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Duty Of Reasonable Care To Third Persons On The Premises

DUTY OF REASONABLE CARE TO THIRD PERSONS ON THE PREMISES

In dealing with the problem of the standard of care owed by an owner or occupier of land to one injured upon that land, the courts have traditionally engaged in an examination of the legal status of the entrant in an effort to determine whether he was a trespasser, licensee or invitee.[1] After the plaintiff has been placed in one of these categories, certain general rules have been applied which require varying degrees of care by the occupier with respect to each class.[2]

Rowland v. Christian[3] involved a suit by a social guest who was injured in his host's apartment when the knob of a cold water faucet broke while he was using it. The defendant was aware that the faucet was defective and had reported that fact to her landlords. Yet, she failed to warn the plaintiff of the defect, which was not obvious, even when she knew that he was about to encounter it. The court, with two judges dissenting, reversed a summary judgment for the defendant entered in a lower court.

Referring to a California statutory provision[4] reflecting the general principle of tort law imposing liability for want of ordinary care,[5] the court concluded that exceptions to this statutory rule should not be made "unless clearly supported by public policy."[6] In the court's opinion this criterion was not met by the common law dis-

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[1]*See* W. PROSSER, TORTS § 58, at 364 (3d ed. 1964). The RESTATEMENT (SECOND) OF TORTS (1965) defines these terms as follows:

§ 329 *Trespasser Defined.* "A trespasser is a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise."

§ 330 *Licensee Defined.* "A licensee is a person who is privileged to enter or remain on land only by virtue of the possessor's consent."

§ 332 *Invitee Defined.* "(1) An invitee is either a public invitee or a business visitor."

[2]*See, e.g.*, Snyder v. I. Jay Realty Co., 30 N.J. 303, 153 A.2d 1 (1959); Rogers v. Cato Oil & Grease Co., 396 P.2d 1000 (Okla. 1964).

[3]— Cal. 2d —, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

[4]"Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person...." CAL. CIV. CODE § 1714 (West 1954).

[5]"Failure to use reasonable care is the foundation of all negligence, and a finding of such fact is a ncessary prerequisite to tort liability...." Atchison, T. & S.F. Ry. v. Messmore, 339 P.2d 779, 782 (Okla. 1959); *accord*, Dobbertin v. Johnson, 95 Ariz. 356, 390 P.2d 849 (1964); Robelen Piano Co. v. DiFonzo, 53 Del. 346, 169 A.2d 240 (1961); Greyhound Corp. v. White, 323 S.W.2d 578 (Ky. 1958); Pinyan v. Settle, 263 N.C. 578, 139 S.E.2d 863 (1965); Barnette v. Dickens, 205 Va. 12, 135 S.E.2d 109 (1964).

[6]443 P.2d at 564, 70 Cal. Rptr. at 100.

tinctions between trespassers, licensees and invitees. Feeling that these distinctions tend to obscure, rather than illuminate, the proper basis for imposing liability, the court stated: "We decline to follow and perpetuate such rigid classifications."[7] The new test to be applied is whether the occupier acted as a reasonable man in view of the foreseeability of harm to those on the premises.[8] Applying this rule to the facts of the case, it was concluded that the failure to repair the defective faucet or to warn of its potential danger constituted negligence.

The common law distinctions of trespasser, licensee and invitee had their origins in the mid-nineteenth century,[9] and a set of rather well-defined rules soon developed with respect to each class.[10] These rules have subsequently been altered and eroded by the courts. However, certain general propositions are still nearly universally followed. For example, the owner or occupier of premises has no duty toward a trespasser, except to refrain from injuring him by willful or wanton conduct.[11] This is also true with respect to the duty owed a licensee,[12] who has no right to expect that the premises will be prepared for his

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[7]*Id.* at 568, 70 Cal. Rptr. at 104.

[8]The court mentioned the existence of liability insurance. Rather than using it as a basis for imposing liability, however, the court suggested that it should not be deemed a reason for refusing to require a duty of reasonable care.

> [T]here is no persuasive evidence that applying ordinary principles of negligence law ... will materially reduce the prevalence of insurance due to increased cost or even substantally increase the cost. *Id.* at 567-68, 70 Cal. Rptr. at 103-04.

[9]*See* Marsh, *The History and Comperative Law of Invitees, Licensees and Trespassers,* 69 L.Q. REV. 182 (1953), in which the author points out how the various attempts to resolve the conflicting values of the sanctity of landed property and the need to protect the community from negligence, combined with a judicial distrust of the jury system, resulted in the development of different categories of entrants.

[10]It should be noted that an entrant's status may shift while he is on the land when his relationship to the occupier changes, or when he exceeds the scope of his invitation. *See* Mathias v. Denver Union Terminal Ry., 137 Colo. 224, 323 P.2d 624 (1958) (invitee became licensee); Brant v. Matlin, 172 So. 2d 902 (Fla. Dist. Ct. App. 1965) (licensee became invitee); Cobb v. Clark, 265 N.C. 194, 143 S.E.2d 103 (1965) (invitee became licensee).

[11]*E.g.,* Missouri-Kansas-Texas R.R. v. Mathis, 349 F.2d 897 (10th Cir. 1965); Langford v. Mercurio, 254 Miss. 788, 183 So. 2d 150 (1966); Beauchamp v. New York City Housing Authority, 12 N.Y.2d 400, 190 N.E.2d 412, 240 N.Y.S.2d 15 (1963); Evans v. Philadelphia Transp. Co., 418 Pa. 567, 212 A.2d 440 (1965); Nalepinski v. Durner, 259 Wis. 583, 49 N.W.2d 601 (1951).

[12]*E.g.,* Steinmeyer v. McPherson, 171 Kan. 275, 232 P.2d 236 (1951); Maxwell v. Maxwell, 140 Mont. 59, 367 P.2d 308 (1961); Walker v. Williams, 215 Tenn. 195, 384 S.W.2d 447 (1964).

reception, even though he has entered with permission.[13] There is almost universal agreement that a social guest, no matter how expressly he may have been invited, is not an invitee, but a mere licensee[14] who must take the premises as he finds them.[15] Invitees include only public invitees and business visitors.[16]

An invitee enjoys the greatest protection. The occupier has an affirmative duty of care to inspect his premises and make them safe for the reception of invitees.[17] He must also warn an invitee of any concealed dangers,[18] although he has no duty to warn of open or obvious dangers which are as well known or discernible to the invitee as to the occupier himself.[19]

The most abrupt and sweeping change in these rules has been made in England where the distinctions between licensees and invitees have been abolished by statute.[20] A "common duty of care"[21]

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[13]The rule is stated to be that the licensee takes the premises as he finds them. Warner v. Lieberman, 253 F.2d 99, 101 (7th Cir. 1958), *cert. denied*, 357 U.S. 920 (1958); Kapka v. Urbaszewski, 47 Ill. App. 2d 321, 198 N.E.2d 569, 572 (1964); Graham v. Loper Elec. Co., 192 Kan. 558, 389 P.2d 750, 753 (1964); Berger v. Shapiro, 30 N.J. 89, 152 A.2d 20, 24 (1959).

[14]*See, e.g.*, Laube v. Stevenson, 137 Conn. 469, 78 A.2d 693 (1951); Kapka v. Urbaszewski, 47 Ill. App. 2d 321, 198 N.E.2d 569 (1964); Wolfson v. Chelist, 284 S.W.2d 447 (Mo. 1955); Maxwell v. Maxwell, 140 Mont. 59, 367 P.2d 308 (1961); Berger v. Shapiro, 30 N.J. 89, 152 A.2d 20 (1959); Krause v. Alper, 4 N.Y.2d 518, 151 N.E.2d 895, 176 N.Y.S.2d 349 (1958); Davies v. McDowell Nat'l Bank, 407 Pa. 209, 180 A.2d 21 (1962); Walker v. Williams, 215 Tenn. 195, 384 S.W.2d 447 (1964); Cordula v. Dietrich, 9 Wis. 2d 211, 101 N.W.2d 126 (1960).

[15]"For the time being he thereby becomes a member of the host's family and as such accepts the entertainment accorded him coupled with the understanding that he must take the premises as he finds them and accommodate himself to the conditions of his host." Pagliaro v. Pezza, 92 R.I. 110, 167 A.2d 139, 141 (1961); *See also* Ziegler v. Elms, 388 S.W.2d 839, 842 (Mo. 1965); Krause v. Alper, 4 N.Y.2d 518, 151 N.E.2d 895, 176 N.Y.S.2d 349, 351 (1958).

[16]RESTATEMENT (SECOND) OF TORTS § 332 (1965), note 1 *supra*.

[17]Harry Poretsky & Sons v. Hurwitz, 235 F.2d 295 (4th Cir. 1956); Garrett v. National Tea Co., 12 Ill. 2d 567, 147 N.E.2d 367 (1958); Graham v. Loper Elec. Co., 192 Kan. 558, 389 P.2d 750 (1964); Mackey v. Allen, 396 S.W.2d 55 (Ky. 1965); Benjamin v. O'Connell & Lee Mfg. Co., 334 Mass. 646, 138 N.E.2d 126 (1956); Bonniwell v. Saint Paul Union Stockyards Co., 271 Minn. 233, 135 N.W.2d 499 (1965).

[18]Harry Poretsky & Sons v. Hurwitz, 235 F.2d 295 (4th Cir. 1956); Graham v. Loper Elec. Co., 192 Kan. 558, 389 P.2d 750 (1964); Benjamin v. O'Connell & Lee Mfg. Co., 334 Mass. 646, 138 N.E.2d 126 (1956); Straight v. B.F. Goodrich Co., 354 Pa. 391, 47 A.2d 605 (1946).

[19]Chenoweth v. Flynn, 251 Iowa 11, 99 N.W.2d 310 (1959); Del Sesto v. Condakes, 341 Mass. 146, 167 N.E.2d 635 (1960); Wilkins v. Allied Stores, 308 S.W.2d 623 (Mo. 1958).

[20]Occupiers' Liability Act of 1957, 5 & 6 Eliz. 2, c. 31.

[21]This duty is defined as "... a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe

is imposed upon the occupier but only with respect to those who come upon his land by his invitation or with his permission. Thus, trespassers are not included under the statute.[22]

American jurisdictions, which followed England in the adoption of the traditional distinctions, have not seen fit to follow the English practice of abolishing the distinctions by legislative action. Rather, what has happened is that:

> [i]n an effort to do justice in an industrialized urban society, ... modern [American] common-law courts have found it necessary to formulate increasingly subtle verbal refinements, to create subclassifications among traditional common-law categories, and to delineate fine gradations in the standards of care which the landowner owes to each.[23]

This erosion can be seen most clearly in relation to the duties which have been imposed upon the occupier with respect to licensees. A distinction has been made between active and passive negligence,[24] and the occupier is now held to a duty of reasonable care as to any affirmative actions which he may take while a licensee is on the premises.[25] The courts have also seized upon the notion that a concealed dangerous condition known to the occupier is a "trap,"[26] and liability will be imposed where the occupier fails to disclose it to his licensee.[27] With the exception of the duty to inspect the premises to discover such

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in using the premises for the purposes for which he is invited or permitted by the occupier to be there." Occupiers' Liability Act of 1957, 5 & 6 Eliz. 2, c. 31, § 2(2), at 834.

[22]*See* Payne, *The Occupiers' Liability Act*, 21 MODERN L. REV. 359 (1958).

[23]Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630 (1959).

[24][T]he term 'passive negligence' denotes negligence which permits defects, obstacles or pitfalls to exist upon the premises, in other words, negligence which causes dangers arising from the physical condition of the land itself. 'Active negligence,' on the other hand, is negligence occurring in connection with activities conducted on the premises, as, for example, negligence in the operation of machinery or of moving vehicles....

Potter Title & Trust Co. v. Young, 367 Pa. 239, 80 A.2d 76, 78 (1951).

[25]Ciaglo v. Ciaglo, 20 Ill. App. 2d 360, 156 N.E.2d 376, 379 (1959); Potter Title & Trust Co. v. Young, 367 Pa. 239, 80 A.2d 76, 79 (1951); Cordula v. Dietrich, 9 Wis. 2d 211, 101 N.W.2d 126 (1960). *See also* W. PROSSER, TORTS § 60, at 388-89 (3d ed. 1964). *Compare* Warner v. Lieberman, 253 F.2d 99 (7th Cir. 1958) (failure to repair lounge chair was passive negligence and not actionable).

[26]Walker v. Williams, 215 Tenn. 195, 384 S.W.2d 447, 451 (1964); Szafranski v. Radetzky, 31 Wis. 2d 119, 141 N.W.2d 902, 905 (1966).

[27]Laube v. Stevenson, 137 Conn. 469, 78 A.2d 693, 696 (1951); Kapka v. Urbaszewski, 47 Ill. App. 2d 321, 198 N.E.2d 569, 572 (1964); Mackey v. Allen, 396 S.W.2d 55, 58 (Ky. 1965); Berger v. Shapiro, 30 N.J. 89, 152 A.2d 20, 24-25 (1959). *See also* 2 F. HARPER & F. JAMES, TORTS § 27.9, at 1471-72 (1956); W. PROSSER, TORTS § 60, at 389-90 (3d ed. 1964); RESTATEMENT (SECOND) OF TORTS § 342 (1965).

concealed dangerous conditions, this is identical to the duty owed to an invitee[28] and is subject to the same limitations that there is no obligation to warn of dangerous conditions which are open or could be observed by a licensee using reasonable care for his own safety.[29] One court has made an additional qualification that the occupier must have had an opportunity to warn the licensee of the danger before the injury took place.[30]

Another method which has been used by the courts to shift the burden from the entrant to the occupier is the broadening of the category of invitees so as to bring many who were formerly licensees under its protections. Traditionally, one was an invitee only if he passed the "economic benefit" test, that is, if because of his presence there was a possibility of economic benefit accruing to the occupier.[31] However, an "invitation" test has also been applied to determine who is an invitee.[32] This test based upon an implied representation to the public that the premises have been prepared for their reception.[33] The result is that entrants have been held to be invitees, under this latter test, in cases where economic benefit was completely lacking.[34] But in spite of the trend toward the broadening of the invitee category, courts have not permitted social guests to come within the "invitation" test, nor have they considered gratuitous services performed by a social guest to be sufficient grounds for a finding that such guests are invitees under the "economic benefit" theory.[35]

Perhaps the greatest dissatisfaction with the decisions of the courts

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[28]*See, e.g.*, Harry Poretsky & Sons v. Hurwitz, 235 F.2d 295 (4th Cir. 1956); Graham v. Loper Elec. Co., 192 Kan. 558, 389 P.2d 750 (1964).

[29]Hennessey v. Hennessey, 145 Conn. 211, 140 A.2d 473 (1958); Mackey v. Allen, 396 S.W.2d 55 (Ky. 1965).

[30]Lomberg v. Renner, 121 Vt. 311, 157 A.2d 222 (1959).

[31]*See, e.g.*, McNulty v. Hurley, 97 So. 2d 185 (Fla. 1957); Chambers v. Peacock Constr. Co., 115 Ga. App. 670, 155 S.E.2d 704 (1967); Ward v. Thompson, 57 Wash. 655, 359 P.2d 143 (1961); 2 F. HARPER & F. JAMES, TORTS § 27.12, at 1478-79 (1956).

[32]*See, e.g.*, Guilford v. Yale University, 128 Conn. 499, 23 A.2d 917 (1942); Handleman v. Cox, 39 N.J. 95, 187 A.2d 708 (1963); Tancian v. Meghrigian, 15 N.J. 267, 104 A.2d 689 (1954); Ward v. Thompson, 57 Wash. 655, 359 P.2d 143 (1961).

[33]*See* W. PROSSER, TORTS § 61, at 398-99 (3d ed. 1964).

[34]Price v. Central Assembly of God, 144 Colo. 297, 356 P.2d 240 (1960) (attending meeting); Guilford v. Yale University, 128 Conn. 449, 23 A.2d 917 (1942) (college reunion). *See also* Valunas v. J.J. Newberry Co., 336 Mass. 305, 145 N.E.2d 685 (1957) (child with parent in store).

[35]Kapka v. Utbaszewski, 47 Ill. App. 2d 321, 198 N.E.2d 569 (1964) (delivering gift); Ciaglo v. Ciaglo, 20 Ill. App. 2d 360, 156 N.E.2d 376 (1959) (relative picking plums); Pearlstein v. Leeds, 52 N.J. Super. 450, 145 A.2d 650 (App. Div. 1958) (relative preparing for party).

has been in the area concerning the duty owed to social guests.[36] This dissatisfaction is precipitated not only by the fact that it is very difficult to fit social guests comfortably into any one of the three categories commonly recognized, but also by the seemingly logical inconsistency in saying that although social guests have been invited, they are not invitees. One court, pointing to this inconsistency, has decided that social guests expressly invited to the premises will be treated as invitees.[37]

Other courts, while unwilling to go that far, have taken varying approaches in an effort to solve the problems caused by the classification of social guests as licensees. In one jurisdiction, a special category has been created for social guests.[38] However, the duties which have been imposed upon the occupier of land with respect to this new class are in fact identical to those duties generally owed a licensee in most jurisdictions.[39] In contrast, the Supreme Court of Washington, in *Potts v. Amis*,[40] while retaining the traditional licensee classification, gave greater protection to social guests by holding that the occupier has a duty to exercise reasonable care to avoid injuring a person on his land with his permission.[41] *Potts* allowed recovery for injuries sustained when a guest was struck by a golf club being demonstrated by his host. In a special concurrence, Justice Hill made the point which has been the basis of the critics' argument against the traditional system: "Whether these parties were on a golf course, in a stranger's vacant lot, or on the defendant's lawn is quite immaterial so far as their duties toward each other are concerned."[42]

The common law rules with respect to owners and occupiers of land are based on history rather than logic. In an effort to reach results which are comfortable to modern society, the courts have developed

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[36]*See* Rosenkrantz, *Duty to Licensees in California*, 2 U. SAN FRAN. L. REV. 230 (1968); 22 MO. L. REV. 186 (1957); 12 RUTGERS L. REV. 599 (1958); 4 VILL. L. REV. 256 (1959); 7 WM. & MARY L. REV. 313 (1966).

[37]Alexander v. General Accident Fire & Life Assur. Corp., 98 So. 2d 730 (La. Ct. App. 1957).

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

[39]The court required ordinary care in the exercise of active operations and a duty to warn of any conditions known to the host to be dangerous. Scheibel v. Lipton, 156 Ohio St. 308, 102 N.E.2d 453, 463 (1951). *Compare* these with the duties owed licensees in Ciaglo v. Ciaglo, 20 Ill. App. 2d 360, 156 N.E.2d 376, 379 (1959); Potter Title & Trust Co. v. Young, 367 Pa. 239, 80 A.2d 76, 79 (1951); Walker v. Williams, 215 Tenn. 195, 384 S.W.2d 447, 451 (1964); Szafranski v. Radetzky, 31 Wis. 2d 119, 141 N.W.2d 902, 905 (1966).

[40]62 Wash. 2d 777, 384 P.2d 825 (1963).

[41]*Id.* at 831.

[42]*Id.* at 833.

refinements which are highly complex and often confusing. This fact has troubled the California courts for some time. As early as 1950 it was judicially stated: "Such an approach [to determining liability] is unrealistic, arbitrary, and inelastic. The point where the duties towards members of each of the classes begins or ends . . . is almost impossible of perception.[43]

Finally, in *Rowland,* the supreme court declared that it declined "to follow and perpetuate such rigid classifications."[44] There is some language, however, which suggests that the traditional distinctions may continue to be relevant: "[A]lthough the plaintiff's status as a trespasser, licensee, or invitee may in the light of the facts giving rise to such status have some bearing on the question of liability, the status is not determinative."[45] The court wanted to abolish the distinctions. However, it also realized that it could not ignore what underlies the distinctions, the question of how the entrant came upon the land. Thus, the character of the plaintiff's entry will continue to have some bearing upon potential liability, although it will be only one of the factors to be considered. Consequently the results in the cases decided under the new rule may frequently be the same as under the old common law classifications.

In an effort to determine how the character of the plaintiff's entry may be relevant in deciding cases under the new rule, it may be useful to make an analogy to the rules now generally applied with respect to infant trespassers. In this area the duty owed has been analyzed in terms of liability for "ordinary" negligence.[46] The foreseeability test[47] is applied and it is suggested that courts consider all the cirmumstances of the particular case.[48] Among these circumstances are the character of the entry, the place where the entry occurs, the knowledge which the occupier has, or should have of the foreseeability of entrants, and the likelihood of a probable injury.[49] There is no judicial statement as to the weight to be given each of these factors.

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[43]Fernandez v. Consolidated Fisheries, Inc., 98 Cal. App. 2d 91, 219 P.2d 73, 76 (Dist. Ct. App. 1950).

[44]443 P.2d at 568, 70 Cal. Rptr. at 104.

[45]*Id.*

[46]*See* RESTATEMENT (SECOND) OF TORTS § 339 (1965).

[47]This test is concerned with what a reasonable man would know beforehand, or what he could reasonably foresee. The term escapes precise definition and the decision as to what is foreseeable is frequently made by resort to hindsight. *See* W. PROSSER, TORTS § 50, at 306-09 (3d ed. 1964).

[48]*See* W. PROSSER, TORTS § 59, at 375 (3d ed. 1964).

[49]*See* Vidas v. British Transp. Comm., [1963] 2 Q.B. 650, 666-67 (C.A.) (Denning, L.J.).

In deciding cases where a plaintiff has been injured while upon another's land, there are conflicting values which must be weighed. Courts must balance the desire to allow free and unrestricted use of land by an owner or occupier with the need to protect an entrant from injuries caused by the occupier's negligence. In the infant trespasser cases, the utility to the occupier of maintaining the condition is examined in light of the risk involved to foreseeable entrants.[50] This would be a possible approach in deciding cases under the new rules in *Rowland*. It should be recognized, however, that conditions on the land in cases where liability is imposed upon the occupier, where a child trespasser has been injured, are usually of a permanent nature. As a result, their utility to the occupier would appear to be greater than with respect to the more temporary conditions or activities normally involved in cases concerning licensees and invitees.

Under the old rules an occupier might be held liable where an invitee was injured, and be excused where a trespasser was injured by the very same condition.[51] Thus, whether or not the occupier would be liable in each instance for identical conduct on his part depended upon the wholly fortuitous circumstance that the plaintiff entered with or without permission. These results were particularly disturbing in cases where the accident could have been prevented had the occupier exercised the slightest care.[52]

Rowland attempts to change that result. It rejects the traditional rule of law which *first* places the plaintiff in one of three categories and *then* determines the degree of care owed, solely on the basis of such classification. The goal is a new approach directed at restoring a logical basis for determining liability. The occupier will owe the same duty of reasonable care to all foreseeable entrants. The class of foreseeable entrants includes those who were formerly licensees and invitees, i.e. those who entered with permission, as well as trespassers,

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[50]E. I. du Pont De Nemours & Co. v. Edgerton, 231 F.2d 430 (8th Cir. 1956); Callahan v. Buttrey, 186 F. Supp. 715 (D. Mont. 1960); *aff'd*, 300 F.2d 809 (9th Cir. 1962); King v. Lennen, 53 Cal. 2d 340, 348 P.2d 98, 1 Cal. Rptr. 665 (1959); Reynolds v. Willson, 51 Cal. 2d 94, 331 P.2d 48 (1958); Mikkelson v. Risovi, 141 N.W.2d 150 (ND. 1966); Dugan v. Pennsylvania R.R., 387 Pa. 25, 127 A.2d 343 (1956); RESTATEMENT (SECOND) OF TORTS § 339(d) (1965).

[51]*See, e.g.*, Snyder v. I. Jay Realty Co., 30 N.J. 303, 153 A.2d 1 (1959); Rogers v. Cato Oil & Grease Co., 396 P.2d 1000 (Okla. 1964). *Compare* Chenoweth v. Flynn, 251 Iowa 11, 99 N.W.2d 310 (1959) *with* Nalepinski v. Durner, 259 Wis. 583, 49 N.W.2d 601 (1951).

[52]Frequently, slight care by the occupier could have prevented the injury regardless of the status of the plaintiff. *See, e.g.*, Warner v. Lieberman, 253 F.2d 99 (7th Cir. 1958) (defective leg on chaise lounge); Berger v. Shapiro, 30 N.J. 89, 152 A.2d 20 (1959) (brick on steps missing for two months).