Licensees in Landoccupiers' Liability Law--Should They Be Exterminated or Resurrected

Osborne M Reynolds, Jr., University of Oklahoma Norman Campus
LICENSEES IN LANDOCCUPIERS' LIABILITY LAW — SHOULD THEY BE EXTERMINATED OR RESURRECTED?

OSBORNE M. REYNOLDS, JR.*

Tort law regarding landoccupiers' liability in the United States has long been organized around three categories of entrants onto property — trespassers, licensees, and invitees — to whom the landoccupier owes varying duties. While recent decades have seen a trend toward placing emphasis on the foreseeability of the injury rather than the status of the entrant, many jurisdictions have retained the traditional categories due to the standards and predictability that they provide. Abrogation of the categories, it has been feared, might leave important social policy decisions to the jury without adequate guidance from the court. Nonetheless, the tendency to modify the old system of classification has shown particular strength when applied to the middle category of land entrants: the "illusive" category of licensees. Since licensees, like invitees, are permissive entrants onto property, there is persuasive argument for treating them the same as invitees, regardless of whether or not the same standard is applied to trespassers, who, by definition, enter the premises without permission. Before this long-recognized group of licensees is consigned to the dustbin of history, it is productive to ask whether this classification serves some purpose and should have some continued application. This article will explore the following topics: (1) the definition of "licensees"; (2) the duty customarily owed to those who fall into this group; (3) the reasons, if any, for maintaining this classification; and (4) whether a more generalized approach to land occupiers' liability should be applied.


1. See Wendell L. Griffen, Note, Tort Liability of Owners and Possessors of Land — A Single Standard of Reasonable Care Under the Circumstances Toward Invitees and Licensees, 33 Ark. L. Rev. 194, 195 (1979) (stating that the system of categories was first recognized in the United States in Sweeney v. Old Colony & Newport R.R. Co., 92 Mass. (10 Allen) 368 (1865)).


5. See Griffen, supra note 1 (discussing O'Leary v. Coenen, 251 N.W.2d 746 (N.D. 1977), which abolished the distinction between licensee and invitee but retained separate trespasser status).


7. See Recent Developments, Torts — Abrogation of Common-Law Entrant Classes of Trespasser, Licensee, and Invitee, 25 Vand. L. Rev. 623 (1972) (observing the judicial reluctance to eliminate the trespasser category but urging that a general standard of ordinary care be applied to all entrants onto land, including trespassers).
for separate treatment of the group; and (4) the changes that have occurred, and their desirability, as to the recognition of this category.

Who Are Licensees?

Authorities widely agree that a licensee is a person who enters the property of another with express or implied permission or authority from the land occupier or his agent. Mere sufferance of, or failure to object to, the entrant's presence does not suffice to confer licensee status, and permission cannot be inferred from actual or constructive knowledge of the intrusion. Some degree of consent must be established. But there is a second requirement, besides permission, for licensee status: the entrant must be on the land for his own purposes, not for any purpose that is of potential benefit to the land occupier and not simply because the property is open to the general public. This second requirement separates the licensee category from that of invitees (to whom a greater duty is owed), while the permission requirement separates licensees from trespassers (to whom a lesser duty is owed). The Oklahoma Supreme Court has adopted this generally recognized view of the requirements for licensee status, emphasizing that a licensee comes onto property for a pleasure or benefit of his own.

The classic example of a licensee is a social guest who, in the eyes of the law, is perceived as coming primarily for his own advantage. Thus, a guest, whether adult or child, attending a party is clearly a licensee, as is a guest at dinner or some other meal. This is true regardless of whether there is a blood or marital relationship between guest and host and regardless of whether the alleged harm to the guest proceeds from the host's own action or inaction or from the conduct of other guests. This is true even though the guest may have been specifically invited and urged by the land occupier to come to the premises and even if the

8. Waddell v. New River Co., 93 S.E.2d 473 (1956) (holding that a licensee must have express or implied permission of a landowner or his authorized agent); see also RESTATEMENT (SECOND) OF TORTS § 330 (1965) (requiring possessor's consent by invitation or permission).
9. See Midland Valley R.R. Co. v. Littlejohn, 1914 OK 388, 143 P. 1 (holding that an invitation may not be implied from the fact that the landowner knew or should reasonably have known that children were in the habit of playing on the premises).
13. See Barry v. Cantrell, 258 S.E.2d 61 (1979) (finding that an eleven-year-old girl attending a birthday party was a licensee).
15. See Wolfson v. Chelist, 284 S.W.2d 447 (Mo. 1955) (finding that a social guest in the home of her sister was a gratuitous licensee).
17. See Robles v. Severn, 504 P.2d 1284 (Ariz. Ct. App. 1973) (finding that a social guest was a licensee, not an invitee, despite invitation from person in possession); Rushton v. Winters, 200 A. 60 (Pa. 1935).
purpose of the visit included discussing or transacting matters connected with an organization to which the host and guest belong. For an entrant to become an invitee, some public or business purpose must predominate, rather than a purpose of providing companionship or having social relations.

In the host-guest cases, the guest's performance of services to the host is also relevant to determining the visit's purpose. Merely providing incidental help with a household repair does not turn the guest into an invitee if he was there primarily for social reasons. For example, a mother who visits her grown daughter's home and provides the daughter with help in performing domestic chores will be considered a social guest and thus a licensee, as will a son-in-law who helps his father-in-law trim the trees while visiting. Even a visiting mother who waxes the floors so that the house will look more attractive to prospective purchasers may remain primarily a guest, not an employee or agent of her hosts, and thus a licensee. Nor does necessity for the visit, as where the guests are seeking refuge from a violent storm, terminate licensee status.

When reasonable people could differ as to whether the primary reason for the entrant's presence was social or business, the question will be for the trier of fact, as in a case in which the plaintiff had gone to the defendants' residence to collect money owed him for the defendants' purchases, and then, for unclear reasons, the defendants gave the plaintiff a tour of their house. But there is no jury question if the business reasons for the visit were clearly incidental to the social ones, as in a case in which an attorney vacationing at the defendants' beachfront cabin unsuccesfully claimed that his presence indirectly benefited the defendants' law-student.
daughter due to the attorney's contacts in the legal community. 27 Similarly, the mere social nicety of a guest's bringing wine or flowers when invited to a meal cannot confer invitee status on the visitor. 28 It should, however, be noted that an entrant's status may not be the same in relation to all the landoccupiers potentially involved in a case. For example, a social visitor to a tenant in an apartment house may be an invitee as to the landlord of that house since the premises on which the "apartment business" is maintained are presumably open for the purpose of such visits. 29 Further, if a social guest exceeds the scope of his permission, as by entering a neighbor's property, he certainly may be a trespasser as to that neighbor. 30

Besides the social-guest situations, many cases discussing licensee status involve persons who may have implied consent, as evidenced by prior custom and practice, to use a road, path, or other passageway. Generally, courts will not infer consent of a landoccupier merely based on that landoccupier's knowledge of the incursions. Additionally, the landowner's failure to object does not necessarily imply consent if protest would be expensive, otherwise burdensome, or likely futile. 31 Thus, a landowner will not ordinarily be held to have given permission for the use of his roadway solely on the basis of his failure to post "private road" signs. 32 But where lack of objection is accompanied by long public use and by the apparent acquiescence of the landowner, the question of consent may go to the jury. 33 The existence of a well-worn footpath 34 or testimony establishing the regular use of such a path 35 may suffice to take the matter to the trier of fact. Evidence es-

28. See Bailey v. Pennington, 406 A.2d 44 (Del. 1979) (bottle of liquor was "de minimis"); Kapka v. Urbaszewski, 198 N.E.2d 569 (Ill. Ct. App. 1964) (plaintiff brought gift of used clothing); Blackman v. Crowe, 425 P.2d 323 (Mont. 1967) (plaintiff went to birthday party to bring present and possibly to help serve cake and ice cream).
29. See Pruitt v. Timme, 1959 OK 276, 349 P.2d 4 (finding that a plaintiff who fell down unlighted stairs of defendant's apartment house after entering premises for purpose of visiting friends living in basement apartment was an invitee of the landlord); cf. Tancian v. Meghrigian, 104 A.2d 689 (N.J. 1954) (holding that landlord who lived in one unit of multi-family house was liable to his own social guest as a landlord for injury suffered in common area, but was not liable as a tenant-occupier).
30. See Champlin v. Walker, 249 N.W.2d 839 (Iowa 1977) (finding that plaintiff who was a social guest at friend's home was a trespasser when he fell into a trench on neighboring property).
31. See Denton v. L.W. Vail Co., 541 P.2d 511 (Or. Ct. App. 1975) (finding that a motorcyclist who rode into barbed-wire fence stretched across one end of a construction project was a trespasser as to road construction company, though court also stated that company had no duty to warn even if motorcyclist was licensee).
32. See Huyck v. Hecla Mining Co., 612 P.2d 142 (Idaho 1980) (finding that a motorcyclist who collided with a cable across a private road was a trespasser).
33. See Wilhelm v. Mo., Okla. & Gulf Ry. Co., 1915 OK 894, 152 P. 1088 (footpath along and across railroad track had been used by public for years without objection); cf. Gulf, Colo. & Santa Fe Ry. Co. v. Nail, 1932 OK 253, 10 P.2d 668 (plaintiff might have been licensee when using footpath across railroad tracks, but there was insufficient evidence of railroad's negligence).
34. See Jackson v. Pa. R.R. Co., 3 A.2d 719 (Md. 1939) (finding that a pedestrian using well-worn footpath across railroad right-of-way was a trespasser or bare licensee).
35. See Midland Valley R.R. Co. v. Kellogg, 1925 OK 135, 233 P. 716 (whether railroad had acquiesced in use of railroad track as footpath by general public and had thus granted a license was a
blishing habitual use by others of a parking space supposedly reserved for a certain group of employees may also suffice to create a question for the trier of fact. At most, those others who use such a facility are licensees, not invitees, because acquiescence or implied permission creates only a license, not a welcome. The landowner who regularly allows use of his land for fishing may be giving tacit consent but is not extending a general invitation to the public. And even the licensee status is dependent on a showing of widespread and longstanding public use or of regular use by a particular group, such as the landoccupier's employees, with the landowner's knowledge.

The licensee category has, over the years, been held to include a considerable variety of individuals who have some degree of consent from the landoccupier for their presence so that they are not trespassers, but whose presence is largely for their own benefit, not that of the occupier. Thus, while a child accompanying a parent to a business premises is usually held an invitee, an occasional case may hold that the child's presence served only to provide pleasure and convenience for the child and the accompanying adult, not for the business proprietor, thus relegating the child to licensee status. Similarly, while those attending religious services are most often regarded as invitees, several courts view the attendance as mainly for

jury question).

36. Babcock & Wilcox Co. v. Nolton, 71 P.2d 1051 (Nev. 1937) (holding that habitual use of parking space without objection would give rise to implication of consent so that users would be licensees).

37. See Jackson v. Pa. R.R. Co., 3 A.2d 719 (Md. 1939) (holding that a pedestrian using a footpath across a railroad was a mere licensee); Mo.-Kan.-Tex. R.R. Co. v. Sowards, 1933 OK 348, 25 P.2d 641 (holding that a pedestrian walking along a path near a railroad track was a mere licensee).

38. See City of Grandfield v. Hammonds, 1924 OK 429, 227 P. 140 (finding a city not liable for the death of a three-year-old child who fell into city well and drowned, reasoning that temptation to enter property does not necessarily mean an invitation, even as to a child; silence and acquiescence may create a license but not an invitation).

39. Douglas v. Bergland, 185 N.W. 819 (Mich. 1921) (holding that plaintiff fisherman was at most a licensee).

40. See Hill v. Balt. & Ohio R.R. Co., 153 F.2d 91 (7th Cir. 1946) (finding the evidence insufficient to establish that the place where a boy was injured when attempting to cross railroad tracks was a path created by the general public so as to impose on the railroad the duty owed to a licensee). The court in Hill did entertain the possibility that the boy was a "naked licensee," but stated there would nonetheless be no liability. Id. at 93.


42. See DAN B. DOBBS, THE LAW OF TORTS § 233, at 596 (2000) (providing examples to show that in addition to social guests, "[q]uite a few other people fit the definition of a licensee").


44. See Petree v. Davison-Paxton-Stokes Co., 118 S.E. 697 (Ga. Ct. App. 1923) (customer, who was injured by a slot machine in the ladies' restroom, took the child to the store merely for pleasure and convenience, overruled in part, Cooper v. Anderson, 101 S.E.2d 770, 776 (Ga. Ct. App. 1957); cf. Dunleavy v. Constant, 204 A.2d 236 (N.H. 1964) (holding that a child accompanying his father, who was repairing a car at a private residence, was a licensee).

the benefit of the attendee, making the attendee comparable to a social guest and thus a licensee. Indeed, comparability to a social guest often seems a factor in helping fit a person into the licensee category. This has been true of a mother who served as a volunteer leader of her daughter's Girl Scout troop and attended a troop meeting at a private home; of the son of a civilian employee at a U.S. naval training station who used navy recreational facilities such as the football field and swimming pool; and of someone who went to a neighbor's house to use the phone. A person attending a holiday celebration at a private parking lot is also arguably analogous to a social guest and may thus be regarded as a licensee. Similarly, licensee status—if not sometimes invitee status—should be accorded a person who enters a hotel to use the restroom or an employee who uses the hotel's ice room to cool off after finishing work.


46. Autry v. Roebuck Park Baptist Church, 229 So. 2d 469 (Ala. 1969) (finding status similar to that of a social guest enjoying uncompensated hospitality in a private home by invitation); see also Broad St. Christian Church v. Carrington, 234 So. 2d 732 (Fla. Dist. Ct. App. 1970) (finding that plaintiff attending ordination of his grandson into ministry was a licensee); Trinity Episcopal Church v. Hoglund, 222 So. 2d 781 (Fla. Dist. Ct. App. 1969) (holding that church member attending weekday meeting was a licensee); cf. Carter v. Kinney, 896 S.W.2d 926 (Mo. 1995) (holding that church member going to Bible class at a private home was a licensee); Turpin v. Our Lady of Mercy Catholic Church, 202 S.E.2d 351 (N.C. Ct. App. 1974) (holding that nonmember of church using church's basketball court with permission was a licensee).


50. See Cooper v. Corporate Prop. Investors, 470 S.E.2d 689 (Ga. Ct. App. 1996) (finding that pedestrian-litigant at Independence Day celebration was probably a licensee, but that the landowner owed the same duty as would be owed an invitee since the landoccupier was aware of the presence of a large crowd including plaintiff).

51. See Eddy v. Okla. Hotel Bldg. Co., 228 F.2d 106 (10th Cir. 1955) (plaintiff entered hotel to use restroom and visit nonguest friends who were members of a club that met at the hotel). Where a business provides a facility such as a bathroom or telephone for customer use or for general public use, those using it are most often regarded as invitees. See McCluskey v. Duncan, 113 So. 250 (Ala. 1927); Dickau v. Rafala, 104 A.2d 214 (Conn. 1954); Bass v. Hunt, 100 P.2d 696 (Kan. 1940). The invitee status has usually been accorded even though the entrant came only to use the facilities and not for any business purpose. See Dym v. Merit Oil Corp., 36 A.2d 276 (Conn. 1944) (toilet); Campbell v. Weathers, 111 P.2d 72 (Kan. 1941) (same); Coston v. Skyland Hotel, 57 S.E.2d 793 (N.C. 1950) (telephone). But see Argus v. Michler, 349 S.W.2d 389 (Mo. Ct. App. 1963) (finding that the possibility that a plaintiff who came to a gasoline station to use the telephone might buy something is insufficient to make him an invitee). But if the facility is kept for the private use of those who work on the premises, then a customer or other person who is given permission to use it may be a licensee. See Wesbrook v. Colby, 43 N.E.2d 405 (Ill. Ct. App. 1942). An occasional such case makes the user's status depend on whether the use is connected to a business purpose. See Hundt v. LaCrosse Grain Co., 425 N.E.2d 687 (Ind. Ct. App. 1981) (jury question whether use of bathroom was incidental to business transaction).

52. Okla. Biltmore, Inc. v. Williams, 1938 OK 228, 79 P.2d 202 (holding that a hotel maid whose employment did not require her presence in ice room was a licensee). But those on the premises in
A key consideration in separating licensees from invitees is that a licensee is on the premises only, or largely, for his own benefit, not for the benefit of the land occupier. Thus, a person arranging furniture in a lecture hall for the presentation of a program that will benefit his employer, but will not benefit the college, has been held a licensee. A telegraph-line crewman who was on railroad property to remove telegraph lines, where such removal was solely for the convenience and benefit of the telegraph company, has also been classified as a licensee.

Similarly, due to implied consent derived from social custom, a door-to-door salesperson is presumed to be a licensee, unless and until the implied consent is clearly revoked. So is a person soliciting funds for a charity or soliciting for a religious group. Even a person following up on an inquiry for further information by a land occupier to whom religious literature had previously been distributed has been classified a licensee, as has a "demonstrator" distributing coupons entitling the holder to a free sample of a product.
Another important subgroup of licensees consists of those who enter a premises for a business purpose, initially making them invitees, but who depart from the business area in order to pursue some more personal errand elsewhere on the property. Thus, it has been ruled that a doctor was an invitee when he went to the office of a patient's employer to obtain insurance-report blanks, but became a licensee when he left the office and entered an alleyway not intended for public use in an attempt to see his patient regarding information for the insurance form.63 Courts have reached the same conclusion as to a customer who made a payment to a company but then went to a storeroom on the premises in order to transact personal business with a company employee,64 and as to a customer who entered a store to make a purchase but then went to a storage room in search of a box for his own use.65 A person who enters a premises for business purposes can also become a licensee if he uses a facility such as a phone or restroom that is not maintained for customers.66 In general, any invitee who departs from the area that he could reasonably believe is open to him in connection with the activity that made him an invitee becomes a mere licensee during the time of such departure, as in the case of a student on a field trip who strays from the permitted area.67

But so long as a person's presence in a particular area has some business purpose, such as an owner of a mineral interest making inspections of mining operations, courts are inclined to treat the person as an invitee. Courts take a broad view of the business or public purposes for which a premises is maintained. For example, courts have held that a hospital's business purposes include allowing visitors to visit patients.68 Courts also take a broad view of the areas open for business or public

65. Whelan v. Van Natta, 382 S.W.2d 205 (Ky. Ct. App. 1964). A business visitor who is invited or encouraged by the land occupier or his agent to enter an area that is usually off-limits will generally remain an invitee if he enters that area for a business purpose. See Bullock v. Safeway Stores, Inc., 236 F.2d 29 (8th Cir. 1956) (back room); Duffy v. Stratton, 210 N.W. 866 (Minn. 1926) (behind counter). But if the business visitor enters an off-limits area without encouragement or for his own personal errands, he is at most a licensee. See Gayer v. J.C. Penney Co., 326 S.W.2d 413 (Mo. Ct. App. 1959) (stock room); Campbell v. Hoffman, 371 S.W.2d 174 (Tenn. Ct. App. 1963).
66. Liveright v. Max Lifsitz Furniture Co., 187 A. 583 (N.J. 1936) (salesman entered store for business purposes and was injured when he attempted to enter unlighted bathroom after having used store's phone to make personal call). On the status of those who use facilities such as bathrooms and telephones, see generally supra note 51.
67. Tincani v. Inland Empire Zoological Soc'y, 875 P.2d 621 (Wash. 1994) (landoccupier's negligent failure to prevent invitee from staying outside permitted area may extend the area of invitation, but here, plaintiff exceeded bounds of that area).
68. See Good v. Whan, 1959 OK 5, 335 P.2d 911 (holding that where an owner of a one-fourth interest in minerals was making his daily inspection when injured, it was unnecessary to decide whether he was a licensee or invitee because he was owed at least ordinary care in any case and because whether such care was breached was a jury question).
purposes. For example, an Oklahoma court treated a person sleeping on the retaining wall of a homeless shelter as a possible invitee of the shelter.\textsuperscript{70} Similarly, one case accorded a resident of a gated community invitee status when the resident was using common areas of the community.\textsuperscript{71} All employees, contractors, and subcontractors who are on any premises in connection with their work are usually viewed as invitees,\textsuperscript{72} so long as the worker does not go beyond the area he could reasonably believe was open to him.\textsuperscript{73} Even a friend of an employee who regularly, to the knowledge of the landoccupier-employer, helped the employee in his work has been treated as a possible invitee,\textsuperscript{74} though a person merely walking onto a construction jobsite in search of employment is probably no more than a licensee.\textsuperscript{75} Persons whose work requires them to go to premises owned by people other than their employers, such as a driver making deliveries of merchandise, are normally invitees on the properties to which their work takes them.\textsuperscript{76} Additionally, anyone

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70. Pickens v. Tulsa Metro. Ministry, 1997 OK 152, 951 P.2d 1079; cf. Egede-Nissen v. Crystal Mountain, Inc., 606 P.2d 1214 (Wash. 1980) (holding that those using a public ski area remained invitees even when attempting to ride a ski lift that was not yet open for season, in absence of notice that this was beyond bounds of invitation).

71. Landry v. Hilton Head Plantation Prop. Owners Ass'n, 452 S.E.2d 619 (S.C. Ct. App. 1994) (finding that the basic distinction between licensees and invitees is that invitees confer a benefit on the landowner).

72. See Moore v. Denune & Pipic, Inc., 269 N.E.2d 599 (Ohio 1971) (holding that the duty owed by owner-contractor of house, which was being constructed by subcontractors, to employee of plumbing subcontractor was that owed an invitee).

73. See Nicoletti v. Westcor, Inc., 639 P.2d 330 (Ariz. 1982) (holding that a department store employee went beyond the scope of her invitation when she walked through ornamental shrubbery on the periphery of shopping center instead of using the sidewalk, reasoning that a business visitor must reasonably believe that an area is open to him); cf. Turner v. B Sew Inn, 2000 OK 97, 18 P.3d 1070 (holding that a parking lot constituted premises for worker's compensation purposes).

74. See Dorton v. Francisco, 833 S.W.2d 362 (Ark. 1992) (jury could have concluded that farm employee's friend, who was injured when he was caught by auger with altered metal guard, was either an implied invitee or a licensee in a position of danger to whom landowner owed a duty of ordinary care); cf. Hoffman v. Planters Gin Co., 358 So. 2d 1008 (Miss. 1978) (finding that whether a fourteen-year-old boy who occasionally helped his truck-driver father with his work was a licensee or an invitee was a question for the jury, but that a minor who accompanies a parent or other adult onto business premises to conduct business is ordinarily an invitee).

75. See Jeffries v. Potomac Dev. Corp., 822 F.2d 87 (D.C. Cir. 1987) (finding that employment applicant injured in building under construction was "licensee by invitation"). However, if the job-seeker has good reason to think the landowner is seeking applicants, the job-seeker may even be an invitee. See St. Louis, Iron Mountain & S. Ry. Co. v. Wirbel, 149 S.W. 92 (Ark. 1912).

reasonably believing that the premises is open to him so that he might make a purchase thereon, such as a prospective home buyer attending an open house, is treated as an invitee.\textsuperscript{77}

In applying the distinction between licensees and invitees, courts have been particularly troubled by public employees. Most of these employees, such as mail carriers, have been classified as invitees because (1) their presence on a landowner's property is normally of benefit to the occupier, and (2) these workers have an undoubted right — even duty — to be on the property.\textsuperscript{77} But courts often recognize exceptions and find licensee status in cases of firefighters\textsuperscript{9} and police officers\textsuperscript{80} because these public employees frequently come at unexpected times and landowners have little opportunity to prepare for their presence. Oklahoma has followed these general rules and has held, for instance, in the case of firemen, that the landowner's duty to them should be that owed licensees and should thus not extend beyond the duty to warn of hidden perils.\textsuperscript{81} Other courts agree that it would be unduly burdensome to hold a landowner potentially liable to firefighters or police officers for mere negligence and have thus held that the duty-restricting classification of licensee is appropriate in these situations.\textsuperscript{82} But there is authority

\textsuperscript{77} See Hopkins v. Fox & Lazo Realtors, 625 A.2d 1110 (N.J. 1993) (prospective home buyer fell on step during open-house tour conducted by real estate broker).

\textsuperscript{78} See A.L. Schwartz, Annotation, \textit{Liability of Owner or Occupant of Premises for Injuries Sustained by Mail Carrier}, 21 A.L.R.3d 1099 (1968) (stating that most cases hold that a mail carrier is an invitee). In classifying the carrier as an invitee, courts have particularly emphasized the stringency of the duty imposed on these employees and the nature and regularity of their visits. \textit{Id.} at 1101, 1103.

\textsuperscript{79} See Larry D. Scheafer, Annotation, \textit{Liability of Owner or Occupant of Premises to Fireman Coming Thereon in Discharge of His Duty}, 11 A.L.R.4th 597, 601 (1987) (stating the traditional general rule that a fireman entering premises in discharge of his duty is a licensee). But invitee status may be conferred if the fireman is engaged in inspection activities, making him akin to a building inspector, who is usually treated as an invitee. See Walsh v. Madison Park Props., Ltd., 245 A.2d 512 (N.J. Super. Ct. 1968). \textit{Contra} Mulcrone v. Wagner, 4 N.W.2d 97 (Minn. 1942). Invitee status may also attach if the fireman is, by special invitation, acting outside the jurisdiction of the government that employs him. See Buckeye Cotton Oil Co. v. Campagna, 242 S.W. 646 (Tenn. 1922) (firefighter outside city limits was an invitee).

\textsuperscript{80} See Richard C. Tinney, Annotation, \textit{Liability of Owner or Occupant of Premises to Police Officer Coming Thereon in Discharge of Officer's Duty}, 30 A.L.R.4th 81, 86 (1981) (holding that an officer is usually a licensee unless entering premises at special request or invitation of owners or occupiers). But see Fancil v. Q.S.E. Foods, Inc., 328 N.E.2d 538 (Ill. Ct. App. 1975) (holding that an officer performing routine security check was an invitee).

\textsuperscript{81} Rogers v. Cato Oil & Grease Co., 1964 OK 152, 396 P.2d 1000 (stating majority view). \textit{But cf.} Clinkscales v. Mundkoski, 1938 OK 336, 79 P.2d 562 (finding that a fireman pressed into extraordinary service may be invitee but that it was unnecessary to decide since invitee and licensee would be treated the same under Oklahoma law); St. Louis-S.F. Ry. Co. v. Williams, 1936 OK 73, 56 P.2d 815 (holding that a policeman who was specifically asked to inspect railroad property was an invitee).

\textsuperscript{82} See Marquart v. Toledo, Peoria & W. R.R. Co., 333 N.E.2d 558 (Ill. Ct. App. 1975) (requiring a showing of willful and wanton conduct and denying recovery for simple negligence where a fire department chief was injured when a railroad tank car exploded while he was seeking to arrange removal
to the contrary, reasoning that landoccupiers owe a general duty of reasonable care
to fire and police personnel and that fire and police personnel should be classified,
if at all, as implied invitees. Other authority finds the traditional categories totally
inapplicable to these public employees and treats them as neither licensees nor
invitees but as sui generis, or as simply within the general rules of negligence law
and not subject to any categorization. Finally, some courts have completely
overthrown the traditional rule and held that firefighters and police officers, in light
of the obvious benefit they provide the public, should be treated as invitees. This
reflects the trend toward broadening the category of invitees and placing emphasis
on the nature of the service provided rather than the official designation of the
person rendering it. Even applying a more traditional analysis, it is possible to
fit police and fire workers within the definition of invitees as persons whose
presence is mutually beneficial to landoccupier and entrant. Under this rationale,
the full-fledged obligation of reasonable care that a landoccupier generally owes an
invitee can, especially in non-emergency situations, be appropriately applied to these
workers.

The liability of landoccupiers to firefighters is also affected by the widely
accepted rule that such liability does not extend to negligent starting of the fire or
failure to curtail its spread because firefighters assume these risks when they
knowingly and voluntarily undertake this line of work. This rule is a particular

of unexploded cars from populated area); Krauth v. Geller, 157 A.2d (N.J. 1960) (holding that where a
fireman fell from a balcony on which the railing had not yet been installed because the house was still
under construction, the landowner was not liable in the absence of wanton conduct).
83. See Mounsey v. Ellard, 297 N.E.2d 43 (Mass. 1973) (abolishing the distinction between
licensees and invitees where a policeman delivering a criminal summons fell on an accumulation of ice
on defendants' premises).
84. Buren v. Midwest Indus., Inc., 380 S.W.2d 96 (Ky. 1964) (finding that a fireman is neither
licensee nor invitee but occupies a status sui generis as to the property on fire).
85. Armstrong v. Mailand, 284 N.W.2d 343 (Minn. 1979) (holding that firemen are not licensees,
invitees, or sui generis, but are owed same duty of care as all entrants except as they assume risks).
86. Dini v. Naiditch, 170 N.E.2d 881 (Ill. 1960) (holding that a fireman performing his duty is an
invitee, not a licensee); Cameron v. Abatiell, 241 A.2d 310 (Vt. 1968) (holding that a police officer
looking for fires after having checked the security lock on a door was an invitee); see also Meiers v. Fred
Koch Brewery, 127 N.E. 491 (N.Y. 1920) (finding that a fireman is not a bare licensee but is owed
the duty to keep premises reasonably safe).
87. Cameron, 241 A.2d at 313-14 (noting that the presence of this police officer at this time and
place could reasonably have been anticipated).
(finding that a firefighter is an invitee because he is on the premises for purpose mutually beneficial to
both parties), rev'd in part on other grounds, 415 N.W. 2d 178 (Mich. 1987).
89. See Newton v. New Hanover County Bd. of Educ., 467 S.E.2d 58, 64 (N.C. 1996) (holding that
the duty owed a police officer on premises in performance of his public duty is same as duty owed
invitees).
90. See Wright v. Coleman, 436 N.W.2d 864 (Wis. 1989) (concluding that there is no liability for
property owner's starting a fire or failing to curtail its spread, but possible liability if owner was negligent
in failing to warn of patch of ice).
91. Buchanan v. Pickett & Son, Inc., 279 N.W.2d 855 (Neb. 1979) (holding that a volunteer
fireman could not recover for injuries suffered in attempting to rescue truck driver from a fire caused by
application of the assumption-of-risk doctrine and is often called "the fireman's
rule," but it applies to any emergency-creating negligence, the risk of which is
assumed by police officers or others by virtue of their choice of profession. The
assumption of risk does not extend to hidden dangers that could not reasonably be
anticipated. And some courts have abolished the fireman's rule and held that a
public-safety officer does not assume the risk of negligent conduct that injures him
in the line of duty.

What Duty Is Owed Licensees?

Licensees, then, fill an imprecisely defined middle ground lying somewhere
between trespassers and invitees. This middle ground includes a number of
commonly encountered subgroups such as social guests. What is the duty that
landoccupiers owe those who fit within this class? Traditionally, the duty was
substantially the same as that owed trespassers and did not include any assurance
that the premises would be made safe or that affirmative steps would be taken to
protect the licensee from harm. Thus, the traditional rule states that the landoc-
cupier owes the licensee only the duty not to injure him by intentional, willful, or
wanton conduct. "Willful or wanton" conduct in this context requires the
landoccupier to have knowledge that someone is imperiled by his conduct or
inaction and then to proceed in the face of such knowledge with reckless disregard
of the consequences. Such wantonness is often hard to establish. For instance,
courts did not find wantonness in the following situations: (1) the injury-causing
danger had produced three calls to the fire department within the previous five

92. See id. at 858-59.
93. See Lee v. Luigi, Inc., 696 A.2d 1371 (D.C. Cir. 1997) (holding that a police officer who fell
while investigating suspected burglary was engaging in rescue activities at time of fall and thus came
within professional rescue doctrine, an application of assumption of risk).
94. See James v. Cities Serv. Oil Co., 31 N.E.2d 276 (Ohio Ct. App. 1942), aff'd by an equally
divided court, 43 N.E.2d 276 (Ohio 1942) (finding that a landowner could be liable to fireman if open
manhole that caused fireman's injury was a hidden danger of which fireman was ignorant; that fireman
had no opportunity of knowing of hidden danger before explosion; and that landowner's agent knew of
hidden danger but failed to exercise reasonable care to warn fireman).
95. See Christensen v. Murphy, 678 P.2d 1210 (Or. 1984) (abolishing the fireman's rule and holding
that a public-safety officer does not impliedly assume risk of negligent conduct that injures him).
1956)).
97. See Jason Asmus, Note, Torts — Special Host Duty to Protect Guests: No Need for the
Leininger, 599 N.W.2d 127 (Minn. 1999), in which the court found that social hosts have no duty to
protect their guests).
98. DOBBS, supra note 42, § 233, at 597 (citing Ill. Cent. R.R. v. White, 610 So. 2d 308, 316 (Miss.
1992)).
99. Whaley v. Lawing, 352 So. 2d 1090 (Ala. 1977) (reasoning that where a social guest sued
homeowners for injuries caused by the collapse of a sundeck, there was no evidence that landowners had
knowledge of danger, as they had made uneventful use of sundeck during the year and a half prior to
its collapse).
days;\textsuperscript{100} (2) debris was allowed to accumulate on steps that the landoccupier knew were sometimes used by the public;\textsuperscript{101} and (3) an electrical transmission line was pulled across another line on which a licensee was working.\textsuperscript{102} Under this traditional approach, some courts even hold that the landoccupier's duty remains only to refrain from wantonly causing injury after the landoccupier actually discovers the plaintiff's perilous position.\textsuperscript{103} This "willful and wanton conduct" requirement was part of Oklahoma law prior to 1934\textsuperscript{104} and is a rule still expressed by the courts of some jurisdictions.\textsuperscript{105} The rule is sometimes embellished by the statement that a licensee takes the land in the condition in which he finds it,\textsuperscript{106} as to both natural and artificial conditions.\textsuperscript{107} In particular, courts have stated that there is ordinarily no duty to warn or protect a licensee as to natural conditions, such as debris occurring in a body of water\textsuperscript{108} or sticks and twigs falling from trees.\textsuperscript{109} The courts reason that any dangers associated with natural conditions are usually open and obvious, or at least reasonably to be expected. But it has been held that natural conditions are not always open and obvious as a matter of law and therefore may not automatically be held outside the scope of willful and wanton conduct; sometimes, this may be a jury question.\textsuperscript{110}

There is one other refinement that is frequently attached to the willful and wanton limitation: it is widely agreed that a landoccupier cannot escape liability if he sets a trap or snare for a licensee, causing him injury.\textsuperscript{111} As to a licensee, the landoccu-

\textsuperscript{101} Steen v. Grenz, 538 P.2d 16 (Mont. 1975).
\textsuperscript{102} State ex rel. Burlington N., Inc. v. Dist. Court, 496 P.2d 1152 (Mont. 1972).
\textsuperscript{103} Mo.-Kan.-Tex. R.R. Co. v. Sowards, 1933 OK 347, 25 P.2d 641 (pedestrian walking along path near railroad track struck by projectile from railroad car). \textit{But see} Cooper v. Corporate Prop. Investors, 470 S.E.2d 689 (Ga. Ct. App. 1996) (holding that failure to use reasonable care as to licensee within range of hidden peril on one's premises, after licensee's presence is known, amounts to willful or wanton conduct). The modern tendency to impose a duty of reasonable care toward discovered licensees is discussed \textit{infra} in notes 117-24 and accompanying text.
\textsuperscript{105} See \textit{supra} note 42, \S 233, at 597.
\textsuperscript{106} See Wilson v. Goodrich, 252 N.W. 142 (Iowa 1934); Kight v. Bowman, 333 A.2d 346 (Md. Ct. Spec. App. 1975); Southcote v. Stanley, 156 Eng. Rep. 1195 (1856) (finding that a visitor or guest takes the premises as he finds them, the same as any other member of establishment).
\textsuperscript{107} See Robles v. Seyervyn, 504 P.2d 1284 (Ariz. Ct. App. 1973) (holding that where a neighbor boy was injured by a palm frond, the landoccupier had no duty to warn about trees).
\textsuperscript{108} Swanson v. McKain, 796 P.2d 1291 (Wash. Ct. App. 1990) (finding that the duty owed to a licensee does not include duty to warn of natural conditions associated with bodies of water).
\textsuperscript{110} Timanci v. Inland Empire Zoological Soc'y, 875 P.2d 621 (Wash. 1994) (student fell from rock cliff on zoo property during school field trip).
\textsuperscript{111} See Pickens v. Tulsa Metro. Ministry, 1997 OK 152, 951 P.2d 1079 (explaining that a duty toward licensees extends to traps or snares but holding that because plaintiff fell off a retaining wall on which he was sleeping, any danger was open and obvious). \textit{See generally} \textit{PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS} \S 60, at 417 (5th ed. 1984) (noting that the early English authorities using the "trap" language stated that the landoccupier could be liable for creating an
The land occupier is under a duty to make the premises as safe as it appears, or to disclose any hidden risks that make it more dangerous than it looks. While the land occupier has no duty to correct or warn of dangers that are open and obvious, a failure to remedy a hidden peril, or to give notice of it, can result in liability. A few courts go somewhat further and find possible willful and wanton conduct, and hence liability, for active negligence in maintenance of the premises, such as careless storage and handling of gunpowder or a failure to maintain a stairway in a safe condition.

Gradually, over the years, courts have recognized that the land occupier always has some duty to anticipate licensees, who are thus entitled to somewhat greater protection than trespassers. Yet the old willful and wanton limitation had the effect of treating licensees no better than trespassers. And, indeed, in recent decades, a land occupier has been held to owe a duty of reasonable care to a discovered trespasser, raising the possibility that some trespassers might be treated better than licensees if the willful and wanton limitation is still applied to the latter. Therefore, a number of courts have adopted one qualification to this willful and wanton requirement: if the land occupier is aware of the presence of a licensee, a duty of reasonable care toward such licensee then arises. For instance, a railroad ordinarily owes no more than the duty to avoid willful and wanton conduct toward those using a private crossing of its tracks, but the railroad must exercise reasonable care toward a user once his presence is known. The reasonable-care requirement, it has been held, applies only to activity of the land occupier, not to condition of the premises, thus showing some overlap with the above-stated rule of liability for active negligence. As to conditions on the premises, some authority still applies the willful and wanton limitation even to the discovered licensee. Other authority holds the land occupier liable if he knows or has reason to know of the condition and should realize that it involves an unreasonable risk of appearance of safety where it did not exist, but that later cases have interpreted the obligation to be one of warning the licensee of any concealed dangers of which the land occupier has knowledge.

112. Rushton v. Winters, 200 A. 60 (Pa. 1938) (finding liability for failure to warn when landowner knew that porch railing was insecure but failed to repair it).
113. See Pickens, 1997 OK 152, ¶ 10, 951 P.2d at 1083-84.
114. Szafranski v. Radetzky, 141 N.W.2d 902 (Wis. 1966).
115. Newton v. New Hanover County Bd. of Educ., 67 S.E.2d 58 (N.C. 1996) (finding landowner liable for injuries sustained by licensee as result of active and affirmative negligence in management of property or business if the negligence subjects licensee to increased danger while licensee is on premises and exercising due care for his own safety).
116. See Keeley ET AL., supra note 111, ¶ 58, at 396-99 (noting that some courts "have said outright that once the presence of the trespasser is discovered, there is a duty to use ordinary care to avoid injuring him").
119. Bowers v. Ottenad, 729 P.2d 1103 (Kan. 1986) (holding that a guest at a dinner party who was injured by the activity of the occupier of the premises was owed a duty of reasonable care), overruled on other grounds, Jones v. Hansen, 867 P.2d 303 (Kan. 1994).
120. See supra text accompanying notes 114-15.
harm to the discovered licensee. Thus, some courts state, in general terms applicable to both active conduct and condition of the premises, that the landoccipier owes a duty of reasonable care to the discovered licensee once his danger is also discovered, or even if the landoccipier has reason to know of the danger.

Even where a landowner owes a duty of reasonable care to a licensee, the landowner still has no duty to warn of open and obvious risks. Thus, there is no duty to warn a guest using the landoccipier's swimming pool of the danger of striking his head on the side of the pool. A landoccipier who reasonably expects that the licensee will realize the danger himself and appreciate the risks involved has no duty to warn. Indeed, even if the plaintiff is an invitee, it has been held that there is no duty to warn or take precautions of those dangers that are known or obvious to the invitee. As to either a licensee or invitee, there is simply no duty to warn of obvious risks such as a curb separating a store from a parking lot, a two-inch drop in a floor level, or a lawn chair being displayed in the aisle of a store.

Among the cases retaining the licensee classification, the most extreme departure from the traditionally limited duty of care is found in opinions that apply a general standard of ordinary reasonable care not merely to discovered licensees but to all licensees. The duty owed the licensee by the landoccipier clearly then becomes

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123. See Jackson v. Pa. R.R. Co., 3 A.2d 719 (Md. 1939) (reasoning that the duty owed trespassers or bare licensees is to not willfully or wantonly injure them and to use reasonable care to avoid injury to them after the danger is discovered).

124. See DOBBS, supra note 42, § 233, at 597 (discussing RESTATEMENT (SECOND) OF TORTS § 342 (1965), which says that to be liable to a discovered licensee, the defendant-landoccipier must have known of the danger or had reason to know of it — though "should have known" is not enough).

125. Scifres v. Kraft, 916 S.W.2d 779 (Ky. Ct. App. 1996) (finding that hosts had no duty to warn guest of the danger of striking his head on side of swimming pool opposite from where he dove).


127. See City of Tulsa v. Harman, 1931 OK 73, 299 P. 462 (reasoning that defendant, who controlled lake on which boating accident occurred, had duty to keep premises reasonably safe for invitees but that this duty did not apply to known or obvious dangers).

128. See Safeway Stores v. McCoy, 1962 OK 194, 376 P.2d 285 (customer injured when she stepped off curb separating store parking lot from entrance to store); cf. J.C. Penney Co. v. Johnson, 1961 OK 207, 364 P.2d 1111 (holding that store was not liable for customer's falling on pencil because there was no evidence the pencil was ever actually on the floor).

129. Hull v. Newman Mem'l Hosp., 1963 OK 46, 379 P.2d 701 (holding that a drop of about two inches in floor level in a hospital foyer was an obvious danger and should have been observed in ordinary care).

130. Safeway Stores v. Sanders, 1962 OK 162, 372 P.2d 1021 (finding that a chair was visible and obvious and there was ample aisle space). But cf. J.J. Newberry Co. v. Lancaster, 1964 OK 21, 391 P.2d 224 (affirming judgment for plaintiff-customer who fell over stool in aisle of store where the display of drapes caused prospective purchasers to look upward but noting that the stool would otherwise have been obvious). See generally Phil P. Homing, Note, Slip, Trip, and Fall in Oklahoma, 21 OKLA. L. REV. 233 (1968).

131. See Julian v. Sinclair Oil & Gas Co., 1934 OK 96, 32 P.2d 31; Memel v. Reimer, 538 P.2d...
greater than that owed a trespasser and is roughly comparable to that owed an
invitee. Since 1934, Oklahoma has imposed this heightened duty on landoc-
cupiers in their encounters with licensees, though hints of a reasonable-care duty
can be found in one much older case dealing with a user of a footpath across a
railroad track. In jurisdictions taking this view of licensees, such as Oklahoma,
any trace of the old wanton conduct limitation is gone. The duty owed the
licensee by the landoccupier includes a duty of reasonable care in discovering the
licensee, a duty of reasonable care as to the conduct of activities performed on the
land by the landoccupier or his agents, and a duty to warn of any concealed
dangers. Thus, when engaging in such activities as driving a car or operating
machinery on his premises, the landoccupier must keep a reasonable watch for
licensees and must carry out the activities with all reasonable precaution.

Even in jurisdictions that have gone so far as to adopt this reasonable-care rule
regarding licensees, the distinction between liability for condition of the premises
and liability for activities thereon remains relevant. The possessor has a full-
fledged duty of reasonable care as to the activities but, as to conditions of the land,
has a duty to warn only of hazards that are known to the possessor and that a
reasonable person should consider dangerous. As to the licensee, the landoc-
cupier has no duty to actually discover latent defects on the land but only to correct
or to give warning of those dangers of which he is aware. Actual knowledge of

517 (Wash. 1975).

132. See Clinkscales v. Mundkoski, 1938 OK 336, 79 P.2d 562 (immaterial whether firefighter was
a licensee or an invitee because in Oklahoma the duty of ordinary care is now owed a licensee as well
as an invitee). See generally Hastie, supra note 4, at 234 (concluding as to Oklahoma law that
"[r]egardless of whether the entering party is treated as a licensee or an invitee, the standard of care
required is that of ordinary or reasonable care").

133. See Eddy v. Okla. Hotel Bldg. Co., 228 P.2d 106 (10th Cir. 1955) (recognizing that it is settled
law in Oklahoma that reasonable care is owed a licensee as well as an invitee); Okla. Biltmore, Inc. v.
Williams, 1938 OK 228, 79 P.2d 202 (hotel owed licensee duty of ordinary care).

134. Wilhelm v. Mo., Okla. & Gulf Ry. Co., 1915 OK 894, 152 P. 1088 (reasoning that the duty
to bare licensee on railroad track is to exercise degree of care commensurate with probability that person
may be on track at that point; quoting with approval cases applying reasonableness standard, but finding
gross negligence).

135. See Memel, 538 P.2d at 519 (holding that the wanton conduct rule has been replaced by the
standard of reasonable care).


Potomac Dev. Corp., 822 F.2d 87 (D.C. Cir. 1987) (reasonable care as to affirmative act). See generally
DOBBS, supra note 42, § 233, at 598.

138. See Lipham v. Federated Dept Stores, Inc., 440 S.E.2d 193 (Ga. 1994) (explaining that the
status of the entrant is relevant where condition of premises is involved but store is liable for negligent
acts of its agent, such as knocking third party to ground, regardless of whether third party was on
premises as invitee, licensee, or trespasser).

139. Scheibcl v. Lipton, 102 N.E.2d 453 (Ohio 1951) (finding that where landoccupiers provided
a paved walk from front door of their residence to driveway, they could not, as to a licensee, be
reasonably required to go further and fill all depressions and level all mounds in front yard).

140. See Hopkins v. Fox & Lazo Realtors, 625 A.2d 1110 (N.J. 1993) (finding that plaintiff — a
prospective home buyer on an open-house tour — was an invitee but acknowledging that attempts to
the condition by the possessor is required for liability, though a reasonableness standard is then applied to determine if the possessor had a duty to realize the danger. And there remains the ever-present limitation that the duty extends only to defects or conditions in the nature of hidden perils that are not subject to being observed by a licensee exercising ordinary care. The duty remains less than that owed invitees, as to whom a duty exists to warn of conditions that are known or reasonably should be known to the landoccupier. This imposes an obligation of reasonable inspection for defects as to invitees, an obligation that does not exist as to licensees. Indeed, it is broadly said that, as to invitees, there is a duty to warn of any dangerous conditions. But actually, even as to invitees, there is no duty to warn of hazards that are open and obvious, hazards that create no greater danger than should reasonably be anticipated by an invitee on the premises, or hazards that have not existed long enough that they should reasonably have been discovered by the landoccupier.

**Why Treat Licensees Separately?**

What common threads appear among those classified as licensees, and do these commonalities justify the separate treatment that this category has historically been given? While at first glance the category may appear fairly narrow, courts have often accorded it a wide expanse. Courts stretch the category at the bottom to include, due to some kind of implied consent, people who might be considered pigeonhole entrants into the traditional categories are often now awkward and strained).

141. See Reilly v. Spiegelhalter, 241 A.2d 665 (N.J. Super. Ct. App. Div. 1968) (explaining that landoccupiers are bound to give warning of any concealed danger known to them). Compare id., with RESTATEMENT (SECOND) OF TORTS § 342 (1965) (explaining that possessor can be liable for condition of which he knew or had reason to know).

142. See Stevens v. Dovre, 234 A.2d 596 (Md. 1967) (finding liability only if host should realize that conditions on premises pose unreasonable risk to guests).

143. See Rogers v. Cato Oil & Grease Co., 1996 OK 152, 396 P.2d 1000 (finding that the duty to firemen-licensees only extends to defects or conditions in nature of hidden perils not subject to being observed by ordinary care).

144. See Clinkscales v. Mundkoski, 1938 OK 336, 79 P.2d 562 (reasoning that, as to invitees, landoccupier has duty to warn of any dangers of which he knows or ought to know and which are unknown to invitees). As to the duty owed invitees, see generally KEETON ET AL., supra note 111, § 1, at 425-28, which states that a landoccupier's duty includes that of inspecting premises to discover dangerous conditions of which he does not know.

145. See Pratt v. Womack, 1961 OK 10, 359 P.2d 223 (observing that storekeeper owes customer a duty to warn of any dangerous conditions).

146. See Tulsa Stockyards v. Mangrum, 1963 OK 76, 380 P.2d 534 (noting the general proposition that an owner's duty to keep premises reasonably safe for invitees applies only to defects or conditions that are unknown to invitee and that would not have been observed by him in exercise of ordinary care; leaving jury to decide whether cattle seller, who was an invitee at a stockyard, was aware of unattended cattle or would have been aware if he had exercised ordinary care).

147. See Chase v. Parry, 1958 OK 105, 326 P.2d 809 (finding a jury question of negligence where a customer slipped and fell on a recently waxed floor of defendant's restaurant).

148. See M & P Stores v. Taylor, 1938 OK 123, 326 P.2d 804 (finding a jury question of negligence where condition of hole in floor was shown to be of long duration).
"tolerated trespassers." Courts expand the category at the top to include people whose presence benefits the landoccupier, but only if it benefits the landoccupier in an emotional or psychological, rather than a pecuniary or commercial, way. Inevitably, some cases require that a jury determine the status of the entrant. This determination depends on such factors as community custom regarding the implied consent or whether a service performed by the entrant is basically commercial or social. Certain generalizations gleaned from the cases regarding licensees provide limits to courts' power to define the category's scope and guidance to juries that must decide the borderline situations. In particular, cases emphasize that licensees, as opposed to trespassers, are persons whose presence is always probable, thus justifying some care in their behalf. But while this higher probability may justify treating licensees differently from trespassers, this factor's importance at the other end of the scale is more doubtful: are licensees less likely to come to a premises than invitees, thus justifying the lower duty to licensees? Both categories include only lawful visitors, and the foreseeability of presence in each category seems similar. The same is true if the emphasis is placed on foreseeability of injury rather than foreseeability of mere presence; nothing suggests that a social guest is, for instance, any more or less likely to be harmed than a business visitor. There is also little sense in holding that an invited guest is owed a lesser duty of care in regard to preparation of the premises for his presence than is owed a potential customer merely because the landoccupier receives a social benefit in one case and an economic benefit in the other. In either case, the duty should be defined according to (1) the landowner's superior knowledge of, and superior ability to discover, possible perils on the property, and (2) the entrant's ability to observe those perils for himself. The landoccupier who is aware of a danger on the

151. See Holzheimer v. Johannesen, 871 P.2d 814 (Idaho 1994) (holding that, where a fruit farmer fell while borrowing fruit boxes from neighboring orchard owner, the evidence supported the conflicting conclusions that lending or selling boxes at cost to neighboring farmers was a business transaction or was a minimal service done in a spirit of cooperation).
152. See Barry v. Cantrell, 258 S.E.2d 61 (Ga. Ct. App. 1979) (explaining that the presence of a licensee is at all times probable).
153. See Mounsey v. Ellard, 297 N.E.2d 43 (Mass. 1973) (stating that a landoccupier owes a common duty of reasonable care to all lawful visitors and therefore abolishing the distinction between licensees and invitees).
154. See Clarke v. Beckwith, 858 P.2d 293 (Wyo. 1993) (stating that foreseeability of injury rather than status of the entrant should be the basis for liability and therefore abolishing the distinction between licensees and invitees).
156. See Jenkins v. Lake Montonia Club, Inc., 479 S.E.2d 259 (N.C. Ct. App. 1997) (finding owner of recreational facility not liable when swimmer struck head on concrete lake bottom after diving from sliding board even though it was unclear whether swimmer was licensee or invitee).
premises, or who knowingly places a danger in the entrant's path, should reasonably be expected to give warning of the danger, without regard to the type or degree of benefit the landoccupier receives from the entrant's visit. Although imposing a higher duty to licensees than to invitees might be unjustifiable, this does not mean that imposing a lower duty to licensees, as traditionally required, is necessary, is desirable, or that it must be retained.

What Should Happen to Licensees?

What has happened to the licensee category in recent decades? In four ways, the licensee classification has moved toward merger with the invitee classification: (1) As explained previously, a landoccupier's duty to a licensee has increased, sometimes now approaching the general duty of reasonable care that is owed invitees. (2) While courts have at times broadened the licensee category, courts have broadened the invitee category as much or more by replacing the old "economic benefit" test with a "mutual benefit" test. Thus, as courts treat more land entrants as invitees, courts upgrade some of those formerly regarded as licensees to the higher category and therefore apply the all-encompassing duty of reasonable care more often. (3) Some jurisdictions have overthrown the old classification of social guests as licensees and now treat them as invitees. Courts have done so either by calling them "licensees by invitation" and treating them the same as commercial visitors or by applying the invitation test, under which anyone invited onto the land, including a social guest, is classified as an invitee. These approaches reject the old notion that a social guest takes the premises as he finds it and is entitled to no more care from the landoccupier than a member of the household. Instead, these approaches point out that, by modern social practice, a

158. See Gallegos v. Phipps, 779 P.2d 856 (Colo. 1989) (holding that a statute imposing a higher duty toward licensees than toward invitees violates federal and state equal protection provisions).
159. See supra text accompanying notes 116-48.
160. See Lauriston H. Long, Comment, Land Occupant's Liability to Invitees, Licensees, and Trespassers, 31 TENN. L. REV. 485, 493 (1964) (stating that Tennessee was at that time requiring reasonable care on the part of landoccupiers in discovering licensees and in avoiding injury to them from activities performed on the land). But no duty to inspect in order to discover dangers unknown to the land occupier was yet being imposed in behalf of licensees, only in behalf of invitees. Id.
161. See supra text accompanying notes 42-77.
162. See KEETON ET AL., supra note 111, § 61, at 420-24. Oklahoma long ago rejected the "financial benefit" test as to invitees. City of Anadarko v. Swain, 1914 OK 381, 142 P. 1104 (finding that a child in a city park was an invitee).
163. Wood v. Camp, 284 So. 2d 691 (Fla. 1973) (finding no distinction between commercial visitors and social guests).
164. Burrell v. Meads, 569 N.E.2d 637 (Ind. 1991) (rejecting old "economic benefit" test); see also Foggin v. Gen. Guar. Ins. Co., 195 So. 2d 636 (La. 1969) (finding that a social guest is an invitee); Ferguson v. Bretton, 375 A.2d 225 (Me. 1977) (applying a statute to hold the same). Since many states have now abolished the licensee-invitee distinction, those states now also treat social guests, as well as all other former licensees, the same as invitees. See infra note 167.
host often prepares the premises at least as carefully for social guests as for business visitors.\textsuperscript{165} Certainly a person who is specifically invited to a social occasion may reasonably expect that degree of care. (4) Finally, some jurisdictions have completely rejected the distinction between licensees and invitees, either by merging those two categories while retaining the trespasser classification\textsuperscript{166} or by rejecting all three categories.\textsuperscript{167}

What approaches seem most desirable? Is it time to abolish the categories or at least the separate classification for licensees? Oklahoma has thus far retained the categories, including licensees, finding no public policy that justifies changing the law.\textsuperscript{168} Some other courts have reaffirmed the categories, reasoning that there would otherwise be inadequate standards to guide the trier of fact\textsuperscript{169} or that such a sweeping change would needlessly inject uncertainty into the law.\textsuperscript{170} Some jurists believe there is adequate reason for retaining the traditional rules, such as imposing a lesser duty of care in behalf of a social guest than in behalf of a potential customer.\textsuperscript{171} There is particular reluctance to terminate the separate treatment of

\begin{itemize}
\item \textsuperscript{165} Glenn Arann McCleary, \textit{The Liability of a Possessor of Land in Missouri to Persons Injured While on the Land}, 1 Mo. L. REV. 45, 58 (1936).
\item \textsuperscript{166} See Gilbertson \textit{v. Leininger}, 599 N.W.2d 127 (Minn. 1999) (abolishing the licensee-invitee distinction); Nelson \textit{v. Freeland}, 507 S.E.2d 882 (N.C. 1998) (same).
\item \textsuperscript{169} Younse \textit{v. Ferguson}, 724 P.2d 991 (Wash. 1986).
\item \textsuperscript{170} Adams \textit{v. Fred's Dollar Store}, 497 So. 2d 1097, 1102 (Miss. 1986).
\item \textsuperscript{171} Wolfson \textit{v. Cheliist}, 284 S.W.2d 447 (Mo. 1955) (reasoning that a guest admitted as an invitee in the ordinary social sense should not expect the same precautions to be taken for him that would be
trespassers because, by definition, they have no express or implied permission to be on the land and their presence cannot be anticipated.\textsuperscript{172}

However, it can also be argued that (1) the basic standard of reasonableness provides adequate guidance to the trier of fact in landoccupier cases, as it does in other negligence cases; (2) the classifications were created by the courts and can thus be appropriately abolished by them; and (3) the differences on which the categories are based, at least as to licensees and invitees, offer insufficient reason for different treatment. Thus, there is a definite trend toward holding that foreseeability of injury ought to be the key to liability and that status of the land entrant should be only one factor in determining the foreseeability.\textsuperscript{173} Under this approach, most landoccupier cases can be sent to the jury under a single standard of negligence, with the jury being instructed to weigh all relevant factors.\textsuperscript{174} Some suggest that this general standard of ordinary care determined by foreseeability of risk could even be applied in trespasser cases.\textsuperscript{175} But if this is considered unjustified because of the lack of landoccupier consent and the general lack of foreseeability as to trespassers, the reasonable care standard should at least be applied across the board to all permitted entrants, regardless of whether they were formerly classified as licensees or invitees.\textsuperscript{176}

The standard applied to invitees has always been basically one of reasonable care under the circumstances. Its application has presented no special problems, and there is no reason to expect that it will present such problems when persons formerly regarded as licensees are brought under the same standard.\textsuperscript{177} The standard is always qualified by the "under the circumstances" limitation, and the nature and foreseeability of the entrant remain among the circumstances to be considered.\textsuperscript{178} Rigid limitations on a landoccupier's duty based on the precise nature of the entrant result in hairsplitting that illogically favors the landowner. The

\textsuperscript{172} See Huyck v. Hecla Mining Co., 612 P.2d 142 (Idaho 1980) (reaffirming categories and emphasizing that a trespasser was involved); Gerchberg v. Loney, 576 P.2d 593 (Kan. 1978) (possible attractive nuisance involved), overruled on other grounds by Bowers v. Ottenad, 729 P.2d 1103 (Kan. 1986). Some courts, even if partially abolishing the traditional categories in landoccupiers' liability, are particularly reluctant to eliminate the attractive-nuisance doctrine, under which most states grant favored status to child trespassers; however, it has been suggested that even this doctrine might be encompassed by a general standard of reasonable conduct. See Osborne M. Reynolds, Attractive Nuisance: More Nuisance Than Attraction, 26 OKLA. L. REV. 342 (1973).

\textsuperscript{173} See Gulbis, supra note 2, at 299.

\textsuperscript{174} See Edward A. Strenkowski, Note, Tort Liability of Owners and Possessors of Land — A Single Standard of Reasonable Care Under the Circumstances Toward Invitees and Licensees, 33 ARK. L. REV. 194 (1979) (noting O'Leary v. Coenen, 257 N.W.2d 746 (N.D. 1977), which abolished the distinction between licensees and invitees but retained trespasser status).

\textsuperscript{175} See Recent Developments, supra note 7.

\textsuperscript{176} See Clarke v. Beckwith, 858 P.2d 293 (Wyo. 1993) (abolishing the distinction between licensees and invitees).

\textsuperscript{177} See Dini v. Naiditch, 170 N.E.2d 881 (Ill. 1960) (rejecting as an illogical anachronism the old rule that firefighters are licensees and adopting instead the rule that these public employees are invitees).

\textsuperscript{178} See Scurti v. City of New York, 354 N.E.2d 794 (N.Y. 1976) (rejecting categories and asserting foreseeability as the measure of liability).
landoccuper’s duty should be the same as that usually owed by all potential defendants to all potential and foreseeable plaintiffs: the duty of reasonable care.\textsuperscript{179} Other general principles of negligence law, such as assumption of the risk, can also be applied where considered appropriate.\textsuperscript{180} But those general principles, not illusive classifications triggering rigid limitations on duty, should decide landoccuper cases, as with all other negligence cases. The trend is clearly toward eventual elimination of most, and perhaps eventually all, of the special categories that have existed in landoccupiers’ liability law. Elimination of the licensee category is a beneficial step in that direction.

\textsuperscript{179} See Peter W. Agnes, Jr., Comment, Torts — Abolition of the Distinction Between Licensees and Invitees Entitles All Lawful Visitors to a Standard of Reasonable Care, 8 SUFFOLK U. L. REV. 795 (1974) (noting Mounsey v. Ellard, 297 N.E.2d 43 (Mass. 1973), which abolished the licensee-invitee distinction, and favoring the extension of general negligence principles to trespassers).

\textsuperscript{180} See Walters v. Sloan, 571 P.2d 609 (Cal. 1977) (holding that a police officer assumed the risk under the "fireman's rule," and reasoning that this rule is not based on the categories as to entrants on land and is thus unaffected by changes in those categories); Armstrong v. Mailand, 284 N.W.2d 343 (Minn. 1979) (reasoning that firemen are not licensees, invitees, or sui generis, but are subject to general negligence rules regarding duty and assumption of risk); Buchanan v. Pickett & Son, Inc., 279 N.W.2d 855 (Neb. 1979) (retaining categories but finding it unnecessary to decide on their retention since in any case the plaintiff-firefighter was barred by the fireman’s rule, an application of primary assumption of risk).