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Liability for Personal Injuries Caused by Use and Occupation of Real Estate

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COMMENTS

LIABILITY FOR PERSONAL INJURIES CAUSED BY USE AND OCCUPATION OF REAL ESTATE

A home owner digs a barbecue pit in his back yard and his neighbor falls in and breaks his leg. Will the home owner be liable for the personal injuries? The answer to this question depends on the legal relationship between the possessor of the land and the third person. Several different legal relationships might arise between them. The third person might be described as a trespassers, a licensee or an invitee and the possessor of the land might owe a different duty of care to each. The designations of trespassers, licensee and invitee describe a rough sliding scale of legal status.[1] As the legal status of the third person improves, the land owner owes him a higher degree of care. Trespassers are on the bottom of the scale. Licensees are in a slightly improved legal position, while invitees enjoy the greatest legal status and are owed the highest duty of care.

The law relating to personal injuries caused by condition and use of real property varies greatly among the different states. The meanings given to the words trespass, license and invitation, fluctuate and the duties of care imposed upon possessors of land are not uniform. The law in this area has been classified, categorized and organized to such an extent that it has become a mass of subtle distinctions and variations. The Restatement of Torts 2d. epitomizes this propensity to over-classify. It not only recognizes the three relationships but adds a fourth. According to the Restatement, there may be trespassers, licensees, public invitees and business visitors.[2] The first edition of the Restatement recognized a fifth class, the gratuitous licensee.[3] However, this class was deleted from the second edition. Each of these classes gives rise to a different duty of care.

This paper will analyze Montana personal injury law as it relates to ownership and occupation of land. Montana, fortunately, does not have a classification problem. There are only two classes. Third persons will be treated as either invitees or non-invitees. There are only two correlative duties to match the classifications: a) duty to invitees and b) duty to non-invitees.

There is no explicit statement that there are only two relationships between possessors of land and third persons. Nowhere does Montana case law state that there are only invitees and non-invitees. However, analysis indicates that there is no substantive difference between the duty owed

[1]PROSSER, HANDBOOK OF THE LAW OF TORTS (3d ed. 1964), p. 364.
[2]RESTATEMENT (SECOND) OF TORTS, §§ 329, 330, 332.
[3]RESTATEMENT (FIRST) OF TORTS, § 331.

to trespassers and the duty owed to licensees. The first indication that there is no substantive differences between trespassers and licensees was in 1901 in the case of Egan v. Mont. Cent. Ry.[4] The plaintiff was struck by a train while he was walking down the defendant's track. Although the court concluded that the plaintiff was a trespasser and could not recover, it stated that even if the plaintiff had been a licensee by sufferance, the defendant's duty of care to him would have been no greater than if he had been a naked trespasser. In 1920 the court reaffirmed this proposition in Jonosky v. Northern Pacific Ry. Co.[5] In that case an infant was killed while taking a shortcut across the defendant's railroad yard. The court again considered whether the plaintiff was a trespasser or a licensee. It decided that the plaintiff was, at best, a mere licensee enjoying the gratuitous[6] favor of the defendant, that:

> the plaintiff was upon the track by tacit permission only, . . . and to such a licensee by sufferance and tolerance . . . no duty was imposed by law on the defendants other or greater than they would have owed to a naked trespasser.[7]

In 1925 the court again united trespassers and licensees into a single class.[8] In classifying the status of the plaintiff, the court felt that it had two choices. The plaintiff was either a) an invitee, or b) a mere licensee or naked trespasser. The next case dealing with trespasser-licensee occurred in 1944.[9] The court again treated trespassers and licensees in a single class. Since that time the court has not been required to decide whether there might be any substantive difference between trespassers and licensees. It seems that there is no reason for the question ever to arise. The duties, as established by the early cases, are the same whether the plaintiff is classified as a trespasser or as a licensee.

While there is no substantive difference between licensees and trespassers, the distinction between invitees and licensees is critical. Different duties are owed to each. The criterion for separating invitees from licensees is a common interest or mutual advantage.

> An invitation is inferred where there is a common interest or mutual advantage, while a license is implied where the object is the mere pleasure, convenience or benefit of the person enjoying the privilege.[10]

This criterion has been utilized by the court without variation from its

[4]Egan v. Montana Central Railway Co., 24 Mont. 569, 63 P. 831 (1901).

[5]Jonosky v. Northern Pacific Railway Co., 57 Mont. 63, 187 P. 1014 (1920).

[6]The court has used words such as mere and gratuitous to modify licensee. Analysis indicates that the use of these modifiers makes no substantive change in the legal meaning of the term licensee.

[7]*Jonosky v. Northern Pacific Railway Co., supra* note 5 at p. 76.

[8]Chichas v. Foley Brothers Grocery Co., 73 Mont. 575, 236 P. 361 (1925).

[9]Ahlquist v. Mulvaney Realty Co., 116 Mont. 6, 152 P.2d 137 (1944).

[10]*Jonosky v. Northern Pacific Railway Co., supra* note 5, at p. 73.

enunciation in 1920 until the present day. As recently as 1967 the court reaffirmed the validity of the test by quoting the above passage verbatim.

Application of the common interest-mutual advantage rule has not been difficult. In cases involving customers injured in retail stores,[11] theatres,[12] warehouses,[13] lumber yards,[14] bowling alleys,[15] taverns[16] and at cattle sales[17] the court has assumed without discussion that the plaintiffs were invitees.

In other cases it has been unnecessary to decide the question of classification. The court has adopted an economical approach to the classification problem. The court first assumes that the plaintiff is an invitee and goes directly to the question of breach of duty. The duty of care to invitees is the strictest and the negligence necessary for breach is the least. If there can be no recovery for an invitee there will be no recovery for a non-invitee. If no breach of duty (negligence) is found the case can be disposed of because an essential of the claim is missing. The cases support this conclusion. In all cases in which the court *assumed* that the plaintiff was an invitee it found no liability because there was no breach of the strict duty owed to invitees.[18]

The court has utilized this same approach to arrive at the opposite result by assuming the plaintiff was a licensee but concluding that the defendant had been negligent to the degree necessary to breach the limited duty owed to licensees.[19] There was therefore no reason to decide whether the plaintiff was an invitee or not. There would be recovery whether the plaintiff was classified as an invitee or a licensee.

The court has had to meet the issue of whether the plaintiff was an invitee in relatively few cases. Cases involving social guests have required individual analysis by the court. The purpose for which the plaintiff goes to the defendant's house determines his status and social guests are generally not invitees because there is no common interest or mutual ad-

[11]Pushard v. J. C. Penney Co., Inc., 438 P.2d 928, 25 St. Rep. 230 (1968); Kerns v. F. W. Woolworth Co., 138 Mont. 249, 356 P.2d 127 (1960). Rossberg v. Montgomery Ward & Co., 110 Mont. 154, 99 P.2d 979 (1940); Robinson v. F. W. Woolworth Co., 80 Mont. 431, 261 P. 253 (1927); Montague v. Hanson, 38 Mont. 376, 99 P. 1063 (1909).

[12]Milasevich v. Fox Western Montana Theatre Corp., 118 Mont. 265, 165 P.2d 195 (1946).

[13]*Chichas v. Foley Brothers Grocery Co., supra* note 8.

[14]McIntosh v. Linder-Kind Lumber Co., 144 Mont. 1, 393 P.2d 782 (1964).

[15]Clark v. Worrall, 146 Mont. 374, 406 P.2d 822 (1965).

[16]Nevin v. Carlasco, 139 Mont. 512, 365 P.2d 637 (1961); Ganger v. Zook, 141 Mont. 214, 377 P.2d 101 (1962).

[17]Thompson v. Yellowstone Livestock Commission, 133 Mont. 403, 324 P.2d 412 (1958).

[18]Hanson v. Colgrove, 447 P.2d 486, 25 St. Rep. 749 (1968); Matson v. Northern Hotel, Inc., 446 P.2d 913, 25 St. Rep. 708 (1968); Luebeck v. Safeway Stores, Inc., 446 P.2d 921, 25 St. Rep. 690 (1968); Tigh v. College Park Realty Co., 149 Mont. 358, 427 P.2d 57 (1967). Cassaday v. City of Billings, 135 Mont. 390, 340 P.2d 509 (1959). Myles v. Helena Motors, Inc., 113 Mont. 92, 121 P.2d 549 (1942).

[19]LeCompete v. Wardell, 134 Mont. 490, 333 P.2d 1028 (1959); McLaughlin v. Bardsen, 55 Mont. 27, 145 P. 954 (1915).

vantage.[20] There have been, however, several Montana cases in which the plaintiffs claimed recovery as invitees. One argued that because she had come to the defendant's home to help with supper and watch the defendant's children there was the requisite common interest or mutual advantage. The court found that these services were the incidental and customary help given by social guests[21] and were not sufficient to raise the plaintiff to the status of an invitee. Another plaintiff went to the house of a friend to help with a birthday party. She tripped in the back yard and was injured. The court found that the testimony fell short of the common interest or mutual advantage necessary to place the plaintiff within the legal definition of invitee.[22] If, however, a guest comes to perform services other than those customarily done by social guests, he will be classified as an invitee. Services sufficient to raise a guest to the status of an invitee occurred in McCulloch v. Horton.[23] In that case the plaintiff was holding a garage door while the defendant backed his truck out. The plaintiff was hit and injured by the truck. The court held that the plaintiff was at least an invitee because of the services performed and allowed him to recover for his injuries.[24]

The court has decided status in few other cases. In Ahlquist v. Mulvaney Realty Co.[25] the plaintiff went to a bus terminal to inquire about departure times and to purchase a ticket. Before she transacted her business she went to the rest-room. She tripped on the floor and was injured. The major issue was her status. In deciding whether there was the requisite common interest or mutual advantage the court held:

> (an invitee) must come for a purpose connected with the business in which the occupant is engaged. . . . There must be at least a mutuality of interest . . . (Therefore) one who intends to become a passenger upon a carrier's passenger bus or passenger train, and enters the station or depot facility for that purpose is a passenger . . .[26]

A more recent application of the common interest-mutual advantage test occurred in 1960.[27] The plaintiff was delivering water to the defendant for his drilling operations. The plaintiff had to climb the water tower to determine whether it was full. He was injured when he slipped and fell because of a defective condition of the tank. The court held:

[20]Maxwell v. Maxwell, 140 Mont. 59, 62, 367 P.2d 308 (1961).

[21]*Id.*

[22]Blackman v. Crowe, 149 Mont. 253, 257, 425 P.2d 323 (1967).

[23]McCulloch v. Horton, 102 Mont. 135, 56 P.2d 1344 (1936).

[24]The conclusion that the plaintiff was an invitee is difficult to understand in view of the two preceding cases, i.e. there is not much factual difference between them. Whether a third person is an invitee or a trespasser-licensee is a question of fact. The court found that "plaintiff was at the time of the injury performing a service for the benefit of the defendant, and at his request." "If the plaintiff did not at that particular time occupy the position of a gratuitous employee, he was at least an invitee." P. 146.

[25]*Supra,* note 9.

[26]*Id.* at p. 25.

[27]Teesdale v. Anschutz Drilling Co., 138 Mont. 427, 357 P.2d 4 (1960).

> [T]he plaintiff was an invitee at the time of the accident . . . [T]he presence of the plaintiff on the water tank in order to furnish water for the drilling of the oil well was for the common interest or mutual advantage of both the defendant and the plaintiff and he was an invitee of defendant while on the tank.[28]

Status may change. It is possible for an invitee to lose his status and for a licensee to gain status. Status may be lost in various ways. If, for example, the plaintiff goes beyond the area of invitation he will become a licensee-trespasser.[29] The Vogel case is an excellent example of a change of status.[30] In that case the plaintiff went on the defendant's land entirely for his own benefit. At that time he was a licensee. He gratuitously began helping the defendant stack hay. While he was so involved, the defendant's barn caught fire. While fighting the fire the plaintiff was injured. The court found:

> Applying the common interest or mutual advantage test to the facts of the instant case we conclude that plaintiff was an invitee. It is true that plaintiff's purpose in visiting the Fetter ranch was to see his aunt and was for his own benefit and interest. But . . . he had been assisting in the hay field . . . and helped fight the fire. These actions by plaintiff were for the benefit or advantage of defendant. For these reasons the presence of plaintiff on the premises was for the common interest or mutual advantage of both plaintiff and defendant . . .[31]

In another case the plaintiff lost her status as an invitee. She had originally gone into the defendant's building to transact banking business. She got on the elevator and engaged in conversation with her daughter who operated it. The elevator made several round trips before it failed. The plaintiff was denied recovery for her injuries because she had lost her status as an invitee.[32]

INVITEES

Owners and occupiers of land do not have an absolute duty to make their premises safe for invitees.[33] They are not insurers against all accidents or injuries which occur on their premises.[34] They are, however, obligated to use ordinary care to make the premises reasonably safe for invitees or to warn the invitees of any hidden or lurking danger.[35] While this rule is easy to state in general terms it is difficult to apply in specific cases. What does it mean? Are there two separate duties; one to keep the land in a reasonably safe condition and one to warn invitees of hidden dangers? Is the land not in a reasonably safe condition if there are any hidden or lurking dangers? If the necessary warnings

[28] *Id.*, p. 433.
[29] *Chichas v. Foley Brothers Grocery Co., supra* note 8, at p. 581.
[30] Vogel v. Fetter Livestock Co., 144 Mont. 127, 394 P.2d 766 (1964).
[31] *Id.*, p. 137-8.
[32] Hickman v. First National Bank of Great Falls, 112 Mont. 398, 117 P.2d 275 (1941).
[33] *Tigh v. College Park Realty, supra* note 18 at 365.
[34] *Luebeck v. Safeway Stores, Inc., supra* note 18 at 693.
[35] Suhr v. Sears Roebuck & Co., 450 P.2d 87, 26 St. Rep. 1, 4 (1969).

are given does the land not have to be kept in a reasonably safe condition?

Regedahl v. Safeway,[36] decided in 1967, attempted to answer these questions. The court stated that both duties would be discharged if the possessor gives notice of the dangerous conditions which is reasonable under the circumstances; that if no warning is given the jury might find liability for breach of both duties; and that there may be a duty to warn even though the premises are reasonably safe.[37] Most cases, however, do not attempt to distinguish the duty to maintain the premises in a reasonably safe condition from the duty to warn of dangerous hidden conditions. Some merely find a breach of duty in general terms while others specifically find a breach of the duty to warn or a breach of the duty to maintain the premises.

Suhr v. Sears Roebuck[38] is of the former type. In that case the plaintiff was called to remove some used appliances from the defendant's warehouse. In order for him to reach them he had to step over a pile of boards. The plaintiff stepped on the boards and ran a nail into his foot. The court did not discuss whether the defendant failed to use ordinary care to keep the warehouse in a reasonably safe condition or whether it failed to warn the plaintiff of a hidden or lurking danger. It merely held that there was sufficient evidence of negligence for the jury to have found for the plaintiff.

Quite a number of cases deal with the duty to warn of dangerous, hidden conditions. The most recent was *Regedahl*.[39] In that case the plaintiff was delivering milk to the defendant. There had been a recent snowfall which made the delivery ramp slippery. The plaintiff slipped and fell on the ramp. The court sustained a decision for the plaintiff because the defendant's manager failed to warn him of the dangerous condition of the ramp. The manager knew that the ramp was slick because another person had told him about it.

Invitees do not have to be warned of every dangerous condition. A possessor of land is not negligent if he fails to warn invitees of dangerous conditions which are not hidden. There is no duty to warn if the danger is obvious or so apparent that the invitee should reasonably be expected to discover it.[40] The plaintiff must use ordinary and reasonable care for his own safety. He will be contributorily negligent and not recover for injuries caused by dangerous conditions if he fails to exercise reasonable care to discover them.[41] Even if the plaintiff discovers the

[36]Regedahl v. Safeway Stores, Inc., 149 Mont. 229, 425 P.2d 335 (1967).
[37]*Id.* at 233.
[38]*Suhr v. Sears Roebuck & Co., supra* note 35.
[39]*Supra* note 36.
[40]*Clark v. Worrall, supra* note 15, at p. 380; *Myles v. Helena Motors, Inc., supra* note 18, at p. 97.
[41]*Suhr v. Sears Roebuck & Co., supra* note 35, at p. 6.

dangerous conditions he will not recover for injuries caused by them if he assumes the risk of injury. If the plaintiff knows of the risk, appreciates the condition as dangerous, and voluntarily remains or continues, he assumes the risk and will not recover for the injuries.[42] Contributory negligence and assumption of risk are affirmative defenses which insulate possessors of land from liability even though they breach their duty of care to the invitees. Whether a condition is so obvious as not to require warning is, of course, a question of fact. In some cases negligence has been predicated on failure to warn of conditions in plain sight. In McIntosh v. Linder-Kind Lumber Co.,[43] the court upheld a judgment for the plaintiff because the defendant failed to warn her about a roll of tin which was in plain sight. In Montague v. Hanson[44] the court found a breach of the duty to warn the plaintiff about an open trap door which was located in the middle of an aisle used by customers.

The duty to warn of hidden dangers is imposed because of potential benefit to the possessor of the land and because of the possessor's superior knowledge of the condition of the premises.[45] Vogel v. Fetter Livestock[46] illustrates the rationale behind this rule. In that case the plaintiff was gratuitously helping fight a fire in the defendant's barn. Because of the benefit accruing to the defendant he had a duty to warn the plaintiff of any dangerous condition which he could not be reasonably expected to discover. The defendant had dynamite stored in the barn but did not tell the plaintiff about it. The dynamite exploded and the plaintiff was severely injured. The court affirmed the judgment for the plaintiff because the defendant knew there was a hidden or lurking danger. The failure to warn the plaintiff about the dynamite was actionable negligence.

In many cases, liability is imposed for injuries caused by negligent conditions on the premises. Possessors are negligent if they fail to use ordinary care to maintain their premises in a reasonably safe condition.[47] While the question of negligence has been decided in various fact situations, slip and fall cases make up the bulk of Montana law in this area. A number of cases deal with natural conditions, such as accumulations of ice and snow on parking lots and sidewalks. The court has uniformly upheld judgments for the defendants in these cases. In Montana, failure to remove snow and ice from sidewalks and parking lots is not negligence.[48] The court has explicitly rejected the rationale that natural conditions, such as snow and ice, create such an unreasonable, dangerous

[42]*Hanson v. Colgrove, supra* note 18.
[43]*Supra* note 14.
[44]*Supra* note 11.
[45]*Regedahl v. Safeway Stores, Inc., supra* note 36, at p. 234; *McIntosh v. Linder-Kind Lumber Co., supra* note 14, at p. 6.
[46]*Supra* note 30.
[47]*Suhr v. Sears Roebuck & Co., supra* note 35 at p. 4.
[48]*Hanson v. Colgrove, supra* note 18.

condition as to require the owner of the premises to take precautions. There is no liability where the danger created is by the elements because the danger is universally known.[49]

Slip and falls caused by artificial conditions are treated differently. The condition of floors is a fertile area of controversy. For example, in Pushard v. J. C. Penney Co., Inc.,[50] the plaintiff testified that she slipped on some excess wax on the floor and fell. The defendant offered no evidence to the contrary and the case went to the jury on that basis. Judgment was rendered for the plaintiff. Based on this and other cases, it appears that slippery floors in customer areas of stores is a negligent condition.[51] Liability may be imposed for injuries caused by this condition. Ahlquist v. Mulvaney[52] also involved the condition of a floor. The floor of the rest-room was uneven and the light was dim. The plaintiff tripped and fell. Although the case was remanded, the court intimated that the condition of the floor would be sufficient to justify a judgment for the plaintiff.

The question of negligent condition of property has arisen in other connections. In Teesdale v. Anschutz Drilling Co.[53] the plaintiff was injured when he fell off the defendant's water tank. The tank had just been painted and a pipe coupling had been loosened. To determine whether it was full the plaintiff had to grasp the pipe and pull himself up and look into the tank. The coupling came off in his hand. The court affirmed a finding of negligence. Thompson v: Yellowstone Livestock Commission[54] involved the condition of a cattle sales arena. The plaintiff was injured when a cow jumped through the arena fence. The court held that the defendant breached its duty to maintain the premises in a safe condition because the fence was not strong nor high enough to prevent the cow from getting through.

Not every defective condition is negligent. In Matson v. Northern Hotel, Inc.[55] the plaintiff injured his hand when the elevator door closed on it. The pull strap to the door was missing. The condition was such that it might arise without the knowledge of the defendant and in order to prove negligence the plaintiff had to show that the defendant knew or should have known that the strap was missing. The court upheld a judgment for the defendant because there was no evidence that it knew of the defective condition of the elevator. Cassady v. City of Billings[56]

[49]*Luebeck v. Safeway Stores, Inc., supra* note 18, at p. 693.
[50]*Supra,* note 11.
[51]*Kerns v. F. W. Woolworth, supra* note 11; *Rossberg v. Montgomery Ward & Co., supra* note 11.
[52]*Supra* note 9.
[53]*Supra* note 27.
[54]*Supra* note 17.
[55]*Supra* note 18.
[56]135 Mont. 390, 340 P.2d 509 (1959).

is a leading case in this area. The plaintiff was injured when she fell on the ice rink. The ice was very rough and broken. The court sustained a finding for the defendant because maintaining an ice rink in that condition was not negligent. In Milasevich v. Fox Western Montana Theatre Corp.[57] the plaintiff was injured when he was bitten by a dog which had gotten into the theatre. The defendant was attempting to extricate the dog when the plaintiff was bitten. No negligence was established in that case.

TRESPASSER-LICENSEES

Possessors of land owe a slighter duty of care to trespasser-licensees than they do to invitees. Apparently there are two branches of the duty. The first relates to the condition of the premises. The second deals with activities conducted upon the premises. The possessor must not maintain the premises in a wilful or wantonly negligent condition. He must also refrain from wilful and wanton acts before discovery of the presence of the licensee-trespasser; after discovery he must exercise reasonable care to avoid injuring him.

The first statement of the duty appeared in Egan v. Mont. Cent. Ry. in 1901.[58] Although since that time the court has utilized essentially the same language, a reading of the later cases show confusion over the rule. The Egan case explicitly stated that the duty was to refrain from wanton and wilful acts *before discovery* of the licensee and to exercise reasonable care to avoid injuring him *after discovery*.[59] The next case, Montague v. Hanson, stated the rule differently. The court held the possessor had a duty to refrain from wanton and wilful injury *after* discovery of the licensee.[60] Although this statement was a definite contradiction of Egan, which required reasonable care after discovery, it was not authoritative because the plaintiff was an invitee. The court's reference to licensees was therefore dicta. The next case dealing with this duty did not state the nature of the duty toward licensee-trespassers after they are discovered.

> **[T]he land owner owes no legal duty until his presence is discovered. He is only required to refrain from wilful and wanton acts which cause injury.[61]**

It would be possible to construe the court's statement to require only abstinence from wanton and wilful conduct after discovery of the

[57] *Supra* note 12.
[58] *Supra* note 4.
[59] *Id.* at p. 573.
[60] *Montague v. Hanson, supra* note 11, at p. 382.
[61] Fusselman v. Yellowstone Valley Land & Irrigation Co., 53 Mont. 254, 258, 163 P. 473 (1917).

licensee. The court in Jonosky v. N. P. Ry.[62] adopted this interpretation. It stated:

> [T]o a trespasser, the Company owes no primary duty. Its duty is of a negative character: To refrain from wantonly or wilfully injuring him after discovering his presence in a position of peril.[63]

Although this was clearly a misstatement of the basic rule as originally enunciated in the Egan case, the court failed to state whether it intended to change the rule. Five years later, in Chichas v. Foley, the court restated the Egan rule. It held that "the land owner owes the duty to refrain from any wilful or wanton act causing injury . . . and, after discovering that the trespasser is in imminent danger or immediate peril, to use reasonable care to avoid an action causing injury."[64]

In view of these inconsistent and conflicting statements of the rule, is it possible to make an accurate statement of the duty which possessors of land owe to licensee-trespassers? Must a possessor exercise ordinary care or merely refrain from wanton or wilful injury? In order to answer this question it is necessary to classify the cause of the injury. The injury might be caused by: 1) active negligence, i.e. due to an activity carried on upon the premises, or 2) passive negligence, i.e. due to a condition of the premises.

If the injury is passive, the possessor will be liable only if he was wilful or wantonly negligent in the maintenance of the premises. If he knows of the presence of the licensee he must not wilfully or wantonly allow him to come in contact with the dangerous condition. If the injury is active, and the possessor does not know of the licensee's presence, he will be liable only if he is wilful or wantonly negligent in his activity. If, however, he knows of the licensee's presence he must exercise reasonable care to avoid injuring him.

This contention is supported by the cases following *Chichas*. In LeCompete v. Wardell[65] the court distinguished between *active* and *passive* negligence. The defendant in that case contended that the only duty owing to licensees is that of refraining from doing him wilful or wanton injury and cited the McCulloch, Montague, and Chichas cases as authority for the proposition. The plaintiff contended that the possessor owes an obligation to exercise reasonable care in every active operation he carries on. The defendant objected to the instructions given which would make him liable for want of care toward the plaintiffs if they knew or should have known, in the exercise of reasonable care, that the plaintiff was present. He objected that the instruction placed a higher duty than that fixed by law. The court held:

[62] *Supra* note 5.
[63] *Id.* at p. 73.
[64] *Supra* note 8, at p. 582.
[65] *LeCompete v. Wardell, supra* note 19, at p. 493.

> [The objection] has no merit in the light of the general rule fixing liability if in the exercise of reasonable care defendants should have known of the plaintiff's presence on the premises.[66]

The later case of Maxwell v. Maxwell involved a passive condition of the property.[67] In that case the court stated the rule: The possessor has a duty to refrain from wanton and wilful negligence. The court also stated an exception to this rule; if the possessor knows of a dangerous condition he must not allow the licensee to run into it if he knows of his presence.[68] Lenz v. Mehrenes also involved a condition of the land.[69] In that case the court reiterated the rule that a possessor of land has the duty to refrain from acts of wilful and wanton negligence.

The question of the existence of wanton and wilful negligence has been presented in various fact situations. Establishing breach of this duty has proved to be a difficult obstacle. In *Egan* the plaintiff was injured while walking down the defendant's railroad track. Although the defendant knew the track had been used by the plaintiff and others for a considerable length of time it failed to keep a lookout for them. This failure to keep a lookout was held not to be wanton or wilful negligence.[70]

In the case of McLaughlin v. Bardsen[71] the plaintiff proved wanton and wilful negligence. The defendant was constructing a sewer system. The ditch extended 2-3 feet into a well-used pathway. It was left unguarded, unlighted, and uncovered. The plaintiff fell into the hole and was injured. The court held that the facts disclosed a reckless disregard of the lives and safety of others and that: "If this does not make out a *prima facie* case of reckless disregard of the lives and safety of others, it would be difficult to imagine a state of circumstances which would do so."[72]

The *Jonosky* case also illustrates the difficulty in proving wanton and wilful conduct. The plaintiff, an infant, was killed while crossing the defendant's tracks. The defendant knew that the railroad yard was being used as a short-cut and attempted to prevent it. The court held that the defendant was not required to curtail its operations or keep a lookout in order to protect the licensees. "The [plaintiff] entered the premises at his own risk and enjoyed the license subject to the concomittant perils arising from the owner's use in the ordinary course of business.[73]

LeCompete v. Wardell involved active negligence.[74] The plaintiff was a sub-contractor on the defendant's construction job. The defendant main-

[66] *Id.* at p. 498.
[67] *Supra* note 20.
[68] *Id.* at p. 64.
[69] 149 Mont. 394, 427 P.2d 297 (1967).
[70] *Supra* note 4, at p. 573.
[71] 50 Mont. 177, 145 P. 954 (1915).
[72] *Id.* at p. 190.
[73] *Supra* note 5, at p. 74.
[74] *Supra* note 65.

tained and operated an elevator for its own use. The defendant sometimes granted use of the elevator to the sub-contractors. The plaintiff was riding up the elevator when an employee of the defendant pushed something across the shaft. The hoist struck it and fell to the ground. Although the defendant had the duty to exercise reasonable care because the plaintiff's presence was known, the court held that the facts were sufficient to establish wanton or wilful conduct. The most recent cases involve social guests who were injured by conditions upon the premises. These cases establish that fresh wax,[75] basement stairs[76] and rough back yards[77] are not wanton or wilfully negligent conditions.

No analysis of liability for personal injuries caused by use and occupation of land is complete without consideration of the attractive nuisance doctrine and the landlord-tenant relationship.

ATTRACTIVE NUISANCE

The attractive nuisance doctrine modifies the duty of care owed by possessors of land to a certain class of trespasser-licensees. The law imposes a stricter duty of care in relation to infant trespasser-licensees. They might recover in situations in which adults would be denied recovery. The law of attractive nuisance has undergone considerable change since its enunciation in 1905.[78] Originally the theory was based on a fiction. An infant could only recover for injuries caused by dangerous conditions or activities if he was *"invited"* on the land by the cause of his injury, i.e. if the condition or activity was so appealing as to draw him on to the land. The court discarded this theory in 1952 and adopted the attractive nuisance doctrine as propounded by the Restatement (First) of Torts, § 339.[79] The court reaffirmed its acceptance of the Restatement doctrine in 1968 in Gagnier v. Curran Const. Co.[80]

A possessor of land has the duty to exercise reasonable care to eliminate dangerous artificial conditions or otherwise protect trespassing infants if:

a) he knows or has reason to know that children are likely to trespass.

b) he knows or has reason to know of the condition and realizes or should realize that it involves an unreasonable risk of death or serious bodily harm to the children, and

c) the children, because of their youth, do not discover the condition or realize the risk involved, and

[75] *Maxwell v. Maxwell, supra* note 20.
[76] *Lenz v. Mehrens, supra* note 69.
[77] *Blackman v. Crowe, supra* note 22.
[78] Driscoll v. Clark, 32 Mont. 172, 80 P. 1, (1905).
[79] Nichols v. Consolidated Dairies of Lake County, Inc., 125 Mont. 460, 464, 239 P.2d 740 (1952).
[80] Gagnier v. Curran Const. Co., Mont., 433 P.2d 894, 25 St. Rep. 483 (1968).

d) the utility of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to the children involved.[81]

If the condition can be classified as an attractive nuisance by these criteria and the possessor fails to exercise reasonable care or protect the children he will be liable for their injuries.

LANDLORD-TENANT

Liability for personal injuries occurring on land falls upon the possessor.[82] The owner of the land is generally not liable for the injuries because he is not in control of the premises. The landlord is not responsible for dangerous conditions and injuries resulting from them if the premises are in the exclusive possession of the tenant.[83] There is one exception to this rule of non-liability. The landlord is liable for injuries if the negligent condition was present at the time of the lease, or the premises were likely to deteriorate into such a condition, and he failed to make repairs.[84] A landlord may also be held liable for the injuries if the tenant did not have exclusive possession of the premises. If, for example, there was a common stairway used by both the tenant and the landlord. Also, if the landlord has the right to make or supervise repairs he may be liable for injuries caused by the negligent failure to do so.[85]

CONCLUSION

Montana personal injury law, as it relates to use and occupation of land, may be simply stated. Essentially there are two relationships which might arise between possessors of land and third persons. Third persons are classified as either invitees or trespasser-licensees. However, a special relationship might arise if the third person is an infant.

Possessors of land must either exercise reasonable care to protect invitees from injury or warn them of dangerous concealed conditions. Both duties are discharged if an adequate warning of the dangerous condition is given. Possessors have a similar duty of care to infants who come within the attractive nuisance doctrine. To them the possessor must exercise reasonable care to eliminate the dangerous condition or otherwise protect them. Invitees injured by obvious conditions are denied recovery by the affirmative defenses of contributory negligence and assumption of risk.

[81] *Id.* at p. 487.
[82] Grey v. Fox West Coast Service Corp., 93 Mont. 397, 405, 18 P.2d 797 (1933).
[83] Doran v. United States Building & Loan Assn., 94 Mont. 73, 75, 20 P.2d 835 (1933).
[84] *Grey v. Fox West Coast Service Corp., supra* note 81, at p. 406.
[85] Hedby v. Polar Works at University of Montana, 1968 note 82, at p. 76.

Possessors owe a less strict duty of care to trespasser-licensees. If the trespasser-licensee's presence is unknown the possessor must refrain from wanton or wilful negligence. If he knows that the trespasser-licensee is present he must not wilfully or wantonly allow him to come in contact with a dangerous concealed condition. After becoming aware of the trespasser-licensee's presence, the possessor must exercise reasonable care in his activities.

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