5.20F DUTY OWED — CONDITION OF PREMISES

(Approved 03/2000, Revised 09/2021)

NOTE TO JUDGE

The duty owed by an occupier of land to third persons coming on that land involves an inquiry identifying, weighing, and balancing several factors—the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and considerations of public policy.

Our common law has developed well-defined categories based on the status of the plaintiff. If the plaintiff falls into the predetermined category of an invitee, licensee, or trespasser, the category itself establishes the duty, dispensing with the Court weighing the above factors to determine if a duty is owed.[1] The scope of that duty is set forth in these Model Charges for each of the above categories.

However, if the facts in a given case do not fit into any of the above categories, the Court must undertake a duty analysis weighing the above factors and, if a duty is ascertained, must also define the scope of the duty.[2]

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[1] See *Rowe v. Mazel Thirty, LLC*, 209 *N.J.* 35, 44-45, 48-49 (2012) ("The common law categories are a shorthand, in well-established classes of cases, for the duty analysis; they, too, are based on the relationship of the parties, the nature of the risk, the ability to exercise care, and considerations of public policy. The only difference [between those three classes of cases and other cases] is that, through the evolution of our common law, the duty analysis has already been performed in respect of invitees, licensees (social guests), and trespassers.").

[2] In *Hopkins v. Fox & Lazo Realtors*, 132 *N.J.* 426 (1993), the Supreme Court evaluated the liability of a real estate broker for injuries sustained by a plaintiff who had attended an open house on a third-party's premises. *Id.* at 431-33. The Court found that the relationship between the plaintiff and the real estate broker did not fit neatly into any of the three traditional categories (i.e., invitee, licensee, or trespasser). *Id.* at 438 ("In a case such as this in which the legal relationships are not precisely defined, the attempt to pigeonhole the parties within the traditional categories of the common law is both strained and awkward."). Accordingly, the Court ruled that proper resolution of the issue in such a case required a full duty analysis that evaluates "not what common law classification or amalgam of classifications most closely

characterizes the relationship of the parties, but . . . whether in light of the actual relationship between the parties under all of the surrounding circumstances the imposition on the broker of a general duty to exercise reasonable care in preventing foreseeable harm to its open-house customers is fair and just." *Ibid.* Applying that test, the Court held "that a real estate broker has a duty to ensure through reasonable inspection and warning the safety of prospective buyers and visitors who tour an open house," and that "[t]he scope of the duty to inspect and warn is limited only to defects that are reasonably discoverable through an ordinary inspection of the home undertaken for purposes of its potential sale," not "latent defects that are hidden and of which the broker has no actual knowledge." *Id.* at 448-49. In general, therefore, when the facts of a case do not fit neatly into one of the three common law categories (trespasser, licensee, or invitee), the court will evaluate whether a duty of care exists under the circumstance of the case and, if so, define the scope of that duty. See *ibid*.; see*, e.g., Robinson v. Vivirito*, 217 *N.J.* 199 (2014) (conducting full duty analysis based on foreseeability, fairness, and public policy and concluding that school principal owed no duty of care to person injured on school premises after hours by dog owned by adjacent property owner); *Ellis v. Hilton United Methodist Church*, 455 *N.J. Super.* 33 (App. Div. 2018) (no duty owed by owner of vacant residential or noncommercial property absent evidence of prior commercial use); *Estate of Desir v. Vertus*, 214 *N.J.* 303 (2013) (performing "the traditional, comprehensive analysis of whether a duty is owed," and finding no duty of care owed by property owner to neighbor, when owner left his premises based on belief crime was being committed therein, asked neighbor to telephone subject premises, and then failed to prevent neighbor from going to scene where fleeing robber shot neighbor); *Olivo v. Owens-Illinois, Inc.*, 186 *N.J.* 394 (2006) (evaluating fairness and foreseeability concerns and holding "that to the extent [defendant] owed a duty to workers on its premises for the foreseeable risk of exposure to friable asbestos and asbestos dust, similarly, [defendant] owed a duty to spouses handling the workers' unprotected work clothing based on the foreseeable risk of exposure from asbestos borne home on contaminated clothing," but remanding for resolution of "genuine issues of material fact about the extent of the duty" because "[q]uestions persist concerning the scope of the work husband was hired to perform, the scope of work that he actually performed, particularly with respect to the handling of asbestos containing products, and the extent of [defendant's] supervision and control over the work"); *Schwartz v. Accuratus Corp.*, 225 *N.J.* 517 (2016) (holding that *Olivo's* duty of care may, in appropriate circumstances, extend to a plaintiff who is not a spouse of a worker exposed to the toxin by application of the *Hopkins* factors); *Nielsen v. Wal-Mart Store #2171*, 429 *N.J. Super.* 251 (App. Div.) (holding that "the *Hopkins* factors" warrant finding that defendant property owner owed duty to protect employee of independent contractor that defendant hired from hazardous condition slightly outside the boundaries of owner's unit, even though another entity had contractually assumed duty to maintain and repair area in question), *certif. denied*, 213 *N.J.* 535 (2013); see also *Rowe v. Mazel Thirty, LLC,* 209 *N.J.* 35, 44-45, 48-49 (2012) (observing that "[w]here the status of the plaintiff, vis-à-vis the landowner, does not fall into one of the pre-determined categories, as in *Hopkins*, . . . we perform a full duty analysis," but nevertheless holding that plaintiff, police officer investigating vacant building pursuant to safe-streets initiative, fell "within the category of a licensee" under the circumstances of the case);

1. Adult Trespasser — Defined and General Duty Owed

A trespasser is a person who enters or remains upon land in the possession of another without a right to enter or remain on the property. A right may be created by the possessor's consent or otherwise. An owner/occupier of property owes a duty to a trespasser to refrain from acts which willfully injure the trespasser.

Cases:

> *Lordi v. Spiotta*, 133 *N.J.L.* 581, 584 (Sup. Ct. 1946); *Snyder v. I. Jay Realty Co*., 30 *N.J.* 303, 312 (1959). See *2 Harper & James, Law of Torts*, § 27.3, pp. 1435, 1440 (1956), to the effect that a possessor of land may take some steps to repel a trespasser, but may not arrange the premises intentionally as to cause death or serious bodily harm to a trespasser. *Lordi v. Spiotta*, *supra*, speaks of abstaining from "willful or wanton injury." See also *Imre v. Riegel Paper Corp*., 24 *N.J.* 438, 446-449 (1957), dealing with repeated trespasses. The Court said that there may be such acquiescence as to amount to a license and that some courts have held continued toleration of trespass amounts to permission to use the land and transforms a trespasser into a licensee, but the Court seems to prefer the rule that a higher degree of care is owed to one whose repeated trespasses are known to the landowner where the reasonably foreseeable risk of death or severe injury outweighs the freedom of action that would otherwise govern the conduct of a landowner in regard to a trespasser. Sledding on Shoprite property by children held not sufficient to transform them from trespassers to licensees. *Ostroski v. Mount Prospect Shoprite, Inc*., 94 *N.J. Super*. 374, 382 (App. Div. 1967).

Monaco v. Hartz Mt. Corp., 178 *N.J.* 401, 417-19 (2004) (holding that irrespective of whether Court applied "the classic commercial landowner liability standard" or "the more fluid *Hopkins* rule," defendant landlord owed duty of care to employee of defendant's commercial tenant).

2. Infant Trespasser — Defined and General Duty Owed (Revised 10/2003)

A trespasser is a person who enters or remains upon land in the possession of another person without a right to enter or remain on the property. A trespasser is one who is not invited, allowed, or privileged to be on another's property. The owner or occupier of property owes a duty to an adult trespasser only to refrain from acts, which would willfully injure the trespasser. This rule of law on the obligations of owners and occupiers of property towards adult trespassers is modified in the case of children trespassers.

Although a possessor of land generally is not required to keep the land safe for trespassers, an exception exists for those trespassers who are children. Because children may lack sufficient discretion for their own safety, a possessor of property, who maintains an artificial condition upon the property, will be liable for physical harm to a child trespassing on the property caused by the artificial condition if:

(a) the possessor of the property knows or has reason to know children are likely to trespass in the place where the condition exists, and

(b) the possessor of the property knows or has reason to know and realizes or should realize that the condition involves an unreasonable risk of death or serious bodily harm to such children, and

(c) the children because of their youth either
(1) do not discover the condition, or

(2) do not realize the risk involved by trespassing in that area of the property made dangerous by the condition, or

(3) do not realize the risk involved in intermeddling with the condition, and

(d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to the children involved, and

(e) the possessor of the property fails to exercise reasonable care to eliminate the danger or otherwise protect the children.

In order for the defendant to be held liable for the plaintiff's injuries, the plaintiff must prove each and every one of these five elements.

Cases:

Restatement of Torts, 2d, §339, p. 197 (1965)*; Ostroski v. Mount Prospect Shoprite, Inc.,* 94 *N.J.Super.* 374 *(*App. Div. 1967)*, certif. denied,* 49 *N.J.* 369 (1967); *Scheffer v. Braverman,* 89 *N.J.Super.* 452 (App. Div. 1965); *Turpan v. Merriman,* 57 *N.J. Super.* 590 (App. Div. 1959), *certif. denied,* 31 *N.J.* 549 (1960); *Coughlin v. U.S. Tool Co., Inc.,* 52 *N.J.Super.* 341 (App. Div. 1958), *certif. denied,* 28 *N.J.* 527 (1959); *Vega by Muniz v. Piedilato,* 154 *N.J.* 496 (1998).

In this case the plaintiff has alleged that the plaintiff was injured as a result of [*describe the artificial condition*]. I will now discuss each of these five elements with you as they relate to that condition.

(a) the possessor of the property knows or has reason to know children are likely to trespass in the place where the condition exists,

If you find the landowner or occupant has no reason to anticipate the presence of children at a place of danger on landowner's/occupant's land, the landowner/occupant has no duty to look out for children and no liability for injuries sustained by children trespassing at such place of danger.

When I say the plaintiff must prove the possessor of land "knows" or "has reason to know" children are likely to trespass at a place of danger on the land, I mean the law charges a defendant with information from which a person of reasonable intelligence would infer that children are likely to trespass on the property and would govern the possessor's conduct upon the assumption that they would.

Cases:

> *Long v. Sutherland-Backer Co.,* 48 *N.J.* 134 *(1966), reversing* 92 *N.J. Super.* 556 (App. Div. 1966); *Callahan v. Dearborn Developments, Inc.,* 57 *N.J. Super.* 437 (App. Div. 1959), *aff'd,* 32 *N.J.* 27 *(1960); Hoff v. Natural Refining Products Co.,* 38 *N.J. Super.* 222 (App. Div. 1955); *Restatement of Torts 2d,* §339, Comment g., p. 201 (1965).

(b) the possessor of the property knows or has reason to know and realizes or should realize that the condition involves an unreasonable risk of death or serious bodily harm to such children,

When I say the plaintiff must prove the possessor of land "knows" or "has reason to know" that the condition involves an unreasonable risk of death or bodily harm, I mean the law charges a defendant with information from which a person of reasonable intelligence would infer that the condition involves an unreasonable risk of death or bodily harm and would govern the possessor's conduct upon the assumption that the condition is likely to be dangerous to trespassing children.

Citation:

Restatement of Torts 2d, §339, Comment h, p. 201 (1965)

(c) the children because of their youth

(1) do not discover the condition, or
(2) do not realize the risk involved by trespassing in that area of the property made dangerous by the condition, or
(3) do not realize the risk involved in intermeddling with the condition,

In determining whether a child because of the child's youth either did not discover the condition, or did not realize the risk involved by trespassing in that area of the property made dangerous by the condition, or did not realize the risk involved in intermeddling with the condition, you are to determine whether the child's state of mind at the time of the accident was such that either the child did not discover the condition, or the child did not realize the risk involved by

trespassing in that area of the property made dangerous by the condition, or the child did not realize the risk involved in intermeddling with the condition.

If you find that the child, regardless of the child's age, did in fact discover the condition and realize the risk and appreciate the danger involved, and still proceeded despite knowledge and appreciation of the danger, the child cannot recover for the child's injuries. The purpose of the duty placed upon the possessor of property is to protect children from dangers, which they do not appreciate, but not to protect them against harm resulting from their own immature recklessness in the case of dangers, which they know and appreciate. Therefore, even though the possessor of land should know that the condition is one that children are unlikely to appreciate the full extent of the danger of meddling with it or encountering it, the possessor of land is not subject to liability to a child who in fact discovers the condition and appreciates the full risk involved, but nonetheless chooses to encounter it out of recklessness or bravado.

Cases:

> *Vega by Muniz v. Piedilato*, 154 *N.J.* 496, 506 (*1998); Restatement of Torts 2d,* §339, Comment i, p. 202 (1965); *Ostroski v. Mount Prospect Shoprite, Inc.,* 94 *N.J. Super.* 374 (App. Div. 1967), *certif. denied,* 49 *N.J.* 369 (1967).

(d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved,

In determining whether a particular condition maintained by a possessor of land involves an unreasonable risk to trespassing children, you must compare the recognizable risk to the children with the usefulness to the possessor of land in maintaining the condition. A particular condition is, therefore, regarded as not involving an unreasonable risk to trespassing children unless it involves a risk of serious bodily harm to the children, and could be removed without any serious interference with the possessor's legitimate use of the land.

Citation:

Restatement of Torts 2d, §339, Comment n, p. 205 (1965).

(e) the possessor of the property fails to exercise reasonable care to eliminate the danger or otherwise protect the children.

The possessor of land is liable to the trespassing child only if the possessor of land has failed to conform to the standard of care of a reasonable person in the same or similar circumstances.

Even if you find the possessor of land knew or had reason to know that children were likely to trespass on the property, and that the condition on the land involved an unreasonable risk of harm to the trespassing children, and even if you

find the children were not likely to discover or appreciate the risk, the possessor of land is liable only if you find possessor of land failed to take such steps as a reasonable person would have taken to make the condition safe or to protect the children.

If you find that the possessor of land took the same care that a reasonable person in the same or similar circumstances would take to make the condition safe or protect the children which the possessor of land had reason to know would trespass on the property, then the possessor of land is not liable even though an injury has occurred to the trespassing child.

Cases:

> *Restatement of Torts 2d,* §339, Comment n, p. 205 (1965); *Coughlin v. U.S. Tool Co., Inc., supra*. "Foresight" is not synonymous with "omniscience"; hence, the possessor is not chargeable with knowledge of inherent danger in the storage of its cement mixer where boys pushed the mixer causing its wheels to move forward and the towing tongue to come down and crush the decedent. *Long v. Sutherland-Backer Co., supra,* 92 *N.J. Super.* at 559. In *Diglio v. Jersey Central Power & Light Co.*, 39 *N.J. Super.* 140 (App. Div. 1956), it was held that a fence was made unreasonably dangerous when sharp, pointed wires projecting upward were added in the face of knowledge that children often played on the property, and of the propensity of children to climb fences, where the utility of the dangerous fence to defendant was slight in contrast to the foreseeable risk to the children.

NOTE TO JUDGE

For definitions of trespasser, licensee and invitee, see subsection 1, 3 and 5 above; *Snyder v. I. Jay Realty Co.,* 30 *N.J.* 303, 312 (1959). Prior use of area by children is not sufficient to warrant a finding of licensee. *Ostroski v. Mount Prospect Shoprite, Inc., supra,* 94 *N.J. Super.* at 382. However, continued toleration of trespass and acquiescence therein may amount to permission or implied leave and license. *Imre v. Riegel Paper Corp.,* 24 *N.J.* 438, 446 (1957).

As to infant trespassers on railroad property, see *Egan v. Erie R. Co.,* 29 *N.J.* 243 (1959) and *N.J.S.A.* 48:12-152. This statute absolves a railroad company from the duty to a trespasser, including an infant trespasser. Although in *Egan v. Erie R. Co., supra,* 29 *N.J.* at 254, the Court held that the statute does not preclude recovery for injuries caused by a railroad's willful or wanton conduct, the failure to have watchmen present to protect infant trespassers is not wanton misconduct as a matter of law.

[*Warning of Condition, Where Appropriate Add:*]

In dealing with the obligation of the possessor of land to use reasonable care to eliminate the danger or otherwise protect an infant trespasser, you may consider whether a warning would have been sufficient. In a particular situation, a warning may be sufficient, and if you find that the possessor gave such a warning, but that warning was disregarded by the child, you may find for the defendant. In that connection, you must also determine whether the child was mature enough to understand the full nature and scope of the warning and danger involved. Only if you find that the child was capable of understanding the

warning and danger involved may you find for the defendant in this regard. If, however, you find that the child was too young to understand or heed the warning, or that the warning was not sufficient, a possessor may not be relieved from liability simply by giving such warning.

Citation:

Restatement of Torts 2d, §339, Comment o, p. 206 (1965).

[Artificial Condition, Where Appropriate Add:]

A landowner or occupant is responsible for harm caused by artificial conditions upon the landowner's/occupant's land.

Conversely, a landowner or possessor is not responsible for harm caused by a natural condition upon the land, even if you find the natural condition of the property was a proximate cause of the accident and the minor plaintiff's injuries.

Case:

Ostroski v. Mount Prospect Shoprite, Inc., supra, 94 *N.J. Super.* 374 at 380 (App. Div. 1967).

[*Creation of Condition, Where Appropriate Add:*]

In order for you to find the defendant liable it is not necessary that the defendant be the person who created the condition that caused the plaintiff's injuries. You may find defendant liable even though the condition was created by

some third person, provided you find the defendant had actual knowledge of the condition and should have foreseen that the condition would create an unreasonable risk of harm to children entering the property. However, the landowner has no obligation to make regular inspections upon the property for dangers created by others.

Cases:

> *Caliguire v. City of Union City,* 104 *N.J. Super.* 210 (App. Div. 1967)*, aff'd,* 53 *N.J.* 182 (1969)*; Simmel v. N.J. Coop Co.,* 28 *N.J.* 1, 11 (1958)*; Lorusso v. DeCarlo,* 48 *N.J. Super.* 112 (App. Div. 1957).

[*Comparative Negligence of Trespassing Child, Where Appropriate Add:*]

In this case, the defendant claims the minor plaintiff was negligent, in other words, that the minor plaintiff failed to exercise that degree of care or caution for the minor plaintiff's own safety that you would expect of a reasonable child of the same age.

In order to decide whether or not the minor plaintiff was negligent, you must consider the child's actions or inactions by an evaluating whether the child failed to exercise that degree of care for the child's own safety that a person of the same age would have exercised under the same or similar circumstances.

a. In General (7 years and older)

A child, old enough to be capable of negligence, is required to act with the same amount of care as children of similar age, judgment and experience. In order for you to determine whether a child has acted negligently, you should take into consideration the child's age, intelligence and experiences. Also, you must consider the child's capacity to understand and avoid the danger to which the child was exposed in the actual circumstances and situation in this case. You, the jury, must decide the factual question of whether this child was comparatively negligent.

b. Where Child is Under 7 Years

There is a presumption in the law that a child under the age of seven years is not capable of acting negligently. You may reject this presumption only if the party who is claiming the child was negligent proves that this particular child had the experience and the capacity to avoid the danger, which was present in this situation.

If you decide that this child had the capacity to act negligently, then you must review the facts to see if the child failed to use that amount of care to avoid the danger, which should have been exercised by children with like experiences and intelligence.

If you find that the minor plaintiff deviated from this standard of care, then you will find that the minor plaintiff was also negligent, and you will then consider whether or not the negligence of the minor trespassing plaintiff was a proximate cause of the accident and the injuries, which you find were caused by the accident.

NOTE TO JUDGE

Paragraphs a. and b. are taken from Model Civil Charge 7.11 A and B. Please refer to ***NOTE TO JUDGE*** in Charge 7.11.

The Supreme Court in *Vega by Muniz v. Piedilato,* 154 *N.J.* 496, 506 (1998), citing with approval *Colls v. City of Chicago,* 212 *Ill.App. 3d* 904, 571 *N.E. 2d* 951 (1991), held that a comparative negligence charge in a trespassing child case was proper. The Court held that in determining whether an infant plaintiff has met the burden on element c of the *prima facie* case the jury is to use a subjective standard in evaluating the plaintiff's state of mind. If the jury concludes that the defendant is negligent, the jury must then determine whether the infant plaintiff is negligent under an objective evaluation of whether the infant plaintiff failed to use that degree of care which persons of the same age should exercise for their own safety in the same or similar circumstances.

3. Licensee, Defined and General Duty Owed (Approved 03/2000; Revised 12/2014)

A licensee is a person who has the right to enter or remain upon land by the consent of the possessor. A licensee is not invited but the licensee's presence is tolerated. The owner/occupier of property owes a duty to a licensee to abstain from willfully injurious acts. If the owner/occupier knows of a hazardous condition on

the premises and the owner/occupier could reasonably anticipate the licensee would not observe and avoid such condition, then the owner/occupier must either give warning of it or make the condition reasonably safe. A licensee is a person who is permitted to come onto the property and does so for the licensee's own purposes. The owner does not have a duty to a licensee to actually discover latent – hidden defects. The owner does have a duty to warn a licensee/social guest of any dangerous conditions of which the owner had actual knowledge and of which the guest is unaware.

NOTE TO JUDGE

The duty of care owed to a social guest is the same duty owed to a licensee. *Berger v. Shapiro*, 30 *N.J.* 89, 96, 98 (1959); *Pearlstein v. Leeds*, 52 *N.J. Super*. 450, 457 (App. Div. 1958), *certif. denied*, 29 *N.J.* 354 (1959). For a more complete charge and supporting authorities see Social Guest, Defined and General Duty Owed in subsection 4, below.

Cases:

Snyder v. I. Jay Realty Co., 30 *N.J.* 303, 312 (1959), holding that a friend of a manufacturer's employee who visits the manufacturer's rented factory premises at the invitation of the employee is a licensee of the manufacturer-tenant, but is an invitee as to the landlord's duty of care in common passageways.

One may enter the premises of another without invitation, express or implied, and be regarded as a licensee rather than a trespasser if one's presence is either expressly or impliedly permitted by the possessor of the premises. Prevailing customs often determine whether a possessor

of land is willing to have a third person come thereon. They may be such that it is entirely reasonable for one to assume that one's presence will be tolerated unless told otherwise. *Snyder v. I. Jay Realty Co.*, *supra*, 30 *N.J.* at 312.

Rowe v. Mazel, 209 *N.J.* 35 (2012), where police officer on duty investigating an abandoned building was deemed to be a licensee, but specific facts of a case will determine if a police officer is a licensee or invitee.

Examples of licensees: Salesmen or solicitors canvassing at the door of private homes, tourists visiting a plant at their own request, people who enter a building to get out of the rain, parents in search of their children, someone who comes to borrow tools, etc. *Prosser, Torts* (3rd ed. 1964) § 60, p. 386.

NOTE TO JUDGE

As to passengers in automobiles, the duty owed is the same, whether a licensee or an invitee. *Cohen v. Kaminetsky*, 36 *N.J.* 276, 283 (1961).

4. Social Guest — Defined and General Duty Owed (Approved 03/2000; Revised 11/2019)

A social guest is someone invited to a host's premises. The social guest must accept the premises of the host as the social guest finds them. In other words, the host has no obligation to make the home safer for the social guest than for the host. The host also is not required to inspect the premises to discover defects that might cause injury to the social guest.

If, however, the host knows or has reason to know of some artificial or natural condition on the premises which could pose an unreasonable risk of harm to the

guest and that the guest could not be reasonably expected to discover it, the owner/occupier owes the social guest a duty to exercise reasonable care to make the condition safe or to give warning to the guest of its presence and of the risk involved. In other words, although a social guest is required to accept the premises as the host maintains them, the guest is entitled to the host's knowledge of dangerous conditions on the premises. On the other hand, where the guest knows or has reason to know of the condition and the risk involved and nevertheless enters or remains on the premises, the host cannot be held liable for the accident.

[*Where Appropriate Add:*]

If you find that the property owner/occupier (1) knew or had reason to know of the dangerous or defective condition, (2) realized or in the exercise of reasonable foresight should have realized it involved an unreasonable risk of harm to the guest, (3) had reason to believe the guest would not discover the condition and realize the risk, and (4) failed to take reasonable steps to protect the guest from the danger by either making the condition safe or warning the guest of the condition and the risk involved, you may find the host negligent under the circumstances. If, however, you find that the defect was obvious and the owner/occupier had reason to believe the social guest would be aware of the defect and the risk involved, you must find the host was not negligent even though an injury occurred.

Cases:

Berger v. Shapiro, 30 *N.J.* 89 (1959) (Houseowner's mother-in-law, who had been visiting homeowner for several week, was a social guest or licensee to whom there was not owed a higher degree of care as to one on the premises to confer some benefit to the owner other than purely social). *Pearlstein v. Leeds*, 52 *N.J. Super.* 450 (App. Div. 1958), *certif. denied*, 29 *N.J.* 354 (1959) (Party guest who helped homeowner with preparations was a mere licensee and entitled only to same degree of care as a licensee); *Giordano v. Mariano*, 112 *N.J. Super.* 311 (App. Div. 1970) (reversing dismissal of suit brought by 11-1/2-year-old social guest injured after running into closed sliding glass door while attending birthday party, because homeowner had actual knowledge of the dangerous condition of unmarked, previously open glass door on pitch black night and therefore presented a jury question regarding reasonableness of defendant's conduct); *Endre v. Arnold,* 300 *N.J. Super.*_136 (App. Div. 1997) (affirming summary judgment for defendant-host because alleged defects in stairway were obvious such that host did not breach her duty to social guest as to conditions of property); *Tighe v. Peterson*, 175 *N.J.* 240 (2002) (affirming summary judgment for defendant because social guest injured while using homeowner's swimming pool was aware of the configuration of the pool's depth as he had been in the pool many times before and knew where the deep and shallow areas were located (but see dissent of Justice Long outlining the fact-sensitive nature of the duty inquiry, which must account for the great risk of harm compared to the small cost for avoiding it, and arguing that ultimate question was for the jury); *Parks v. Rogers*, 176 *N.J.* 471 (2003) (reversing summary judgment for defendant because, although social guest injured after fall down dark stairway with short railing was aware of the darkness hazard, that darkness caused her to rely on the handrail, and therefore a factual issue remained regarding whether she was aware or should have been aware of the shortness of the handrail); *Sussman v. Mermer*, 373 *N.J. Super.* 501 (App. Div. 2004) (reversing summary judgment for defendant because a factual question existed regarding whether social guest injured after fall down his neighbors' unilluminated porch steps was aware or should have been aware of the

hazards of the steps (see also reference to transition of broadening application of general tort obligation to exercise reasonable care against foreseeable harm to others); *Longo v. Aprile*, 374 *N.J. Super.* 469 (App. Div. 2005) (Neighbor who volunteered to perform household tasks for neighbor deemed to be a social guest, not an invitee. Danger which plaintiff encountered was self-evident); *Bagnana v. Wolfinger*, 385 *N.J. Super.* 1 (App. Div. 2006) (Social guest who sustained injury while jumping on homeowner's trampoline. Summary judgment denied where issues of fact existed as to whether homeowner removed warning label from trampoline prior to guest's arrival and whether he failed to enforce the manufacturer's rules and prohibitions, and observing that "the fact that a danger is obvious is . . . not necessarily conclusive evidence that the licensee can be expected to avoid it without a warning by the landowner"); see also *Estate of Desir v. Vertus*, 214 *N.J.* 303 (2013)(observing that "[a] property owner has a duty to warn a social guest of a dangerous condition on the property of which the owner is aware," and deeming that "a fair proposition because the social guest should be at no greater risk than the landowner, who, by reason of his knowledge of the property, has the ability to protect himself against a dangerous condition" (citations and internal quotation marks omitted)).

NOTE TO JUDGE

(1) EXCEPTION AS TO VOLUNTARY UNDERTAKINGS

(If this exception is applicable, the General Duty charge for a social host does not apply and should not be charged. See *Piech v. Layendecker,* 456 *N.J. Super.* 367 (App. Div. 2018).)

Where the host has gratuitously undertaken to do an act or perform a service recognizably necessary to a guest's bodily safety, and there is reasonable reliance thereon by the guest, the host is liable for harm sustained by the guest resulting from the host's failure to exercise reasonable care to carry out the undertaking. *Johnson v. Souza*, 71 *N.J. Super.* 240 (App. Div. 1961) (reversing dismissal of plaintiff-

licensee's case because jury could determine that plaintiff reasonably relied on host's undertaking of salting icy front steps after plaintiff had warned about the dangerous condition), *certif. denied*, 36 *N.J.* 598 (1962); but see *O'Neill v. Suburban Terrace Apartments, Inc.*, 110 *N.J. Super.* 541, 547 (App. Div.) (affirming dismissal of plaintiff's case because it was beyond dispute that plaintiff did not rely on landlord's undertaking to shovel snow), *certif. denied*, 57 *N.J.* 138 (1970).

(2) EXCEPTION AS TO HOST'S ACTIVITIES

(If this exception is applicable, the General Duty charge for a social host does not apply and should not be charged. *Piech v. Layendecker,* 456 *N.J. Super.* 367 (App. Div. 2018).)

In cases where the host is conducting some "activity" on the premises at the time of the guest's presence, the host is under an obligation to exercise reasonable care for the protection of the guest. *Hanna v. Stone*, 329 *N.J. Super.* 385, 389-91 (App. Div. 2000) (holding that "[i]n regard to activities, the duty of the person conducting the activity, such as parents sponsoring a party for their son, is simply to use reasonable care in all the circumstances," and affirming summary judgment for parents who hosted birthday party where plaintiff-guest was injured in a fight with another guest); *Vallillo v. Muskin Corp.*, 218 *N.J. Super.* 472, 475-76 (App. Div. 1987) (reversing summary judgment and remanding for trial because, notwithstanding plaintiff's knowledge of the shallowness of the pool, there were fact questions regarding whether defendants prevented plaintiff from knowing that diving was prohibited or actively facilitated and condoned the prohibited conduct), *certif. denied*, 111 *N.J.* 624 (1988); *accord Cohen v. Kaminetsky*, 36 *N.J.* 276, 279-80 (1961); *Barbarisi v. Caruso*, 47 *N.J. Super.* 125, 131 (App. Div. 1957); *Cropanese v. Martinez*_35 *N.J. Super.* 118 (App. Div. 1955); see also *Berger v. Shapiro*, 30 *N.J.* 89, 97 (1959); *Prosser, Torts* (3rd ed. 1964), § 60, p. 388; 2 *Harper & James, The Law of Torts*, § 27.10, p. 1474 (1956).

(3) GUEST DEEMED INVITEE AS TO COMMON PASSAGEWAYS OF MULTIPLE DWELLING

See *Gonzalez v. Safe & Sound Sec. Corp.*, 185 *N.J.* 100, 121 (2005); *Taneian v. Meghrigian*, 15 N.J. 267, 277-278 (1954), *Van Der Woude v. Gatty*, 107 *N.J. Super.* 164, 166-167 (App. Div. 1969), and for the rule that an owner of a two-family or multi-family dwelling owes a social guest the same duty of care as is owed to an invitee with respect to common passageways.

(4) SOCIAL GUEST PERFORMING SERVICES FOR HOST

If the main purpose of the visit is social and the guest also performs services beneficial to the host, the social guest remains a social guest. *Pearlstein v. Leeds*, 52 *N.J. Super.* 450, 459 (App. Div. 1958), *certif. denied*, 29 *N.J.* 354 (1959). However, where the sister of a homeowner was asked to perform some chores for the homeowner and did not enter the home for a social gathering, the sister was deemed an invitee. *Benedict v. Podwats*, 109 *N.J. Super*. 402, 406 (App. Div. 1970), *aff'd per curiam*, 57 *N.J.* 219.

5. Invitee — Defined and General Duty Owed (12/1988)

An invitee is one who is permitted to enter or remain on land (or premises) for a purpose of the owner/occupier. The invitee enters by invitation, expressed or implied. The owner/occupier of the land (or premises) who by invitation, expressed or implied, induced persons to come upon the premises, is under a duty to exercise ordinary care to render the premises reasonably safe for the purposes embraced in the invitation. Thus, the owner/occupier must exercise reasonable care for the invitee's safety. The owner/occupier must take such steps as are reasonable and

prudent to correct or give warning of hazardous conditions or defects actually known to the owner/occupier (or the owner's/occupier's employees), and of hazardous conditions or defects which the owner/occupier (or the owner's/occupier's employees) by the exercise of reasonable care, could discover.

[*Where Appropriate As to Business Invitee Add:*]

The basic duty of a proprietor of premises to which the public is invited for business purposes of the proprietor is to exercise reasonable care to see that one who enters the premises upon that invitation has a reasonably safe place to do that which is within the scope of the invitation.

NOTE TO JUDGE

(1) Business Invitee: The duty owed to a "business invitee" is no different than the duty owed to other "invitees."

(2) Construction Defects, Intrinsic and Foreign Substances: The rules dealt with in this section and subsequent sections apply mainly to those cases where injury is caused by transitory conditions, such as falls due to foreign substances or defects resulting from wear and tear or other deterioration of premises which were originally constructed properly.

Where a hazardous condition is due to defective construction or construction not in accord with applicable standards it is not necessary to prove that the owner or occupier had actual knowledge of the defect or would have become aware of the defect had the owner or occupier personally made an inspection. In such cases the owner is liable for failing to provide a safe place for the use of the invitee.

Thus, in *Brody v. Albert Lipson & Sons*, 17 *N.J.* 383 (1955), the Court distinguished between a risk due to the intrinsic quality of the material used (calling it an "intrinsic substance" case) and a risk due to a foreign substance or extra-normal condition of the premises. There the case was submitted to the jury on the theory that the terrazzo floor was peculiarly liable to become slippery when wet by water and that defendant should have taken precautions against said risk. The Court appears to reject defendant's contention that there be notice, direct or imputed by proof of adequate opportunity to discover the defective condition. 17 *N.J.* at 389.

It may be possible to reconcile this position with the requirement of constructive notice of an unsafe condition by saying that an owner of premises is chargeable with knowledge of such hazards in construction as a reasonable inspection by an appropriate expert would reveal. See *Restatement to Torts* 2*d*, § 343, Comment f, pp. 217-218 (1965), saying that a proprietor is required to have superior knowledge of the dangers incident to facilities furnished to invitees.

Alternatively, one can view these cases as within the category of defective or hazardous conditions created by defendant (see subsection b. 9 below) or by an independent contractor for which defendant would be liable (see introductory note above).

(3) Landlord and Tenant Both May be Liable to Invitee: *Krug v. Wanner*, 28 *N.J.* 174 (1958). The Court held that a tenant storekeeper and landlord owner were both liable to customer who tripped over protruding edge of cellar door in sidewalk. There the landlord installed and repaired the cellar door and tenant could have required the landlord to make repairs, or, in default thereof, made repairs himself, even if the lease called upon the landlord to make repairs. See authority cited in 28 *N.J.* at 183.

(4) Negligent Activities or Operations: As to injury to invitees caused by activities or operations negligently conducted on the premises, see Model Civil Charge 5.20E.

(5) Public Officials: As to public officials not controlled by "fireman's rule," but who are injured while making same use of property that an invitee should have been reasonably anticipated to have made, duty owed is that to an invitee. *Caroff v. Liberty Lumber Co*., 146 *N.J. Super*. 353, 361 (App. Div. 1977), *certif. denied* 74 *N.J*. 266 (1977).

Cases:

Bozza v. Vornado, Inc., 42 *N.J*. 355, 359 (1954) (slip and fall on sticky, slimy substance in self-service cafeteria which inferably fell to the floor as an incident of defendant's mode of operation).

Buchner v. Erie Railroad Co., 17 *N.J*. 283, 285-286 (1955) (trip over improperly illuminated curbstone).

Brody v. Albert Lifson & Sons, 17 *N.J*. 383, 389 (1955) (slip and fall on wet composition floor in store).

Bohn v. Hudson & Manhattan R. Co., 16 *N.J*. 180, 185 (1954) (slip on smooth stairway in railroad station).

Gudnestad v. Seaboard Coal Dock Co., 15 *N.J*. 210, 219 (1954) (employee of contractor engaged in repair work on defendant railroad company's yard struck by railroad car).

Gallas v. Public Service Electric and Gas Co., 106 *N.J. Super*. 527 (App. Div. 1969) (employee of contractor killed while constructing a water tank when boom of crane made contact with power lines).

Williams v. Morristown Memorial Hospital, 59 *N.J. Super*. 384, 389 (App. Div. 1960) (fall over low wire fence separating grass plot from sidewalk).

Nary v. Dover Parking Authority, 58 *N.J. Super*. 222, 226-227 (App. Div. 1959) (fall over bumper block in parking lot).

Parmenter v. Jarvis Drug Store, Inc., 48 *N.J. Super*. 507, 510 (App. Div. 1957) (slip and fall on wet linoleum near entrance of store on rainy day).

Nelson v. Great Atlantic & Pacific Tea Co., 48 *N.J. Super*. 300 (App. Div. 1958) (inadequate lighting of parking lot of supermarket, fall over unknown object).

Barnard v. Trenton-New Brunswick Theatre Co., 32 *N.J. Super*. 551, 557 (App. Div. 1954) (fall over ladder placed in theatre lobby by workmen of independent contractor).

Ratering v. Mele, 11 *N.J. Super*. 211, 213 (App. Div. 1951) (slip and fall on littered stairway at entrance to restaurant).

6. Implied Invitation (Approved 05/1970; Revised 12/2014)

a. Defined

The test of an implied invitation is whether the entry of the plaintiff upon the premises was for a purpose directly or indirectly connected with the business carried on there by the owner/occupier or was of interest or advantage which was common or mutual to the owner/occupier and to the plaintiff.

Another test of an implied invitation is whether the owner/occupier by the arrangement of the premises or other conduct led the plaintiff reasonably to believe that the premises were intended to be used in the manner in which plaintiff used them.

Cases:

Barnard v. Trenton-New Brunswick Theatres Co., 32 *N.J. Super*. 551 (App. Div. 1954). Also see *Restatement of Torts* 2*d*, § 332, p. 176 *et seq*. (1965); 2 *Harper & James, Torts*, § 27.17, p. 1478 *et seq*. (1956). *Handelman v. Cox*, 39 *N.J*. 95, 106 *et seq*. (1963) (jury could find that employer knew and acquiesced in visits by salesman to sell merchandise to employees and that salesman reasonably felt welcome to enter the premises); *Black v. Central Railroads Co*., 85 *N.J.L*. 197, 201 (E. & A. 1913) (private way given all appearances of public street); *Phillips v. Library Co*., 55 *N.J.L*. 307, 315 (E. & A. 1893).

NOTE TO JUDGE

The purpose of the entrant's visit need not involve some business benefit to the owner or occupier — the "economic benefit" test is not the exclusive one for determining whether an implied invitation exists. The "invitation test" which focuses upon the holding out of the premises by the owner or occupier for certain purposes also may be utilized. *Handelman v. Cox, supra*, 39 *N.J*. at 106 *et seq*.

b. Scope of Invitation

The plaintiff is deemed to be an invitee only to the extent that the plaintiff remains within the scope of the plaintiff's invitation. An invitation extends to all parts of the premises to which the invitee reasonably may be expected to go in view of the invitation given to the plaintiff, and to those parts of the premises which the defendant by the defendant's conduct has led plaintiff reasonably to believe are open to the plaintiff.

Cases:

With respect to commercial establishments, courts have held that the duty owed to customers includes a duty to provide reasonably safe means of "ingress and egress." In *Warrington v. Bird*, 204 *N.J. Super.* 611, 617-18 (App. Div. 1985), *certif. denied*, 103 *N.J.* 473 (1986), the restaurant's limited duty was extended to ensure safe ingress and egress to patrons crossing a public roadway with adequate lighting to access a parking lot for the restaurant. See also *Mulraney v. Auletto's Catering*, 293 *N.J. Super.* 315, 321 (App. Div.) (holding that business proprietor has a duty, at least under same circumstances, to undertake reasonable safeguards to protect its customers from dangers posed by crossing adjoining highway to area proprietor knows or should know its customers will use for parking), *certif. denied*, 147 N.J. 263 (1996); but see *Ross v. Moore*, 221 *N.J. Super.* 1, 6-7 (App. Div. 1987) (Tort Claims Act immunity precluded claim against school board by night student who parked in shopping center lot opposite the school. In dictum, the court in *Ross*, *supra*, distinguished *Warrington*, *supra*, because it involved a commercial proprietor who owned and provided the parking lot; the court in *Mulraney*, *supra*, 293 *N.J. Super.* at 323-24, disagreed with said dictum, noting its opinion that ownership and control are irrelevant to the dispositive inquiry, which focuses instead on the reasonable expectations of the invitee).

See also *Reiter v. Max Marx Color & Chemical Co.*, 82 *N.J. Super.* 334 (App. Div.), *aff'd*, 42 *N.J.* 352, 353 (1964) (employee of plumbing company working on water tank fell while using defective ladder attached to inside of tank. The Court held: "When an owner of premises engages a contractor to perform certain work or repairs thereon, under the law he impliedly invites the employees of the contractor to use such part or parts of the premises as are reasonably necessary for the doing of the work or the making of the repairs"); *Handelman v. Cox*, 39 *N.J.* 95, 110 (1963) (salesman showing merchandise to employees of defendant used rear entrance of defendant's diner); *Giangrosso v. Dean Floor Covering Co.*, 51 *N.J.* 80, 83 (1968) (open area in rear of store not intended for use by

customers as pathway to store); *Williams v. Morristown Memorial Hospital*, 59 *N.J. Super.* 384, 389-90 (App. Div. 1960) (jury question as to invitation to cross grass area between parking space and cement walk.)

7. Duty to Inspect Owed To Invitee

The duty of an owner/occupier of land (or premises) to make the place reasonably safe for the proper use of an invitee requires the owner/occupier to make reasonable inspection of the land (or premises) to discover hazardous conditions.

Cases:

See, *e.g., Monaco v. Hartz Mt. Cmp.*, 178 *N.J.* 401 (2004) (landowner's duty to make a reasonable inspection of its property included inspecting an unsafe sign on the abutting sidewalk, even though it was owned and maintained by the city); *Filipowicz v. Diletto*. 350 *N.J. Super.* 552 (App. Div. 2002) (garage-sale customer tripped on a drop off in homeowner's sidewalk camouflaged by tall, uncut grass); *Teney v. Sheridan Gardens, Inc.*, 163 *N.J. Super.* 404(App. Div. 1978) (a jury could reasonably find that flattened wet leaves, which had fallen from a nearby tree, were on the apartment steps for at least a day, and had defendant performed its inspection duty, it would have observed them); *Zentz v. Toop*, 92 *N.J. Super.* 105 (App. Div. 1966), aff'd, 50 *N.J.* 250 (1967) (roofing contractor required to make a reasonable inspection to protect its employees from guy wires, which were the same color of the surface of the roof); *Handelman v. Cox*, 39 *N.J.* 95 (1963) (salesman showing merchandise to employees of defendant fell down cellar stairway partially obscured by carton); *Van Staveren v. F. W. Woolworth Co.*, 29 *N.J. Super.* 197 (App. Div. 1954) (owner of department-store cafeteria had a duty to inspect the brackets and bolts of the stools at lunch counter).

But see *Geringer v. Hartz Mountain Development Corp.*, 388 *N.J. Super.* 392, 404 (App. Div. 2006) (landlord had no "ongoing duty to perform inspections" because the lease unambiguously placed upon the tenant exclusive responsibility for maintenance and repair of the area where the plaintiff fell).

8. Notice of Particular Danger as Condition of Liability

If you find that the land (or premises) was not in a reasonably safe condition, then, in order to recover, plaintiff must show either:

(a) Actual Notice for a period of time before plaintiff's injury to permit the owner/occupier, in the exercise of reasonable care, to have corrected it; or

(b) Constructive Notice.

When the term Actual Notice is used, we mean that the owner/occupier or the owner's/occupier's employees actually knew about the unsafe condition.

When the term Constructive Notice is used, we mean that the particular condition existed for such period of time that an owner/occupier of the premises in the exercise of reasonable care should have discovered its existence. That is to say, constructive notice means that the person having a duty of care to another is deemed to have notice of such unsafe conditions, which exist for such period of time that a person of reasonable diligence would have discovered them.

Cases:

See*, e.g., Monaco v. Hartz Mt. Corp.*, 178 *N.J.* 401 (2004) (testimony that a city-owned sign on the sidewalk abutting the landowner's prope1ty had a cracked base, was crooked, and squeaked and moved when subject to high winds was sufficient to permit a finding of constructive notice where defendant inspected the area two or three times per week); *Ruiz v. Toys R Us, Inc.*, 269 *N.J. Super.* 607 (App. Div. 1994) (where defendant had actual knowledge of a leak in the ceiling, plaintiff did not have to prove actual or constructive knowledge of the specific puddle upon which she fell); *Milacci v. Mato Realty Co.*, 217 *N.J. Super.* 297 (App. Div. 1987) (plaintiff's testimony that she fell on sand and dirt on the stairs of defendant's building was sufficient to permit a finding of constructive notice); *Terrey v. Sheridan Gardens, Inc.*, 163 *N.J. Super.* 404 (App. Div. 1978) (a jury reasonably could find that flattened wet leaves, which had fallen from a nearby tree, were on the apartment steps for at least a day, and had defendant performed its inspection duty, it would have observed them); *Tua v. Modem Homes, Inc.*, 64 *N.J. Super.* 211 (App. Div. 1960), affd, 33 *N.J.* 476 (1960) (plaintiffs testimony that a wax-like substance on the floor of defendant's store was soft in the center but "encrusted" around the edges and could not be cleaned without scraping it was sufficient to raise a jury question about defendant's constructive notice); *Parmenter v. Jarvis Drug Store, Inc.*, 48 *N.J. Super.* 507 (App. Div. 1957) (in a case involving plaintiffs slip and fall on wet linoleum near entrance of store on rainy day, testimony of the severity and duration of the storm and evidence that the water on the floor was dirty was sufficient to permit a finding of constructive notice of the water on the floor); *Ratering v. Mele*, 11 *N.J. Super.* 211 (App. Div. 1951) (when plaintiff fell on stairs littered with cigarette butts, matches and paper, evidence indicating accumulation of litter over two and one-half hour period without inspection by defendant presented a jury issue as to defendant's constructive knowledge).

But see *Carroll v. New Jersey Transit*, 366 *N.J. Super.* 380 (App. Div. 2004) (plaintiff could not prove that defendant had actual or

constructive notice of dog feces because there was "no evidence to indicate how long the substance was on the stairway"). See also *Vellucci v. Allstate Ins. Co.*, 431 *N.J. Super.* 39 (App. Div. 2013) (commercial owner did not owe duty to ensure its water supply was not contaminated with Legionella bacteria absent evidence of actual or constructive notice of contamination).

NOTE TO JUDGE

(1) The above charge is applicable to those cases where the defendant is not at fault for the creation of the hazard of where the hazard is not to be reasonably anticipated as an incident of defendant's mode of operation. See *Maugeri v. Great Atlantic & Pacific Tea Company*, 357 *F.2d* 202 (3d Cir. 1966) (dictum).

(2) An employee's knowledge of the danger is imputed to the employer, the owner of premises. *Handelman v. Cox*, 39 N.J. 95, 104 (1963).

(3) See *Note to Judge,* numbered paragraph 2, in subsection 5 above, distinguishing between transitory defective conditions, such as foreign substance cases, where actual or constructive notice is required, and original defects in construction, sometimes referred to as "intrinsic substance" cases, where it is not necessary to prove that the owner had personal knowledge of the hazardous condition.

9. Notice Not Required When Condition is Caused by Defendant

If you find that the land (or premises) was not in a reasonably safe condition and that the owner/occupier and/or an agent, servant or employee of the owner/occupier created that condition through their own act or omission, then, in order for plaintiff to recover, it is not necessary for you also to find that the

owner/occupier had actual or constructive notice of the particular unsafe condition.

Cases:

> See*, e.g., Tymczyszyn v. Columbus Gardens*, 422 *N.J. Super.* 253 (App. Div. 2011) (plaintiff was not required to prove actual or constructive knowledge where defendant's negligent snow removal created icy condition of sidewalk that caused plaintiff to fall); *Atalese v. Long Beach Twp.*, 365 *N.J. Super.* 1 (App. Div. 2003) (actual or constructive notice not required where the County created depression in pedestrian-bicycle lane by negligently installing storm sewer extension); *Smith v. First National Stores*, 94 *N.J. Super.* 462 (App. Div. 1967) (slip and fall on greasy stairway caused by sawdust tracked onto the steps by defendant's employees); *Plaga v. Follis*, 88 *N.J. Super.* 209 (App. Div. 1965) (slip and fall on fat in restaurant area traversed by bus boy); *Gill v. Krassner*, 11 *N.J. Super.* 10 (App. Div. 1950) (in a case involving excessive accumulation of wax on defendant's floor, plaintiff did not need to establish actual or constructive notice of the condition; instead, plaintiff only needed to prove that defendant's employee performed the floor waxing negligently).
>
> For an example of this principle applied to a defendant's omission, see *Ruiz v. Toys R Us, Inc.*, 269 *N.J. Super.* 607 (App. Div. 1994) (where defendant had actual knowledge of a leak in the ceiling, plaintiff did not have to prove actual or constructive knowledge of the specific puddle upon which she fell).

10. Notice Not Required Under Certain Circumstances

A proprietor of business premises has the duty to provide a reasonably safe place for customers. If you find that the premises were in a hazardous condition, whether caused by defendant's employees or by others, such as customers, and if

you find that said hazardous condition was likely to result from the particular manner in which defendant's business was conducted, and if you find that defendant failed to take reasonable measures to prevent the hazardous condition from arising or failed to take reasonable measures to discover and correct such hazardous condition, then defendant is liable to plaintiff. In these circumstances, defendant would be liable even if defendant and defendant's employees did not have actual or constructive knowledge of the particular unsafe condition, which caused the accident and injury.

11. Mode of Operation Rule

A proprietor of business premises that permits its customers to handle products and equipment in a self-service setting, unsupervised by employees, increases the risk that a dangerous condition will go undetected and that patrons will be injured. In self-service settings, patrons may also be at risk for injury from the manner in which the business's employees handle the business's products or equipment, or from the inherent quality of the merchandise itself.

If you find that plaintiff has proven that (1) the defendant's business was being operated as a self-service operation; (2) that the plaintiff's accident occurred in an area affected by the business's self-service operations; and (3) that there is a reasonable factual nexus between the defendant's self-service activity and the

dangerous condition allegedly producing the plaintiff's injury, then the plaintiff is relieved of the burden of proving that the defendant had actual or constructive knowledge of the particular dangerous condition. In such circumstances, an inference of negligence arises that shifts the burden to the defendant to produce evidence that it did all that a reasonably prudent business would do in the light of the risk of injury that the self-service operation presented.

Cases:

> The "mode-of-operation" rule is typically used in connection with accidents arising from self-service stations at supermarkets. See*, e.g.*, *Nisivoccia v. Glass Gardens, Inc.*, 175 *N.J.* 559, 563 (2003) (loose grapes displayed in open-top, vented plastic bags); *Wollerman v. Grand Union Stores Inc.*, 47 *N.J.* 426 (1966) (string beans sold from open self-service bins); *Bozza v. Vornado Inc.*, 42 *N.J.* 355 (1964) (beverages served in paper cups without lids or tops); *Torda v. Grand Union Co.*, 59 *N.J. Super.* 41 (App. Div. 1959) (slip and fall on the wet floor near self-service bin containing wet vegetables); *Francois v. American Stores Co.*, 46 *N.J. Super.* 394 (App. Div. 1957) (a self-service display of stacked cans of soda in the narrow quarters of the checkout aisle in front of cashier came tumbling down onto plaintiff).
>
> This rule, however, is not limited to only supermarket cases. See, *e.g., Craggan v. IKEA USA*, 332 *N.J. Super.* 53 (App. Div. 2000) (trip on string in self-help loading area); *O'Shea v. K. Mart Corp.*, 304 *N.J. Super.* 489 (App. Div. 1997) (golf bag fell from shelf and hit plaintiff); *Krackomberger v. Vornado. Inc.*, 119 *N.J. Super.* 380 (App. Div. 1972) (slip on clear plastic apparel coverings on floor from rack in retail store); *Mahoney v. J.C. Penney Co.*, 71 *N.M.* 244, 317 P.2d 663 (Sup. Ct. 1963) (fall on stairway littered with sticky substance). *Ryder v. Ocean County Mall*, 340 *N.J. Super.* 504 (App. Div.) (slip and fall outside food court area while holiday shopping),

certif. denied, 170 *N.J.* 88 (2001); *Walker v. Costco Wholesale Warehouse*, 445 *N.J. Super.* 111, 121-128 (App. Div. 2016) (reversing judgment for defendant and remanding for new trial during which "mode of operation" instruction shall be charged, because plaintiff presented sufficient evidence to justify giving the charge, but holding that jury must first be instructed to determine "whether [plaintiff] met his threshold burden of proving the necessary factual nexus to a defendant's self-service activity," i.e., that plaintiff in fact "slipped on a substance that came from the stand with free samples").

But see *Arroyo v. Durling Realty, LLC*, 433 *N.J. Super.* 238, 241 (App. Div. 2013) (declining to apply mode-of-operation rule to claim by plaintiff injured on public sidewalk by tripping on used phone card against store that might have sold card); *Carroll v. New Jersey Transit*, 366 *N.J. Super.* 380 (App. Div. 2004) (in a case in which a customer of a municipal subway system slipped on dog feces as he descended a flight of stairs, the mode-of-operation rule was inapplicable because there was no evidence in the record to indicate, as a matter of reasonable probability, that the presence of dog feces was likely to occur as a result of the nature of the defendant's business, the condition of the property, or a demonstrable pattern of conduct or incidents); *Znoski v. Shop-Rite Supermarkets, Inc.* 122 *N.J. Super.* 243 (App. Div. 1973) (holding that the mode-of-operation rule was inapplicable where plaintiff was struck in the back by a shopping cart pushed by a child because there was no substantial risk of injury as shopping carts are not dangerous instrumentalities). *Znoski*, *supra*, subsequently was distinguished by the Supreme Court in *Meade v. Kings Supermarket-Orange*, 71 *N.J.* 539 (1976), where the Court limited *Znoski* to its precise facts, holding that where plaintiff was struck by line of shopping carts and propelled through plate glass window, there was abundant proof from which jury could find design and construction of ramp were defective and that shopping carts moving in and around supermarket premises is reasonably foreseeable).

See also *Prioleau v. Kentucky Fried Chicken, Inc.*, 434 *N.J. Super.* 558, 582 (App. Div. 2014) (mode of operation doctrine found inapplicable in case where plaintiff slipped and fell on way to restroom due to absence of proof that fall on grease was caused by defendants as fry cook used the rest room. The court found the "mode of operation" rule focuses on business model encouraging self-service, not conduct of establishment's employee), *aff'd*, 223 *N.J.* 245, 264 (2015) (affirming inapplicability of mode-of-operation doctrine under circumstances because "[t]here is no evidence in the trial record that the location in which plaintiff's accident occurred—the section of the restaurant traversed by plaintiff as she walked from the counter to the restroom—bears the slightest relationship to any self-service component of defendants' business"). But see *Walker v. Costco Wholesale Warehouse*, 445 *N.J. Super.* 111,121-128 (App. Div. 2016) (finding reasonable factual basis sufficient to justify giving "mode of operation" charge in case involving plaintiff's allegation that he slipped and fell on cheesecake given out from free sample stand in Costco).

NOTE TO JUDGE

BURDEN OF GOING FORWARD

In *Wollerman v. Grand Union Stores, Inc.*, 47 *N.J.* 426, 429-430 (1966), the Court held that where string beans are sold from bins on a self-service basis there is a probability that some will fall or be dropped on the floor either by defendant's employees or by customers. Since plaintiff would not be in a position to prove whether a particular string bean was dropped by an employee or another customer (or how long it was on the floor) a showing of this type of operation is sufficient to put the burden on the defendant to come forward with proof that defendant did what was reasonably necessary (made periodic inspections and clean-up) in order to protect a customer against the risk of injury likely to be generated by defendant's mode of operation. Presumably, however, the burden of proof remains on plaintiff to prove lack of reasonable care on defendant's part. If defendant fails to produce evidence of reasonable

care, the jury may infer that the fault was probably his. See also *Bozza v. Vornado, Inc*., 42 *N.J.* 355, 359 (1964).

12. Notice to Invitee or Obviousness of Defect

a. Affecting Negligence or Contributory Negligence

Whether defendant has furnished an invitee with a reasonably safe place for the invitee's use may depend upon the obviousness of the condition claimed to be hazardous and the likelihood that the invitee would realize the hazard and protect against it.

Even though an unsafe condition may be observable by an invitee, you may find that an owner/occupier of premises is negligent, nevertheless, in maintaining said condition when the condition presents an unreasonable hazard to invitees in the circumstances of a particular case**.**

If you find that defendant was negligent in maintaining an unsafe condition, even though the condition would be obvious to an invitee, the fact that the condition was obvious should be considered by you in determining whether the invitee was contributorily negligent (a) in proceeding in the face of a known hazard or (b) in the manner in which the invitee proceeded in the face of a known hazard.

NOTE TO JUDGE

See comprehensive note at the end of this section.

b. Warning of Danger

The duty of an owner or occupier of premises is to provide a reasonably safe place for use by an invitee. Where the owner/occupier knows of an unsafe condition the owner/occupier may satisfy the duty by correcting the condition, or, in those circumstances where it is reasonable to do so, by giving warning to the invitee of the unsafe condition.

Where a warning has been given, it is for you as jurors to determine whether the warning given was adequate to meet the duty of care owed to the invitee. In this regard you should consider the nature of the defect or unsafe condition, the prevailing circumstances, and the likelihood that the warning given would be adequate to call attention to the invitee of the hazard and of the need to protect against said hazard.

NOTE TO JUDGE

See comprehensive note at the end of this section.

c. Distraction or Forgetfulness of Invitee

Even if you find that plaintiff knew of the existence of the unsafe or defective condition, or that the unsafe or defective condition was so obvious that

defendant had a reasonable basis to expect that an invitee would realize its existence, plaintiff may still recover if the circumstances or conditions are such that plaintiff's attention would be distracted so that the plaintiff would not realize or would forget the location or existence of the hazard or would fail to protect against it.

Thus, even where a hazardous condition is obvious, you must first determine whether, in the circumstances, the defendant was negligent in permitting the condition to exist. Even if defendant was negligent, however, if plaintiff knew that a hazardous condition existed, plaintiff could not recover if plaintiff was contributorily negligent, that is to say, plaintiff could not recover if plaintiff did not act as a reasonably prudent person either by proceeding in the face of a known danger or by not using reasonable care in the manner in which plaintiff proceeded in the face of the danger. In considering whether plaintiff was contributorily negligent, you may consider that even persons of reasonable prudence in certain circumstances may have their attention distracted so that they would not realize or remember the existence of a hazardous condition and would fail to protect themselves against it. Mere lapse of memory or inattention or mental abstraction at the critical moment is not an adequate excuse. One who is inattentive or forgetful of a known and obvious danger is contributorily negligent

unless there is some condition or circumstance, which would distract or divert the mind or attention of a reasonably prudent person.

NOTE TO JUDGE

In *McGrath v. American Cyanamid Co.*, 41 *N.J.* 272 (1963), the employee of a subcontractor was killed when a plank comprising a catwalk over a deep trench up-ended causing him to fall. The court held that even if the decedent had appreciated the danger that fact by itself would not have barred recovery. The Court said if the danger was one which due care would not have avoided, due care might, nevertheless, require notice of warning unless the danger was known or obvious. If the danger was created by a breach of defendant's duty of care, that negligence would not be dissipated merely because the decedent knew of the danger. Negligence would remain, but decedent's knowledge would affect the issue of contributory negligence. The issue would remain whether decedent acted as a reasonably prudent person in view of the known risk, either by incurring the known risk (by staying on the job), or by the manner in which decedent proceeded in the face of that risk.

In *Zentz v. Toop*, 92 *N.J. Super.* 105 (App. Div. 1966*)*, *aff'd o.b.*, 50 *N.J.* 250 (1967), the employee of a roofing contractor, while carrying hot tar, tripped over a guy wire supporting an air conditioning tower on a roof. The court held that even if plaintiff had observed the wires or if they were so obvious that he should have observed them, the question remained whether, considering the hazard and the work of the employee, he was entitled to more than mere knowledge of the existence of the wires or whether he was entitled to a warning by having the wires flagged or painted in a contrasting color. This was a fact for the jury to determine. The jury must also determine whether defendant had reason to expect that the employee's attention would have been distracted as he worked so that he would forget the location of a known hazard or fail to protect against it. The court also held the plaintiff's knowledge of the danger would not alone bar his

recovery, but this knowledge goes to the issue of contributory negligence.

In *Fenie v. D'Arc*, 31 *N.J.* 92, 95 (1959), the Court held that there was no reasonable excuse for plaintiff's forgetfulness or inattention to the fact that a railing was temporarily absent from her porch, as she undertook to throw bones to her dog, and fell to the ground because of the absence of a railing she customarily leaned upon. The Court held:

> When an injury results from forgetfulness or inattention to a known danger, the obvious contributory negligence is not excusable in the absence of some condition or circumstance which would divert the mind or attention of an ordinarily prudent man. Mere lapse of memory, or inattention or mental abstraction at the critical moment cannot be considered an adequate diversion. One who is inattentive to or forgetful of a known and obvious condition which contains a risk of injury is also guilty of contributory negligence as a matter of law, unless some diversion of the type referred to above is shown to have existed at the time.

But see *Wolczak v. National Electric Products Corp.*, 66 *N.J. Super.* 64, 75 (App. Div. 1961), saying that the duty to provide a safe place for employees of an independent contractor does not relate to "known hazards which are part of or incidental to the very work the contractor was hired to perform."

The following discussion in 2 *Harper & James*, Torts,§ 27.13, pp. 1489 *et seq.,* (1956), cited with approval in *Zentz, supra*, 92 *N.J. Super.* at 112, may be helpful in understanding the principles involved in the above charges:

> Once an occupier has learned of dangerous conditions on his premises, a serious question arises as to whether he may-as a matter of law under all circumstances-

discharge all further duty to his invitees by simply giving them "a warning adequate to enable them to avoid the harm." A good many authorities, including the *Restatement,* take the position that he may. But this proposition is a highly doubtful one both on principle and authority. The alternative would be a requirement of due care to make the conditions reasonably safe - a requirement which might well be satisfied by warning or obviousness in any given case, but which would not be so satisfied invariably.

* * *

1. Defendant's duty. People can hurt themselves on almost any condition of the premises. That is certainly true of an ordinary flight of stairs. But it takes more than this to make a condition unreasonably dangerous. If people who are likely to encounter a condition may be expected to take perfectly good care themselves without further precautions, then the condition is not unreasonably dangerous because the likelihood of harm is slight. This is true of the flight of ordinary stairs in a usual place in the daylight. It is also true of ordinary curbing along a sidewalk, doors or windows in a house, counters in a store, stones and slopes in a New England field, and countless other things which are common in our everyday experience. It may also be true of less common and obvious conditions which lurk in a place where visitors would expect to find such dangers. The ordinary person can use or encounter all of these things safely if he is fully aware of their presence at the time. And if they have no unusual features and are in a place where he would naturally look for them, he may be expected to take care of himself if they are plainly visible. In such cases it is enough if the condition is obvious, or is made obvious (*e.g.,* by illumination).

* * *

On the other hand, the fact that a condition is obvious - *i.e.,* it would be clearly visible to one whose attention was directed to it - does not always remove all unreasonable danger. It may fail to do so in two lines of cases. In one line of cases, people would not in fact expect to find the condition where it is, or they are likely to have their attention distracted as they approach it, or, for some other reason, they are in fact not likely to see it, though it could be readily and safely avoided if they did. There may be negligence in creating or maintaining such a condition even though it is physically obvious; slight obstructions to travel on a sidewalk, an unexpected step in a store aisle or between a passenger elevator and the landing furnish examples. Under the circumstances of any particular case, an additional warning may, as a matter of fact, suffice to remove the danger, as where a customer, not hurried by crowds or some emergency, and in possession of his faculties, is told to "watch his step" or "step up" at the appropriate time. When this is the case, the warning satisfies the requirement of due care and is incompatible with defendant's negligence. Here again, plaintiff's recovery would be prevented by that fact no matter how careful he was. But under ordinary negligence principles the question is properly one of fact for the jury except in the clearest situations.

In the second line of cases, the condition of danger is such that it cannot be encountered with reasonable safety even if the danger is known and appreciated. An icy flight of stairs or sidewalk, a slippery floor, a defective crosswalk, or a walkway near an exposed high tension wire may furnish examples. So may the less dangerous kind of condition if surrounding circumstances are likely to force plaintiff upon it, or if,

for any other reason, his knowledge is not likely to be a protection against danger. It is in these situations that the bite of the *Restatement's* "adequate warning" rule is felt. Here, if people are in fact likely to encounter the danger, the duty of reasonable care to make conditions reasonably safe is not satisfied by a simple warning; the probability of harm in spite of such precaution is still unreasonably great. And the books are full of cases in which defendants, owing such a duty, are held liable for creating or maintaining a perfectly obvious danger of which plaintiff are fully aware. The *Restatement,* however, would deny liability here because the occupier need not invite visitors, and if he does, he may condition the invitation on any terms he chooses, so long as there is full disclosure of them. If the invitee wishes to come on those terms, he assumes the risk.

The *Restatement* view is wrong in policy. The law has never freed landownership or possession from all restrictions or obligations imposed in the social interest. The possessor's duty to use care toward those outside the land is of long standing. And many obligations are imposed for the benefit of people who voluntarily come upon the land. For the invitee, the occupier must make reasonable inspection and give warning of hidden perils.... But this should not be conclusive. Reasonable expectations may raise duties**,** but they should not always limit them. The gist of the matter is unreasonable probability of harm in fact. And when that is great enough in spite of full disclosure, it is carrying the quasi-sovereignty of the landowner pretty far to let him ignore it to the risk of life and limb.

So far as authority goes, the orthodox theory is getting to be a pretty feeble reed for defendants to lean on. It is still frequently stated, though often by way of dictum. On the other hand, some cases have simply—though

unostentatiously--broken with tradition and held defendant liable to an invitee in spite of his knowledge of the danger, when the danger was great enough and could have been feasibly remedied. Other cases stress either the reasonable assumption of safety which the invitee may make or the likelihood that his attention will be distracted, in order to cut down the notion of what is obvious or the adequacy of warning. And the latter is often a jury question even under the *Restatement* rule. It is not surprising then, that relatively few decisions have depended on the *Restatement* rule alone for denying liability.

2. Contributory Negligence... But there are several situations in which a plaintiff will not be barred by contributory negligence although he encountered a known danger... For another, it is not necessarily negligent for a plaintiff knowingly and deliberately to encounter a danger which it is negligent for defendant to maintain. Thus a traveler may knowingly use a defective sidewalk, or a tenant a defective common stairway, without being negligent if the use was reasonable under all the circumstances.

* * *

These situations show that the invitee will not always be barred by his or her self-exposure to known dangers on the premises**.**

INFANT TRESPASSER JURY VERDICT SHEET

1. Did the Plaintiff prove that the Defendant knew or had reason to know that children were likely to trespass on Defendant's property?

   YES _____ NO _____

   If your answer is "YES", proceed to question 2. If your Answer is No, cease deliberations.

2. Did the Plaintiff prove that the Defendant knew or had reason to know that (describe dangerous condition) involved an unreasonable risk of death or serious bodily harm to children trespassing on Defendant's property?

   YES _____ NO _____

   If your answer is "YES", proceed to question 3. If your Answer is No, cease deliberations.

3. Did the plaintiff prove that because of the child's youth, the child

   (A) did not discover the condition, or
   (B) did not realize the risk involved by trespassing in that area of the property made dangerous by the condition, or
   (C) did not realize the risk involved in intermeddling with the condition?

   If your answer to any one of the three subparts of question 3 is "YES", then your answer to question 3 is YES. If your answer to all subparts is "NO", then your answer to question 3 is NO.

   YES _____ NO _____

   If your answer is YES, proceed to question 4. If your Answer is No, cease deliberations.

4. Did the plaintiff prove that the usefulness to the defendant of maintaining the condition and the burden of eliminating its danger were slight as compared with its risk of death or serious bodily harm to the Plaintiff?

YES _____ NO _____

If your answer is "YES", proceed to question 5. If your Answer is No, cease deliberations.

5. Did the Plaintiff prove that the Defendant failed to exercise reasonable care to eliminate the danger of the condition or otherwise protect the trespassing children from the danger of the condition?

YES _____ NO _____

If your answer is "YES", proceed to question 6. If your answer is No, cease deliberations.

6. Did the Plaintiff prove that the Defendant's negligence was a proximate cause of the plaintiff's injuries?

YES _____ NO _____

If your answer is "YES", proceed to question 7. If your Answer is No, cease deliberations.

7. Did the Defendant prove that the Plaintiff failed to exercise that degree of care or caution for Plaintiff's own safety that you would expect of a reasonable child of the same age as Plaintiff?

YES _____ NO _____

If your answer is "YES", proceed to question 8. If your Answer is No, proceed to question 10.

8. Did the Defendant prove that the Plaintiff's negligence was a proximate cause of the plaintiff's injuries?

   YES _____ NO _____

   If your answer is "YES", proceed to question 9. If your Answer is No, proceed to question 10.

9. By answering questions 5, 6, 7 and 8 "YES" you have found both the Plaintiff and Defendant negligent and that their negligent conduct proximately caused the accident. Taking the combined negligence of both Plaintiff and Defendant which caused this accident as being 100%, what percentage of such total negligence is attributable to:

   Defendant _____

   Plaintiff _____
   Total 100%

10. What sum of money will fairly and reasonably compensate the Plaintiff for damages sustained as a proximate result of this accident?

    $_____