

THE LANDOWNER'S DUTY TO LICENSEES IN MISSOURI: CHANGE IN AN
OUTMODED LAW?

Wells v. Goforth, 443 S.W.2d 155 (Mo. 1969)

Plaintiff was not warned of the icy condition of defendant's porch. As she was leaving his home, she slipped and fell. She brought an action for damages, arguing that her hosts knowingly let her "go into a Hidden Peril, Trap, or Ultra-Hazardous Condition", or in the alternative "were guilty of Active Negligence."¹ Defendants denied both allegations. The trial court, relying on the actual knowledge test of the Restatement of Torts First § 342,² found for plaintiff on the question of fact. Defendant appealed, contending that the court erred in patterning its instructions after the first Restatement "which has been explicitly rejected in Missouri".³ The Missouri Supreme Court reversed the lower court's finding that an icy porch is an ultra-hazardous condition and that failure to warn constituted active negligence. However, it remanded on the grounds that plaintiff might be allowed recovery under the first Restatement § 342 if she could prove actual knowledge.⁴

In feudal times, the English landowner's sovereignty was virtually unlimited by obligations to visitors on his property.⁵ The common law "no liability" concept was eventually limited by the classification of those coming onto the land as trespassers, licensees, and invitees, with a varying degree of care owed to each.⁶ This was due to an increased

1. Brief for Respondent at 5, *Wells v. Goforth*, 443 S.W.2d 155 (Mo. 1969).

2. A possessor of land is subject to liability for bodily harm caused to gratuitous licensees by a natural or artificial condition thereof if, but only if, he

(a) knows of the condition and realizes that it involves an unreasonable risk to them and has reason to believe that they will not discover the condition or realize the risk, and

(b) invites or permits them to enter or remain upon the land, without exercising reasonable care

(i) to make the condition reasonably safe, or

(ii) to warn them of the condition and the risk involved therein.

2 RESTATEMENT OF TORTS § 342 (1934).

3. Brief for Appellant at 19, *Wells v. Goforth*, 443 S.W.2d 155, 158 (Mo. 1969).

4. *Wells v. Goforth*, 443 S.W.2d 155 (Mo. 1969).

5. The king's law stopped at the boundary of the owner's sovereign territory When the comparatively modern law of negligence reached the relations of landowners to persons entering his property, it found the field occupied by the concept of the owner's right as sovereign to do what he pleased on or with his own property.

F. BOHLEN, *STUDIES IN THE LAW OF TORTS* 163, 164 (1926) [hereinafter cited as BOHLEN]. See generally McCleary, *The Liability of a Possessor of Land in Missouri to Persons Injured While on the Land*, 1 MO. L. REV. 45 (1936); Marsh, *The History and Comparative Law of Invitees, Licensees, and Trespassers*, 69 L. Q. REV. 182, 184-85 (1953).

6. Marsh, *The History and Comparative Law of Invitees, Licensees, and Trespassers*, 69 L. Q. REV. 182, 198 (1953); see also *Southecote v. Stanley*, 156 Eng. Rep. 1195 (Ex. 1856); *Indemaur v. Dames*, L.R.1C.P. 274 (1866); 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 27.1 (1956)

judicial concern for the "general principles of negligence" at the expense of traditional concepts of property law.⁷

At common law, it was generally agreed that a possessor's duty to trespassers (those entering without consent) was limited to refraining from intentional inflictions of harm.⁸ However, a minority would hold the possessor liable for recklessness as well.⁹

Early common law courts held that licensees (those who enter with permission, but without an intent to confer economic benefit on the possessor), like trespassers, were owed nothing beyond protection from the intentional trap.¹⁰ Gradually there arose a distinction between the two classes. A possessor was held liable for failing to disclose ". . . any defect of which he actually knows and which he should recognize as creating a risk of injury [to the licensee] . . ." ¹¹ But he owed no duty of inspecting the premises prior to the licensee's arrival.¹²

To the invitee (or so-called "business guest"¹³), the possessor was held to a duty of inspecting the premises, and to warn of or repair any defect which he discovers or *should have* discovered.¹⁴ At common law, the duty owed to licensees was based on a subjective or "actual knowledge" requirement. By contrast, that owed to invitees was objective, based on the "reasonable man" test.

A survey of decisions in the United States indicates that, prior to about 1900, almost all jurisdictions adhered to the feudal "no duty" rule, except for a duty to refrain from intentional mischief, with respect to licensees and trespassers.¹⁵ By 1945, the "no duty" rule jurisdictions could be characterized as only "a bare majority."¹⁶ In that period of time, a minority position had emerged similar in substance to the common law tripartite classification. The minority position was codified

[hereinafter cited as HARPER & JAMES]. For leading cases, see 38 AM. JUR., *Negligence* § 92 (1941); 65 C.J.S. *Negligence* § 23 (1950).

7. BOHLEN 163; 2 HARPER & JAMES § 27.1.

8. W. PROSSER, THE LAW OF TORTS § 76 (1955) [hereinafter cited as PROSSER]; 2 RESTATEMENT (SECOND) OF TORTS § 333 (1965). However, the rights of the landowner have been limited in this area by other distinct inroads such as the "attractive nuisance" doctrine.

9. BOHLEN 164-68.

10. PROSSER § 77.

11. BOHLEN 183.

12. *Id.* 183-84.

13. Early authorities used the terms "invitee" and "business guest" interchangeably. This was because business guests alone occupied the more protected status of invitee. BOHLEN chs. 2, 3. See also 2 RESTATEMENT OF TORTS § 332 (1934) and accompanying Comment.

14. BOHLEN 183-84.

15. 35 MO. L. REV. 252, 256 n.34 and accompanying text (1970).

16. *Id.*; cf. *Porchey v. Kelling*, 353 Mo. 1034, 1042, 185 S.W.2d 820, 823 (1945).

in the Restatement of Torts published in 1934.¹⁷ Between then and 1968, most states either explicitly or implicitly approved of the Restatement formula.¹⁸ In addition, during this time, many jurisdictions have increased the protection owed to certain trespassers.¹⁹

Recent years have marked a trend toward piecemeal abolition of the licensee status, the objective standard of due care being conferred upon all who enter the land with permission.²⁰ This trend is reflected by the 1965 Revision of the Restatement.²¹ Instead of requiring "actual knowledge" of a dangerous condition on his premises, which was the earlier Restatement standard with respect to duty owed to licensees, the 1965 Revision would hold a possessor liable to a licensee injured by a dangerous condition on his premises if he knew or *had reason to know* of that condition.²² The central difference between the duty owed to invitees and that owed to licensees under the Restatement Second is in the duty to inspect.²³ No such duty is owed to licensees.²⁴

17. See generally 2 RESTATEMENT OF TORTS §§ 329-350 (1934).

18. See 4 RESTATEMENT (SECOND) OF TORTS Appendix §§ 328-350 and citations therein.

19. For instance, discovered trespassers are often said to be owed a duty of ordinary care. Likewise are frequent trespassers on a limited area. Possessors who carry on dangerous activities are sometimes said to owe trespassers a higher degree of care. And courts have developed the doctrine of attractive nuisance to protect trespassing children from dangers which due to their judgment might not be appreciated. See generally PROSSER § 76.

20. Where the injured plaintiff has accompanied an invitee onto the land, he is accorded invitee status. *Kennedy v. Phillips*, 319 Mo. 533, 5 S.W.2d 33 (1928). Policeman and fireman have occasionally been declared invitees. *Cameron v. Abatiel*, 241 A.2d 310 (Vt. 1968) (policemen); *Dini v. Naiditch*, 20 Ill. 2d 406, 170 N.E.2d 881, 885 (1960) (firemen). A New Jersey court has found that a plaintiff fireman who was inspecting fire escapes for safety was a business invitee while retaining the rule that firemen fighting fires are mere licensees. *Walsh v. Madison Park Properties Ltd.*, 102 N.J. Super. 134, 245 A.2d 512 (1968). In Louisiana, all social guests have been accorded invitee status. *Alexander v. General Accident Fire and Life Assurance Corp.*, 98 So. 2d 730 (La. App. 1957). See also *Carr v. Brooks*, 356 S.W.2d 293, 298 (Mo. App. 1962); *McLaughlin v. Marlatt*, 296 Mo. 656, 246 S.W. 548 (1922)(rifle); *Ahnfeld v. Wabash Ry. Co.*, 212 Mo. 280, 11 S.W. 95 (1908)(train).

21. A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,

- (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
- (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
- (c) the licensees do not know or have reason to know of the condition and the risk involved.

2 RESTATEMENT OF TORTS § 342 (1965 Revision).

22. *Id.* § 342(a).

23. The second RESTATEMENT language ["knows or by the exercise of reasonable care would discover the condition" § 343(a)] like that of the first ["knows or by the exercise of reasonable care could discover" § 343(a) (emphasis added)] has been interpreted by most courts to call for an inspection of the premises. See 2 RESTATEMENT (SECOND) OF TORTS § 343 and accompanying Comment b.

24. The licensee must receive a warning or be accorded repair only if "the possessor knows or has

In Missouri, the licensee was originally afforded no more protection than the trespasser.²⁵ To both, the possessor owed only a duty to refrain from setting intentional traps. To mitigate the rigors of the application of this strict test, the Missouri courts developed several well-known exceptions to this rule. Speaking for the majority in *Wells v. Goforth*, Judge Donnelly presents a chronology of this development, noting first, that in 1909 the Missouri Supreme Court said in *Glaser v. Rothschild*:

The general rule is that the owner or occupier of premises is under no duty to protect those from injury who go upon the premises as volunteers . . . in no way connected with business or other relations with the owner or occupier A bare licensee (*barring wantonness, or some form of intentional wrong, or active negligence by the owner or occupier*) takes the premises as he finds them. (Emphasis added)²⁶

Gilliland v. Bondurant set down another exception to the no duty rule, in addition to the three appearing in parenthesis above: "The only duty of the owner is that he must not wilfully or wantonly injure [the licensee] or knowingly let him go into a hidden peril . . ." ²⁷ However, in *Anderson v. Cinnamon*, "This court declined to extend the *hidden peril* exception to situations other than those involving harmful chemicals, explosives and other dangerous material."²⁸ Other exceptions to the "no duty" rule not mentioned in *Wells* have been fashioned in Missouri.²⁹ With respect to most licensees and trespassers, however, the no duty rule remained in force.³⁰

The significance of *Wells* is that it appears to be an across the board

reason to know of the condition." The subjective, or actual knowledge test of the first Restatement is no longer required. Knowledge of suspicious circumstance would be enough. There is no language from which courts could impute a duty to inspect. See RESTATEMENT (SECOND) OF TORTS § 342 and accompanying Comment d. (1965).

25. See, e.g., *Glaser v. Rothschild*, 221 Mo. 180, 120 S.W. 1 (1909).

26. *Id.*

27. 332 Mo. 881, 59 S.W.2d 679 (1933).

28. 282 S.W.2d 445 (Mo. 1935).

29. For example, Missouri courts created the following exceptions: "attractive nuisance", *Bichsel v. Blumhost*, 429 S.W.2d 301, 303 (Mo. App. 1968); *Bayer v. Guidicy Marble, Terrozzo & Tile Co.*, 246 S.W.2d 742, 745 (Mo. 1952); the "hard-by" rule which holds the possessor to a duty of due care to protect users of a public right-of-way who inadvertently stray onto his adjacent property, *Patterson v. Gibson*, 287 S.W.2d 853, 856 (Mo. 1956); "Discovered trespassers" are owed a duty of ordinary care, *McVicar v. W.R. Arthur & Co.*, 312 S.W.2d 805, 812 (Mo. 1958); railroads have a duty to look out for trespassers, *Everett v. St. Louis & S.F.R.R.*, 214 Mo. 54, 112 S.W. 486 (1908); *Ahnefeld v. Wabash R.R.*, 212 Mo. 280, 111 S.W. 95 (1908). See also 35 Mo. L. REV. 252, 255 (1970).

30. See 35 Mo. L. REV. 252, 255 (1970).

abrogation of the feudalistic no duty rule with respect to licensees.³¹ One factor motivating the court to take this final step is undoubtedly the large volume of adjudication called for by the piecemeal approach. The greater consideration, however, is that Missouri law relating to this subject "is outmoded".³²

Having limited itself to a choice of either the first Restatement or the second, the *Wells* court chose the first.³³

We do not believe a possessor of land should be subject to liability for bodily harm caused to gratuitous licensees by a natural or artificial condition thereon unless the possessor is himself aware of the condition.³⁴

Missouri's adoption of the first Restatement § 342 is subject to several criticisms. First, it creates an unjustifiable distinction between the standard of care required for licensees and that required for invitees. The possessor is liable for injury caused to a licensee only if he has *actual knowledge* of that condition, and fails to warn or repair.³⁵ Courts have never interpreted this language to call for a duty to inspect.³⁶ For invitees, however, the first Restatement subjects the possessor to liability if he "knows, or by the exercise of reasonable care could discover, the condition . . .".³⁷ Courts almost universally construe this language to call for an inspection of the premises, and to hold him liable for injury (to an invitee) caused by any defects which a reasonable man would have discovered upon inspection.³⁸ While a possessor's actual knowledge of

31. *Id.* 252.

32. 443 S.W.2d at 158.

33. As stated in the text above the court refused to find defendant liable under either the "active negligence" or the "hidden peril" exception. Rather, it remanded with the instruction that he be judged under the first RESTATEMENT standard.

34. 443 S.W.2d at 158.

35. See note 2 *supra*.

36. See note 23 *supra*.

37. A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon if, but only if, he

(a) knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them, and

(b) has no reason to believe that they will discover the condition or realize the risk involved therein, and

(c) invites or permits them to enter or remain upon the land without exercising reasonable care

(i) to make the condition reasonable safe, or

(ii) to give a warning adequate to enable them to avoid the harm without relinquishing any of the services which they are entitled to receive, if the possessor is a public utility.

2 RESTATEMENT OF TORTS § 343. Missouri has used the first RESTATEMENT formula for invitees since 1942. See also *Hudson v. Kansas City Baseball Club*, 349 Mo. 1215, 164 S.W.2d 318 (1942).

38. See note 23 *supra*. See also 2 RESTATEMENT OF TORTS § 343. Comment a (1934).

the condition (subjective standard) must be shown by the licensee before he can recover, the invitee need only show that a reasonable man would have appreciated the danger (objective standard).

Advocates of the subjective standard have reasoned that compensation for injuries should only be awarded if there is "some attendant moral turpitude, at the least an indifferent or inadvertent state of mind."³⁹ The rationale of the objective or external standard⁴⁰ is that the innocently injured should be compensated by those at fault regardless of moral turpitude. Since our social policy is to prevent or compensate for all harmful conduct, the subjective standard has been rejected in most of negligence law.⁴¹

If for instance a man is born hasty and awkward, is always hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him at his peril to come up to their standard, and the courts which they establish decline to take his personal equation into account.⁴²

The *Wells* opinion suggests no reasons why the landholder, alone among men, should be judged by the subjective standard.⁴³

This inconsistency is complicated by the insertion of the actual knowledge requirement in the test for licensees but not for invitees. In *Associated Dry Goods Corp. v. Drake*,⁴⁴ an invitee slipped on worn and

39. P. FITZGERALD, SALMOND ON JURISPRUDENCE 389-392 (1966); R. HEUSTON, SALMOND ON TORTS 268 (1965).

40. The objective standard is termed external because the conduct in question is compared to that of the "reasonable man".

41. HARPER & JAMES 900. Two additional reasons for rejecting the subjective standards are proposed: (1) state of mind is hard to prove, (2) wherever the results differ, those from the mental or subjective test are less desirable.

42. O. HOLMES, THE COMMON LAW 108 (1881); *Oceanic Steam Navigation Co. v. Aitken*, 196 U.S. 589 (1905); *Vaughn v. Menlove*, 132 Eng. Rep. 490 (1837); *Heaven v. Pender*, 11 Q.B.D. 503, 509 (1883); see generally *Seavey, Negligence—Subjective or Objective?*, 41 HARV. L. REV. 1 (1927).

43. In *Orr v. Bradley*, 126 Mo. App. 146, 103 S.W. 1149 (1907), a house had been burned so that only the walls were left standing. The court stated that the landowner's actual judgment or thought as to whether or not it was a dangerous condition was not the standard. The actual state of mind had no place in the question. The issue was what would a reasonable man have realized. The explanation for the choice of standards is that the wall fell on a neighboring house, not on a licensee. In *Smith v. Southwest Mo. Ry.*, 333 Mo. 314, 320, 62 S.W.2d 761, 763 (1933), the Missouri Supreme Court adopted a rule that would have completely equalized the status of invitees and licensees. The court stated "that the defendant railroad company knew or in the exercise of reasonable care would have known of these conditions and realized that they involved an unreasonable risk to the plaintiff [licensee]. The court has since distinguished and then ignored the *Smith* case.

44. 394 F.2d 637 (8th Cir. 1968). See also *Trabue v. Fields*, 433 S.W. 2d 48 (Mo. App. 1968); *Zacher v. Missouri Real Estate & Ins. Co.*, 393 S.W. 2d 446 (Mo. App. 1965).

rounded steps that become slippery when it rained. The plaintiff could not show that defendant actually knew that the steps were worn smooth so that inclement weather would make them dangerous, but the court held it "common knowledge that steps became worn and rounded and beveled over a period of years."⁴⁵ If the plaintiff in *Associated Dry Goods* had been a licensee suing under *Wells*, he could not have recovered, for the landowner did not actually know of the condition. The result turns on the state of mind of the defendant; in effect, he knows of the condition for the invitee but not for the licensee. The layman licensee's faith in the law might well be blunted, if it were explained to him that if the landowner had expected a monetary benefit, he would have known of the dangerous condition and been liable for the damages resulting from it.⁴⁶

Secondly, the *Wells* case may have the effect of fostering an undesirable social policy. By holding that an occupier must actually know of the dangerous condition, the Missouri court has put a premium on ignorance and forgetfulness.⁴⁷ Applying a similar subjective (actual knowledge) requirement, a federal court of another jurisdiction found that the Army was not liable when they abandoned a training ground with live mines on it and an injury subsequently resulted. Since the Army had discharged its duty by removing all the mines whose location they actually remembered, they did not have to warn a licensee on the land and they were not liable for his injuries.⁴⁸

Third, *Wells* fails to provide a framework in which it will be unnecessary to manipulate the exceptions to the "no-duty" rule. Yet, plaintiffs will undoubtedly continue to argue these exceptions since at least one of them holds a possessor to a higher degree of care than that set down in *Wells*.⁴⁹ In not explicitly overruling them, *Wells* assures that

45. 394 F.2d at 642.

46. The requirement that the licensee should be judged by an objective standard as to issue of his knowledge of the dangerous condition would seem to be additionally inconsistent particularly in light of the often made statement that the liability of the landowner is predicated on his superior knowledge.

47. The mental theory in either of its chief forms—that negligence is or that it necessarily involves, inadvertence or indifference—would leave the general security unprotected against that vast amount of dangerous and harmful conduct which results not from inadvertence or indifference but from deficiencies in knowledge, memory, observation, imagination, foresight, intelligence, judgment, quickness of reaction, deliberation, coolness, self-control, determination, courage and the like.

Edgerton, *Negligence, Inadvertence and Indifference: The Relation of Mental States to Negligence*, 39 HARV. L. REV. 849, 867 (1926).

48. *Ford v. United States*, 200 F.2d 272 (10th Cir. 1952).

49. The objective standard of care is required of a possessor engaged in an activity after the

they will still be utilized. In cases like *Cupp v. Montgomery*,⁵⁰ which prompted the reform of the licensee rule, if the defendant was on remand shown to have not actually known of the mud on the porch, the court may still have to go through the identical contortions to submit the issue of negligence to the jury.

Fourth, it is doubtful that *Wells* has brought about any changes in Missouri law at all. Prior to *Wells*, the landowner had no duty to the licensee except for the exceptions set forth above. For instance, he could not knowingly let the licensee go into a hidden peril.⁵¹ Stated conversely, the landowner had a duty to warn of or repair hidden perils. The *Wells* rule is that a landowner must warn or repair all conditions "which involve an unreasonable risk" to licensees, and of which he actually knows and which the reasonably prudent licensee would not discover. Such conditions are the equivalent of a "hidden peril". Now the landowner must warn the licensee of known perils which are undiscoverable to the licensee; whereas before, he did not have to warn of anything but known perils which were hidden.⁵²

In reaching their new formulation the Missouri court probably accorded respect to precedent, interests relying on that precedent, and a respect for the privileged position of the landowner, yet other jurisdictions have found sufficient reason to reject this landholder's immunity. In *Keramec v. Compagnie General Transatlantique*,⁵³ the United States Supreme Court reasoned that the simple, feudal concept landholder's immunity was no longer applicable to our industrialized, urban society with its complex relationships and that the result of its use had been the creation of refinements and illogical exceptions. California found the system unreflective of the many factors which should determine liability.

Some of the factors, including the closeness of the connection between the injury and the defendant's conduct, the moral blame attached to the defendant's conduct, the policy of preventing future harm, and the prevalence and availability of insurance, bear little, if any, relationship to

licensee's presence has been discovered or using an inherently dangerous substance. *Gilliland v. Bondurant*, 332 Mo. 881, 59 S.W. 2d 679 (1933).

50. 408 S.W. 2d 353 (Mo. 1966).

51. *Id.*

52. Arguably this assessment is much too harsh, for the imposition of the duty upon the landowner would seem to put the burden on him to prove that he did not know of the condition or that the licensee should reasonably have been aware of it. *But see* 35 MO. L. REV. 252 (1970), where it is pointed out that the plaintiff must prove as part of his case that he could not have been reasonably expected to discover the dangerous condition.

53. 358 U.S. 625 (1959).

the classification of trespasser, licensee, and invitee and the existing rules of conferring immunity.⁵⁴

Fifty years ago, Bohlen made note of a steady movement toward squaring the landowner's duties to visitors on his land with other principles in negligence law.⁵⁵ In *Keramec*, the Supreme Court found that the trend creating a single duty of reasonable care in all circumstances had made impractical the introduction of the invitee-licensee-trespasser "semantic morass" from property law into maritime law. Later, the Supreme Court rejected these classifications again and decided that they were too illusory to have any application in fourth amendment "illegal search and seizure" decisions.⁵⁶ Recently, the California Supreme Court found that the protection of life and limb was also too important an issue to be determined by these ethereal categorizations.⁵⁷

Missouri adopted an actual knowledge requirement as a prerequisite to a landholder's liability to a licensee for injuries caused by a dangerous condition. This requirement maintains much of the very framework the earlier Missouri courts have consistently found unworkable. The social basis of the law of trespassers, licensees and invitees has changed. The lessened recognition of the privileged position of the landowner, the increasing respect for life and limb, and the complexity of the relationships of an urban-industrial society dictate a reconsideration of the doctrine. The law in Missouri has not adapted to reflect present social conditions. *Wells v. Goforth* is an unacceptably small step in that direction.

54. *Rowland v. Christian*, 69 Cal. 2d 108, 115, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 103 (1969).

55. BOHLEN.

56. *Jones v. United States*, 362 U.S. 257 (1959).

57. *Rowland v. Christian*, 69 Cal. 2d 108, 115, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 103 (1969):

A man's life and limb does not become less worthy of protection by law nor less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose.