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Recent Developments in Duties of Owners and Occupiers of Land: Wood v. Camp--Florida Imposes Upon Landowners a Standard of Reasonable Care to "Licensees by Invitation"

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COMMENTS

RECENT DEVELOPMENTS IN DUTIES OF OWNERS AND OCCUPIERS OF LAND: *WOOD v. CAMP* — FLORIDA IMPOSES UPON LANDOWNERS A STANDARD OF REASONABLE CARE TO "LICENSEES BY INVITATION"

I. INTRODUCTION

The problem of defining a landowner's[1] duty to those entering upon his land has been the subject of continuing litigation and commentary.[2] Most American courts continue to apply the common law formula which ascertains the landowner's duty by classifying an entrant as a trespasser, licensee, or invitee.[3] However, a growing number of courts,[4] supported by the vast majority of commentators,[5] have broken with tradition and have rejected or greatly modified the common law entrant classification scheme. The growing minority has chosen to impose upon owners and occupiers of land a

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[1] For the purposes of this comment, the terms "landowner," "land occupier," and "possessor of land" are used interchangeably to mean one who would be answerable to an action in negligence brought by one injured on his premises.

[2] *See* Hughes, *Duties to Trespassers: A Comparative Survey and Reevaluation*, 68 YALE L.J. 633 (1959) [hereinafter cited as Hughes]; James, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 YALE L.J. 605 (1954) [hereinafter cited as James]; McDonald and Leigh, *The Law of Occupiers' Liability and the Need for Reform in Canada*, 16 U. TORONTO L.J. 55 (1965); Marsh, *The History and Comparative Law of Invitees, Licensees, and Trespassers*, 69 L.Q. REV. 182 (1953) [hereinafter cited as Marsh]; Payne, *The Occupiers' Liability Act*, 21 MODERN L. REV. 359 (1958); Note, 17 MODERN L. REV. 265 (1964); 25 VÅND. L. REV. 623 (1972).

[3] For a discussion of these distinctions and the duties accompanying each, *see* notes 18-28 *infra*.

[4] Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973); Rowland v. Christian, 443 P.2d 561 (Cal. 1968); Mile High Fence Co. v. Radovich, 489 P.2d 308 (Colo. 1971); Pickard v. City and County of Honolulu, 452 P.2d 445 (Hawaii, 1969); Mounsey v. Ellard, 297 N.E.2d 43 (Mass. 1973); Peterson v. Balach, 199 N.W.2d 639 (Minn. 1972).

[5] *See generally* Hughes at 633; Long, *Land Occupant's Liability to Invitees, Licensees and Trespassers*, 31 TENN. L. REV. 485 (1964); McCleary, *The Liability of a Possessor of Land in Missouri to Persons Injured While on the Land*, 1 Mo. L. REV. 45 (1936); Comment, *Occupier of Land Held to Owe Duty of Ordinary Care to All Entrants - "Invitee," "Licensee," and "Trespasser" Distinctions Abolished*, 44 N.Y.U.L. REV. 426 (1969) [hereinafter cited as Comment, 44 N.Y.U.L. REV.].

broad duty of reasonable care to entrants under *all* circumstances.

These two opposing philosophies converged in the recent case of *Wood v. Camp*,[6] in which Florida joined those states which have judicially examined and redefined the rights and duties of landowners in this area of the law. *Wood v. Camp*[7] was a wrongful death action brought by the father of Randall Camp, a minor, who died as a result of a gas explosion in a bomb shelter at the home of Frank Wood. Randall Camp and Frank Wood, Jr., had done some painting in the bomb shelter and were working on an outboard motor in the Wood garage. On the day of the explosion, Wood was not present, and reasons are unclear why Camp ventured into the bomb shelter alone.

The trial judge, following well-established precedent,[8] granted summary judgment for the defendants. The Second District Court of Appeals of Florida reversed;[9] in abolishing *in toto* the common law categories of invitee, licensee, and trespasser, the court imposed upon owners and occupiers of land a single duty of reasonable care under all the circumstances as to all entrants.[10] The defendants thereupon applied for a writ of certiorari for review by the Florida Supreme Court.

The Florida Supreme Court was unwilling to allow the complete abrogation of the trespassee-licensee-invitee classifications in favor of a single standard of reasonable care.[11] The court felt the limited duty toward trespassers and others not reasonably anticipated upon the land worthy of retention and was concerned that a single standard of care would not "sufficiently afford a reasonable standard which can be applied as a measure by the jury."[12] The court also feared that the lack of standards might practically make the landowner "an insurer of those who enter upon his premises."[13]

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[6] 284 So. 2d 691 (Fla. 1973).

[7] *Id.*

[8] *See* Post v. Lunney, 261 So. 2d 146 (Fla. 1972), in which the standard of care owed a social guest was stated as "[The landowner] must not wilfully and wantonly injure a licensee, or intentionally expose him to danger . . . ." *Id.* at 147. *See also* Goldberg v. Straus, 45 So. 2d 883 (Fla. 1950); Hauben v. Melton, 267 So. 2d 16 (Fla. Ct. App. 1972).

[9] Camp v. Gulf Counties Gas Co., 265 So. 2d 730 (Fla. Ct. App. 1972).

[10] *Id.* at 731.

[11] Wood v. Camp, 284 So. 2d 691, 695 (Fla. 1973).

[12] *Id.* at 695.

[13] *Id.* at 696.

Instead, the Florida Supreme Court expanded the class of invitees—those to whom the landowner traditionally owes a duty of reasonable care[14]— to include "licensees by invitation" (either express or reasonably implied) of the property owner.[15] The court then remanded the case for a determination of whether Randall Camp was present in the bomb shelter at the time of the explosion at the express or implied invitation of the defendant.

II. DUTIES OF OWNERS AND OCCUPIERS: THE HISTORICAL CONTEXT

Negligence liability is predicated upon the breach of a legal duty of care running from one person to another. The classic formulation of the usual duty of care was announced in the case of *Heaven v. Pender*:[16]

> Whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.[17]

The requisite duty of care imposed upon a landowner, however, traditionally has been determined by classifying the injured party as a trespasser,[18] licensee,[19] or invitee.[20] The underlying

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[14] *See* Post v. Lunney, 261 So. 2d 146, 147-48 (Fla. 1972); McNulty v. Hurley, 97 So. 2d 185 (Fla. 1957); RESTATEMENT (SECOND) OF TORTS § 341A (1965) [hereinafter cited as RESTATEMENT (SECOND)]. *See also* note 20 *infra*.

[15] 284 So. 2d at 695.

[16] 11 Q.B.D. 503 (1883) (Brett, M.R.).

[17] *Id.* at 509. Master Brett, later Lord Esher, subsequently modified his conception of duty in Le Lievre v. Gould, [1893] 1 Q.B. 491. *See also* F. HARPER & F. JAMES, THE LAW OF TORTS § 27.1, at 1430 (1956) [hereinafter cited as HARPER & JAMES].

[18] The state of the law concerning the duties of owners and occupiers of land prompted one English judge to state:

> What I particularly wish to emphasize is that there are three different classes—invitees, licensees, trespassers. . . .
>
> Now the line that separates each of these three classes is an absolutely rigid line. There is no halfway house, no no-man's land between adjacent territories. When I say rigid, I mean rigid in law . . . .

Robert Addie & Sons (Collieries) v. Dumbreck, (1929) A.C. 358, 371 (Scot.) (Dunedin, V.).

"A trespasser is a person who enters or remains upon land in the possession of

another without a privilege to do so created by the possessor's consent or otherwise." RESTATEMENT (SECOND) § 329. *See* Mann v. Des Moines Ry., 7 N.W.2d 45, 50 (Iowa 1942).

"The owner owes a trespasser no duty other than not to intentionally harm him. No group of ideas has been harder set in the pronouncements of courts." Green, *The Duty Problem in Negligence Cases*, 29 COLUM. L. REV. 255, 271 (1929). *See* RESTATEMENT (SECOND) § 333. *See generally* HARPER & JAMES, *supra* note 17, at § 27.1; W. PROSSER, THE LAW OF TORTS § 58 (4th ed. 1971) [hereinafter cited as PROSSER]; Hughes at 633; Marsh, *supra* note 2. *See also* note 26 *infra*.

[19] "A licensee is a person who is privileged to enter or remain on land only by virtue of the possessor's consent." RESTATEMENT (SECOND) § 330. "Such a person is not a trespasser, since he is permitted to enter; but he comes for his own purposes rather than for any purpose or interest of the possessor of land. He has only the consent to distinguish him from a trespasser. . . ." PROSSER § 60 at 376. *See* Post v. Lunney, 261 So. 2d 146, 147 (Fla. 1972).

Generally, " . . . the licensee must take the land as he finds it. 'Of course, the landowner is liable if he does him intentional injury, or wantonly or *recklessly* exposes him to danger . . . .' " O'Brien v. Union Freight R.R., 95 N.E. 861, 862 (Mass. 1911) (emphasis added). Thus the law protects licensees against "reckless" as well as willful conduct, while a trespasser is protected only against the latter. *See* Gonzalez v. Broussard, 274 S.W.2d 737, 738-39 (Tex. Civ. App. 1954). The landowner is, however, under no duty to inspect the premises to discover dangers or warn the licensee of dangers which are reasonably discoverable by the licensee. Myszkiewitz v. Lord Baltimore Filling Stations, Inc., 178 A. 856, 857-58 (Md. 1935); State v. Tennison, 486 S.W.2d 219, 221-22 (Tex. Civ. App. 1973).

A classic, albeit grossly oversimplified, statement of a licensee's rights can be found in Reardon v. Thompson, 21 N.E. 369 (Mass. 1889): "No doubt a bare licensee has some rights. The landowner cannot shoot him." *Id.* at 370. *See generally* PROSSER § 60; James, *supra* note 2; Marsh, *supra* note 2. *See also* note 27 *infra*.

[20] At its inception, the invitee category was composed solely of "business visitors." RESTATEMENT OF TORTS § 332 (1934). A "business visitor" is defined as "a person who is invited or permitted to enter or remain on land in the possession of another for a purpose directly or indirectly connected with business dealings between them." *Id.* Bennett v. Railroad Co., 102 U.S. 577 (1880), seemed to establish the necessity of an economic benefit for invitees. The source of this mutual advantage test is attributed to R. CAMPBELL, LAW OF NEGLIGENCE 63-64 (2d ed. 1878) by Prosser in Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573, 583 (1942).

> The standard of care as to invitees is that a possessor of land is subject to liability to his invitees for physical harm caused to them by his failure to carry on his activities with reasonable care for their safety, if but only if, he should expect that they will not discover or realize the danger, or will fail to protect themselves against it.

RESTATEMENT (SECOND) § 341A.

The elevated status of invitees can be seen in that "[T]he occupier is commonly said to owe greater duties to his invitees than to licensees, notably with respect to inspection and discovery of latent dangers on his land." HARPER & JAMES, *supra* note 17, § 27.12, at 1478. For an incisive summary of the law as to invitees *see* Commentary, *Traditional Distinction between Trespassers, Licensees, and Invitees Abolished as Determinative of the Standard of Care Owed a Visitor*, 25 ALA. L. REV. 401, 403 n.12 (1973) [hereinafter cited as Commentary, 25 ALA. L. REV.]. *See also* McDonald & Leigh, *supra* note 2 at 56-63; PROSSER § 61; note 28 *infra*.

philosophy of this entrant classification scheme explains, at least in part, why the classifications have remained so resistant to change. In a post-feudal society, such as Victorian England, based upon and strongly supportive of private ownership, it was considered a socially desirable policy to allow a person to use his land as he saw fit, without the burden of protecting those who entered without permission or with only the acquiescence of the owner.[21] Moreover, as the Industrial Revolution reached its peak, more intensive and potentially dangerous uses of land were being made to accommodate increasing urbanization and industrialization. Factories, mines, and tenements replaced once vacant land.[22] In addition, the greater concentrations of population provided increasing numbers of potential victims of these industrial hazards.

When accidents did occur, embryonic concepts of negligence came into conflict with more extensively developed property concepts favoring the unfettered use of land. At this interface between negligence and property law, the latter predominated; and the financial burden of the injury was allowed to fall upon the victim rather than upon the landowner, who was protected because of his economic contributions to the economic vitality of society.[23]

Application of the tripartite entrant classifications often led to harsh and inequitable results.[24] Moreover, as time

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[21] *See* PROSSER § 58, at 359. *See also* F. BOHLEN, STUDIES IN THE LAW OF TORTS 162-64 (1926); HARPER & JAMES, *supra* note 17, at § 27.1; Marsh, *supra* note 2.

Early cases applying these categories were Chapman v. Rothwell, 120 Eng. Rep. 471 (Q.B. 1858); Indermaur v. Dames, L.R. 1 C.P. 274 (1866). The first American case adopting the distinctions was Sweeny v. Old Colony & N.R.R., 92 Mass. (10 Allen) 368 (1865).

[22] *See generally* R. PALMER & J. COLTON, A HISTORY OF THE MODERN WORLD 422-29 (3d ed. 1965).

[23] *See generally* Green, *supra* note 18, at 271-72; Marsh, *supra* note 2, at 183-86. A recent commentator has presented an excellent summary of the suggested reasons for the classification system, none of which he has found compelling. *See* Commentary, 25 ALA. L. REV. at 407-08 n.28.

[24] *E.g.*, McAlpin v. Powell, 55 How. Pr. 163 (N.Y. 1878), in which a ten year old was killed when he fell through a rusted trap door on the fire escape outside his tenement window, but the landlord was held not liable; Dunbar v. Olivier, 50 P.2d 64 (Colo. 1935), in which recovery was denied a nine year old boy who became a permanent cripple when burned at an unattended bonfire in an open lot in violation of a statute; Reardon v. Thompson, 21 N.E. 369 (Mass. 1889), in which recovery was denied for injuries suffered when plaintiff, a lawful visitor, fell into an unilluminated excavation hole on a strip of land which was the only access to defendant's house.

passed, the philosophy supporting the special status of owners and occupiers of land changed, and the law became "more willing than in the past to protect personal safety at the expense of property rights."[25] As a result of these developments, further complications, exceptions, and subcategories were created within the classifications of trespasser,[26] licensee,[27] and

[25] Comment, 44 N.Y.U.L. REV. at 427.

[26] The duty toward known and "constant trespassers on a limited area," RESTATEMENT (SECOND) § 334, was ameliorated so that a landowner was "subject to liability for bodily harm there caused to them by his failure to carry on an activity involving a risk of death or serious bodily harm with reasonable care for their safety." *Id.* at § 334; Palmer v. Gordon, 53 N.E. 909 (Mass. 1899); Johnson v. Lake Superior Terminal & Transfer Co., 56 N.W. 161, 163 (Wis. 1893). Moreover, the landowner is subject to liability for bodily injury caused to known trespassers by dangerous artificial conditions of which the owner is reasonably apprised but the trespasser is unlikely to discover. RESTATEMENT (SECOND) § 335; Clark v. Longview Public Service Co., 255 P. 380 (Wash. 1927).

Child trespassers have traditionally received more protection. In Sioux City & P.R.R. v. Stout, 84 U.S. (17 Wall.) 657 (1873) (the "turntable case") the Supreme Court affirmed recovery by a child trespasser who was maimed by defendant's turntable. The "attractive nuisance" doctrine was a development of the "child trespasser" exception. *See* RESTATEMENT (SECOND) § 339; Louisville Trust Co. v. Nutting, 437 S.W.2d 484 (Ky. 1968); Lyshak v. City of Detroit, 88 N.W.2d 596 (Mich. 1958); Marsh, *supra* note 2.

[27] Ameliorating doctrines also developed within the licensee category. Instead of liability for only wanton, willful or reckless conduct — *see* text accompanying note 18 *supra* — an owner or occupier may be held to a standard of reasonable care "if, but only if, (a) he should expect that they will not discover or realize the danger, and (b) they do not know or have reason to know of the possessor's activities and of the risk involved." RESTATEMENT (SECOND) § 341. This may give rise to a duty to warn licensees of dangerous conditions. Gonzalez v. Broussard, 274 S.W.2d 737, 738-39 (Tex. Civ. App. 1954); Arbogast v. Terminal R.R., 452 S.W.2d 81, 83-84 (Mo. 1970) (duty to warn licensee of ultrahazardous substances which the licensee was unlikely to discover). A possessor may also be held liable for leaving a "trap" on his premises because he knowingly or recklessly let a licensee run into a hidden peril. Midwest Oil Co. v. Storey, 178 N.E.2d 468, 473 (Ind. Ct. App. 1961). A trap once referred to a device or condition created with intent to injure, but now "generally means any kind of a hidden dangerous condition and there need not be any intent to injure." Walker v. Williams, 384 S.W.2d 447, 451 (Tenn. 1964).

In Gross v. Bloom, 411 S.W.2d 326 (Ky. 1967), a minor guest was injured when she fell through a clothes chute located in the closet in which she had been playing. The Court of Appeals reversed a directed verdict for the defendant. Although there was evidence that the defendant knew that the children were playing in the closet, the Court ignored RESTATEMENT (SECOND) § 341. Instead, the Court applied the "attractive nuisance" doctrine, *Id.* at § 339, reasoning that a child social visitor should have at least the protection given a child trespasser. *Gross, supra* at 328. *See also* Kemline v. Simonds, 41 Cal. Rptr. 653, 655 (Ct. App. 1965).

The distinction of "active" versus "passive" negligence has also developed. ". . . [A]ctive negligence . . . is negligence occurring in connection with activities con-

invitee.[28] These complications were inevitable, according to commentator Graham Hughes, "for the simplicity of the nineteenth century approach was a simplicity of harshness, reflecting a social law which could not long be tolerated."[29]

Instead of imposing order and minimizing the inequity, however, these efforts at mitigating harshness created a "complex patchwork of legal classifications [which were] by no means uniformly interpreted by the various jurisdictions."[30] Writing more pointedly, Hughes states:

> . . . [T]hese efforts have only made the structure more hideous. They are like an attempt to convert a bicycle into an automobile by adding parts. Each fresh distinction, each sup-

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ducted on the premises while the licensee is present and his presence should be known to the licensor." Arbogast v. Terminal R.R., 452 S.W.2d 81, 84 (Mo. 1970); Hansen v. Richey, 46 Cal. Rptr. 909, 911-13 (Ct. App. 1965). *See also* Bylstone v. Kiesel, 431 P.2d 262, 263-64 (Ore. 1967); Perry v. St. Jean, 218 A.2d 484, 485-86 (R.I. 1966); Bradshaw v. Minter, 143 S.E.2d 827, 829-30 (Va. 1965); Oettinger v. Steward, 148 P.2d 19, 21-22 (Cal. 1944). *Oettinger* has been effectively overruled by Rowland v. Christian, 443 P.2d 561 (Cal. 1968). *See* text accompanying notes 48-54 *infra*.

Perhaps the broadest statement of any of the ameliorating doctrines can be found in Cunningham v. Hayes, 463 S.W.2d 555 (Mo. Ct. App. 1971): "And once presence becomes known, whether that of an invitee, licensee, or trespasser, the significance of status largely disappears, and a uniform duty — that of reasonable care — is owed to each as to activities conducted on the premises." *Id.* at 559. *See also* Ralls v. Caliendo, 422 P.2d 862, 866-68 (Kan. 1967) (Fatzer, J., dissenting in part); Hardin v. Harris, 507 S.W.2d 172, 175-76 (Ky. 1974); Taylor v. New Jersey Highway Authority, 126 A.2d 313 (N.J. 1956); Potts v. Amis, 384 P.2d 825 (Wash. 1963) (recovery allowed for social guest struck by a golf club while his host was demonstrating his golf swing).

[28] The duty toward invitees has remained constant—that duty being one of ordinary care under all the circumstances. *See* note 20 *supra*. What has changed is the types of persons to whom this duty is owed. RESTATEMENT (SECOND) § 332 added "public invitee" to the "business visitor" of the first RESTATEMENT, *supra* note 14 at § 332. A "public invitee is a person who is invited to enter or remain on land as a member of the public for which the land is held open to the public." RESTATEMENT (SECOND) § 332. With respect to the sort of "invitation" the public invitee must receive, Fleming James has written:

> The invitation test does not deny that "invitation" may be based on economic benefit, but it does not regard it as essential. Rather, it bases "invitation" on the fact that the occupier by his arrangement of the premises or other conduct has led the entrant to believe "that [the premises] were intended to be used by visitors" for the purpose which this entrant was pursuing, and that such use was not only acquiesced in by the owner . . . but that it was in accordance with the intention and design with which the way or place was adopted and prepared.

James, *supra* note 2, at 613. *See also* Post v. Lunney, 261 So. 2d 146, 149 (Fla. 1972).

[29] Hughes at 686.

[30] Comment, 44 N.Y.U.L. REV. 427.

> plementary doctrine, comes no doubt, from a well-meaning design to nuzzle closer to the real problems which clamor for scrutiny in these cases, but often it will have the paradoxical effect of smothering the issues and making their appraisal impossible.[31]

In addition to excoriating the increasing complexity of the entrant classification schemes, vigorous criticism has also been focused on the system's shabby treatment of the social guest.[32] There is an apparent contradiction in that, as Prosser notes

> . . . a social guest, however cordially he may have been invited and urged to come, is not in law an invitee — a distinction which has puzzled generations of law students, and even some lawyers. The guest is legally no more than a licensee, to whom the possessor owes no duty . . . of affirmative care to make the premises safe for his visit.[33]

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[31] Hughes at 695. Two contemporaneous California cases provide an excellent example of the confusion engendered by the classifications. In Braun v. Vallade, 164 P. 904 (Cal. Ct. App. 1917), and Kneiser v. Belasco-Blackwood Co., 133 P. 989 (Cal. Ct. App. 1913), plaintiffs suffered injuries resulting from defective conditions in saloons. In *Kneiser* plaintiff was denied recovery because his friends had bought his drinks. In *Braun* plaintiff was allowed recovery because he had purchased a drink, although his original purpose in entering the saloon was to use the restroom.

[32] Since the English case of Southcote v. Stanley, 156 Eng. Rep. 1195 (Ex. 1856), social guests have been classified as licensees, entitling them to those limited protections afforded licensees. One judge has remarked that

> [s]o far as my research discloses, every commentator who has discussed this question of the classification of social guests as mere licensees for purposes of determining the level of care owed such guests by the host *and has expressed an opinion of his own* has strongly criticized the rule.

Sideman v. Guttman, 330 N.Y.S.2d 263, 267 (Sup. Ct. 1972). *See* Harper, *Laube v. Stevenson; A Discussion*, 25 CONN. BAR J. 123 (1951); Long, *Land Occupant's Liability to Invitees, Licensees and Trespassers*, 31 TENN. L. REV. 485 (1964); McCleary, *The Liability of a Possessor of Land in Missouri to Persons Injured While on the Land*, 1 MO. L. REV. 45 (1936); Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573, 612 (1942). *See also* Note, *Torts— Duty of Occupier to Social Guests*, 19 LA. L. REV. 906 (1959); Comment, *The Outmoded Distinction between Licensees and Invitees*, 22 MO. L. REV. 786 (1957); Comment, *Negligence: Land Occupiers' Liability for Injuries to Lawful Entrants— Trend Toward Reasonable Care in All Instances*, 4 VILL. L. REV. 256 (1958); Comment, *Status of the Social Guest: A New Look*, 7 WM. & MARY L. REV. 313 (1966); Comment, 18 KAN. L. REV. 161 (1969); Comment, 15 N.Y.L.F. 933, 940-41 (1969); Comment, 44 N.Y.U.L. REV. 426 (1969); Comment, 9 SANTA CLARA LAW. 179 (1968); Comment, 14 S.D.L. REV. 332 (1969).

[33] PROSSER § 60, at 378-79. *See* Shannon v. Butler Homes, Inc., 428 P.2d 990, 994 (Ariz. 1967) (recovery denied minor guest who ran through glass door). Wolfson v. Chelist, 284 S.W.2d 447 (Mo. 1955) sought to explain this apparent contradiction in the status of a social guest:

According to Fleming James,[34] the justification for this limited duty is that the

> . . . limitation of duty probably conforms to people's reasonable expectations in the ordinary host-guest situation. If the host is the kind of person who does not inspect and maintain his property on his own account, a guest scarcely expects an exception to be made on the occasion of his visit. . . . [M]oreover, while most social contact is among people who are on a similar economic footing, the host is usually in no better position than the guest to absorb or distribute the loss.[35]

This rationale has always been questionable, and the converse probably conforms more closely to present day expectations. An invited guest should reasonably expect that his host will inspect his premises for the presence of concealed dangers and

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> . . . The word 'invitation' here has been a source of difficulty because of an apparent incongruity in terminology inasmuch as the 'invited' social guest is held to be not an invitee but a licensee. We have here an invitee who is not an invitee. The incongruity, only apparent, disappears, however, when it is understood . . . there must be something more than the mere fact of an invitation to give the entrant upon another's property the status of an invitee in the legal sense.

Id. at 450. What *Wolfson* suggests is that invitee status demands a mutual *economic* benefit; *see* notes 20 and 25 *supra*. Invitee status could not be conferred by purely social intercourse. Problems arose when social and economic purposes united. *E.g.*, West v. Tan, 322 F.2d 924 (9th Cir. 1963) (restaurant customer injured while descending bandstand, where she had been given permission to play piano, and lost her invitee status); Hanson v. Cohen, 276 P.2d 391 (Ore. 1954) (parking lot customer lost his invitee status after entering into dice game with attendant).

[34] James, *supra* note 2.

[35] *Id.* at 611-12. *See also* Southcote v. Stanley, 156 Eng. Rep. 1195 (Ex. 1856); PROSSER § 60, at 379.

James' reference to economic and loss allocation considerations suggests a principle often articulated by commentators but only intimated by courts—that the availability of insurance may (and probably has) modified the underlying philosophy of duties to social guests and other entrants. James, *supra* note 2, at 612, acknowledges that "[i]f such insurance becomes prevalent, it may in time alter the matter of duty." Hughes, *supra* note 2, at 691 finds:

> The burden of making the occupier pay for the inevitable horrors of life is already mitigated by the already widespread incidence of insurance . . . . A great number of private householders also carry such insurance . . . insurance is always available, and the premiums are not heavy. An increase in the number of verdicts favoring [entrant] plaintiffs would accentuate only a very slight inflation of insurance premiums.

See also Benedict v. Podwats, 271 A.2d 417, 418 n.1 (N.J. 1970) (dissent from per curiam affirmance of decision which allowed invitee status for social guest who performed incidental household services).

arrange his property so as to minimize the possibility of injury to his guests. The New York Supreme Court examined this issue in *Sideman v. Guttman*,[36] writing:

> [I]t seems clear . . . that present day social customs are wholly inconsistent with the view that a guest who visits a friend does so at his own risk, is subject to the doctrine of *caveat hospes* and is remediless against injury resulting from his host's lack of ordinary care while he is on the host's premises.[37]

Despite such criticism and calls for reform,[38] only three states made significant changes in the common law classification system prior to the recent spate of judicial reevaluation.[39] Connecticut elevated the social guest to the status of an invitee by statute in 1963.[40] The Ohio Supreme Court, as early as 1951,

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[36] 330 N.Y.S.2d 263 (Sup. Ct. 1972) which involved a social guest in her daughter's home. Plaintiff suffered injuries when she stepped on a throw rug which "flew away," causing her to fall. The court held that absent proof that defendant 1) knew the rug created a dangerous condition, and 2) knew that plaintiff could not be expected to discover the existence of the condition, recovery must be denied under the rule of Higgens v. Mason, 174 N.E. 77 (N.Y. 1930). Sideman v. Guttman, 330 N.Y.S.2d 263, 265-66 (Sup. Ct. 1972). The court then proceeded to sharply criticize the *Higgens* holding and urge the New York Court of Appeals to confer invitee status upon social guests.

[37] Sideman v. Guttman, 330 N.Y.S.2d 263, 272 (Sup. Ct. 1972). This is not to imply that all courts have been infected with concern over the social guest's status as a licensee. *E.g.*, Standifer v. Pate, 282 So. 2d 261, 266 (Ala. 1973); Haag v. Stone, 193 S.E.2d 62, 63 (Ga. Ct. App. 1972); Casey v. Addison, 211 N.W.2d 410, 411 (Neb. 1973); Hilker v. Knox, 197 S.E.2d 618, 620 (N.C. 1973); Olsen v. Robinson, 496 S.W.2d 462, 463 (Tenn. 1973).

[38] *See* notes 2 and 32 *supra*.

[39] Major changes in English and Commonwealth jurisdictions antedated change in America. England, where the common law entrant classification categories originated, abolished them by statute. Occupiers' Liability Act, 5 & 6 Eliz. 2, c. 31 § 2 at 303 (1957) which provides in part:

> (1) An occupier of premises owes the same duty, the "common duty of care," to all his visitors, except in so far as he cares to and does extend, restrict, modify or exclude his duty to his visitor or visitors by agreement or otherwise.
>
> (2) The common duty of care is a duty to take such care as in the circumstances of the case is reasonable to see that the entrant will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.

Australia abolished the distinctions of invitee and licensee and imposed "a duty of care to those persons whom it could reasonably foresee might be injured by any failure on its part to act reasonably in the circumstances . . . ." Thompson v. Council of Bankstown, 87 COMMW. L.R. 619 (Austl. 1952).

[40] CONN. GEN. STAT. REV. § 52-557a (1968) provides: *"Standard of care owed social*

criticized the meager protection the classification system afforded social guests[41] and created, *sui generis*, the separate distinction of social guests.[42] Finally, Louisiana, by judicial decision, included social guests in the class of invitees,[43] reasoning (somewhat artfully) that since a social guest is expressly in-

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invitee. The standard of care owed to a social invitee shall be the same as the standard of care owed to a business invitee." *See* Kopjanski v. Festa, 273 A.2d 692 (Conn. 1970) (interpreting statute).

[41] "If a social guest is to be classified in Ohio as a licensee and is, therefore, entitled only to the protection of a licensee . . . as such duties are defined by Ohio decisions, then the duty owed to him would be very meager." Scheibel v. Lipton, 102 N.E.2d 453, 461 (Ohio 1951).

[42] "A reasonable solution of the difficulty of forcing social guests into any one of the three molds commonly recognized is solved by ceasing such effort and merely considering . . . social guests as social guests." *Id.* at 462. The duties imposed as to social guests were: 1) "to exercise ordinary care not to cause injury . . . by any act . . . or by activity carried on by the host on the premises;" and 2) to warn the guest of dangers which a host knows or should know to be dangerous, if the host has reason to believe that the guest neither knows or will not discover the dangerous condition. *Id.* at 463.

It is arguable whether *Scheibel* caused any great change. James, *supra* note 2, at 612 did not think so:

> It is true that a recent Ohio case [*Scheibel*] has broken with tradition and refused to classify the social guest as a mere licensee. . . . [but] [w]hen it comes to define the duties owed to this new class, however, the court describes precisely those which most states prescribe in favor of a licensee.

A recent case indicates that Ohio courts are giving *Scheibel* a broader interpretation. *See* Di Galdo v. Caponi, 247 N.E.2d 732 (Ohio 1969), which allowed recovery for a minor guest who was playing in his host's auto which was parked in the driveway. Plaintiff engaged the transmission and the car rolled down the driveway. In getting out of the car, the child wedged his finger between the car and a concrete wall, resulting in its partial amputation.

[43] Crittenden v. Fidelity & Cas., 83 So. 2d 538, 540 (La. Ct. App., 2d Cir. 1955) assumed *sub silentio* that a social guest is an invitee. The court in Alexander v. General Accident Fire & Life Assurance Corp., 98 So. 2d 730 (La. Ct. App., 1st Cir., 1957) seized on *Crittenden, supra*, stating, "we see no reason why the duty of ordinary care should not be owed to social guests who are expressly invited to the premises as well as other invitees . . . albeit other American jurisdictions differ." *Alexander, supra* at 734. *See also* Daire v. Southern Farm Bureau Cas. Ins. Co., 143 So. 2d 389 (La. Ct. App., 3rd Cir., 1962) (followed *Alexander, supra*). The Louisiana Supreme Court adopted invitee status for social guests in Foggin v. General Guar. Ins. Co., 195 So. 2d 636 (La. 1967).

Michigan, for a short period of time also classified social guests as invitees rather than licensees. Genessee Merchants Bank & Trust Co. v. Payne, 148 N.W.2d 503 (Mich. Ct. App. 1967) *aff'd by an equally divided court*, 161 N.W.2d 17 (Mich. 1968). Preston v. Sleziak, 175 N.W.2d 759, 765 (Mich. 1970), repositioned adult social guests as licensees. *But see* Leveque v. Leveque, 199 N.W.2d 675 (Mich. Ct. App. 1972) (guest became invitee by performing incidental services).

vited upon the premises, he should be an invitee.[44]

In addition, the distinctions of licensee and invitee were abolished in admiralty law by the United States Supreme Court in *Kermarec v. Compagnie Generale Transatlantique*.[45] Therein, a unanimous Court placed a duty of reasonable care under all circumstances upon shipowners as to entrants whose presence is "for purposes not inimical to [the shipowner's] legitimate interest."[46] The Court contrasted the simplicity and practicality of its newly adopted standard to the confusion engendered by the application of the common law distinctions.[47]

III. *Rowland* AND ITS PROGENY: THE RECENT JUDICIAL REEVALUATION

In *Rowland v. Christian*[48] California became the first state to completely abolish the common law distinctions and impose a single standard of ordinary care under all circumstances. Decided in 1968, this case has become the touchstone for nearly all contemporary discussions concerning the duties of owners and occupiers of land.

In *Rowland* the plaintiff was a social guest at the apartment of Ms. Christian, who had agreed to drive him to the San Francisco Airport. While the plaintiff was using the bathroom prior to his departure, the porcelain handle on a wash basin

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[44] ". . . [Plaintiff] was a social guest in her son['s] home. She had been invited and therefore was an 'invitee.' " Foggin v. General Guar. Ins. Co., 195 So. 2d 636, 640 (La. 1967). This statement may make up in common sense for what it lacks in legal precedent. *See also* Daire v. Southern Farm Bureau Cas. Ins. Co., 143 So. 2d 389, 392 (La. Ct. App. 1962).

[45] 358 U.S. 625 (1959). *Kermarec* involved an action by a crew member's visitor who was on board under a pass issued by the shipowner. Plaintiff was injured on a stairway when a canvas runner allegedly slipped. A guest of a seaman had traditionally been a licensee. Silverado S.S. Co. v. Prendergast, 31 F.2d 225 (9th Cir. 1929); Metcalfe v. Cunard S.S. Co., 16 N.E. 701, 704 (Mass. 1888).

[46] 358 U.S. at 632.

[47] For admiralty law at this late date to import such conceptual distinctions would be foreign to its traditions of simplicity and practicality. . . . The incorporation of such concepts appears particularly unwarranted when it is remembered that they originate under a legal system in which status depended almost entirely upon the nature of the individual's estate . . . a legal system in that respect entirely alien to the law of the sea.

Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 631-32 (1959). The Court adopted much of Chief Judge Clark's dissent from the Second Circuit's decision. Kermarec v. Compagnie Generale Transatlantique, 245 F.2d 175, 179-83 (2d Cir. 1957).

[48] 443 P.2d 561 (Cal. 1968) (2 judges dissenting).

faucet shattered in his hand, severing tendons and nerves. He brought suit and the trial court granted summary judgment for Ms. Christian. The First District Court affirmed,[49] holding that Ms. Christian owed no duty to warn Rowland, who was a social guest (and therefore a licensee), of the concealed dangerous condition.[50]

The California Supreme Court reversed the grant of summary judgment.[51] Rather than attempting to determine Rowland's place in the classification scheme of trespasser, licensee, or invitee, the court acknowledged that these common law distinctions were originally based upon policy decisions which had, in time, been incorporated into law. It then emphatically rejected these underlying considerations, stating:

> A man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose. Reasonable people do not ordinarily vary their conduct depending upon such matters, and to focus on the status of the injured party as a trespasser, licensee, or invitee in order to determine . . . whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values. The common law rules obscure rather than illuminate the proper considerations which should govern determination of the question of duty.[52]

The court went on to hold that the entrant's "status" — his relation to the landowner—was only *one of several factors* to be considered in determining whether the landowner exercised reasonable care in the management of his property.[53]

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[49] Rowland v. Christian, 63 Cal. Rptr. 98 (1st Dist. Ct. App. 1967).

[50] *Id.* at 102-03. Under the rule of RESTATEMENT (SECOND) § 342, however, there is a duty to warn of a known dangerous condition if the landowner should expect that his licensee would not discover the danger, but California did not follow this rule. *See* Saba v. Jacobs, 279 P.2d 826 (Cal. Ct. App. 1955); Fisher v. General Petroleum Corp., 267 P.2d 841, 847 (Cal. Ct. App. 1954).

[51] Rowland v. Christian, 443 P.2d 561 (Cal. 1968).

[52] *Id.* at 568.

[53] *Id.* The court also relied, in part, on a longstanding provision of the California Civil Code, which provides:

> Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has

Rowland v. Christian evoked overwhelming favorable commentary[54] and has served as a catalyst for a judicial reevaluation of the privilege status of owners and occupiers of land. Since the date of that decision, Hawaii,[55] Colorado,[56] Minnesota,[57] the District of Columbia,[58] Massachusetts,[59] and now

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willfully or by want of ordinary care, brought the injury upon himself. . . .

CAL. CIV. CODE § 1714 (West 1972). During its 96 year existence, this provision had been construed as a reformulation of the common law and never as a statutory abrogation of landowner's immunities. *See* Buckley v. Chadwick, 288 P.2d 12, 17 (Cal. 1955); *rehearing denied*, 289 P.2d 242 (Cal. 1955). Commentators are in agreement that this sudden reinterpretation of § 1714 was secondary to the policy considerations expressed in *Rowland*. *See* Comment, 44 N.Y.U.L. REV. 432; 25 VAND. L. REV. 623, 631 (1972).

[54] 33 ALBANY L. REV. 230 (1968); 41 U. COLO. L. REV. 167 (1969); 18 DEPAUL L. REV. 852 (1969); 37 FORDHAM L. REV. 675 (1969); 44 N.Y.U.L. REV. 426 (1969); 3 U. SAN FRAN. L. REV. 170 (1968); 21 S.C.L. REV. 291 (1969); 20 SYRACUSE L. REV. 147 (1968); 14 VILLANOVA L. REV. 360 (1969); 26 WASH. & LEE L. REV. 128 (1969); 71 W. VA. L. REV. 226 (1969). *See also* Annot., 32 A.L.R.3d 508 (1970).

[55] Pickard v. City & County of Honolulu, 452 P.2d 445 (Hawaii 1969) (Plaintiff fell through a hole in the floor of a darkened restroom that he had been given permission to use).

> We believe the common law distinctions between classes of persons have no logical relationship to the exercise of reasonable care for the safety of others. We therefore hold that an occupier of land has a duty to use reasonable care for the safety of all persons reasonably anticipated to be on the premises, regardless of the legal status of the individual.

Id. at 446, *followed in* Gibo v. City & County of Honolulu, 459 P.2d 198 (Hawaii 1969).

[56] Mile High Fence Co. v. Radovich, 489 P.2d 308 (Colo. 1971) (recovery allowed for injuries suffered by policeman who stepped into an unmarked post hole on property abutting alley in which he was conducting surveillance); *followed in* Smith v. Mill Creek Court Inc., 457 F.2d 589 (10th Cir. 1972) (interpreting Colo. law); Hurst v. Crowtero Boating Club Inc., 496 P.2d 1054 (Colo. 1972). *But see* Cook v. Demetrakas, 275 A.2d 919 (R.I. 1971) (policeman, as licensee, denied recovery for injuries suffered when he fell over embankment on construction site while chasing suspect): "As a licensee, the occupant owes a policeman only the limited duty of not knowingly letting him run upon a hidden peril, or not willfully causing him harm." *Id.* at 922. *Mile High Fence Co.* was favorably reviewed in Comment, *Premises Liability: The Foreseeable Emergence of the Community Standard*, 51 DENVER L.J. 145 (1972).

[57] Peterson v. Balach, 199 N.W.2d 639 (Minn. 1972) (wrongful death action for minor who died from inhalation of carbon monoxide fumes while spending the night at the house of a friend): "An entrant's status as a licensee or invitee is no longer controlling, but is one element, among many, to be considered in determining the landowner's liability under ordinary standards of negligence." *Id.* at 647.

[58] Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973) (injuries received by building inspector who fell down greasy steps on defendant's premises): "A landowner must act as a reasonable man in maintaining his property in a reasonably safe condition in view of all the circumstances . . . ." *Id.* at 99.

[59] Mounsey v. Ellard, 297 N.E.2d 43 (Mass. 1973) (injuries suffered by policeman who fell on accumulation of ice on defendant's premises after delivering criminal

Florida[60] have judicially abolished some or all of the traditional distinctions. In other jurisdictions, similar cases have produced vigorous dissents exhorting their highest courts to follow this trend.[61]

IV. *Wood v. Camp:* THE FLORIDA RESPONSE

While *Wood v. Camp*[62] follows the trend established in *Rowland v. Christian*,[63] it carves a different and narrower path. The *Rowland* court was unable to identify any justification for continued application of the common law classification system; the Florida Supreme Court, however, perceived a continuing justification for limiting a landowner's duty as to unanticipated entrants:

> An owner cannot, however, be held liable for a negligent condition as to an undiscovered trespasser who chooses to come upon his property without his knowledge. It is unreasonable

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summons) "Therefore, we no longer follow the common law distinction between licensees and invitees and, instead, create a common duty of reasonable care which the occupier owes to all lawful visitors." *Id.* at 51. Two justices dissented, arguing that the issue of the abolition of the distinctions was not briefed, and the same result could have been reached on narrower grounds. *Id.* at 53-57 (Quirico and Reardon, J.J., dissenting in part).

[60] Wood v. Camp, 284 So. 2d 691 (Fla. 1973).

[61] *See* Sideman v. Guttman, 330 N.Y.S.2d.263 (Sup. Ct. 1972); *see* text accompanying notes 27 and 32 *supra. See also* Heald v. Cox, 480 S.W.2d 107 (Mo. Ct. App. 1972).

Most courts have not taken the opportunity to reevaluate the landowner's privileged status. A few have done so and refused to join in the trend toward modification or abolition of the common law categories. *See* Astleford v. Milner Enterprises, Inc., 233 So. 2d 524 (Miss. 1970): "After a careful consideration and study of this rule we can envision many problems in its application and we do not think conditions have changed to such an extent that we should adopt this rule at this time." *Id.* at 525; Werth v. Ashley Realty Co., 199 N.W.2d 899 (N.D. 1972), preferred the old approach of carving out exceptions to the general rule when necessary. *Id.* at 907. *See also* Robles v. Severyn, 504 P.2d 1284 (Ariz. Ct. App. 1973); Buchholz v. Steitz, 463 S.W.2d 451 (Tex. Civ. App. 1971); Payne, *The Occupiers' Liability Act*, 21 MODERN L. REV. 359 (1958):

> A legal system must, in the nature of things, create and impose its own comparatively rigid categories on the phenomena which it seeks to control, and the seemingly arbitrary operation of them in borderline cases is the price one has to pay for some degree of legal certainty and for the exclusion of bias in the judicial process.

Id. at 373.

[62] 284 So. 2d 691 (Fla. 1973).

[63] 443 P.2d 561 (Cal. 1968).

> to subject an owner to a "reasonable care" test against someone who isn't supposed to be there and about whom he does not know.[64]

Guided by this consideration, the Florida court retained the trespasser classification and left within the licensee classification "*uninvited* [licensees] . . . who choose to come upon the premises solely for their own convenience without invitation, either expressed or reasonably implied from the circumstances."[65]

On the other hand, the Florida Supreme Court felt that the presence of an invitation, either express or reasonably implied from the circumstances, should place upon the landowner a higher duty of care as to the invited entrants.[66] Therefore, *Wood* repositioned social guests and other "licensees by invitation" in the invitee category. The court therein rejected the broad sweep of *Rowland v. Christian* with its imposition of a single duty of reasonable care, reasoning that such a rule would leave juries without guidelines[67] and "virtually make the owner an insurer of those who come upon his premises."[68] Thus, Florida's approach suggests two pertinent questions for further judicial consideration: (1) Who is a "licensee by invitation"; and (2) Is their approach preferable to—or any different from—the other cases abrogating or modifying the common law distinctions?

The phrase "licensee by invitation, express or implied" seems to be redundant, for the term "licensee" connotes a person who enters upon or uses another's premises either with the express or implied permission of the owner, or by operation of law.[69] The Florida Supreme Court further limited the term, however. Focusing on the status of a social guest who is invited to an apartment, the court's opinion suggests that such a tenant's social guest may be a bare licensee as to the landlord when the guest is in "common areas" of the apartment building.[70] It would seem logical, however, that a landlord could

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[64] 284 So. 2d at 693.
[65] *Id.* at 695.
[66] *Id.* at 694.
[67] *Id.* at 695.
[68] *Id.* at 696.
[69] *See* 65 C.J.S. *Negligence* § 63(26) (1966).
[70] Wood v. Camp, 284 So. 2d 691, (Fla. 1973), citing Tomei v. Center 116 So. 2d

reasonably foresee that his tenants would entertain guests and that these guests would use the common areas as means of ingress and egress. Within the context of the landlord-tenant relationship one could reasonably imply an invitation to the guests of tenants. Moreover, if a tenant and his guest were simultaneously injured due to the landlord's lack of ordinary care in maintaining the common areas, it would be unreasonable to allow recovery to the tenant while denying recovery to his guest. Apparently *Wood* will require further interpretation to ascertain the status of police and firemen,[71] door-to-door salesmen,[72] and others traditionally falling within the licensee category.

Moreover, the *Wood* court suggested that broadening the class of invitees to include social guests and other *invited* licensees was based on logic and reason.[73] It refused to allow the

> . . . complete abolition of distinctions as between persons upon an owner's premises for liability connected with the condition of those premises, in the manner those distinctions are wiped away without difference or standard in *Pickard v. City & County of Honolulu, Rowland v. Christian, Peterson v. Balach*, and *Kermarec v. Compagnie Generale*

251, 253 (Fla. Ct. App. 1959). That a social guest of a tenant is a licensee when in hallways and other areas in common is by no means universally accepted. *See* Sargent v. Ross, 308 A.2d 528 (N.H. 1973). This particular area may be in doubt after *Wood, supra*, because the court suggested that it was an area requiring guidelines. *Id.* at 695. The Court then, however, suggested that *Tomei, supra*, was overruled. *Wood, supra* at 697.

[71] The general rule is that police and firemen are licensees. *See* 65 C.J.S. *Negligence* § 63(110-11) (1966). Florida apparently follows this rule, at least with respect to firemen. Romedy v. Johnston, 193 So. 2d 487, 490 (Fla. Ct. App. 1958). *See also* Natasio v. Cinnarron, 295 S.W.2d 117, 121 (Mo. 1956) (fireman is licensee); Narad v. School Dist. of Omaha, 215 N.W.2d 115 (Neb. 1974); Scheurer v. Trustees of Open Bible Church, 192 N.W.2d 38, 41 (Ohio 1963); Cook v. Demetrakas, 275 A.2d 919, 922 (R.I. 1971) (policeman is licensee). *But see* Buron v. Midwest Industries Inc., 380 S.W.2d 96, 98 (Ky. 1961) (fireman treated as *sui generis* class). Other courts have disagreed and have classified public servants as invitees. *See* Dini v. Naiditch, 170 N.E.2d 881 (Ill. 1960); Cameron v. Abatiell, 241 A.2d 310, 313 (Vt. 1968) (policeman is invitee); and Sprong v. Seattle Stevedore Co., 466 P.2d 545, 548 (Wash. Ct. App. 1970) (fireman is invitee). The question Florida courts must eventually answer is whether the requirements of public safety reasonably imply an invitation for police and firemen to enter upon property.

[72] *See* Prior v. White, 180 So. 347 (Fla. 1938); City of Osceola v. Blair, 2 N.W.2d 83 (Iowa 1942); Phillips v. Bush, 363 S.W.2d 401 (Tenn. Ct. App. 1961); Dunster v. Abbott [1953] 2 All E.R. 1572 (C.A.).

[73] 284 So. 2d at 696.

> *Transatlantique*. The result of those cases is practically to make the owner an insurer of those who come upon his premises.[74]

While broadening the class of invitees is based upon logic and reason, the court's refusal to allow abrogation of the entrant classification scheme is based upon an erroneous reading of the cases which it cites. The result of those cases does *not* make the landowner an insurer of his premises, and the distinctions are not wiped away without difference or standards. The court thus misinterpreted those decisions it cites, those which nullify the common law distinction and impose a duty of reasonable care under the circumstances. Only California[75] and Colorado[76] impose a duty of reasonable care upon landowners as to trespassers. Although the District of Columbia Circuit Court of Appeals has suggested that they might apply such a standard to trespassers,[77] in the other jurisdictions this standard clearly is to be applied only to non-trespassers.

In admiralty cases, the standard of reasonable care applies only to persons "on board for purposes not inimical to [the shipowner's] legitimate interests."[78] The standard of care established by *Pickard v. City & County of Honolulu*[79] pertains to those persons "reasonably to be anticipated upon the premises."[80] This formulation would probably exclude all trespassers except those drawn by attractive features. Both *Peterson v.*

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[74] *Id.* (citations omitted).

[75] *See* Mark v. Pacific Gas & Elec. Co., 496 P.2d 1276, 1279 (Cal. 1972) (allowed wrongful death action by decendants of college student trespasser electrocuted while attempting to unscrew bulb from street lamp).

[76] "A person's status as a trespasser, licensee, or invitee may, of course, in the light of the facts giving rise to such status, have some bearing on the question of liability, but it is only a factor—not conclusive." Mile High Fence Co. v. Radovich, 489 P.2d 308, 314-15 (Colo. 1971).

[77] *See* Cooper v. Goodwin, 478 F.2d 653 (D.C. Cir. 1973). One judge in that case thought Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir. 1972), applied to *all* entrants. Cooper, *supra*, at 656 n.13 (Bazelon, C.J.—author of *Smith, supra*). Another judge stated the case should exclude trespassers from its holding. Cooper, *supra*, at 657 (Leventhal, J.). A third felt the issue need not be joined as it was unnecessary to the holding and not properly before the court. *Id.* at 659 (Sobeloff, J.). As Judge Sobeloff correctly pointed out, the issue of liability to trespassers was not before the court; therefore, any discussion would be speculative.

[78] Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 632 (1959).

[79] 452 P.2d 445 (Hawaii 1969).

[80] *Id.* at 486.

Balach[81] and *Mounsey v. Ellard*[82] abolished the traditional distinctions governing licensees and invitees, but declined to change the status of trespasser because

> . . . there is significant difference in the legal status of one who trespasses on another's land as opposed to one who is on the land under some color of right — such as a licensee or invitee. For this reason, among others, we do not believe they should be placed in the same legal category.[83]

With these considerations in mind, it is difficult to discern a significant difference between abolishing the distinctions between the classes of non-trespassers and broadening the category of invitees to include "licensees by invitation." Arguably, the only difference is that *Wood v. Camp*[84] leaves a residue of "uninvited licensees" in the traditional category of licensee.[85]

It seems certain that the retention of this small group in the licensee category will have minimal impact on the duties of owners and occupiers of land in Florida and that its effect will be no different from those cases which have imposed a standard of reasonable care as to all non-trespassers.

V. REMAINING PROBLEM AREAS

As *Wood v. Camp*[86] demonstrates, the greatest objection to the abolition or modification of the common law distinctions and the imposition of a duty of reasonable care is the fear that the landowner virtually will become an insurer of his premises.[87] The rationale is that more and more cases will get to the

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[81] 199 N.W.2d 639 (Minn. 1972).

[82] 297 N.E.2d 43 (Mass. 1973).

[83] *Id.* at 51-52 n.7. *Peterson* actually reserved judgment, but intimated reluctance to abolish the trespasser category: "Furthermore, the considerations governing a landowner's . . . liability to trespassers may be fundamentally different from his duty to those whom he has expressly or by implication invited onto his property." 199 N.W.2d at 642.

[84] 284 So. 2d 691 (Fla. 1973).

[85] *Id.* at 695. The *Wood* court realized that "this very limited category seems to overlap with the trespasser" and only suggested one example of a possible "uninvited licensee", acknowledging that "[t]hese are areas requiring guidelines." *Id.* at 695. *See* text accompanying notes 69-72 *supra.*

[86] 284 So. 2d 691 (Fla. 1973).

[87] *Id.* at 696. *See also* Rowland v. Christian, 443 P.2d 561, 569 (Cal. 1968) (Burke, J., dissenting).

jury, thereby increasing its role,[88] and that without workable standards, juries will invariably render more verdicts for plaintiffs.[89]

A. *Increasing the Role of the Jury*

The theory that more cases will reach the jury has merit. In fact, one of the criticisms of the common law distinctions is that they prevent meritorious claims from ever reaching the jury:

> The common law classifications often resolve the occupier's liability as a matter of law, whether by summary judgment, . . . by non-suit[,] or directed verdict. Where such cases do reach the jury, it is often for consideration of the plaintiff's status rather than for the more fundamental question of whether defendant has acted carelessly. Thus the jury is deprived of the flexibility necessary to allow it to assess the burden of liability on the facts of each case in accord with community standards.[90]

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[88] "The greater the discretion conferred on the court, the more uncertain the outcome of a case will be, and therefore the higher will be the proportion of cases that go to trial instead of being settled out of court. That is a doubtful gain . . . ." Payne, *supra* note 2, at 374. Hughes, a strong advocate of a single duty of ordinary care, is not enthralled by the jury system either: "An award of damages by a jury is admittedly not the perfect instrument for adjusting a social imbalance. Jury awards are influenced by the capricious application of sentiment, and they exhibit distressing fluctuations from jurisdiction to jurisdiction." Hughes, *supra* note 2, at 691.

[89] Wood v. Camp 284 So. 2d 691, 696 (Fla. 1973); Rowland v. Christian, 443 P.2d 561, 569 (Cal. 1968) (Burke, J., dissenting). *But see* Mounsey v. Ellard, 297 N.E.2d 43 (Mass. 1973):

> Our holding in the instant case does not make landowners and occupiers insurers of their property nor does it impose unreasonable maintenance burdens. The 'reasonable care in all the circumstances' standard will allow the jury to determine what burdens of care are unreasonable in light of the relative [circumstances] . . . .

Id. at 53. *See also* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 106 (D.C. Cir. 1972).

[90] Comment, 44 N.Y.U.L. REV. 430. *See also* Hughes, *supra* note 2, at 693.

[91] Harshness results because the essential task of judging a landowner's conduct under prevailing community standards is removed from the province of the jury . . . . Mechanical legal decisions made by judges eliminate jury scrutiny of the actual conduct of the visitor and the landowner.

Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 103-04 (D.C. Cir. 1972).

> The problem of allocating the costs and risks of human injury is far too complex to be decided solely by the status of the entrant, especially where the status question often prevents the jury from ever determining the funda-

Those cases abrogating or modifying the common law distinctions have expressly acknowledged that more cases will and *should* get to the jury.[91]

B. *The Search for New Standards and Jury Instructions*

In *Wood v. Camp* the Florida Supreme Court feared that the abolition of the common law categories and imposition of a standard of reasonable care under all the circumstances would leave judges and juries without guidelines.[92] This being so, the court apparently feared that juries would follow their natural sympathies and allow recovery regardless of fault.[93] These fears, however, have no basis in fact.

First, the assumption that juries are plaintiff-oriented has never been conclusively proven. One extensive study, the Chicago Jury Project of the University of Chicago Law School,[94] compared the jury verdict with the verdict the judge would have rendered in 1428 personal injury cases. According to this study, juries were only slightly more plaintiff-oriented than the judge, and the bias usually manifested itself in the amount of damages awarded.[95] The director of the jury project, Professor Harry Kalven, Jr., concluded: "The very widely held view that juries in personal injury cases are more plaintiff prone than judges is thus shown to be a considerable oversimplification."[96]

Moreover, those cases modifying or abolishing the common law classifications did not completely eradicate all guidelines which could assist judges and jury in determining a landowner's duty. For example, one source of standards can be found in the existing law as to invitees. A duty of reasonable care has always been imposed upon owners and occupiers as to

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mental question whether the defendant has acted reasonably in light of all the circumstances.

Mounsey v. Ellard, 297 N.E.2d 43, 51 (Mass. 1973).

[92] 284 So. 2d at 694.

[93] This fear was articulated in some of the other cases abolishing or modifying the traditional distinctions. *See* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 105-06 (D.C. Cir. 1972); Peterson v. Balach, 199 N.W.2d 639, 643 (Minn. 1972); Mounsey v. Ellard, 297 N.E.2d 43, 53 (Mass. 1973).

[94] *See* Kalven, *A Report on the Jury Project of the University of Chicago Law School*, 24 INS. COUNSEL J. 368 (1957).

[95] *Id.* at 380.

[96] *Id.*

their invitees.[97] In order to recover, an invitee historically has been required to prove that a duty existed[98] and was breached.[99] Moreover, this standard has never been applied in such a way as to make an owner or occupier an insurer of his premises. According to the Tenth Circuit Court of Appeals, "[t]he standard of care owed to business invitees is . . . one of 'due care to keep the premises reasonably safe' for their use, but the [landowner] is not an insurer of their safety."[100]

Another source of standards for determining a landowner's liability can be found in those cases which have nullified the common law distinctions. Anticipating criticism that a single standard of ordinary care would leave juries in a vacuum, the D.C. Circuit, in *Smith v. Arbaugh's Restaurant, Inc.*,[101] formulated some basic considerations for a jury determination of liability:

> Eliminating reliance on the common law classifications does not leave the jury awash, without standards to guide its determination of reasonable conduct. The principles which are now to be applied are those which have always governed personal negligence under our jurisprudence. The factors to be weighed in the determination of the degree of care demanded in a specific situation are "the likelihood that [the landowner's] conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which [the landowner] must sacrifice to avoid the risk," and the jury should be so instructed.[102]

Other factors which have been proposed as pertinent to a deter-

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[97] *See* notes 21 and 28 *supra*.

[98] *See* Nevarez v. Thriftimart, Inc., 87 Cal. Rptr. 50 (2d Dist. Ct. App. 1970) (child plaintiff, attracted by grand opening of store, was run over in the street. Judgment was reversed because defendant was not in possession of the street and therefore had no duty toward plaintiff).

[99] *See* Jones v. Jarvis, 437 S.W.2d 189 (Ky. 1969) (invitee could not recover absent evidence as to how banana peel, on which she slipped and fell, got on the floor and how long it had been there).

[100] Kelly v. Kroger Co., 484 F.2d 1362, 1363 (10th Cir. 1973). *See also* Gowdy v. United States, 412 F.2d 525, 534 (6th Cir. 1969), *cert. denied*, 396 U.S. 960 (1969) (interpreting Michigan law); Frantz v. Knights of Columbus, 205 N.W.2d 705, 707 (Iowa 1973); Demaree v. Safeway Stores, Inc., 508 P.2d 570, 574 (Mont. 1973); Dickson v. J. Weingerten, Inc., 498 S.W.2d 388, 389 (Tex. Civ. App. 1973).

[101] 469 F.2d 97 (D.C. Cir. 1972).

[102] *Id.* at 105-06.

mination of negligence are: the time, place, manner, and foreseeability of the visit[103] (which were formerly considerations relating to the status of the entrant); the moral blame attached to the defendant's conduct; the cost and availability of insurance; and the policy of preventing future harm.[104]

The D.C. Circuit's reference to the application of ordinary negligence principles to duties of owners and occupiers of land suggests yet another source of applicable standards. If ordinary negligence principles, rather than the status of the entrant, are dispositive of a landowner's duty, then the landowner retains the full range of traditional defenses to actions for negligence. Thus, contributory negligence,[105] unforeseeability,[106] and financial status,[107] among others, will defeat recovery in actions by entrants in jurisdictions which have abolished the common law classifications.

One case in particular merits attention. In *Cooper v. Goodwin*[108] injuries were received by a social guest who fell down a basement stairway after having opened what she believed to be the bathroom door. Both parties were of modest

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[103] This factor has been adopted by all the cases establishing a broader standard of reasonable care. Rowland v. Christian, 443 P.2d 561, 567 (Cal. 1968); Pickard v. City and County of Honolulu, 452 P.2d 445, 446 (Hawaii 1969); Mile High Fence Co. v. Radovich, 489 P.2d 308, 314 (Colo. 1971); Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 106 (D.C. Cir. 1972); Peterson v. Balach, 199 N.W.2d 639, 647 (Minn. 1972); Wood v. Camp, 284 So. 2d 691, 695 (Fla. 1973); Mounsey v. Ellard, 297 N.E.2d 43, 52 (Mass. 1973).

[104] Rowland v. Christian, 443 P.2d 561, 567 (Cal. 1968).

[105] "Likewise, such a person entering upon the land will be held to the same standard of care, that of a reasonable man under the circumstances then existing." Peterson v. Balach, 199 N.W.2d 639, 647 (Minn. 1972). In Krengel v. Midwest Automatic Photo, Inc., 203 N.W.2d 841 (Minn. 1973), the plaintiff tripped over the slightly raised floor of a photo booth. The court found the plaintiff contributorily negligent, denying recovery. Although the case had originated before *Peterson, supra*, the court in *Krengel* stated that the result would have been the same under *Peterson*. *See also* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 106 n.48 (D.C. Cir. 1972); Martin v. Barclay Distributing Co., 91 Cal. Rptr. 817, 819-21 (Ct. App. 1970).

[106] "One is bound to anticipate and provide against what usually happens, and what is likely to happen; but it would impose too heavy a responsibility to hold him bound in like manner to guard against what is unusual and unlikely to happen, or what . . . is only remotely and slightly probable." Kaffel v. Cloverleaf Kennel Club, 504 P.2d 374, 375-76 (Colo. Ct. App. 1972), *citing* Carr v. Mile High Kennel Club 242 P.2d 238, 240 (Colo. 1952), *citing* Stone v. Boston & A.R. Co., 51 N.E. 1, 3 (Mass. 1898) (plaintiff was injured when a beer keg inexplicably fell off a stationary flat bed truck).

[107] *See* Cooper v. Goodwin, 478 F.2d 653 (D.C. Cir. 1973).

[108] *Id.*

means, and the case provided the D.C. Circuit its first opportunity to apply the standards announced in *Smith v. Arbaugh's Restaurant, Inc.*[109] The court stated that

> . . . the financial capacity of the occupant to undertake safety precautions should be taken into account in determining what was, for him, reasonable maintenance conduct. Financial hardship should be no excuse for failing to take those measures which are within a defendant's capacity — for example, an adequate warning.[110]

This statement demonstrates the considerable flexibility of a broader standard of reasonable care; this increased flexibility is the most cogent argument supporting abrogation or modification of the more rigid common law classification system. For example, although a person may be financially incapable of maintaining his premises, as in *Cooper v. Goodwin*,[111] he can always warn his guest of danger. Moreover, allowing a dangerous condition to exist on grazing land in a sparsely settled rural area is vastly different from allowing a dangerous condition to exist in a densely populated neighborhood with small adjoining yards and wandering children. Although these situations defy application of a precisely predetermined judicial formula, the common law classification system insists on precisely such a rigid, unvarying application. Furthermore, the common law distinctions focus on the "status" of the injured party and do not allow for consideration of the foreseeability of the injury, the defendant's culpability, and other factors which may be more relevant under the circumstances of a particular case.

C. *The Quantitative Impact of Abolishing or Modifying the Common Law Distinctions*

Whether the abolition or modification of the common law categories will actually result in more litigation and verdicts for plaintiffs, as the court in *Wood v. Camp* feared, is a question

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[109] 469 F.2d 97 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973).

[110] Cooper v. Goodwin, 478 F.2d 653, 656 (D.C. Cir. 1973). Judgment for the defendant was reversed in this case, but only because the trial judge incorrectly instructed the jury that plaintiff could only recover for active negligence. This instruction was in direct contradiction of the standard formulated in Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir. 1972).

[111] 478 F.2d at 653 (D.C. Cir. 1973).

which will be resolved in time. Although it is too early to perceive a definite trend, the most recent commentary states: "In jurisdictions that have adopted the new rule, the types of plaintiffs who were recovering under the old scheme are still winning, and the types of plaintiffs (except the social guest) who were losing before are still losing."[112] It should also be noted that all but two of the very cases which established the new rule for their respective jurisdictions would have been similarly decided by an application of the old scheme.[113]

Moreover, the civil law experience of France demonstrates that a duty of reasonable care under all the circumstances need not result in a disproportionate number of judgments against owners and occupiers of land.[114] French law never developed status classifications such as trespasser, licensee, or invitee. Instead, the nature of the plaintiff's entry on the premises is merely one factor in the primary consideration of the plaintiff's own fault in causing the injury to himself. Furthermore, the burden is on the defendant to prove that he did not act unreasonably. In spite of the advantages that French plaintiffs enjoy, Graham Hughes, after studying French case law, concluded that "[t]he French experience is a demonstration of the practicality of a general theory of liability in this field, and at the same time shows that such a general theory need not lead to incessant verdicts in favor the plaintiff."[115]

VI. CONCLUSION

Because the common law categories of trespasser, licensee,

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[112] Commentary, 25 ALA. L. REV. 401, 412-13. (Footnotes omitted).

[113] Rowland v. Christian, 443 F.2d 561 (Cal. 1968) (broken water faucet handle); Mile High Fence Co. v. Radovich, 489 P.2d 308 (Colo. 1971) (unmarked construction hole near alley); Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir. 1972) (grease covered stairs); and Mounsey v. Ellard, 297 N.E.2d 43 (Mass. 1973) (ice-covered sidewalk caused by broken drain pipe). Each of these cases dealt with dangerous conditions of which the landowner was aware and which the entrant (all licensees in these cases) could not have been expected to discover. Under these circumstances, RESTATEMENT (SECOND) § 341 imposes a duty of reasonable care upon the landowner. The unlighted restroom with the unguarded hole in the center of the floor in Pickard v. City and County of Honolulu, 452 P.2d 445 (Hawaii 1969) is an example of a concealed trap. *See* note 27 *supra*. Nevertheless, the results in Wood v. Camp, 284 So. 2d 691 (Fla. 1973) and Peterson v. Balach, 199 N.W.2d 639 (Minn. 1972), would be difficult to justify under the old system.

[114] *See* Hughes, *supra* note 2, at 672-84.

[115] *Id.* at 684.

and invitee are based on policy judgments which have evolved into law, their viability must be judged by the fundamental assumptions which support them. If the necessity of protecting the unfettered use and enjoyment of land has been displaced by an increasing concern for human safety, a continuing application of the common law distinctions does not serve the needs of society. To prevent legal paralysis, a periodic reevaluation of the competing interests in light of present realities is necessary.

Wood v. Camp[116] is the product of such a reconsideration of competing interests in the area of the duties of owners and occupiers of land:

> [W]e are mindful of the basic reasons for the distinctions in the first place; namely, that a property owner is entitled to some privacy upon his own premises and should not be bound to those who choose to avail themselves of it at will. We are also cognizant however of the continuing inroads of a crowded society, living of necessity in close proximity. We are aware of the contiguous property of others which demands concern for the welfare of our neighbor. Life in these United States is no longer as simple as in the frontier days of broad expanses and sparsely settled lands . . . . With social change must come change in the law, for . . . " [t]he first duty of the law is to keep sound the society it serves."[117]

Wood is the most hesitant and limited of the recent cases abolishing some or all of the common law categories in favor of a broader standard of reasonable care. Though striking a balance in favor of "invited" entrants, it stops short of the advances made in other jurisdictions which either have increased the landowner's duty to non-trespassers or imposed a standard of reasonable care as to all entrants. Although these courts may have reached different results in their balancing of interests, what is most important is that they have treated the law as a living organism and have not allowed the dead hand of the past to perpetuate remediable errors.

David A. Koenig

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[116] 284 So. 2d 691 (Fla. 1973).

[117] *Id.* at 696.