Invitee Status in Louisiana

Benjamin F. Day
his appointments do an effective job in securing a fair trial.\textsuperscript{71} What, however, is the trial judge's duty when retained counsel commits errors which prejudice an accused's right to fair trial? It is submitted that in this situation the judge may have some duty to privately advise the retained attorney of errors noted by the court, because of the general duty of the judge to conduct a fair trial. Caution should be exercised, however, so that the judge cannot be accused of interfering with the defendant's freedom to choose his own counsel.

Lawrence L. Jones

INVITEE STATUS IN LOUISIANA

INTRODUCTION

Traditionally the standard of care owed by an occupier of land to one entering upon the land has been determined by the circumstances surrounding the entry. In determining this standard, courts have considered two elements, the consent of the occupier and the economic benefit derived by him from the visit. Based on these considerations the common law has recognized three broad statuses: trespassers, licensees, and invitees. The trespasser, coming on the land without the consent of the occupant and with no intention of bestowing an economic benefit, takes the premises as he finds them. The landowner owes no duty other than not to harm him intentionally.\textsuperscript{1} The licensee is on the land with an expressed or implied invitation from the occupant, but with no purpose of rendering an economic benefit.\textsuperscript{2} However, licensee status has also been given one who enters without the required invitation, but who intends to bestow some real or fancied benefit on the occupier.\textsuperscript{3} The standard of care owed is not to injure the licensee wilfully or wantonly or cause him harm from active negligence. The occupier must also warn the licensee against all known hidden hazards.\textsuperscript{4} The invitee comes on the

\textsuperscript{71} Braxton v. Peyton, 365 F.2d 563 (4th Cir. 1966); Jones v. Cunningham, 319 F.2d 347 (4th Cir. 1963); Mckenna v. Ellis, 280 F.2d 592 (5th Cir. 1960).

1. RESTATEMENT (SECOND), TORTS \S 333 (1965); Barrilleaux v. Noble Drilling Corp., 160 So. 2d 319 (La. App. 4th Cir. 1964).


3. Malatesta v. Lowry, 139 So. 2d 785 (La. App. 4th Cir. 1961); Mercer v. Tremont & R. R., 19 So. 2d 270 (La. App. 2d Cir. 1944) (plaintiff was granted invitee status); Mills v. Heidingsfield, 192 So. 786 (La. App. 2d Cir. 1939).

4. RESTATEMENT (SECOND), TORTS \S 341 (1965); Potter v. Board of Comm'rs, 148 So. 2d 439 (La. App. 4th Cir. 1963).
land with an invitation and for the purpose of rendering some potential service or benefit for the occupier. The landowner owes a high standard of care to the invitee, including protection from negligence, and from reasonably discoverable hazards created by a third party. Most important, the landowner owes the duty to inspect the premises and make them safe for the visit. This Comment focuses on the rights of the invitee. Its purpose is to show how Louisiana courts have broadened this category and to investigate ramifications resulting from this development.

The duty of prior inspection has given rise to the doctrine of constructive knowledge. The injured invitee need not prove the landowner had actual knowledge of the hazard, but only that it had existed for a sufficient length of time that a reasonable inspection should have uncovered it. The higher standard of care owed an invitee, plus this lightening of his burden of proof, has produced a history of legal battles in which the technical status of the injured party has overshadowed the real issue of whether the occupier's act or omission amounted to an actionable wrong against the plaintiff.

The redactors of the Louisiana Civil Code attempted to spell out in broad, liberal terms the liability of a landowner for injuries resulting from his negligence. Article 2315 states a general philosophy of tort law: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." Article 2322 sets out more particularly the duty a landowner has to one who is injured while on the premises: "The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original structure." The Louisiana courts, however, have held that these articles must be read in context with the common law technicalities as to the status of the entrant.

However, the Civil Code has not been without effect in this area of tort law. The courts have faithfully guarded the civil law obligations of a lessor to a tenant. The lessor's guaranty

5. See, e.g., Roberts v. Courville, 162 So. 2d 750 (La. App. 1st Cir. 1964).
8. Klein v. Young, 163 La. 59, 111 So. 495 (1927); Mills v. Heidingsfield, 192 So. 786 (La. App. 2d Cir. 1939).
to the lessee of the safety of the premises has been extended to anyone who is rightfully on the premises. The courts in this narrow area abandoned the technical distinction between invitee and licensee. Since there is no requirement of actual knowledge in the guaranty of the lessor, licensees on leased property are protected from all substantial latent defects in the leased premises.

The recognition and extension of the lessor’s duty to keep the premises safe led to an anomaly. If a lessee invited a friend onto property for the sole purpose of social pleasure, this social guest, technically a licensee, was protected from hazards, both known and unknown to the occupier and the owner of the premises. However, if this same guest entered the property of a homeowner and the same accident occurred he would be denied recovery unless he could show the owner had actual knowledge of the hidden danger, or the injury resulted from the

9. Malatesta v. Lowry, 130 So. 2d 785, 786 (La. App. 4th Cir. 1961): “The jurisprudence teems with cases holding that a landlord is bound to know whether his building is safe for the purposes for which he rents or authorizes its use or is defective, rotten, or otherwise unsafe, and is answerable in damages, under the above articles [LA. CIVIL CODE arts. 670, 2322 (1870)] to third persons who being lawfully or rightfully therein are injured by reason of its defects, whether of original construction or caused by failure to make proper repairs.” (Citations omitted.)

10. Id. at 787: “In accordance with this general rule, it has been held where a third person is injured in the leased premises by a fall from defective steps, or by the collapse of a rotten wharf or from falling plaster or other materials, or by a defective floor, the landlord is liable to the person injured, whether he was a guest, roomer, visitor of the lessee, housekeeper, subtenant, daughter of subtenant, or the wife or child of the tenant, sister of the lessee, or even a concubine.” (Citations omitted.)

11. LA. CIVIL CODE arts. 2693, 2695 (1870).

12. Chaix v. Viau, 15 So. 2d 662, 663 (La. App. Orl. Cir. 1943): “The alleged defect in the flood board was not such a defect as to make the floor unsafe for normal use. While it is true that the owner of a building is liable for the vices and defects of construction, or for his failure to make adequate repairs, this does not mean that he is an insurer of the safety of the occupants of the house for accidents which may befall them through their lack of ordinary observation and care. The vices and defects spoken of in the Articles of the Civil Code must be substantial or those which are likely to cause injury to a reasonably prudent man.”

James D. Davis, Liability of an Owner to Third Persons Injured by Structural Defects, unpublished article to appear in a later issue of the Louisiana Law Review, deals specifically with this area, and the extension of art. 2322 to homeowners. This article questions the soundness of the lessor-owner and homeowner distinction, and the undue complications created by this line of jurisprudence.

13. 95 A.L.R.2d 992, 1000 (1964): “Under what has been called the ‘economic benefit’ test of invitee status, an entrant upon land of another is not entitled to the status of invitee unless the visit is directly or indirectly connected with business dealings between them or, as it is sometimes put, unless the purpose of the visit is to promote some real or fancied material, financial, or economic interest of the landowner.” See also Annot., 25 A.L.R.2d 900 (1962).

wilful and wanton or active negligence of the landowner. With this glaring discrepancy, it does not seem strange that Louisiana should be the first state, and at present the only state, to grant a social guest invitee status.

**LOUISIANA ENLARGEMENT OF INVITEE PROTECTION**

The distinction between business and social guests was abolished in *Alexander v. General Acc. Fire & Life Assur. Corp.* The impact of this modification was apparent almost from the outset. Now the entrant only has to show an invitation, and is not required to show he came on the land for the purpose of rendering a service to the occupier. This decision narrowed the class of licensees only to those whom the landowner allowed on his property out of sufferance. Therefore more cases come under the reasonable care doctrine of the invitee rule, and fewer turn on technical classifications. The emphasis has switched from the legal question of plaintiff's status to the factual question of whether, under the particular circumstances, there is a breach of the duty of reasonable care.

The broadening of the invitee class has tended to make obsolete several arbitrary distinctions. Prime among these was the requirement that an invitee must leave the premises within a reasonable time after his business has been transacted. Formerly loitering by a business guest would transform his status into that of licensee. Under the expanded invitee rule, if the party elected to stay on the premises to chat with the occupant, or to inspect the premises, he would be a social guest and the same duty of reasonable care would apply. In reality, unless the occupant had expressly revoked the invitation, it would take an extreme case to reduce an invitee to the status of a licensee.

---

16. England abolished the common law distinction between invitee and licensee by statute. The Occupiers' Liability Act 1957 (5 & 6 Eliz. 2c, 31), §§ 2, 3. It is interesting that both England and Louisiana restrict the use of the civil jury trial.
17. 98 So. 2d 730 (La. App. 1st Cir. 1957) noted 19 LA. L. REV. 906 (1959). The court stated in its opinion: "And we see no reason why the duty of ordinary reasonable care should not be owed to social guests who are expressly invited to the premises as well as to other invitees." *Id.* at 734.
18. Potter v. Board of Comm'rs, 148 So. 2d 439 (4th Cir. 1963). There has been a trend away from the strict compliance with the common law technicalities in all American jurisdictions. The courts have tended to draw a distinction between "bare licensees" and "licensees by implied invitation." See Annot., 95 A.L.R.2d 992, 1016 (1964).
A logical result of the social guest-invitee rule would be that people conducted through plants on guided tours purely for their own intellectual satisfaction should now be treated as invitees. Because the doctrine of reasonable care is plastic and can be molded to fit the myriad situations that arise, and since there is an invitation and cooperation by the occupant, there seems to be sound reason for granting social guest standing to such people. Another class of visitors most likely affected by this broadened rule are people who come on land to view an exhibition or demonstration. Traditionally some promotional purpose or contract relationship had to be established before invitee status attached. Louisiana's appellate review of facts removes the fear that these legal distinctions are essential to protect defendants from jury mishandling of the reasonable care doctrine. Review of facts also gives the courts an opportunity to give form and predictability to the reasonable care concept.

PLASTICITY IN THE REASONABLE CARE DOCTRINE

The traditional concept of business guest—invitee worked best where the occupant held his premises open to the public. He had reason to anticipate his premises would be used in the manner for which they were designed. Thus the owner of a department store, inn, or theater was not unreasonably

---

22. DeHart v. Travelers, 10 So. 2d 597, 598 (La. App. Orl. Cir. 1942); "It cannot be disputed that the proprietor of any public house of entertainment, as a result of an implied contract, though not an insurer of the safety of his guest, owes the duty to exercise reasonable care to protect them both in person and property, from injury at the hands of a fellow guest or guests."
23. Businesses which require partial darkness have given the courts difficulty. Cassanova v. Paramount-Richards Theatres, 204 La. 813, 16 So. 2d 444, 147 (1948) noted 15 Tul. L. Rev. 646 (1941); "The authorities are in conflict as to what constitutes reasonable and ordinary care on the part of proprietors of places of public amusement, but we think the authorities holding that, because of the darkened theatres, moving picture exhibitors are held to a stricter account in the performance of this rule express the sounder logic and the better view, for
burdened with the obligation of maintaining safe premises, since the premises themselves contributed to his economic gain. However, the doctrine lost most of its rationality when a landowner chose to transact some incidental business at his home. The homeowner who received his unannounced insurance agent was charged with the same high degree of care and required to make the same inspection as the business establishment expecting thousands to use its premises daily. Now, the homeowner is under the duty of keeping his premises reasonably safe at any time a social or business guest should happen to be invited on the premises. However, this duty can be tempered by a more flexible handling of the reasonable care concept.

The courts have come to realize there is no set norm to judge reasonable care or breach of duty. Not all negligence is of such a nature as to violate the duty to use reasonable care. In Simmons v. Chuck’s Inc. the court found as a matter of fact that the chairs in a night club had been too closely placed, and that plaintiff’s injury was caused by being hit by the backrest of the next barstool. The court of appeal reversed the lower court’s judgment for plaintiff, and held the defendant had not violated his duty. The court said:

“In determining what is negligent conduct we have remarked on several occasions that there is no fixed rule; the facts and environmental characteristics of each case must be considered and treated individually in conformity with the true civil law concept. Judicially we are tending more and more to an appreciation of the truth that, in the last analysis, there such a rule has the added weight of common sense behind it.” But in Benton v. Connecticut Fire Ins. Co., 145 So. 2d 89, 92 (La. App. 4th CIR. 1962), the court quoted from Daniels v. United States Cas. Co. 103 F. Supp. 742 (W.D. La. 1952): “The extent of the lighting ordinarily used depends upon the nature of the business and is generally known to those who patronize it, such as theatres or picture shows, where a degree of darkness is necessary to their operation, and in other instances where the customer for one reason or another prefer and accept, as an inducement, less than cathedral-lighting conditions. In the later cases, the guest accepts a situation which is well known to him and it would seem to require something more than mere inadequacy of lights to constitute negligence.”

24. 65 C.J.S. Negligence 63(45), at 733 (1966) : “The duty of exercising ordinary care for the safety of business visitors may require one who invites the public to his premises to purchase goods to take measures different from those required of one inviting others to his private residence, and a person who enters a private residence even for purposes connected with the owner’s business is entitled to expect only such preparation as a reasonably prudent householder makes for the reception of such visitors to secure their safety. The measure of duty owed to an invitee is greater than that due to a licensee.” The weight of authority seems not to make any such distinction, and the Louisiana courts have made no statements indicating the adoption of this rule.

are principally standards and degrees of negligence for the reason that no one is so gifted with foresight that he or she could anticipate every possible legal cause for personal injury and prescribe the proper rule for each.”

The courts have always emphasized that the occupier is not the insurer of the safety of his invitees. He does not have to make the premises foolproof from all freak accidents. The landowner, also, is not liable for the unfortunate accidents occurring on his premises through no fault of his own. The courts have not exclusively employed the test of whether the hidden hazard would have been disclosed with proper inspection, but rather have also looked at whether the defect was such a hazard that an injury was foreseeable. The courts seem to be more inclined to look to foreseeability and degree of hazard rather than to constructive or actual knowledge of the vice.

Two recent cases illustrate this new approach. In Savell v. Foster plaintiff went to defendant's service station to indicate repairs he wished done to his automobile. As he watched the mechanics, he attempted to open a defective window which fell and crushed his hand. Although the mechanics admitted knowing about the vice and failing to warn the plaintiff, the court denied recovery because the defendant could not reasonably anticipate the plaintiff would open a defective window.

In Bougon v. Traders Gen. Ins. Co. the court demonstrates how a sliding scale of reasonable care is used to ease the duty now imposed on the owner to inspect his property for a social guest. Plaintiff, a social guest, was injured while diving into a private swimming pool. Although there was a slight defect in the diving board, the court held negligence had not been proved. The test set forth was:

"It is his duty to fend against possibility of injury but should an accident and an injury occur which could not have been

26. Id. at 311.
28. See, e.g., Allen v. Honeycutt, 171 So. 2d 770 (La. App. 2d Cir. 1965); Magesi v. Wells, 154 So. 2d 524 (La. App. 4th Cir. 1963); Morel v. Franklin Stores Corp., 91 So. 2d 42 (La. App. 4th Cir. 1956).
31. 149 So. 2d 210 (La. App. 2d Cir. 1963).
32. 146 So. 2d 535 (La. App. 4th Cir. 1962).
reasonably anticipated, it cannot be considered actionable negligence. The accident must have been such that when considering all the facts and circumstances in connection therewith, it must have been reasonably foreseen by a man of ordinary intelligence and prudence. . . . The courts must consider that there was a probable or reasonably foreseeable danger rather than a remote possibility that an accident might happen, resulting in an injury.”

To a certain extent the duty of the occupier to protect invitees on his premises eludes definition. Generally he must warn the invitee of hidden traps and nonapparent defects when the invitee is not in a position to recognize or fully appreciate the full extent of danger. The occupier must also remedy those conditions so extremely hazardous that the invitee could not avoid them and use the premises safely even while exercising the utmost caution. The test being reasonableness, there is no duty to alter the premises to make them absolutely safe. One has the right to assume the invitee will conduct himself in a reasonably prudent manner and avoid apparent dangers.

Work Area Rule

The invitee has only a right to go on those parts of the premises to which his invitation extends. The “work area” doctrine is a qualification unchanged by the court’s extension of invitee status. The invitee has the right to assume the aisle and areas where business is carried on have been made safe in anticipation of his use. Also the social guest has only the right to go into those areas where he has been invited. The

33. Id. at 537.
35. 65 C.J.S. Negligence § 50, at 545 (1955), as quoted in Sherrill v. United States Fid. & Guar. Co., 132 So. 2d 72, 74 (La. App. 3d Cir. 1961): “‘However, even though the invitee has knowledge of the danger, or the defect is obvious, the duty of the owner or occupant to use reasonable care to keep the premises reasonably safe for invitee remains, and it runs concurrently with the duty of the invitee to protect himself, so that where the invitee does not fully appreciate the danger, or is without fault, the owner or occupant may be held liable for injury.’”
customer cannot go behind a counter and expect to find the same safe conditions he enjoys in the rest of the store; nor can the social guest roam freely into areas where he reasonably should know the invitor did not intend to allow him and then complain that a proper inspection had not been made. An express invitation to enter these places, however, does give him the rights of an invitee, though the degree of reasonable care is reduced. On the other hand, an implied invitation amounting to no more than failing to object when a person abuses his invitation by going into a work area has been held insufficient to grant invitee status.

**DETERMINING WHETHER DUTY HAS BEEN BREACHED**

**DEFENSES I**

As the courts move from technical classifications to an examination of each particular case a degree of stability is achieved in determining breach of duty.

The plaintiff's attorney should seldom have to worry whether his client can somehow be fitted under the "legal wire" to enjoy the fullest protection of the law. The defendant's attorney, on the other hand, has jurisprudence to guide him in deciding what defenses may most effectively be applied to the particular facts in his case. A survey of these defenses and how they have been applied probably gives the best view of how the changing concepts in this area have affected the rights and duties of the landowner.

**The Object Must Be Hazardous**

The first requirement to maintain a suit against a landowner for an accident is to show that the accident was caused by a hazardous condition. The extraneous object or condition must be itself inherently or potentially hazardous; if not, there is no breach of duty. In *Joynes v. Valloft & Dreaux* a soft drink bottle fell off a candy counter and shattered. There was no showing that the bottle was placed too near the edge, that the counter was cluttered with bottles, or that the bottle had

40. RESTATEMENT (SECOND), TORTS § 343, comment b (1965).
42. Clement v. Bohning, 159 So. 2d 495 (La. App. 1st Cir. 1963).
43. 1 So. 2d 108 (La. App. Orl. Cir. 1941).
remained there for an unreasonable time. The court implied that a soft drink bottle is not of itself a hazardous object; normal conduct can be carried on without taking special precautions to guard against knocking a bottle off a counter. The court set out the following rule:

"Where it is sought to hold liable a storekeeper for injuries resulting from some extraneous substance or object, there is no liability unless it appears, first that the object is dangerous, and second that it was allowed to remain a source of danger for too long a time."44

In *Lejeune v. Hartford Acc. & Indem. Co.*,45 the court reiterated this requirement. Plaintiff, a customer in a department store tripped on a chair in the aisle while looking at merchandise. She could not show that the displays were so ingeniously arranged as to distract her from looking where she was walking. In denying recovery the court remarked that it is "fundamental in our law that the extraneous instrumentality or other object causing the accident must be inherently or potentially dangerous."46 The court showed no concern over how long the chair had been in the aisle or who had placed it there.

Not every object causing an accident will result in the occupier being liable. The plaintiff must establish that the condition was of such a nature as to be reasonably foreseen as a potential cause of danger.47 In *Boute v. American Motorists Ins. Co.*,48 plaintiff, a social guest, was cut by an ordinary electric fan on a hallway floor as she slipped and reached out to stop her fall. The court admitted that a fan was a hazardous object, but applied a foreseeability test to deny recovery.

The Injury Must Be Foreseeable

In *Morel v. Franklin Stores Corp.*,49 the court denied recovery in an admittedly close case. While shopping in defendant's store,

44. Id. at 113.
45. 136 So. 2d 157 (La. App. 3d Cir. 1961).
48. 176 So. 2d 833 (La. App. 3d Cir. 1965).
49. 91 So. 2d 42 (La. App. Orl. Cir. 1956).
plaintiff told an employee she would like to remain, but that she had promised to meet her husband at a designated time. The employee offered to let her use a telephone behind a counter. She tripped on a three-quarter inch cable lying on the floor, the existence of which was known to the employees, but no warning was given to the plaintiff. The court found the facts did not disclose a hazard which would foreseeably cause an injury.

The Possibility of the Injury Must not be too Remote

The question asked is whether the injury is reasonably expected to flow from the hazard. If the answer is negative, but some minor harm was foreseeable, the court will find due care has been observed. Quite a different question appears when an occupier allows an inherently dangerous condition to remain because the possibility of the accident ever happening is too remote. The court must decide whether the chance of the accident is so small that it would be ridiculous to demand that the occupier guard against it or give a warning to each person coming in contact with it. Since the landowner is not an insurer of the safety of the invitee, he need not be on constant vigilance to guard against all foreseeable, but freak, accidents.50

In Campbell v. All State Ins. Co.51 defendant asked plaintiff to help him repair a lawnmower.52 Plaintiff pulled the cord several times in an attempt to start the machine. The cord met with no resistance and the plaintiff flew back, breaking his arm against a wall. It was proved that defendant knew the cord slipped, and that it had done so about four times a year. The court held that the accident was too remote to warrant special care.

The court also felt it was too remote that a man would walk into the kitchen of a cafe, get a gun, and shoot his common law

51. 112 So. 2d 143 (La. App. 1st Cir. 1958).
52. Ibid. The fact that plaintiff was not on the land of defendant did not faze the court. "Generally an invitee is held to be a person who goes on the premises of another in answer to an express or implied invitation of the other.... In the instant case, Campbell had not been invited to go on premises belonging to Ellard but he had been requested to perform a gratuitous service or favor for Ellard. That Ellard did not own the premises is immaterial under the circumstances, he having chosen the place to work on his mower and having designated the place at which he wished the requested service performed. Ellard, in making the request of Campbell, selecting the place and assisting in the execution of the act, assumed toward Campbell the same legal status as the owner of property who expressly or tacitly invites another upon his premises to perform some desired service." Id. at 147.
wife while a state trooper was sitting at the next table. In so finding the court set out the rule covering remoteness of accidents.

"Negligence consists in a failure to provide against the ordinary occurrences of life, and the fact that the provision made it insufficient as against an event such as may happen once in a lifetime or perhaps twice in a century does not... make out a case of negligence upon which an action in damages will lie."

DEFENSES II

These three defenses discussed before have one thing in common: they do not have to be proved in their absolute form to deny recovery. Seldom is a condition resulting in an accident found totally unhazardous, nor on accident completely unforeseeable or too remote. These are flexible concepts which courts use, often in combination, in an attempt to determine whether that nebulous margin of reasonable care has been crossed. These elements are merely guidelines by which the sliding scale of reasonable care can be fitted to particular facts.

Apparent Defects

On the other hand, there are two legal defenses long recognized by the courts which, like contributory negligence, will absolutely bar recovery. They are that the hazard is apparent, and that the occupier has no actual or constructive knowledge of hazards not created by himself.

A user of another's property is expected to exercise reasonable care in avoiding being injured by apparent hazards. The occupier's duty does not extend to a requirement of altering his premises in order to receive his guest. He, being the owner of the land, has the right to make it what he wishes. This policy has led the courts to remark that before an invitee can be successful in a suit, he must show fault by the landowner and

56. See cases cited notes 34 and 35 supra.
ignorance of the danger by the invitee.\(^{57}\) Levert v. Travelers Indem. Co.\(^{58}\) expressed the rule:

"The duty of an occupier of premises to an invitee is to exercise reasonable or ordinary care for his safety commensurate with the particular circumstances involved. The occupier thus owes a duty to avoid reasonably foreseeable danger to his invitee and keep his premises safe from hidden dangers in the nature of traps or pitfalls in that they are not known to the invitee and would not be observed and appreciated by him in the exercise of ordinary care. This includes the duty of reasonable prior discovery of such unobservable dangerous conditions of the premises and correction thereof or a warning to the invitee of the danger.

"On the other hand, the occupier does not insure an invitee against the possibility of accident. The invitee assumes all normally observable or ordinary risks attendant upon the use of the premises. The occupier is not liable for an injury to an invitee resulting from a danger which is observable or which should have been observed by the invitee in the exercise of reasonable care, or from a danger which the invitee should reasonably have appreciated before exposing himself to it."\(^{59}\)

Before an apparent defect will bar recovery, the invitee must be in such a position, or should have been in such a position,\(^{60}\) to be fully apprised of the risk involved. If the plaintiff can show that he was aware of a certain degree of hazard, but that the hazard was of such a nature that he reasonably could not comprehend the true extent of danger, he is still entitled to recover.\(^{61}\)

As a general rule any slick, wet but adequately lighted surface is an apparent hazard and the risk is assumed by the user.\(^{62}\) Miller v. New Amsterdam Cas. Co.\(^{63}\) demonstrates how far this doctrine

---

58. 140 So. 2d 811 (La. App. 3d Cir. 1962).
59. Id. at 813.
has been carried. The assured operated a beauty shop. The weather was extremely cold and snow had lain on the ground for four days. Plaintiff admitted she was aware of the danger of slipping on ice and snow, so well aware that at the time of the accidents she was wearing rubber-soled tennis shoes. Apparently the defendant did not share the plaintiff's full appreciation of the danger because he allowed the snow and ice to remain on his private sidewalk without taking the precaution of sprinkling salt, sand, or ashes. Plaintiff slipped on the sidewalk and was seriously injured. The court found the defendant had been negligent, but denied recovery on the grounds that the hazard was obvious and the invitee was in a position to fully appreciate the danger involved. One dissenting judge made this observation:

"Under such a theory, the more unreasonable a hazard and the greater the danger created to others by the condition, the less negligent is the occupier of the premises in maintaining a hazard endangering his customers' safety in their use of the premises per the implied invitation of the shop owner that they do so."\textsuperscript{64}

The decision seems manifestly unjust and incorrect. The court in stating the rule applicable italicized what seems to have been its error:

"The circumstance that the entrance way to a commercial building may be more slippery in wet weather than in dry is not of itself sufficient to constitute actionable negligence on the part of the property owner, \textit{when such a condition is observable by a reasonably prudent person of ordinary intelligence and when the entranceway can be traversed in safety by the exercise of ordinary care}.\textsuperscript{65}

The findings of the majority seem to belie the fact that the sidewalk could have been used safely even with the exercise of extraordinary care.\textsuperscript{66}

The holding in the \textit{Miller} case, however, is supported by long
and sound jurisprudence. The court merely failed to observe that ice is more treacherous than rain slick surfaces. The only case which may have modified this rather absolute stand is Hesse v. Marquette Cas. Co. But this case is subject to being distinguished on the grounds that the court found the area "poorly lighted." In this case, plaintiff walked into the foyer of a night club where water had accumulated on the floor. The court found the floor was of a material that lacked a non-slip ingredient, and the rain had been able to come under the door because of faulty construction. Knowing this the manager had not put up a canopy, nor placed rubber mats to protect his customers. The court simply stated its reason for allowing recovery:

"There are myriads of factual situations involved in cases of this kind, and application of the principles of law to each case must be applied by the Court in conformity with the true civil law concept. . . . He [the proprietor] must maintain his premises in a reasonably safe condition. If he maintains any furnishings or equipment therein which probably, foreseeably, or reasonably, will cause damage to others he should provide adequate safeguards to avert an accident."

The concept of apparent hazards has been applied to numerous situations: a man failing to notice a step in a hallway when he should have been able to see it from the fact that the room he was entering was lower than the one he had just left; a woman slipping on a loose rug which she knew was not properly fastened; and even a woman hit in the lower abdomen by a bowling ball.

The apparent danger rule seems to have absorbed, if not embodied, the defense of assumption of risk. The courts' preference to talk in terms of apparent and obvious defects instead of assumption of risk may be due to their familiarity with the

68. 170 So. 2d 173 (La. App. 4th Cir. 1964).  
69. Id. at 170.  
70. Magoni v. Wells, 154 So. 2d 534 (La. App. 4th Cir. 1963).  
former terms in the law of warranty in the Civil Code.\textsuperscript{73} The court did, however, deny recovery on the basis of assumption of risk in \textit{Regenbagan v. Southern Shipwrecking Corp.}\textsuperscript{74} Plaintiff fell when he walked across a plank which connected two ships being dismantled for salvage. Defendant’s agent had gone before and had jumped off the plank before reaching the end. Plaintiff walked past the place where the agent had jumped and the board upended. The court held:

“Where an employee is not placed by an employer in a position of undisclosed danger but is a mature man, doing the ordinary work which he was engaged to do and whose risks are obvious to anyone, he assumes the risks of the employment.”\textsuperscript{75}

\textbf{No Actual or Constructive Knowledge}

The occupier also may use the defense that he had no actual or constructive knowledge of extraneous objects left on the premises by a third person.\textsuperscript{76} This defense is perennial in slip-fall cases in supermarkets. In order to recover, a plaintiff must show that the extraneous object was placed on the floor through the occupier’s own negligence,\textsuperscript{77} or, if a third person was responsible, that the object was allowed to remain on the floor for such an unreasonable length of time that defendant had failed in his duty to inspect and to remedy hazardous conditions.\textsuperscript{78}

In the landmark case of \textit{Peters v. Great Atlantic & Pacific Tea Co.},\textsuperscript{79} a woman pushing a shopping cart slipped on a bean on the floor. Plaintiff attempted to use the doctrine of res ipsa loquitur, but the court found the doctrine inapplicable and found that the plaintiff failed to prove negligence:

“Even if we concede, however, that her foot slipped upon a bean which had fallen to the floor still plaintiff has entirely failed to prove that the bean remained on the floor for such a period of time that it became the duty of the defendant to

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{73}] \textit{La. Civil Code} art. 2521 (1870) dealing with apparent defects as redhibitory vice.
\item[\textsuperscript{74}] 41 So. 2d 110 (La. App. 4th Cir. 1949).
\item[\textsuperscript{75}] Id. at 113.
\item[\textsuperscript{76}] Lawson v. Continental Southern Lines, Inc., 176 So. 2d 220 (La. App. 2d Cir. 1965) denied recovery.
\item[\textsuperscript{77}] Dever v. George Theriot’s Inc., 150 So. 2d 602 (La. App. 3d Cir. 1964) ; Reid v. Monticello, 33 So. 2d 790 (La. App. 1st Cir. 1948).
\item[\textsuperscript{78}] See, e.g., Vogts v. Schweigmann, 56 So. 2d 177 (La. App. Orl. Cir. 1952).
\item[\textsuperscript{79}] 72 So. 2d 562 (La. App. 2d Cir. 1954).
\end{enumerate}
\end{footnotesize}
notice and remove it from the floor. In failing to do this plaintiff has failed to prove fault on the part of the defendant to the extent required in order to assess liability."

This places an almost insurmountable burden of proof upon the plaintiff. Often the plaintiff in such a case must rely on adverse witnesses in the employ of the defendant to re-establish the events of the accidents. Plaintiff through cross-examination is able to elicit the inspection procedure of defendant. Yet, he is thereby left with making out a case on often unreliable testimony.

Even if the inspection procedure is found to be inadequate it must also be shown by a preponderance of the evidence that the extraneous object had been on the floor for too unreasonable a time.

This defense will not protect an occupier from his own negligence or the negligence of his agents. There is no requirement of constructive knowledge in such a case. In Dever v. George Theriot's Inc. the court remarked:

"A similar rule of notice of the hazard does not apply when the storekeeper's employees themselves created the danger through some act on their part. In this latter instance, the storekeeper is liable under the principle of respondeat superior for the negligent acts of his employees in creating an unreasonable hazard to the storekeeper's invitees."

80. Id. at 565.
82. See Cannon v. Great Atlantic & Pacific Tea Co., 146 So. 2d 804, 812 (La. App. 3d Cir. 1962) (dissent): "The store keeper has in its possession all of the evidence surrounding what made this floor slippery, if it was. It is only natural that the store employees feel that no fault on their part or on the part of their co-employees, with whom they associate daily, had contributed to the accident. Whether they are accurate in this feeling and whether their testimony at the trial, more than a year after the accident, truly reflects what they actually saw and knew at the time (or rather is what they thought should have been the situation or is what mutual inter-conversations over the year had assured them was the situation), is a matter for the trial court to determine by its evaluation of the credibility and accuracy of the witnesses."
84. 159 So. 2d 602 (La. App. 3d Cir. 1964).
85. Id. at 604.
Probability of occurrence affects the scope of the duty to inspect for and discover dangerous objects left on the land by a licensee. In *Wilkinson v. Hussen* plaintiff sat on a trick chair which had been placed there by a third party. The court reversed a motion for summary judgment in favor of defendants:

"An owner of property or premises may be liable for injury... where it was caused by an act, connected with the property, which he permitted another to do, or by a defective or dangerous condition of the premises which he permitted another to create.

"An owner of premises may be liable for injuries caused by their defective or dangerous condition even though they are in the possession of a licensee. Generally speaking, however, an owner of land is not liable for an injury caused by the acts of a licensee unless such acts constitute a nuisance which the owner knowingly suffers to remain." 87

The court arrived at the correct result, but seems to have applied the wrong rule. The rule stated implies the landowner needs actual knowledge of the dangerous object placed on his property by a third party. There seems to be no reason why the rule in *Peters v. Great Atlantic and Pacific Tea Co.* should not be applied. Then a determination should be made as to whether the defendant had constructive knowledge.

The rule applied by the court should logically be restricted to actual physical acts done on the premises by a licensee without the actual knowledge of the occupier.

Constructive knowledge is a presumption producing the same effect as actual knowledge. There must be facts known to the occupant which would influence a reasonable man to make further inquiry. 88 Thus if the landowner would have no reason to expect that some hazardous object had been placed on his premises, it would seem illogical to require him to make routine, periodic inspections to discover possible dangers. The degree of reasonableness should be adjusted to fit the particular circumstances and facilities of the occupier.

---

86. 154 So. 2d 490 (La. App. 1st Cir. 1963).
87. Id. at 496, quoting 65 C.J.S. *Negligence* §§ 92a, 92, at 605, 606 (1955 ed.) now § 92, at 1045, 1042 (1966 ed.).
88. Longlois v. Ackel, 146 So. 2d 289 (La. App. 3d Cir. 1962) .
CONCLUSION

The doctrine of imputed knowledge gives sound support to the distinction between guest and licensee allowed only by sufferance. Only a fine line separates this class from trespassers. To the licensee the occupier should owe a duty of reasonable care for he has consented to his presence. However, it would be too burdensome to require the landowner to prepare his property for their reception. Enough is asked by requiring him to repair known defects to guard their safety. On the other hand, when he throws open his premises and invites one to enter, he voluntarily assumes the responsibility of protecting his guests from injury. A hermit should be allowed to live his life, but one who holds open his doors to his friends and business guests cannot be heard to say he has the right to disregard the well-being of those who give him entertainment and profit.

Benjamin F. Day

89. Restatement (Second), Torts § 341 (1965), Prosser, Torts § 60, at 388 (3d ed. 1964): "[T]he earlier decisions frequently said that there was no duty to a licensee except to refrain from injuring him intentionally, or by wilful, wanton or reckless conduct. . . . [A]n increasing regard for human safety has led to a gradual modification of this position, and the greater number of courts now expressly reject it. It is now generally held that as to any active operations which the occupier carries on, there is an obligation to exercise reasonable care for the protection of a licensee."