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THE EARLY COMMON LAW, from which our present law has evolved, classifies persons on land into three basic categories: trespassers, licensees, and invitees. The classification determines the standard of care that is owed to these persons. The standard of care is a duty imposed upon the landowner because he is in control of his land, is presumed to know all about his land and any dangers or possible dangers that may exist, and is best able to prevent any harm to others.[1]

The landowner is not liable for injury to trespassers caused by his failure to exercise reasonable care to put his land in a safe condition for them, and possibly the only duty owed to a trespasser is not to trap or wilfully injure him.[2] The licensee takes the premises as he finds them, but the occupier must take reasonable precautions to prevent injury. If the occupier is aware of a concealed trap, he must warn the licensee, but he is otherwise only liable for wanton and wilful acts of active negligence.[3] When the occupier has warned the licensee of any such danger and the nature of the danger, it is reasonable to assume that the occupier intended that the licensee was to assume the risk of any injury to himself which might result from the danger to which the warning was related.[4] To the invitee he owes the highest degree of care, which is a duty to protect him against known dangers, and also against those which with a reasonable amount of care he might discover.[5]

A "social guest" can fit into all three of the categories, as a trespasser, a licensee, or an invitee. If a social guest outstays his welcome or through his actions makes himself no longer welcome, he may be asked to leave. His continued presence thereafter would make him a trespasser. Likewise a social guest "turns into a trespasser" when he is specifically invited to a particular part of the premises and he leaves and wanders around on his own. In such a case, he becomes a trespasser as to the other property area.[6] Generally the social guest is a licensee, having been invited onto the land by an express or implied

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1 Prosser, Law of Torts, 358 (3d ed. 1964).

2 *Id.* at 365.

3 Note, 63 Yale L. J. 605 (1954); Richey v. Kemper, 392 S. W. 2d 266 (Mo. 1965).

4 DeMilia v. DeMilia, 260 N. Y. S. 2d 254, 24 App. Div. 2d 447 (1965); Mitchell v. Legarsky, 95 N. H. 214, 60 A. 2d 136 (1965); Ziegler v. Elms, 388 S. W. 2d 839 (Mo. 1965), Note, 18 Modern L. Rev. 623 (1955).

5 Prosser, *op. cit. supra,* n. 1 at 395; Note, 26 Minn. L. Rev. 573 (1942).

6 Lamb v. Redemptionist Fathers of Georgia, 165 Ga. 837, 142 S. E. 2d 278 (1965); Fullerton v. Conan, 87 Cal. App. 2d 354, 197 P. 2d 59 (1948).

invitation[7] by the occupier, and his presence on the land is for a mutual benefit, with much of the benefit flowing to the social guest. In this situation the social guest is a licensee and must take the premises as he finds them.[8] The duty owed to him by the landowner is not to trap or intentionally harm him and to warn of hidden or latent dangers. The social guest on land under an implied license is, for example, a neighbor whose backdoor kitchen visits are almost customary and expected, or a farmer who has an implied license to visit another's farm and, because of the size of farms, his presence is not always immediately known, but should be expected.[9]

A social guest can become an invitee, from a licensee status, or a licensee, from an invitee status. In the first situation, we may have a plumber visiting socially and the host becomes in need of his services. The work performed, the length of time needed to perform the work, and the fact that the services were compensated for, all enter into the determination to raise the "guest licensee" to the status of a business invitee. An example of the other situation is a business invitee, who is on the premises to conclude a transaction[10] or to plan a business arrangement,[11] and the hour has grown late and the invitee is requested to join the family for dinner. At this point the business invitee becomes a social guest and is given the same standard of care given to the members of the household. A more remote situation would be where a social guest, specifically invited to take part in a poker game,[12] admires an antique of the host and purchases it. This does not change his position to a business invitee, and thus the higher standard of care is not required.

When the social guest is enjoying the hospitality of the host and is interrupted with an "invitation" to accompany the host outside to chase away annoying children, and the guest is injured in returning to the house, the journey outside is only an incident in the visit and does not change the duty of care owed by the host.[13] Georgia law treats the guest, who is visiting in the home at the request of the host, as an invitee rather than a licensee, and the duty, imposed on the host, of keeping the premises safe for invitees extends not only to those portions of the premises which the invitees were expressly invited to use, but also

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[7] Niebes v. Crestline Aerie, 94 Ohio App. 21, 114 N. E. 2d 260 (1952); Frankel v. Kurtz, 239 F. Supp. 713 (W. D. S. C. 1965).

[8] Comeau v. Comeau, 285 Mass. 578, 189 N. E. 588 (1934); Goldberg v. Straus, 45 So. 2d 883 (Fla. 1950); DeMilia v. DeMilia, *supra*, n. 4.

[9] McLaughlin v. Marlatt, 296 Mo. 656, 246 S. W. 548 (1922).

[10] Arogona v. Parrella, 325 Mass. 583, 91 N. E. 2d 778 (1950).

[11] Sanders v. Brown, 73 Ariz. 116, 238 P. 2d 941 (1951).

[12] Lewis v. Dear, 120 N. J. L. 244, 198 A. 887 (1938); Note, Minn. L. Rev., *supra*, n. 5.

[13] O'Brien v. Shea, 326 Mass. 796, 96 N. E. 2d 163 (1951).

to those portions which the invitees might reasonably be expected to use, and if this area is exceeded the invitee becomes a licensee.[14]

We have seen that the social guest occupies the land of another under very peculiar circumstances, *i.e.*, in most cases the social guest has been specifically invited onto the land,[15] but is not an invitee. Where the social guest has been specifically invited by the host, there is a mutual flow of benefit to the parties from the social intercourse. Nevertheless, the social guest is not entitled to the rights of a business visitor, but is a mere gratuitous licensee. The "flow of benefit" rule can be used to determine the position of one occupying the land of another.[16] In the case of the trespasser, he is on the land of another usually without the permission or knowledge of the landowner and solely for his own benefit. The licensee, or social guest, is on the land by an expressed invitation, but such invitation is for his benefit as much as the host's. Thus, the guest is not entitled to any higher degree of care than the host himself.[17] Where the licensee performs tasks for the host, this work does not raise him to the level of a business invitee.[18] In fact, where a licensee was invited to stay awhile and help out with a new baby or settling in a new house, the work performed was held not to be sufficient to take him out of the "guest licensee" category and to place him in the position of a business invitee.[19] The invitee is on the land at the expressed invitation of the landowner and usually for the benefit of the landowner.

Applying the established doctrine of classifying persons entering upon the land of another, there is still one further test, and that is whether the landowner is liable, to the licensee or social guest, for "willful and wanton injury," [20] and for "negligent active conduct." [21] If the land contains a dangerous condition and the landowner fails to convey warning thereof to his social guests, he is at most *passively* negligent and such passive negligence constitutes no ground of liability for the death or injury of a social guest.[22] In cases involving injury resulting from *active* conduct, the landowner may be liable for failure

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[14] Cobb v. Clark, 265 N. C. 194, 143 S. E. 2d 103 (1965).

[15] Dotson v. Haddock, 46 Wash. 2d 52, 278 P. 2d 338 (1955); Zala v. "Italia" Societa Anonymo Di Navigazione, 342 Mass. 547, 87 N. E. 2d 183 (1949); McNamara v. Hall, 38 Wash. 2d 864, 233 P. 2d 852 (1951); Lewis v. Dear, *supra,* n. 12.

[16] Lubenow v. Cook, 137 Conn. 611, 79 A. 2d 826 (1951); Dotson v. Haddock, *supra,* n. 15.

[17] Saba v. Jacobs, 130 Cal. App. 2d 717, 279 P. 2d 826 (1955).

[18] McHenry v. Howells, 201 Ore. 697, 272 P. 2d 210 (1954); Mitchell v. Legarsky, *supra,* n. 4; Vogel v. Eckert, 22 N. J. S. 220, 91 A. 2d 633 (1952); Ziegler v. Elms, *supra,* n. 4.

[19] Shaw v. Wiegartz, 1 Mich. App. 271, 135 N. W. 2d 565 (1965); Shepherd v. Whigham, 111 Ga. 274, 141 S. E. 2d 583 (1965); Zala v. "Italia" Societa, *supra,* n. 15.

[20] McNamara v. Hall, *supra,* n. 15.

[21] Free v. Furr, 140 Cal. App. 2d 378, 295 P. 2d 134 (1956).

[22] Hansen v. Richey, 46 Cal. Rptr. 909 (1965).

to exercise ordinary care toward a licensee whose presence on the land is known or should reasonably be known to the landowner.[23] If there is no active negligence, and willful and wanton injury is involved, the landowner is not liable for injuries resulting from a condition of the premises other than one amounting to a trap, and the licensee must take the premises as he finds them, insofar as any alleged defective condition is concerned.[24]

The host should treat the social guest as a member of his family,[25] and the guest should accept the conditions ordinarily found in the host's home without complaint. As members of a family are aware of small defects in the premises, the guest is assumed to accept the possibility that they may exist, but if the defects amount to a trap,[26] which would present a real danger, then the host should endeavor to remove this danger or warn the guest that they exist. Failure to do so would amount to active negligence, and the guest could recover should injury result.[27]

The problems that arise when the social guest accepts the premises as a member of the host's family[28] usually start with the guest's not being familiar with the layout of the property, *i.e.*, not knowing a steep stairway is located next to the downstairs bathroom and that doors to the stairway and other rooms are similar,[29] not knowing that a highly polished floor is under a throw rug and that stepping on the rug may cause it to slide and cause the guest to sustain injury,[30] or not knowing the back of a closet is a stairwell and that one need only to reach in the closet to hang up his coat.[31] All the unfamiliar situations are inherent dangers to the social guest, but are known by the landowner and not considered a danger by him. Thus, where active conduct of a landowner is involved, the duty owed to a gratuitous licensee is only that of ordinary care, and as concerns the alleged defect or inherent danger, in the premises, the licensee must take the premises as he finds them.[32]

Section 342 of the Restatement of Torts 2d (1965) states that a landowner is subject to liability for bodily harm caused to a social guest by a natural or artificial condition on the land *only* if the land-

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[23] Oettinger v. Stewart, 24 Cal. App. 2d 133, 148 P. 2d 19 (1944).

[24] *Ibid.;* Palmquist v. Mercer, 43 Cal. App. 2d 101, 272 P. 2d 26 (1954).

[25] Wolfson v. Chelist, 284 S. W. 2d 447 (Mo. 1955).

[26] Frankel v. Kurtz, *supra,* n. 7.

[27] Oettinger v. Stewart, *supra,* n. 23.

[28] Comeau v. Comeau, *supra,* n. 8.

[29] Biggs v. Bear, 320 Ill. App. 597, 51 N. E. 2d 799 (1943); Keretian v. Asadourian, 349 Ill. App. 390, 110 N. E. 2d 679 (1953); Maher v. Voss, 46 Del. 418, 84 A. 2d 527 (Super. Ct. 1951).

[30] Rapaport v. Hume, 80 Ohio L. Abs. 119, 157 N. E. 2d 889 (1957).

[31] Maher v. Voss, *supra,* n. 29.

[32] Friedman v. Berkowitz, 206 Misc. 889, 136 N. Y. S. 2d 81 (Bronx Cty. City Ct. 1954).

owner knows or has reason to know of the condition, realizes or should realize that it involves an unreasonable risk to the guest licensee, and has reason to believe that the guest will not discover the condition or realize the risk, and invites or permits the unsuspecting guest to enter or remain upon the land without exercising reasonable care to make conditions reasonably safe or to warn him of the condition and risk involved.

The Missouri courts do not adopt this rule completely, but state that a licensee takes the premises of the landowner as he finds them, absent evidence of any ultrahazardous condition or trap of which the landowner has knowledge but the licensee does not.[33] The courts have set out the following factors to be considered in determining the liability of the host toward the social guest: Is the guest on the premises of the landowner by permission or invitation? Is the permission or invitation express or implied? What is the real purpose of the visit? Is there a benefit, economic or otherwise, flowing to the social guest or landowner? What is the nature of the premises and of the activities conducted thereon? What is the nature of the defect or danger? Is it unusual, a trap, or extra-hazardous? What is the foreseeability of the harm and the ease of correction or warning? What is the relative position of the parties, are they young or old, and how many may be exposed to risk of injury? [34]

While most of the states have chosen from time to time to apply to the social guest the classifications of "licensee," [35] "bare licensee," [36] "mere licensee," [37] or "gratuitous licensee," [38] Ohio has kept the social guest in a category of his own and has said that, "A host is not an insurer of the safety of a guest while upon the premises of the host and there is no implied warranty on the part of a host that premises to which a guest is invited by him are in safe condition." [39] The social relationship raises no duty on the part of the host to exercise care or to make the premises safer, and the relationship of the host and guest is equivalent to a legal relationship of licensor and licensee and not that of invitor and invitee. A host who invites a social guest to his premises owes the guest the duty to exercise ordinary care and not to cause

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[33] Ziegler v. Elms, *supra*, n. 4.

[34] Wolfson v. Chelist, *supra*, n. 25.

[35] Laube v. Stevenson, 137 Conn. 469, 78 A. 2d 693 (1951); O'Brien v. Shea, *supra*, n. 13; Goldberg v. Straus, *supra*, n. 8; Ziegler v. Elms, *supra*, n. 4.

[36] Popkin v. Shanker, 232 N. Y. S. 2d 574, 36 Misc. 2d 242 (Nassau Cty. Sup. Ct. 1962); Murrell v. Handley, 245 N. C. 559, 96 S. E. 2d 717 (1957).

[37] Guertin v. Antonelli, 93 R. I. 105, 171 A. 2d 449 (1961); Pagliaro v. Pezza, 93 R. I. 110, 167 A. 2d 139 (1961).

[38] Free v. Furr, *supra*, n. 21; Lubenow v. Cook, *supra*, n. 16; Maher v. Voss, *supra*, n. 29; Wolfson v. Chelist, *supra*, n. 25; Laube v. Stevenson, *supra*, n. 35; Saba v. Jacobs, *supra*, n. 17.

[39] Scheibel v. Lipton, 156 Ohio St. 308, 102 N. E. 2d 453, 454 (1951).

injury, and to warn the guest of any condition of the premises which is known to the host and which one of ordinary prudence and foresight should reasonably consider dangerous.[40] Thus, Ohio successfully avoids the definite classification of a social guest as a trespasser, licensee, or invitee, but applies the duties owed to a licensee. The one area that Ohio has expanded is the application of ordinary prudence and foresight to the host's duty to reasonably consider the premises dangerous.

Up to now we have considered the *landowner's* responsibility to a social guest, with the landowner being the occupier of the premises. Where the *tenant* is the occupier and the one in control of the premises, what are the owner's responsibilities to the social guest of the tenant? The owner of leased property is no longer in control, and is not responsible for personal injuries occurring during the term of the lease as a result of the condition of the leased premises.[41] When a tenant leases premises, he takes them as they are and the landowner has no duty to repair. The only liability to which the landowner may be subject is the liability for any hidden or concealed dangers of which the tenant was not apprised.[42] The guest assumes the status of the tenant and has no greater rights against the landlord than the tenant would have if he had been similarly injured.[43] Thus, since the renting ordinarily transfers to the tenant possession and control of the premises, the landlord is usually under no duty to make repairs and is therefore not liable for injuries caused by the failure to do so.[44] The guest might recover from the landowner on the ground of a latent or concealed defect in the premises of which the lessor, but not the lessee, knew or was charged with knowledge at the inception of the lease.[45] The social guest, however, generally must seek any possible redress from his host because a guest of a tenant usually has the same rights as a tenant against the landlord for injuries caused by a defective condition of the rental premises.

The social guest may be an invitee of the landlord and the mere licensee of the tenant, as where the landlord retains control of a stairway,[46] or other common area, and is charged with keeping this area

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[40] *Ibid;* Rapaport v. Hume, *supra,* n. 30.

[41] Prosser, *op. cit. supra,* n. 1 at 412.

[42] Anderson v. Valley Feed Yards, Inc., 175 Neb. 719, 123 N. W. 2d 839 (1963); White v. E. & F. Const. Co., 151 Conn. 110, 193 A. 2d, 716 (1963).

[43] Bartkowski v. Schrembs, 45 Ohio L. Abs. 597, 67 N. E. 2d 922 (1944).

[44] Conner v. Farmers and Merchants Bank, 243 S. C. 132, 132 S. E. 2d 385 (1963).

[45] McKenzie v. Cheetham, 83 Me. 543, 22 A. 469 (1891); Kleinberg v. Lyons, 39 Ga. App. 774, 148 S. E. 535 (1929).

[46] Mularski v. Brzuchalski, 117 Ohio App. 486, 192 N. E. 2d 672 (1961); Rice v. Ziegler, 128 Ohio St. 239, 190 N. E. 560 (1934).

free of defects. In such case, a hidden or latent defect in this area could be the cause of the social guest's injury and the basis of the landlord's liability.[47]

Social guests may be trespassers, licensees, or invitees when upon the property of another person. Their status determines the duty that is owed to them by the landowner or the occupier of the premises. Georgia treats the social guest as an invitee and imposes upon the landowner a correspondingly high duty of care.

The Missouri courts have endeavored to move away from the strict classification and have set out factors to be considered in determining liability. Ohio has more or less adopted a fourth classification for the social guest and requires the host to exercise ordinary prudence and foresight to render the premises safe. California, along with many other states, has drawn a distinction between passive and active conduct on the part of the landowner and has held him not liable for his passive negligence. He is thus liable to the social guest only for willful and wanton injury and for negligent active conduct.

All of these changes point to an evolution from the early common law and broader interpretations designed to afford relief to the social guest. Prior to these changes, the only way the social guest could secure relief was by proving the injury was a result of a "trap."

It is only fitting that this change should take place since our very society is changing and the social intercourse enjoyed between the host and guest should require more than the acceptance of the premises as they are on the part of the guest.

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[47] Hardin v. Elvitsky, 232 Cal. App. 2d 357, 42 Cal. Rptr. 748 (1965); Taneian v. Meghrigian, 15 N. J. 267, 104 A. 2d 689 (1953).