1942

Invitees

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INVITEES

By GEORGE W. PATON*

AFTER an interesting and skillful examination of the cases, Professor Prosser[1] argues that the American Law Institute's Restatement of the Law of Torts is wrong in so far as it emphasizes the test of material interest in the definition of the term "business visitor."[2] His thesis is that, in the early cases dealing with the liability of an occupier, business interest or pecuniary gain is only incidentally mentioned; that the decisions which have turned on the presence or absence of business interest are few in comparison with the large number which cannot be accounted for on that basis.

So far as American law is concerned, the writer has no comments—it would be presumption for a stranger to challenge an expert. But if Professor Prosser's thesis is correct for American law, then there is a gulf between it and modern English law on this point.

A. THE CASES RELATING TO INVITEES

A historical survey of the English cases brings out strongly that business interest is the test which has been applied ever since *Indermaur v. Dames*.[3] Before that, the cases are very confused and, as late as 1864, Pigot, L. C. B., confessed the difficulty of discovering any rule at all.[4] But in 1866, Willes, J., stated the test which since has been followed almost universally in England: invitees are those who "go upon business which concern the occupier, and upon his invitation, express or implied."[5] This test had been foreshadowed by Erle, J., in *Chapman v. Rothwell*,[6] a few years before, when he distinguished between the case of a visitor who must take care of herself and a customer who, as one of the public, is invited for the purpose of business carried on by the defendant.

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[1]Prosser, Business Visitors and Invitees, (1942) 26 MINNESOTA LAW REVIEW 573.

[2]Restatement of Torts (1934), sec. 332.

[3](1866) L. R. 1 C. P. 274, Har. & Ruth. 243, 35 L. J. C. P. 184, 14 L. T. 484.

[4]Sullivan v. Waters, (1864) 14 I. C. L. R. 460.

[5]Indermaur v. Dames, (1866) L. R. 1 C. P. 274, Har. & Ruth. 243, 35 L. J. C. P. 184, 14 L. T. 484.

[6](1858) E. B. & E. 168, 27 L. J. Q. B. 315, 4 Jur. N. S. 1180.

In *Holmes v. North Eastern Ry. Co.*,[7] there are signs of hesitation as to the exact rule. Bramwell, B., certainly speaks of an invitation "in the same sense in which the public are invited to go into a shop." But Channel, B., emphasises the modern rule: "In the delivery and receipt of the coal there was a common interest in them and in the plaintiff . . . and this prevents the case from being that of one who is a mere licensee." Cleasley, B., remarks: "The question of a mere licensee does not arise: for as soon as you introduce the element of business . . . all idea of mere voluntariness vanishes." Denman, J., lays down the same test in *White v. France*,[8] although he goes fairly far in applying it to the facts. Plaintiff, who was a waterman, went to defendant to complain about the navigation of one of the latter's barges. The learned judge found that he was there on lawful business, in which both parties had an interest.

Miller v. Hancock[9] raises an interesting point, and we will depart from the chronological order, so as to discuss its subsequent history. The Court of Appeal held that an invitee of a tenant was also an invitee of the landlord in using the common staircase, following *Smith v. London and St. Katharine Docks Co.*[10] In that case, defendant dock company, because of an arrangement with the owner of the ship, was responsible for providing a gangway to it. Plaintiff was an invitee of one of the officers of the ship and was injured owing to the negligent placing of the gangway. There was clearly no direct bond of interest between defendants and the plaintiff, for it was the shipowner who paid for the docking charges. Bovill, C. J., however, considered that the defendants were paid to provide a gangway for all persons having business with the ship, and therefore that plaintiff was "invited." Even apart from this view, there was ample cause to find for the plaintiff, since the gangway, placed as it was, constituted a trap of which defendants knew and of which plaintiff was ignorant. This case has never been specifically over-ruled, although it was explained by the House of Lords in *Fairman's Case*[11] as depending on the fact that there was a trap known to defendants. In the same case, however, the Lords over-ruled *Miller v. Hancock*.[12]

[7](1869) L. R. 4 Ex. 254, 38 L. J. Ex. 161, 20 L. T. 616.
[8](1877) 2 C. P. D. 308, 46 L. J. Q. B. 283.
[9][1893] 2 Q. B. 177, 69 L. T. 214, 9 T. L. R. 512.
[10](1868) L. R. 3 C. P. 326, 37 L. J. C. P. 217, 18 L. T. 403.
[11]Fairman v. Perpetual Investment Building Society, [1923] A. C. 74, 92 L. J. K. B. 50, 128 L. T. 386.
[12][1893] 2 Q. B. 177, 69 L. T. 214, 9 T. L. R. 512.

Lord Buckmaster defined an invitee as one "invited to the premises by the owner or occupier for purposes of business or material interest." The facts of *Fairman's Case* were that the plaintiff was a lodger with one of the tenants and so it would have been possible without great difficulty to have held that there was an interest between the landlord and the plaintiff, since, if tenants cannot take lodgers, then the landlord may find it more difficult to let the flats. But it was held that the plaintiff was a licensee, and the only duty owed by the defendants was not to expose her to a concealed danger or trap of which defendants knew.

In *Haseldine v. Daw & Son, Ltd.*,[13] Scott, L. J., had the courage to suggest that the Lords were merely uttering *obiter dicta* when they suggested that an invitee of a tenant is only a licensee of the landlord; his argument was that on the facts the plaintiff in *Fairman's Case* could not have recovered, even if she had been an invitee, since the alleged danger was one that was perfectly obvious. Goddard, L. J., however, refused to take this view which rejected what had been the universal interpretation of *Fairman's Case* for the last twenty years. Clauson, L. J., did not specifically discuss this point, but, although the Court was thus equally divided on this issue, there is little doubt that English lawyers will continue to interpret *Fairman's Case* in the traditional fashion.[14] As in *Haseldine's Case* leave was given to appeal to the House of Lords, the point may soon be cleared up.

To return to our chronological survey, in 1913 Hamilton, L. J., stated that the term invitee is reserved for those who are "invited into the premises by the owner or occupier for some purpose of business or of material interest."[15] In 1916, it was laid down in the Court of Appeal: "It is essential to the plaintiff's case that he should bring himself into the position of an invitee, and he can only do that by satisfying the Court that by reason of the contract between the defendants and the County Council the defendants had a common interest with his employers in the completion of the work and that therefore he, as a workman employed on the work . . . was using the gangway as an invitee of the defendants."[16]

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[13][1941] 3 All E. R. 156.

[14]This is the view taken by Dixon, J., in Lipman v. Clendinnen, 46 C. L. R. 550.

[15]Latham v. Johnson (R.) & Nephew, Ltd., [1913] 1 K. B. 398, 410, 82 L. J. K. B. 258, 108 L. T. 4.

[16]Per Bankes, L. J., Elliott v. Roberts (C.P.) & Co., Ltd., [1916] 2 K. B. 518, 527, 85 L. J. K. B. 1689, 115 L. T. 255.

In 1917, Scrutton, L. J., used the phrase licensee with an interest. "A licensee who is on premises on the business of the owner, or with a common interest with them, is not a bare or mere licensee, but a licensee with an interest and has the same rights as an invitee."[17] This case concerned an actress who had as yet no contract, but was attending rehearsals in the hope of obtaining one.

Mercer v. South Eastern and Chatham Ry. Co.'s Managing Committee,[18] is a curious case. Defendants normally locked the pedestrian gate at a level crossing when a train was approaching. On one occasion, the signalman forgot to do so and plaintiff began to cross and was injured by a train. Lush, J., held that by leaving the gate unlocked the plaintiff received a tacit invitation to cross the line, and applied *Indermaur v. Dames* on the ground that plaintiff was an invitee. This case really belongs, not to the law concerning private occupiers and their visitors, but to that dealing with public utilities and those who enter as of right. In no way does the public utility invite pedestrians to use a public crossing—there is no bond of material interest and the railway company has no power to forbid use of the path, save when the crossing is needed for railway traffic. The better view is that the duty of a public utility is higher than that owed to invitees—it must make the premises reasonably safe, whereas an occupier probably fulfils his duty to an invitee by giving warning of known dangers. This, however, is still a fairly open point in English law, but as it is not directly relevant, we do not pursue it.

In *Sutcliffe v. Clients Investment Co.,*[19] the owners of a flat leased it to a tenant and agreed to contribute to the cost of repairing and decorating it at the commencement of the term. The tenant actually engaged the builders. While on a balcony, which was not part of the demised premises, the foreman fell, because the balustrade collapsed, and was killed. His widow was held entitled to recover against the landlord, the court emphasizing the bond of common interest between the builder and the landlord; the builder was "doing repairs in which both the tenant and the landlord were interested." Lord Dunedin, in 1929, used the same

[17]Hayward v. Drury Lane Theatre & Moss' Empires, [1917] 2 K. B. 899, 914, 87 L. J. K. B. 18, 117 L. T. 523. In Pritchard v. Peto, [1917] 2 K. B. 173, 86 L. J. K. B. 1292, 117 L. T. 145, a tradesman, calling to collect a bill, was held to be an invitee.

[18][1922] 2 K. B. 549, 92 L. J. K. B. 25, 127 L. T. 723.

[19][1924] 2 K. B. 746, 94 L. J. K. B. 113, 132 L. T. 83.

test. "The invitee must be on the land for some purpose in which he and the proprietor have a joint interest."[20]

In *Weigall v. Westminster Hospital*[21] the plaintiff was the mother of a patient and was injured when she slipped on a highly polished floor. The majority of the Court of Appeal emphasized that, as the mother was paying both the hospital and the surgeon, she was an invitee, not only when visiting her son in the hospital, but also when she entered a small room in order to discuss the case with the surgeon.

In *Griffiths v. St. Clement's School*[22] an exhibition of school work was organized by the managers of a school and the parent of a pupil was injured when the floor collapsed. The parent was treated as an invitee, the bond of material interest being found in the fact that it was in the interest of the school to secure the support and co-operation of the parents by showing to them the work done at the school.

Professor Prosser suggests: "It is only when entry is upon private premises for a private purpose that 'business dealings' become decisive. When the English and Canadian Courts were at last confronted squarely with the issue of a public invitation without any possibility of economic benefit, in the case of a municipal playground, a free public library, and even a railway crossing open for public use, it is not surprising, in the light of *Corby v. Hill*,[23] that the plaintiffs were held to be invitees."

It is submitted that this statement does not correctly portray modern English law. The writer has discussed this problem elsewhere in an article dealing with the general problem of the duty owed to those who enter as of right.[24] The Court of Appeal treats children in public playgrounds as licensees, not as invitees, precisely because there is no bond of material interest between the child and the authority which supplies the playground. Two mem-

[20]Robert Addie & Son's Collieries, Ltd. v. Dumbreck, [1929] A. C. 358, 371, 98 L. J. P. C. 119, 140 L. T. 650.

[21][1936] 1 All E. R. 232, 52 T. L. R. 301. Eve, J., dissented, holding that the mother was only a licensee.

[22][1938] 3 All E. R. 537. Actually, Tucker, J., found for the defendants on a point arising under the Public Authorities Protection Act. The case was affirmed on appeal, but the argument in the court of appeal was confined to the statutory defense. See Griffiths v. Managers of St. Clement's School, [1939] 2 All E. R. 76.

[23](1858) 4 C. B. N. S. 556, 27 L. J. C. P. 318, 31 L. T. O. S. 181.

[24]Paton, The Responsibility of An Occupier to Those Who Enter as of Right, (1941) 19 Can. B. R. 1.

bers of the Court adopted this view in *Ellis' Case,*[25] and in *Coates' Case,* Slesser, L. J., said that it was not possible to go beyond the majority decision in the former case.[26] One cannot treat the decision of the House of Lords in *Glasgow Corp. v. Taylor*[27] as laying down a definite rule on this point. The poisonous berries constituted a trap of which defendants knew and hence the plaintiff child could recover even if he was only a licensee. Lord Atkinson, Buckmaster, and Sumner merely followed the "trap cases." Lord Shaw did say that, the child being there as of right, he was entitled to rely on the gardens being in a reasonably safe condition, but this dictum is rather an argument for treating those who enter as of right as being outside the categories of licensees and invitees altogether, than a plea that the child is an invitee. Had the Lords laid down a definite rule that the child is an invitee, it would have bound the Court of Appeal in 1938, whereas the court (as shown above) held that the child was only a licensee.

The view of the High Court of Australia is shown by a case decided in 1939.[28] The facts were that defendants had the control of a jetty which the public were entitled to use free of charge. Plaintiff was injured because of a dangerous gap in the planking —the defendants knowing of this danger. The plaintiff could succeed therefore, even if he were only a licensee. Dixon, J., however, discussed the rules relating to those who enter as of right. He found it impossible to describe these visitors as either licensees (since they entered as of right and not by mere permission) or as invitees (since there was no bond of material interest). Speaking of invitees, the learned Justice stated: "The governing consideration is found in the character in which an invitee comes upon the premises and in the interest of the occupier in giving the invitation. Whether the invitation be express or implied, general or particular, it arises from reasons of business or is connected with some other actual or potential advantage to the occupier. The object of the visit is incidental to matters in which the occupier has a pecuniary or material interest."[29] In another case, the same Justice said: "It is enough if the visitor comes upon

[25]Ellis v. Fulham Borough Council, [1938] 1 K. B. 212, 107 L. J. K. B. 84, 157 L. T. 380. Purkis v. Walthamstow Borough Council, [1934] 151 L. T. 30, 98 J. P. 244, 78 Sol. Jo. 207, really left the question open, although Maugham, L. J., (as he then was) thought the children fell outside the ordinary category of licensees and invitees.

[26]Coates v. Rawtenstall Borough Council, [1937] 3 All E. R. 602, 157 L. T. 415, 101 J. P. 483.

[27][1922] 1 A. C. 74, 91 L. J. P. C. 49, 126 L. T. 262.

[28]Aiken v. Kingborough, 62 C. L. R. 179.

business in his own interest, but in the course of a transaction with the occupier to which his visit is reasonably incidental."[30]

Concerning the position of those who enter a railway station to farewell travellers, it is true that some cases have treated such persons as invitees.[31] It must be admitted that here there is no direct bond of material interest. These cases, however, have been questioned and the point must still be regarded as an open one.[32] Dixon, J., explains them as resting on the principle that "the visitor comes on a matter of material interest, if his presence is in a general way ancillary to the business carried on by the occupier."[33] If this principle is broadly interpreted, it would go far to meet Professor Prosser's point that the element of business interest becomes so small in many cases that it may really be ignored. But an examination of English cases reveals few examples of this, whereas the emphasis on common interest is very much stressed in the majority of decisions.

B. Cases Relating to Licensees

Many of these have already been discussed, so far as they bear upon the question of the definition of an invitee. Thus an invitee of a tenant is merely a licensee of the landlord;[34] a child in a public playground is only a licensee.[35] The decision is reached in both these cases precisely because there is no bond of material interest between the visitor and the defendant. In English law, if I throw open my house for a public lecture, to which admission is free, the visitors are (it is submitted) merely licensees. One using a public swimming pool gratuitously is only a licensee, if we adopt the recent decision of the Court of Appeal. Many of the American cases seem to have gone much further than the English decisions go.

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[29]Ibid. 209.

[30]Lipman v. Clendinnen, (1932) 46 C. L. R. 550, 558-9. The same view was laid down by the High Court in Leveridge v. Skuthorpe, (1919) 26 C. L. R. 135, 19 N. S. W. L. R. 254, 36 N. S. W. W. N. 46.

[31]Watkins v. Great Western Ry., 46 L. J. Q. B. 817, 37 L. T. 193. The Australian courts have followed this decision: Langton v. Board of Land & Works, (1880) 6 V. L. R. (L.) 316; Lipman v. Clendinnen, (1932) 46 C. L. R. 550.

[32]Charlesworth, Negligence, 104; cf. also Thatcher v. Great Western Ry. Co., (1893) 10 T. L. R. 13. The M. R. said that in strictness friends were not owed the same duty as passengers, but in practice a railway company must show reasonable care towards both.

[33]Lipman v. Clendinnen, (1932) 46 C. L. R. 550.

[34]A recent illustration of this is Morgan v. Girls' Friendly Society, [1936] 1 All E. R. 404, 80 Sol. Jo. 323.

[35]Ellis v. Fulham Borough Council, supra, note 25.

Many of the interesting points which Professor Prosser discusses are not directly covered by English authority, e.g., the child accompanying an adult who enters a shop to make a purchase; passengers in a car which stops at a garage for petrol. One case mentioned would be treated in English law as falling under the head of nuisance rather than that of occupier and visitor. If an occupier paves a piece of his land near the highway and throws it open to the public, what is the position of one who walks over it? He is not an invitee unless there is a bond of material interest between him and the owner. But the law imposes a duty to maintain the property so as not to be a *nuisance* to users of the highway.[36]

[36]Owens v. Scott & Sons, Ltd., & Wastall, [1939] 3 All E. R. 663, following Harrold v. Watney, [1898] 2 Q. B. 320, 67 L. J. Q. B. 771, 78 L. T. 788, 46 W. R. 642, 14 T. L. R. 486.