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Negligence - Occupiers of Land - Land Occupier Has a Duty to Both Invitees and Licensees to Act as a Reasonable Man

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pension or revocation.[52] Not until the driver is afforded such a meaningful opportunity will the essentials of procedural due process actually be attained.[53]

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NEGLIGENCE—OCCUPIERS OF LAND—LAND OCCUPIER HAS A DUTY TO BOTH INVITEES AND LICENSEES TO ACT AS A REASONABLE MAN

Plaintiff, an insurance agent, brought an action for damages suffered when she was bitten by defendant's dog. Plaintiff had gone uninvited to defendant's farm to try to sell an insurance policy. Defendant was not home at the time. As plaintiff was walking to the front door, the dog rushed out of the house, chased her back toward the car, and bit her on the leg.[1] The district court concluded that plaintiff was a bare licensee on the premises and therefore defendant owed her no duty other than not to harm her willfully or wantonly. The court found no such willfullness or wantonness by defendant[2] and dismissed with prejudice plaintiff's complaint. On appeal, the North Dakota Supreme Court remanded the case to the district court and held that the status of the person entering the premises is no longer the sole factor to be used in determining liability and that the occupier[3] has a duty to act as a reasonable person in maintaining his property in a reasonably safe condition for both invitees and licensees.[4] *O'Leary v. Coenen*, 251 N.W.2d 746 (N.D. 1977).

Liability for negligence is generally based upon whether the

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52. In both Bell v. Burson, 402 U.S. 535 (1971) and Goldberg v. Kelly, 397 U.S. 254 (1970), the Court was careful to point out the serious economic hardships of suspension. In both cases it appears that the Court was cognizant of the relative importance of both state and individual interests.

53. The necessity of notice and hearing is only one of many possible legal issues that may arise on appeal from a suspension or revocation of a driver's license. The reader's attention is accordingly called to several annotations concerning the suspension or revocation of a driver's license on various grounds: Annot., 38 A.L.R.3d 452 (1971) (physical disease or defect); Annot., 9 A.L.R.3d 756 (1966) (habitual, persistent, or frequent violations of traffic laws); Annot., 5 A.L.R.3d 690 (1966) (accumulation of a sufficient number of points under a point system); Annot., 88 A.L.R.2d 1064 (1963) (refusal to take an intoxication test); Annot., 96 A.L.R.2d 612 (1964), Annot., 87 A.L.R.2d 1019 (1963) and Annot., 79 A.L.R.2d 866 (1961) (convictions of motor vehicle offenses). The reader's attention is also called to an annotation concerning the validity of financial responsibility laws, Annot., 35 A.L.R.2d 1011 (1954). *See also* Jennings v. Mahoney, 404 U.S. 25, 26 (1971), where the Court declared that there was plainly a susbstantial question whether the Utah statutory scheme for the suspension of licenses under a financial responsibility law, on its face, afforded the procedural due process required by *Bell*.

1. O'Leary v. Coenen, 251 N.W.2d 746, 747-48 (N.D. 1977).
2. *Id.* at 748.
3. In this comment the term "occupier" shall mean occupier, owner, possessor, or anyone who has control of the premises.
4. 251 N.W.2d at 752.

actor's conduct was reasonable in view of the circumstances.[5] Occupiers of land, however, have been treated differently.[6] Their liability has been based on rights of property owners or occupiers in a culture which traces many of its standards to a heritage of feudalism.[7] The result was that an occupier's liability was determined not by the reasonableness of his conduct, but rather by the status of the entrant on the premises: trespasser, licensee, or invitee.[8]

At common law, an occupier owed no duty to a trespasser[9] other than to refrain from willfully or wantonly harming him.[10] Once the trespasser was discovered, the occupier had to exercise ordinary care to avoid injuring him.[11]

The next higher category at common law was a licensee,[12] who was distinguishable from a trespasser only by the consent to entry given by the occupier. The duty on occupier owed a licensee was the same as that owed a discovered trespasser.[13]

The highest standard of care owed an entrant was that owed an invitee. The occupier was under an affirmative duty to protect the entrant, not only against dangers of which he knew, but also against those which he might discover.[14] There has arisen great difficulty in deciding who is an invitee.

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5. In Heaven v. Pender, 11 Q.B. 503, 509 (1883), the court stated the general rule as follows:

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

See also W. PROSSER, LAW OF TORTS § 32 (4th ed. 1971).

6. "Occupiers liability" refers only to liability for injuries sustained as a result of the condition of the premises. The duty involved in these cases is to keep the premises relatively safe. For his personal actions, the occupier's liability will be determined by the usual standard of negligence. *See supra* note 5.

7. The common law categories of entrants upon land derive from an initial premise that the rights of possessors merit special protection. 2 F. HARPER & F. JAMES, LAW OF TORTS 1432 (1956). Another reason for a different standard of liability is that the plaintiff has voluntarily, at least in most cases, placed himself within reach of the defendant's failure to take precautions. *Id.* at 1430.

8. *See generally* PROSSER, *supra* note 5, at 357-98.

9. 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). For a general discussion of trespassers and modifications of the trespasser rule, *see* J. PAGE, THE LAW OF PREMISES LIABILITY 7 (1976).

10. Reasoner v. Chicago, Rock Island and Pacific R. Co., 251 Iowa 506, 101 N.W.2d 739 (1960); Frederick v. Great Northern Ry. Co., 207 Wis. 234, 241 N.W. 363 (1932).

11. Reasoner v. Chicago, Rock Island and Pacific R. Co., 251 Iowa 506, 101 N.W.2d 739 (1960); Dubs v. Northern Pacific Ry. Co., 50 N.D. 163, 195 N.W. 157 (1923). At least one jurisdiction holds that no duty is owed even to discovered trespassers, at least where the peril is not imminent. Carroll v. Spencer, 204 Md. 387, 104 A.2d 628 (1954).

12. A licensee is a person who enters the premises with the permission or consent of the occupier or owner for the licensee's own purposes. Reddington v. Beefeaters Tables, Inc., 72 Wis. 2d 119, ——, 240 N.W.2d 363, 366 (1976), *modified on other grounds*, 72 Wis. 2d 119, 243 N.W.2d 401 (1976).

13. Leach v. Inman, 63 Ga. App. 790, 12 S.E.2d 103 (1940); Wolfson v. Chelist, 284 S.W.2d 447 (Mo. 1955). In those jurisdictions which have abolished the use of the categories the important factual issue in many cases is whether the person is anticipated on the premises. *See, e.g.*, Gibo v. City & County of Honolulu, 51 Haw. 299, 459 P.2d 198 (1969).

14. Graham v. Loper Electric Company, 192 Kan. 558, 389 P.2d 750 (1964); Boniwell v.

To determine who is an invitee, the Restatement of Torts has adopted the "economic benefit" theory.[15] This theory is based upon the status of an invitee as a customer or business visitor in a place of business.[16] The idea is that the store owner would realize a possible economic benefit from the entrant's presence. The affirmative duty owed the invitee is part of the price the owner pays for the possible benefit.[17] Courts have been very imaginative in finding the entrant to be an invitee under this theory.[18]

An alternate theory, the one used by the majority of the courts, is based upon the occupier's representation that reasonable care has been exercised in making the premises safe for those whom he has encouraged to enter and further a purpose that is to the benefit of the occupier.[19] The test stresses the "invitation" and whether the premises are held open to the public.[20]

For many years the three categories of entrants were used in the overwhelming majority of jurisdictions.[21] Determining liability by using the category method, rather than looking at the reasonableness of the occupier's conduct under all the circumstances, has

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Saint Paul Union Stockyards Company, 271 Minn. 233, 135 N.W.2d 499 (1965). The rule was first established in 1866 in England. Indermaur v. Dames, 1866 L.R. 1 C.P. 274, *affirmed*, 1867 L.R. 2 C.P. 311.

15. RESTATEMENT OF TORTS §§ 332, 343 (1934). § 332 states as follows: "A business visitor is a person who is invited or permitted to enter or remain on land in the possession of another for a purpose directly or indirectly connected with busiess dealings between them."

Comment b to § 332 states as follows: "[S]hopkeepers as a class regard the presence of the public for any of these purposes [buying goods, looking at the goods displayed, or even for the purpose of passing through the store as a shortcut] as tending to increase their business."

RESTATEMENT (SECOND) OF TORTS § 332 (1965) lists a business visitor as one type of licensee.

16. Krueger v. North American Creameries, Inc., 75 N.D. 264, 27 N.W.2d 240 (1947).

17. *See* W. PROSSER, *supra* note 5, § 61, at 386. Much to the confusion of juries, a social guest has not been considered an invitee, but rather a licensee, even if he renders incidental services to the occupier. Wolfson v. Che'ist, 284 S.W.2d 447 (Mo. 1955); Hall v. Duke, 513 S.W.2d 776 (Tenn. 1974). *See also infra* note 35.

18. For example, one case held that a person who entered a bank to get change for a $100 bill was an invitee because it was reasonable for the plaintiff to believe that getting change for a large bill is consistent with the intentions and purposes of bank owners. First National Bank of Birmingham v. Lowrey, 263 Ala. 36, 81 So. 2d 284 (1955). The economic benefit in a case such as this is a mystery. *See* W. PROSSER, *supra* note 5, at 387-88. Professor Prosser commented as follows: "While it has been said often enough that the 'mutuality of interest' may be indirect and remote from the object of the particular visit, there is at least ground for suspectng that in some of these cases, at least, it has been dredged up for the occasion." *Id.* at 388 (footnote omitted).

19. Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 753 (1942).

20. RESTATEMENT (SECOND) OF TORTS § 332 (1965). Invitation is conduct which justifies others in believing that the possessor desires them to enter the land. It differs from permission in that permission allows others to believe the possessor is willing that they shall enter if they so desire.

21. *See* W. PROSSER, *supra* note 5, at 357. The first case of its kind in North Dakota was O'Leary v. Brooks Elevator Co., 7 N.D. 554, 75 N.W. 919 (1898). The court held that no duty was owed an eleven year old trespassing boy. The defendant knew that children played at the spot where the boy was injured and that it was a potentially dangerous spot. But the court refused to apply the attractive nuisance doctrine because the boy went to the spot with his uncle and not because he was attracted to the thing which injured him. *Id.* at 559, 75 N.W. at 920. This holding was followed eighteen years later in Costello v. Farmer's Bank of Golden Valley, 34 N.D. 131, 157 N.W. 982 (1916).

It is interesting to note that North Dakota law of trespassers, licensees, and invitees began and ended with an O'Leary.

been criticized by many as being harsh because the results are often inequitable and the jury's function is usurped.[22] The courts have tried to modify the harshness by carving out numerous exceptions to the rules.[23] These exceptions tended to produce confusion and conflict. Because of these difficulties, there has been an increasing dissatisfaction with the use of the common law categories.[24]

The first significant departure from the use of the categories came in the country of their origin. In 1957, England adopted the Occupier's Liability Act,[25] which abandoned the licensee and invitee categories. The occupier in England now owes the same common duty of care to both licensees and invitees. The reasonableness of the occupier's acts depends upon the circumstances of the entry.[26] The Act does not affect the trespasser category nor the duty owed the trespasser at common law.

In the United States the changes have been made by the courts and not by the legislative bodies.[27] The United States Supreme Court made the first significant move and discarded the categories as they applied to maritime torts by calling their use a "semantic morass."[28]

The leading case for abandoning the categories in all situations is *Rowland v. Christian*.[29] In *Rowland*, the California Supreme Court held that whether the plaintiff is a trespasser, a licensee or an invitee is not determinative of the duty of care owed, but is only one of the factors to be considered in determining that issue.[30] The court based its holding in part on a California statute.[31] Subsequent

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22. 2 F. HARPER & F. JAMES, LAW OF TORTS 1430-1505 (1956); 49 N.D.L. REV. 733, 738 (1973); 44 N.Y.U.L. REV. 426, 430-31 (1969).

23. The North Dakota Supreme Court gives a "brief listing of some of the exceptions and distinctions complained of . . . : discovered and undiscovered trespassers; owner and nonowner cases; nonowners using the premises for their own convenience and nonowners acting on the owner's behalf; active negligence (i.e. dangerous activities) and passive negligence (i.e. dangerous conditions); dangerous conditions obvious to the owner and those not obvious to the owner; child trespassers; frequent use of limited area exceptions; technical trespassers; social guests; implied licensee; business visitor; and trapped trespassers." O'Leary v. Coenen, 251 N.W.2d 746, 749 (N.D. 1977).

The United States Supreme Court noted that a "[r]andom selection of almost any modern decision will serve to illustrate the point." Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630 n.6 (1959).

24. The Missouri Supreme Court expressed its dissatisfaction in 1955 by saying that the status of the person entering does not necessarily control under all circumstances. Wolfson v. Chelist, 284 S.W.2d 447 (Mo. 1955).

25. The Occupiers' Liability Act, 1957 5 & 6 Eliz. 2 c. 31.

26. *Id.* at § 2(2)-(3).

27. An exception is Connecticut, whose legislature raised the status of a social guest from licensee to invitee. CONN. GEN. STAT. ANN. § 52-557a (West Supp. 1975). DiIorio v. Tipaldi, ——Mass. App. Ct.——, 357 N.E.2d 319 (1976), applying Connecticut law. *See also infra* note 35. Although limited to social guests, the Connecticut statute removes one of the most difficult problems of the licensee-invitee distinction. *See supra* note 17.

28. Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630 (1959). The Court found that "[f]or the admiralty law . . . to import such conceptual distinctions [licensee-invitee] would be foreign to its traditions of simplicity and practicality." *Id.* at 631. The court then noted that the categories of entrants originated under a system with respect to real property, a system "alien to the law of the sea." *Id.* at 631-32.

29. 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561 (1968).

30. *Id.* at ——, 70 Cal. Rptr. at 104, 443 P.2d at 568.

31. *Id.* at ——, 70 Cal. Rptr. at 99-100, 443 P.2d at 563-64. CAL. CIV. CODE § 1714 (West 1973), provides as follows:

decisions in states without a similar statute indicate, however, that there are also nonstatutory rationales for the decision.[32] Currently eight jurisdictions have followed California in abandoning the common law categories.[33]

Four jurisdictions no longer use the licensee and invitee categories, but do use the special category of trespasser.[34] Seven others have raised the status of a social guest from a licensee to an invitee.[35] Iowa and Kentucky do not use the categories when the entrant is a child.[36] The rest of the states have either not recently decided a case such as *O'Leary*, or have retained the common law categories despite the current trend away from their use.[37]

The first case to provide the North Dakota Supreme Court with an opportunity to follow *Rowland* and abandon the categories was *Werth v. Ashley Realty Company*.[38] The court, however, declined to follow California's lead, saying that they perceived no great trend in that direction and dismissed the California court's reasoning by saying that the categories have been "reasonably useful in the past."[39]

In 1976, in *Sendelbach v. Grad*,[40] the North Dakota Supreme

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> Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. The extent of the liability in such cases is defined by the Title on Compensatory Relief.

N.D. CENT. CODE § 9-10-06 (1975) is almost identical.

32. Pickard v. City & County of Honolulu, 51 Haw. 134, 452 P.2d 445 (1969). The Supreme Court of Hawaii believes that the common law distinctions have no logical relationship to the exercise of reasonable care for the safety of others.

33. Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1972); Webb v. City and Borough of Sitka, 561 P.2d 731 (Alaska 1977); Mile High Fence Co. v. Radovich, 175 Colo. 537, 489 P.2d 308 (1971); Pickard v. City & County of Honolulu, 51 Haw. 134, 452 P.2d 445 (1969); Cates v. Beauregard Elec. Cooperative, Inc., 328 So. 2d 367 (La. 1976); Oulette v. Blanchard, 116 N.H. 552, 364 A.2d 631 (1976); Scurti v. City of New York, 40 N.Y.2d 433, 387 N.Y.S.2d 55, 354 N.E.2d 794 (1976); Mariorenzi v. Joseph DiPonte, Inc., 114 R.I. 294, 333 A.2d 127 (1975).

34. Kermarec v. Compagnie General Transatlantique, 358 U.S. 625 (1959); Mounsey v. Ellard, 363 Mass. 693, 297 N.E.2d 43 (1973); Peterson v. Balach, 294 Minn. 161, 199 N.W.2d 639 (1972); Antoniewicz v. Reszcynski, 70 Wis. 2d 836, 236 N.W.2d 1 (1975).

35. Wood v. Camp, 284 So. 2d 691 (Fla. 1973); Hardin v. Harris, 507 S.W.2d 172 (Ky. 1974); Bramble v. Thompson, 264 Md. 518, 287 A.2d 265 (1972); Preston v. Sleziak, 16 Mich. App. 18, 167 N.W.2d 477 (1969); Scheibel v. Hillis, 531 S.W.2d 285 (Mo. 1976); Memel v. Reimer, 85 Wash. 2d 685, 538 P.2d 517 (1975); CONN. GEN. STAT. ANN. § 52-557a (West Supp. 1975).

> A social guest, no matter how cordially he was invited or urged to come, was, until recently, a licensee in almost all jurisdictions. This was so even if he performed incidental services while on the host's premises. The reasoning given was that the guest understands when he comes that he will be treated like one of the family and must take the premises as the occupier himself uses them and is entitled at most to a warning of dangers known. Pagliaro v. Pezza, 92 R.I. 110, 167 A.2d 139 (1961).

36. Rosenau v. City of Estherville, ——Iowa——, 199 N.W.2d 125 (1972); Louisville Trust Co. v. Nutting, 437 S.W.2d 484 (Ky. 1968).

37. *See, e.g.*, McMullan v. Butler, ——Ala.——, 346 So. 2d 950 (1977); Disabatino Bros., Inc. v. Baio, ——Del.——, 366 A.2d 508 (1976); Gerchberg v. Loney, 1 Kan. 2d 84, 562 P.2d 464 (1977); Behrns v. Burke, ——S.D.——, 229 N.W.2d 86 (1975).

38. 199 N.W.2d 899 (N.D. 1972). *See* 49 N.D.L. REV. 733 (1973).

39. 199 N.W.2d at 907.

40. 246 N.W.2d 496 (N.D. 1976). In *Sendelbach*, the plaintiffs had retired from farming and had given their chickens to the defendants. In return, the plaintiffs received free eggs

Court had another opportunity to follow the lead of *Rowland*. Although the court again failed to adopt the reasoning of *Rowland*, Justice Vogel, in a special concurring opinion, advocated abolishment of the distinctions between licensees and invitees in favor of a rule that reasonableness of the conduct of occupiers be adopted as the proper test for determining liability.[41] The court, in retaining the categories, relied heavily on *Werth*, but Justice Vogel declared that "it is now time for *Werth* to self-destruct."[42]

Less than six months later, in *O'Leary v. Coenen*, North Dakota joined the other jurisdictions following the lead of *Rowland* and abandoned the use of the licensee and invitee categories as being solely determinative of the duty of care owed such an entrant.[43] The trespasser category remains.[44]

The *O'Leary* court held that the common law distinctions have no logical relationship to the exercise of reasonable care for the safety of others,[45] that human safety is of greater importance than a land occupier's unrestricted freedom,[46] that the common law categories are often difficult to apply in factual situations,[47] and that using the categories usually usurps the jury's function and does not let them apply changing community standards to the duty owed.[48]

The holding in *O'Leary* does not make an occupier an insurer of his property. Rather, the status of an entrant will no longer be solely determinative on the issue of the duty of care.[49] All the factors of the case may now be integrated into a general theory of the land occupier's liability.

The circumstances of the entry will remain important.[50] Foreseeability will be a major factor. Foreseeability of the entry of people on the premises will likely differ in a city as compared with

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for a time and then occasionally bought some from the defendants. The defendants were not in the egg selling business. On one occasion the plaintiff was bitten by the defendant's dog while going out to the chicken coop to get some eggs. It was unclear whether the defendant had consented to the plaintiff going to the coop. The jury found that the plaintiff was a licensee and could not recover. *Id.* at 498. It is interesting to note that in *Sendelbach* the jury was allowed to determine the plaintiff's status and that it was not decided as a matter of law as is the usual case.

41. *Id.* at 502.

42. *Id.* Two justices concurred with Justice Vogel on the issue of abandoning the categories; the same two justices who concurred with Justice Vogel also concurred with the majority opinion. *Id.*

43. O'Leary v. Coenen, 251 N.W.2d 746 (N.D. 1977).

44. *See infra* notes 54-55, and text accompanying.

45. 251 N.W.2d at 752. *See also* Pickard v. City & County of Honolulu, 51 Haw. 134, 452 P.2d 445 (1969).

46. 251 N.W.2d at 752. *See also* Rowland v. Christian, 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561 (1968).

47. 251 N.W.2d at 752. The court cited *Sendelbach* as a good example of how definitive such a determination can be. *Id.* at 749. *See supra* note 40.

48. In *O'Leary*, the court cited Werth v. Ashley Realty Company, 199 N.W.2d 899 (N.D. 1972), as an example of a case "where a local jury could well have found possessors of premises located in or near urban areas which the public frequents to be under a higher standard of care than the possessors of rural property. 251 N.W.2d at 749.

49. *Id.* at 752.

50. *Id.*

a rural area.[51] For example, even in rural areas, foreseeability of people being present during the hunting season will most likely differ from other times of the year. The import of the new rule is that the jury may now decide these issues and they will not be decided as a matter of law.[52]

To make the premises safe for the entrant, the occupier must sacrifice some interest in ownership of his land.[53] Under the *O'Leary* rule, the interest which must be sacrificed by the occupier is a factor having new importance. The interest may be more or less important, depending upon whether the premises is a store, or a farm, or a person's home. For example, in both *Sendelbach* and *O'Leary*, the plaintiff was bitten by a dog while on a farm, an obviously important fact to consider in answering the question of sacrifice, since dogs are useful on farms.

Although an increasing number of jurisdictions have abolished the licensee-invitee distinction, they have not agreed on whether the trespasser category should be maintained. Those jurisdictions which have followed *Rowland* in abandoning all three categories have held that they serve no useful function.[54] Other jurisdictions, including North Dakota, consider the distinction between trespassers and those who enter with consent so great that the abrogation of the rule as to trespassers should not be considered.[55]

It is reassuring to see that North Dakota has acknowledged the trend favoring the abandonment of the common law categories, at least as the sole determinative factor in cases where they arise. The categories have long since outlived whatever useful function they were designed for and their demise is welcomed.

MARK W. MORROW

INFANTS—CRIMES—YOUTHS SENTENCED UNDER FEDERAL YOUTH CORRECTIONS ACT MAY NOT BE CONFINED IN A CORRECTIONAL INSTITUTION WITH ADULT OFFENDERS

In 1975, petitioners were convicted of criminal acts and were sentenced for treatment and supervision under the Federal Youth

51. *Id.*

52. Normally the status of the entrant will be an issue decided by the court. Werth v. Ashley Realty Co., 199 N.W.2d 899 (N.D. 1972). In a case where the evidence is inconclusive, however, the jury is instructed as to the distinctions of the status involved and are allowed to determine the status as a matter of fact. Sendelbach v. Grad, 246 N.W.2d 496 (N.D. 1976).

53. O'Leary v. Coenen, 251 N.W.2d 746, 752 (N.D. 1977).

54. *See supra* note 33.

55. Mounsey v. Willard, 363 Mass. 693, 297 N.E.2d 43 (1973); O'Leary v. Coenen, 251 N.W.2d 746 (N.D. 1977); Antoniewicz v. Resczynski, 70 Wis. 2d 836, 236 N.W.2d 1 (1975).