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Torts—Extension of Definition of Invitee to One Entering Private Property Without Permission

D, a private boat club, leased certain waterfront property. *P*, a sixteen-year-old boy, a nonmember of the club, went onto *D*'s property with friends to swim and dive. *P* had done this repeatedly in the past, but had never asked for or been given permission to use the premises. *P* was severely injured when he dived from *D*'s pier into the ocean, and either struck the ocean bottom or an object concealed beneath the water. *P* brought an action for his injuries. One of the theories upon which he based his action was that he was an invitee to whom *D* owed a duty of ordinary care to keep the premises reasonably safe and to discover hidden dangers. Judgment of nonsuit was ordered in the lower court. *Held*, affirmed. The court adopted the definition of an invitee set forth in the *Restatement Second of Torts*, which provides that an invitee may be either a public invitee or a business visitor. *P* could not qualify under this definition. *O'Keefe v. South End Rowing Club*, 64 Cal.2d 791, 414 P.2d 830 (1966).

Three basic tests have been used to define an invitee: (1) the "business visitor" test; (2) the "public invitation" or "public invitee" test; and (3) a test combining these two, *i.e.*, that an "invitee" is a person who can qualify under either of the first two tests.

Under the "business visitor" test, also known as the "economic benefit" or "business benefit" test, adopted by the first *Restatement of Torts*, an entrant upon land of another is not entitled to invitee status unless the visit is "directly or indirectly connected with business dealings with the possessor of the land."¹ The second of the basic tests, the "public invitation" or "public invitee" test, would find one to be an invitee "whenever he comes upon the land of another under circumstances justifying the conclusion that the landowner intended to open his land to public use for the purposes for which the entrant came."² Recognition of a test whereby an invitee is a person who can qualify as either a business visitor or a public invitee was given by the *Restatement Second of Torts*.³ It states that "a public invitee is a person who is invited

¹ RESTATEMENT, TORTS § 332 (1934).

² Annot., 95 A.L.R.2d 992, 999 (1964).

³ RESTATEMENT (SECOND), TORTS § 332 (1) (1964).

to enter or remain on land as a member of the public for a purpose for which the land is held open to the public,"⁴ and that "a business visitor is a person who is invited to remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land."⁵

An examination of the historical development of the definition of an invitee reveals that the public invitation theory is considered the oldest of the tests, and that it was the preferred test during the early development of the law in this area.⁶ The theory of the business visitor seems to have originated in approximately 1878, when a writer on the law of negligence, Robert Campbell, derived it from the ambiguous use of the word "business" in some of the early English cases.⁷ It was then given support by the United States Supreme Court in 1881, in *Bennett v. Louisville & N.R.R.*,⁸ when the Court quoted Campbell and said that "invitation is inferred when there is a common interest or mutual advantage, while a license is inferred when the object is the mere pleasure or benefit of the person using it."⁹

The business visitor test was more fully developed by Professor Francis H. Bohlen,¹⁰ and as a result, the theory was accepted by the first *Restatement of Torts*,¹¹ for which Professor Bohlen was the Reporter. In the first Restatement, the term business visitor was used exclusively, while the term "invitee" was not recognized.

Although the first Restatement and many courts adopted the more narrow business visitor test of invitee status, most of the courts which professed to follow that view seemingly made an effort to construe the definition liberally.¹² An example of such a liberal construction is the New Jersey case of *Murphy v. Kelly*,¹³ in which the court held that children who accompany customers

⁴ *Id.* § 332. (2).

⁵ *Id.* § 332 (3).

⁶ Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573 (1942).

⁷ PROSSER, *TORTS* § 61 (3d ed. 1964).

⁸ 102 U.S. 577 (1881) (dictum.)

⁹ *Id.* at 585.

¹⁰ Bohlen, *The Bases of Affirmative Obligations in the Law of Tort*, 53 U. PA. L. REV. 209, 237, 337 (1905); *The Duty of a Landowner Towards Those Entering His Premises of Their Own Right*, 69 U. PA. L. REV. 142, 340 (1920).

¹¹ RESTATEMENT, *Torts* § 332 (1934).

¹² PROSSER, *op. cit. supra* note 7.

¹³ 28 N.J. Super. 266, 100 A.2d 558 (1953).

into business establishments, and who would certainly not be buying anything themselves, are invitees. In a Missouri case,¹⁴ the court held that a friend of a store customer who entered the store with the customer was an invitee. Most courts follow this line of cases, in spite of the fact that there are no direct or indirect business dealings between these people and the occupant, as the business visitor test requires.

The position of West Virginia law in regard to the definition of an invitee is in need of clarification. The West Virginia Supreme Court of Appeals has held that "a case of invitation exists when one goes upon the premises for the common or mutual advantage of both parties"¹⁵ In a later case,¹⁶ the West Virginia Supreme Court stated that a person who visits an automobile show room for the purpose of negotiating the purchase of an automobile is an invited person. More recently, the court held that "a person is an invitee when for purposes connected with the business conducted on the premises he enters or uses a place of business."¹⁷ These remarks by the West Virginia Supreme Court of Appeals seem to indicate that the economic benefit theory is followed in West Virginia and this has been accepted as the view in West Virginia by writers on the subject.¹⁸

On the other hand, there is evidence that a person failing to qualify under the business visitor test, but qualifying under the test of the new *Restatement of Torts*, might be held to be an invitee by the West Virginia court. In *Wingrove v. Home Land Co.*,¹⁹ the court held that members of the family or invited guests of a customer of a gasoline filling station are invitees of the operator of the station.²⁰ In 1937, in *Ashworth v. City of Clarksburg*,²¹ the court stated that "the public maintenance of the pool was a public invitation"²² and held that the city would be liable for failure to exercise ordinary care in its maintenance of the

¹⁴ *Kennedy v. Phillips*, 319 Mo. 573, 5 S.W.2d 33 (1928).

¹⁵ *Ross v. Kanawha & M.R.R.*, 76 W. Va. 197, 201, 85 S.E. 180, 181 (1915).

¹⁶ *Cooper v. Pritchard Motor Co.*, 128 W. Va. 312, 36 S.E.2d 405 (1945).

¹⁷ *Burdette v. Burdette*, 147 W. Va. 313, 127 S.E.2d 249 (1962).

¹⁸ BROWN & LUGAR, LEGAL STATUS OF OWNERS OR OCCUPANTS OF WEST VIRGINIA LAND AS TO PERSONS WHO ENTER THEIR LAND 4 (1965).

¹⁹ 120 W. Va. 100, 196 S.E. 563 (1938).

²⁰ The court limited its holding "to owners or operators of motor vehicles and their families or guests." *Id.* at 108, 196 S.E. at 566.

²¹ 118 W. Va. 476, 190 S.E. 763 (1937).

²² *Id.* at 478, 190 S.E. at 764.

swimming pool. This case is cited by Dean Prosser²³ as an example of a court following the public invitation theory in regard to the definition of an invitee. In another case,²⁴ the West Virginia court stated that

invitation is the act of one who solicits or incites others to enter upon, remain in, or make use of, his property or structures thereon, or who so arranges the property or the means of access to it or of transit over it as to induce the reasonable belief that he expects or intends that others shall come upon it or pass over it.²⁵

There has been no case since the adoption of the new *Restatement of Torts* definition of an invitee in which the West Virginia Supreme Court of Appeals has stated its position in regard to what constitutes an invitee. It should be pointed out, however, that even in cases in which the court has ruled that a business visitor was an invitee, it did not necessarily exclude a public invitee. There are also remarks by the court, cited above, which indicate that it does follow the public invitation test as well as the business visitor test. In light of the added impetus and credibility given to the public invitation concept of an invitee by the American Law Institute, it is possible that the West Virginia Supreme Court of Appeals may in the future formally adopt the new Restatement definition of an invitee, as did the California Supreme Court in the principal case.

Robert Bruce King

Torts—Rebuttable Presumption of Child's Incapacity for Contributory Negligence

P, a twelve year old child, rode a bicycle into an intersection and was injured when the bicycle collided with an automobile driven by *D*. In directing a verdict for *D* the trial court ruled as a matter of law that *P* was guilty of contributory negligence. *Held*, reversed for further proceedings. The contributory negligence of

²³ PROSSER, *op. cit. supra* note 7.

²⁴ *Waddell v. New River Co.*, 141 W. Va. 880, 93 S.E.2d 473 (1956).

²⁵ *Id.* at 883, 93 S.E.2d at 476.