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Torts

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compensation under the act is not afforded for all types of injury,[56] there has been considerable dissatisfaction with the "exclusive remedy" principle of workmen's compensation acts.[57] If the legislature responds to the agitation thus created by allowing suits against persons who are now immune, the same problems presented by the *Hammack* case will recur.

Perhaps the *Hammack* decision can be rationalized as a policy decision in keeping with the exclusive remedy principle of workmen's compensation acts by strictly construing those causes of action that are allowed. This theory is greately weakened by the *Nogosek* case which implies that this reasoning will be extended to other statutory causes of action and defenses as well.

THOMAS B. GRAHN

TORTS

Torts—Violation of Civil Rights—Damages. In *Browning v. Slenderella Systems*[1] the Washington Supreme Court allowed nominal damages for embarrassment and humiliation caused by a discriminatory refusal of service. The action was brought under the public accommodations law,[2] which is criminal in form.

Mrs. Browning, a Negro, went to the defendant's salon for a courtesy demonstration of Slenderella reducing treatments. Although an appointment had been arranged in advance by telephone, she was asked to wait a few minutes before being served. Nearly two hours later she was still waiting for her treatment. During this time other ladies came and were served without undue delay. Mrs. Browning asked a receptionist if she would ever be served and received an evasive reply. The manager was summoned and Mrs. Browning was informed that the salon had never served one who was not Caucasian and that she would not be happy there. This conversation was private and no public scene was created. No physical violence was threatened. Mrs. Browning left without being served; shortly thereafter this action was commenced

[56] The case of Hand v. Greyhound Corp., *supra* note 17, furnishes a good example. Plaintiff was injured in a traffic collision and suffered severe facial disfigurement. This type of injury is not covered by the act, and the plaintiff was denied his suit against the third party tort-feasor because of the immunity proviso. It was partly as a result of the *Hand* case that the legislature abolished the immunity proviso.

[57] See SOMMERS & SOMMERS, WORKMEN'S COMPENSATION 191 (1954).

[1] 154 Wash. Dec. 556, 341 P.2d 859 (1959).

[2] RCW 9.91.010: "(2) Every person who denies to any other person because of race, creed, or color, the full enjoyment of any of the accommodations, advantages, facilities or privileges of any place of public resort, accommodation, assemblage, or amusement, shall be guilty of a misdemeanor."

for damages for the "embarrassment, humiliation, mental anguish, and emotional shock" suffered as a consequence of the discrimination against her.

The trial court found that the defendant's salon was within the meaning of a "place of public resort, accommodation, assemblage, or amusement," under the statute,[3] that an act of discrimination had been committed against the plaintiff on account of her race or color, and that damages of $750 were warranted.

On appeal the supreme court affirmed, declaring that discrimination may arise without threats of physical violence, through "subtleties of conduct," and that a civil action may be maintained under the criminal statute. The court felt that severe emotional distress was not shown, however, and the damages were therefore reduced to $100.

It is well settled in Washington law that an action for damages may be maintained under the public accommodation law. The theory stems from *Anderson v. Pantages Theatre Co.*,[4] where it was held that the statute confers upon all persons, regardless of race, creed, or color, the right to be admitted to public places. If this right is violated, according to the *Anderson* case, the person discriminated against has a civil remedy against the wrongdoer which is in no way affected by the fact that the state may act through the sanctions of the criminal law. This reasoning was reviewed and accepted in subsequent cases.[5] It has not been repudiated by the legislature, although the civil rights statutes have twice undergone revision.[6] It is clearly stated in the recently amended "Law Against Discrimination" statute[7] that the civil rights legislation there enacted is in addition to other enforcement measures in the civil rights area.[8]

In prior cases brought under the public accommodation statute, the discriminatory acts involved more than "subtleties of conduct." In

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[3] RCW 9.91.010. This determination was not contested on appeal.

[4] 114 Wash. 24, 194 Pac. 813 (1921).

[5] Powell v. Utz, 87 F. Supp. 811 (W.D. Wash. 1949); Randall v. Cowlitz Amusements, Inc., 194 Wash. 82, 76 P.2d 1017 (1938).

[6] RCW 9.91.010 was revised in 1953. RCW 49.60 was revised in 1957.

[7] RCW 49.60.020.

[8] A person aggrieved by a discriminatory practice may pursue a remedy in a civil action as in the instant case, or he may elect to invoke an administrative remedy by appealing to the Washington State Board Against Discrimination. According to RCW 49.60.020, he may not pursue both. Should the latter remedy be elected, a tribunal of the board (if an act of discrimination is proved in an adversary proceeding) will endeavor to solve the matter by "conference, conciliation, and persuasion." If this is ineffective the board is empowered to issue a cease and desist order against the wrongdoer. An award of damages by the board is not a legal impossibility, but the chances of such action are remote. See Note, 32 WASH. L. REV. 185 (1957).

the *Anderson* case,[9] and in the subsequent case of *Randall v. Cowlitz Amusements, Inc.*,[10] as well, the wrongdoer employed threats and active force in preventing the plaintiff from entering a public place. It now appears that no threat need be shown. If refusal of service, or of admittance to a public place, is based solely upon race or color, the statute is violated, a cause of action arises, and the rules of recovery for intentional torts are applicable.

The Washington court has previously allowed compensatory damages for mental distress resulting from outrageous acts, even though no physical injury was shown.[11] The court in the instant case summarily classified discrimination as an outrageous act, but felt that substantial damages would be more than compensatory and therefore punitive. It is well settled in Washington law that punitive damages will not be allowed unless provided by statute.[12] Hence, the measure of damages is that indemnity which will afford an adequate compensation for the injury sustained.[13]

The rule promulgated by the *Restatement of Torts*[14] recognizing the intentional causing of "severe emotional distress" as a separate tort and approving recovery for the distress itself was clearly accepted by the court. The plaintiff lost her award of substantial damages because she did not prove *severe* emotional distress. By implication it appears that a violation of the statute followed by severe emotional distress will qualify a plaintiff for an award of substantial damages. The language in the opinion is susceptible to the broader interpretation that any intentional act causing severe emotional distress gives rise to a tort action. The court had not heretofore fully accepted the *Restatement* rule.

The award of $100 damages is subject to dual interpretation. It is not clear whether the award is compensation for the embarrassment and humiliation suffered or a judicially imposed penalty for violation of the statute. If the damages are compensatory, it would seem that a plaintiff in a subsequent case could recover at least $100 upon showing a violation of the statute resulting in embarrassment, with a chance of

[9] 114 Wash. 24, 194 Pac. 813 (1921).
[10] 194 Wash. 82, 76 P.2d 1017 (1938).
[11] Nordgren v. Lawrence, 74 Wash. 305, 133 Pac. 436 (1913).
[12] Anderson v. Dalton, 40 Wn.2d 894, 246 P.2d 853 (1952); Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45, 25 Pac. 1072 (1891).
[13] Dyal v. Fire Cas. Adjustment Bureau, 23 Wn.2d 515, 161 P.2d 321 (1945).
[14] § 46 (1948 Supp.): "Conduct Intended to Cause Emotional Distress Only. One who, without a privilege to do so, intentionally causes *severe* emotional distress to another is liable (a) for such emotional distress, and (b) for bodily harm resulting from it." [Emphasis added.] See PROSSER, TORTS § 11 (2d ed. 1955).

recovering a greater amount, depending upon the degree of indignity suffered. If this is the view of the court, liability has been extended further than most courts have been willing to go. The general rule is that recovery is not allowed for personal insults or embarrassment and humiliation.[15] When damages have been allowed, they have been labeled punitive rather than compensatory.[16] The difficulty with this interpretation is that it contradicts the test adopted by the court—that compensatory damages are allowable only if *severe* emotional distress is shown.

The other possible interpretation of the award, *i.e.*, that the assessment is a penalty for violation of the statute, is equally beset with perplexity. Since the statute does not provide any recovery for a simple violation, even an award of nominal damages could be attacked as contrary to the rule against punitive damages. One could argue that reduction of the amount was but a palliative measure.

If one accepts the premise enunciated by the majority that "racial discrimination is a wrong that must be remedied,"[17] the result in *Browning v. Slenderella Systems* can be rationalized. When an act of discrimination is committed, rarely will severe emotional distress follow, and the wrongdoer will escape civil liability. By allowing $100 damages the court imposes some liability for violation of the statute, yet a solid precedent allowing recovery for mere embarrassment is not established. The rule against punitive damages, winked at by the court, may not be strictly adhered to, but the effect of this is justifiable if one assumes that a person discriminated against will always suffer some embarrassment or humiliation.

By any analysis the result puts teeth in the public accommodation law.[18] The decision indicates that the court is sensitive to problems of racial discrimination. This attitude will no doubt be reflected in subsequent cases involving civil rights legislation.

LLOYD W. PETERSON

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[15] Wallace v. Shoreham Hotel Corp., 49 A.2d 81 (Mun. App. D.C. 1946); PROSSER, TORTS § 11 (2d ed. 1955).

[16] *E.g.*, Saunders v. Gilbert, 156 N.C. 463, 72 S.E. 610 (1911).

[17] 154 Wash. Dec. 556, 561, 341 P.2d 859, 863 (1959).

[18] This was recognized by two dissenting justices, whose opinion expounded the theory that discrimination is but another word for free choice. The opinion was anchored by declarations that the thirteenth amendment to the United States Constitution granted Caucasians as well as Negroes freedom from involuntary servitude. The argument of the dissenters encompasses but fails to address the specific problem, *i.e.*, whether one may refuse to serve another solely on the basis of race or color. For a recent commentary advocating views similar to those expressed in the dissent see Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 33-34 (1959).

Personal injuries as community property—*Res ipsa loquitur.* The case of *Chase v. Beard*[1] presents an interesting contrast in the court's treatment of two old and vexing problems. Admiration for the court's willingness to cut through the obfuscation enshrouding the so-called "doctrine" of *res ipsa loquitur* is diminished somewhat by its unwillingness to abandon the indefensible and illogical position that in a community property state any recovery for personal injuries to the wife is community property.

The case arose from the following facts: The plaintiff husband rented a cabin from the defendant motel owners. When the defendant was showing the cabin to the husband, the latter stated that his wife would join him shortly and they would live in the motel until they could purchase and move into a home of their own. The defendant at this time warned the husband that the outside porch of the cabin was "shaky." Eight days after the rental the wife arrived. Twelve days after her arrival she was injured when a board on the porch gave way beneath her. Plaintiff brought suit for negligent maintenance of the premises. The defendant denied negligence and alleged that the wife was contributorily negligent. The plaintiffs appealed from an adverse judgment. Error was assigned to (1) the trial court's instruction on contributory negligence and the refusal to charge that plaintiffs were not contributorily negligent and (2) the refusal to instruct on the theory of *res ipsa loquitur*. The court's discussions of these two points in affirming the judgment of the trial court are examined seriatim.

The court, in sustaining the instruction on contributory negligence, said: "The community property system is an important factor in dealing with contributory negligence. Any recovery for personal injuries to the wife is community property."[2] That this has been the rule in Washington is unquestioned.[3] It is submitted, however, that the reasoning supporting this rule is as "shaky" as the defendant's porch. The general analysis and criticism of this position by one scholar[4] seems particularly applicable to the Washington court's rationale. Professor de Funiak points out that this rule arises from an "incomplete understanding of the true principles of community property;"[5] this misunderstanding in turn leads to a too literal interpretation of the stat-

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[1] 155 Wash. Dec. 57, 346 P.2d 315 (1959).
[2] *Id.* at 62, 346 P.2d at 318 (1959).
[3] Hawkins v. Front Street Cable Ry., 3 Wash. 592, 28 Pac. 1021 (1892), is the leading case; Comment, 1 WASH. L. REV. 129 (1925).
[4] 1 DE FUNIAK, COMMUNITY PROPERTY, § 82 (1943).
[5] *Id.* § 82 at 225.

utes.[6] Property acquired before marriage remains separate property, of course. It is difficult to believe that while a husband or wife may retain a separate interest in an automobile or silverware acquired before marriage, they may not retain a separate interest in the limbs of their bodies. The Washington statute,[7] however, provides that property acquired after marriage other than by gift, devise, or inheritance is community property. From this the court reasons that since the right to sue in tort is a chose in action acquired after marriage otherwise than by "gift, bequest, devise or descent [it] is common or community property."[8]

> But this overlooks the principles of onerous and lucrative titles and other pertinent principles. Except for gifts clearly made to the marital community, community property only consists of that which is acquired by onerous title, that is, by labor and industry of the spouses, or which is acquired in exchange for community property. . . . It must be plainly evident that a right of action for injuries to person, reputation, property or the like, or the compensation received therefor, is not property acquired by onerous title. The labor and industry of the spouses did not bring it into being. . . .[9]

Compensation by way of damages in tort is designed to make whole an injury. It would seem that in reality there may be two injuries arising from one act physically harming a spouse: (1) an injury to the spouse as an individual for pain and suffering[10] and (2) injury to the community for medical expenses incurred or loss of earnings of the spouse.[11] Washington and a number of community property states fail to recognize this distinction. It is indeed lamentable that at this late date the courts cling to a concept that is but a reflection of medieval chattel status of a wife.[12] Four jurisdictions,[13] either by statute or case law or both, have recognized the only logical and defensible position, *i.e.*, that compensation received for personal injuries sustained by the husband or wife shall be the separate property of the spouse sustaining

[6] *Ibid.*
[7] RCW 26.16.010—.030.
[8] Hawkins v. Front Street Cable Ry., 3 Wash. 592, 595, 28 Pac. 1021, 16 L.R.A. 808 (1892).
[9] DE FUNIAK, *supra* note 4 § 82 at 225.
[10] Fredrickson & Watson Constr. Co. v. Boyd, 60 Nev. 117, 102 P.2d 627 (1940).
[11] Simon v. Harrison, 200 So. 476 (La. App. 1941) (loss of income); Shield v. F. Johnson & Son Co., 132 La. 773, 61 So. 787, 47 L.R.A. (N.S.) 1080 (1913) (medical expenses).
[12] See Zaragosa v. Craven, 33 Cal.2d 315, 202 P.2d 73, 6 A.L.R.2d 461 (1949) (dissenting opinion).
[13] California: CAL. CIV. CODE ANN. § 163.5 (1957). Louisiana: LA. CIV. CODE Act 2402; Simon v. Harrison, *supra* note 11; Shield v. F. Johnson & Son Co., *supra* note 11. Nevada: Fredrickson & Watson Constr. Co. v. Boyd, *supra* note 10. New Mexico: Soto v. Vandeventer, 56 N.M. 483, 245 P.2d 826, 35 A.L.R.2d 1190 (1952).

such injuries. It appears that since the Washington court has consistently followed the contrary position for nearly seventy years, any change must come through the legislature.

The court made short work of the errors assigned to the instruction on contributory negligence and the instruction that notice of the condition of the porch was imputed to Mrs. Chase. The court reasoned that since the husband was acting as agent for the community, the normal rules of agency applied. Notice to the agent is notice to the principal; therefore, knowledge of the condition was imputed to the wife, thereby raising a jury question "whether she had conducted herself in a proper manner for her self-protection under the circumstances.[14] The application of this agency concept in the marital partnership makes sense only when it is restricted to its proper area, that is, to business transactions in which the husband is acting for the wife and notice to him of a defect in title, for example, is imputed to the wife so as to prevent her from being a bona fide purchaser or holder in due course.[15]

It is suggested that a better analysis would be to distinguish between the two classifications of the injuries sustained: (1) the personal injury of the wife involving her pain, suffering, and possible disfigurement, and (2) injury to the community in the medical expenses incurred and the resulting loss of earnings of the wife. As to the former there should be no imputation of notice, and contributory negligence of the husband should not be a bar. The conversation between the defendant and the husband is relevant only as it presents the question of whether the defendant motel operator acted reasonably in telling only the husband of the defective porch. This analysis is in keeping with the traditional tort concepts of negligence. If the defendant acted reasonably his duty is discharged; he did not later breach any duty and, therefore, could not be negligent. As to the latter classification—injury to the community—notice to the husband standing alone should

[14] 155 Wash. Dec. 57, 63, 346 P.2d 315, 319 (1959).

[15] The cases cited to support the broad proposition that "this general rule of agency applies when a husband is acting as agent for his wife" do not go beyond the logical boundary suggested. B. F. Goodrich Co. v. Naples, 121 F. Supp. 345, 356 (D.C. 1954) ("[t]he husband, under his power to manage the community property, may bind it by acts which amount to fraud or deceit. To *this* extent, the rule of agency applies, which holds the principal through notice to the agent"); Morgan v. Bruce, 76 Ariz. 121, 259 P.2d 558 (1953) (husband's knowledge of third party interest prevents wife from being an innocent purchaser for value without notice); Palo Alto Bldg. Co. v. Jones, 81 Cal. App.2d 725, 185 P.2d 25 (1947) (wife could not be an innocent purchaser since husband had knowledge of a loan and a mistake in the transfer and was deemed to have communicated those facts to his wife); Young v. Neill, 190 Ore. 161, 220 P.2d 89 (1950) (agency implied by conduct, wife bound by estoppel).

not bar recovery. The question here is whether the husband was contributorily negligent in failing to notify his wife of the defect, thereby barring the community from recovery. Stated another way, the community should be barred only if (1) the wife should have noticed the defect (*i.e.*, an obvious defect) and taken greater care, or (2) the husband was guilty of contributory negligence in failing to warn his wife of the shaky porch.

The court, in discussing the error assigned to refusal of the trial court to instruct on the doctrine of *res ipsa loquitur*, spoke in a forthright and sensible manner and put the so-called "doctrine" in its proper place.

The court prefaced its remarks by pointing out that the "doctrine" is not a doctrine at all and not a rule of substantive law, but a rule of evidence. A brief but scholarly discussion of conflict and confusion surrounding this so-called "doctrine" is followed by a terse statement of principle which effectively limits the procedural aspects of *res ipsa loquitur*. "In cases in which the so-called 'doctrine' is applicable, its primary purpose is to withstand the defendant's challenge of a non-suit. It did so here. There was no necessity for any instruction."[16] The jury is not to be instructed that there would be an inference of negligence from a given state of facts. They are to be instructed that negligence is to be proved but they may, in their discretion, draw an inference that the occurrence could not have happened but for the negligence of the defendant.[17]

The real question is: In what situation is the so-called "doctrine" applicable? Prior to this decision rather strict criteria had to be met in order for the "doctrine" to apply. In Washington the conditions precedent to its application have been thus stated: (1) It must be an occurrence of a type that would not normally happen without fault, (2) the defendant or his servant must be in exclusive control of the instrumentality inflicting the injury, and (3) the defendant must have superior knowledge concerning the circumstances surrounding the injury.[18]

It does not seem inappropriate to suggest that under the rationale of the instant case these heretofore immutable rubrics have given way

[16] 155 Wash. Dec. 57, 65, 346 P.2d 315, 320 (1959).

[17] *Id.* at 66, 346 P.2d at 320. The court quotes approvingly from Palmer Brick Co. v. Chenall, 119 Ga. 837, 843, 47 S.E. 329, 330 (1904), outlining what the jury should be told.

[18] Morner v. Union Pac. R.R., 31 Wn.2d 282, 196 P.2d 744 (1948), and cases cited therein. For an analysis of Washington case law on *res ipsa loquitur* see Comment, 13 WASH. L. REV. 215 (1938), and Comment, 27 WASH. L. REV. 147 (1952).

to a broad test of probative value. The trial judge, in passing on a motion for nonsuit or dismissal, need only ask himself: Has the plaintiff stated sufficient facts and circumstances surrounding his injury that reasonable men could infer that the injury could not have occurred but for lack of due diligence on the part of the defendant? If the answer is "yes," then the motion should be denied, thereby permitting the question to reach the jury. Since the "doctrine" is a rule of evidence, the test should be probative weight rather than iron clad rules. If the reasonable inference covers all of the necessary elements of negligence and points to a breach of duty by the defendant, then the plaintiff has stated a jury question.

ROBERT D. DUGGAN

Defamation.[1] In 1959 the Washington court en banc decided two important cases involving those irascible "siamese-twins"—libel and slander.

The first case, *Grein v. La Poma*,[2] involved the question whether it was slanderous per se to call another a "communist." The court based its affirmative answer on alternative grounds. First, it observed that, by the weight of authority, if the defendant's accusation had been in writing rather than oral, it would have been libelous per se.[3] The court then stated, after liberal quotations from legal treatises deprecating the distinction between libel and slander, that: "There ought not to be any distinction between oral and written defamation. It is entirely a matter of judge-made law, and English judges at that."[4] Implicit in this quotation is the assumption that there has been a distinction between libel and slander in the Washington law of defamation. The error of this assumption is discussed below.

The second ground proceeds on the old concept of words actionable

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[1] See Comment, 30 WASH. L. REV. 36 (1955), for a collection of cases and comment.

[2] 154 Wash. Dec. 457, 340 P.2d 766 (1959). This case is also noted in: 33 So. CAL. L. REV. 104; 11 SYRACUSE L. REV. 119. Both Notes take the position that the Washington court abolished the distinction between libel and slander in the instant case, whereas this Note develops the thesis that all practical distinctions between libel and slander have long since been eliminated by the court.

[3] A difficulty arises when citing other jurisdictions for the proposition that a publication is libelous per se, because that term "per se" can be used in two senses, as is pointed out below. Washington has generally used "per se" in the sense that special damages need not be alleged and proved, whereas some jurisdictions use "per se" in the sense that the words are clearly defamatory on their face. Of the cases cited by the court, two use the term "per se" in the sense of "clear on its face." Utah State Farm Bureau Fed. v. National Farmers Union Serv. Corp. 198 F.2d 20 (10th Cir. 1952); Parmelee v. Hearst Pub. Co., Inc., 341 Ill. App. 339, 93 N.E.2d 512 (1950) (by implication, libelous per se to write that one is a communist).

[4] 154 Wash. Dec. at 461, 340 P.2d at 768 (1959).

without proof of special damages, that is — slanderous per se.[5] The court held that to call one a "communist" is to impute a crime[6] and is therefore slanderous per se.

The court implied that the elimination of the distinction between libel and slander is a new principle in Washington. The court, however, has long since obliterated any practical distinction between an action brought on a libel theory or a slander theory. This has been accomplished in Washington by infusing into the law of libel the slander concept of words actionable per se and those words that are actionable only upon pleading and proof of special damages (sometimes called *per quod*).[7]

At common law, aside from the distinction based on the form of the publication, there was a more significant distinction between libel and slander, based upon the pleading and proof of special damages. An action for libel could be maintained by the mere showing of the defamatory nature of the publication, whereas an action for slander could be maintained only upon pleading and proof of special damages, unless the statement fell within a certain class deemed actionable per se.[8] The law imputed an injury to the reputation of the plaintiff in an action for libel, apparently because of the wider circulation and permanence of the written form[9] and the credibility given to the written word by an illiterate populace at the time the law was developing.[10] Slander, on the other hand, was viewed as causing only limited injuries which could be best handled by "patching up the personal quarrels involved"[11] and therefore was actionable only upon proof of special damages unless it fell within the proscribed classification.[12]

The Washington court, apparently to reconcile and harmonize the law of libel and slander, appended to the word libel the words "per se." This bit of judicial plastic surgery has been criticized[13] on the grounds

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[5] To be slanderous per se the oral defamation must fall within a certain category: (1) imputation of a serious crime; (2) the imputation of certain loathsome diseases; (3) imputation affecting the plaintiff in his business, trade, profession, or office; or (4) in some jurisdictions, the imputation of unchastity in women. *Cf.* RCW 9.58.110 (1909). PROSSER, TORTS § 93 (2d ed. 1955). This category was expanded to include the statutory definition of libel in Magee v. Cohn, 187 Wash. 157, 59 P.2d 1131 (1936). See note 18 *infra*.

[6] RCW 9.81.020-.030 (1951). (Subversive Activities statute, making subversive activities or membership in a subversive organization a felony.)

[7] Urban v. Helmick, 15 Wash. 155, 45 Pac. 747 (1896), was the first Washington case to adopt the libel per se concept.

[8] Note 5 *supra*; GATLEY, LIBEL AND SLANDER 2 (4th ed. 1953).

[9] GATLEY, LIBEL AND SLANDER 4 (4th ed. 1953).

[10] PROSSER, TORTS § 93 (2d ed. 1955).

[11] SPRING, RISKS AND RIGHTS § 20 (1952).

[12] See note 5 *supra*.

[13] Burke, *Libel per se*, 14 CALIF. L. REV. 61 (1925).

that it neither reconciles nor harmonizes the law of defamation.[14] The effect, however, has been to require proof of special damages in those cases which are not deemed libelous per se,[15] thereby removing the practical distinction between libel and slander. While the criticism may be sound as to other jurisdictions, the fact remains that as far as the Washington law is concerned: "[I]t is safe to say that, though they are discussed separately, there are no substantial differences in the rules of civil libel and slander as they exist in Washington."[16]

This is not to say that the law is free from confusion. On the contrary, the area is fraught with uncertainty, principally because the phrase "per se" is capable of two meanings: (1) the words are clearly defamatory on their face, or (2) the words are actionable without proof of special damages. An attempt to clarify the confusion can be found in the second defamation case to reach the court in 1959, *Purvis v. Bremer's, Inc.*[17]

The *Purvis* case involved an alleged libel of a lawyer-legislator. The plaintiff pleaded special damages but did not state with particularity how the damages occurred. The trial court sustained the demurrer of the defendant and entered judgment of dismissal. The plaintiff appealed. Since the special damages were not pleaded with particularity, no cause of action was stated unless the words were libelous per se.

Libel per se has been defined in Washington in the terms of RCW

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[14] Burke reasons that if per se is used in the "clear on the face sense" the words would be actionable wherever the meaning of the writing was clear, whereas in slander the words would be actionable per se only in certain enumerated cases.

> The addition of the requirement of special damage in cases of libel where the meaning of the words is covert would seem, therefore, not to have the effect of harmonizing the law of slander and libel but rather to add another anomaly to the Anglo-American law of defamation.
>
> . . . If the term libel per se is used in the sense of the non-essentiality of special damage, it is properly applied whenever the law will protect one's reputation as such regardless of any pecuniary loss. Where the meaning of the words used is covert but has been rendered clear to the satisfaction of the court and jury by proper innuendo, colloquium and explanatory circumstances, there seems to be no good reason why the law should not allow recovery for the loss of reputation just as readily as in cases where unequivocal language appears. Thus, it will be seen that if the term actionable per se is used in this sense, every written defamation will be a libel per se or will not be libelous at all. *Id.* at 65, 66.

[15] Blende v. Hearst Publications, Inc., 200 Wash. 426, 93 P.2d 733 (1939) (newspaper article implying that plaintiff, a physician, had made an incomplete diagnosis of patient who subsequently died, it not being intimated that an earlier diagnosis would have saved the patient); Velikanje v. Millichamp, 67 Wash. 138, 120 Pac. 876 (1912) (letter charging that an attorney had presented forged receipts and attempted to collect money on them, it not being charged that he forged the receipts or knew of the forgery).

[16] Comment, 30 WASH. L. REV. 36, 37 (1955). This statement follows from the decision in Magee v. Cohn, 187 Wash. 157, 59 P.2d 1131 (1936), which expanded the common law classifications of slander per se to include the statutory definition of libel. The criticism that the words "per se" are capable of two meanings is still valid.

[17] 154 Wash. Dec. 891, 344 P.2d 705 (1959).

9.58.010,[18] absent the element of malice, which is applicable only to criminal libel.[19] The court, in enlarging the test of what constitutes libel per se, said it is not limited to publications which are "so clearly defamatory that it ceases to be a question of fact for the jury . . . and becomes a question of law to be determined by the court. . . . The test actually is whether the language used concerning a person and his affairs must from its nature, or presumably will as its natural consequence, occasion him pecuniary loss."[20] Such a publication, said the court, is prima facie a wrong, actionable without proof of special damages, and is said to be libelous per se.

> Where the definition of what is libelous per se goes far beyond the specifics of a charge of a crime, or of unchastity in a woman, into the more nebulous area of what exposes a person to hatred, contempt, ridicule or obloquy, or deprives him of public confidence or social intercourse, the matter of what constitutes libel per se becomes, in many instances, a question of fact for the jury.[21]

The court found a jury question on the basis of this test as to two specific statements, and a jury question when considering the writing as a whole, for the jury could find that: "it tended to deprive the plaintiff of the benefit of public confidence and to injure him in his standing in his profession, and was, therefore, libelous per se."[22]

It would seem that the court is actually using the words per se in both senses; that is, if the words are not clearly defamatory on their face they can still be libelous per se by the circumstances and innuendo, and special damages need not be proved. The practical effect of this test is to make the alleged defamatory statement either libelous per se or not defamatory at all. If the court cannot rule as a matter of law that the words were libelous per se, the jury may so find as a matter of fact. The court's enumeration of the "nebulous area" in which a jury question is raised seemingly covers the entire ground of what could constitute a defamation. The net effect of this is to require a finding of an actionable defamation or no defamation at all.

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[18] RCW 9.58.010 (1935), provides: "Every malicious publication by writing, printing, picture, effigy, sign [,] radio broadcasting or which shall in any other manner transmit the human voice or reproduce the same from records or other appliances or means, which shall tend: (1) To expose any living person to hatred, contempt, ridicule or obloquy, or to deprive him of the benefit of public confidence or social intercourse; or . . . (3) To injure any person, corporation or association or persons in his or their business or occupation, shall be libel. Every person who publishes a libel shall be guilty of a gross misdemeanor.

[19] Ziebell v. Lumbermens Printing Co., Inc., 14 Wn.2d 261, 127 P.2d 677 (1942), and cases cited therein.

[20] 154 Wash. Dec. at 899-900, 344 P.2d at 711.

[21] *Id.* at 900, 344 P.2d at 711.

[22] *Id.* at 902, 340 P.2d at 712.

The words "per se" have, by the test, become surplusage, and their continued use can only result in more confusion. To speak in terms of "actionable without proof of special damages" is now redundant, for under the "test" the court or the jury must find the words to be actionable or not defamatory at all. If as a matter of law or fact the words cannot be given a defamatory meaning, no tort has been committed. In such a case the plaintiff who alleges special damages cannot thereby save his action, for if there is no tort there can be no liability for damages.

The *Grein* case re-emphasizes the court's desire to treat oral and written defamation in the same manner. The *Purvis* case indicates a more liberal approach to the determination of what is actionable. In light of both cases, the Washington law of libel and slander could be clarified by referring to the twin torts as a single wrong—"Defamation." Further, the use of the words "per se" should be discontinued. The continued use of these words can only stifle the clarification of this amorphous area of the law.

ROBERT D. DUGGAN

Torts—Storekeeper's Liability. A storeowner owes his patrons a continuous duty to keep his floors reasonably safe.[1] However, the Washington Supreme Court in *Pement v. F. W. Woolworth Co.*[2] noted: *"Firmly embedded in the decisional law of this state is the principle that the slippery condition of a floor does not prove negligence."* Quoting a dance hall case,[3] the court then included slipperiness resulting from waxing. Taken loosely this broad language has misleading implications, probably not intended by the court, and clearly conflicting with the context of this case and prior decisions.

In 1953 Mrs. Pement was crippled for life by a fall in Woolworth's Wenatchee store. Her fall, she claimed, was caused by the slickness of the store's highly-polished worn and wooden floors. Woolworth denied

[1] Liability for slippery conditions of the floor has been extensively annotated: Slippery floor because of waxing: 63 A.L.R.2d 591 (1959); personal injuries generally: 100 A.L.R. 710 (1936), 58 A.L.R. 136 (1929), 46 A.L.R. 1111 (1927), 43 A.L.R. 866 (1926), 33 A.L.R. 181 (1924), 5 A.L.R. 282 (1920), and 21 L.R.A.N.S. 456 (1909). Other than shops: 118 A.L.R. 425 (1939); 61 A.L.R. 1289 (1929), and 22 A.L.R. 610 (1923); Tracked-in water, snow, etc.: 62 A.L.R.2d 6 (1958); Washing or cleaning: 63 A.L.R.2d 694 (1959); Debris on floor: 61 A.L.R.2d 6 (1958); Defect in floor covering: 64 A.L.R.2d 335 (1959). Annotations on the related area of slippery steps are: 64 A.L.R.2d 471 (1959); defect, 64 A.L.R.2d 398 (1959); debris, 61 A.L.R.2d 174 (1958); lighting, 66 A.L.R.2d 443 (1959), and for amusements, 55 A.L.R.2d 866 (1957).

[2] 153 Wash. Dec. 722, 723; 337 P.2d 30, 31 (1959).

[3] Kalinowski v. Y.W.C.A., 17 Wn.2d 380, 391, 135 P.2d 852, 858 (1943): "Furthermore, negligence is not proven by showing that the floor had been waxed and as a result was slippery."

any slipperiness or recent polishing. The floor dressing itself was a widely-used, non-slip chemical compound, which will not become slick unless negligently applied. The jury found for Woolworth, upon being instructed to award damages only if the store had applied too much polish. Mrs. Pement appealed, contending that the jury should have been given more leeway.

Probably the instructions fully covered the pleadings and proof, except for the possibility that the waxing itself might have constituted negligence.[4] The broad wording of the court was, then, apparently intended to restate the oft-repeated presumption:[5] the existence of a waxed surface in a retail store, per se, neither makes the floor "unreasonably unsafe" nor the storeowner "negligent." Instead, the court inadvertantly inserted the phrase "slippery condition" for "waxed surface" and made the statement universal. This invites confusion. "Slippery" and "slippery condition" usually denote a greater degree of smoothness than the normal tolerance for store floors. Washington's previous decisions had used this shorthand connotation.[6] Thus, the court's unequivocal language can easily be misunderstood as creating a new legal rule that would preclude a finding of negligence in the manner of waxing on evidence of a slick floor, waxing too often,[7] or application of any wax on certain types of flooring materials[8] or on sloping ramps.[9]

That result offends common sense, but it might gradually gain un-

[4] This possibility was advanced in argument in Hanson v. Lincoln First Fed. Sav. & Loan Ass'n, 45 Wn.2d 577, 277 P.2d 344 (1954). The court found the floor proper, adding: "Neither the fact the plaintiff slipped and fell nor the fact the floor was waxed, of itself, establishes or permits an inference of negligence."

[5] This supposition is often called a rule of law, but it may be rebutted by the facts of the case. Nicola v. Pacific Gas & Elec. Co., 50 Cal. App. 2d 612, 123 P.2d 529 (1942) states the usual approach:

> The right of a proprietor of a place of business to wax a floor which the customers are expected to use is not... held to be superior to his duty to use ordinary prudence and caution.... If wax... [is] applied to the floor, it must be in such manner as to afford reasonably safe conditions for the proprietor's invitees, and if such compounds cannot be used on a particular type of floor material without violation of the duty to exercise ordinary care for the safety of invitees... they should not be used at all.

[6] When the court has referred to the inherent smoothness resulting from waxing, it has usually spoken in terms of "the fact the floor was waxed," etc.; a conclusion that the floor in fact was "unreasonably unsafe" has been phrased that way or as "so smooth as to be dangerous for use." Slipperiness has indicated a preliminary conclusion of the relative co-efficient of friction.

[7] *E.g.*, S. H. Kress Co. v. Telford, 240 F.2d 70 (5th Cir. 1957); Baker v. Manning's, Inc., 122 Cal. App. 2d 390, 265 P.2d 96 (1953).

[8] *E.g.*, Cagle v. Bakersfield Medical Group, 110 Cal. App. 2d 77, 241 P.2d 1013 (1952) (pre-polished tile); City of Colorado Springs v. Colburn, 102 Colo. 483, 81 P.2d 397 (1938) (polished terrazzo).

[9] Burg v. Great Atl. & Pac. Tea Co., 256 F.2d 613 (7th Cir. 1958). See Annot., 65 A.L.R.2d 420 (1959).

critical acceptance. Mixed conclusions of fact and law, stated vigorously and broadly in a case, are sometimes taken to crystalize subordinate legal standards. These formulas are soon applied to related situations where their rigidity causes hardship.[10]

In the area of storekeeper's liability, inflexible tests would be especially harmful, since the facts—not the rights and relations—are the crux of the dispute. Determining whether the fall was accidental or caused by the merchant's negligence nearly always resolves the controversy.[11] Since the fact patterns vary greatly, the controlling principles should remain in general terms. A quick review shows that they have worked well.

To establish liability, an invitee[12] must prove a fall was caused[13] by an "unreasonably unsafe" condition, which the storekeeper's "negligence" has created or allowed to continue. His negligence may take the form of improper waxing or maintenance, using construction materials unable to withstand normal wear and tear,[14] or failure to

[10] Perhaps the classic example of this unfortunate tendency is an old, ill-fated rule of contributory negligence that required a motorist at a railroad crossing to "stop, get out of the car, and reconnoitre" before proceeding. It was adopted from a broad factual statement by Justice Holmes in Baltimore & Ohio R.R. v. Goodman, 275 U.S. 66 (1927), noted 26 Mich. L. Rev. 582 (1928): "In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look." Pokora v. Wabash Ry., 292 U.S. 98 (1934), noted in 33 Mich. L. Rev. 457 (1934), repudiated the rule with a strong warning of "the need for caution in framing standards that amount to rules of law," for: "They are then, not the natural flowerings of behavior in its customary forms, but rules artificially developed and imposed from without."

[11] Assumption of risk and contributory fault are common defenses. However, an invitee does not assume a risk he does not see or appreciate: Lozan v. Fraternal Order of Eagles, 53 Wn.2d 547, 335 P.2d 4 (1959) (grease spot at banquet, assumption of risk not found); State *ex rel.* Bellingham Pub. Co. v. Hinkle, 120 Wash. 85, 206 Pac. 942 (1922) (inclined ramp, assumption of risk found). Shoppers may assume the floor is safe and look at displays, etc., but failure to notice an obvious hazard is contributory fault: held to be a jury question in Smith v. Manning's, Inc., 13 Wn.2d 573, 126 P.2d 44 (1942); Buttnick v. J & M, Inc., 186 Wash. 658, 59 P.2d 750 (1936); and Watson v. Zimmerman, 175 Wash. 410, 27 P.2d 707 (1933). Contributory fault found as a matter of law with regard to stairways: Hollenbaek v. Clemmer, 66 Wash. 565, 119 Pac. 1114 (1912); Dunn v. Kemp & Hebert, 36 Wash. 183, 78 Pac. 782 (1904). Other stairway cases include: Wardhaugh v. Weisfield's, Inc., 43 Wn.2d 865, 264 P.2d 870 (1953); Fay v. Allied Stores Corp., 43 Wn.2d 512, 262 P.2d 189 (1953); Simpson v. Doe & Sterling Theatres, Inc., 39 Wn.2d 934, 239 P.2d 1051 (1952); Tyler v. F. W. Woolworth Co., 181 Wash. 125, 41 P.2d 1093 (1935).

[12] A licensee or trespasser normally assumes the risks of injury from a static condition. To keep him within his status, the invitee's accident should occur on areas authorized for his use. See Restatement, Torts § 343, comment *b* (1934), and 63 A.L.R.2d 601 (1959).

[13] Although usually inferred from the events, proximate cause was not found in two Washington cases: Walker v. Washington State Theatres, Inc., 165 Wash. 608, 5 P.2d 981 (1931) (bulge in carpet on stairway); Hall v. Lawton, 36 Wn.2d 317, 217 P.2d 796 (1950) (battery in a tavern).

[14] Annot., 64 A.L.R.2d 335 (1959). Although the proof was inadequate, the court in Knopp v. Kemp & Hebert, 193 Wash. 160, 74 P.2d 924 (1938), recognized that an

take regular precautions to avert or minimize foreseeable hazards, *e.g.*, placing anti-skid matting at entrances during bad weather,[15] or avoiding displays that topple easily.[16] "Due care" is measured with reference to the "careful and prudent" businessman in the same trade; safety focuses on the customer's position and the risks he should expect or be required to assume. Both factors—"due care" and safety—vary with the nature of the business and the surrounding circumstances in each case.[17]

A floor is deemed "unreasonably unsafe" when the risks of its condition unnecessarily outweigh its benefits. Some hazards are obviously treacherous to footing, *e.g.*, a greasy slick or an open trap door.[18] When the case involves slushed-in water, sloppy polishing, or improper flooring, the courts weigh carefully the degree of smoothness in view of the intended use. The same coefficient of friction may be held "unsafe" for a retail store, and yet be deemed normal, expected, and safe in another trade. For example, in *Chilberg v. Standard Furniture Co.*,[19] an unfastened carpet was safely left on a hardwood floor in a rug department; moist cement aisles were proper between vegetable stalls of a public market in *Schumaker v. Charada Inv. Co.*;[20] *Kalinowski v. Y.W.C.A. Ass'n*,[21] quoted as supporting authority in the *Pement* case, permitted a very highly-polished floor for a dance hall; and steps by a public swimming pool in *Anderson v. Seattle Park Co.*[22] could be wet and slippery but not "slimy." How many of these "slippery conditions" would be "safe" in a dime store? Furthermore, in certain types of establishments, the inherent smoothness of waxing may make a floor

injured shopper would have had a cause of action if a terrazzo entrance to a department store had lacked enough abrasive material to withstand muddy water tracked in. *Accord*, Erickson v. Walgreen Drug Co., 120 Utah 31, 232 P.2d 210 (1951).

[15] *E.g.*, W. T. Grant Co. v. Karren, 190 F.2d 710 (10th Cir. 1951) (non-slip powder); McDonald v. F. W. Woolworth Co., 177 F.2d 401 (4th Cir. 1949) (non-slip powder); De Weese v. J. C. Penney Co., 5 Utah 2d 116, 297 P.2d 898 (1956).

[16] See Annot., 20 A.L.R.2d 95 (1951) (fall of display of goods). Annot., 42 A.L.R.2d 1103-1110 (1955).

[17] Where the hazard involves the surface or polish of the floor itself, the determinations of safety and "due care" overlap. Due care should make the floor reasonably safe; likewise, an unsafe condition is strong evidence of negligence. Inevitably such cases rest on dual grounds, *e.g.*, in Shumaker v. Charada Inv. Co., 183 Wash. 521, 49 P.2d 44 (1935), produce vendors in a public market could sprinkle their wares, and the resulting wet cement aisle between stalls was held no more unsafe to pedestrians than a sidewalk on a rainy day.

[18] Driscoll v. Devenere, 110 Wash. 307, 188 Pac. 408 (1920); Stone v. Smith-Premier Typewriter Co., 48 Wash. 204, 93 Pac. 209 (1908); Franklin v. Engel, 34 Wash. 480, 76 Pac. 84 (1904).

[19] 63 Wash. 414, 115 Pac. 837, 34 L.R.A.(n.s.) 1079 (1911).

[20] 183 Wash. 521, 49 P.2d 44 (1935).

[21] 17 Wn.2d 380, 135 P.2d 852 (1943). See generally Annot., 28 A.L.R.2d 612 (1953).

[22] 79 Wash. 575; 140 Pac. 698 (1914). See generally Annot., 48 A.L.R.2d 166-170 (1956).

"unreasonably unsafe," *e.g.*, in a ballet studio, an elevator for the infirm,[23] or a beauty parlor.[24]

Like *Pement* a vast mass of cases concern slipperiness resulting from the floor polish. In these cases, the patron must prove the element of negligence from the slippery condition of the floor itself, unless the store has not followed routine trade practices. A minority of courts allow a direct inference of negligence from any impropriety in the choice of polish, application, or surface to which applied; or if the floor was in any other or different condition than would result from proper oiling, *i.e.*, unsafe.[25] The majority drop the last alternative.[26] This shifts the stress from the condition of the floor to the manner of polishing and from the consequence to the particular carelessness. The minority's approach seems more sensible, since it treats a slick surface like any other hazard apparently due to or under the control of the land occupier. For example, no proof of the antecedent laxness is required when boards are left loose or trap doors open. The unsafe condition infers negligence of the storeowner in failing to keep the premises reasonably safe. Washington's previous decisions emphasized the condition of the floor more than the method of polishing,[27] but *Pement* may have altered this.[28] Of course, an excess of wax or pool of oil will carry a case under both views,[29] but the difference in approaches could become important in marginal cases.[30]

[23] McKay v. Parkwood Owners, 139 F.2d 385 (D.C. Cir. 1943).

[24] Wilson v. Payne, 330 P.2d 120 (Nev. 1958) (patrons used stocking feet).

[25] *E.g.*, S. H. Kress & Co. v. Evans, 70 Ariz. 175, 218 P.2d 486 (1950); Sanders v. MacFarlane's Candies, 119 Cal. App. 2d 497, 259 P.2d 1010 (1953); Isaac Benesch & Sons v. Ferkler, 153 Md. 680, 139 Atl. 557 (1927); Robinson v. F. W. Woolworth Co., 80 Mont. 431, 261 Pac. 253 (1927). Sometimes the elimination of other alternatives will be enough to make the proprietor responsible, *e.g.*, Gray v. Fitzgerald & Platt, Inc., 144 Conn. 57, 127 A.2d 76 (1956). The leading case in the field, Spickernagle v. C. S. Woolworth & Co., 236 Pa. 496, 84 Atl. 909, Ann. Cas. 1912A 132, denied recovery to a shopper slipping on an oily surface, because: "The plaintiff failed to show how long before the accident the floor had been oiled; that the substance used thereon was unusual or improper; that it was oiled in an improper manner; or that it was in any other or different condition than would result from proper oiling." However, during the 1920's and 30's, stores treated their floors with a thin film of oil, which made them inherently rather slippery. This influenced the courts to adopt the majority position.

[26] *E.g.*, Dixon v. Hart, 344 Ill. App. 432, 101 N.E.2d 282 (1951); Murrell v. Handley, 245 N.C. 559, 96 S.E.2d 717 (1957); McCann v. Philadelphia Fairfax Corp., 344 Pa. 636, 26 A.2d 540 (1942).

[27] *E.g.*, Wright v. Safeway Stores, Inc., 7 Wn.2d 341, 109 P.2d 542 (1941). Several employees who had waxed the floor did not testify at the trial. Although resolved on another point, the decision stressed the key issue as the condition of the floor rather than the method of waxing.

[28] Mrs. Pement alleged application of an excess of wax, rather than a negligent failure to keep the floors reasonably safe. The decision could be taken as merely requiring proof of her particular pleadings.

[29] *E.g.*, Lee v. H. L. Green & Co., 236 N.C. 83, 72 S.E.2d 33 (1952); Weir v. Bond Clothes, Inc., 131 Pa. Super. 54, 198 Atl. 896 (1938); Watson v. Zimmerman, 175 Wash. 410, 27 P.2d 707 (1933).

[30] Most cases turn on the sufficiency of the evidence. A fall by itself does not prove

Finally, the shopkeeper should promptly remove *existing* hazards left by the public. Shoppers often drop debris or grease upon the floor, slush-in snow and water, or derange displays; constant wear and tear may rub a depression into the floor.[31] Since the storeowner's negligence then consists of a failure to remove, remedy, or warn, he must first be given a chance to discover and correct the situation. According to *Kennett v. Federici*,[32] the plaintiff must prove either:[33] (1) that the proprietor or his employees prima facie had notice (if so, the shopkeeper must exculpate himself by proving that he could not have remedied the situation in time), or (2) that the hazard existed for a long enough time to give him sufficient opportunity, using due care, to have discovered or removed the danger. In the *Kennett* case, a cafeteria employee had apologized to a diner who had fallen, for lacking time to clean up an accident-causing grease splotch. The management was then required to prove the truth of the excuse. Cases concerning the constructive notice approach, *i.e.*, the second alternative, are more frequent.[34]

The duty to remedy or warn obviously covers also hazards which the proprietor may have created. Thus, proof of notice, actual or constructive, of excess slickness in a polished surface substitutes for a showing of carelessness in waxing or other negligence.[35] If an employee

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slipperiness, nor will general claims of slickness by the injured shopper and her companions suffice. Usually, they must testify to some objective fact: the presence of skid marks, a pool of oil, or excess sheen or discoloration. Practically, the most convincing evidence is soiled garments, *e.g.*, S. H. Kress v. Evans, 70 Ariz. 175, 218 P.2d 486 (1950); Budrow v. Grand Union Co., 275 App. Div. 978, 90 N.Y.S.2d 168 (1949); wax absorbed on shoes, or proof that others have slipped in the same area, City Specialty Stores, Inc., v. Bonner, 252 F.2d 501 (6th Cir. 1958). Expert testimony, whether by experienced janitors or chemists has been highly persuasive, *e.g.*, Kress v. Telford, 240 F.2d 70 (5th Cir. 1957); J. C. Penney Co. v. Campbell, 325 P.2d 1056 (Okla. 1958).

[31] In Belles v. City of Tacoma, 79 Wash. 200, 140 Pac. 324 (1914), lack of notice absolved the city from liability for a fall caused by a depression worn into the floor, but in Norton v. Anderson, 164 Wash. 55, 2 P.2d 266 (1931), a cavity worn into a decayed plank existed long enough to give notice. Similar but relating to worn stairway: Riley v. Pacific Outfitting Co., 185 Wash. 497, 55 P.2d 1058 (1936).

[32] 200 Wash. 156, 93 P.2d 333 (1939).

[33] In Placanica v. Riach Oldsmobile Co., 53 Wn.2d 171, 332 P.2d 47 (1958), the court added a criterion that the defendant should have superior knowledge concerning the dangerous condition of the premises.

[34] The object remained long enough on the floor to give constructive notice in two cafeteria cases: Smith v. Manning's, Inc., 13 Wn.2d 573, 126 P.2d 44 (1942) (pickle amidst littered crumbs and cigarette butts), and Wiard v. Market Operating Corp., 178 Wash. 265, 34 P.2d 875 (1934) (grease drop). In Hendrickson v. Brill, 45 Wn.2d 766, 278 P.2d 315 (1954) (spilled drink in dance hall), and Mathis v. S. H. Kress Co., 38 Wn.2d 845, 232 P.2d 921 (1951) (lotion from broken cosmetic bottle in dime store), recovery was denied in the absence of proof of how long the liquid had been there. Since mechanics of a drive-in garage in Placanica v. Riach Oldsmobile Co., 53 Wn.2d 171, 332 P.2d 47 (1958), knew cars were dripping oil all morning, notice was imputed of an oily mess on the floors.

[35] *E.g.*, First Fed. Sav. & Loan Ass'n v. Wylie, 46 So.2d 396 (Fla. 1950); Shipp v.

has dropped an object,[36] or left obstructions in the aisle,[37] the action is directly negligent and no notice is required.

As this review of the controlling principles indicates, the crucial questions in these cases are of fact, not law. The key issues—slickness, safety, notice, negligence, and contributory fault—are all conclusions of fact usually left to the jury. The trial judge has a corrective influence, if needed, through his control of the admission of evidence and the determination of its sufficiency. To add subordinate inflexible rules of law would complicate an area already well served by a few fundamental legal principles.

JORGEN BADER

Torts—Children Staying After School—Invitees or Licensees. Pupils attending free non-school extra-curricular activities on school grounds are "invitees" and not merely "licensees" according to *Kidwell v. School Dist. No. 300.*[1]

During a Bluebird[2] meeting held after school in a grade school classroom, several playful girls accidently pushed a 63-year-old overbalanced piano over backward, smashing Judy Kidwell's foot. She sued and won a jury verdict on either an invitee or attractive nuisance theory. The school district appealed, maintaining that the lack of any material benefit from her presence—the earmark of an invitee—made Judy a licensee. The Washington Supreme Court, however, bypassed the point without comment and held that Judy Kidwell was an "invitee, as a matter of law." The decision imposed a duty to keep the premises safe, from the granting of the invitation itself:

> The school district permitted its school room to be put to use for an extracurricular activity, approved as being educational in character, immediately following the close of school. This was an invitation to those granted that use to remain upon the premises. The duty upon the school district, therefore, was to use reasonable care to keep the premises safe, not only as to the children who occupied it during school hours, but also to those who would use it by such invitation.[3]

Thirty-Second St. Corp., 130 N.J.L. 518, 33 A.2d 852 (1943); J. C. Penney Co. v. Campbell, 325 P.2d 1056 (Okla. 1958).

[36] Falconer v. Safeway Stores, Inc., 49 Wn.2d 478, 303 P.2d 294 (1956) (meat trimmings on pavement).

[37] Petey v. Larson, 28 Wn.2d 790, 183 P.2d 1020 (1947) (boxes by grocery checkout stand); Griffin v. Cascade Theatres Corp., 10 Wn.2d 574, 117 P.2d 651 (1941) (advertising placard in theater); Engdal v. Owl Drug Co., 183 Wash. 100, 48 P.2d 232 (1935) (scales). See generally Annot., 26 A.L.R.2d 675 (1952).

[1] 53 Wn.2d 672, 335 P.2d 805 (1959).

[2] The Bluebirds are a subgroup of the "Campfire Girls" for girls aged 5-7.

[3] 53 Wn.2d at 674, 335 P.2d at 808 (1959).

This represents a marked shift in reasoning. Two early cases—decided in 1915 and 1918—cited by the court, had assumed an invitee status in allowing recovery.[4] During the early 1920's the court applied the attractive nuisance doctrine, apparently conceiving the children to be licensees.[5] Thereafter, the invitee-licensee problem was largely sidestepped. A duty of reasonable care in supervision was imposed if the school district undertook to oversee the children playing on its grounds. Injuries from unsafe facilities then became merged into charges of negligence in supervision, *i.e.*, not realizing the danger or not eliminating danger foreseen.[6] *Kidwell* puts schools in a class with government-owned lands as an exception to the material benefit test, and as an example of the "invitation theory."

Instead of potential gain to the invitor, sought under the material benefit theory, the court under the "invitation theory" seeks an implied assurance of safety to the guest. If the invitor has induced callers or users to believe the premises are reasonably safe, he must use due care to make them so. When premises are thrown open or prepared for public use, this assurance to members of the public entering in response to, and within the scope and intent of the invitation, is usually implied. The axiom that private docks and roads must be kept reasonably safe was derived from this source.[7] Schools convey a more restricted invitation but the rationale is the same: "School facilities are provided for the use of large numbers of children. It is the duty of the school district to use reasonable care in order that the

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[4] Howard v. Tacoma School Dist. No. 10, 88 Wash. 167, 152 Pac. 1004 (1915) (pupil sneaked into gym, fell from horizontal exercise bars, no mat underneath); Holt v. School Dist. No. 71, 102 Wash. 443, 173 Pac. 335 (1918) (improperly constructed slide).

[5] Hutchins v. School Dist. No. 81, 114 Wash. 548, 195 Pac. 1020 (1921) (boarded-over pit); Heva v. School Dist. No. 1, 110 Wash. 668, 188 Pac. 776 (1920) (fire escape accident during weekend), See Comment, 22 Wash. L. Rev. 45 (1948), stating that children on public playfields are invitees.

[6] Before school: Rice v. School Dist. No. 302, 140 Wash. 189, 248 Pac. 388 (1926) (wire dangling from tree hit power line).

Noon: Kelley v. School Dist. No. 71, 102 Wash. 343, 173 Pac. 333 (1918) (swing broke); Stovall v. Toppenish School Dist. No. 49, 110 Wash. 97, 188 Pac. 12 (1920) (steel water tank rolled over child); Bruenn v. North Yakima School Dist. No. 7, 101 Wash. 374, 172 Pac. 569 (1918) (teeter-totter accident); Eckerson v. Ford's Prairie School Dist. No. 11, 3 Wn.2d 475, 101 P.2d 345 (1940); McLeod v. Grant County School Dist., 42 Wn.2d 316, 255 P.2d 360 (1953).

Recess: Redfield v. School Dist. No. 3, 48 Wash. 85, 92 Pac. 770 (1907).

However, no duty to supervise existed in *Kidwell*, since there was a simple loan of the premises. Walter v. Everett School Dist., 195 Wash. 45, 79 P.2d 689 (1938) (school not liable for W.P.A. conducted tumbling class).

For school liability generally, see Annot., 160 A.L.R. 7 (1940).

[7] Gregg v. King County, 80 Wash. 196, 141 Pac. 340 (1914); Harris v. City of Bremerton, 85 Wash. 64, 147 Pac. 638 (1915); Gray v. King County, 140 Wash. 169, 248 Pac. 397 (1926).

school premises and facilities be safe for the use of these children."[8]

Dean Prosser recommends that the "invitation theory" be adopted generally to supplement the material benefit test.[9] Washington used that approach exclusively until 1916 with good results.[10] Many states now turn to it when the material benefit test leads to harsh results. The Washington court in *Kidwell* effectively did that. It should do so more often.

JORGEN BADER

Attractive Nuisance. A boat precariously leaning against a wall is not an "attractive nuisance" to children coming in contact with it, the supreme court held in *Holland v. Niemi*.[1] Thus, a five-year-old child, attracted to defendant's premises by the boat, was denied recovery for injuries sustained when the boat fell upon him while he and other children were playing around it. Applying the test set forth in *Schock v. Ringling Bros. & Barnum & Bailey Combined Shows*,[2] the court stated that a boat leaning against a wall was not "dangerous in itself" nor was it an agency that was likely to, or probably would, result in injury to those coming in contact with it.

Prior to the *Holland* decision, the supreme court has on two occasions considered the application of the "dangerous in itself" test enunciated in the *Schock* case. In *Anderson v. Reeder*,[3] the court held that a "washing machine with a wringer attachment is not, of itself, a danger-

[8] 53 Wn.2d at 674, 335 P.2d at 807 (1959).

[9] See Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573 (1942), and PROSSER, TORTS at 452-464 (1955).

[10] See, *e.g.*, Clark v. Northern Pac. Ry., 29 Wash. 139, 69 Pac. 636 (1902); Meyers v. Syndicate Heat & Power Co., 47 Wash. 48, 91 Pac. 549 (1907); Collins v. Hazel Lumber Co., 54 Wash. 524, 103 Pac. 798 (1909); Hanson v. Spokane Valley Land & Water Co., 58 Wash. 6, 107 Pac. 863 (1910); Kroeger v. Seattle Elec. Co., 37 Wash. 544, 79 Pac. 1115 (1905). The Washington Supreme Court adopted the material benefit criterion in Gasch v. Rounds, 93 Wash. 317, 160 Pac. 962 (1916).

[1] 155 Wash. Dec. 83, 345 P.2d 1106 (1959).

[2] 5 Wn.2d 599, 616, 105 P.2d 838 (1940). The court set out the following requirements for the "attractive nuisance" doctrine:

1) the instrumentality or condition must be dangerous in itself, that is, it must be an agency which is likely to, or probably will, result in injury to those attracted by, and coming in contact with it;
2) it must be attractive and alluring, or enticing, to young children;
3) the children must have been incapable, by reason of their youth, of comprehending the danger involved;
4) the instrumentality or condition must have been left unguarded and exposed at a place where children of tender years are accustomed to resort, or where it is reasonably to be expected that they will resort, for play or amusement, or for the gratification of youthful curiosity; and
5) it must have been reasonably practicable and feasible either to prevent access to the instrumentality or condition, or else to render it innocuous, without obstructing any reasonable purpose or use for which it was intended.

[3] 42 Wn.2d 45, 253 P.2d 423 (1953).

ous instrumentality." The court did foresee the possibility that such a machine might become an agency likely to injure children if left running and placed in a location where it would attract children. In the *Anderson* case, however, the machine was not running and was located in an apartment house laundry room. In *Mail v. Smith Lumber & Shingle Co.*,[4] the court held that ordinary pike poles[5] lying on a walkway which ran along a millpond on defendant's property were not in and of themselves dangerous instrumentalities. In the *Schock* case, the court stated that a wagon itself was not a dangerous instrumentality,[6] but added that for purposes of argument the danger in the operation of unloading was sufficient to bring the case within the first requirement of the rule.[7]

In all the above cases the court's discussions and conclusions as to what constitutes an instrument "dangerous in itself" are a logical evolution from the vague and inadequate meaning inherent in the *Schock* rule. Danger is not an absolute term, but the courts have attempted to ascribe such attributes to it. Nothing in and of itself is dangerous. Perhaps the propensities for danger of some instruments are in *degree* greater than others, but only in a *relative* sense,[8] *i.e.*, in relation to those persons or things coming in contact with it, there is a greater or lesser possibility of harm.[9]

Mechanical application of the "dangerous in itself" rule has also led to an analysis which does not differentiate between an instrument and a condition. An instrument may constitute a potential danger, not only because of the nature of the instrument, but because of the manner in which it was constructed or the position in which it was placed.[10] In such a case the proper analysis is in terms of a dangerous condition,

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[4] 47 Wn.2d 447, 287 P.2d 877 (1955).

[5] The poles had a sharp point at one end and were used to move, sort, store, or handle logs.

[6] Young children, watching the unloading of a circus wagon from a flatcar, were injured by the tongue of the wagon when the snubbing rope broke.

[7] The court rejected applicability of the attractive nuisance doctrine because the fourth and fifth elements of the rule were lacking.

[8] The attractive nuisance doctrine is actually a product of this relative concept. It is only in relation to infants who fail to comprehend the danger that the instrument or condition constitutes an attractive nuisance.

[9] Consider harm in terms of magnitude and severity. For example, the magnitude (encompassing area of possible harm) of dynamite is great, while the corresponding magnitude of a knife may be small, but the severity (specific harm resulting from contact) of each may be equal.

[10] Justice Cardozo in MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), said: "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger." As an example he stated: "A large coffee urn may have within itself, if negligently made, the potency of danger, yet no one thinks of it as an implement whose normal function is destruction."

not in terms of a dangerous instrument. On the other hand, a dangerous condition is not necessarily associated with an instrument. Thus, in *Bjork v. Tacoma*[11] the court allowed recovery when a small child fell through a hole in a flume and drowned. The defective cover of the flume can only be properly described as a condition. So, too, in the *Holland* case, it was not the boat itself that was dangerous; the possible danger lay in the fact that the boat was leaning rather precariously against the wall. The failure of the court to make this distinction has led to distortion of an already inadequate rule.

A practical solution to the ambiguity inherent in the *Schock* rule lies in the course recently taken by the California court,[12] which has adopted *in toto* the rule set forth in the *Restatement of Torts*.[13] In *King v. Lennen*,[14] plaintiffs recovered for the wrongful death of their eighteen-month-old boy who drowned in an artificial swimming pool maintained on defendant's premises. Only a small wooden fence surrounded the yard, through which children could readily enter. The court held that the pool constituted a dangerous condition and an unreasonable risk of bodily harm to children of tender years. Unlike the Washington court, the California court is not compelled to make a verbal dichotomy in distinguishing a dangerous instrument from a dangerous condition. The *Restatement* rule limits the analysis solely in terms of *conditions* which involve an unreasonable risk of death or serious bodily harm to children.

The adoption of the *Restatement* rule by the Washington court would not necessarily change the result of the *Holland* case, nor would it in any way unduly expand or enlarge the concept of attractive nuisance. The rule would, however, provide a reasonable and sensible standard by which the court could apply the doctrine and dispel the present confusion.

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[11] 76 Wash. 225, 135 Pac. 1005 (1913).

[12] Garcia v. Soogian, 52 Cal.2d, 338 P.2d 433 (1959).

[13] RESTATEMENT, TORTS §339 (1934). The rule is stated as follows:

A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if

(a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and

(b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and

(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and

(d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein.

[14] 1 Cal. Rptr. 699, 348 P.2d 98 (1959).