THIRTY YEARS OF THE SAFE PLACE STATUTE

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The Wisconsin lawyer before whom is placed a set of facts relating to the liability of the occupant of premises has come upon confusion as well as upon a client. Were his office in another state, the limits of such liability are by now likely to have become fairly well crystallized by the Restatement of Torts and by the applicable case-law. The client may readily be advised whether a cause of action exists. Not so in Wisconsin. The lawyer here, in order to form his opinion, must not only exhaust the common law but thread his way through the mazes of the Safe Place Statute and its judicial interpretations.

Almost thirty years after the Statute's first enactment,[1] an inquiry into its present utility may be profitable. How has it altered

[1] The Safe Place Statute consists of three sections of Chapter 101: Wis. Stat. (1939) §§101.01, 101.06 and 101.07 (1) (portions adopted by Wis. Laws 1911, c. 485, c. 664, §105, in plain type; by Wis. Laws 1913, c. 588, in italics; by Wis. Laws 1917, c. 133, in small capitals; by Wis. Laws 1931, c. 161, in large capitals):

§ 101.01 "The following terms as used in sections 101.01 to 101.29 of the statutes, shall be construed as follows:

"(1) The phrase 'place of employment' shall mean and include every place, whether indoors or out or underground and the premises appurtenant thereto where either temporarily or permanently any industry, trade or business is carried on, or where any process or operation, directly or indirectly related to any industry, trade or business, is carried on, and where any person is directly or indirectly, employed by another for direct or indirect gain or profit, but shall not include any place where persons are employed in private domestic service or agricultural pursuits which do not involve the use of mechanical power.

"(2) The term 'employment' shall mean and include any trade, occupation or process of manufacture, or any method of carrying on such trade, occupation, or process of manufacture in which any person may be engaged, except in such private domestic service or agricultural pursuits as do not involve the use of mechanical power.

"(3) The term 'employer' shall mean and include every person, firm, corporation, STATE, COUNTY, TOWN, CITY, VILLAGE, SCHOOL DISTRICT, SEWER DISTRICT, DRAINAGE DISTRICT AND OTHER PUBLIC OR QUASI-PUBLIC CORPORATIONS AS WELL AS ANY agent, manager, representative or other person having control or custody of any employment, place of employment or of any employe.

"(4) The term 'employe' shall mean and include every person who may be required or directed by any employer, in consideration of direct or indirect gain or profit, to engage in any employment, or to go or work or be at any time in any place of employment.

"(5) The term 'frequenter' shall mean and include every person, other than an employe, who may go in or be in a place of employment OR PUBLIC BUILDING under circumstances which render him other than a trespasser.

"(6) The term 'deputy' shall mean and include any person employed by the industrial commission designated as such deputy by the commission, who shall

the common law of Wisconsin, using the Restatement's classification, rubric by rubric? And what has been the cost, in uncertainty and

possess special, technical, scientific, managerial or personal abilities or qualities in matters within the jurisdiction of the industrial commission, and who may be engaged in the performance of duties under the direction of the commission, calling for the exercise of such abilities or qualities.

"(7) The term 'order' shall mean and include any decision, rule, regulation, direction, requirement or standard of the commission, or any other determination arrived at or decision made by such commission.

"(8) The term 'general order' shall mean and include such order as applies generally throughout the state to all persons, employments, places of employment OR PUBLIC BUILDINGS, or all persons, employments, or places of employment OR PUBLIC BUILDINGS of a class under the jurisdiction of the commission. All other orders of the commission shall be considered special orders.

"(9) The term 'local order' shall mean and include any ordinance, order, rule or determination of any common council, board of aldermen, board of trustees, or the village board, of any village or city, or the board of health of any municipality, or any order or direction of any official of such municipality, upon any matter over which the industrial commission has jurisdiction.

"(10) The term 'welfare' shall mean and include comfort, decency and moral wellbeing.

"(11) The term 'safe' or 'safety' as applied to an employment or a place of employment *or a public building,* shall mean such freedom from danger to the life, health, safety *or welfare* of employes or frequenters, *or the public, or tenants,* OR FIREMEN, *and such reasonable means of notification, egress and escape in case of fire,* AND SUCH FREEDOM FROM DANGER TO ADJACENT BUILDINGS OR OTHER PROPERTY, as the nature of the employment, *place of employment, or public building,* will reasonably permit.

"(12) The term 'public building' as used in sections 101.01 to 101.29 shall mean and include any structure used in whole or in part as a place of resort, assemblage, lodging, trade, traffic, occupancy, or use by the public, or by three or more tenants.

"(13) The term 'owner' shall mean and include every person, firm, corporation, state, county, town, city, village, SCHOOL DISTRICT, SEWER DISTRICT, DRAINAGE DISTRICT AND OTHER PUBLIC OR QUASI-PUBLIC CORPORATIONS AS WELL AS ANY manager, representative, officer, or other person having ownership, control or custody of any PLACE OF EMPLOYMENT or public building, or of the construction, repair or maintenance of any place of employment or public building, or who prepares plans for the construction of any place of employment or public building. Said sections 101.01 to 101.29, inclusive, shall apply, so far as consistent, to all architects and builders".

§101.06 "Every employer shall furnish employment which shall be safe for the employes therein and shall furnish a place of employment which shall be safe for employes therein and for frequenters thereof and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employes and frequenters. *Every employer and every owner of a place of employment or a public building now or hereafter constructed shall so construct, repair or maintain such place of employment or public building, and every architect shall so prepare the plans for the construction of such place of employment or public building, as to render the same safe*".

§101.07 (1) "No employer shall require, permit or suffer any employe to go or be in any employment or place of employment which is not safe, and no such employers shall fail to furnish, provide and use safety devices and safeguards, or fail to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe, and no such employer shall fail or neglect to do every other thing reasonably necessary to protect the life, health, safety or welfare of such employees and frequenters; and no . . . employer *or owner,* or other person shall hereafter construct or occupy or maintain any

litigation, of these alterations? Upon the answers to these questions must depend our judgment as to the present-day desirability of the Safe Place Statute.

I. LIABILITY OF POSSESSORS OF LAND TO PERSONS THEREON

A. For Active Negligence

The language of the Statute, talking about "place of employment" and "public building", pretty clearly refers only to dangerous natural or artificial conditions or appliances, rather than to active negligence. Defects of *things,* rather than of *men,* seem proscribed. The early cases, however, failed to recognize this limitation of the Act's scope.

In *Langos v. Menasha Paper Company,*[2] for example, the defendant's superintendent ordered the plaintiff employe to repair its disabled drying machine when in motion. While doing so, the plaintiff was injured. The court affirmed a jury verdict in his favor upon the ground that the superintendent should not have ordered the repairs while the machine was in motion. Such negligence would seem to be grounded upon bad judgment on the part of the superintendent rather than upon any defect in the machine, and hence not within the Statute. A desire to avoid the harsh common-law rule of assumption of risk (later held abrogated by the Act) may explain the eagerness to bring the case within the Statute.

Again, in *Szelwicki v. Connor Lumber & Land Company,*[3] the plaintiff lumber-yard employe was injured by a fellow-employe's negligent throwing of boards. The court, in remanding the case for a new trial, pointed out that recovery might be founded on the theory that the fellow-employe's negligence made the place of employment unsafe, and later affirmed a verdict based on that theory.[4] We may again discern a tendency to enlarge the Safe Place Statute, this time for the purpose of avoiding the common-law rule denying recovery for a fellow-servant's negligence.

Without expressly overruling these early cases, the court has since reached directly opposite results on the question of active negligence. In *Northwestern Casualty & Surety Company v. Industrial Commission,*[5] an employe was killed by being caught in a conveyor

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place of employment, *or public building,* that is not safe, *nor prepare plans which shall fail to provide for making the same safe".*

[2] 156 Wis. 418, 145 N.W. 1081 (1914).

[3] 156 Wis. 286, 146 N.W. 509 (1914).

[4] 163 Wis. 20, 156 N.W. 622 (1916).

[5] 194 Wis. 337, 216 N.W. 485 (1927).

belt temporarily off its pulley, although the engine was still in operation. An award of 15% increased workman's compensation[6] was held invalid on the ground that the Safe Place Statute had not been violated, in that no defect in structure or tools existed, and that the only negligence was that of a human being in failing to stop the engine. The court said:[7]

> In this case the defect was being removed as rapidly as the nature of the business permitted. The premises were not being used at the time of the accident, work was suspended in an endeavor to make the place safe. As the trial court points out, the belt was idling and the accident was due primarily to the failure of some one to stop the engine. It is considered, therefore, that the trial court correctly held that the fifteen per cent penalty was unlawfully imposed.

The *Northwestern* case also disposed of the somewhat broad language of Section 101.06 which requires the employer, in addition to furnishing a safe place of employment and safe employment, to "do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employes and frequenters." The court held this language could be considered only in connection with prior clauses, and thus did not refer to active negligence.

And in *Waldman v. Young Men's Christian Ass'n of Janesville,*[8] where the defendant's employes left a diving board improperly fastened down, the wrong was held one caused by employes rather than by a defect in the premises, and hence not within the Act.[9] In several other cases, moreover, the court has recently excluded from the operation of the Statute instances of active negligence.[10]

Clearly, therefore, the injured person today must find his unsafeness in the premises if he wishes to succeed under the Act. But since he remains within it if his injury is caused by a combination of

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[6] Wis. Stat. (1939) §102.57, held to apply where the Safe Place Statute has been violated in Builders Mut. Cas. Co. v. Industrial Comm., 210 Wis. 311, 246 N.W. 313 (1933).

[7] 194 Wis. at 341, 216 N.W. at 487 (1927).

[8] 227 Wis. 43, 277 N.W. 632 (1938).

[9] Recovery was denied upon the ground, *inter alia,* that defendant enjoyed the common-law immunity from tort liability of all charitable organizations.

[10] *E.g.,* Sikora v. Great Northern Ry., 230 Wis. 283, 282 N.W. 588 (1938) (dock worker injured by moving train); Baker v. Janesville Traction Co., 204 Wis. 452, 234 N.W. 912 (1931) (streetcar motorman struck by tourist); *cf.* Salus v. Great Northern Ry., 157 Wis. 546, 147 N.W. 1070 (1914).

human and inanimate force,[11] he is likely to attempt to find inanimate defects along with the animate.

B. For Natural or Artificial Condition of the Premises

(1) To Trespassers

In expressly excluding trespassers,[12] the Act alters the common law not at all. Indeed, the exclusion prevents recovery under the Statute in a few special instances where the common law allows recovery for a trespasser, as for activities or artificial conditions highly dangerous to constant trespassers upon a limited area,[13] artificial conditions highly dangerous to known trespassers,[14] and artificial conditions highly dangerous to trespassing children.[15] The Statute, of course, merely supplements the common law, so that the injured trespasser may still recover if he succeeds in bringing his case within one of these common-law categories.

In construing the meaning of the word "trespasser", the court has treated that statutory word of art as including the same persons who are differentiated from gratuitous licensees or business visitors in the common-law cases. Thus, for example, the tag of "trespasser" has been applied to an employe of a contractor with the defendant factory who, though instructed to work on the outside of the plant, wandered inside during the noon hour;[16] to an employe of a contractor with the defendant who was using the defendant's derrick without its permission;[17] and to a guest of a tenant in the defendant's apartment building who wandered into a basement boiler room.[18] But, as at common law, what would ordinarily be a trespass loses its character as such where the owner of the premises has for a long time known of and acquiesced in it.[19]

[11] *E.g.*, Czapinski v. Thomas Furnace Co., 158 Wis. 635, 149 N.W. 477 (1914) (recovery affirmed where defendant's crane operator negligently operated over plaintiff a crane which defectively retained bits of iron in its jaws).

[12] §101.01 (5).

[13] Restatement, Torts (1934) §§334, 335.

[14] *Id.*, §§336, 337.

[15] *Id.*, §339. In Lewko v. Chas. A. Krause Milling Co., 179 Wis. 83, 190 N.W. 928 (1922), recovery was denied an infant trespasser on defendant's premises who fell into a hole containing hot water, upon the ground that no hidden trap existed. Crownhart, J., dissented, upon the ground that the Safe Place Statute applied and that the infant was a "frequenter". Such a construction would seem to fly in the face of the express statutory exclusion of trespassers.

[16] Klemens v. Morrow Milling Co., 171 Wis. 614, 177 N.W. 903 (1920).

[17] Sheban v. A. M. Castle & Co., 185 Wis. 282, 201 N.W. 379 (1924).

[18] Grossenbach v. Devonshire Realty Co., 218 Wis. 633, 261 N.W. 742 (1935).

[19] Tomlin v. C.M.St.P. & P. Ry., 220 Wis. 325, 265 N.W. 72 (1936); *cf.* Sheban v. A. M. Castle & Co., 185 Wis. 282, 201 N.W. 379 (1924).

Upon occasion the definition of "frequenter" has seemingly been lost sight of. Thus in *Sullivan v. School District*,[20] a pupil injured by an unguarded manual training saw was barred from recovery against the school district upon the ground that he was not a "frequenter". To denominate him a "trespasser" seems more the result of an unwillingness to mulct a school in damages than of a careful analysis of what constitutes a trespasser, since the pupil was licensed to be where he was.[21]

(2) To Gratuitous Licensees

No case has yet squarely decided what appears from the language of the Safe Place Statute to be a fundamental change in the liability of occupants of places of employment or public buildings to their gratuitous licensees, less legalistically known as social guests. But the statutory definition of "frequenter" is clear: since such licensees are not "trespassers," they are entitled to all the rights of a "frequenter." Support for this view is lent by a dictum of the court in an early case:[22]

> The safe-place employment statutes quoted above have undoubtedly broadened the field of those to whom there is and was a common-law duty to keep such premises as are here involved reasonably safe so as to now protect and include those upon such premises under the rights belonging to the class described under the somewhat vague and indefinite term of "licensees".

To hold the occupant of premises for injuries to social guests for unsafe conditions of which the occupant is unaware represents a substantial change from the common law, which created no liability under such circumstances.[23] It may be argued that this tightening of the duty is just in that it imposes upon the occupant of public premises no new duty, since he is already under the obligation to keep them "safe" for "employes" and "frequenters," and the result

[20] 179 Wis. 502, 191 N.W. 1021 (1923).

[21] This somewhat tortured construction was, as a matter of fact, unnecessary. The court should properly have exonerated the school district on the ground that the then definition of "employer" in Wis. Stat. (1921) §2394-41 (3) did not include school district within its purview ("school district" was not so included prior to the amendment of the section by Wis. Laws 1931, c. 161). Instead, the court relied upon the definition of "employer" in Wis. Stat. (1921) §2394-4 (1), which, although including "school district", expressly referred only to workmen's compensation and not to the Safe Place Statute.

[22] See Klemens v. Morrow Milling Co., 171 Wis. 614, 618, 177 N.W. 903, 904 (1920).

[23] Restatement, Torts (1934) §342; Greenfield v. Miller, 173 Wis. 184, 180 N.W. 834 (1921).

is thus simply to bestow a windfall upon the social guest without increasing the duty of the occupant. The flaw in this reasoning is that, because the Safe Place Statute many times leaves the content of the word "safe" to the jury,[24] an employer or owner in actuality cannot, by observing certain safety and inspection precautions, guarantee himself against liability. And, once we assume that the occupant is liable at all for a given situation of the premises, increasing the number of persons entitled to take advantage of that liability by including social guests seriously adds to the occupant's burden.

The additional criticism of unevenness may be leveled against the application of the Safe Place Statute to social guests. Such guests are protected only where the building or premises which they happen to enter is a "place of employment" or a "public building", rather than private premises. There is no particular reason why a *social* guest should get more protection in public premises than he does in private premises. And yet, to allow all social guests recovery regardless of the nature of the premises would place a great burden upon occupants of premises without a readily apparent corresponding social advantage, since most people would agree that social guests are not as deserving of protection as business visitors.

A second change wrought by the Act regarding the rights of social guests on public premises consists of the seeming removal of the requirement that the injured person fail to discover the defective condition or realize the risk involved.[25] Under the Statute the occupant may apparently be liable although the injured person discovered the condition or realized the risk, and such a state of mind on the part of the injured person goes only to the question of his contributory negligence.

(3) To Business Visitors

The main area of applicability of the Safe Place Statute relates to "employes" or "frequenters" of "places of employment" or "public buildings": those whom some sort of business purpose brings to factories or business establishments, indoors or out. By far the greatest volume of litigation, both in the lower courts and in the reported appellate decisions, has fallen within this field, for the obvious reason that accidents to these classes of visitors are the most frequent. During the first years after the Act's adoption, most of the cases in-

[24] See notes 93, 99, *infra*.

[25] Restatement, Torts (1934) §342; but see Prehn v. C. Niss & Sons, Inc., 288 N.W. 736 (Wis. 1939).

volved liability of employer to employe. This was so because the first Workmen's Compensation Act was optional, and applied only to employers of four or more. With many employes thus not subject to the Compensation Act, it was natural that they should frequently rely upon the Safe Place Statute, which looked more kindly on them than did the common law. Today the Workmen's Compensation Act is compulsory for employers of three or more.[26] Where it applies, it is the exclusive remedy, and the Safe Place Statute cannot be invoked.[27] Moreover, the Compensation Act, which imposes liability irrespective of fault, is so advantageous to the employe that he would as a practical matter almost always avail himself of it in preference to the Safe Place Statute even were the latter optional.

Thus the Statute today concerns chiefly the business visitor who is not an employe of the occupant. The only employe cases likely to arise are those where there are less than three employes, so that the Compensation Act is inapplicable, or where a question of 15% increased compensation for violation of a safety statute or commission order is presented.

The Safe Place Statute has altered the common-law liability of an occupant to his business visitors in at least four respects:

(a) Realization of the risk—At common law, the business visitor could not spell negligence out of the dangerous condition of the premises unless the occupant had no reason to believe that the visitor would discover the condition or realize the risk involved.[28] The decisions under the Statute do not make clear whether this requirement has been retained or discarded. In an early case, *Hommel v. Badger State Investment Company*,[29] the plaintiff woman, who tripped and fell

[26] Wis. Stat. (1939) §102.04.

[27] Knoll v. Shaler, 180 Wis. 66, 192 N.W. 399 (1923).

[28] Restatement, Torts (1934) §343; see Flood v. Pabst Brewing Co., 158 Wis. 626, 633, 149 N.W. 489, 492 (1914): ". . . a landowner is liable for injuries to one using due care, who comes upon his premises by his invitation, express or implied, by reason of the unsafe condition of such premises known to the owner, and which he negligently suffers to exist and of which the injured party has no notice or knowledge". Whether the defendant occupant had reason to believe that the plaintiff would discover the condition or realize the risk, as an element of the defendant's liability, is a quite separate question from the plaintiff's assumption of risk or contributory negligence. Under the Safe Place Statute, the defense of assumption of risk has been abolished (see p. 343, *infra*); and under Wis. Stat. (1939) §331.045, the comparative negligence statute, contributory negligence is merely a cause for the diminution of the amount of plaintiff's recovery. Whether the plaintiff, under the Safe Place Statute, can recover when the occupant had reason to believe that the plaintiff would discover the condition or realize the risk, depends entirely upon whether the Statute be held to have abolished the common-law requirement.

[29] 166 Wis. 235, 165 N.W. 20 (1917).

on a marble step in defendant's lobby, was allowed to recover. The fact that the step must have been obvious to her was not even mentioned in the decision. Yet in the recent case of *Prehn v. C. Niss & Sons, Inc.,*[30] the court, in dismissing the complaint of a woman who had stumbled against an easily visible lecture platform, held that her awareness of the presence of the platform ruled out any "unsafeness." The two cases seem irreconcilable. Since the *Hommel* decision was not mentioned in the *Prehn* case, the state of the law is uncertain.

(b) Assumption of risk and contributory negligence—Under the Statute, the defense of assumption of risk is no longer available to the occupant. Thus in *Washburn v. Skogg,*[31] a traveling salesman was allowed to recover from a business customer on whom he was calling, for the latter's failure to provide lights and install a handrail on its steps. Assumption of risk was expressly held no defense. The holding that asumption of risk is no defense under the Statute seems, again, judge-made rather than legislative. The Act nowhere expressly abolishes the defense, and acceptable canons of statutory construction would therefore seem to dictate its preservation, as part of the common law.

But the liberalization achieved by ruling out the defense of assumption of risk seems negatived by the continued recognition of the doctrine of contributory negligence in several cases holding one who proceeds in the dark barred from recovery as a matter of law.[32] Since most situations involving the one doctrine call also for the application of the other, the abolition of assumption of risk is small comfort to the injured person. Fortunately, the comparative negligence statute applies so as to ameliorate the effect of a contributory negligence under the Statute.[33]

(c) Abrogation of immunities—A far-reaching change—particularly from the plaintiff's standpoint—imparted into the relationship of occupant and business visitor is the abolition of certain immunities, such as those of charitable organizations and of governmental units. These will be discussed separately below.

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[30] 288 N.W. 736 (Wis. 1939).

[31] 204 Wis. 29, 233 N.W. 764 (1931).

[32] Du Rocher v. Teutonia Motor Car Co., 188 Wis. 208, 205 N.W. 921 (1925); Erickson v. McKay, 207 Wis. 497, 242 N.W. 133 (1932). But *cf.* Kelenic v. Berndt, 185 Wis. 240, 201 N.W. 250 (1924).

[33] Bent v. Jonet, 213 Wis. 635, 252 N.W. 290 (1934).

(d) Standard of care—The change most commonly thought to be fundamental is, upon analysis, probably the least significant. At common law, the occupant of premises was required to keep them "reasonably safe".[34] The Statute requires him to keep the "place of employment" or "public building" as safe as "the nature of employment, place of employment, or public building, will reasonably permit". While our court has frequently stated that the duty imposed by the Safe Place Statute is more stringent,[35] it would take a metaphysician to describe any real difference between "reasonably safe" and "as safe as the (premises') nature reasonably permits".[36] The common law requires, just as does the Safe Place Statute, a standard of care geared to the uses to which the land is being put.[37] One therefore suspects that the statutory standard is merely another such "vituperative epithet" as "gross negligence". A jury willing to find for the plaintiff under the Statute would in all likelihood be equally willing under the common-law instruction.

An early importation from the common law, without any particular statutory warrant, was the requirement of notice. The court had previously decided, in cases not involving the Safe Place Statute, that the occupant of premises is not liable for defects in the absence of notice, actual or "constructive".[38] This same requirement, the court has held, is applicable to the Statute:[39]

> . . . in order to make an employer liable for defects in the nature of repair or maintenance he should have either actual or constructive notice of such defects. Natural principles of justice would seem to require that. Such principles of justice are recognized by the common law. . . .

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[34] Howard v. Beldenville Lumber Co., 129 Wis. 98, 108 N.W. 48 (1906).

[35] Sparrow v. Menasha Paper Co., 154 Wis. 459, 143 N.W. 317 (1913); Rosholt v. Worden-Allen, 155 Wis. 168, 144 N.W. 650 (1913); Hollenbeck v. Chippewa Sugar Co., 156 Wis. 317, 144 N.W. 1104 (1914); Peschel v. Klug, 170 Wis. 519, 175 N.W. 806 (1920); Mullen v. Larson-Morgan Co., 212 Wis. 52, 249 N.W. 67 (1933). See Woodmansee, *The Wisconsin Safe Place Statute* (Unpublished thesis, University of Wisconsin Law School, 1937).

[36] See 1939 Wis. L. Rev. 314, 318-19. The court has not flinched at making nice distinctions, as in Bentley Bros. v. Industrial Comm., 194 Wis. 610, 217 N.W. 316 (1928), where an order of the Commission that "safe and appropriate scaffolds shall be provided . . ." was held illegal upon the ground that the Statute authorized only such safety rules as made the premises "as safe as their nature reasonably permits"! See also Wenzel & Henoch Const. Co. v. Industrial Comm., 202 Wis. 595, 233 N.W. 777 (1930).

[37] See Restatement, Torts (1934) §343, comment *e*.

[38] Lundgren v. Gimbel Bros., 191 Wis. 521, 210 N.W. 678 (1927); Schroeder v. Great A. & P. Tea Co., 220 Wis. 642, 265 N.W. 559 (1936).

[39] Pettric v. Gridley Dairy Co., 202 Wis. 289, 293, 232 N.W. 595, 597 (1930).

In this connection, it should be borne in mind that the Safe Place Statute apparently follows the common law in holding that actual notice is necessary, in order to charge the occupant with liability, only where the defect has been caused by a third person.[40] Where, however, the occupant is himself responsible for the defective condition, he is charged with "constructive" notice,—in other words, no notice at all is required. Thus, in *Hommel v. Badger State Investment Company*,[41] the court expressly held notice to the occupant immaterial where the injury had occurred as a result of a badly placed step in the lobby of his building. This distinction in the requirement of notice would seem perfectly in accord with that observed in the common-law decisions.[42]

As at common law, the standard of care is buttressed by the concept of non-delegable duties. An occupant of unsafe premises may not escape liability by the fact that he employed an architect to draw the plans.[43] Nor will it avail him to show that an independent contractor was responsible for the installation or maintenance of the "place of employment",[44] or for the erection of the "public building".[45] But the occupant is not liable under the Statute for the active negligence of the independent contractor.[46] And, as at common law, even though the duty is non-delegable, liability is subject to the requirement that the occupant either have actual notice of the third

[40] Pettric v. Gridley Dairy Co., 202 Wis. 289, 232 N.W. 595 (1930); Kaczmarski v. F. Rosenberg Elevator Co., 216 Wis. 553, 257 N.W. 598 (1934) (defendant without notice not liable where faulty elevator had been installed by a third person); Dieckes v. White Paving Co., 229 Wis. 660, 283 N.W. 446 (1939) (defendant without notice not liable where plank causing accident had been placed by a third person).

[41] 166 Wis. 235, 165 N.W. 21 (1917).

[42] See Schroeder v. Great A. & P. Tea Co., 220 Wis. 642, 265 N.W. 559 (1936) (dispensing with the requirement of notice where the defective condition was caused by the defendant's employes).

[43] Bunce v. Grand & Sixth Bldg., Inc., 206 Wis. 100, 238 N.W. 867 (1931).

[44] Sparrow v. Menasha Paper Co., 154 Wis. 459, 143 N.W. 317 (1913) (employe entitled to recover from employer railroad for injuries sustained while unloading boxcar defectively packed by a third person); Waskow v. Robert L. Reisinger Co., 180 Wis. 537, 193 N.W. 358 (1923) (plumber engaged in working on defendant's building held entitled to recover from occupant for faulty elevator designed by third person); *cf.* Neitzke v. Kraft-Phoenix Dairy, Inc., 214 Wis. 441, 253 N.W. 579 (1934); Kuske v. Miller Bros., 227 Wis. 300, 277 N.W. 619 (1938) (person injured breaking scrap for occupant of place of employment may recover though injury caused by defective apparatus supplied by independent contractor).

[45] *Cf.* Bunce v. Grand & 6th Bldg., Inc., 206 Wis. 100, 283 N.W. 867 (1931).

[46] Maryland Cas. Co. v. Thomas Furnace Co., 185 Wis. 98, 201 N.W. 263 (1924).

person's defective work, or that such a time have elapsed as to make unreasonable the occupant's failure to discover the defect.[47]

No discussion of the standard of care imposed by the Safe Place Statute would be complete without mention of the distinction, drawn by the court, dependent upon whether the defect is "structural". At common law, a business visitor to premises was, in general, accorded the same treatment whether those premises were in a place of employment or a public building. Under the Statute, however, the court was not long in setting up a crucial distinction in the scope of the duty owed by occupants of the two types of premises. In *Juul v. School District,*[48] a pupil who fell into a pail containing cleaning fluid in a school hall was held not entitled to recover, upon the ground that the duty of the "owner" of a "public building" to "construct, repair, or maintain" the building referred to "some act more closely related to the structure itself of a building than such an operation as is here involved of keeping the floors of the building clean".[49] At that time a school district was not included within the definition of "employer". Had it been, the court implied, the broad requirement that the "employer" should render the "place of employment" safe for frequenters would make the school district liable for temporary conditions as well as for structural defects.

While this interpretation seems justified by the language of the Statute, the actual determination in each case whether a defect is "structural" has been difficult. The next decisions held a formation of ice on a public building not a "structural" defect, and the occupant hence not liable.[50] A pair of 1930 cases, although not too explicit on the point, held the failure to have adequate lighting a "structural" defect.[51] And the two most recent decisions absolved an occupant upon the ground that a stack of chairs and a loose diving board, respectively, were not "structural" defects.[52]

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[47] Kaczmarski v. F. Rosenberg Elevator Co., 216 Wis. 553, 257 N.W. 598 (1934) (occupant not liable where he had no opportunity to discover defective installation by independent contractor). But *cf.* Waskow v. Robert L. Reisinger Co., 180 Wis. 537, 193 N.W. 358 (1923) (occupant liable on ground that defective nature of elevator shaft constructed by independent contractor was readily perceptible).

[48] 168 Wis. 111, 169 N.W. 309 (1918).

[49] *Id.* at 114, 169 N.W. at 311.

[50] Holcomb v. Sczymczyk, 186 Wis. 99, 202 N.W. 189 (1925); Rosenthal v. First Bohemian B. & L. Ass'n., 192 Wis. 326, 212 N.W. 526 (1927).

[51] Wilson v. Evang. Lutheran Church of Reformation, 202 Wis. 111, 230 N.W. 708 (1930); Pettric v. Gridley Dairy Co., 202 Wis. 289, 232 N.W. 595 (1930).

[52] Jaeger v. Evang. Lutheran Church Holy Ghost Congregation, 219 Wis. 209, 262 N.W. 585 (1935); Waldman v. Y.M.C.A. of Janesville, 227 Wis. 43, 277 N.W. 632 (1938).

This formula compels counsel for the injured person who would invoke the Safe Place Statute to show either that the public building had a "structural" defect, or to treat the scene of the accident as a "place of employment", and thus ground liability upon a "non-structural" defect. But the dilemma is not as serious as it sounds. The court has recently expressly confirmed the logically inescapable conclusion that, if the "public building" is also a "place of employment", the occupant is liable whether the defect is "structural" or not. In *Prehn v. C. Niss & Son, Inc.,*[53] a retail furniture store, which presumably employed sales clerks at the place of the plaintiff's injury, was held a "place of employment" as well as a "public building", and thus liable not only for defects in the structure but for the "position of furniture and fixtures". The utility of this decision to the plaintiff is apparent. Most public buildings are either used industrially, in which case they abound with employes, or have sufficient janitor service so as to comply with the definitive provision of Section 101.01 (1), requiring the employment of "any person . . . for direct or indirect gain or profit".[54] One wonders, in the light of all this, whether plaintiff's counsel in the *Holcomb* and *Rosenthal* cases[55] might not have succeeded by simply showing that the occupant of the building maintained one or more employes on the premises other than such as were "employed in private domestic service or agricultural pursuits", within Section 101.01(1).

An argument may be made that "place of employment" really means "place *for* employment": a place primarily for profiting through the services of employes, rather than through the sale of goods or the rental of real estate, economic activities in which other ingredients overshadow direct labor. As so construed, "place of employment" would refer to industrial plants; "public building" to stores, office buildings, and governmental structures. But the distinction, while convenient, is simply not called for by Section 101.01 (1), and the *Prehn* case thus correctly interprets the Statute. A "place of

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[53] 288 N.W. 736 (Wis. 1939); *cf.* Erbe v. Maes, 226 Wis. 484, 277 N.W. 111 (1938).

[54] That no employes were present at time of accident would be no answer to plaintiff's contention that the place constituted a "place of employment". Several cases have found liability under the Statute where the occupant of the "place of employment" had no employes present at or about the time of accident. U.S.F. & G. v. Christiansen, 193 Wis. 1, 212 N.W. 660 (1927); Sandeen v. Willow River Power Co., 214 Wis. 166, 252 N.W. 706 (1934); Neitzke v. Kraft-Phenix Dairy, 214 Wis. 441, 253 N.W. 579 (1934).

[55] See note 49, *supra.*

employment", therefore, would seem for most purposes co-extensive with a "public building".

II. LIABILITY OF VENDORS OF LAND TO PERSONS THEREON

At common law, a vendor of land is not liable for injuries caused after the purchaser has taken possession by defects arising either before or after such time, provided the vendor has not concealed a known defect.[56] Section 101.01 (13) defines "owner" as any person "having ownership, control or custody of any place of employment or public building". Because of the juxtaposition of the three words "ownership, control or custody", it would seem that the legislature meant to include as tortfeasors those having mere legal ownership of land as well as those having actual possession and control. The court, however, in *Freimann v Cumming*[57] absolved the vendor of a building under a land contract for injuries caused by a step which became defective after the purchaser had assumed possession, upon the ground that the statutory word "owner" contemplated only one enjoying such right to present possession as would entitle him to enter and repair defects, a right not possessed by the vendor under a land contract. Whether or not the decision respects sufficiently the statutory language, it would seem sound policy.

III. LIABILITY OF LESSORS OF LAND TO PERSONS THEREON

If we again follow the literal language of Section 101.01 (13), the term "owner" would seem to include the landlord who is out of possession. The Safe Place Statute is entirely silent concerning the effect upon the landlord's liability for defects of the premises of a covenant to repair, of the existence of a right to enter to make repairs, of the landlord's retention of control of certain parts of the leased premises, or of the projected admission of numerous persons. Faced with this barren statutory material, the court has again attempted—this time with one important exception—to assimilate the Statute to the existing common law. In the absence of a covenant to repair, the landlord is not liable under the Statute, any more than at common law, for injuries to tenants or persons in their shoes

[56] Restatement, Torts (1934) §§351-353; see Freimann v. Cumming, 185 Wis. 88, 200 N.W. 662 (1924).
[57] 185 Wis. 88, 200 N.W. 662 (1924).

caused by temporary defects.[58] Thus the court, in *Kinney v. Luebkemann*,[59] absolved the landlord of liability to the tenant's customer for injuries occasioned by the tenant's failure to keep an electric light on the stairs burning. When one in the position of a tenant comes into a part of the premises of which control has been retained by the landlord, that person becomes a "trespasser" and retains his common-law impediment to recovery.[60] The landlord, however, is liable for defects in a common passageway maintained for his tenants under the Act,[61] as he was at common law.[62]

The one difference in the tort law of landlord and tenant wrought by the Safe Place Statute is its imposition of liability upon the landlord for injuries caused by defects in the structure of the premises existing at the time possession was transferred. Thus, in *Skrzypczak v. Konieczka*,[63] the owner of the building rented a flat to plaintiff, who was injured when a post toenailed to the floor broke. The court, in affirming a directed verdict for the defendant, ruled that (1) there was no common law liability since the post was not a concealed dangerous defect, and the landlord had not covenanted to repair; and (2) though the toenailed post was safe as a matter of law, had it been otherwise, the case would have gone to the jury, since the landlord is liable for such structural defects:[64]

> We are of opinion that if the defect here involved is deemed structural the case was for the jury under the statute.

But in *Bewley v. Kipp*[65] an outside stair rail which became defective through wear and tear after possession had been transferred was held not a structural condition, and the landlord hence not liable.

At common law, the landlord was not liable (with certain exceptions) for dangerous conditions, whether they came into existence before or after possession was transferred.[66] "There is no law

[58] Gobar v. Val. Blatz Brewing Co., 179 Wis. 256, 191 N.W. 509 (1923); Holcomb v. Szymczyk, 186 Wis. 99, 202 N.W. 189 (1925); Rosental v. First Bohemian B. & L. Ass'n., 192 Wis. 326, 212 N.W. 526 (1927); Kinney v. Luebkeman, 214 Wis. 1, 252 N.W. 282 (1934); *cf.* Bewley v Kipp, 202 Wis. 411, 233 N.W. 71 (1931).

[59] 214 Wis. 1, 252 N.W. 282 (1934).

[60] Grossenbach v. Devonshire Realty Co., 218 Wis. 633, 261 N.W. 742 (1935).

[61] Zeininger v. Preble, 173 Wis. 243, 180 N.W. 844 (1921); Kelenic v. Berndt, 185 Wis. 240, 201 N.W. 250 (1924).

[62] Restatement, Torts (1934) §360; Inglehardt v. Mueller, 156 Wis. 609, 146 N.W. 808 (1914).

[63] 224 Wis. 455, 461, 272 N.W. 659, 662 (1937).

[64] 224 Wis. 455, 461, 272 N.W. 649, 662 (1937).

[65] 202 Wis. 411, 233 N.W. 71 (1930).

[66] Restatement, Torts (1934) §§355, 356.

against renting a tumbledown house." In holding the landlord for structural defects existing at the time the tenancy began, the Safe Place Statute penalizes him only for such defects as were reparable by him at the time he was in possession. Socially valid though the distinction may be, it does not appear from the language of the Act, which requires the "owner" of a "public building" to "maintain" it irrespective of whether the structural defect came into existence before or after the transfer of possession.

IV. LIABILITY OF PERSONS SUPPLYING CHATTELS FOR THE USE OF OTHERS

Section 101.06 contains abundant language to impose liability upon the *employer* for furnishing unsafe chattels to his *employes,* requiring him not only to furnish a safe place of employment but to "furnish employment which shall be safe for the employe." Under this clause, numerous cases have held the employer liable for injuries to employes arising out of tools and similar chattels furnished them.[67] Moreover, the employer would seem under an obligation to *frequenters* to furnish safe chattels, under the statutory language requiring him to "adopt and use methods and processes . . . reasonably adequate to render such employment . . . safe."

This result was reached under the first clause above quoted in *Lang v. Findorff,*[68] where a general contractor in charge of the construction of a building was held liable for a defective elevator hoist furnished an employe of an independent contractor, upon the ground that the injured person was an "employe" within the statute, though not an employe of the particular "employer". It would seem a better ground to denominate the injured person a "frequenter", for whom the employer must still "adopt and use methods . . . reasonably adequate to render such employment . . . safe".

The question whether the owner of the public building need furnish safe chattels for frequenters is apparently answered by the numerous cases discussed above holding that his liability exists only as to structural defects. A defective chattel has nothing to do with the structure of a building, and the Statute therefore would seem inapplicable.

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[67] Van De Zande v. C. & N.W. Ry., 168 Wis. 628, 170 N.W. 259 (1919) (boxcar); Hahn v. Rothstein, 174 Wis. 381, 182 N.W. 983 (1921) (electric washer); Carlson v. C. & N.W. Ry., 185 Wis. 365, 200 N.W. 669 (1925) (ice chute).

[68] 185 Wis. 545, 201 N.W. 727 (1925).

V. LIABILITY OF PRINCIPAL CONTRACTOR FOR UNSAFENESS OF PREMISES UNDER CONTROL OF INDEPENDENT CONTRACTOR

The strict language of the Safe Place Statute has been cushioned to shield the principal contractor without control over the operations of his independent contractor from liability for a workplace made defective through the latter's negligence, just as in the case of the landlord without control over his tenant, and the vendor of realty without control over his purchaser. Thus in *Connor v. Meuer,*[69] a city school which contracted to allow a photographer to photograph its students was recently held not responsible to a student for injuries caused by the photographer's defectively erected temporary bleachers, upon the ground that the school had no control over the structure. And a railroad which contracted with an ice-cutter to have its cars loaded with ice was held not liable for injuries to a workman caused by the independent contractor's defective ice chute.[70]

If the absence of control means freedom from liability, it is equally true that its presence spells liability. The principal cannot escape responsibility for a place which he still controls simply through his having engaged an independent contractor to perform services at that place. An employe of an independent contractor hired by a power company to erect a building upon its land may, for instance, recover for injuries received when a derrick he was moving contacted an uninsulated high-tension wire owned and maintained by the power company.[71] And an employe of an independent contractor hired to erect a smokestack upon the principal's property may recover for injuries received through contact with the latter's unguarded electric coil.[72]

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[69] 288 N.W. 272 (Wis. 1939).

[70] Carlson v. Chicago & N.W. Ry., 185 Wis. 365, 200 N.W. 669 (1925). Accord: Wood v. General Ry. Signal Co., 161 Wis. 71, 151 N.W. 271 (1915); La Coco v. Massey Steamship Co., 174 Wis. 545, 183 N.W. 677 (1921); Menge v. Manthey, 200 Wis. 485, 227 N.W. 938 (1930). But *cf.* Kuske v. Miller Bros. Co., 227 Wis. 300, 277 N.W. 619 (1938) ("frequenter" injured through unsafe apparatus of independent contractor engaged to break scrap held entitled to recover from occupant of premises).

[71] Sandeen v. Willow River Power Co., 214 Wis. 166, 252 N.W. 706 (1934).

[72] Neitzke v. Kraft-Phenix Dairies, Inc., 214 Wis. 441, 253 N.W. 579 (1934). Accord: Waskow v. Robert L. Reisinger & Co., 180 Wis. 537, 193 N.W. 357 (1923).

This emphasis upon control is precisely that made by the common law, and the Statute therefore has apparently effected no change as regards independent contractors.[73]

VI. LIABILITY OF PERSONS IN CHARITABLE, MUNICIPAL, PARENTAL, OR CO-EMPLOYE RELATIONSHIPS

The most striking achievement of the Safe Place Statute is not in its effect on the standard of care required of the occupant of the premises but in its adventitious breakdown of defenses traditionally available at common law. In several instances the disintegration of the common-law rule has already received judicial sanction; in others, similar sanction may be anticipated, although the field is not free from speculation.

A. Charitable Immunity

In *Wilson v. Evangelical Lutheran Church of the Reformation*,[74] the plaintiff alleged that, while visiting the defendant church, she fell because of an insufficiently lighted stairs. The court upheld her complaint against demurrer upon the ground that the Statute had abrogated the common-law exemption of charitable and religious corporations from the doctrine of *respondeat superior*. The court said:[75]

> If the complaint in this case states a cause of action it is because the defendant failed to maintain a public building so as to render the same safe. The principle upon which charitable corporations were held not to be liable for acts of their servants involved considerations of public policy. It is peculiarly within the province of the legislature to determine questions of public policy. The chapter referred to makes no exceptions of religious or charitable corporations and there appears to us to be no reason why it does not apply to a place of worship maintained by a religious corporation. More appropriate language to express that intention could scarcely be employed.

"More appropriate language" would, of course, have been a simple legislative declaration that the Safe Place Statute wiped out the doc-

[73] Hackett v. Western Union Telegraph Co., 80 Wis. 187, 49 N.W. 822 (1891); Smith v. Milwaukee Builders' & Traders' Exchange, 91 Wis. 360, 64 N.W. 1041 (1895); Machae v. Fellenz Coal Co., 183 Wis. 44, 197 N.W. 198 (1924); see Restatement of Torts (1934) §426.

[74] 202 Wis. 111, 230 N.W. 708 (1930).

[75] *Id.* at 113, 230 N.W. at 709. Accord: Jaeger v. Evangelical Lutheran Holy Ghost Congregation, 219 Wis. 209, 262 N.W. 585 (1935).

trine of charitable immunity. There would then have been no room for the invocation of the constructional canon that common-law principles will be presumed not affected by legislation using general terms grammatically sufficient to abrogate the common-law rule.[76] Only seven years before, the court had explicitly held that the Safe Place Statute was not intended to abrogate any common-law doctrines of immunity in the absence of clear legislative language to that effect.[77] The two constructional approaches cannot be reconciled. But there can be doubt as to the social desirability of the decision. The lack of any real reason for the doctrine of charitable immunity has repeatedly been pointed out.[78] And while the case succeeds in eliminating the outworn doctrine from only a small portion of tort law—that having to do with premises—any inroad at all represents an advance.

Where the defendant in a Safe Place Statute case is a charitable institution, the issue of whether the scene of the accident was a "public building" or a "place of employment" becomes sharply posed. If the defect injuring the plaintiff was not a "structural" one, so that he may not rely upon the theory that the place was a "public building", he is forced to bring his case within the definition of a "place of employment". This, in the case of a charity, is an impossible task, since the court has expressly held that a charitable institution neither conducts an "industry, trade or business" nor employs persons "for profit", thus failing to come within the statutory definition of "place of employment" in Section 101.01 (1).[79]

B. Governmental Immunity

The history of the defense of governmental function to a suit brought under the Safe Place Statute has been one of judicial resistance to a consistent legislative manifestation of a desire to abrogate the defense. After avoiding a decision as to whether a school district was the "owner" of a "public building" in an early case,[80] the court, when squarely faced with the problem, held that Section 101.01 (13) as it then stood did not include a school district within its definition of "owner", which then read: "owner shall mean and include every person, firm, corporation, state, county, town, city, vil-

[76] Will of Johnson, 175 Wis. 1, 183 N.W. 888 (1921).

[77] Sullivan v. School District No. 1, 179 Wis. 502, 191 N.W. 1020 (1923) (Statute held not to abrogate common law doctrine of governmental immunity for tort.)

[78] Comments (1922) 2 Wis. L. Rev. 246; (1918) 31 Harv. L. Rev. 479.

[79] Waldman v. Y.M.C.A. of Janesville, 227 Wis. 43, 277 N.W. 632 (1938).

[80] Juul v. School District, 168 Wis. 111, 169 N.W. 309 (1918).

lage, manager, representative, officer or other person".[81] The construction given seems to deny meaning to the words "or other person". And in *Sullivan v. School District*,[82] the court, assuming that the term "employer" included a school district and thus placed upon the defendant the duty of guarding manual training saws in favor of "frequenters", nevertheless held the plaintiff pupil not a "frequenter" upon the ground that the legislature could not have intended to alter the common-law rule of governmental immunity. Since the pupil was in the school building by express invitation and was therefore not a "trespasser", he would seem automatically a "frequenter" under Section 101.01 (5), and the court's decision therefore a mere rationalization of its refusal to hold liable a governmental unit.

The matter was finally set at rest by the 1931 amendment, which expressly included "state, county, town, city, village, school district, sewer district, drainage district, and other public or quasi public corporations" in the definitions of "owner" and "employer".

Even after the amendment, however, there still remained the question whether it served to abrogate entirely the doctrine of governmental immunity in cases where the Statute applied, or whether it merely aimed to include the specified governmental organizations as owners and employers in cases where the organization, by performing a proprietary function, renounced the immunity. The case of *Heiden v. Milwaukee*[83] made it clear that the inclusion of governmental organizations in the definitions of 1931 imposed liability upon such organizations irrespective of whether a governmental or proprietary function was being performed.

As with the doctrine of charitable immunity, partial abolition of governmental immunity seems better than none. More and more we are scotching the notion that the government may commit torts with impunity.[84] The legislature has seen fit to abolish the doctrine as regards negligent driving of municipally owned automobiles,[85] and as to certain highway defects.[86] It is thus perhaps not too much to hope that an entire abolition of the doctrine is not far distant.

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[81] Srnka v. Joint District No. 3, 174 Wis. 38, 182 N.W. 325 (1921).

[82] 179 Wis. 502, 191 N.W. 1020 (1923).

[83] 226 Wis. 92, 275 N.W. 922 (1937).

[84] See Borchard, *Governmental Liability in Tort* (1924) 34 Yale L. J. 1, 129, 229; Doddridge, *Distinction Between Governmental and Proprietary Functions of Municipal Corporations* (1925) 23 Mich. L. Rev. 325; Harno, *Tort Immunity of Municipal Corporations* (1921) 4 Ill. L.Q. 28; *cf.* Maguire, *State Liability for Tort* (1916) 30 Harv. L. Rev. 20.

[85] Wis. Stat. (1939) §66.095.

[86] Wis. Stat. (1939) §§66.25, 81.15.

As with charitable corporations, the injured person can recover from a governmental organization only if the place of injury was a "public building". A governmental organization cannot be a "place of employment" (at least in its governmental capacity) since it carries on no "industry, trade or business", and employs no person "for profit" within Section 101.01 (1).[87]

C. Disability of Child to Sue Parent

The common-law rule is well established in Wisconsin that an unemancipated minor child may not sue his parent in tort.[88] It is interesting to speculate whether the Safe Place Statute abrogates this immunity where the suit is based upon defects in the parent's premises. Certainly the parent is a "person" within the meaning of the statutory definition of "employer" or "owner". While at first blush this would hardly seem a sufficient peg upon which to hang the abolition of the immunity doctrine, it must be remembered that the charitable immunity was held to have been abolished by virtue of language hardly more explicit. One may, therefore, anticipate that venturesome counsel will some day seek to hold the parent (or, more realistically, the parent's public liability insurer) at the suit of the child under the Act. While there is no particular reason of policy why the doctrine should be abrogated solely in relation to the law of premises, and not as to other types of negligence, the same might have been said of the charitable and governmental situations.

D. Co-Employes

The definition of "employer" in Section 101.01 (3) includes "any agent, or other person, having control or custody of any employment, place of employment, or of any employe". The definition of "owner" in Section 101.13 includes "any manager, representative, officer or other person having ownership, control or custody of any place of employment or public building". If taken at its full verbal scope, this language would impose liability upon an agent in charge of a part of a building for injuries suffered because of the negligent maintenance of a fellow-employe. Each employe having custody is theoretically liable for the negligence of each other employe. Such a results is, of course, wholly out of line with every principle of agency, since the doctrine of *respondeat superior* clearly does not apply as

[87] Herrick v. Luberts, 230 Wis. 387, 284 N.W. 27 (1939); Cegelski v. Green Bay, 231 Wis. 89, 285 N.W. 343 (1939).

[88] Wick v. Wick, 192 Wis. 260, 212 N.W. 787 (1927).

between agents.[89] Moreover, such liability would serve no social purpose. Since one agent gets no pecuniary benefit from the acts of another agent, no reason for the imposition of *respondeat superior* exists. The Statute, if so interpreted, would clearly work an unfair result in this respect.

CONCLUSION

This catalog of the achievements of the Safe Place Statute, as judicially construed, reveals much that is good for the Wisconsin system of jurisprudence and much that is not good. Perhaps the best method of ascertaining the Statute's net worth is to regroup its works into four categories and to separate assets from liabilities.

Undoubtedly, the outstanding achievement of the Safe Place Statute lies in the implementation it gives to the Industrial Commission's regulatory code. Persons injured on premises are benefited because violation of these regulations constitutes *per se* negligence.[90] And the owner is benefited through his ability, in many cases, to avoid liability by compliance with a readily available and easily understandable code.

A survey of the General Orders of the Industrial Commission gives some idea of their scope: General Orders on Safety, Safety Orders for General Industry, Elevators, Tunnels, Caisson or Trench Construction, Electrical Safety, Dust, Vapors, Gases, Fumes, Industrial Lighting, School Lighting, Sanitation, Safety and Construction, Refrigeration, Existing Buildings, Heating, Ventilating, Air Conditioning, and Fire Prevention. Advisory committees made up of representatives of interested organizations have assisted in the formulation of these orders. For example, General Orders on Safety was the work of representatives of the Industrial Commission, Wisconsin Manufacturers' Association, Milwaukee Association of Commerce, Wisconsin State Federation of Labor, and insurance interests.[91]

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[89] Restatement, Agency (1933) §358.

[90] There can be no doubt that the Safe Place Statute imposes liability where the jury, at common law, might have absolved the defendant. But this increased liability has not been reflected in higher public liability insurance rates. The National Bureau of Casualty and Surety Underwriters' rate schedules contain no loading because of the act. And a comparison of the rates charged for the so-called "Owners', Landlords', and Tenants'" policies suggests that Wisconsin insureds pay something approaching the national average. With respect to public liability rates on apartments, mercantile buildings not occupied by the owner, office buildings, halls, department stores, and vacant buildings, Milwaukee's rates are higher than those of San Francisco and New Orleans, but lower than those of Buffalo, Newark, and Pittsburgh.

[91] Letter of Industrial Commission, July 17, 1939.

Beyond much question, the predominant purpose of the Safe Place Statute was thus to substitute expert standards of safety for the relatively uninformed opinions of judges and juries. Indeed, there is ground for believing that the Statute was intended to apply *only* where an Industrial Commission safety regulation had been violated.[92] The Act, as adopted in 1911, placed on the employer the duty of making his place "safe" and delegated to the Industrial Commission the task of formulating orders which would define "safety".[93] It is surely arguable that an injured person who could point to no violation of the code was intended to be relegated to his common-law remedy, based upon the failure of the occupant of premises to keep them "reasonably safe".

Whatever the Statute's original purpose, it is constantly applied although no Industrial Commission safety regulation has been violated.[94] Thus in *Bunce v. Grand and Sixth Building, Inc.,*[95] the plaintiff, injured by a fall occasioned by the different floor levels in the defendant building's toilet room, was allowed to recover under the Safe Place Statute despite the absence of any violation of an Industrial Commission order, there being none applicable. But observance of a specific safety regulation governing the part of the

[92] See Altmeyer, The Industrial Commission of Wisconsin (1932) 17-18-106; Commons, Principles of Labor Legislation (1927 ed.) 418 ("The legislature has laid down the law in a broad way; the Industrial Commission, as rapidly as circumstances permit, may fill in the administrative detail").

[93] Wis. Stat. (1939) §101.09.

[94] See, *e.g.*, the opinion of the Circuit Court of Dane County in Stockdreher v. Hunholz, Nov. 15, 1923:

> "While the Industrial Commission is given the power to supplement these safety statutes by orders which point out dangers in advance of accidents, such orders are in no way essential to liability under these safety statutes. Such orders may amplify these statutes but their absence does not relieve employers from compliance with the rule prescribed by the legislature".

An occasional intimation to the contrary has not been followed. See Maryland Cas. Co. v. Thomas Furnace Co., 185 Wis. 98, 201 N.W. 263 (1924) (boiler held safe as matter of law, since no Industrial Commission regulation on the subject); and see the following quotation from a 1919 workmen's compensation case:

> " 'Safe' as used in the statutes is a relative term. It is defined to mean 'such freedom from danger to the life, health or safety of employes as the nature of the employment will reasonably permit! No one can say with certainty in a case of this kind just what degree of safety is required until the commission lays down a definite and positive rule; employers must exercise their best judgment and use the best available means to prevent accidents. . . . It is undoubtedly true that a safer method of signals could have been furnished, but there is no provision in the statute or in the orders of the commission directing the safe method and in the absence of such provision, the employer cannot be held to the safest method but to the rule above indicated. . . . It is not the purpose of the compensation law to punish either the employe or employer for mere negligence". Malek v. Burnell Engineering & Const. Co., 3rd. Rep. of Workmen's Comp. 54.

[95] 206 Wis. 100, 238 N.W. 867 (1931).

premises or operation causing the injury has been held to insulate the occupant against liability.[96]

The second major achievement of the Statute is its effective abrogation of the immunity of governmental and charitable organizations from tort liability relating to premises. Although this brushing aside of precedent has been accomplished by the unobtrusive definition of "employer" in Section 101.01, today it is the aspect of the Act perhaps most commonly met with. A study of the thirty-one cases construing the Statute which have reached the Supreme Court of Wisconsin in the decade 1930-1939 shows that it is most frequently invoked, in that court at least, upon these grounds rather than for any superiority over the common law with respect to standards of safety. Of the thirty-one cases, in nineteen instances the plaintiff failed;[97] in ten cases in which he prevailed, it is difficult to see how the Safe Place Statute afforded any advantage that the common-law standard of "reasonable safety" would not have given.[98] In the only two cases in which the Statute appears to have made any difference, the plaintiff recovered because of its abolition of the doctrines of governmental and charitable immunity, respectively.[99]

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[96] Skrzypczak v. Konieczka, 224 Wis. 455, 272 N.W. 659 (1937) (where regulation did not require bracketing post, failure to bracket held no defect); Waterman v. Heineman Bros. Co., 229 Wis. 209, 282 N.W. 29 (1938) (since lighting regulation adhered to, warning sign unnecessary); *cf.* Kendzewski v. Wausau Sulphite Fibre Co., 156 Wis. 452, 146 N.W. 517 (1914).

[97] Bewley v. Kipp, 202 Wis. 411, 233 N.W. 71 (1930); Baker v. Janesville Traction Co., 204 Wis. 452, 234 N.W. 912 (1931); Kinney v. Luebkeman, 214 Wis. 1, 252 N.W. 282 (1934); Kaczmarski v. F. Rosenberg Elevator Co., 216 Wis. 553, 257 N.W. 598 (1934); Grossenbach v. Devonshire Realty Co., 218 Wis. 633, 261 N.W. 742 (1935); Jaeger v. Evangelical Lutheran Holy Ghost Congregation, 219 Wis. 209, 262 N.W. 505 (1935); Skrzypczak v. Konieczka, 224 Wis. 455, 272 N.W. 659 (1937); Erbe v. Maes, 226 Wis. 484, 277 N.W. 111 (1938); Waldman v. Y.M.C.A. of Janesville, 227 Wis. 43, 277 N.W. 632 (1938); Heckel v. Standard Gateway Theatre Inc., 229 Wis. 80, 281 N.W. 640 (1938); Waterman v. Heinemann Bros. Co., 229 Wis. 209, 282 N.W. 29, (1938); Sikora v. Great Northern Ry. 230 Wis. 283, 282 N.W. 588 (1938); Dieckes v. White Paving Co., 229 Wis. 660, 283 N.W. 446 (1938); Herrick v. Luberts, 230 Wis. 387, 284 N.W. 27 (1939); Cegelski v. City of Green Bay, 231 Wis. 89, 285 N.W. 343 (1939); Lawver v. Joint District No. 1, 288 N.W. 192 (Wis. 1939); Grinde v. City of Watertown, 288 N.W. 273 (Wis. 1939); Prehn v. C. Niss & Sons, Inc., 288 N.W. 736 (Wis. 1939); Connor v. Meuer, 288 N.W. 273 (Wis. 1939).

[98] Pettric v. Gridley Dairy Co., 202 Wis. 289, 232 N.W. 595 (1930); Washburn v. Skogg, 204 Wis. 29, 233 N.W. 765 (1931); Bunce v. Grand & Sixth Bldg., Inc., 206 Wis. 100, 238 N.W. 867 (1931); Bent v. Jonet, 213 Wis. 635, 252 N.W. 290 (1934); Neitzke v. Kraft-Phenix Dairies, Inc., 214 Wis. 441, 253 N.W. 579 (1934); Sandeen v. Willow River Power Co., 214 Wis. 166, 252 N.W. 706 (1934); Tomlin v. C.M.St. P. & P. Ry., 220 Wis. 325, 265 N.W. 72 (1936); Powers v. Cheney Const. Co., 223 Wis. 586, 270 NW. 41 (1936); Sweitzer v. Fox, 226 Wis. 27, 275 N.W. 546 (1937); Kuske v. Miller Bros. Co., 227 Wis. 300, 277 N.W. 619 (1938).

[99] Wilson v. Evangelical Lutheran Church of Reformation, 202 Wis. 111, 230 N.W. 708 (1930); Heiden v. Milwaukee, 226 Wis. 92, 275 N.W. 922 (1937).

As with the aspect of the Safe Place Statute which gives the effect of law to Industrial Commission regulations, this abrogation of immunities is a definite advance. So, perhaps, is the abolition of the doctrine of assumption of risk, although the retention of the doctrine of contributory negligence largely offsets the gain. And making the landlord liable for structural defects in existence before he transferred possession to the tenant may constitute a forward step. But there the asset side of the Statute would seem to end.

The Act's third major achievement has been the introduction into tort law of the several questionable doctrines previously described—liability to gratuitous licensees for defects unknown to the owner, the possible removal of the requirement that the injured party fail to realize the risk involved, liability of an agent for defects not caused by himself. It is safe to say that the common law would not have evolved these doctrines if left to itself.

Finally, the Safe Place Statute has provoked an inestimable amount of litigation. For one thing, the jury is made the judge of the question of what constitutes safety even more widely than at common law.[100] As a result, the cases are full of hairline distinctions. Thus a step in the floor of a public building has been held "unsafe",[101] yet a floor mat,[102] a step without a warning sign in a department store,[103] and a rug in a motion picture theatre corridor[104] have been held "safe" as a matter of law. A standard product such as a box car is "unsafe",[105] but a similar standardized electrical clothes washer is "safe".[106] Ice which freezes on the floor of an ice house is "unsafe",[107] but ice on an elevated passageway[108] and wet beet pulp on the floor of a sugar factory[109] is "safe". Pieces of planking are "unsafe",[110] but a broken chain used to move a

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[100] *E.g.* "The legislature evidently endeavored to remove the question [of safeness] as exclusively as practicable into the field of jury interference". Sadowski v. Thomas Furnace Co., 157 Wis. 443, 450, 146 N.W. 770, 773 (1914).

[101] Hommel v. Badger State Inv. Co., 166 Wis. 235, 165 N.W. 21 (1917); Bunce v. Grand & Sixth Bldg., Inc. 206 Wis. 100, 238 N.W. 867 (1931).

[102] Erbe v. Maes, 226 Wis. 484, 277 N.W. 111 (1938).

[103] Waterman v. Heineman Bros., 229 Wis. 209, 282 N.W. 29 (1938).

[104] Heckel v. Standard Gateway Theatre, Inc., 229 Wis. 80, 281 N.W. 640 (1938).

[105] Sparrow v. Menasha Paper Co., 154 Wis. 459, 143 N.W. 317 (1913); Van De Zande v. C.&N.W. Ry., 168 Wis. 628, 170 N.W. 259 (1919).

[106] Hahn v. Rothstein, 174 Wis. 381, 182 N.W. 983 (1921).

[107] Sweitzer v. Fox, 226 Wis. 27, 275 N.W. 546 (1937).

[108] Kendzewski v. Wausau Sulphite Fibre Co., 156 Wis. 452, 146 N.W. 517 (1914).

[109] Tallman v. Chippewa Sugar Co., 155 Wis. 36, 143 N.W. 1055 (1913).

[110] Puza v. C. Hennecke Co., 158 Wis. 482, 149 N.W. 223 (1914).

pile driver[111] and a canopy which gave way under a repairman's weight[112] are "safe".

But the question of what constitutes an actual defect is, after all, little more troublesome than the same question at common law. Where the Safe Place Statute has caused the most trouble is in the simple fact that, being a statute, it poses all the problems to which statutory wording, with its accompanying judicial gloss, is heir. What is a "structural defect"?[113] What constitutes a "public building"?[114] At what point does a workplace become a "place of employment"?[115] Is a flagpole a "place of resort"?[116] Can a municipality have a "place of employment"?[117] Is a social caller a "frequenter"?[118] Until the last drop of ambiguity is squeezed from each word, the process of construction which the Act necessitates goes on. Meanwhile, the community must bear the cost of litigation.

Fortunately, the statutory wheat can safely be separated from the chaff. Industrial Commission regulations may be endowed with teeth sufficient to impose automatic liability on their violators by enacting a simple provision:

> The violation of any order of the Industrial Commission adopted pursuant to Chapter 101, when shown in any action for injuries to the person, shall constitute negligence as a matter of law.

Whether the abrogation of governmental or charitable immunities should be achieved as part of the law of premises is questionable. Reconsideration of both doctrines in their entirety, followed by statutes doing away with so much as the legislature sees fit to abolish, seems a more orderly procedure. If the legislature is unwilling to widen materially the gap created in the immunity doctrines by present law, it can at least consolidate existing law by providing:[119]

[111] Olson v. Whitney Bros. Co., 160 Wis. 606, 150 N.W. 959 (1915).
[112] Palmer v. Janesville Improvement Co., 195 Wis. 607, 219 N.W. 437 (1928).
[113] *E.g.*, Holcomb v. Sczymczyk, 186 Wis. 99, 202 N.W. 189 (1925) (ice); Pettric v. Gridley Dairy Co., 202 Wis. 289, 232 N.W. 595 (1930) (lights).
[114] *E.g.*, Bent v. Jonet, 213 Wis. 635, 252 N.W. 290 (1934) (temporary bleachers); Grinde v. City of Watertown, 288 N.W. 196 (Wis. 1939) (park slide).
[115] *E.g.*, United States F. & G. Co. v. Christiansen, 193 Wis. 1, 212 N.W. 660 (1927) (trench under construction).
[116] *E.g.*, Lawver v. Joint District No. 1, 288 N.W. 192 (Wis. 1939).
[117] *E.g.*, Herrick v. Luberts, 230 Wis. 387, 284 N.W. 27 (1939) (town street); Cegelski v. City of Green Bay, 231 Wis. 89, 285 N.W. 343 (1939) (toboggan slide).
[118] See Klemens v. Morrow Milling Co,. 171 Wis. 614, 618, 177 N.W. 903, 904 (1920).
[119] Such a bill would, it is true, slightly extend the inroad made on these immunities by the Safe Place Statute as it now stands, which abridges them, generally speaking, only where there is a "public building". The suggested Statute would abridge the immunities in all cases involving defective premises, whether

> The defenses of charitable or governmental function shall not be available in an action against the occupant of premises for injuries to the person.

Any reforms in the doctrine of assumption of risk or in the law of landlord and tenant had better, likewise, be treated as separate problems, broader than the existing Safe Place Statute.

The only way of ridding the law of the two unhealthy achievements of the Safe Place Statute—the doubtful doctrines and the litigation-provoking verbal ambiguities—is the somewhat drastic method of repealing Sections 101.06 and 101.07(1) outright. Little reason, save sentimentality, argues their continuance in the statute book.[120] With those undesirable aspects excised, and the good retained, the Safe Place Statute could again justly be called "nothing less than a work of genius".[121]

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buildings or not. If the abrogation is to be attempted at all, no reason exists why it should stop at the fortuitous point where the present statute stops it.

[120] With the Safe Place Statute abrogated save where an Industrial Commission order is violated, it may be that Wis. Stat. (1939) §102.57, imposing a 15% increased penalty in certain workmen's compensation cases, should be amended to include the penalty not only where the employer has violated an Industrial Commission order, but also where he is guilty of common-law negligence.

[121] See Altmeyer, The Industrial Commission of Wisconsin (1932) 106.