award); Camors & Co. v. Losch, Mannings Unreported Cases 95 (garnishment of proceeds paid to attorney under unauthorized settlement). *Cf.* Zibilich v. Rittenberg, 8 La. App. 628, 139 So. 309 (1932) (requested dismissal of original suit based on compromise).

1. However, this discussion will not treat liability of land occupiers under the attractive nuisance doctrine, which involves injuries to trespassing children due to defective conditions of the premises. For a treatment of this doctrine, see Comment, *The Attractive Nuisance Doctrine in Louisiana*, 10 LOUISIANA LAW REVIEW 469 (1950).

2. Lynch v. American Brewing Co., 127 La. 848, 54 So. 123 (1911). See also RESTATEMENT, TORTS § 329 (1938).

3. Gray v. Elgutter, 5 La. App. 315 (1926) (maid entered into an unopened apartment she was not supposed to clean).

4. Those persons coming onto the land of another have been classified into three distinct groups by the courts, and the degree of the land occupier's obligation differs in each case. (1) The invitee is a person who comes upon the property for some reason beneficial to the land occupier and with the land occupier's express or implied invitation. See Gosey v. Kansas City Southern Ry., 100 So.2d

extends to the family, employees, and servants of the occupier,[5] and further extends to those whose activities on the premises are in behalf of, and with the consent of, the occupier.[6] For example, in one case, a vendor who came upon the premises to deliver materials was held to be under the same relationship to trespassers as the occupier.[7]

Historical Perspective of the Trespasser

The immunity originally enjoyed by the land occupier quite logically resulted from early English society that so greatly emphasized the value of ownership or occupancy of land.[8] The landowner's established position of importance and his interest in the free and unrestricted use of his property overrode the value placed upon the trespasser's interest in physical safety.[9] Thus there arose the common notion that the trespasser was a wrongdoer, making it no wonder, as aptly stated by one writer, that "the idea that poachers should have any legal rights in connection with harm received in the course of their nefarious in-

311 (La. App. 1958); Mercer v. Tremont & G. Ry., 19 So.2d 270 (La. App. 1944). See also RESTATEMENT, TORTS § 332 (1938). The occupier owes duties to the invitee to use reasonable care in his active conduct and to protect him against dangers of which he knows, or by reasonable care might discover. See Gosey v. Kansas City Southern Ry., 100 So.2d 311 (La. App. 1958); Bartell v. Serio, 180 So. 460 (La. App. 1938); Ransom v. Kreeger Store, 158 So. 600 (La. App. 1935). See also RESTATEMENT, TORTS § 343 (1934). The term "business visitor" was adopted by the RESTATEMENT, TORTS § 332. This section limits this class of persons to those who have business dealings with the occupier. There is some question as to this classification in regard to social guests. A recent Louisiana decision placed a social guest in the same class that had before contained only persons having business dealings with the occupier. See Alexander v. General Fire & Life Assur. Corp., 98 So.2d 730 (La. App. 1957). (2) The licensee is a person who comes upon the land by the consent or permission of the occupier. See Mercer v. Tremont, 19 So.2d 270 (La. App. 1944); Mills v. Heidensfield, 192 So. 786 (La. App. 1939); Myers v. Gulf Public Service Corp., 132 So. 416 (La. App. 1931); Vargas v. Blue Seal Bottling Works, 12 La. App. 652, 126 So. 707 (1930). See also RESTATEMENT, TORTS § 330 (1938). The occupier owes the licensee duties to use reasonable care in his active conduct and to warn him of concealed dangers within his knowledge. See Mills v. Heidensfield, 192 So. 786 (La. App. 1939); Vargas v. Blue Seal Bottling Works, 12 La. App. 652, 126 So. 707 (1930). See also RESTATEMENT, TORTS §§ 340, 341, 342 (1934). (3) The third classification is the trespasser.

5. PROSSER, LAW OF TORTS 434 (2d ed. 1955).

6. RESTATEMENT, TORTS §§ 383-386 (1934).

7. Buchanan v. Chicago Ry., 9 La. App. 424, 119 So. 703 (1929). It should be observed that those persons who are not entitled to the occupier's immunity are on an equal footing with the trespasser and owe him a duty of reasonable care in all respects. See Scott v. Claiborne Electric Corp., 13 So.2d 534 (La. App. 1943).

8. 2 HARPER & JAMES, THE LAW OF TORTS 1432 (1956); Eldridge, *Tort Liability to Trespassers*, 12 TEMP. L.Q. 32 (1937).

9. 2 HARPER & JAMES, THE LAW OF TORTS § 27.1 (1956); PROSSER, LAW OF TORTS § 76 (2d ed. 1955).

trusion would have been sufficient to have caused an apoplectic stroke to the judges of the age."[10]

However, the land occupier's exalted position gave him no license to hunt trespassers. An exception to the rule that the occupier owed no duties to trespassers was recognized in that the occupier could inflict no intentional harms upon the trespasser.[11] While privileged to eject the intruder, the occupier could not use a force that was more than necessary.[12] Nor could the occupier deliberately set out traps or spring guns for a trespasser who might come on the premises.[13] Eventually the courts condemned conduct on the occupier's part which was deemed wilful and wanton.[14]

In the nineteenth century courts began to expand the occupier's duties to trespassers. Perhaps the most cogent reason assigned to the new attitude of the courts was that the new and dangerous uses to which land was put during industrialization presented a greater likelihood that trespassers would suffer harm, and humanitarianism dictated that occupiers take greater care in their operations.[15] During this period of transition the courts continued to pay verbal respect to the established rule that an occupier owed no duty to a trespasser save to refrain from wilful and wanton misconduct.[16] Nevertheless, methods were found to soften this rule and extend certain duties to occupiers. These duties arose in two ways: those relating to the active conduct of the occupier, and those relating to the condition of the premises.

10. Eldridge, *Tort Liability to Trespassers*, 12 TEMP. L.Q. 32, 33 (1937). Courts have submitted several legal reasons for the land occupier's immunity. It has been said that the trespasser assumes all risks in going onto another's property. See 2 HARPER & JAMES, THE LAW OF TORTS 1439 (1956). It has been said that a trespasser is contributorily negligent. See PROSSER, LAW OF TORTS 434 (2d ed. 1955). A discussion of contributory negligence and the trespasser will appear later in this Comment. It has been said that the presence of the trespasser is not to be anticipated; thus a reasonable man would not take steps to protect him. See PROSSER, *op. cit. supra* at 433, 434. But the basic reason behind the occupier's immunity would seem to be that "in a civilization based on private ownership, it is considered a socially desirable policy to allow a man to use his own land in his own way, without the burden of watching for and protecting those who come there without permission or right." PROSSER, *op. cit. supra* at 434.

11. PROSSER, LAW OF TORTS 435 (2d ed. 1955); Eldridge, *Tort Liability to Trespassers*, 12 TEMP. L.Q. 32, 33 (1937).

12. PROSSER, LAW OF TORTS 435 (2d ed. 1955).

13. Eldridge, *Tort Liability to Trespassers*, 12 TEMP. L.Q. 32, 33 (1937).

14. *Ibid.*; PROSSER, LAW OF TORTS 435 (2d ed. 1955).

15. O'Connor v. Illinois Central R.R., 44 La. Ann. 339, 10 So. 678 (1892). See Eldridge, *Tort Liability to Trespassers*, 12 TEMP. L.Q. 32, 33 (1937).

16. Eldridge, *Tort Liability to Trespassers*, 12 TEMP. L.Q. 32, 33 (1937).

Active Conduct

Perhaps the principal factor that contributed to the judicial change of heart to trespassers was the advent of the railroad. Persons persist in using the tracks as a mode of pedestrian travel; as a result, the majority of cases that involve the occupier's active misconduct are those cases in which the trespasser has been struck by a locomotive.

The courts in Louisiana, while clinging to the rule that the occupier is liable to the trespasser only for wilful and wanton misconduct,[17] held that the railroad's failure to use reasonable care after discovering the trespasser amounted to wilful and wanton negligence.[18] The use of the terms *wilful* and *wanton* to describe ordinary negligence is perhaps misleading since these terms traditionally designated conduct, if not intentional, bearing a high degree of culpability. Suffice it to say, however, that as an established rule the engineer owes a duty of reasonable care to the trespasser on the tracks when the trespasser's presence is known.

The duty to use reasonable care in relation to the known trespasser on the tracks has by no means created such an inexorable rule of law that when a person is seen upon the tracks the train must be immediately halted. The engineer is allowed to assume that a person travelling the tracks has normal faculties[19] and is ordinarily required only to give a warning whistle.[20] If it becomes apparent, however, that the signal is not heard, the engineer must then make every reasonable effort to avoid the

17. Jones v. Sibley L.B. & S. Ry., 121 La. 39, 46 So. 61 (1908); McClanahan v. Vicksburg S. & P. Ry., 111 La. 781, 35 So. 902 (1902); McGuire v. Vicksburg S. & P. Ry., 46 La. Ann. 1543, 16 So. 457 (1894); Settoon v. Texas & P. Ry., 48 La. Ann. 807, 19 So. 759 (1896); Schexnaydre v. Texas & P. Ry., 46 La. Ann. 248, 14 So. 513 (1894); Snyder v. Natchez, Red River & Texas Ry., 42 La. Ann. 302, 7 So. 582 (1890).

18. Roberts v. Louisiana Ry. & Nav. Co., 132 La. 446, 61 So. 522 (1913); Spizale v. Louisiana Ry. & Nav. Co., 128 La. 187, 54 So. 714 (1911); Davis v. Arkansas Southern Ry., 117 La. 320, 41 So. 587 (1906); McClanahan v. Vicksburg S. & P. Ry., 111 La. 781, 35 So. 902 (1902).

19. Cook v. Louisiana N.W. Ry., 130 La. 917, 58 So. 767 (1912) (boy on side of track suddenly leaped in path of train); Hebert v. Louisiana W. R.R., 104 La. 483, 29 So. 239 (1901) (deceased was sitting on tracks, apparently conscious); Schexnaydre v. Texas & P. Ry., 46 La. Ann. 248, 14 So. 513 (1894) (deaf mute on tracks); Houston v. Vicksburg S. & Ry. Co., 39 La. Ann. 796, 2 So. 562 (1887) (deceased got hysterical, began running down the track); Patterson v. Yazoo & M.V. Ry., 187 So. 305 (La. App. 1939).

20. Sanders v. Texas & P. Ry., 118 La. 174, 42 So. 764 (1907); Provost v. Yazoo & M.V. Ry., 52 La. Ann. 1894, 28 So. 305 (1900). See also Hyde v. Texas & P. Ry., 143 La. 185, 78 So. 441 (1918) (failure to signal not negligence since engineer thought it would frighten the deceased sleeping near the track).

disaster by stopping the train.[21] Thus, if the person seen upon the tracks appears to be unconscious or unable to disengage himself from the tracks, the engineer is under a duty to use reasonable efforts to halt the train.[22]

Courts have been more reluctant to require engineers to anticipate the presence of trespassers than to require proper care after the trespasser's presence is discovered. However, in most jurisdictions a rule has evolved that if the engineer knows that trespassers constantly intrude upon a limited area, he is under a duty to take reasonable care for those trespassers' safety.[23] In Louisiana the early case of *Maguire v. Vicksburg Ry.*[24] held that a failure of the engineer to use proper care in discovering a trespasser on a track running through a populous city amounted to wilful and wanton negligence. While the basis of extending liability to the railroad in the *Maguire* case was criticized as an unwarranted application of wilful and wanton negligence concepts,[25] the rule nevertheless has become established that an engineer owes a duty of reasonable care to unknown trespassers where, from the density of inhabitation, the number of road crossings, and the known frequency of trespassers, the presence of such trespassers on the track is likely.[26] The requirement to use reasonable care in such populous areas thus puts the engineer

21. Russo v. Texas & P. Ry., 189 La. 1042, 181 So. 485 (1938); Young v. Thompson, 189 So. 487 (La. App. 1939); Monk v. Crowell & Spencer Lbr. Co., 168 So. 360 (La. App. 1936).

22. Roberts v. Louisiana Ry. & Nav. Co., 132 La. 446, 61 So. 522 (1913); Provost v. Yazoo & M.V. Ry., 52 La. Ann. 1894, 28 So. 305 (1900); Miller v. Baldwin, 178 So. 717 (La. App. 1938). *Contra*, Sanders v. Texas & P. Ry., 118 La. 174, 42 So. 764 (1907).

23. PROSSER, LAW OF TORTS 439 (2d ed. 1955). See also RESTATEMENT, TORTS § 335 (1934).

24. McGuire v. Vicksburg S. & P. Ry., 46 La. Ann. 1543, 16 So. 457 (1894).

25. McClanahan v. Vicksburg S. & P. Ry., 11 La. 781, 35 So. 902 (1902) (dissent). However, several early cases extended a duty of reasonable care to the railroad in such cases using other reasoning. In the *McClanahan* case, *supra*, it was said that the track was a public highway and the railroad owed a duty to protect those persons upon the track. This position was refuted on rehearing. It has been said that the railroad, by virtue of its formation in the public interest, puts it under a duty to persons on the track, even though unknown. See Downing v. Morgan's L. & T. Ry. & S.S. Co., 104 La. 508, 29 So. 207 (1900). Subsequent cases held a duty to exist to anticipate unknown trespassers in certain areas on the track. See Blackburn v. Louisiana Ry. & Nav. Co., 144 La. 520, 80 So. 708 (1919); Ingram v. Kansas City S. & G. Ry., 134 La. 377, 64 So. 146 (1914); Harrison v. Louisiana W. Ry., 132 La. 761, 61 So. 782 (1913); Hammers v. Colorado Southern, N.O. & P. Ry., 128 La. 648, 56 So. 4 (1911); Buhler v. Morgan's L. & T. R.R. & S.S. Co., 129 La. 423, 56 So. 355 (1911); Spizale v. Louisiana Ry. & N. Co., 128 La. 187, 54 So. 714 (1911); Davis v. Arkansas So. Ry., 117 La. 320, 41 So. 587 (1905); Gilliam v. Texas & P. Ry., 114 La. 272, 38 So. 166 (1905); Provost v. Yazoo & M.V. Ry., 52 La. 1894, 28 So. 305 (1900).

26. Jones v. Chicago R.I. & P. Ry., 162 La. 690, 111 So. 62 (1927); Miller v. Baldwin, 178 So. 717 (La. App. 1938).

of the train under a duty to keep a sharp lookout[27] and maintain a speed that will enable the train to be halted after discovering the trespasser.[28] Such requirements naturally impose burdens upon the public interest in speedy transit. This is especially true at night when speed must be considerably reduced in order to ascertain objects on the track in time to halt the train.[29] In the light of these considerations, the courts in recent years have limited the rule of reasonable care to unknown trespassers to areas of very dense population.[30]

Cases involving injuries to trespassers on the track are often treated by the courts under the doctrine of last clear chance.[31] The reason that this doctrine is employed is that in a great many cases of this sort the court is faced with the defense that the

27. McClanahan v. Vicksburg S. & P. R.R., 11 La. 781, 35 So. 902 (1902); McGuire v. Vicksburg S. & P. Ry., 46 La. Ann. 1542, 16 So. 457 (1894); Griffin v. Thompson, 11 So.2d 114 (La. App. 1942); Edwards v. Texas & P. Ry., 185 So. 111 (La. App. 1938); Miller v. Baldwin, 178 So. 717 (La. App. 1938); Sorey v. Yazoo & M.V. Ry., 17 La. App. 538, 136 So. 155 (1931).

28. Shaw v. Missouri Pacific Ry., 39 F. Supp. 652 (W.D. La. 1941); Blackburn v. Louisiana Ry. & Nav. Co., 144 La. 520, 80 So. 708 (1919); Downing v. Morgan's L. & T. Ry. & S.S. Co., 104 La. 508, 29 So. 207 (1900); Hall v. Kansas City So. Ry., 14 So.2d 485 (La. App. 1943); Shipp v. St. Louis Southwestern Ry., 188 So. 526 (La. App. 1939).

29. Blackburn v. Louisiana Ry. & Nav. Co., 144 La. 520, 80 So. 708 (1919); Shipp v. St. Louis Southwestern Ry., 188 So. 526 (La. App. 1939).

30. Hollinquest v. Illinois Cent. Ry., 76 So.2d 568 (La. App. 1954) (near a community of 1500 but few habitations on the track; no negligence in failing to discover the trespasser); Hall v. Kansas City So. Ry., 14 So.2d 485 (La. App. 1943) (one mile from thickly populated town of De Quincey, near a crossing, no negligence in failing to reduce speed or keep a lookout); Sullivan v. Yazoo & M.V. Ry., 8 So.2d 109 (La. App. 1942) (evidence of a footpath, 150 houses within a mile; no negligence in failing to reduce speed or in failing to watchout); Bourgeois v. New Orleans T. & M. Ry., 193 So. 394 (La. App. 1940) (very small hamlet, sparsely populated, no negligence in failing to reduce speed). Often recovery is denied, when, even though the train is in an area so populated that speed should have been reduced and a lookout kept, circumstances would have prevented discovery of the trespasser even had such care been taken. These cases do not mean that the railroad was not negligent, but that the negligence did not in fact cause the injury to the trespasser. Royal v. Kansas City So. Ry., 75 So.2d 705 (La. App. 1954) (extremely thick blanket of fog); Griffin v. Thompson, 11 So.2d 114 (La. App. 1942) (train going around a curve).

31. Russo v. Texas & Pac. Ry., 189 La. 1042, 181 So. 485 (1938); Jones v. Chicago R.I. & P. Ry., 162 La. 690, 111 So. 62 (1927); Blackburn v. Louisiana Ry. & Nav. Co., 144 La. 520, 80 So. 708 (1919); Harrison v. Louisiana Western Ry., 132 La. 761, 61 So. 782 (1913); McClanahan v. Vicksburg S. & P. Ry., 11 La. 781, 35 So. 902 (1902); Tillman v. Public Belt R. Comm., 42 So.2d 888 (La. App. 1949); Williams v. Missouri Pac. Ry., 11 So.2d 658 (La. App. 1942); Young v. Thompson, 189 So. 487 (La. App. 1939); Monk v. Crowell & Spencer Lbr. Co., 168 So. 360 (La. App. 1936); Johnson v. Texas & Pac. Ry., 16 La. App. 464, 133 So. 517 (1931); Gibson v. Texas & Pac. Ry., 10 La. App. 678, 121 So. 382 (1929); Buard v. Texas & Pac. Ry., 5 La. App. 725 (1926).

trespasser is contributorily negligent.[32] Last clear chance is a limitation to the concept of contributory negligence. In Louisiana, according to the doctrine, despite the fact that the plaintiff is contributorily negligent, if the plaintiff is in a helpless position, and the defendant knows or should know of the plaintiff's peril, the defendant is nevertheless liable to the plaintiff.[33] It is to be noted that last clear chance does not add to the duties owed by the railroad to trespassers; the effect of the doctrine is simply that the railroad's defense of contributory negligence will not succeed.

Other than the cases involving injuries to trespassers on the tracks, few cases have arisen involving the occupier's active misconduct. Generally any intentional force that is more than necessary to eject the trespasser from the premises will render the occupier liable to the trespasser.[34] But it is uncertain whether the same rules involving negligent misconduct of the occupier that were applied in the railroad cases will be applied elsewhere. In *Cannon v. Mengal*[35] a nightwatchman allowed two boys to sleep upon a boiler in the defendant's mill. Another employee, not knowing of the presence of the boys, opened an escape valve on the boiler, resulting in death to one of the boys. Since the watchman's knowledge of the trespasser's presence could be imputed to the defendant, the intruders were known trespassers. While quoting a common law authority for the proposition that the failure to use reasonable care to a known trespasser was considered wilful and wanton negligence, the court nevertheless held that the negligence involved in turning the escape valve was not great enough to warrant recovery. In the light of the authority the court itself quoted, any failure to use reasonable care should have rendered the occupier liable. The decision in the *Cannon* case well illustrates the confusion that can occur due to the use

32. Fils v. Iberia St. M. & E. Ry., 145 La. 544, 82 So. 697 (1919); Tyler v. Gulf C. & C. F. Ry., 143 La. 177, 78 So. 438 (1918); Gilliam v. Texas & P. Ry., 114 La. 272, 38 So. 166 (1905); Provost v. Yazoo & M.V. Ry., 52 La. Ann. 1894, 28 So. 305 (1900); Houston v. Vicksburg, S. & P. Ry., 39 La. Ann. 796, 2 So. 562 (1887); Brown v. Texas & P. Ry., 193 So. 511 (La. App. 1940); Patterson v. Yazoo & M.V. Ry., 187 So. 305 (La. App. 1939).

33. Tillman v. Public Belt. Ry. Comm., 42 So.2d 888 (La. App. 1949). The doctrine may be referred to as the doctrine of unconscious last clear chance, or of apparent peril. The *Tillman* case, *supra*, presents a clear statement of last clear chance.

34. Dorsey v. Kansas City P. & G. Ry., 104 La. 478, 29 So. 177 (1901) (brakeman threw rocks at trespasser riding underneath box cars); Jackson v. St. Louis S.W. Ry., 52 La. Ann. 1706, 28 So. 241 (1900) (boy kicked off a moving train); Young v. Texas & Pac. Ry., 51 La. Ann. 295, 25 So. 69 (1898) (cripple kicked off a moving train).

35. 8 La. App. 375 (1928).

of the misleading terms, *wilful* and *wanton.* Despite the *Cannon* case, however, there would seem to be no reason why the same rule applied in the railroad cases involving known trespassers should not also be applied in other circumstances.[36]

There are no Louisiana cases other than those involving injuries to persons upon the railroad tracks in which the occupier is required to use reasonable care to unknown trespassers. However, the rule that in areas frequented by trespassers the occupier must use reasonable care in his activities has been extended to situations other than those involving injuries on the railroad tracks in many jurisdictions. However, this rule has been so extended only when the activity engaged in by the occupier is highly dangerous.[37] One Louisiana case has indicated by way of dicta that there is no reason why this rule would not apply to all situations in which the occupier is engaged in highly dangerous activities.[38]

Condition of the Premises

The occupier is under no general duty to maintain the condition of his premises so that trespassers will escape injury other than to refrain from deliberate efforts to injure the intruder.[39] However, the Louisiana courts, like many other jurisdictions, have held that the acquiescence on the part of the occupier to a frequent number of intrusions in a limited area amounts to the consent necessary to term the intruder a licensee, to whom greater duties are owed than trespassers.[40] Three factors must be present in order to render the occupier liable in these cases. (1) The area in which the condition exists must be one in which persons are in the habit of intruding and the occupier must know of

36. Most jurisdictions apply this rule in all situations. See PROSSER, LAW OF TORTS 436 (2d ed. 1955).

37. See RESTATEMENT, TORTS § 336 (1934).

38. Tillman v. Public Belt Ry. Comm., 42 So.2d 888 (La. App. 1949).

39. Tomlinson v. Vicksburg S. & P. Ry., 143 La. 641, 79 So. 174 (1918); Jefferson v. King, 12 La. App. 249, 124 So. 589 (1930); Gray v. Elgutter, 5 La. App. 315 (1929).

40. Taylor v. Baton Rouge Sash and Door Works, 68 So.2d 159 (La. App. 1953); Mercer v. Tremont & G. Ry., 19 So.2d 270 (La. App. 1944); Mills v. Heidensfield, 192 So. 786 (La. App. 1939); Builliard v. New Orleans Terminal Co., 166 So. 640 (La. App. 1936). See also PROSSER, LAW OF TORTS 438 (2d ed. 1955). The main criticism of calling such intruders licensees is that in the usual situation, the occupier allows the intruders to enter, not because he acquiesces, but because it would be too burdensome to keep them out. Under such circumstances it could not be said that the occupier freely consents to the intrusion. See PROSSER, LAW OF TORTS 438 (2d ed. 1955).

these frequent intrusions.[41] (2) The condition must be artificial and constitute a newly created obstacle which has altered the path of intrusion. In *Builliard v. New Orleans Terminal Co.*,[42] a drawbridge which was frequently used by passing laborers was raised and the plaintiff was suspended upon the draw before having to leap to the ground. The court held that the defendant had altered the condition of the premises and was liable to the plaintiff for his failure to give a warning before raising the draw. While it would seem that, by raising the draw, the defendant's negligence was more in the nature of active misconduct rather than an altering of the condition of the premises, the principle of this case remains.[43] (3) The condition must constitute a "trap," that is, it must be one that the occupier knows in fact to exist, and which the trespasser could not have ascertained by using reasonable care.[44] In addition, the *Restatement of Torts* requires that the condition be one highly dangerous in nature.[45] It is to be observed that the occupier is not obligated to restore the premises to its original condition. An adequate warning will suffice to discharge his duty to the intruder.[46]

If the existence of the trespasser is known in fact, the *Restatement of Torts* takes the position that the occupier must warn him of known hazards which are artificial and highly dangerous, but few jurisdictions support this rule.[47] It has been pointed out that this rule would logically follow in a jurisdiction like Louisiana, which imposes a duty upon the occupier to warn

41. Taylor v. Baton Rouge Sash and Door Works, 68 So.2d 159 (La. App. 1953); Builliard v. New Orleans Terminal Co., 166 So. 640 (La. App. 1936).

42. 166 So. 640 (La. App. 1935).

43. Venezie v. Salles, 176 So. 407 (La. App. 1937). Here the plaintiff was a customer in a department store. He used a restroom, which, though customers were not authorized to use, was still used by the customers. The plaintiff was injured by an altered condition in the passageway. Recovery was allowed.

44. Taylor v. Baton Rouge Sash and Door Works, 8 So.2d 159 (La. App. 1953) (plaintiff could have discovered the condition by using care; defendant apparently did not know of the condition). See also Vargas v. Blue Seal Bottling Works, 12 La. App. 652, 126 So. 707 (1930).

45. RESTATEMENT, TORTS § 336 (1934). It is to be observed that the *Restatement* treats the intruders as trespassers and does not elevate them to licensees because of the occupier's acquiescence.

46. Builliard v. New Orleans Terminal Co., 166 So. 640 (La. App. 1935); Myers v. Gulf Public Service Corp., 132 So. 416 (La. App. 1931).

47. RESTATEMENT, TORTS § 337 (1934). See Martin v. Jones, 122 Utah 597, 253 P.2d 359 (1953). *Contra*, Carroll v. Spencer, 204 Md. 387, 104 A.2d 628 (1954); Bush v. Amory Mfg. Co., 69 N.H. 257, 44 Atl. 809 (1898).

unknown and frequent intruders of newly created hazards.[48] However, no Louisiana courts have directly decided this point.[49]

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48. The *Restatement* justified the rule for this reason. See Eldridge, *Tort Liability to Trespassers*, 12 TEMP. L.Q. 32, 48 (1937).

49. See Gaylord Container Corp. v. Miley, 230 F.2d 177, 181 (1956). Here a drunk wandered off a public path 35 feet into defendant's property, where he fell into a flume. Defendant's employees had seen him in the area, knew he was drunk, but failed to warn him. The court held that a drunk, being like a child in capacity, was owed the duty an occupier owes children to maintain safe conditions by the highway where children may wander. See RESTATEMENT, TORTS § 367 (1934). The court held also that even though the plaintiff was contributorily negligent, the defendant was liable under the doctrine of last clear chance. It would seem that this case is one properly coming under the principle that the occupier must warn a trespasser of known hazardous conditions. *Id.* § 337.