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Torts - Negligence - Premises Liability: The Foreseeable Emergence of the Community Standard - Mile High Fence Co. v. Radovich, 175 Colo. 537, 489 P.2d 308 (1971)

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COMMENT

TORTS—NEGLIGENCE—PREMISES LIABILITY: The Foreseeable Emergence of the Community Standard

Mile High Fence Co. v. Radovich, 175 Colo. 537, 489 P.2d 308 (1971).

INTRODUCTION

A defendant's liability for the tort of negligence is determined, in part, by the nature of the duty he owes the plaintiff—generally, a duty not to expose the plaintiff to an unreasonable risk of harm.[1] Since duty depends on the relationship between the plaintiff and the defendant,[2] and since this relationship often defies precise legal characterization, defining the level or quality of duty is usually a difficult task. At early common law, special rules were developed to define duties in terms of frequently occurring relationships. These rules were actually a judicial "codification" of the level of duty to be imposed upon a defendant who stands in a particular relationship to the plaintiff.

One of those special relationships was that between a defendant-landowner or -occupier[3] and a plaintiff who entered upon the defendant's land. The rules fashioned at common law to define the duty created by such a relationship depended solely upon the ancient classification of the plaintiff as a trespasser, licensee, or invitee.[4]

These categories and their attendant duties were far from all encompassing, and almost from the beginning difficulties arose in their application. In some factual situations the plaintiff did not fit comfortably into any of the classifications.[5] In other situations, the defendant escaped liability because of the plaintiff's classification, even though the defendant's conduct was patently unrea-

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[1]*See* Winfield, *Duty in Tortious Negligence*, 34 COLUM. L. REV. 41 (1934).

[2]*See* LeLievre v. Gould, 1 Q.B. 491, 497 (1893).

[3]The orthodox view treats all those in possession of land in the same manner as the landowner when determining the duty owed to an entrant upon the land. *See* W. PROSSER, THE LAW OF TORTS 395-96 (4th ed. 1971) [hereinafter cited as PROSSER].

[4]PROSSER 357.

[5]See Wolfson v. Chelist, 284 S.W.2d 447 (Mo. 1955), for a discussion of the controversy surrounding the proper classification of social guests. See PROSSER at 395-96 for a thorough discussion of the difficulty of categorizing an entrant who is a public servant performing a function within the scope of his official duties.

sonable or irresponsible.[6] Beyond the difficulties inherent in applying the categories, the judicial methodology of their application was necessarily mechanical: first, the class of the entrant was determined; then, the duty owed by the landowner followed from that determination without regard to the reasonableness of the landowner's behavior. This mechanical and often rigid approach stands in contrast to the more articulated and flexible methods of modern jurisprudence.[7] Under the mechanical approach, courts often arrived at results fraught with conflict and harshness. This generated years of debate over the proper application of the common law classifications in determining the duty of defendant-landowners.[8]

With this backdrop of controversy, Colorado, in the 1971 decision of *Mile High Fence Co. v. Radovich*,[9] joined a small but growing number of states[10] in abrogating the common law classifications as conclusive determinants of the level of duty owed by a landowner to persons coming upon his land. Instead, the court applied a standard of duty no different from that imposed upon any other defendent: the landowner must conduct himself as a reasonable man under the circumstances. The category of the entrant is to be considered, but is not to ultimately control the liability of the land occupier.[11]

The purpose of this comment is to analyze the significance of this change in the law of Colorado, highlighting both procedural and substantive effects of the *Mile High* decision and exploring its impact upon the theoretical foundations of negligence

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[6]Blyth v. Topham, 79 Eng. Rep. 139 (C.P. 1607). *See also* Susquehanna Power Co. v. Jeffress, 159 Md. 465, 150 A. 788 (1930) (harm caused by an unguarded, dangerous electric wire).

[7]*See, e.g.*, C. MORRIS, MORRIS ON TORTS 249-52 (1953).

[8]For some of the more frequent criticisms, see Green, *Landowner v. Intruder; Intruder v. Landowner. Basis of Responsibility in Tort*, 21 MICH. L. REV. 495 (1923); Hughes, *Duties to Trespassers: A Comparative Survey and Revaluation*, 68 YALE L.J. 633 (1959); Marsh, *The History and Comparative Law of Invitees, Licensees and Trespassers*, 69 L.Q. REV. 182 (1953); Comment, *The Outmoded Distinction Between Licensees and Invitees*, 22 MO. L. REV. 186 (1957).

[9]175 Colo. 537, 489 P.2d 308 (1971).

[10]*See* Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). *See also* Pickard v. City & County of Honolulu, 51 Hawaii 134, 452 P.2d 445 (1969); Louisville Trust Co. v. Nutting, 437 S.W.2d 484 (Ky. 1968) (classifications of entrants are no longer controlling in application of "attractive nuisance" doctrine); Taylor v. New Jersey Highway Authority, 22 N.J. 454, 126 A.2d 313 (1956) (although the common law rule appears to have been reinstated in New Jersey by Snyder v. I. Jay Realty Co., 30 N.J. 303, 153 A.2d 1 (1959)).

[11]175 Colo. at 548, 489 P.2d at 314.

law. We begin by examining the historical development of the common law scheme of entrant classification.

I. Historical Development and Modification of the Common Law Classifications

Under the common law, the landowner's duty to those entering upon his land was strictly defined according to the classification of the entrant as a trespasser, licensee, or invitee.[12] The Colorado decision in *Gotch v. K. & B. Packing & Provision Co.*[13] exemplifies this traditional status approach. Here the trial court granted the defendant's motion for a nonsuit on grounds of the plaintiff's status. On appeal, the supreme court affirmed the trial court, reasoning that the plaintiff was a mere licensee and as such he was required to take the defendant's premises as he found them. Had the plaintiff possessed the status of an invitee, however, the defendant's duty would have included the maintenance of the premises in a reasonably safe condition, and, arguably, recovery would have followed.

It is generally conceded that the common law formulation is rooted in the characteristics of feudal society. The medieval landowner occupied a privileged position in society and as a result possessed a nearly absolute right to maintain and use this property in whatever manner and for whatever purpose he wished.[14] Although numerous qualifications and exceptions to absolute property rights appeared in early common law,[15] these did not include the duty to maintain and use land so that others were not harmed. Duty, as such a qualification, did not emerge until the law of negligence developed several centuries after feudal notions of property rights had become cemented in English jurisprudence.[16] As a result, the classifications of entrants upon land were

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[12]For early cases, see Southcote v. Stanley, 156 Eng. Rep. 1195 (Ex. 1856); Chapman v. Rothwell, 120 Eng. Rep. 471 (Q.B. 1858); Hounsell v. Smyth, 141 Eng. Rep. 1003 (C.P. 1860). See also the following three American cases which adopted the distinctions: Sweeny v. Old Colony & N.R.R., 92 Mass. (10 Allen) 368, 87 Am. Dec. 644 (1865); Beck v. Carter, 68 N.Y. 283, 23 Am. R. 175 (1877); Gillis v. Pennsylvania R.R., 59 Pa. 129, 98 Am. Dec. 317 (1868).

[13]93 Colo. 276, 25 P.2d 719 (1933).

[14]Marsh, *supra* note 8, at 184.

[15]The basic land rights grew from a system of feudal tenure. Attendant to the rights of a landowner were the many incidents of tenure such as homage, primer seisin, and others which restricted the rights of the land possessor. *See* C. Moynihan, Introduction to the Law of Real Property (1962).

[16]The concept of duty was first defined *in terms of foreseeability* in Heaven v. Pender, 11 Q.B.D. 503, 509 (1883).

developed independently of the law of negligence and were later borrowed from other doctrinal areas of the law for application in negligence cases.[17]

A. *The Evolution of the Three Classifications*

1. Trespasser

The category of trespasser grew largely from the law of nuisance. Acts by a landowner, such as felling a tree onto an adjacent highway, gave rise to an action in nuisance against the landowner for damage suffered by a traveler.[18] The law gradually expanded to protect one who strayed onto land adjacent to a highway, where his presence was considered incidental to the use of the highway. If, however, his entry was something other than incidental, the law afforded him no protection. This resulted in two classes of entrants: those who possessed a right of presence incident to the use of the public way; and those who entered the landowner's premises in violation of his property rights. The latter were deemed trespassers.[19] Thus, a trespasser was one who entered the land without legal right; that is, the landowner had neither actually nor constructively consented to the entrance, and the trespasser possessed no other legal privilege.[20]

2. Licensee

It has been suggested that the category of licensee grew from an analogy to the law of bailments.[21] The bailor's duty to the bailee, with regard to the condition of the chattel, varied according to whether the bailment was gratuitous or for hire. If the bailment was gratuitous, the bailor's duty was only to warn of known defects which were concealed from the bailee.[22] The relationship between landowner and licensee is analagous to that between a bailor and gratuitous bailee. The licensee, then, is one who possesses only the tolerance or bare consent of the landowner. The relationship is a gratuitous one, with the landowner gaining no economic or other benefit from the licensee's presence.[23]

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[17]James, *Tort Liability of Occupiers of Land: Duties Owed to Trespassers*, 63 YALE L.J. 144, 145 (1953); Marsh, *supra* note 8, at 186.

[18]Marsh, *supra* note 8, at 186-90.

[19]*Id.* at 187.

[20]RESTATEMENT (SECOND) OF TORTS § 329 (1965) [hereinafter cited as RESTATEMENT].

[21]Marsh, *supra* note 8, at 193-94.

[22]8 C.J.S. *Bailments* § 25 (1962).

[23]Marsh, *supra* note 8, at 190.

3. Invitee

The invitee class developed primarily under the influence of the law of contracts.[24] Whereas the licensee appeared in the common law as a gratuitous bailee, the invitee assumed many of the legal traits of a contractual bailee or bailee-for-hire. The bailor owed his bailee-for-hire the duty to inspect, correct, and/or warn of defects in the bailed chattel.[25] This relationship parallels that between the landowner and his invitee. Invitee status existed where the presence of the entrant provided some economic benefit to the landowner.[26] In short, the landowner exchanged the benefit or prospective benefit that he gained from the invitee's presence for an obligation to protect the invitee while on the premises. This is analogous to the role of consideration in the bailment-for-hire.

It is clear then that the various categories of entrant arose in the law of nuisance, bailment, and contract. When negligence emerged as a tort in its own right, it borrowed these classifications and assigned them new and often distorted meanings to meet the needs of the general law of negligence.[27]

B. *The Emergence of Negligence*

Before the early 19th century, the common law recognized negligence as a type of fault, and as such it was often treated as *one element* of a substantive tort.[28] Thus negligence first appeared in actions on the case, but gradually grew to its modern status as a distinct tort in its own right.[29] The tort of negligence requires proof of (1) a recognized legal duty owed by the defendant to avoid exposing the plaintiff to a foreseeable and unreasonable risk of harm, (2) a breach of that duty, (3) some injury to the plaintiff recognized by law as compensable, and (4) a causal connection between the breach of duty and the plaintiff's injury.[30]

As has already been observed,[31] duty is dependent upon the relationship between the plaintiff and defendant. Thus, in defin-

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[24]*See* PROSSER 386-87; *see also* Marsh, *supra* note 8, at 190-95.

[25]RESTATEMENT, *supra* note 20.

[26]The characteristics of this class were established in the leading English case, Indermaur v. Dames, L.R. 1 C.P. 274, 35 L.J.C.P. 184, *aff'd*, L.R. 2 C.P. 311, 36 L.J.C.P. 181 (1866). *See also* RESTATEMENT § 332.

[27]Marsh, *supra* note 8, at 191.

[28]For a discussion of the historical development of negligence as a tort, see Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951).

[29]PROSSER 139-40.

[30]*Id.* at 143.

[31]*See* text accompanying note 2 *supra*.

ing the landowner's duty, the law of negligence looked to the relationship between him and the entrant upon his land. This relationship was characterized by the entrant's classification as a trespasser, licensee, or invitee.[32]

The landowner's duty to the entrant was determined by (1) his awareness of the presence of any member in the entrant's class, and (2) his consent to this presence. The law imputed to the landowner no knowledge of or consent to the trespasser's presence, and thus the landowner owed no duty to make or to keep his premises safe for a trespasser, although he could not willfully or wantonly injure him.[33] In part, this limited duty reflected the fact that the trespasser was committing a tortious wrong against the interest of the landowner by entering the premises in the first instance.[34]

However, under the principle of *volenti non fit injuria* (no violence is done to one who consents), an entry consented to by the landowner was not tortious.[35] Such bare consent to an entrance converted the legal status of the entrant from one of trespasser to one of licensee. Thus, the licensee presumably entered the land with the knowledge and consent of the landowner who tolerated—but did not affirmatively encourage—the entrance.[36] The licensee, like the trespasser, had to take the premises as he found them, and the landowner's duty was only to avoid affirmative acts which might injure the licensee.[37]

Where consent was present in combination with the landowner's affirmative encouragement of the entrance for a specific economic purpose, the entrant's status was that of an invitee.[38] To the invitee, the landowner owed a higher level of duty than was owed to a trespasser or licensee. Not only did the landowner have to avoid willful and affirmative injury to the invitee, he also had to inspect for hazards and, upon discovery, act to rectify them or warn the entrant of their existence.[39]

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[32]PROSSER 357.

[33]Deane v. Clayton, 7 Taunt. 489, 521 (C.P. 1817).

[34]Green, *supra* note 8, at 502.

[35]PROSSER 101.

[36]*Id.* at 376.

[37]The source of the licensee rule is Southcote v. Stanley, 156 Eng. Rep. 1195 (Ex. 1856).

[38]PROSSER 385-91.

[39]*Id.* at 392-94. *See also* COLO. JURY INST. 12:9 (1969). A leading Colorado invitee decision is Rocky Mountain Fuel Co. v. Tucker, 72 Colo. 308, 211 P. 383 (1922).

In this manner, the classifications of trespasser, licensee, and invitee constitute a continuum of the landowner's consent to and knowledge of the plaintiff's presence upon the land. The trespassing plaintiff stands in a relationship with the defendant void of both consent and knowledge, the implication being that even if the defendant had had knowledge of the plaintiff's presence he would not have consented to it. The licensee relationship with the defendant includes only that consent and knowledge which might be inferred from the landowner's toleration of the plaintiff's presence. The invitee's relationship with the defendant-landowner, on the other hand, is one of both consent and knowledge inferred from the affirmative encouragement of the plaintiff's presence by the defendant-landowner.

The classes of entrants, when applied to the wide range of circumstances surrounding the landowner-entrant relationship, proved to be ill equipped for their new role in the law of negligence.[10] The devotion to history and historical antecedents in the laws of nuisance, bailment, and contract retained considerable importance to the relationships of the landowner with the various classes of entrants upon his land. In these areas of the law, the classification scheme was narrowly applied to the relationships of landowners and entrants.[11] However, in their application to negligence cases the discrete, nearly rigid classes of plaintiffs could not accommodate the broad scope of relationships in which negligent injury occurred. In short, courts were forced to determine the defendant's duty by pigeonholing the plaintiff into one of the categories fashioned from the narrow applications of the law of nuisance, bailment, or contract. Until recently, this mechanical jurisprudence has persisted in the common law, and courts, rather than abandoning it, have fashioned numerous modifications of the classification scheme—modifications as mechanical as the original doctrine.

C. *The Development of Exceptions to and Modifications of the Common Law Categories*

As a result of general dissatisfaction with the rigidity of the categories and the increasing momentum of the general law of negligence, exceptions and refinements developed in the plaintiff

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[10]*See* C. WILLIAMS, THE REFORM OF THE LAW 77 (1951); *see also* Hughes, *supra* note 8; Wright, *The Law of Torts: 1923-47*, 26 CAN. B. REV. 46, 81-89 (1948); Comment, *supra* note 8.

[11]Marsh, *supra* note 8, at 199.

classifications and their corresponding defendant duties. These changes included the redefinition of both the membership in the three classes and the duty owed to each class.

1. Modifications in Class Definition and Duty Owed Trespassers and Licensees

The earliest common law rules held that the landowner owed no duty to avoid negligent injury to a licensee upon his property. Courts soon carved out an exception to the no-duty rule, holding that where a licensee was injured because of the landowner's failure to warn of a "latent defect," liability might be imposed.[42] Latent defects were those unknown to the entrant, as distinguished from patent defects—those obvious to him upon a reasonable inspection.[43] There was no duty to warn an entrant of the obvious or patent defect, but where the condition was latent, unknown to the entrant, and known to the landowner, a duty to warn was imposed.[44] This distinction between latent and patent defects probably arose as an extension to the liability imposed on a landowner when he acted to trap the licensee.[45] Courts found great similarity between an injury caused by a trap and that caused by a failure to warn of a dangerous, concealed hazard known to the landowner but not to the entrant.[46] In both situations, courts were seemingly responding to the wanton or willful character of the defendant's misfeasance or nonfeasance. In this sense the expansion of duty for latent defects was not truly an expansion at all, but rather a recognition of more diverse conduct as willful.

This duty to warn of latent defects was extended to both licensees and to certain types of trespassers.[47] Thus where a trespasser's presence became known to the landowner the latter owed not only a duty to refrain from affirmative conduct injurious to the trespasser but also a duty to warn him of any "latent defects" that might exist on the premises.[48] In short, where the landowner

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[42]The source of this exception is found in the cases of Bolch v. Smith, 158 Eng. Rep. 666 (Ex. 1862), and Corby v. Hill, 140 Eng. Rep. 1209 (C.P. 1858). *See also* COLO. JURY INST. 12:10 (1969).

[43]PROSSER 380-82.

[44]RESTATEMENT § 342.

[45]Griffith, *Licensors and 'Traps'*, 41 L.Q. REV. 255 (1925).

[46]*Id.*

[47]RESTATEMENT § 338.

[48]Davis' Adm'r v. Ohio Valley Banking & Trust Co., 127 Ky. 800, 106 S.W. 843 (1908); Herrick v. Wixom, 121 Mich. 384, 81 N.W. 333 (1899); Omaha & Republican Valley Ry. v. Cook, 42 Neb. 577, 60 N.W. 899 (1894).

had actual knowledge of a trespasser's presence, and where he failed to eject him, the law implied his toleration of the trespasser's presence and imposed upon the landowner the additional duty to warn of latent defects, as though the trespasser were actually a licensee.[49]

A similar extension of duty occurred where the landowner had implied rather than actual knowledge of the trespasser's presence. For example, if the plaintiff was a "constant trespasser on a limited area"[50] of the premises, and if the landowner had not taken any action to stop the practice, the trespasser again assumed the status of a licensee under the fiction that customary and tolerated trespasses were known of and consented to by the landowner.[51]

The duty of the landowner was also expanded in cases where the trespasser was a child. If a hazardous or defective artificial condition existed on the land, situated in a place where children were likely to trespass, and if the condition constituted an "attractive nuisance,"[52] the landowner was under a duty to "exercise reasonable care to *eliminate* the danger or otherwise to protect the children."[53] An "attractive nuisance" was defined as any artificial condition on land which presented an unreasonable risk of harm to children—unreasonable in that the risk could not be perceived by children due to their youth.[54] Consequently, the duty owed the trespassing child approached that owed an invitee. This is not surprising since the attractive nuisance, in some sense, lured the child onto the premises and into danger, and thus it had an effect similar to that of "affirmative encouragement" in invitee situations.[55]

These modifications of duty owed licensees and the three subclasses of the general class of trespassers are really responses

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[49]*See, e.g.*, St. Louis S.W. Ry. v. Douthit, 208 S.W. 201 (Tex. Civ. App. 1919).

[50]*See, e.g.*, Wise v. Chicago, R.I. & Pac. Ry., 355 Mo. 1168, 76 S.W.2d 118 (1934).

[51]Smith v. Philadelphia & R. Ry., 274 Pa. 97, 117 A. 786 (1922); St. Louis S.W. Ry. v. Douthit, 208 S.W. 201 (Tex. Civ. App. 1919); Davis v. Chicago & N.W. Ry., 58 Wis. 646, 17 N.W. 406 (1883).

[52]Keffe v. Milwaukee & St. P. Ry., 21 Minn. 307 (1875).

[53]RESTATEMENT § 339 (emphasis added).

[54]Meagher v. Hirt, 232 Minn. 336, 45 N.W.2d 563 (1951).

[55]In 1934 the first *Restatement of Torts* supported the special rules pertaining to trespassing children without any fiction of attractive nuisance. *See* RESTATEMENT OF TORTS § 339 (1934). For a discussion of the competing policies embraced by the trespassing children doctrine, see Bohlen, *The Duty of a Landowner Towards Those Entering His Premises of Their Own Right*, 69 U. PA. L. REV. 142, 237, 340, 348 (1921).

to the strain of applying discrete plaintiff categories to negligence cases. For many entrants, the mechanical classification scheme worked well. To illustrate, a trespasser's presence on the land was unconsented to, unprivileged, and unknown by the landowner, and hence the latter's duty was severely limited. But if "known trespassers," "constant trespassers," or "trespassing children" were negligently injured upon the land, classifying them as mere trespassers would bar their recovery, even though the circumstances of their trespass suggested at least constructive consent to and knowledge of their presence by the defendant.[56] To avoid the harsh consequences of the original common law scheme, courts began to distort the clear demarcations between classes of plaintiffs, extending new protection to licensees and treating some trespassers as licensees or invitees. From case to case these expansions invited uneven applications and finely-drawn distinctions between plaintiffs.[57] However, as will be demonstrated shortly,[58] they did foreshadow later, more candid departures from mechanical jurisprudence.

2. Modifications in Class Definition and in Duty Owed Invitees

At common law, one who entered land under a social invitation was classified as a licensee since his presence provided no economic benefit to the landowner.[59] The courts, however, had difficulty in squaring the minimal duty owed the "social invitee"[60] with the affirmative nature of his invitation. This difficulty encouraged a broadening of the definition of an invitee to include one who was encouraged to enter by the words or conduct of the landowner, irrespective of economic benefit.[61] The courts implied from the invitation of the landowner his guarantee that the premises would be reasonably safe for the guest. Thus in some jurisdictions the social guest became an invitee.[62]

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[56]For an analysis of these modifications in terms of the post-*Mile High* foreseeability test, see section III. A. *infra*.

[57]*See* authorities cited note 8 *supra*.

[58]*See* section II. *infra*.

[59]Southcote v. Stanley, 156 Eng. Rep. 1195, 1197 (Ex. 1856).

[60]*See, e.g.*, Laube v. Stevenson, 137 Conn. 469, 78 A.2d 693 (1951).

[61]The economic benefit requirement actually developed later than the implied assurance theory; however, the social guest in earlier cases did not receive a per se assurance of the safety of the premises. *See* PROSSER 388-89.

[62]The social guest was made an invitee by statute in Connecticut. *See* CONN. GEN. STAT. ANN. § 52-557a (Supp. 1973). The same result was achieved by judicial decision in Lousiana. *See* Alexander v. General Accident Fire & Life Assurance Corp., 98 So. 2d 730

The reasoning underlying the modern social invitee rule found further expression in the development of a "public invitee doctrine." As the *Restatement (Second) of Torts* defines the term, "A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public."[63]

These broader definitions brought a larger number of plaintiffs under the umbrella of duty owed the invitee. The modifications, however, affected only the membership of the invitee class, not the duty owed the class. The landowner was still required to inspect his premises[64] in order either to make them safe for an invitee or to warn him of any hazards.[65]

Although such modifications of the categories permitted more "just" results in particular cases, they failed to correct the confusion and complexity in issues of duty. In fact, they served to further confuse the determination of the landowner's duty by creating additional rigid categories to be applied to the plaintiff.[66] In distinguishing, for example, a "known trespasser" from all other trespassers, courts were often forced to split definitional hairs, and still the spectre of harsh results remained. Where a plaintiff was injured by the clearly unreasonable conduct of a defendant, but where the plaintiff could not be rationally placed in a favored category, his recovery was still often barred.

Dissatisfaction with the common law expansions which had occurred on both sides of the Atlantic led England to abolish the distinction between invitee and licensee in 1957.[67] The same pressures for change were then building in America.[68]

II. The Point of Departure

A. Rowland v. Christian

With the confusion and conflict created by the varied appli-

(La. App. 1957). Colorado, however, followed the majority rule, treating social guests as mere licensees. *See* Kenny v. Grice, 171 Colo. 185, 188-89, 465 P.2d 401, 403 (1969).

[63]Restatement § 332.

[64]Durning v. Hyman, 286 Pa. 376, 133 A. 568 (1926); Kallum v. Wheeler, 129 Tex. 74, 101 S.W.2d 225 (1937). *See also* Restatement § 343.

[65]Johnston v. De La Guerra Properties, 28 Cal. 2d 394, 170 P.2d 5 (1946); Dean v. Safeway Stores, Inc., 300 S.W.2d 431 (Mo. 1957).

[66]The court in Wolfson v. Chelist, 284 S.W.2d 447 (Mo. 1955), underscores this observation in detail.

[67]Occupiers Liability Act, 5 & 6 Eliz. 2, c. 31, at 308 (1957). The limited duty owed a trespasser was not changed by this legislation.

[68]*See, e.g.*, O'Keefe v. South End Rowing Club, 64 Cal. 2d 729, 414 P.2d 830, 51 Cal. Rptr. 534 (1966).

cations of the common law rules, it was inevitable that some courts would break with tradition and refuse to apply the original classification scheme or the modifications which had been grafted onto it. The first court to do this was the California Supreme Court in its 1968 decision, *Rowland v. Christian.*[69] In this case the plaintiff, a guest in the apartment of the defendant, injured his hand while using a faucet in the bathroom. The defendant had notified the landlord of the defect in the faucet and had requested its replacement 1 month prior to the accident. At trial, the defendant moved for a summary judgment alleging that the plaintiff had used the bathroom facilities on a prior occasion and that he had been aware of the faucet's condition. Under the traditional common law approach, the plaintiff had been a mere licensee since his presence in the defendant's apartment had been gratuitous.[70] The trial court therefore granted the defense motion, ruling that the plaintiff, as a licensee, had not been entitled to a warning.

In his appeal from the summary judgment, the plaintiff alleged that the defendant had owed him a duty of warning because she had been aware of his impending use of the bathroom and of the hazard existing therein. As a licensee, the plaintiff might still have been entitled to a warning of the defective condition if the condition had been latent, and if he had been unaware of it.[71] Alternatively, if the definition of invitee had been expanded, as it had in some jurisdictions, the plaintiff might have been considered a social invitee, and thus entitled to a warning.[72] Instead of permitting or denying recovery by selecting an appropriate plaintiff classification, or by creating a new one, the court held:

> The proper test . . . is whether in the management of his property [the defendant] has acted as a reasonable man in view of the probability of injury to others, and, although the plaintiff's status as a trespasser, licensee, or invitee may in the light of the facts giving rise to such status have some bearing on the question of liability, the status is not determinative.[73]

The court concluded that modern society could no longer justify the supremacy of landowner rights over the life and limb of entrants. Since the common law classifications primarily served

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

[70]Hansen v. Richey, 237 Cal. App. 2d 475, 481, 46 Cal. Rptr. 909, 911 (1967).

[71]*See* text accompanying notes 42-46 *supra.*

[72]*See* text accompanying notes 59-63 *supra.*

[73]69 Cal. 2d at 114, 443 P.2d at 568, 70 Cal. Rptr. at 104.

landed interests, the court chose to "turn the corner" away from the classifications and to install in their place the general rules of negligence for determining the duty of the landowner vis-à-vis the entrant upon his land.[74] This decision provided the stimulus for other jurisdictions, including Colorado, to institute a more modern concept of duty in cases of premises liability.

B. Mile High Fence Co. v. Radovich

In 1971 the Colorado Supreme Court was faced with a situation much like that presented by *Rowland.* In *Mile High Fence Co. v. Radovich*,[75] the defendant occupied land for the purpose of erecting a fence. At the end of a day's work, several post holes had not been permanently filled with fence posts; however, employees of the defendant had temporarily placed posts in all but one of the empty holes. This open hole was located approximately 7 inches from the edge of an alley. Late that evening Radovich, a policeman on duty, strayed from the alley and stepped into the open hole, breaking his leg. There were no barricades, warning lights, or other protective devices to alert the plaintiff to the hazard. The trial court granted judgment for the plaintiff.[76]

The defendant appealed, alleging that Radovich entered the property as a licensee, that the hazard was apparent upon a reasonable inspection, and that he was therefore owed no duty of warning.[77] The court of appeals affirmed the judgment for the plaintiff, concluding that the entrant's status or classification as an invitee, trespasser, or licensee was no longer controlling in determining the landowner's duty.[78] In affirming the court of appeals decision, the Colorado Supreme Court held:

> *[S]tatus* or *classification* of one who is upon the property of another is not to be determinative of the occupant's responsibility or the degree of care which he owes to that person.[79]

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[74]The court cited as a further justification for its decision section 1714 of the Civil Code:

> Every one is responsible, not only for the results 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 . . . .

CAL. CIV. CODE § 1714 (West 1973).

[75]175 Colo. 537, 489 P.2d 308 (1971).

[76]*Id.* at 538-39, 489 P.2d at 309.

[77]*Id.* at 539, 489 P.2d at 310. The company also argued that the trial court erred in not finding Radovich contributorily negligent for his failure to use his flashlight.

[78]*Id.* at 539-40, 489 P.2d at 310.

[79]*Id.* at 548, 489 P.2d at 314.

The court gave two reasons for its decision. First, the traditional rules bred conflict and confusion, resulting in a number of the exceptions and modifications discussed earlier.[80] The different interpretations of an individual's status in different courts in the same jurisdiction also compounded litigation.[81]

The second reason given by the court was that the traditional approach usurped the jury function. The court felt that the common law rules were active in "preventing the jury from applying changing community standards to a landowner's duties, a harshness which is inappropriate to a modern legal system."[82] The court expressed concern that the mechanical application of the common law classifications to determine the landowner's duty often resolved the question of liability as a matter of law. Thus, the rigid application of the common law classifications, instead of permitting a flexible jury assessment, often acted to deny meritorious claims.[83] In order to achieve more equitable results, the court set forth the following rule:

> *[I]t is the foreseeability of harm from the failure by the possessor to carry on his activities with reasonable care for the safety of the entrants which determines liability.*[84]

Thus, Colorado joined California in abrogating the common law classifications as the sole factor in ascertaining the duty of a land occupier to one injured upon his land.[85]

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[80]*See* section I.C. *supra.*

[81]The court cited *Smith v. Windsor Reservoir & Canal Co.* as having been before the court on four occasions as a result of conflict and confusion in determining the class to which an entrant belonged. These four cases, all of the same name, are found at 78 Colo. 169, 240 P. 332 (1925); 82 Colo. 497, 261 P. 872 (1927); 88 Colo. 422, 298 P. 646 (1931); 92 Colo. 464, 21 P.2d 1116 (1933).

[82]175 Colo. at 542, 489 P.2d at 312.

[83]*Id.* at 543-46, 489 P.2d at 312-13. The court indicated that decisions as a matter of law were the rule rather than the exception in Colorado citing, *inter alia*, Dunbar v. Olivieri, 97 Colo. 381, 50 P.2d 64 (1935); Gotch v. K. & B. Packing & Provision Co., 93 Colo. 276, 25 P.2d 719 (1933); Catlett v. Colorado & S. Ry., 56 Colo. 463, 139 P. 14 (1914); Watson v. Manitou & P.P. Ry., 41 Colo. 138, 92 P. 17 (1907).

[84]175 Colo. at 547, 489 P.2d at 314 (emphasis added) (adopting the position of the *Restatement (Second) of Torts).* This foreseeability and reasonableness standard in *Mile High* was "codified" in the 1973 revision of the Colorado civil jury instructions. The new instruction states that the owner or occupant of the premises must use reasonable care to keep his premises in a reasonably safe condition, in the light of the foreseeability of injury to others. COLO. JURY INST. 12:9 (Supp. 1973).

[85]A comparsion of *Mile High* and *Rowland* reveals several similarities. First, both plaintiffs would have been licensees under the common law rules. The instrumentalities in both cases were either unknown to the plaintiff or not obvious to him upon a reasonable inspection. In *Rowland*, the defect in the faucet was not obvious to the plaintiff. In *Mile High*, the indirect lighting in the alley was insufficient to illuminate the open post hole.

III. An Analysis of the *Rowland* and *Mile High* Impact

Thus far we have examined the rigid common law classifications as they grew from the privileged status of the landowner in feudal society. The classification scheme attempted to divide the duty owed by landowners to entrants into three discrete levels according to the equally discrete classes of entrants. Since the duty actually varied continuously across the spectrum of possible plaintiffs and depended on other factors in addition to the entrant's class, the results of this scheme were uneven and often harsh. Courts created a number of exceptions to the classes and fashioned certain legal fictions which either elevated some entrants to a class owed a higher duty or raised the level of duty owed a particular class. But far from correcting the problems, these changes further compounded the confusion and complexity surrounding questions of landowner duty.

The California Supreme Court in *Rowland* sought to rectify these difficulties by refusing to apply the entrant's class as the conclusive determinant of the landowner's duty and instead imposed a duty of reasonable care under all relevant circumstances. This constituted an application of the general law of negligence. Subsequently, in *Mile High*, Colorado joined California in abrogating the strict classification scheme and in adopting the general law of negligence for questions of landowner duty.

To date, subsequent case law in both California and Colorado has been inadequate for a conclusive evaluation of either *Rowland*'s or *Mile High*'s impact. Nevertheless, the existing case experience does point to certain trends and influences developing as a result of these decisions. For example, 1 year after *Rowland* was decided, the California Court of Appeals, in the case of *Beauchamp v. Los Gatos Golf Course*,[86] refused to apply the principles of *Rowland* to an invitee case. The court ruled that although *Rowland* may have changed the method of determining the duty owed a licensee, it did not alter the duty rules of prior invitee decisions.[87]

Thus, both courts suggested that a basis for the liability of the landowner might have existed under common law. In both cases, the court chose not to perpetuate the common law classifications but rather to impose upon the occupier an obligation to use his property reasonably in light of the foreseeability of harm.

[86]273 Cal. App. 2d 20, 77 Cal. Rptr. 914 (1969). The California Court of Appeals for the Fifth District has also sanctioned this approach of not applying *Rowland* to invitees. *See* Solgaard v. Guy F. Atkinson Co., 16 Cal. App. 3d 881, 884 n.1, 94 Cal. Rptr. 471, 474 n.1 (1971).

[87]273 Cal. App. 2d at 23, 77 Cal. Rptr. at 918.

Decisions like *Beauchamp* in both California and Colorado serve to focus the remainder of this comment upon the theoretical, procedural, and substantive implications of abrogating the common law classification scheme. The theoretical implications act to establish the framework in which the new rule will be applied and hence provide a logical starting point for analysis.

A. *The Foreseeability of Relation and Risk: A Theoretical Analysis*

In the famous decision of *Palsgraf v. Long Island Railroad Co.*,[88] Chief Judge Cardozo stated the essence of the general law of negligence: "[t]he risk reasonably to be perceived defines the duty to be obeyed"[89] and "negligence, like risk, is . . . a term of relations."[90] Read together, these two statements support the earlier observation[91] that the "risk to be reasonably foreseen" depends largely upon the "relation" between plaintiff and defendant. This reasoning prompted Professor Prosser to characterize, in extremely broad terms, that relation between a plaintiff and defendant which determines duty: a relation "of close proximity in time, space, and direct causal sequence, between a negligent defendant and the person he injures."[92]

The common law classification scheme for determining a landowner's duty to those entering upon his land arose outside these principles of the general law of negligence.[93] Reformulating the classification approach in terms of these principles reveals the root cause of the difficulty with the scheme's operation. To illustrate, the presence of an adult trespasser is usually "unknown" to the landowner. This is equivalent, in most cases, to saying the trespasser's presence is *not* "reasonably foreseeable" and, like Mrs. Palsgraf,[94] the trespasser is an "unforeseeable plaintiff."[95] Under both the common law scheme and the general law of negligence then, the trespasser is owed no duty to be protected from risks of harm. This follows because all risks of harm to a plaintiff

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[88]248 N.Y. 339, 162 N.E. 99 (1928).

[89]*Id.* at 341, 162 N.E. at 100.

[90]*Id.* at 341, 162 N.E. at 101.

[91]*See* text accompanying note 2 *supra*.

[92]Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 15 (1953).

[93]*See* section I. *supra*.

[94]The court's decision in *Palsgraf* constituted a finding that Mrs. Palsgraf was not a foreseeable plaintiff, and therefore no duty was owed her by the railroad. *See* Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).

[95]PROSSER 254.

whose presence is unforeseeable must be outside that class of risks that are to be "reasonably foreseen" and which "define the duty to be obeyed." Phrased differently, the plaintiff-trespasser and the landowner-defendant stand in a relation devoid of "close proximity in time, space, and direct causal sequence," and no duty in negligence terms exists.

Similarly, the common law exceptions to and modifications of the original status approach can be described in terms of foreseeability. When courts created the special classes of "constant trespasser," "known trespasser," and "trespassing children," and provided greater protection to these classes, they were implicitly recognizing that these plaintiffs were more foreseeable than the typical trespasser. Likewise, courts perceived a greater foreseeability of harm to noninvitee entrants from latent defects than from patent ones, and hence recognized a duty to warn of latent defects. As to social and public invitees, the courts which recognized these statuses were responding to the absence of any real difference in foreseeability of harm to members of the economic, social, and public invitee classes.[96]

The difficulty with the common law scheme should now be clear: the presence of all entrants, even within the same class, is not equally foreseeable, and to apply a single rigid level of duty to any one class of plaintiffs disrupts the underlying theory of negligence law. Although foreseeability, with few exceptions, increases continuously as the plaintiff moves through the classes (from trespasser, through licensee, and into invitee), the specific level of duty increases in discrete steps.

B. *The Post-*Mile High *Role of Plaintiff Status*

In cases where the plaintiff would have been classified as a trespasser or licensee under the traditional scheme, the general law of negligence should now increase the probability of his recovery. Instead of losing to a per se rule of law because he is classified as a trespasser or licensee, the plaintiff may recover under the tests of foreseeable risk, foreseeable plaintiff, and reasonableness of the defendant's conduct. However, in the case of an invitee, it

[96]It is of note that the early common law rules gave greater protection to invitees than to any other class of entrants. Although the differing levels of duty for trespassers and licensees demonstrate a correspondence between "knowledge of presence" and the *Mile High* foreseeability approach, the old invitee rule turned on the existence of economic benefit. Economic benefit, however, has no correspondence with the foreseeability standard, since such benefit is irrelevant to the foreseeability of the plaintiff's presence.

is quite possible that the strict duty of inspection, repair, and/or warning owed him under the common law scheme will not be owed under these tests of general negligence law (or may not be owed in every situation where the plaintiff is an invitee).

Although we know from both *Rowland* and *Mile High* that the common law classifications retain some importance in determining the extent of landowner liability,[97] defining the role of the classifications with any precision is a difficult task. In *Mile High*, the Colorado Supreme Court commented on this role rather cryptically:

> A person's status as a *trespasser, licensee* or *invitee* may, of course, in the light of the facts giving rise to such status, have some bearing on the question of *liability*, but it is only a factor—not conclusive.[98]

It is noteworthy that the court speaks of the plaintiff's status as a factor in establishing liability. In contrast, the tests of foreseeability and reasonableness are characterized as questions going to the landowner's *duty*.[99] This suggests that the plaintiff's status is relevant in determining the defendant's breach of duty as defined under the general principles of foreseeability and reasonableness.

In making reference to "facts giving rise to such status," the *Mile High* court probably had in mind facts such as the plaintiff's purpose in entering the premises, his manner of entry, and his conduct while on the premises, as well as the defendant's consent or lack of consent to the entry. These were the salient factual considerations under the original common law approach used in determining the plaintiff's status. Although these facts, like the status which they determine, may bear on the breach of duty question, it is also possible that such facts will serve as key factors in other elements of liability, most notably causation. Indeed, the conditions of entry and the details of plaintiff and defendant conduct during the injury-producing relationship are the very facts needed to support any finding on the causation issue.

Whatever the precise role ultimately given the plaintiff's status, it is certain the plaintiff classes will act at least as a guide in characterizing that critical "relationship" between the plain-

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[97]Rowland v. Christian, 69 Cal. 2d 108, 114, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968); Mile High Fence Co. v. Radovich, 175 Colo. 537, 548, 489 P.2d 308, 314-15 (1971).

[98]175 Colo. at 548, 489 P.2d at 314-15 (emphasis added to "liability").

[99]*Id.* at 548, 489 P.2d at 314. The court here speaks of status as no longer being determinative of the landowner's "responsibility" and the requisite "degree of care"; rather, reasonableness and foreseeability apply in this regard.

tiff and defendant which measures the foreseeability of the plaintiff's presence. In a majority of cases, the risk of harm and the foreseeability of presence will still be greater for an invitee than for a trespasser, and hence the duty owed the former will still be greater than that owed the latter. However, it is also clear that circumstances other than the plaintiff's classification may significantly influence the foreseeability of his presence or of the risk of harm to him, and these, too, will now be considered in defining duty. For example, on a construction site in a crowded urban area the risk of harm and foreseeability of presence may be nearly the same for a trespasser as for an invitee.

C. *From Law to Fact*

Examining the role of the plaintiff's status suggested by *Mile High* leads to other interrelated changes in premises liability cases. It seems certain that status is to have more impact as a matter of fact or facts than as a matter of law. In *Mile High* itself, the Colorado Supreme Court analyzed many facts which would previously have gone to the *legal* classification of the plaintiff, but now such facts are used to test the foreseeability of the entrant and the risk of harm to him. The court examined such facts as the quality of lighting and the proximity of the open hole to the edge of the alley[100] and held that foreseeability and reasonableness could be determined as matters of fact during the trial. The court thus stressed the need for a comprehensive presentation of facts in defining the level of duty owed the plaintiff by the premises occupier.

In a 1972 decision, *Ward v. Enevold*,[101] the Colorado Court of Appeals applied the *Mile High* ruling and accomplished a result which probably could not have been achieved under the traditional status approach. This case clearly illustrates the importance of factual analysis to the tests of foreseeability and reasonableness. In *Ward* the plaintiff was injured when she slipped and fell after leaving a bar and while entering the rear portion of property owned by an adjacent bar. The injury occurred at night and the area was poorly lit. In holding the defendant bars liable, the court reasoned that the pedestrian was a foreseeable entrant upon the affected properties and that the hazardous condition which caused her injury constituted an unreasonable risk of

[100] *Id.* at 538-39, 489 P.2d at 309.

[101] 504 P.2d 1108 (Colo. Ct. App. 1972).

harm. Under the traditional status approach this plaintiff would have been classified a licensee at best, and the possibility of recovery would have been severely limited.[102]

Although cases like *Ward* imply an extensive foreseeability to be imputed to many landowners, the Colorado Supreme Court in *Mile High* explicitly warns against any imposition of absolute liability upon such defendants.[103] This warning was heeded by the Colorado Court of Appeals in its 1972 decision, *Kaffel v. Cloverleaf Kennel Club.*[104] Here the plaintiff was a paying customer of the defendant racetrack (and hence, an invitee). He was injured when a beer keg fell off a vehicle and onto his foot. The keg was under the control of a delivery man not employed by the racetrack, and the keg was being delivered to a concession stand leased to a concessionaire by the defendant. Citing *Mile High* as precedent, the court concluded that nothing in the evidence would lead a reasonably prudent man in the defendant's position to foresee this risk of harm, and recovery was denied. Thus, although *Mile High* demands an extensive foreseeability analysis, application of the test is not synonymous with plaintiff victory.

D. *Jury Function: The Importance of the "Community Standard"*

Since the issue of duty is no longer a matter of per se legal classification, judges may not decide the issue purely as a matter of law.[105] They must permit the trier of fact to judge circumstances, reasonableness, and foreseeability, and to apply "community standards"[106] in these judgments. This change was foreshadowed by the majority in *Mile High* when it observed that the abrogation of the classification scheme would end the usurpation of jury functions by judges. Under the traditional approach the plaintiff was often deprived of a jury's "community-oriented" evaluation of the defendant's conduct "in light of all the relevant circum-

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[102]In relation to the bar that she had patronized, the plaintiff's status as an invitee had terminated prior to the time of the injury. As to the second defendant bar, the plaintiff was a trespasser.

[103]Specifically, the court comments that "[i]n overruling *Lunt* and *Gotch* we do not mean to imply that the plaintiffs were entitled to recover as a matter of law." 175 Colo. at 548, 489 P.2d at 314.

[104]504 P.2d 374 (Colo. Ct. App. 1972).

[105]*See* text accompanying notes 96-97 *supra.*

[106]The leading case on "community standards" and their role in duty determination is Levine v. Russell Blaine Co., 273 N.Y. 386, 7 N.E.2d 673 (1937). *See also* Weisbart v. Flohr, 260 Cal. App. 2d 281, 67 Cal. Rptr. 114 (1968).

stances," because judges would rule on duty as a matter of law.[107] Now, however, the plaintiff's status is only one of many relevant circumstances to be considered by a jury in applying community standards to the facts of the case.

The community standard in negligence cases defines what risks the "reasonably prudent man"[108] would have reasonably foreseen under the particular set of circumstances. This constitutes the "standard of care" by which the defendant's conduct is to be measured. In view of both the theoretical and practical importance of the community standard, it is fitting for the jury to assume a larger role in questions of duty, since a jury is supposedly the true representative of the community and its standards.[109] Arguably, a jury in its collective wisdom is better equipped than any single judge to represent community standards. Indeed judges applying an ancient classification scheme, even with modern twists, are in a doubtful position to reflect the dynamic nature of contemporary society.[110]

The shift of decisionmaking to the jury has not occurred as smoothly as one might have hoped. There has been concern expressed for the potential lack of certainty created by the *Rowland-Mile High* approach. Juries, for example, will vary greatly in the quality and rationality of their deliberations. Such systemic biases as the imposition of liability against defendants merely because they are capable of compensating a less fortunate plaintiff may now be permitted free rein in negligence cases.[111] Justice Burke, dissenting in *Rowland*, expressed the fear that "today's decision appears to open the door to potentially unlimited liability . . . ."[112] These concerns prompted the California

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[107]Mile High Fence Co. v. Radovich, 175 Colo. 537, 543, 489 P.2d 308, 312 (1971).

[108]PROSSER 149-66.

[109]*See* Comment, 44 N.Y.U.L. REV. 427, 430-31 (1969).

[110]The shift to a larger role for juries is borne out by the case experience in both jurisdictions. Many of the California decisions following *Rowland* and the Colorado decisions following *Mile High* overturned judgments in favor of defendants because they were based on rulings made as a matter of law. Such cases were remanded for consideration by a jury. *See* Mark v. Pacific Gas & Elec. Co., 7 Cal. 3d 170, 496 P.2d 1276, 101 Cal. Rptr. 908 (1972); Minoletti v. Sabini, 27 Cal. App. 3d 321, 103 Cal. Rptr. 528 (1972); Hurst v. Crowtero Boating Club, Inc., 496 P.2d 1054 (Colo. Ct. App. 1972); Hall v. Cheyenne Mt. Museum & Zoological Soc'y, 492 P.2d 894 (Colo. Ct. App. 1972).

[111]This fear was first expressed in the 19th century. *See* Marsh, *supra* note 8, at 185-86.

[112]69 Cal. 2d at 115, 443 P.2d at 569, 70 Cal. Rptr. at 105 (Burke, J., dissenting).

Court of Appeals in *Beauchamp*[113] to delimit the full implication of *Rowland*:

> [W]e do not believe such established decisional principles [as those relating to the invitee status] have been abandoned and free-wheeling by the triers of fact substituted in their stead.[114]

The court cautioned that withdrawal from the status approach would limit the power of the court to control potential jury abuses.[115] It is noteworthy, however, that these very same concerns led to the original judicial "codification" of duty for "frequently occurring plaintiff-defendant relationships" and ultimately to the classification scheme abrogated by *Rowland* and *Mile High*. It is of further note that Colorado courts, as exemplified by the *Kaffel* decision,[116] have shown no reluctance in applying *Mile High* to invitee cases.

The concern expressed by the California court in *Beauchamp* about possible jury abuses has not surfaced in the post-*Mile High* decisions in Colorado. Generally, the courts are demanding that premises liability cases go to the jury. In *Cline v. Brown Palace Hotel Co.*,[117] for example, the court of appeals reversed the trial court's directed verdict for the defendant on the grounds that the issue of negligence may be taken from the jury and decided by the court as a matter of law only in the clearest of cases, as where there are undisputed facts about which reasonable minds could not differ.[118]

There are often other concerns attending a jury preference in questions of landowner duty. For example, locale will influence the attitude of jurors. In urban areas land will tend to be far less important than people, while in rural areas the sanctity of the landowner's interest is more likely to dominate.[119] A related factor important to jury preference is the identity of the parties. In Colorado negligence cases which have followed *Mile High*, a high proportion of the defendants have been corporate entities.[120] If the

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[113]273 Cal. App. 2d 25, 77 Cal. Rptr. 914 (1969). *See also* text accompanying note 86 *supra*.

[114]*Id.* at 24, 77 Cal. Rptr. at 918.

[115]*Id.* at 25, 77 Cal. Rptr. at 919.

[116]*See* text accompanying note 104 *supra*.

[117]492 P.2d 873 (Colo. Ct. App. 1971).

[118]*Id.* at 875.

[119]Juries are now drawn from voter registration lists instead of from property tax rolls as a constitutional requirement to insure the cross-sectional character of juries. *See* Thiel v. Southern Pac. Co., 328 U.S. 217 (1946).

[120]Ranke v. Fowler Real Estate Co., 497 P.2d 1268 (Colo. Ct. App. 1972); Hurst v.

tendency of a jury to favor individual plaintiffs over corporate defendants persists,[121] the jury preference could have a profound effect on the probability and amount of recovery.

All such fears of jury bias are questionable. There is little evidence of any differences, quantitative or qualitative, between juror and judge biases.[122] Moreover, even jury biases are part of that "community standard" underlying the law of negligence. Admittedly existing biases will exert more influence in the absence of strict guidelines for the jury in the determination of the defendant's duty, and neither *Rowland* nor *Mile High* provide guidance other than the generalized tests of "foreseeability" and "reasonableness." The absence of restrictive guidelines is not surprising, however, since by their very nature the tests of foreseeability and reasonableness of conduct defy any a priori definition. To do more than set forth the general principles of decisionmaking would signal a return to rigid mechanical rules not unlike those of the original status approach.

CONCLUSION

Through the *Rowland* and *Mile High* decisions, the narrow levels of defendant duty defined by rigid and discrete plaintiff classifications have been replaced by a continuum of duty—a continuum far more consistent with the fundamental principles of negligence law. Duty depends now on the reasonable foreseeability of the risk of harm which proximately causes the injury suffered by the plaintiff. The foreseeability of the plaintiff's entry and the risk of harm to him, and not the label of the entrant, have become the ultimate determinants of duty.

The *Rowland-Mile High* approach places the jury in the pivotal role of applying community standards to measure the foreseeability of risk and the reasonableness of the landowner's conduct. This application of community standards under the general law of negligence is far more flexible and responsive to individual fact settings than the mechanical common law status approach. Admittedly abrogation of the common law scheme may necessitate some loss of certainty in premises liability cases, but the

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Crowtero Boating Club, Inc., 496 P.2d 1054 (Colo. Ct. App. 1972); Kopke v. AAA Warehouse Corp., 494 P.2d 1307 (Colo. Ct. App. 1972); Hall v. Cheyenne Mt. Museum & Zoological Soc'y, 492 P.2d 894 (Colo. Ct. App. 1972).

[121]This jury bias is discussed in James, *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667 (1949).

[122]*See* Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055 (1964).

gains achieved in terms of "justice" and judicial methodology would seem to more than compensate for this loss.

Mile High thus represents a shift from the application of fragmented rules to a unified methodology which promises more explicit reasoning. Although rules are not inherently bad, they are open to abuse when rigidly applied. They act to obscure the court's underlying thought processes and thereby preclude articulated opinions. In contrast, under the general law of negligence the plaintiff receives an evaluation of all relevant circumstances and an application of the community standard to determine the reasonableness of the landowner's actions. This represents a straightforward, rational judicial method—one which squares the practice of negligence law with its theory.

Some California courts have demonstrated a reluctance to apply the full force of *Rowland*. They have seemingly limited its precedential value to cases involving licensees. In marked contrast, the Colorado courts have begun to build a foundation of precedent which refines and strengthens the *Mile High* decision. It is hoped that future decisions will continue this development.

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