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Torts - Negligence - Licensee - Invitee - Standard of Care

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TORTS—NEGLIGENCE—LICENSEE—INVITEE—STANDARD OF CARE—The Supreme Judicial Court of Massachusetts has held that the common law distinction between a licensee and an invitee is abrogated and that the standard of care owed by an occupier to a non-trespasser is to be decided by personal negligence criteria.

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

Plaintiff, a police officer, was acting in an official capacity at the time he was injured on the defendant's property. On January 20, 1967, at dusk, the plaintiff was directed to serve a criminal summons on the defendant. After arriving at defendant's premises, the plaintiff entered by way of the driveway, served the summons at the door and was injured on an accumulation of ice while leaving. The trial court found that the defendant's rain gutters were defective in such a way as to inevitably deposit ice on the sidewalks and passageways around the defendant's house in the wintertime. The court dismissed the plaintiff's allegations of willful, wanton and reckless conduct, holding that defendant's conduct was not the active and continuing negligence required to support those allegations under the rule of *Carroll v. Hemenway*,[1] where failure to maintain a gate at an elevator shaft was not held to be willful, wanton and reckless conduct. The trial court also granted defendant's motion for directed verdict on the allegations of ordinary negligence, holding that in Massachusetts a policeman is a licensee[2] and that defendant's conduct did not violate the common law duty imposed on an occupier[3] of land toward a licensee.[4] Appealing from the motion for directed verdict, plaintiff urged that public employees be made a sui generis class to whom an occupier of land owes the same duty as to an invitee. The supreme judicial court held that the common law distinction between a licensee and an invitee is abrogated in Massachusetts after concluding that the circumstances necessitating such a distinction had changed and that future questions arising from facts such as the above are to be jury questions decided on a foreseeability approach.

1. 315 Mass. 45, 51 N.E.2d 952 (1943).
2. Aldworth v. F.W. Woolworth Co., 295 Mass. 344, 3 N.E.2d 1008 (1936); Wynn v. Sullivan, 294 Mass. 562, 3 N.E.2d 236 (1936); Brosnan v. Kaufman, 294 Mass. 495, 2 N.E.2d 441 (1936).
3. "Owner," "occupier" and "possessor" will be used interchangeably to refer to a defendant in control of the premises at the time of the plaintiff's injury.
4. Mounsey v. Ellard, 297 N.E.2d 43 (Mass. 1973).

The distinction between a licensee and invitee is important under the traditional common law analysis because status under this dichotomy determines the duty and, therefore, the standard of care owed by a landowner. The determining factors in placing the plaintiff in one or the other category are his reason and right to be on defendant's property. The common law scheme sets up three categories: the trespasser, who enters with no right; the licensee who enters with a right but is only tolerated by the occupier; and the invitee, who not only enters by virtue of right but whose presence is desired by the occupier.[5] The above categories can be thought of as a rough sliding scale along which a visitor's position improves and the occupier's duty to protect the visitor increases.[6]

To illustrate the operation of this sliding scale, consider the generally accepted duties imposed on the occupiers of land under each category. The occupier, subject to some qualifications, is not liable to a trespasser for injury caused by the occupier's failure to use reasonable care to put his land in a safe condition or to carry on his activities in a manner which does not endanger the trespasser.[7] A licensee's position is slightly better. As to him, a duty is imposed on the occupier to warn of a dangerous condition not obvious to the licensee but known to the occupier. There is no duty, however, to make the premises safe or to warn of obvious defects.[8] The invitee's position is obviously the best of the lot. The owner has a duty not only to use reasonable care to make the premises safe, but also to warn the invitee of known defects and those defects which the owner may detect with reasonable care.[9] The problems resulting from the common law analysis do not revolve around understanding the scheme of duties, but rather with the application of the categories.[10]

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5. Indermauer v. Danes, 1 C.P. 247, 35 L.J.C.P. 184 (1886) (occupier held liable to the servants of an independent contractor injured while repairing defendant's property).

6. W. PROSSER, LAW OF TORTS § 58 (4th ed. 1971).

7. RESTATEMENT (SECOND) OF TORTS § 333 (1965); Green, *Landowner v. Intruder; Intruder v. Landowner: Basis of Liability in Tort*, 21 MICH. L. REV. 495 (1923).

8. RESTATEMENT (SECOND) OF TORTS §§ 330-32 (1965); Marsh, *The History and Comparative Law of Invitees, Licensees and Trespassors*, 69 L.Q. REV. 495 (1953).

9. Howlett v. Dorchester Trust Co., 256 Mass. 544, 152 N.E. 895 (1926) (where a mother brought a two year old child to defendant's bank while she conducted business and the child fell from a bench, the surface of which was slick because of its proximity to a vapor radiator, the court charged the defendant not only with a duty to furnish a reasonably safe place to conduct a banking business but also to search out defects which could be caused by the interaction of two otherwise safe instrumentalities); RESTATEMENT (SECOND) OF TORTS § 332 (1965).

10. *See* Lord Denning v. Abbot, 2 All E.R. 1572 (1953), which stated:

A canvassor who comes on your premises without your consent is a trespasser. Once

It would be helpful to understand the rationale used in initially adopting such a scheme. In considering the rationale set out below, it is of assistance to remember that the English common law was a product of the contemporary society's mores and values, and the values dictated the result.[11]

The first English courts to grapple with suits by visitors on another's land employed an interest analysis which balanced the interest in human welfare against the interests of the landowner.[12] The interest in human welfare was measured by the magnitude of the risk of a visitor being injured while on the land of another. The landowner's interest was measured by the necessity of allowing landowners to put the property to whatever uses they see fit and in the interference with its reasonable use which would result from the precautions necessary to make conditions safe. By inserting nineteenth century values[13] on respective sides of the equation one can easily see the strong contemporary social grounding of the holdings of the early English courts.[14]

The above analysis was not confined to the eastern side of the Atlantic. In fact, the Supreme Judicial Court of Massachusetts applied the same analysis in *Sweeney v. Old Conoy & Newport Railroad*,[15] which

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he has your consent he is a licensee. Not until you do business with him is he an invitee. Even when you have done business with him, it seems rather strange that your duty towards him should be different when he comes up to your door than it is when he goes away. Does he change colour in the middle of the conversation? What is the position when you discuss business and it comes to nothing? Such is the morass into which the laws has floundered in trying to distinguish between licensees and invitees. *Id.* at 1574.

11. There are further historical reasons for what today seems the unfair emphasis upon the dominion and proprietorship of landowners. Feudal lords, having their own courts for the regulation of disputes within their fiefdoms, constantly struggled with the king to keep their dominion and sway. English legal history reflects these struggles. As the king became more powerful his courts assumed jurisdiction over the manors. However, unless the offense was heinous, the king's power did not extent across manorial boundaries. If the lord, by an affirmative act, held his land open to strangers, the king's protection went with the stranger. This may help explain the complete immunity which the possessor of property originally enjoyed with respect to injured trespassers.

12. LeLievre v. Gould, [1893] 1 Q.B.D. 491; Heaven v. Bender, [1883] 11 Q.B.D. 503; Indermauer v. Dames, 1 C.P. 247, 35 L.J.C.P. 184 (1886); Southcote v. Stanley, 165 Eng. Rep. 1195 (Ex. 1856).

13. The underlying legal theory and social objections of the nineteenth century, under which the Anglo–American theory of fault originated and developed, are substantially different from that of the middle of the twentieth century. The nineteenth century idea was that freedom of contract, enterprise and unrestricted use of property were to be assigned primacy over human welfare. This philosophy was well adapted to serve the economy of the time—one of extreme exploitation of human and natural resources. Time had not yet overthrown the feudal principle that man was sovereign over his own property.

14. Lelievre v. Gould, [1893] 1 Q.B.D. 491; Indermauer v. Dames, 1 C.P. 247, 35 L.J.C.P. 184 (1886); Southcote v. Stanley, 165 Eng. Rep. 1195 (Ex. 1856).

15. 92 Mass. 368 (1865).

was the outline and original precedent for the common law licensee-invitee distinction in Massachusetts. *Sweeney* dealt with a negligent crossing guard at defendant's railroad crossing and the court found the defendant liable to a licensee only after determining that the risk of harm was very high and the interference with enjoyment minimal.[16]

It is the same interest analysis, using values differing from those in the early English cases and the *Sweeney* case, which, in *Mounsey,* lead the Supreme Judicial Court of Massachusetts to abolish the common law distinction between a licensee and an invitee while retaining a separate category for trespassers. The *Mounsey* court acknowledged the validity of the common law rule in a time when land settlements and large estates were the rule. However, the judges realistically bowed to change by recognizing that industrialization has transformed Massachusetts from a rural agrarian society to an urbanized manufacturing area.[17]

In the 1970's, wealth, or at least urban wealth, no longer is measured in land, and, in fact, land is given value in direct proportion to the uses to which it may be put.[18] Land use has changed from an agrarian base to an urbanized, utilitarian base, and its value may be measured in utility units rather than acres.[19] Also, the value society places on the general human welfare (as opposed to property rights) has increased substantially.[20]

It is not surprising, using this set of values, that the court can arrive at a conclusion opposite from the earlier decisions. Not only does the court devalue the possessor's interest in putting his land to whatever use he sees fit, but it also raises the general human welfare interest by

16. In fact, the court reasoned that there was no interference with the occupier's use and enjoyment since the defendant voluntarily undertook placing a flagman at a railroad crossing and it was the flagman's negligence which was the direct cause of the plaintiff's injuries.

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

18. *See* Jauvins v. First Nat'l Reality Corp., 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied,* 400 U.S. 925 (1971); J. LEVI, P. HABUTZEL, L. ROSENBERG & WHITE, MODEL RESIDENTIAL LANDLORD-TENNANT CODE 6-7 (Tent. Draft 1969).

19. *See,* A MODEL LAND DEVELOPMENT CODE, AMERICAN LAW INSTITUTE (Tent. Draft No. 2, 1970).

20. *See* Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts,* 70 YALE L.J. 499 (1961). Professor Calabresi advocates that without dropping the fault-liability basis of traditional tort law, society must recognize that its industry is not in the peculiar state which it occupied in the early part of the industrial revolution. No longer is there the decreasing cost basis of industrial operation. Instead, industry is established and should recognize the hazards of its operation as a cost of production, therefore putting emphasis on compensation of human injury at the expense of the protection formerly afforded industrial activity.

saying that compensation for injury requires consideration of more factors than the blind status test will allow.[21]

At the same time, the majority of the court could not bring themselves to abolish the category and status of a trespasser. The court considered the trespasser's legal status inferior to one who enters under a color of right. It felt that, after weighing the interests involved, to allow a trespasser to recover for an injury received after the commission of an independent tort or a crime would not be consistent with those property use values[22] which the court still feels are valid. The failure to abolish the trespasser category gave rise to Judge Kaplan's dissent in which he expressed a desire to abolish all arbitrary categories, as is the trend in Britain and in some American jurisdictions.[23]

One might say, as did the dissenting judge, that status should not be a determinative in *any* case. To acknowledge the claim of a trespasser, however, would not be to say that it should be anticipated that one will trespass. While it may be argued that general negligence principles demand that one anticipate some negligence on the part of his fellow man,[24] one may assume, using those same principles, that people will obey the criminal law.[25] To place on the occupier of land a duty to protect an unwanted trespasser overlooks the fact that trespassing remains a crime in Massachusetts.[26] Therefore, the trespasser category

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21. The court quoted from Smith v. Arbaugh's Restaurant, 469 F.2d 97, 103-104 (D.C. Cir. 1972):

> The costs and risks of human injury are too complex to be decided solely on the status of the entrant, especially where the status question often prevents the jury from ever determining the fundamental question whether defendant has acted reasonably in light of all the circumstances in a particular case.

297 N.E.2d at 51.

22. 297 N.E.2d at 51. Those values are housing usage and right of quiet enjoyment of that housing.

23. *Id.* at 52; *see* Rowland v. Christian, 69 Cal.2d 108, 433 P.2d 561, 70 Cal. Rptr. 97 (1968) (where an occupier was held liable to a social guest injured in defendant's bathroom. However, the *Rowland* court went further by asserting that since reasonable people do not vary their conduct according to a conscious realization of the injured party as a trespasser, licensee or invitee, the common law rule was contrary to modern social mores and should no longer be followed in California); Pickard v. City of Honolulu, 51 Hawaii 134, 452 P.2d 445 (1969) (where it was decided that a municipality owed a duty of reasonable care to a citizen to maintain its court house restrooms in a reasonably safe manner and that the citizen's life and limb were no less worthy of protection because he entered without a business purpose); Occupier's Liability Act, 5 & 6 Eliz. 2, c. 31 (1957).

24. Lorenzo v. Wirth, 170 Mass. 596, 49 N.E. 1010 (1897) (held that one seeing a pile of coal on a sidewalk may be expected to realize that it may have been negligently left concealing a coal hole).

25. Bellows v. Worcester Storage Co., 297 Mass. 188, 7 N.E.2d 588 (1937) (where an owner was held not to be negligent for assuming that no one would set fire to his warehouse).

26. MASS. GEN. LAWS ANN. ch. 226, § 120 (1958).

serves to protect the occupier's right to quiet enjoyment of his property —a right which is supported by criminal sanctions.

The position of Judges Quirico and Reardon, concurring in the result but dissenting on the abolition of the licensee-invitee distinction on a judicial restraint theory, questioned the desirability of a sweeping change. The dissenting judges asserted that the instant case is not the proper vehicle for the court to use to abolish the rule and that the court should only go so far as to grant plaintiff's request that public employees be made a sui generis class as invitee. In so doing, the dissent would overrule the series of cases[27] which have held that a public employee on private property in his official capacity is entitled only to status as a licensee. Massachusetts would, by this rationale, retain the sliding scale scheme but elevate public employees from status as licensees to that of the preferentially treated invitees.

However, to terminate the court's consideration at this point would be to ignore the problem that the categorization of plaintiffs produces. The issue to which the majority addresses itself is not whether a public employee is a licensee in Massachusetts, but rather, whether Massachusetts courts will wrestle with similar categorization problems in the future. Indeed, the majority, citing a series of cases[28] dating back to 1883, found a basis for holding a police officer to be an "implied invitee." However, the court said that resolving the problem on a case-by-case basis does not touch the fundamental difficulty involved when a rule which no longer comports with contemporary values is imposed on a changed and changing society.[29]

A review of the tests used by the courts in fixing plaintiffs in the category of invitee will reveal that judges often become judicial contortionists in their attempts to find ways to compensate plaintiffs who would otherwise be unable to recover.[30] The "purpose theory" of in-

27. Aldworth v. F.W. Woolworth Co., 295 Mass. 344, 3 N.E.2d 1008 (1936); Wynn v. Sullivan, 294 Mass. 562, 3 N.E.2d 236 (1936); Brosnan v. Kaufman, 294 Mass. 495, 2 N.E.2d 441 (1936); Breenan v. Keane, 237 Mass. 556, 130 N.E. 82 (1921); Creeden v. Boston & Maine R.R., 193 Mass. 280, 79 N.E. 344 (1906).

28. Gordon v. Cummings, 152 Mass. 513, 25 N.E. 978 (1890); Toomey v. Sandborn, 146 Mass. 28, 14 N.E. 921 (1888); Learoyd v. Godfrey, 138 Mass. 315 (1885); Parker v. Branard, 135 Mass. 116 (1883).

29. 297 N.E.2d at 48.

30. *See* Harper, Honore, Winfield, Green & Seavey, *Laube v. Stevenson: Discussion; Licensee-Invitee, Tweedledum-Tweedledee*, 25 CONN. B.J. 123 (1951):

> It is not easy, at first glance, to discover a "business visitor" in an old grad, wandering about University property at 2:00 o'clock in the morning to find a place to urinate. It may be that in some vague and general way Yale hoped to derive tangible or intangible benefits by way of contributions or goodwill from the plaintiff's return to

vitee status, which is the earlier[31] of the two most widely used devices, requires a court to find that the defendant in some way encouraged the plaintiff to enter his land for defendant's purposes. While this theory would include people who attend free lectures,[32] church services,[33] free amusements[34] and municipal parks,[35] it requires a court to differentiate between a successful and an unsuccessful canvasser[36] (allowing the former to recover while denying recovery to the latter for lack of a proper invitation). The second theory, and the more recent,[37] requires a finding of actual or potential pecuniary gain on the part of the defendant in order to place the plaintiff in the invitee category. This theory is referred to as the "economic benefit test" and would logically include store patrons,[38] potential buyers,[39] and one who wishes to use only the lavatory[40] under the belief he may buy on the way out. Invitee

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the campus for a class reunion. But, if this kind of economic interest is enough to turn a gratuitous or "bare" licensee into an invitee or business guest, the plaintiff's presence around the house and in the care of the baby in the Laube case might be thought to bring about a similar transformation.

Reducing the emphasis on the licensee-invitee classification, abandonment of the attempt to fit every case into one or the other on the basis of business interest and leaving to the jury, wherever possible, the issue whether the conduct of the defendant has conformed to the plaintiff's reasonable expectations in the light of their relationship and all other pertinent factors of the case would, it is believed, lend far greater elasticity to the law of torts.

Id. at 132.

31. Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573 (1942).

32. Bunnell v. Waterbury Hospital, 103 Conn. 520, 131 A. 501 (1925) (where defendant hospital rented out its facilities to the Salvation Army for a public meeting, the court held that all who attended the meeting did so at the implied invitation of the hospital and are, therefore, invitees).

33. Davis v. Central Congregational Soc'y, 129 Mass. 367 (1880) (when a religious society invites members of other faiths to attend a service, those who attend are not gratuitous licensees, but rather, are invitees by virtue of the invitation).

34. Recreation Centre Corp. v. Zimmerman, 172 Md. 309, 191 A. 233 (1937) (non-paying spectator at a bowling match is an invitee and proprietor owes him the corresponding duty of care).

35. Caldwell v. Village of Isle Park, 304 N.Y. 268, 107 N.E.2d 441 (1952) (resident of a municipality which operates a park at no charge to residents is an invitee and defendant-municipality owes a duty of care to keep the premises safe from firecrackers for invitees).

36. Alberts v. Brockelman Bros., 312 Mass. 486, 45 N.E.2d 392 (1942) (where plaintiff, an independent contractor, making a demonstration of cleaning fluid and selling two quarts from defendant's stock is an invitee. However, if the demonstration is unsuccessful, then there is no commercial benefit and plaintiff is a licensee).

37. RESTATEMENT (SECOND) OF TORTS §§ 332, 343 (1965).

38. Kroger Co. v. Thomas, 277 F.2d 854 (6th Cir. 1960) (one in a self-service grocery store who is in the process of putting articles in a shopping cart is an invitee because she is considered to be in the process of purchasing).

39. Finnegan v. Goerke Co., 106 N.J.L. 59, 147 A. 442 (Ct. Err. & App. 1929) (one who enters a store which encourages browsing is an invitee, the store having invited the browsing to increase its sales).

40. Dym v. Merit Oil Co., 130 Conn. 585, 36 A.2d 276 (1944) (guest of a patron of a gas station held to be an invitee even though plaintiff-guest sought to make no purchase, only seeking to use the restroom).

status has been extended from the tenuous economic benefits of good will[41] or advertising.[42] Thus, the courts have avoided the harshness of the old rule by continually creating new types of "invitees."[43] To the majority in the instant case, creation of a sui generis class labeling public employees as invitees would have been merely one step further along the inroad process and no solution to the problem of categorization.

In substitution of the status relationship imposed by categorization the court proposed a foreseeability test to establish the standard of care owed to a plaintiff injured on the land of the defendant. This type of test would seem to have more in common with present day reality in that it would consider the whole range of factors used to determine negligence liability in situations not involving an owner or occupier of land.[44] For example, the frequency of presence on the property by others and the type of use to which the property is put by its owner would dictate the probability of risk and the amount of interference with use that this risk demands for the protection of society.[45]

The decision of the majority eliminates the sources of dissatisfaction with the common law rule. Classification of plaintiffs injured on the land of another would depend on only one factor: their right to be on the land at all. If their entry was not privileged, their recovery is premised on the common law duty owed to a trespasser, whose status has not changed as a result of *Mounsey*. If the plaintiff's entry on the land of another was privileged, a duty to use reasonable care is imposed on the owner if it is foreseeable that someone privileged to be on his land would enter and be injured there.

A second problem which is eliminated altogether is that posed by the changing status visitor.[46] The salesman entering the premises of another

41. Fournier v. New York, N.H. & H.R.R., 286 Mass. 7, 189 N.E. 574 (1934) (one seeking information about train schedules in a railway station is held to be an invitee).

42. Leighton v. Dean, 117 Me. 40, 102 A. 565 (1917) (while viewing defendant's display in defendant's shop window, plaintiff was injured by a falling awning. The court found the plaintiff to be an invitee because the shop owner stood to gain financially by the plaintiff's reading and viewing the advertising under the theory that by advertising, the owner invites all so that some might be persuaded).

43. *See* Bohlen, *50 Years of Torts*, 50 HARV. L. REV. 725, 740 (1937):

Like so many other cases in which a barbaric formula has been retained, its content has been modified by interpretation as to remove much of its inhumanity.

44. Varisco v. Malovin, 356 Mass. 712, 255 N.E.2d 190 (1970); Lutz v. Stop & Shop, Inc., 348 Mass. 198, 202 N.E.2d 771 (1964).

45. F. HARPER & J. JAMES, TORTS § 27.2, at 1432 n.13 (1956).

46. *See* Dunster v. Abbot, 2 All E.R. 1572 (1953); Harper, Honore, Winfield, Green & Seavey, *Laube v. Stevenson: Discussion; Licensee-Invitee, Tweedledum-Tweedledee*, 25 CONN. B.J. 123 (1951).

with the hope of a sale is generally considered a licensee under the common law analysis. If he makes a sale at the door, an economic benefit or an invitation is implied and the common law considers him an invitee. If he is asked in for a lemonade or invited to look at the defendant's flower garden before leaving the property, he reverts to his licensee status. If he were injured after his social encounter, should his status be lower on the scale because of the owner's social invitation? The *Mounsey* court would answer in the negative after determining his right to be on the premises and the foreseeability of being there.

Third, when questions such as the above reach the jury, it is often to determine status rather than to examine the culpability of the defendant.[47] The jury in the above case does not have the flexibility to apply the local community standards to assess the liability of the careless owner on the facts of the case. The *Mounsey* decision would allow a jury to determine if there had been a breach of care without the encumbrance of categories and their attendant rigidity.

Fourth, an otherwise meritorious claim may not be brought because a prudent attorney may realize that the common law rule minimizes his licensee-client's chance of recovery. The *Mounsey* court would indicate to the attorney that if his client's injury is the result of the defendant's negligence, such a claim would not be dismissed on the basis of an antiquated analysis.

Certain dangers may be feared as implicit in the abolition of the common law distinction. First, flooded courts and unjustified recoveries may be envisioned. A review of civil law jurisdictions who have never had a licensee-invitee distinction, however, shows that their experience has been satisfactory[48] and the plaintiffs' recoveries have not been unwarranted.[49] Second, insurance rates, rising as a result of this decision, may put a financial burden on an occupier. To allow this fear to be determinative would be to ignore the "risk spreading" principles of modern tort law. Third, feigned claims by social guests and occupiers with a design to defraud insurers may be feared. However, the fraud opportunity already exists with business invitees. In addition, it would seem

47. Laidlaw v. Perozzi, 130 Cal. App. 2d 169, 278 P.2d 523 (1955).

48. Hughes, *Duties to Trespassers: A Comparative Survey and Revaluation*, 68 YALE L.J. 633, 672 (1959). Calling the mechanical application of traditional categories the "besetting sin of the law of torts," Professor Hughes advocates the abandonment of unreflecting use of categorization dogma. In its place, he advises the use of the jury as the standard setter on a case-by-case basis in those situations where the categorization theory formerly would have applied.

49. *Id.* at 682-83.

more desirable for courts to deal with what may appear to be fraudulent situations than to deny claims of social guests without regard to fault.

With respect to the motivations of the court and the extent of the change, the *Mounsey* decision differs greatly from decisions in other jurisdictions which have rejected categorization.[50] For example, in *Rowland v. Christian*,[51] where a social guest was injured in defendant's bathroom, the California court asserted that people do not vary their conduct toward another person because of a conscious realization of his legal status; therefore, the concept of categorization is completely contrary to modern mores. *Mounsey*, on the other hand, retains the categorization of trespassers on the theory that owners do consciously vary their conduct between trespassers and non-trespassers.[52] Further, the *Mounsey* court attributes the blending of licensees and invitees not to the varied conduct theory of *Rowland*, but rather to a reluctance to perform judicial contortions by retaining an exception to liability in one breath while creating exceptions to the exceptions in the next. *Mounsey*, therefore, does not adopt the *Rowland* rationale, but merely seeks to remove the impediments which prevented this tort action from developing along the lines of other personal injury actions.

The effect of the *Mounsey* decision, therefore, is to place on the owner of property the same duty of reasonable care that is shouldered by members of society in other roles. When there is a question of his conformity to a reasonable standard on which reasonable men may differ, his liability will be judged by a jury employing the same community standards and criteria used to determine other questions of personal negligence. Status will be a determining factor only when the plaintiff was not privileged to be on defendant's land.

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50. Rowland v. Christian, 69 Cal.2d 108, 433 P.2d 561, 70 Cal. Rptr. 97 (1968); Pickard v. City of Honolulu, 51 Hawaii 134, 452, P.2d 445 (1969).
51. 69 Cal.2d 108, 433 P.2d 561, 70 Cal. Rptr. 97 (1968).
52. 297 N.E.2d at 51.