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Holland v. Baltimore & Ohio Railroad: Defining a Landowner's Duty to Trespassers in the District of Columbia

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HOLLAND V. BALTIMORE & OHIO RAILROAD: DEFINING A LANDOWNER'S DUTY TO TRESPASSERS IN THE DISTRICT OF COLUMBIA

The tort liability of landowners[1] to entrants injured on their property hinges upon the duty owed to the injured person.[2] Under the majority common law approach, the duty owed to a land entrant is determined by his status on the land.[3] A land entrant is classified as an invitee,[4] a licensee,[5] or a trespasser,[6] and each of these classifications in turn imposes a different standard of care on the landowner.[7] In practice, this rigid classifi-

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1. This Note concerns not only landowners but possessors and occupiers as well. *See generally*, 2 F. HARPER & F. JAMES, JR., THE LAW OF TORTS § 27.2 (1956).

2. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 57-62 (4th ed. 1971). Prosser referred to land entrant law as "[t]he largest single area in which the concept of 'duty' has operated as a limitation upon liability." *Id.* § 57, at 351.

3. *See, e.g.*, Firfer v. United States, 208 F.2d 524 (D.C. Cir. 1953).

4. The majority common law of an invitee is provided in the RESTATEMENT (SECOND) OF TORTS § 332 (1965).

> (1) An invitee is either a public invitee or business visitor.
>
> (2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is open to the public.
>
> (3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.

RESTATEMENT (SECOND) OF TORTS § 332 (1965).

5. "A licensee is a person who is privileged to enter or remain on land only by virtue of the possessor's consent." RESTATEMENT (SECOND) OF TORTS § 330 (1965).

6. "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) OF TORTS § 329 (1965).

7. To invitees, an owner has a duty to exercise ordinary care to render premises reasonably safe. Schwartzman v. Lloyd, 82 F.2d 822 (D.C. Cir. 1936).

Licensees, if on the land by the direct or implied invitation of the owner and if they remain within the boundaries of that invitation, can expect an owner "to exercise reasonable and ordinary care and to provide reasonably safe premises . . . and . . . may hold the owner liable for injuries resulting from active negligence . . . ." Firfer v. United States, 208 F.2d 524, 527 (D.C. Cir. 1953) (citations omitted). However, a licensee on the land at the mere acquiescence of the owner takes upon himself the risk of unconcealed dangers that can be avoided by proper care. The owner's duty to such a land entrant is to refrain from permitting him to run upon a hidden peril or a hidden engine of destruction. *Id.* at 528.

The owner's duty to trespassers is to merely refrain from the infliction of intentional, wanton, or willful injury and the maintenance of a hidden engine of destruction. *Id. See infra* notes 20-42 and accompanying text.

cation system often produces harsh results by insulating truly negligent landowners from liability to injured licensees or trespassers. Most jurisdictions have responded by creating a variety of exceptions to the categories that are intended to make the system more equitable.[8] However, the creation of such exceptions has produced an inequitable, unpredictable, and often confusing body of law. To alleviate this confusion, a minority of jurisdictions has abandoned the duty-determinative classifications and, in their place, has imposed a uniform duty of reasonableness to be applied to all land entrants.[9]

The United States Court of Appeals for the District of Columbia Circuit was among the earliest courts to abolish the common law classifications. In *Smith v. Arbaugh's Restaurant Inc.*,[10] the circuit court ruled that a landowner owes a duty to all land entrants to exercise "reasonable care under all the circumstances."[11] However, District of Columbia courts have been hesitant to read *Arbaugh's* as abolishing all of the common law classifications.[12] Specifically, courts have been reluctant to read *Arbaugh's* as abolishing the trespasser classification.[13] As a result, despite the circuit court's expressed intention of eliminating the confusion created by the common law classifications,[14] the duty owed by a District of Columbia landowner to those who were traditionally classified as trespassers remained unclear.

Recently, the District of Columbia Court of Appeals attempted to eliminate the confusion that followed *Arbaugh's*. In *Holland v. Baltimore & Ohio Railroad*,[15] the court of appeals was squarely presented with an opportunity to adopt the *Arbaugh's* standard for determining the duty of care owed to trespassers. Despite the strong policy reasons for this adoption, the

8. *See, e.g.*, *infra* notes 46-59 and accompanying text.

9. *See* Webb v. City and Borough of Sitka, 561 P.2d 731 (Alaska 1977); Rowland v. Christian, 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561 (1968); Mile High Fence Co. v. Radovich, 175 Colo. 537, 489 P.2d 308 (1971); Pickard v. City and County of Honolulu, 51 Hawaii 134, 452 P.2d 445 (1969); Cates v. Beauregard Elec. Coop., 328 So. 2d 367 (La. 1976); Ouellette v. Blanchard, 364 A.2d 631 (N.H. 1976); Basso v. Miller, 40 N.Y.2d 233, 352 N.E.2d 868, 386 N.Y.S.2d 564 (N.Y. 1976); O'Leary v. Coenen, 251 N.W.2d 746 (N.D. 1977); Mariorenzi v. Joseph Diponte, Inc., 114 R.I. 294, 333 A.2d 127 (1975).

10. 469 F.2d 97 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973).

11. *Id.* at 105.

12. *See, e.g.*, Hopkins v. Baker, 553 F.2d 1339 (D.C. Cir. 1977); Cooper v. Goodwin, 478 F.2d 653 (D.C. Cir. 1973); Alston v. Baltimore & O.R.R., 433 F. Supp. 553 (D.D.C. 1977). For a discussion of these decisions, see *infra* notes 79-98 and accompanying text.

13. The circuit court's decision in *Arbaugh's*, coming after the Court Reorganization Act of 1970, which made the District of Columbia Court of Appeals the authoritative expositor of the law, was not binding on the District of Columbia Court of Appeals. *See infra* notes 75-85 and accompanying text.

14. *Arbaugh's*, 469 F.2d at 103.

15. 431 A.2d 597 (D.C. 1981) (en banc).

court refused to do so, thus reaffirming the viability of the common law trespasser classification in the District of Columbia.[16]

The plaintiff in *Holland* was a nine-year-old child who had accompanied a friend to an area where the Baltimore & Ohio Railroad Company (B & O) and the Penn Central Transportation Company (Penn Central) maintain contiguous railroad tracks. While attempting to join his friend in "hopping" a moving train, the plaintiff fell onto the tracks and caught his leg under the train. He then brought suit against the B & O and the Penn Central for the injuries he suffered.[17]

In granting B & O's motion to dismiss and Penn Central's motion for summary judgment, the trial court found that the complaints failed to allege a willful, wanton or intentional injury, as is required for a common law "trespasser" to recover from a landowner.[18] The District of Columbia Court of Appeals, by affirming the trial court decision, unequivocably established that the trespasser classification continues to determine the duty owed to unlawful land entrants in the District of Columbia.[19]

This note will provide a historical overview of landowner liability to land entrants in the District of Columbia, focusing specifically on the historical development of the duty owed to trespassers. It will provide an analysis of the probable manner in which the *Holland* standard will be applied in trespasser suits by District of Columbia courts, emphasizing the tendency of courts to create confusion and unpredictability through manipulation of the trespasser category.

I. Development of the Common Law Classification System

A. The Creation of Land Entrant Categories and Corresponding Duties of Care

Traditionally, District of Columbia courts have determined a landowner's duty to land entrants according to the common law classification system. Those afforded the highest standard of care are classified as invitees. Defined as people who go upon the land of another for the purpose of carrying on a transaction for the benefit of both parties, or for the benefit of the landowner alone,[20] invitees are owed a duty of reasonable and ordinary care that in effect requires the maintenance of reasonably safe

16. *Id.* at 601.
17. *Id.* at 598-99.
18. *See infra* notes 25-26 and accompanying text.
19. *Holland*, 431 A.2d at 601.
20. *See* Firfer v. United States, 208 F.2d 524, 527 (D.C. Cir. 1953).

premises.[21]

A lesser duty is owed to those classified as licensees. Plaintiffs placed in this group are further categorized as either "licensees by invitation" or "bare licensees."[22] Licensees on the land at the direct or implied invitation of the owner, if they remain within the boundaries of the invitation, receive the benefit of a reasonable and ordinary duty of care.[23] However, a person on the land at the mere acquiescence of the owner is a bare licensee who takes upon himself the risk of unconcealed dangers that could be avoided by proper care. The owner's duty to a bare licensee is to refrain from the infliction of wanton injury and to prevent such an entrant from running upon a hidden peril or a hidden engine of destruction.[24]

21. *See, e.g., id.*; Lustine-Nicholson Motor Co. v. Petzal, 268 F.2d 893 (D.C. Cir. 1959) (action for personal injuries sustained by customer struck by an overhead door in the defendant's garage to which customer had brought his automobile for repairs); Watford v. Evening Star Newspaper, 211 F.2d 31 (D.C. Cir. 1954) (action for injuries sustained by minor spectator struck by a racer at a soap box derby); Schwartzman v. Lloyd, 82 F.2d 822 (D.C. Cir. 1936) (actions for injuries sustained by department store customers when plate window broke due to overcrowding); Hellyer v. Sears, Roebuck & Co., 67 F.2d 584 (D.C. Cir. 1933) (action for injuries sustained on stairs of defendant's store); Thomas v. Potomac Elec. Power Co., 266 F. Supp. 687 (D.D.C. 1967) (action against District of Columbia for death of one lifeguard and injury to another in attempting to rescue swimmer from pool of electrically charged water); Preston v. Safeway Stores, 163 F. Supp. 749 (D.D.C. 1958), *aff'd*, 269 F.2d 781 (D.C. Cir. 1959) (action by customer for injuries resulting from fall due to slipping on piece of onion lying on store floor).

22. Firfer v. United States, 208 F.2d 524, 527 (D.C. Cir. 1953).

23. *See, e.g.*, McNamara v. United States, 199 F. Supp. 879, 881 (D.D.C. 1961) (action for injuries sustained when plaintiff fell in corridor of Capitol building). The distinction between invitees and licensees by invitation is that, though both types of land entrants are invited onto the property, only the invitee is invited specifically for the benefit of the landowner. *See* Firfer v. United States, 208 F.2d at 527. Though distinguishing between the two types of land entrants, the *Firfer* court did not assert that there was a difference in the standards of care imposed by these categories. Thus, in *McNamara*, the court stated, in reference to the facts of that case: "The Court is of the opinion however, that the same result would be reached whether these plaintiffs are regarded as invitees or licensees by invitation and, therefore, will give no further consideration to that distinction beyond having pointed it out." 199 F. Supp. at 881-82.

24. *See Firfer*, 208 F.2d at 528. *See, e.g.*, Smith v. John B. Kelly, Inc., 275 F.2d 169 (D.C. Cir. 1960) (action by general contractor's employee for injuries sustained while riding on subcontractor's lift); Halin v. United Mine Workers, 229 F.2d 784 (D.C. Cir. 1956) (action by electrical contractor's employee against owner of premises for injuries sustained when employee fell while proceeding across walkway laid by principal contractor); Arthur v. Standard Eng'g Co., 193 F.2d 903 (D.C. Cir. 1951), *cert. denied*, 343 U.S. 964 (1953) (action by electrical subcontractor's employee for injuries sustained while using steamfitting subcontractor's scaffolding); Branan v. Wimsatt, 298 F. 833 (D.C. Cir. 1924), *cert. denied*, 265 U.S. 591 (1924) (action for injuries sustained by minor while playing on defendant's lumber pile). A "hidden engine of destruction" has been referred to by the District of Columbia Court of Appeals as a "trap." *See* Washington Metropolitan Area Transit Auth. v. Ward, 433 A.2d 1072, 1074 (D.C. 1981).

The lowest duty of care is owed to land entrants classified as trespassers. Such entrants are defined as people who enter or remain upon the land of another without a privilege to do so and who commit a wrong against the owner by their presence.[25] Trespassers can recover from landowners only for intentional, wanton, or willful injury inflicted by the landowner or for injury resulting from the landowner's maintenance of a hidden engine of destruction.[26]

The development of the common law classification system was due in large part to societal dominance by the nineteenth century landowning class.[27] This dominant class valued uninhibited land use above the safety of uninvited land entrants.[28] Its values had developed in a culture tied very closely to the land.[29] Adherence to these values was reflected in numerous early decisions by District of Columbia courts.

In *Branan v. Wimsatt*,[30] the United States Court of Appeals for the District of Columbia Circuit denied recovery to a twelve-year-old child for injuries that she sustained while unlawfully on the defendant's premises.[31] The court reasoned that "[t]o hold that owners are bound to prevent children from swimming in ponds, entering buildings in course of construction, climbing fruit trees . . . would subject such property owners to an intolerable burden, and impose upon them a duty which would require almost superhuman vigilance to perform."[32] Thus, the court's concern with

25. *See, e.g.*, Firfer v. United States, 208 F.2d 524, 528 (D.C. Cir. 1953); Nimetz v. Shell Oil Co., 74 F. Supp. 1, 2 (D.D.C. 1947).

26. *See Firfer*, 208 F.2d at 528; *Nimetz*, 74 F. Supp. at 3.

27. *See generally* F. HARPER & F. JAMES, *supra* note 1, § 27.2, at 1422 n.13; Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630 (1959); Smith v. Arbaugh's Restaurant, 469 F.2d 97, 101 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973); *Recent Developments—Torts-Premises Liability—New York Joins Minority of States Abolishing Trespasser, Licensee, Invitee Distinctions*, 45 FORDHAM L. REV. 682, 683 (1975); Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?*, 36 MD. L. REV. 816, 818-19 (1977); Note, *Landowner's Duty of Care: Louisiana Rejects Invitee, Licensee, and Trespasser Classifications*, 23 LOY. L. REV. 259, 260 (1977).

28. *See* F. HARPER & F. JAMES, *supra* note 1, § 27.1, at 1432.

29. Kermarec v. Compagnie Generale Transatlantique, 358 U.S. at 630. The Court in *Kermarec*, referring to the evolvement of the common law system, stated: "The distinctions which the common law draws between licensee and invitee were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism." *Id.*

30. 298 F. 833 (D.C. Cir.), *cert. denied*, 265 U.S. 591 (1924).

31. The plaintiff in *Branan*, while playing with other children, attempted to climb to the top of a pile of lumber in the lumber yard of the defendant. In this attempt, numerous boards were displaced and fell on the plaintiff, breaking her right thigh. *Id.* at 834.

32. *Id.* at 837. The *Branan* court found the attractive nuisance doctrine to be inapplicable to the facts of that case. The court stated:

> We are not unaware of the doctrine that an invitation to children to enter and use machinery which to them is specially alluring, tempting, attractive, accessible, and

avoiding the imposition of a burdensome duty of care on the landowner outweighed its concern for the safety of the uninvited land entrant.

Similar values were expressed by the United States District Court for the District of Columbia in *Nimetz v. Shell Oil*.[33] In *Nimetz*, the plaintiff, after entering a restricted area of the defendant's filling station, suffered injuries when he fell into a grease pit. The court, in denying the plaintiff's motion for a new trial, borrowed a revealing quote from a leading British case on the subject of landowner's liability. Quoting Lord Camden, the court stated that "our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law."[34]

After emphasizing the importance of preserving the integrity of free land use, the court then turned to the common law classification system to protect this interest. In denying the motion for a new trial, the court explained:

> It is well settled that the owner or occupier of real property owes no duty to a trespasser to maintain the property in a safe condition, because the trespasser takes the risk when he enters the property. The only obligation affecting a trespasser is to abstain from the infliction of an intentional, wanton or wilful injury, as well as not to maintain some hidden engine of destruction.[35]

In *Firfer v. United States*,[36] the United States Court of Appeals for the District of Columbia Circuit reaffirmed its adherence to the common law classification system.[37] The plaintiff, in *Firfer*, was visiting the Jefferson Memorial when he wandered from the area open to the public to a grassy plot that was not easily accessible and clearly not open to the public. While

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dangerous will be implied, and that owners to escape responsibility must so guard or secure such machines as to prevent their use by children who have not reached the age of discretion and judgment.

Id. at 837-38. However, the court further stated that

[a] lumber yard, maintained as was that of Wimsatt, was not an attractive nuisance or per se dangerous . . . certainly the owner of an everyday lumber yard should not be held answerable for injuries to minors who, knowing the danger, devote his lumber piles to a use for which they were not designed or suitable.

Id. at 838. For a further discussion of the attractive nuisance doctrine, see *infra* note 48.

33. 74 F. Supp. 1 (D.D.C. 1947).

34. *Id.* at 2 (quoting Entick v. Carrington, 95 Eng. Rep. 807, 817 (K.B. 1765)).

35. 74 F. Supp. at 3.

36. 208 F.2d 524 (D.C. Cir. 1953).

37. In *Firfer*, the court concisely summarized the classification system, providing definitions of the various categories and setting forth the corresponding duties of care. *See supra* notes 20-26 and accompanying text.

in this restricted area, the plaintiff sustained an injury when he stepped into a deep hole.[38] The court found that, by exceeding the scope of his license, the plaintiff became either a trespasser or a bare licensee.[39]

Once classifying the plaintiff as a trespasser or bare licensee, the court only had to determine if the plaintiff's injury resulted from intentional, wanton, or willful conduct or the maintenance of a hidden engine of destruction.[40] Since the plaintiff had not alleged that the defendant's conduct was willful, the only possibility of recovery hinged upon whether the hole into which he fell was a hidden engine of destruction.[41] Reasoning that the hole could not be so categorized, the circuit court affirmed the directed verdict for the defendant. Thus, the plaintiff lost the advantage of a jury's factual analysis; further, the manner in which the defendant used its land was not significantly questioned.

Although apparently well entrenched at the time of the *Firfer* decision, the values underlying the common law classification system soon became the subject of increasing court scrutiny. As America became more industrialized, the preeminence of land use over safety began to erode rapidly.[42] This shift in values was evidenced by the legal system's changing attitude toward a landowner's liability to land entrants.

B. Softening the Land Entrant Classification System

The traditional land entrant classification system imposes the harshest results on trespassers. Such entrants, due to the limited duty owed them, are often deprived of a jury's thorough examination of the landowner's behavior.[43] Through the use of motions to dismiss, summary judgments, directed verdicts, and judgments notwithstanding the verdict, courts re-

38. *Firfer*, 208 F.2d at 528.

39. *Id.* at 529.

40. Under the classification system, only when evidence of the status of a land entrant is conflicting will the court present the question to the jury. *See* Willis v. Stewart, 190 A.2d 814 (D.C. 1963). Thus, evidence clearly establishing the status of a land entrant facilitates successful summary judgment motions, directed verdicts, and motions for judgment n.o.v. *See infra* note 44 and accompanying text. This effect was considerably lessened by the *Arbaugh's Restaurant* standard of "reasonableness under the circumstances," under which the land entrant's status on the property became merely one of numerous factors used to measure a landowner's conduct. *See infra* notes 72-74 and accompanying text.

41. *Firfer*, 208 F.2d at 528. Recovery would have been possible, based upon those facts, only if it could have been inferred that Mr. Firfer was an invitee or a licensee by invitation at the time and place of the accident.

42. *See* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?*, 36 MD. L. REV. 816, 818-19 (1977).

43. *See supra* note 40.

move the issue of liability from the jury.[44] As a result, liability is often predicated solely on the facts that determine the trespasser's status rather than the standard of care exercised by the landowner.[45] This rigid formula perpetuates the preeminence of free land use over the safety of wrongful land entrants and has prompted many jurisdictions, including the District of Columbia, gradually to increase the duty owed to certain types of trespassers.

In *Daisey v. Colonial Parking*,[46] the United States Court of Appeals for the District of Columbia recognized the existence of exceptions to the trespasser category. Foremost among the exceptions was the duty owed to trespassing children. The court reasoned that since children lack the maturity to appreciate dangers, a landowner's duty must be measured by the reasonably foreseeable dangers to a trespassing child as opposed to a trespassing adult.[47] Thus, children were to receive the benefit of a reasonable care standard, regardless of their status on the land.[48]

The second exception to the trespasser category recognized by the *Dai-*

44. *See, e.g.*, Smith v. Arbaugh's Restaurant, Inc., 469 F.2d at 103, 104; Firfer v. United States, 208 F.2d 524 (D.C. Cir. 1953); Morse v. Sinclair Auto. Serv. Corp., 86 F.2d 298 (5th Cir. 1936); Nimetz v. Shell Oil Co., 74 F. Supp. 1 (D.D.C. 1947); Argus v. Michler, 349 S.W.2d 389 (1961); Laidlaw v. Perozzi, 130 Cal. App. 2d 169, 278 P.2d 523 (1955); Coston v. Skyland Hotel, Inc., 231 N.C. 546, 57 S.E.2d 793 (1950); Carlisle v. J. Weingarten, Inc., 137 Tex. 106, 152 S.W.2d 1073 (1941).

45. *See Arbaugh's*, 469 F.2d at 104.

46. 331 F.2d 777 (D.C. Cir. 1963).

47. *Id.* at 778.

48. The courts of the District of Columbia also recognize the attractive nuisance doctrine as an exception to the general rule of landowner liability to trespassing children. In McGettigan v. National Bank of Washington, 199 F. Supp. 133 (D.D.C. 1961), *rev'd*, 320 F.2d 703 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 943 (1963) and Hankins v. Southern Transp. Corp., 216 F. Supp. 554 (D.D.C.), *aff'd*, 326 F.2d 693 (D.C. Cir. 1963), the District of Columbia Circuit cited the RESTATEMENT (SECOND) OF TORTS § 339 as supporting a finding of landowner liability. Section 339 reads:

> Artificial Conditions Highly Dangerous to Trespassing Children
>
> A possessor of land is subject to liability for physical harm to children trespassing thereon caused by artificial condition upon the land if
>
> (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
>
> (b) the condition is one which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to children, and
>
> (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or coming within the area made dangerous by it, and
>
> (d) the utility of the possessor of maintaining the condition and the burden of eliminating the danger are slight compared with the risk to children involved, and
>
> (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

sey court evolved from the circumstances of that case. The plaintiff suffered injuries when she tripped over a low-hanging chain that separated a parking area from an alley. The alley was frequently used by the public, and the defendant, who had control of the parking area, was aware of such use.[49] Since the defendant's chain was hanging close to the ground, it was difficult for the plaintiff to see where the public alley ended and where the private parking lot began.[50] In reversing the directed verdict for the defendant, the court held that where premises abut a public way, and where it is difficult to determine the boundary between the two, a landowner owes a duty to everyone, including trespassers,[51] to keep the abutting part

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Despite recognition of the attractive nuisance doctrine, prior case law limits the doctrine. In Harris v. Roberson, 139 F.2d 529 (D.C. Cir. 1943), the circuit court held that the doctrine of attractive nuisance "does not extend to things which become dangerous only when adults set them in motion." *Id.* Though providing no rationale for its holding, the court did cite moving railroad cars as an example of a factual situation that would not trigger the attractive nuisance exception. *Id.* See *infra* note 108 for a discussion of the District of Columbia Court of Appeals' treatment of the attractive nuisance doctrine in Holland v. Baltimore & O.R.R., 431 A.2d 597 (D.C. 1981) (en banc).

The attractive nuisance doctrine serves to significantly limit a landowner's liability to trespassing children. Prior to the development of the doctrine, the Supreme Court had recognized the existence of a higher duty of care owed to all trespassing children. *See* Railroad Co. v. Stout, 84 U.S. 657 (1873). However, the attractive nuisance doctrine limited the imposition of this higher standard of care in child-trespasser cases to situations where a landowner maintained a hazard on his or her property that might have been attractive to small children. The rationale was that the maintenance of such a hazard gave small children an implied license to enter the land. *See, e.g.*, United Zinc & Chemical Co. v. Britt, 258 U.S. 268 (1922); Green, *Landowners' Responsibility to Children*, 27 TEX. L. REV. 1, 5-9 (1948).

Courts responded to the limitation on landowners' liability by eroding the attractive nuisance doctrine. Thus, in Best v. District of Columbia, 291 U.S. 411 (1934), the Supreme Court reversed a directed verdict against a five-year-old child, reasoning that the defendant-landowner had reason to anticipate that children might play in the area in question. Instead of emphasizing the existence of an attractive nuisance, the Court stressed that with notice of the possibility of the presence of children, "reasonable prudence would require that precautions be taken for their protection." *Id.* at 419. Similarly, the United States Court of Appeals for the District of Columbia Circuit, in Eastburn v. Levin, 113 F.2d 176, 177-78 (D.C. Cir. 1940), "recognized that the true rationale for imposing a higher standard of care upon landowners when dealing with foreseeable child-trespassers was not any notion of implied invitation, but rather a policy decision that society would be best served by encouraging landowners to prevent injury to small children." Thus, as recognized by the *Daisey* court, trespassing children may be afforded a higher standard of care despite the inapplicability of the attractive nuisance doctrine to particular cases. This constitutes a significant exception to the trespasser classification.

49. 331 F.2d at 778.

50. *Id.* at 779.

51. In support of its second exception, the *Daisey* court asserted: "When trespassers are not only reasonably foreseeable, but reasonably expected, the landholder may be required to exercise due care to keep trespassers out, warn them of hazards or otherwise protect them." 331 F.2d at 780. Clearly, the court was ignoring the strictures of the trespasser classification.

of his land reasonably safe.[52] Thus, by 1963, the rigidity of the trespasser classification had been considerably softened; subsequent decisions in the District of Columbia expanded this trend.

In *Gould v. DeBeve*,[53] the circuit court again reflected the growing distaste for the results produced by strict application of the trespasser classification. In *Gould*, the plaintiff, a two-year-old infant, and his mother were temporarily living with a tenant of the defendant-landlord. The landlord was unaware of this living arrangement, which violated an express provision of the lease. The accident occurred when the plaintiff, while playing by an open window, knocked out a loose screen and fell to the ground, sustaining injuries.[54] Although classifying the infant as a trespasser, the circuit court found that the defendant's failure to secure the loose screen amounted to wanton and willful conduct.[55] The court stated: "Defining the liability of the one to the other cannot be divorced from the factual context, nor can the law be sensibly applied in this area without taking account of diverging circumstances."[56] Clearly, the court was looking beyond the land entrant status of the child in determining the duty owed by the landowner. By looking to "diverging circumstances," the court went beyond the analysis imposed by strict application of the trespasser classification in order to reach what it deemed to be a just result.

The *Gould* decision demonstrated the willingness of District of Columbia courts to apply the "wanton and willful" common law standard in a result-oriented manner. In effect, the court had stretched the definition of wanton and willful conduct to encompass conduct that was merely negli-

52. *Id.* at 778, 779. The District Court for the District of Columbia recognized the same exception to the common law trespasser category in Daly v. Toomey, 212 F. Supp. 475 (D.D.C. 1963), *aff'd sub nom.* Muldrow v. Daly, 329 F.2d 886 (D.C. Cir. 1964). In *Daly*, the plaintiff, upon leaving a night baseball game, walked through a public alley en route to her car. While proceeding down that dark alley, she suddenly stepped and fell into an unguarded stairwell that led from the alley to the basement of a building. Although classifying her as a trespasser, the court nevertheless upheld the plaintiff's claims. In reference to the trespasser classification, the court stated:

> But this rule of law . . . is a general rule, and subject to an exception, namely, that where property is adjacent to a public highway, and the occupant of the property maintains a dangerous condition, such as an excavation thereon, and also maintains a situation or condition where a reasonably prudent person might mistake the point where the highway ends and the property begins, the occupant has a duty to take reasonable precautions to protect persons against falling into the excavation.

Id. at 477.

53. 330 F.2d 826 (D.C. Cir. 1964). *Gould* was cited by the *Arbaugh's* court, 469 F.2d at 104-05, to demonstrate the confusion created through recognition of "types" of trespassers. *See infra* notes 70-71 and accompanying text.

54. 330 F.2d at 827.

55. *Id.* at 830.

56. *Id.*

gent.[57] In so doing, the court provided an additional means for penetrating the liability shield erected for landowners through the common law system.

As demonstrated in both *Daisey v. Colonial Parking* and *Gould v. DeBeve*, the once rigidly applied common law categories had eroded into "increasingly subtle verbal refinements. . . [and] fine gradations in the standards of care which the landowner owes to each."[58] What in fact had been created was a group of nebulous definitions that courts manipulated to mitigate the harsh results of the traditional system. Underlying this movement was a trend in the common law toward imposing on owners and occupiers a uniform standard of care toward all land entrants.[59]

II. An Attempt to Abolish the Common Law Classification System

A. Smith v. Arbaugh's Restaurant, Inc.

On March 4, 1966, Smith, a health inspector for the District of Columbia, was inspecting Arbaugh's Restaurant following a grease fire. While descending a set of stairs leading to the basement, Smith's foot slipped, causing him to fall backwards. He landed on his back and slid to the bottom of the stairs. Smith subsequently brought suit for the injuries he sustained.[60]

Following the trend already established in California, Hawaii, and Colorado,[61] the United States Court of Appeals for the District of Columbia

57. The duty of care established by the common law trespasser classification is intended to prevent the possessor from being liable for injury to intruders caused by the possessor's failure to put his land in safe condition for such wrongful entrants. Intruders have no right to demand a safe place to trespass under this standard. *See* W. Prosser, *supra* note 2, § 58, at 357-58. By stretching the definition of "wanton and willful conduct" to encompass the defendant's failure to provide a safe window screen, the *Gould* court was clearly defeating the purpose behind the traditional trespasser standard. In effect, the court was requiring safe premises for trespassers.

58. *See* Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630 (1959). For cases in which other jurisdictions have circumvented the classification system, see, e.g., Potts v. Amis, 62 Wash. 2d 777, 384 P.2d 825 (1963); Scheibel v. Lipton, 156 Ohio St. 308, 102 N.E.2d 453 (1957); Taylor v. New Jersey Highway Authority, 22 N.J. 454, 126 A.2d 313 (1956).

59. *See* Kermarec, 358 U.S. at 631 (quoting Kermarec v. Compagnie Generale Transatlantique, 245 F.2d 175, 180 (2d Cir. 1957) (Clark, C.J., dissenting)).

60. *Arbaugh's*, 469 F.2d at 98.

61. The modern practice of predicating a landowner's liability on ordinary principles of negligence, as opposed to the duty-determinative classifications, was first established by the Supreme Court of California in Rowland v. Christian, 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561 (1968). In *Rowland*, the plaintiff, a social guest of the tenant, sustained injuries

Circuit ruled that Mr. Smith's status as a common "licensee"[62] was not wholly determinative of the duty owed him by the defendant. Instead, the Court, in reversing and remanding the trial court's verdict in favor of Arbaugh's Restaurant, ordered that a jury[63] analyze whether the restau-

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when the knob of a cold water faucet broke while he was using it. In reversing a summary judgment for the defendant, the court stated:

> Whatever may have been the historical justifications for the common law distinctions, it is clear that those distinctions are not justified in the light of our modern society and that the complexity and confusion which has arisen is not due to difficulty in applying the original common law rules . . . but is due to the attempts to apply just rules in our modern society within the ancient terminology.

Id. at 114, 70 Cal. Rptr. at 103, 443 P.2d at 568. Thus, the *Rowland* court rejected the classification system, substituting a reasonableness standard in its place. *Id.* The decision had a noticeable influence on other jurisdictions.

Shortly after the *Rowland* decision, the Supreme Court of Hawaii, citing *Rowland* and *Kermarec*, abolished the common law distinctions. The plaintiff, in Pickard v. City and County of Honolulu, 51 Hawaii 134, 452 P.2d 445 (1969), had obtained permission from a night guard to use the courthouse restroom. Due to the failure of a light switch to function, the plaintiff entered the restroom in darkness. He sustained injuries when he fell through a hole in the floor. In remanding the case, the court explained:

> We believe that 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 upon the premises, regardless of the legal status of the individual.

Id. at 135, 452 P.2d 446.

In Mile High Fence Co. v. Radovich, 175 Colo. 537, 489 P.2d 308 (1971), the Supreme Court of Colorado contributed to the development of the modern trend. The plaintiff, in *Mile High*, sustained injuries when he stepped into a fence post hole on property abutting an alley. While affirming a judgment for the plaintiff, the court attacked the common law classification system, asserting that it creates "confusion and judicial waste." *Id.* at 540, 489 P.2d at 311. In addition, the court stated that "by preventing the jury from applying changing community standards to a landowner's duties, a harshness which is inappropriate to a modern legal system has been preserved." *Id.* at 541, 489 P.2d at 312. Citing *Rowland*, the court thus abandoned the classification system. In its place, the following standard was substituted:

> [T]he occupant, in the management of his property, should act as a reasonable man in view of the probability or foreseeability of injury to others. 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.

Id. at 542-43, 489 P.2d at 314-15.

Rowland, Pickard, and *Mile High* established the trend which was joined by *Arbaugh's*. For other jurisdictions that have adopted this modern practice, see *supra* note 9.

62. 469 F.2d at 107. Mr. Smith was not categorized as an "invitee" because he was not on the property for the purpose of carrying on a transaction for the benefit of both himself and the landowner or the landowner alone. *See* Firfer v. United States, 208 F.2d at 527. Thus, he was placed into the "licensee" category.

63. *See supra* note 40.

rant had met the duty of "reasonable care under the circumstances."[64] The court stated: "Rather than continue to predicate liability on the status of the entrant, we have decided to join the modern trend and to apply ordinary principles of negligence to govern a landowner's conduct."[65] The court reasoned that the new standard was merely a recognition of changing social realities.[66]

The prestige and dominance of the nineteenth century land owning class, reasoned the *Arbaugh's* court, formed the foundation for the common law system and was the basis for emphasis on free land use at the expense of the safety of those who qualified as trespassers or licensees. The court recognized that such values are no longer accepted.[67] Borrowing a passage from the Supreme Court of California, the court wrote: "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."[68] Urbanized society and closer living conditions, emphasized the court, demanded abandonment of the protective common law system.[69]

As an additional rationale for the new standard, the *Arbaugh's* court asserted that the classification system had become very difficult for courts to apply.[70] The erosion of the classifications into subclassifications and verbal refinements, stated the court, had created "confusion and conflict and a toleration of exceptions which apply only to individual cases."[71] The court's remedy for this confusion was to impose upon landowners a duty of reasonable care to all land entrants.[72]

The standard that emerged from *Arbaugh's* required the jury to balance three factors in determining a landowner's liability. The governing factors were the likelihood of injury, the seriousness of the injury, and the sacri-

64. 469 F.2d at 103.

65. *Id.* at 100.

66. *Id.* at 102. The court noted: "With urbanized society comes closer living conditions and a more gregarious population. The trespasser who steps from a public sidewalk onto a private parking lot today is not the 'outlaw' or 'poacher' whose entry was both unanticipated and resented in the nineteenth century." *Id.* at 103.

67. *Id.* at 101.

68. *Id.* (quoting Rowland v. Christian, 69 Cal. 2d at 115, 70 Cal. Rptr. at 104, 443 P.2d at 568 (1968)).

69. 469 F.2d at 101.

70. *Id.* at 103.

71. *Id.* The court characterized the current state of the law as a "patchwork" of confusion. *Id.* at 103 n.29 (quoting Note, 44 N.Y.U.L. REV. 426, 427 (1969)).

72. 469 F.2d at 107.

fices required to avoid the risk.[73] However, such circumstances were no longer solely determinative of the landowner's liability.[74] Rather, they were now merely part of all the circumstances to be analyzed and weighed by the jury.

B. Post-Arbaugh's: The Duty Owed to Trespassers Remained Unclear

Despite the circuit court's expressed intention in *Arbaugh's* to eliminate the confusion created by the common law classifications, the duty owed by landowners to those who were traditionally classified as trespassers remained unclear. Since the court in *Arbaugh's* was not presented with facts involving a trespasser, District of Columbia courts, both federal and local, proved hesitant to apply the *Arbaugh's* standard to such land entrants.[75] In addition, the Court Reorganization Act of 1970,[76] and the interpretation of the Act by the District of Columbia Court of Appeals in *M.A.P. v. Ryan*,[77]

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73. *See id.* at 105-06.

74. In a frequently cited concurrence, Judge Leventhal questioned the ability of residential occupants to meet the costs imposed by the negligence standard. Judge Leventhal stressed that an occupier of residential property, as opposed to the owner of a business establishment who can raise prices to meet increased insurance costs, "is not in a position to distribute either the costs of foreseeable losses or the cost of insurance against those losses." *Id.* at 108 (Leventhal, J., concurring). The occupier of residential property "must bear such costs himself." *Id.* By increasing the potential for a homeowner's liability, emphasized Judge Leventhal, less-affluent homeowners would be forced to either pay the increased costs necessary to insure against such risks or face the risks created by insufficient coverage. *Id.*

75. Because the plaintiff in *Arbaugh's* was a licensee, District of Columbia federal courts have accepted the precedential effect of that decision as to invitees and licensees. *See, e.g.*, Alston v. Baltimore & O.R.R., 433 F. Supp. 553, 563 (D.D.C. 1977). But the district and circuit courts have been unwilling to apply *Arbaugh's* to trespassers. *See, e.g., infra* notes 79-99 and accompanying text.

The District of Columbia Court of Appeals, in Blumenthal v. Cairo Hotel Corp., 256 A.2d 400 (D.C. 1969) and District of Columbia Transit System, Inc. v. Carney, 254 A.2d 402 (D.C. 1969), adopted a reasonable care standard as to plaintiffs categorized as invitees or licensees. *See infra* note 100. But the District of Columbia Court of Appeals in Holland v. Baltimore & O.R.R., 431 A.2d 597 (D.C. 1981), refused to adopt the reasonableness standard for trespassers. *See infra* notes 99-130 and accompanying text.

76. The Court Reorganization Act of 1970, § 199(c), effective Feb. 1, 1971, made the District of Columbia Court of Appeals the "highest court of the District of Columbia." D.C. CODE ANN. § 11-102 (1981). The Act consolidated the District of Columbia Court of General Sessions, the Juvenile Court of the District of Columbia, and the District of Columbia Tax Court into a single court named the Superior Court of the District of Columbia. The Act also eliminated the power of the United States Court of Appeals to review judgments of the District of Columbia Court of Appeals and stated that "[f]inal judgments and decrees of the District of Columbia Court of Appeals are reviewable by the Supreme Court of the United States in accordance with section 1257 of Title 28, United States Code." *Id.*

77. 285 A.2d 310 (D.C. 1971). The court stated:

> As this court on February 1, 1971 became the highest court of the District of Columbia, no longer subject to review by the United States Court of Appeals, we

established that the United States Court of Appeals for the District of Columbia Circuit was no longer the authoritative expositor of the common law in the District of Columbia.[78] Thus, decisions such as *Arbaugh's*, which are handed down by the federal appeals court after February 1, 1971, are not binding on District of Columbia courts.

The hesitancy of District of Columbia courts to accept the *Arbaugh's* decision was first evidenced in *Luck v. Baltimore and Ohio Railroad*.[79] In *Luck*, the plaintiff was a minor who was struck by one of the defendant's trains while removing her brother, another minor, from the defendant's railroad tracks.[80] In granting the defendant's motion for judgment n.o.v., the district court rejected the plaintiff's contention that the *Arbaugh's* standard of "reasonable care under the circumstances" was applicable to trespassers. Instead, the court found that the appropriate standard of care for the defendant was not to willfully, wantonly, or intentionally injure a trespasser.[81]

The *Luck* court reasoned that the *Arbaugh's* decision, coming after the Reorganization Act of 1970, was not controlling. Because the common law trespasser classification, as defined in *Firfer v. United States*,[82] had never been overruled by the District of Columbia Court of Appeals, the highest court of the District of Columbia, the federal court concluded that the Supreme Court's pronouncement in *Erie Railroad v. Tompkins*[83] mandated

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are not bound by decisions of the United States Court of Appeals rendered after that date. With respect to decisions of the United States Court of Appeals rendered prior to February 1, 1971, we recognize that they, like the decisions of this court, constitute the case law of the District of Columbia. As a matter of internal policy, we have adopted the rule that no division of this court will overrule a prior decision of this court or refuse to follow a decision of the United States Court of Appeals rendered prior to February 1, 1971, and that such result can only be accomplished by this court en banc.

Id. at 312.

78. *Id. Accord* Cooper v. Goodwin, 478 F.2d 653, 658 (D.C. Cir. 1973) (Leventhal, J., concurring).

79. 352 F. Supp. 331 (D.D.C. 1972), *rev'd in part*, 510 F.2d 663 (D.C. Cir. 1975).

80. *Id.* at 332-33.

81. *Id.* at 333-34.

82. 208 F.2d 524, 528 (D.C. Cir. 1953). *See supra* notes 36-42 and accompanying text.

83. 304 U.S. 64 (1938). The Supreme Court in *Erie* pronounced that, in general, a federal court sitting in diversity must apply the substantive law of the forum state. The Court stated:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law.

adherence to that classification.[84] Thus, the validity of the *Arbaugh's* decision had been placed into question only months after it had been handed down by the circuit court of appeals.[85]

In *Hopkins v. Baker*,[86] the plaintiff was an unauthorized land entrant who was run over by a train while walking through a railroad yard. He asserted that the defendant's conduct should be measured according to the *Arbaugh's* standard of reasonable care under the circumstances.[87] The United States Court of Appeals for the District of Columbia Circuit, however, found that *Arbaugh's* was not necessarily intended to be so far-reaching as to apply to those who were traditionally classified as trespassers.[88]

In refusing to recognize the elimination of the trespasser classification, the *Hopkins* court emphasized that *Arbaugh's* did not concern the trespasser issue and that issue, therefore, remained unresolved.[89] However, in a footnote to its decision, the *Hopkins* court indicated that the rationale of the *Arbaugh's* opinion apparently supported the elimination of the trespasser classification.[90] Despite this indication, the circuit court refrained

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Id. at 78. Following the Court Reorganization Act of 1970, the District of Columbia Court of Appeals became the body that declares District of Columbia law.

84. *Luck*, 352 F. Supp. at 334. On appeal, the United States Court of Appeals for the District of Columbia Circuit reversed the district court's entry of judgment n.o.v. and ordered reinstatement of the jury verdict. Luck v. Baltimore & O.R.R., 510 F.2d 663 (D.C. Cir. 1975). Without addressing the issue of the precedential effect of *Arbaugh's*, the circuit court reversed, finding that District of Columbia law imposes upon landowners a duty of reasonable care to child-trespassers whose presence upon the land could be foreseen. The court determined that the evidence was sufficient to support the jury verdict that the appellee had breached this duty. *Id.* at 667.

85. In Cooper v. Goodwin, 478 F.2d 653 (D.C. Cir. 1973), it again became apparent that the degree of care owed to trespassers was not a settled issue. The circuit court, in *Cooper*, applied the *Arbaugh's* standard to a set of facts in which the land entrant was a "social invitee." However, in a footnote to its decision, the court indicated that a landowner's liability to a trespasser should be determined by the extent of foreseeability. *Id.* at 656 n.13. The court emphasized that the foreseeability of the injury should be the determinative factor in evaluating a landowner's duty to a trespasser. *Id.* By focusing on foreseeability, the court was in effect suggesting that trespassers were owed a duty of care different from that owed invitees and licensees. The court's suggestion placed into question the applicability of the *Arbaugh's* standard to trespassers.

86. 553 F.2d 1339 (D.C. Cir. 1977).

87. *Id.* at 1341-42.

88. *Id.* at 1342. For discussion of those jurisdictions that have abolished the invitee and licensee categories while retaining the trespasser category, see *Recent Developments—Torts—Premises Liability—New York Joins Minority of States Abolishing Trespasser, Licensee, Invitee Distinctions*, 45 FORDHAM L. REV. 682, 691-94 (1976).

89. 553 F.2d at 1342.

90. *Id.* at 1342 n.6.

from reading *Arbaugh's* so broadly and left unclear the duty owed by landowners to trespassers in the District of Columbia.

Shortly after *Hopkins*, in *Alston v. Baltimore & Ohio Railroad*,[91] the United States District Court for the District of Columbia was presented with a case involving a trespasser. The court recognized that there is "no small amount of uncertainty regarding the potential liability of a landowner to persons . . . who are injured while trespassing upon his property."[92] Nonetheless, the court refused to substitute the reasonableness standard for the duty imposed by the trespasser classification. Once again, the precedential effect of *Arbaugh's* had been placed into question.

In *Alston*, the plaintiff was a land entrant who traditionally would have been categorized as a trespasser. Relying on *Hopkins* for the circuit court's position on this issue, the district court refused to impose a duty of reasonable care on landowners to those who trespass upon land.[93] The court reiterated that *Arbaugh's* stood only for elimination of the "invitee" and "licensee" classifications.[94] Citing Judge Leventhal's concurrence in *Arbaugh's*, the court questioned the logic of extending the "reasonableness" standard to unlawful land entrants.[95] To do so would require a jury's analysis of the landowner's behavior "under all circumstances." The court stressed that the imposition of such a subjective standard toward an unlawful land entrant who knowingly and deliberately exposed himself to an unconcealed dangerous hazard was unsupported by either common law or statute.[96]

Thus, the *Alston* court declined to read *Arbaugh's* as the authoritative pronouncement of the standard of care owed to trespassers. In a narrow holding, the court ruled that unlawful land entrants who wantonly expose themselves to unmistakable danger should not receive the benefit of a reasonableness standard.[97]

The *Alston* court's holding was clearly limited to a very specific type of trespasser. Consequently, despite the district court's stated intention of de-

91. 433 F. Supp. 553 (D.D.C. 1977).

92. *Id.* at 562.

93. *Id.* at 566.

94. *Id.* at 563.

95. 433 F. Supp. at 564 (quoting *Arbaugh's*, 467 F.2d at 107 (Leventhal, J., concurring)). *See supra* note 74.

96. 433 F. Supp. at 568.

97. The narrow holding in *Alston*, limited to those who "wantonly expose themselves to unmistakable danger," resulted because the plaintiff in the case was clearly aware of the danger he was confronting. The nine-year-old plaintiff, Myron Alston, injured his leg while jumping off a railroad car that he had previously hopped. The plaintiff's awareness of the dangers involved in train hopping was established in his deposition testimony. *See Alston*, 433 F. Supp. at 556 n.8.

termining an appropriate legal standard for this area of the law,[98] the standard emerging from *Alston* provided only minimal direction for District of Columbia federal courts. As in *Luck* and *Hopkins*, the court in *Alston* refused to follow the standard pronounced by the United States Court of Appeals for the District of Columbia Circuit in *Arbaugh's*, while also failing to provide an alternative legal standard applicable to all trespassers. It was apparent that the confusion in this area would not be resolved until the District of Columbia Court of Appeals, the authoritative expositor of District of Columbia law, was squarely presented with an opportunity to formulate its interpretation of the *Arbaugh's* decision. Such an opportunity arose in *Holland v. Baltimore & Ohio Railroad*.

III. *HOLLAND V. BALTIMORE & OHIO RAILROAD*

A. Refusing to Adopt the Arbaugh's Standard of Reasonable Care for Trespassers

Nine-year-old Kevin Holland was injured while he was playing on property owned by Baltimore & Ohio Railroad Company and the Penn Central Transportation Company. While admittedly a trespasser, appellant Holland asserted that the District of Columbia Court of Appeals should recognize a single standard of care as applicable to trespassers.[99] Holland argued that the United States Court of Appeals for the District of Columbia Circuit had rewritten the general law of tort liability of landowners in the District of Columbia, establishing a standard of reasonableness owed to all land entrants.[100] At last, the court of appeals was

98. *Id.* at 565.

99. *Holland*, 431 A.2d 597 (D.C. 1981). In Blumenthal v. Cairo Hotel Corp., 256 A.2d 400 (D.C. 1969) and District of Columbia Transit Syst. v. Carney, 254 A.2d 402 (D.C. 1969), the District of Columbia Court of Appeals adopted a reasonable care standard as to plaintiffs categorized as invitees or licensees. In *Blumenthal*, the plaintiff brought an action against her lessor for personal injuries inflicted upon her by an intruder who gained entry into the plaintiff's apartment through a window with an allegedly faulty lock. In affirming an entry of summary judgment for the defendant, the court stated: "This jurisdiction does not recognize varying standards of care depending upon the relationship of the parties but always requires reasonable care to be exercised under all the circumstances." 431 A.2d at 402.

The plaintiff in *Carney* brought an action against a bus company for injuries she sustained when the bus in which she was a passenger came to a sudden halt, causing her to fall. The court reversed a judgment for the plaintiff. Concerning the duty of care issue, the court stated: "[T]he care required is always reasonable care. What is reasonable depends upon the dangerousness of the activity involved. The greater the danger, the greater the care which must be exercised." 254 A.2d at 403.

In *Holland*, the District of Columbia Court of Appeals recognized *Blumenthal* and *Carney* as standing for elimination of the invitee and licensee categories. 431 A.2d at 599-600.

100. *Id.*

presented with an opportunity to adopt or reject the *Arbaugh's* standard of reasonableness for trespassing land entrants.

The court, in an en banc decision, quickly rejected the *Arbaugh's* standard. The opinion began by stating that trespassers in the District of Columbia may only recover for "intentional, wanton or willful injury or maintenance of a hidden engine of destruction."[101] The court emphasized that this standard for trespassers had never been overruled in the District of Columbia,[102] acknowledging, however, that a reasonable care standard had been adopted for invitees and licensees.[103] In rejecting the appellant's argument for a reasonable care standard, the court cited two reasons why it was not bound by the *Arbaugh's* decision.

First, as was emphasized in other post-*Arbaugh's* decisions,[104] the court noted that the precise issue of the duty of care owed to a trespasser had not been before the *Arbaugh's* court.[105] The *Holland* court therefore implied that an attempt to abolish the common law classifications was without precedential effect as to trespassers. More importantly, the court emphasized that when the *Arbaugh's* decision was handed down, the United States Court of Appeals for the District of Columbia Circuit was "no longer the authoritative expositor of the common law of the District of Columbia."[106] Therefore, the court of appeals concluded that even if *Arbaugh's* had established a standard of reasonable care for trespassers, it was not bound by that standard.[107]

Not bound by *Arbaugh's*, the court then found no compelling reason to adopt the standard pronounced in that case.[108] Curiously, the court offered

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101. *Id.* at 599.

102. *Id.*

103. *Id. See supra* note 99.

104. *See supra* notes 75-98 and accompanying text.

105. 431 A.2d at 600.

106. *Id.* (quoting Cooper v. Goodwin, 478 F.2d 653, 658 (D.C. Cir. 1973) (Leventhal, J., concurring)).

107. *Id.* The *Holland* court also argued that under Erie R.R. v. Tompkins, 304 U.S. 64 (1938), the circuit court in *Arbaugh's* should have applied the law of the District of Columbia. As the court explained, *Erie* requires federal courts to adhere to the substantive legal precedents of the highest court in the state. The District of Columbia, argued the court, should be treated as a state under the *Erie* doctrine, and thus, the circuit court in *Arbaugh's* should have been bound by the common law classification system.

108. *Id.* at 601. The court also concluded that the attractive nuisance exception to the general rule was not applicable to the facts of *Holland* as a matter of law. *Id.* at 603. Citing decisions from various jurisdictions throughout the country, the *Holland* court asserted that the "attractive nuisance exception does not apply as a matter of law in cases where child trespassers are injured by moving trains." *Id.* at 602.

As set forth in the RESTATEMENT (SECOND) OF TORTS, element (c) of § 339 provides that the attractive nuisance exception applies only when "children because of their youth do not

no policy reasons in support of its decision to retain the common law trespasser classification as it was defined in *Firfer v. United States*.[109] The court simply stated: "Having found the circuit court's attempt to modify District of Columbia case law in the 1972 *Arbaugh's* decision to be without precedential effect as to trespassers, we find no other compelling reason to abandon *Firfer*."[110] Therefore, in the District of Columbia, trespassers may only recover from landowners for injuries that resulted from willful or wanton conduct or from the maintenance of a hidden engine of destruction.[111]

B. The Effect of Holland: Has the Confusion been Resolved?

It would appear that the *Holland* court, by affirming the common law trespasser category as a duty-imposing label, has provided District of Columbia courts with a clearly defined and easily applied legal standard. Under this standard, courts can resolve the issue of a landowner's liability by simply categorizing a plaintiff as an unlawful land entrant. Such categorization, because it establishes the minimal duty of refraining from willful, wanton conduct or the maintenance of a hidden engine of destruction as the governing standard, facilitates elimination of the jury function by in-

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discover the condition or realize the risk involved in intermeddling with it or coming within the area made dangerous by it." *See supra* note 48 and accompanying text. In concluding that the plaintiff in *Holland* failed to satisfy element (c), the court stated: "There are certain obvious conditions which trespassing children can be expected to understand as a matter of law." *Id.* at 603. A moving train, reasoned the court, "is a danger so obvious that any nine-year-old child allowed at large would readily discover it and realize the risk involved in coming within the area made dangerous by it." *Id.*. For this reason, the *Holland* court held that the attractive nuisance exception was inapplicable.

Writing for the dissent, Judge Ferren expressed strong disagreement with the majority's treatment of the attractive nuisance doctrine. Attacking the court's absolute determination that the attractive nuisance doctrine will never apply to trespassing children struck by moving trains, Judge Ferren argued: "Not every child at large, to a certainty, will appreciate the danger of a train in every setting." *Id.* at 604. Thus, RESTATEMENT (SECOND) OF TORTS § 339 may be applicable to such situations. In addition, the dissent expressed disagreement with the majority's absolute determination that a railroad's burden in making track areas safe for children will always outweigh the likelihood of injury. The dissent stated: "The majority is much too rigid in refusing to admit there may be certain locations where, at minimal cost, the railroad significantly can reduce the risk to children—or even locations where a substantial cost may be warranted in view of a particularly high risk." *Id.* at 604.

Thus, the dissent concluded that the majority erred in applying an automatic railroad exemption to RESTATEMENT (SECOND) OF TORTS § 339. Railroad liability under this section, stressed Judge Ferren, should be decided on the facts of each case, not by the application of an absolute exemption. *Id.* at 605. The creation of such an exemption, concluded the dissent, if at all desirable, is a function of the District Council, not of the court. *Id.* at 606.

109. 208 F.2d 524 (D.C. Cir. 1953). *See supra* notes 25-26 and accompanying text.

110. *Holland*, 431 A.2d at 601.

111. *Id.*

creasing the likelihood of successful motions for summary judgments, directed verdicts, and judgments n.o.v. in favor of the landowner.[112] Thus, liability is often predicated solely on the facts that determine the trespasser's status rather than the standard of care exercised by the landowner.[113] When a trespasser case does reach the jury, the focus is usually directed toward determining whether the plaintiff is a trespasser, rather than whether the defendant acted negligently.[114]

The obvious effect of the *Holland* decision is that District of Columbia landowners remain insulated from liability to trespassers injured on their property. By limiting and often eliminating the jury function in trespasser cases, juries are prohibited from scrutinizing the conduct of the defendant, the party who is responsible for the particular condition of the premises in question. Such scrutiny, or lack thereof, ignores the "closeness of the connection between the injury and the defendant's conduct,"[115] as well as the potential for avoiding future harm to trespassers that could be realized through the use of a reasonableness standard. In addition, application of the trespasser classification and its corresponding duty prevents a jury

112. Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 103-04 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973). *See, e.g.*, *supra* note 44.

113. *Id.* at 104.

114. *See, e.g.*, Washington Metropolitan Area Transit Auth. v. Ward, 433 A.2d 1072 (D.C. 1981). In *Ward*, the plaintiff sustained injuries when she slipped on an oil-absorbing compound on the floor of the defendant's garage. The plaintiff, as she had done many times previously, entered the garage to deliver workclothes to her son, an employee of the defendant.

In reversing and remanding the trial court's judgment in favor of the plaintiff, the District of Columbia Court of Appeals stressed that the trial court's jury instructions "failed to require the jury to determine whether Ward was lawfully on the premises or a trespasser, and then to apply the appropriate standard of care." *Id.* at 1074. The court's statement is a revealing demonstration of the limited scope of the jury's inquiry under the common law system. Citing Holland v. Baltimore & O.R.R., 431 A.2d 597, 600 n.5 (D.C. 1981), the court again stressed that the *Arbaugh's* court's extension of a reasonable care standard to trespassers was purely dictum. 433 A.2d at 1074. Thus, "a trespasser may generally only recover for injuries that were willfully or wantonly inflicted, or caused by a hidden engine of destruction." *Id.*

Judge Ferren, in a concurring opinion, argued that the *Arbaugh's* standard of reasonable care under the circumstances should be extended to all land entrants. He stated:

> This case very well illustrates how status distinctions clutter the analysis. On the facts here, the question whether Ward was an invitee, licensee, or trespasser is a most difficult, even impressionistic one. A digression into that thicket gets in the way of the only straightforward—and proper—question for the jury: 'Did WMATA exercise reasonable care to protect Ward from injury, given all the circumstances including the extent to which WMATA indulged her presence on the premises?'

Id. at 1074-75.

115. Rowland v. Christian, 70 Cal. Rptr. 97, 103, 443 P.2d 561, 567 (1968).

from exercising one of its most vital functions—the application of changing community standards to the law.[116]

Depriving injured trespassers of a thorough jury analysis, in the words of the Supreme Court of Colorado, is to preserve "a harshness which is inappropriate to a modern legal system."[117] Courts tend to respond to such severity by carving out exceptions to the duty-imposing classification. The creation of these exceptions directly results from the difficulty encountered by courts in attempting to apply the rigid classification to a wide variety of factual situations.[118] The final product emerging from this process, as recognized by the *Arbaugh's* court, is "confusion and conflict and a toleration of exceptions which apply to individual cases."[119]

Based upon the historical treatment of the classification system in the District of Columbia, it is likely that District of Columbia courts will perpetuate the existence of various exceptions to the trespasser category as a means for softening the harshness of this duty-imposing label. The need which courts have felt, to "formulate increasingly subtle verbal refinements [and] to create subclassifications among traditional common-law categories,"[120] has created a body of law that is both unpredictable and open to arbitrary application. As a result, inequities arise when similar factual situations result in inconsistent decisions.[121] It was such inconsistency and confusion that the *Arbaugh's* decision attempted to eliminate.

The single standard of reasonable care, set forth in *Arbaugh's*, permits a jury analysis of all the circumstances of a particular case, including the conduct of both the landowner and the land entrant. The common law approach, however, prevents a thorough analysis of these same circumstances. For example, despite the obvious differences between a burglar and one who innocently wanders onto a landowner's property, both are treated identically under the common law approach. The reasonableness standard, however, permits an examination of the different motives of these unlawful land entrants, resulting in a more equitable analysis.

In refusing to adopt the *Arbaugh's* standard for trespassers, the District of Columbia remains one of the numerous jurisdictions that have only par-

116. *See* Mile High Fence Co. v. Radovich, 175 Colo. 537, 543, 489 P.2d 308, 312 (1971) (quoting Note, *Occupiers 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, 430 (1969)).

117. *Id.*

118. *See supra* notes 43-59 and accompanying text.

119. 469 F.2d at 103.

120. *Kermarec*, 358 U.S. at 630.

121. Peterson v. Balach, 294 Minn. 161, 168-69, 199 N.W.2d 639, 644 (1972).

tially abolished the common law classification system.[122] Although the District of Columbia Court of Appeals failed to set forth any policy reasons in support of retention of the trespasser classification, other jurisdictions retaining it have set forth various rationales for doing so. The Supreme Court of Massachusetts stressed that there is a fundamental difference between lawful and unlawful land entrants that warrants different standards of care.[123] In addition, the Massachusetts court emphasized that the possible differences between types of trespassers is negligible.[124] Similarly, other courts have set forth the fundamental difference between trespassers and other land entrants in support of retaining the unlawful land entrant category.[125]

By arguing that unlawful land entrants warrant different treatment from that afforded licensees and invitees, the courts are perpetuating a glaring inconsistency. Retaining the trespasser classification tends to encourage the kind of tradition-bound and mistaken analysis that the courts were attempting to correct through elimination of the other classifications.[126] In addition, emphasis on the relatively small differences between classes of trespassers ignores the varying circumstances that may surround a trespasser's entrance upon land.[127] A negligence standard, on the other hand, would allow consideration of these varying circumstances.

Some judges have argued that elimination of the trespasser classification will, in effect, make the landowner an insurer for those who enter upon his or her land, thus imposing an excessive financial burden.[128] Such a fear is unwarranted, however, since a standard of "reasonableness under the cir-

122. *See* Mounsey v. Ellard, 363 Mass. 693, 297 N.E.2d 43 (1973) (policeman slipped on ice after serving summons at defendant's house); Peterson v. Balach, 294 Minn. 161, 199 N.W.2d 639 (1972) (eleven-year-old house-guest asphyxiated by carbon monoxide released from gas refrigerator); Antoniewicz v. Reszcynski, 70 Wis. 2d 836, 236 N.W.2d 1 (1975) (family friend slipped on icy back porch); Alexander v. General Accident Fire & Life Assurance Corp., 98 So. 2d 730 (1957) (woman tripped on carpet while guest of son-in-law); Connecticut abolished the licensee/invitee distinction by statute. CONN. GEN. STAT. ANN. § 52-557a (West Supp. 1977).

123. Mounsey v. Ellard, 363 Mass. at 707 n.7, 297 N.E.2d at 51 n.7.

124. *Id.*

125. *See* Peterson v. Balach, 294 Minn. 161, 164-65, 199 N.W.2d 639, 642 (1972); Antoniewicz v. Reszcynski, 70 Wis. 2d 836, 843-45, 236 N.W.2d 1, 4-5 (1975).

126. *See* Mounsey v. Ellard, 363 Mass. 693, 717, 297 N.E.2d 43, 57 (1973) (Kaplan, J., concurring).

127. *See* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?*, 36 MD. L. REV. 816, 843; Comment, *Duty of Owners and Occupiers of Land to Persons Entering the Premises: Should Pennsylvania Abandon the Common Law Approach?*, 17 DUQ. L. REV., 153, 161 (1978-79).

128. *See, e.g.*, Smith v. Arbaugh's Restaurant Inc., 469 F.2d 97, 108 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973) (Leventhal, J., concurring); Basso v. Miller, 40 N.Y.2d 233, 248, 352 N.E.2d 868, 877, 386 N.Y.S.2d 564, 573 (1976) (Breitel, J., concurring).

cumstances," in the words of the *Arbaugh's* court, "does not leave the jury awash, without standards to guide its determination of reasonable conduct."[129] The financial ability of the landowner to maintain his or her premises is an important factor to be considered by the jury in determining whether conduct was reasonable.[130] Such a consideration guards against placing an excessive burden on land owners.

IV. CONCLUSION

The *Holland* decision represents a partial retention of the rigid common law classification system in the District of Columbia. By predicating landowners' liability to trespassers on the technical status of the land entrant, plaintiff-trespassers are deprived of a complete jury analysis that would consider all of the relevant circumstances in a particular suit. Such limited analysis will cause inequitable results by preventing examination of both the culpable activities of defendant-landowners and the reasons for the trespasser's entrance onto land. In addition, the continued use of exceptions to the harsh common law standard will perpetuate the confusion and uncertainty in this area of the law. In rejecting the application of a reasonableness standard to trespassers, the *Holland* decision has reaffirmed the use of an outdated legal fiction.

John M. Devaney Jr.

129. 469 F.2d at 105.
130. *Id.* at 107; *accord* Cooper v. Goodwin, 478 F.2d 653, 656 (D.C. Cir. 1973).