



# Legal Beat

By MICHAEL SEAN QUINN

## Premises Liability and The Insurance Agent—Part II

*Editor's Note: The first portion of this legal series appeared in the April 5 issue of IJ/Texas (page 30). In that first part, Quinn addressed who is responsible (liable) for premises defects. This article explains who is entitled to damages if there are premises defects. There will also be a third installment in the May 17 issue which will explain the insurance implications.*

Premises liability is really the law of torts (mostly negligence and gross negligence) applied to injuries caused by unsafe features of premises (mostly land and buildings). The defects can be natural or man made. Liability for such injury always involves a three dimensional analysis.

First, there must be some sort of defect in the premises. The first question, therefore, always is: Was the premises defective? Second, there must be a person who has responsibility (and hence potential liability) for such defects. This person is conventionally called the "landowner." I shall follow this convention even though she is not always the person who owns the land. In any case, the second question always is: Who, if anyone, was responsible—in a relevant way—for the defect? (This question is not the same as: Who caused the defect?) Third, there



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is the person who is injured. No victim; no tort.

The third question is always: What was the legal status of the person who was injured? In analyzing the second and third dimensions of premises liability, the type of relationship the person injured has to the landowner and hence to the land is crucial.

Texas divides these relationships into three categories. They

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hinge on why the injured person was on the premises. Persons on premises not their own must have one of three statuses: trespasser, licensee or invitee. A landowner owes higher duties licensees than he owes to trespassers, and she owes yet higher duties to invitees. All states think about premises liability pretty much this way.

**T**respassers are people who are on premises unlawfully. This means they don't have permission to be there (whether expressed or implied), or they entered without some other lawful reason. Licensees are people who commit no legal wrong by being on the land. Thus, they might be invited social guests; the owner might (expressly or impliedly) permit them to squat there; or their presence is simply tolerated. Thus, someone may start as a trespasser but end up a licensee. On the other hand, one might start as a licensee, but stay too long or wander outside the scope of the permission and become a trespasser.

Invitees are on premises for business reasons. Invitees include customers, contractors, repair people, employees of the owner, employees of other invitees, tenants, and various kinds of public servants in their official capacities. (The law is of two minds about firemen, for reasons too murky to delineate. Sometimes they are thought of as licensees. Other times they are thought of as invitees. Is it not obvious they are invitees, even if they are not actually invited?)

Invitees can become licensees. If someone comes to do business and becomes a social guest, she moves from the category of invitee to that of licensee. Moreover, invitees can become trespassers. If someone comes to do business and goes to a portion of the land unconnected to legitimate business, he becomes a trespasser.

**L**andowners owe trespassers hardly any duties at all. They must not subject them to intentional torts (such as battery or false imprisonment), however. And they may not treat them wantonly, i.e., in a grossly negligence manner. In other words, a landowner must not consciously disregard extreme risks when he acts. This rule applies to both known and unknown trespassers.

Thus, a landowner may not set an injurious trap for a trespasser he believes is there. Further, a landowner may not say to himself "I know this activity will create an extreme risk to someone who comes on my land, but to hell with them, I'm going to do it anyway." Placing live land mines around a pond qualifies as gross negligence.

Landowners owe licensees all the duties they owe trespassers. In addition, there must be no "active negligence." In other words,

landowners are responsible for (and hence also liable for) dangerous conditions about which they actually know. They must either fix them or warn of their existence. Thus, a bus company which creates a bus stop which, say, consists of a bench, a sign, and a waste receptacle, may not configure the elements of the stop so as to be dangerous to blind people. For example, it may not put the sign in the middle of the sidewalk. (This is a real case.)

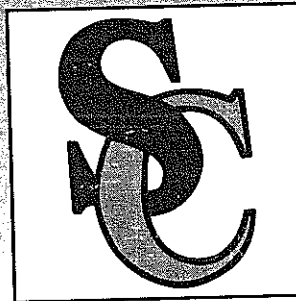
Landowners owe invitees all the duties they owe trespassers and all the duties they owe licensees plus another one. Landowners

must also use ordinary care to keep the premises safe for invitees. In other words, when it comes to invitees, landowners may not be negligent. They must use ordinary care to discover and warn of premises defects. Furthermore, they must take into account the kind of invitees which are foreseeably present on their land. This would include children and people disabled in various ways.

The duty not to be negligent requires that landowner to use reasonable care to find out what defects there are on his premises. What constitutes a reasonable survey will depend

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on the nature of the premises. If it is a forest which is not put to much use, what constitutes a reasonable defects review may be quite minimal.

In contrast, if the premises is a country club swimming pool where children cannot be entirely restrained from running around and where families eat lunches, the duty to inspect may require frequent surveys of the property.

Grocery stores are probably the most frequently litigated type of premises involving invitees. The issues are almost always the same. Something has been spilled on the floor; a shopper slips and falls; the legal question concerns the extent of the grocery store's responsibility. Surprisingly, there is substantial judicial resistance to grocery store (and similar) cases. They are hard to win from the plaintiff's point of view, and liability insurers often litigate them with vigor. Perhaps they believe this is what "med-pay" coverage is for.



On March 11, 1999, in *H.E. Butt Grocery v. Resendez*, the Texas Supreme Court held that there was no evidence of negligence when a supermarket displayed grapes in such a way that customers might sample them. Merely making the grapes available is not negligent.

On the other hand, it has long been the law in this state that a supermarket display can create a risk of unreasonable harm, if (for example) the produce bins are sharply tilted over a tile floor with no protective mats.

Does this particular differentiation among display methods make sense? It seems entirely predictable that if grocery stores make grapes available to customers, including children and inattentive or clumsy adults, grapes will drop on the floor. If so, then supermarkets who do not watch their produce section closely, seem negligent.

Then again, perhaps there is a counter argument. Most people—and all normal grownups—realize that if there is a bowl of free grapes made available, many will nibble and some will spill. Consequently, perhaps reasonable grownups are on notice to be a little more careful. Youngsters, of course, are a different story.

On March 11, 1999, the Supreme Court of Texas also decided *Meeks v. Rosa*, another invitee case. Meeks was an elderly lady, and Rosa provided her home health care services. Both sides agreed that Meeks was an invitee. Rosa was about to prepare food. She opened the refrigerator door to get a container of cooked beans. They spilled on the floor and on her shoes. No one suggested that Rosa spilled the beans. As she prepared

to clean-up, she slipped and fell, sustaining a serious injury.

Rosa suggested that Meeks was negligent. Principally she argued that, unbeknownst to her, the refrigerator was filled to overflowing and hence that it was risky to open the door. Alternatively, Rosa suggested that, although she didn't know it, there were already beans on the floor when she opened the door. The court implied that if either theory was supported by the evidence, Rosa would win. However, it held that neither theory was supported by any evidence.

Obviously, what counts as negligent conduct varies considerably with the facts. This is the nature of negligence. Slip and fall cases, the common form of premises liability case, often turn on whether a reasonable owner should have known about the defective condition. The test is an objective one. For this reason, one wonders about the resolution of this case.

Surely a house holder should know about the over-stuffed condition of her fridge. Even if the test were subjective, Meeks screwed up. Assuming that Meeks was not bedridden, and assuming that she had been to the refrigerator in the last day or so, she should have realized that the items in the refrigerator were configured in an unstable way. This is particularly true if Meeks put

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the beans in the refrigerator in the first place. Something must have been seriously defective about the presentation of the evidence in both of these cases. A unanimous supreme court resoundingly resolved both these cases in favor of the landowners, in short, unsigned opinions.

Either the supreme court is implying stark opposition to run-of-the-mill premises liability cases, or the plaintiff's proof in these cases was miserable. There is no reason why this should have been so in the Resendez case. An expert witness could have easily established the dangers surrounding open bowls of gratis grapes in produce sections.

The decision in Meeks is also puzzling. The court held that there was no evidence that the refrigerator was negligently filled to overflowing. There was testimony at the trial that the refrigerator was full and that it had "a lot of containers" in it, but this testimony was not enough, the court said. The word "overflowing" did not appear in the evidence, observed the court, and either it or some other word like it had to be there in order to sustain the case that the refrigerator was negligently stuffed. But when objects are properly and prudently placed in a fridge, they don't pop out. Perhaps the court really is silently and systematically hostile to these kinds of cases.

**W**Oliver Wendell Holmes once observed that the law is a great anthropological library. The contours of a culture can be found there. Obviously, in our culture, business relations are substantially more important than social relations.

This idea is entailed by the fact that invitees have more rights than licensees. The ancient Greeks and the Hebrews of the Old Testament both would have found this notion dangerous and offensive. In those cultures, the host-guest relation was a sacred, holy one. Hosts had affirmative obligations to treat their guests well and to protect them. Obviously, our culture is quite different.

Why should people owe business invitees a higher duty of care than they owe social guests. After all, shouldn't people who are doing business be expected to pay closer attention than people who are coming to a social event, e.g., an evening meal, a prayer meeting, a lawn party, a study group, or an afternoon stroll in the woods? Does it not seem odd to advise a homeowner that he has a higher duty to a salesman who comes to his door than he does to his best friend who comes to dinner. Nevertheless, as a great philosopher once remarked, "The world is what it is and not another thing." Legal advice and insurance consults must keep that in mind. □



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