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TORTS—INVITEES, LICENSEES AND TRESPASSERS—A TREND TOWARDS ABOLISHING CLASSIFICATION OF ENTRANTS

During the development of the English landowner's common law duty of care to entrants upon his property, the landowner was the backbone of the social system; land ownership was synonymous with power and importance. Thus, the landowner was vested with many rights and privileges, and great importance was attached to his proprietary interests. Entry onto the domain of another without the owner's invitation or knowledge was considered a contemptible act. It was within this social framework that a landowner's duty of care to entrants upon his premises developed in England. This remains a part of our common law today.¹

The common law duty of care owed by the possessor of land to the entrant was determined by the set of conditions surrounding the entry. The entrant was classified as a trespasser,² licensee,³ or invitee,⁴ and the category into which he was placed determined the duty of care owed him by the possessor of the premises. These classifications were adopted by American courts at an early date.⁵

Usually the possessor of land is immune from liability to a trespasser. The possessor must merely refrain from intentionally harming him. The possessor has no duty, as a general rule, to exercise reasonable care to put his land in a safe condition for a trespasser or a licensee, or to carry on his activities in a manner

¹For general discussions and background material concerning the liability of an occupier of land to entrants, see 38 AM. JUR. *Negligence* §§ 92-157 (1941); 65 C.J.S. *Negligence* § 63 (1966); 2 F. HARPER AND F. JAMES, *LAW OF TORTS* §§ 27.1-27.14 (1956); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* §§ 58-62 (4th ed., 1971); James, *Tort Liability of Occupiers of Land: Duties Owed to Trespassers*, 63 YALE L.J. 144 (1953); James, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 YALE L.J. 605 (1954).

²A trespasser is generally defined as one who enters or remains on the land of another without the latter's consent, actual or implied, to do so. W. PROSSER, *supra* note 1, at § 58.

³A licensee is generally defined as one who comes upon land with the knowledge and consent of the owner, but does so for his own purposes or interests and not those of the possessor of the land. *Id.* § 60.

⁴An invitee is generally defined as one who enters the premises of another on business which concerns the occupier and upon the occupier's invitation, whether it be expressed or implied. *Id.* § 61. See RESTATEMENT (SECOND) OF TORTS § 332 (1965), which classifies invitees as either "business visitors" or "public invitees."

⁵See, e.g., *Sweeny v. Old Colony and N.R.R.*, 92 Mass. (10 Allen) 368, 87 Am. Dec. 644 (1865); *Beck v. Carter*, 68 N.Y. 283, 23 Am. Rep. 175 (1877); *Gillis v. Pennsylvania R.R.*, 59 Pa. 129, 98 Am. Dec. 317 (1868). England no longer relies on these distinctions when determining possessor's liability. See note 39, *infra*.

which does not endanger them.⁶ The possessor of land has the duty to use reasonable care in carrying on his activities when a licensee is on the premises. Although the licensee must accept the premises as he finds them, the possessor must warn him of dangerous conditions or activities of which he is aware.⁷ Only to the invitee does the possessor of land have the obligation of exercising reasonable care for the entrant's safety at all times during his presence on the premises.⁸ An invitee enters upon an implied representation or assurance that the land has been made ready and safe for his reception.⁹

While most courts, including the West Virginia Supreme Court of Appeals,¹⁰ maintain the common law classification of entrants, strict adherence to the rigid class distinctions has often worked injustice. Therefore, many jurisdictions have relaxed the strict common law guidelines, at least to the extent of elevating trespassers to the status of licensees in cases involving child trespassers,¹¹ frequent trespasses upon a limited area,¹² foreseeable trespasses,¹³ known trespassers,¹⁴ and situations in which a hidden peril exists on the land.¹⁵ Such exceptions to the original classifications have, in some jurisdictions, resulted in confusion and uncertainty when an entrant's exact status and the care owed him is an issue.

⁶W. PROSSER, *supra* note 1, § 58, at 357-59.

⁷*Id.* § 60, at 379; RESTATEMENT (SECOND) OF TORTS §§ 341-42 (1965).

⁸W. PROSSER, *supra* note 1, § 61, at 385; RESTATEMENT (SECOND) OF TORTS § 343 (1965).

⁹RESTATEMENT (SECOND) OF TORTS § 343, comment *b* (1965).

¹⁰See note 90 and accompanying text *infra*.

¹¹*E.g.*, *Keffe v. Milwaukee and St. Paul Ry.*, 21 Minn. 207 (1875). The most common concept utilized to increase the duty of care owed to a child trespasser is the "attractive nuisance doctrine." W. PROSSER, *supra* note 1, at § 59. The RESTATEMENT (SECOND) OF TORTS § 339 (1965) also discusses the liability of a landowner to a child trespasser for accidents caused by highly dangerous artificial conditions.

¹²*E.g.*, *Southern Ry. v. Campbell*, 309 F.2d 569 (5th Cir. 1962).

¹³*E.g.*, *Virginia Ry. v. Rose*, 267 F.2d 312 (4th Cir. 1959), *cert. denied*, 361 U.S. 837 (1959).

¹⁴*E.g.*, *Omaha and Republican Valley Ry. v. Cook*, 42 Neb. 577, 60 N.W. 899 (1894).

¹⁵*E.g.*, *Hennessey v. Hennessey*, 145 Conn. 211, 140 A.2d 473 (1958). These exceptions to the general rule of a landowner's or occupier's duty of care to trespassers are discussed in the references cited in note 1 *supra*. RESTATEMENT (SECOND) OF TORTS §§ 334-339 (1965) also lists and comments on each of the exceptions. See, Comment, 44 N.Y.U.L. REV. 426, 427 (1969) for references to early cases which recognized the need for such exceptions.

One other facet of the trespasser-licensee-invitee classification system which has caused the courts concern is the status of the social guest on the premises. Although he is usually placed in the category of licensee,¹⁶ some jurisdictions have expressed dissatisfaction with this classification and have increased the duty of care owed the social guest to one of reasonable care, which is the same duty owed an invitee.¹⁷

The many confusing exceptions to the original, rigid classifications of entrants upon another's land point out the need for change of the possessor's liability law. Prior to 1968, the year in which the common law classifications were first abolished by a state court,¹⁸ several jurisdictions had expressed dissatisfaction with the traditional classifications. In 1951, the Ohio court¹⁹ refused to follow the traditional rule that a social guest is owed only the standard of care due a licensee. The court held the host liable by creating a separate classification for the social guest; the duty owed by the host was held to be one of ordinary care under the circumstances. In addition, the court imposed a duty to warn the guest of potentially dangerous situations.²⁰ In 1955, the Missouri court stated that the status of the injured party does not necessarily control under all circumstances.²¹ Although the court held that a social guest was a licensee and decided to retain the traditional classifications, it noted that where economic or social conditions create a basis for invoking a duty of care over and beyond that imposed upon a possessor in a particular possessor-entrant relationship, it would not apply too rigidly the law applicable to the entrant's legal status.²²

¹⁶*Southcote v. Stanley*, 1 H and H 247, 24 L.J. Ex. 339 (1850), held that a social visitor to an inn must take the premises as he finds them and assume all risks unknown to the proprietor, and that he could not recover for injuries caused by a pane of glass falling out of a door. This case is the basis for the social guest's status as a licensee in our common law today.

¹⁷Connecticut has made the standard of care owed a social guest the same as that owed a business invitee. CONN. GEN. STAT. ANN. § 52-557a (1960). Louisiana, in *Alexander v. General Accident Fire and Life Assur. Corp.*, 98 So. 2d 730 (La. App. 1957), and Ohio, in *Scheibel v. Lipton*, 156 Ohio St. 308, 102 N.E.2d 453 (1951), raised the standard of care owed a social guest. *Accord*, *Judy v. Belk*, 181 So. 2d 694 (Fla. 1966).

¹⁸*Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

¹⁹*Scheibel v. Lipton*, 156 Ohio St. 308, 102 N.E.2d 453 (1951).

²⁰*Id.* at 328, 102 N.E.2d at 463.

²¹*Wolfsen v. Chelist*, 284 S.W.2d 447, 451 (Mo. 1955).

²²*Id.*

In a later case involving an injury to a social guest,²³ the New Jersey court permitted the plaintiff to recover, although he was technically a trespasser, because the landlord should have foreseen the harm which caused the accident and exercised reasonable care to prevent the injury. The court further noted that the common law classifications have gradually been excepted in situations such as this.²⁴

The Louisiana court, in elevating the social guest to the status of an invitee, stated:²⁵

[T]he concepts of these rigid classifications unnecessarily concern the courts in minute examination of the theoretical status of the injured person, based often on unrealistic and fictional distinctions, without sufficient realistic inquiry into whether the conduct under the particular circumstances involved an unnecessary risk to the safety of others avoidable by the exercise of due care.

In 1959, the Supreme Court considered the common law classifications in *Kermarec v. Compagnie Generale Transatlantique*.²⁶ In that case, involving a fall by petitioner down a stairway on respondent's ship, the Court refused to apply the common law distinctions between trespasser, licensee, and invitee, because these classifications were foreign to the simplicity and practicality of admiralty law.²⁷ The Court noted also that the distinctions which the common law draws between licensee and invitee were inherited from a culture deeply rooted to the land, and which traced many of its standards to a heritage of feudalism.²⁸ Because the distinctions originated under a legal system in which status depended almost entirely upon the amount of one's real property, the Court refused to apply the classifications to admiralty law.²⁹ Recognizing that the common law classifications had also become

²³Taylor v. New Jersey Highway Authority, 22 N.J. 454, 126 A.2d 313 (1956). The social guest of a tenant sought recovery from the landlord for injuries sustained on a common stairway in the building. By rigid standards of classifications, the plaintiff was a trespasser vis-a-vis the landlord, although a social guest of the tenant.

²⁴*Id.* at 462, 126 A.2d at 317.

²⁵Alexander v. General Accident, Fire, and Life Assur. Corp., 98 So. 2d 730, 733 (La. App. 1957).

²⁶358 U.S. 625 (1959).

²⁷*Id.* at 631.

²⁸*Id.* at 630.

²⁹*Id.* at 631.

quite complicated when applied to non-admiralty cases, the Court noted:³⁰

[E]ven within a single jurisdiction, the classifications and subclassifications bred by the common law have produced confusion and conflict. As new distinctions have been spawned, older ones have become obscured. Through this semantic morass the common law has moved, unevenly and with hesitation, towards "imposing on owners and occupiers a single duty of reasonable care in all the circumstances."

Virtually all of the courts which have abrogated the common law doctrine have cited *Kermarec* in support of their decision. Thus, the opinion was instrumental in laying the groundwork for the decision which first abolished the common law classifications nine years later—*Rowland v. Christian*.³¹

Subsequent to *Kermarec*, several courts were presented with appropriate fact situations in which to abolish the common law classifications. However, the courts chose to modify the existing rules or find other means by which to hold the landowner liable. One such case involved the injury of a social guest while on the host's premises and in the host's presence. A California appellate court held that the host has the extra duty of warning his social guest of potential harm.³² This is more than is required if the social guest is given the status of licensee. The host has the duty to warn a licensee only of an unreasonable risk of harm about which he knows or should know and which the guest would not ordinarily discover.³³

The District of Columbia court brought to light one of the faults of the common law method of determining the liability of a landowner. The court found it difficult to justify imposition of the same legal standard on two trespassers, one an eighteenth century poacher and the other an infant visitor to the apartment of a friend.³⁴ "The manifest differences between them suggest strongly

³⁰*Id.* at 630-31. The Court was quoting from the dissenting opinion in the Court of Appeals. 245 F.2d 175, 180 (2d Cir. 1957).

³¹69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

³²*Anderson v. Anderson*, 251 Cal. App. 2d 409, 59 Cal. Rptr. 342 (Cal. Ct. of App. 4th Dist. 1967). The plaintiff, a social guest of defendant, was injured when he dived into the shallow end of defendant's swimming pool. *Accord*, *Potts v. Amis*, 62 Wash. 2d 777, 384 P.2d 825 (1963), in which the host hit his guest with a golf club while the two were comparing swings in the defendant's yard.

³³RESTATEMENT (SECOND) OF TORTS § 342 (1965).

³⁴*Gould v. DeBeve*, 330 F.2d 826 (D.C. Cir. 1964). An infant, technically a

that projecting the label from one to the other can not rationally be an automatic determinant of the result in each case in which injuries attributable to the landlord have been sustained."³⁵ Although the court recognized this injustice, it did not abolish the traditional classifications. Instead, it based the landlord's liability on wilful and wanton misconduct for failure to repair a screen (a violation of a health ordinance)³⁶ after it had been reported to be in need of repair.

In 1968, the year of the *Rowland* decision, the District of Columbia Court of Appeals gave judgment for a plaintiff who fell in a common area of an apartment building while visiting her grandchildren who were tenants.³⁷ A concurring opinion written by Chief Judge Bazelon stated that the rule developed in the cases cited by the majority was often explained on the theoretical basis that all persons lawfully on the premises were the landlord's invitees. But, in his view, the decision did not depend upon adherence to the outmoded "invitee-licensee-trespasser trinity."³⁸ In support of his position, he referred to several of the cases discussed heretofore and England's Occupier's Liability Act,³⁹ which abolished the distinction between invitees and licensees, as having recognized that the common law classifications and their progeny of subclassifications were not in accord with the realities of modern living.⁴⁰ Chief Judge Bazelon had first discussed the problems created by the common law classifications in 1963 when he noted that the many subclassifications and exceptions to the traditional common law rules were being replaced by the ordinary rule of due care under all the circumstances.⁴¹

trespasser, won a verdict over a landlord for damages incurred when he fell through a screen that was in disrepair. The child was living in the building with his mother under an arrangement with the tenant that was contrary to a provision in the tenant's lease with defendant.

³⁵*Id.* at 829.

³⁶For a discussion of the sections of the ordinance upon which the court relied, see 339 F.2d at 828 n.2.

³⁷*Levine v. Katz*, 407 F.2d 303 (D.C. Cir. 1968).

³⁸*Id.* at 305.

³⁹The Occupier's Liability Act of 1957, 5 & 6 Eliz. c. 31, abolished the distinctions between licensees and invitees and declared that the possessor owes the same standard of care to both, with the standard of reasonable care modified according to the circumstances of the entry. The duty of care owed to trespassers was not affected by this statute.

⁴⁰407 F.2d at 305.

⁴¹*Daisey v. Colonial Parking, Inc.*, 331 F.2d 777, 779 (D.C. Cir. 1963). Chief Judge Bazelon also delivered the majority opinion in *Smith v. Arbaugh's Restaur-*

The cases discussed thus far emphasize the importance of the decision in *Rowland v. Christian*.⁴² In that case, the California court rejected the traditional common law classifications, holding instead that:⁴³

The proper test to be applied to the liability of the possessor of land . . . is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others, and, although the plaintiff's status as a trespasser, licensee, or invitee may in light of the facts giving rise to such status have some bearing on the question of liability, the status is not determinative.

Thus, the common law rule, with its subtleties and confusing subclasses, was replaced by one rather easily applied uniform test which has proven to be effective in other areas of negligence law. That test is reasonable care under the circumstances.

The *Rowland* court determined that the common law distinctions had lost their usefulness, noting that the barriers to recovery they entail are alien to the factors which should determine liability. For example, such factors as possible moral blame associated with defendant's conduct, the causal relationship between the defendant's conduct and the plaintiff's injury, the availability of insurance, and the policy of preventing future harm are obscured by the usual common law approach.⁴⁴ Such a method of determining liability was thought to be contrary to modern social mores.⁴⁵

ant, Inc., 469 F.2d 97 (D.C. Cir. 1972), in which the common law classifications were abolished in the District of Columbia.

⁴²69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). The court reversed a summary judgment in favor of defendant in a case in which a social guest brought an action for injuries sustained when a knob broke off of a cold water faucet while he was using it. See, Comment, 71 W. VA. L. Rev. 226 (1969). The comment noted that West Virginia follows the common law classifications and that many of the exceptions and much of the confusion are also present. It recognized that adoption of the *Rowland* rule could ameliorate the problem.

⁴³69 Cal. 2d at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104.

⁴⁴*Id.* at 117, 443 P.2d at 567, 70 Cal. Rptr. at 103.

⁴⁵*Id.* at 118, 443 P.2d at 568, 70 Cal. Rptr. at 104. To reach its decision in *Rowland*, the court referred to a California statute which said, "Everyone is responsible . . . for an injury occasioned to another by his want of ordinary care or skill in the management of his property . . ." CAL. CIV. CODE § 1714 (Deering 1971). This statute gave the court clear justification for abandoning the common law classifications. However, the fact that the statute had been in effect for almost a century without being applied to this type of situation militates against the idea that the court actually relied on it in deciding *Rowland*. For a suggestion that the

Varied reactions have greeted the *Rowland* decision. Although only six other courts have abolished the common law distinctions,⁴⁶ the *Rowland* rationale has been considered by others that have failed to adopt it for one reason or another. A survey of selected cases decided since *Rowland* provides some insight into how the trend toward abolition of the common law classifications has developed to date and how it may develop in the future.

The First Circuit, in *Burns v. Turner Construction Co.*, acknowledged *Rowland* but stated that the classifications had retained undiminished vitality in Massachusetts.⁴⁷ The liability of the defendant rested upon the plaintiff's status as either invitee or licensee, and he was denied recovery because he was classed as a licensee, rather than an invitee.⁴⁸

When urged to abandon the traditional classifications in *DiGildo v. Caponi*,⁴⁹ the Ohio court decided that a just measure of judicial restraint required that the question be deferred to a later case. The court permitted the infant social guest to recover, and thereby followed prior case law in Ohio requiring a duty of ordinary care toward social guests.⁵⁰

The first state to follow *Rowland* was Hawaii, in the case of *Pickard v. City and County of Honolulu*.⁵¹ Basing its opinion on

presence of this statutory provision may limit subsequent acceptance of the *Rowland* decision by other courts, see Comment, 41 U. COLO. L. REV. 167 (1969).

⁴⁶*Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97 (D.C. Cir. 1972); *Mile High Fence Co. v. Radovich*, 489 P.2d 308 (Colo. 1971); *Pickard v. City and County of Honolulu*, 51 Hawaii 134, 452 P.2d 445 (1969); *Mounsey v. Ellard*, 297 N.E.2d 43 (Mass. 1973); *Peterson v. Balach*, 199 N.W.2d 639 (Minn. 1972); *Heald v. Cox*, 480 S.W.2d 107 (Mo. App. 1972).

⁴⁷402 F.2d 332, 335 (1st Cir. 1968). This decision, a diversity action interpreting Massachusetts law, was not followed by the Massachusetts court in a later case. For a discussion of that case, see the text accompanying note 84 *infra*.

⁴⁸The plaintiff, a doctor who had gone to the office of a fellow physician after a lecture delivered by the latter, was injured as a result of defendant's negligent construction of a walkway while he was walking to an adjacent building with the lecturer to view some materials. The court held that he may have been an invitee while in actual attendance at the lecture, but lost such status by visiting the lecturer afterward. 402 F.2d at 335.

⁴⁹18 Ohio St. 2d 125, 131, 247 N.E.2d 732, 736 (1969). In *DeGildo*, an infant social guest was injured while playing in the host's car when the transmission disengaged.

⁵⁰See *Scheibel v. Lipton*, 156 Ohio St. 308, 102 N.E.2d 453 (1951). This case is discussed in the text accompanying note 19 *supra*.

⁵¹51 Hawaii 134, 452 P.2d 445 (1969). The plaintiff was injured in a courthouse restroom which was cluttered and had a hole in the floor.

Kermarec, Rowland, and England's Occupier's Liability Act, the court abolished the common law distinctions because they had no logical relationship to the exercise of reasonable care for the safety of others.⁵² Although admitting that the rule adopted by Hawaii and California was persuasive, the Mississippi court in *Astleford v. Milner Enterprises, Inc.*,⁵³ was not convinced that the common law distinctions should be abandoned at that time. However, the court indicated the possibility of change after further study.

In *Mile High Fence Co. v. Radovich*,⁵⁴ the Colorado court abolished the common law distinctions, thus carrying out the suggestion in an earlier decision by the court.⁵⁵ *Radovich* held that the status of the entrant may have some bearing on the question of liability, but such status should not be conclusive.⁵⁶ An interesting comparison was made between the *Rowland* rule, which the court adopted, and the rule advocated by the *Restatement (Second) of Torts*.⁵⁷ The court felt that the *Restatement* makes the possessor liable regardless of status if: a) He knows of the existence of an unsafe condition; b) he knows that it involves an unreasonable risk of harm; and c) he fails to take reasonable precautions to correct it.⁵⁸ The court concluded that the *Restatement* is compatible with the *Rowland* decision.

Rowland was categorized as a "sub-trend" away from all tests by the Florida court in *Lunney v. Post*.⁵⁹ The court felt that the trend in this area of the law was to make the plaintiff who paid to enter a defendant's property an invitee under the "invitation test,"⁶⁰ and it adopted that approach.⁶¹ Speaking of the *Rowland*

⁵²*Id.* at 135, 452 P.2d at 446. *Pickard* was followed later in the year by *Gibo v. City & County of Honolulu*, 51 Hawaii 299, 459 P.2d 198 (1969), in which the plaintiff fell on an oil-covered walkway on the premises of the city hospital.

⁵³233 So. 2d 524 (Miss. 1970). The plaintiff was struck by the defendant's truck while standing in defendant's driveway.

⁵⁴489 P.2d 308 (Colo. 1971). A police officer stepped in a post hole while conducting surveillance of a prostitute.

⁵⁵*Kenney v. Grice*, 171 Colo. 185, 465 P.2d 401 (1970). This decision discussed *Rowland* with approval, but did not adopt it in deciding the case. In Colorado, a social guest had never been classified as either a licensee or an invitee, so the court held that he was due the same duty of care that was owed to an invitee. 465 P.2d at 404.

⁵⁶489 P.2d at 314.

⁵⁷RESTATEMENT (SECOND) OF TORTS §§ 333-43 (1965).

⁵⁸489 P.2d at 314.

⁵⁹248 So. 2d 504 (Fla. 1971). The plaintiff was injured while touring defendant's home as part of a garden club tour.

⁶⁰*Id.* at 506. "A public invitee is a person who is invited to enter or remain on

view, the court noted that even though it found much merit in such a position, it could foresee difficulties in a case by case approach.⁶² It did not elaborate on what the difficulties might be.

In the 1971 decision of *Buchholtz v. Steitz*,⁶³ the Texas Court of Civil Appeals chose not to take so "drastic" a step as following *Rowland*. And the North Dakota court, in *Werth v. Ashley Realty Co.*,⁶⁴ stated that it preferred to retain the categories and make exceptions to the general rule when necessary. Both of these cases, though, presented issues which could easily have been resolved in favor of the defendant even if the standard of reasonable care had been applied. The courts, therefore, chose to postpone an alteration of their methods.

Although the Supreme Court of Missouri has not yet had the opportunity to decide whether to follow *Rowland*, one of the two divisions of the Missouri Court of Appeals has abolished the common law distinctions. In *Cunningham v. Hayes*,⁶⁵ the Kansas City Division held that the likelihood of an entrant's presence and the consequent possibility of harm should be the factors in determining the duty of care owed by the possessor of land.⁶⁵ Later in the same year, the St. Louis Division chose not to abolish the classes.⁶⁶ The Missouri Supreme Court's decision in *Wolfsen v. Chelist*,⁶⁷ decided in 1955, indicates that it might be willing to abolish the distinctions.

The Minnesota court, in *Peterson v. Balach*,⁶⁸ did not rule on the duty owed a trespasser, but held that the entrant's status as

land as a member of the public for a purpose for which the land is held open to the public." RESTATEMENT (SECOND) OF TORTS § 332(2) (1965).

⁶¹248 So. 2d at 507.

⁶²*Id.*

⁶³463 S.W.2d 451, 454 (Tex. Civ. App. 1971). A frequent social guest fell down a stairway when she opened a door which she thought was the bathroom. Recovery was denied.

⁶⁴199 N.W.2d 899, 907 (N.D. 1972). The plaintiff fell when a latently defective railing upon which she was leaning collapsed. Recovery was denied because the defendant did not know of the defect.

⁶⁵463 S.W.2d 555, 559 (Kansas City App. 1971). *Accord*, *Heald v. Cox*, 480 S.W.2d 107 (Kansas City App. 1972).

⁶⁶*Pitt v. Fred Weber Construction, Inc.*, 466 S.W.2d 124, 126 (St. Louis App. 1971).

⁶⁷284 S.W.2d 447 (Mo. 1955). This case is discussed in the text accompanying note 21 *supra*.

⁶⁸199 N.W.2d 639, 644 (Minn. 1972). This case was a wrongful death action involving a social guest who died from carbon monoxide inhalation while at the host's cabin.

licensee or invitee was no longer controlling and was but one element, among many, to be considered in determining the possessor's liability under ordinary standards of negligence. The court cautioned that it did not intend to impose an absolute liability, but that instead of placing the entrant (invitee or licensee) within a rigid classification, the new rule would impose the duty of reasonable care on both the possessor and the entrant.⁶⁹

An interesting situation has arisen in the District of Columbia in regard to which test will be used to determine the liability of possessors of land. In *Smith v. Arbaugh's Restaurant, Inc.*,⁷⁰ the United States Court of Appeals for the District of Columbia Circuit refused to follow the common law rule which would have denied recovery by classifying the plaintiff as a licensee, and instead set forth the rule that "[a] landowner must act as a reasonable man in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk."⁷¹ But later the same year, the United States District Court for the District of Columbia, in *Luck v. Baltimore & Ohio Railroad Co.*, chose not to follow the rule laid down by *Arbaugh*.⁷² Instead, it applied the common law rule stated in *Firfer v. United States*.⁷³

Regardless of whether the *Arbaugh* decision will be followed

⁶⁹*Id.* at 647.

⁷⁰469 F.2d 97 (D.C. Cir. 1972). A health inspector was injured when he fell on greasy steps in a restaurant.

⁷¹*Id.* at 100.

⁷²352 F. Supp. 331, 334 (D.D.C. 1972). The minor plaintiff was struck while removing her brother, another minor, from defendant's railroad tracks.

⁷³208 F.2d 524 (D.C. Cir. 1953). This case followed the traditional classifications. Effective February 1, 1971, the District of Columbia Court of Appeals, not to be confused with the United States Court of Appeals, District of Columbia Circuit, became the "highest court of the District of Columbia," and its judgments and decrees were to be "reviewable by the Supreme Court of the United States." D.C. CODE § 11-102 (Supp. V 1972), 84 Stat. 475. Prior to this act, the United States Court of Appeals, District of Columbia Circuit, sat as the highest court of the District of Columbia and had the same status as the highest court of a state. The court in *Luck* reasoned that law established by the District of Columbia circuit, when it was functioning as the highest court for the District of Columbia in comparable state status (*Firfer*), was controlling. *Arbaugh*, coming after the Court Reorganization Act of 1970, which established the District of Columbia Court of Appeals as the highest District of Columbia court, was not controlling. By applying the law set forth by the Supreme Court in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), that a federal court trying a diversity action must apply the law as declared by the highest court of the appropriate state, the *Luck* court decided that *Firfer*, being the law of the highest "state" court, must be followed.

in possessor's liability cases in the District of Columbia, it merits further discussion because it offers some good ideas on how to implement the emerging view to get the best results. The fear that eliminating the traditional classifications would leave the jury without any standard to gauge liability⁷⁴ was dismissed by Chief Judge Bazelon. He suggested the principles that have always governed personal negligence would be used to determine possessor's liability.⁷⁵ These factors, according to Chief Judge Bazelon, are those which Chief Judge Learned Hand delineated in *Conway v. O'Brien*:⁷⁶

The degree of care demanded of a person by an occasion is the resultant of three factors: the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interests which he must sacrifice to avoid the risk.⁷⁷

By applying these principles to the conduct of a possessor of land in a given case, the jury will have a workable guide for assessing liability without reference to the common law distinctions of trespasser, licensee, or invitee. Chief Judge Bazelon realized that what is reasonable will vary from possessor to possessor and entrant to entrant; he felt that the jury, representing the commonly accepted standards of a community, should decide reasonableness in all cases.⁷⁸

⁷⁴See *Benedict v. Podwats*, 57 N.J. 219, 271 A.2d 417 (dissenting opinion 1970); *Lunney v. Post*, 248 So.2d 504 (Fla. 1971). *Lunney* is discussed in the text accompanying note 59 *supra*.

⁷⁵469 F.2d at 105.

⁷⁶111 F.2d 611 (2d Cir. 1940).

⁷⁷*Id.* at 612. In *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947), Chief Judge Hand devised an algebraic formula by which to determine liability in a particular circumstance. The defendant was liable for the plaintiff's injury if P, the probability of an injury occurring, multiplied by L, the seriousness of the injury, is greater than B, the burden which the defendant must bear to prevent the accident.

⁷⁸469 F.2d at 105-06. By modifying a rule of *Seganish v. District of Columbia Safeway Stores, Inc.*, 406 F.2d 653, 655-56 (D.C. Cir. 1968), the court suggested this model instruction for the jury:

A [landowner] is not an insurer of the condition of his [property]. His duty is to exercise reasonable care to keep [his property] safe [in view of the foreseeability of the presence of others on his land]. He is responsible, of course, for injuries resulting from risks created personally or by his employees. Moreover, his obligation of due care extends to reasonable supervision and inspection of the premises to identify and protect against potential perils [in view of the probability of injury to others]. For this reason, liability may also spring from a negligent failure to safeguard

Recognizing the trend away from immunities in tort law, the court, in *Arbaugh*, did not wish to perpetuate the existing immunity of a possessor of land arising from the common law distinctions of entrants. If immunities from liability are to exist, the court felt they should be based on consideration of factors which are relevant in modern society and unrelated to classifications of trespassers, licensees, and invitees.⁷⁹ The court further noted that we are living in a society today in which personal status is no longer dependent upon one's real property, so it seems foolish to continue relying on classifications and immunities which are no longer relevant.⁸⁰

Another important aspect of the *Arbaugh* opinion is the court's recognition that the common law rules often resulted in harsh verdicts because:⁸¹

[T]he essential task of judging a landowner's conduct under prevailing community standards is removed from the province of the jury. Through motions for dismissal, for directed verdicts, and for judgment notwithstanding the verdict, courts resolve the issue of liability solely on the facts which establish the status of the person injured. Mechanical legal decisions made by judges eliminate jury scrutiny of the actual conduct of the visitor and the landowner.

A concurring opinion in *Arbaugh*⁸² agreed with the majority but suggested abolishing the traditional standards for business establishments only. This opinion stated that undue strain may be put on residential property owners to maintain their property in anticipation of an injury to an entrant. This view seems without merit if the majority opinion is fully understood. The jury, when evaluating each case, must consider all circumstances, including the type of property, the foreseeability of entrants, and the burden on the possessor to keep the land injury-proof. With all these factors in mind, the jury can arrive at a reasonable standard of care in each instance.⁸³

against dangers born of the activities of [others]. But negligence can be found in relation to a [visitor]-created hazard only if it is known, or because of its duration should have been discovered, in time to afford a fair opportunity to remove it.

469 F.2d at 106 n.48 (brackets from original).

⁷⁹*Id.* at 102.

⁸⁰*Id.*

⁸¹*Id.* at 103-04.

⁸²*Id.* at 107 (concurring opinion).

⁸³*Id.* at 106.

The latest state to consider the *Rowland* rule was Massachusetts in *Mounsey v. Ellard*.⁸⁴ Rather than merely elevating the policeman in the case to the status of an invitee as plaintiff's counsel had requested,⁸⁵ the court went on to abolish the distinction between licensees and invitees in all cases.⁸⁶ Therefore, the decision partially adopted the *Rowland* rule. The court chose, however, not to abolish the classification of trespasser because it saw a significant difference in the legal status of one who trespasses.⁸⁷ A concurring opinion took issue with this because it tends to perpetuate, although on a smaller scale, the kind of tradition-bound and mistaken analysis that the court was aiming to correct.⁸⁸

Since the *Rowland* decision was handed down in 1968, only *Burns v. Turner Construction Co.*⁸⁹ has flatly refused to follow the "reasonable care" rule when given an appropriate case. But since *Mounsey, Burns*, a federal diversity action interpreting Massachusetts law, is no longer relevant. The remaining jurisdictions that chose not to follow *Rowland* did not rule out the possibility of adopting it in the future. Those cases were ones that could be decided for the plaintiff by following the common law rules, or ones in which the court wished to delay the decision of whether to adopt *Rowland* until after further study. Considering the relatively short time since the decision and the number of courts which have accepted or have considered accepting the *Rowland* rule, there appears a definite movement toward complete abolition of the traditional common law classifications of trespasser, licensee, and invitee and an application of the "reasonable care" test of negligence when ascertaining the liability of possessors of land for injury to entrants upon their premises.

In West Virginia, a land possessor's duty to entrants currently follows closely the common law distinctions with many of the exceptions discussed in the opening remarks of this note.⁹⁰ The ambi-

⁸⁴297 N.E.2d 43 (Mass. 1973). A policeman was injured when he fell on ice that had been allowed to accumulate on the defendants' premises. He was delivering a criminal summons to one of the defendants.

⁸⁵*Id.* at 44.

⁸⁶*Id.* at 51.

⁸⁷*Id.* at 51 n.7.

⁸⁸*Id.* at 57.

⁸⁹402 F.2d 332 (1st Cir. 1968). *Burns* is discussed in text accompanying note 47 *supra*.

⁹⁰*See, e.g.,* *Atkinson v. Harman*, 151 W. Va. 1025, 158 S.E.2d 169 (1967) (duty to refrain from wilfully or wantonly injuring a mere licensee); *Sutton v. Monongahela Power Co.*, 151 W. Va. 961, 158 S.E.2d 98 (1967) ("dangerous instrumentality"

guities and subtleties which existed in the jurisdictions that have abolished the common law approach also exist in West Virginia. Abolition of the common law categories would result in an approach which guarantees that each entrant upon the land of another will be entitled to receive the standard of care due him under the circumstances.⁹¹

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rule rather than "attractive nuisance" rule in cases involving child trespassers); *Burdette v. Burdette*, 147 W. Va. 313, 127 S.E.2d 249 (1962) (ordinary care owed to an invitee); *Wellman v. Christian*, 147 W. Va. 189, 126 S.E.2d 375 (1962) (permission to use premises does not make a licensee an invitee); *Waddell v. New River Co.*, 141 W. Va. 880, 93 S.E.2d 473 (1956) (duty owed trespassers and licensees is the same); *Adams v. Va. Gasoline & Oil Co.*, 109 W. Va. 631, 156 S.E. 63 (1930) (children not exempt from general rules unless there is an exposed or unguarded danger); *Wellman v. Fordson Coal Co.*, 105 W. Va. 463, 143 S.E. 160 (1928) (person can be an invitee by implication). *See also* Comment, 71 W. VA. L. REV. 226 (1969).

⁹¹Such a change in the common law would probably have to be made by the legislature. See W. VA. CONST. art. VIII, § 21, which states that the common law in effect at the time the constitution went into operation shall continue to be the law until altered or repealed by the legislature. *See also* Note, 71 W. VA. L. REV. 341 (1969).