
PART III

MODIFICATION OF DUTY BY STATUS AND RELATIONSHIPS

Introduction

In Chapter One we looked at two major theories by which a defendant can be made liable for a plaintiff's injuries: negligence and strict liability. I noted at that time that the question of "duty" is a deceptively difficult one. In this chapter we return to the issue of duty, and seek to answer the question in the abstract, "How do we know whether a defendant owes a duty of care to a plaintiff, and what that duty is?" Our earlier approximation of that question was that most of the time the defendant must use reasonable care for the plaintiff's safety. That is true of the vast majority of cases. However, several qualifications must be made:

(1) sometimes the nature of the relationship between defendant and plaintiff requires a modification of that standard. For example, special rules apply in premises liability (Chapter Eight), product liability (Chapter Nine) and Professional Negligence cases (Chapter Ten).

(2) Sometimes a defendant can escape liability because she can successfully claim that she was under no duty to use reasonable care at all. These cases include rescuers, agencies responsible for protection of the public (police, fire, etc.). The

question in those cases is when a defendant's *failure to act* is actionable under negligence principles.

In an earlier edition of this book I gave this section the subtitle "The (Ir)relevance of Contract" because tort law is strangely unaffected by the frequency with which tort law grows out of what are essentially contractual relationships. Products liability, medical malpractice, slip-and-fall, airplane crash, and other kinds of cases can be looked at as an outgrowth of some kind of agreement between the plaintiff and the defendant: the landowner invites a visitor; the buyer agrees to purchase a product; the patient agrees to be treated by the doctor. This is a luxury we do not always have in tort law. In fact, one might argue that tort law ought to defer to contract law except in those situations where contract is unavailable: where the parties have no opportunity to bargain ahead of time for who will bear the risks of injury arising from their potential "collision." Thus, tort law is ideally suited for intersection collisions, where the parties have no means of bargaining with each other over who should bear what risks; but contract would be ideally suited for doctor/patient or

owner/visitor or seller/buyer relationships, where the parties have a much better (if still imperfect¹) opportunity to decide.² Although contract principles were to a large extent displaced by tort law in the 20th century, tort law continues to reflect the origin of many important principles in the law of contracts. Moreover, in deciding what duty of care to impose upon the defendant, courts may very well look at the kind of relationship that was formed prior to the injury.

Although the following excerpt is somewhat dated, it eloquently describes the cyclical nature of law reform, and the delicate relationship between contract and tort:

Grant Gilmore, THE DEATH OF CONTRACT
(1974), pp. 87-88, 102-103

Speaking descriptively, we might say that what is happening is that "contract" is being reabsorbed into the mainstream of "tort." Until the general theory of contract was hurriedly run up late in the nineteenth century, tort had always been our residual category of civil liability. As the contract rules dissolve, it is becoming so again. It should be pointed out that the theory of tort into which contract is being reabsorbed is itself a much more expansive theory of liability than was the theory of tort from which contract was artificially separated a hundred years ago.

We have had more than one occasion to notice the insistence of the classical theorists on the sharp

differentiation between contract and tort — the refusal to admit any liability in "contract" until the formal requisites of offer, acceptance and consideration had been satisfied, the dogma that only "bargained-for" detriment or benefit could count as consideration, and notably, the limitations on damage recovery. Classical contract theory might well be described as an attempt to stake out an enclave within the general domain of tort. The dykes which were set up to protect the enclave have, it is clear enough, been crumbling at a progressively rapid rate. With the growth of the ideas of quasi-contract and unjust enrichment, classical consideration theory was breached on the benefit side. With the growth of the promissory estoppel idea, it was breached on the detriment side. We are fast approaching the point where, to prevent unjust enrichment, any benefit received by a defendant must be paid for unless it was clearly meant as a gift; where any detriment reasonably incurred by a plaintiff in reliance on a defendant's assurances must be recompensed. When that point is reached, there is really no longer any viable distinction between liability in contract and liability in tort. We may take the fact that damages in contract have become indistinguishable from damages in tort as obscurely reflecting an instinctive, almost unconscious realization that the two fields, which had been artificially set apart, are gradually merging and becoming one.

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I have one final thought. We have become used to the idea that, in literature and the arts, there are alternating rhythms of classicism and romanticism. During classical periods, which are, typically, of brief duration, everything is neat, tidy and logical; theorists and critics reign supreme; formal rules of structure and composition are stated to the general acclaim. During classical periods, which are, among other things, extremely dull, it seems that nothing interesting is ever going to happen again. But the classical aesthetic, once it has been formulated, regularly breaks down in a protracted romantic agony. The romantics spurn the exquisitely stated rules of the preceding period; they experiment, they improvise; they deny the existence of any rules; they churn around in an ecstasy of self-expression. At the height of a romantic period, everything is confused, sprawling, formless and chaotic — as well as frequently, extremely interesting. Then, the

¹ One justification for tort law's refusal to defer to contract law is that in many "contractual" relationships the potential plaintiff has only limited opportunity to make an informed decision. The fine print on the back of a parking lot stub should not be allowed to prevent the car owner from recovering for negligent handling of his car by the lot. A similar argument is made where the consumer buys a lawnmower or the patient checks into the hospital. This argument is well illustrated by the *Henningsen* case, *infra* § 6B. Of course, even in contract law the language of the contract is not always followed mechanically; there is always U.C.C. § 2-302, preventing unconscionability. However, at some point the consumer must be given a measure of freedom to structure the relationship, even if it may mean the acceptance of a large measure of the risk.

² Many of these issues are discussed in Atiyah, *Medical Malpractice and the Contract/Law Boundary*, 49 L. & CONTEMP. PROB. 287 (Spring 1986); and Law, *A Consumer Perspective on Medical Malpractice*, 49 L. & CONTEMP. PROB. 305 (Spring 1986).

romantic energy having spent itself, there is a new classical reformulation — and so the rhythms continue.

Perhaps we should admit the possibility of such alternating rhythms in the process of the law. We have witnessed the dismantling of the formal system of the classical theorists. We have gone through our romantic agony — an experience peculiarly unsettling to people intellectually trained and conditioned as lawyers are. It may be that, in this centennial year, some new Langdell is already waiting in the wings to summon us back to the paths of righteousness, discipline, order, and well-articulated theory. Contract is dead—but who knows what unlikely resurrection the Easter-tide

may bring.

Questions and Notes

1. If your client has been damaged by some action of the defendant, how do you know whether you should bring an action based upon breach of a tort duty or breach of a contract?

2. For another historical overview, see Swanton, *The Convergence of Tort and Contract*, 12 SYDNEY L. REV. 40 (1989).

Chapter 8

Premises Liability

§ A. The Status Distinctions

1. Are the Status Distinctions Desirable?

YOUNCE v. FERGUSON

106 Wash. 2d 658, 724 P.2d 991 (1986)

GOODLOE, Justice

In this case, we determine whether the common law classifications of entrants as invitees, licensees, or trespassers should continue to be determinative of the standard of care owed by an owner or occupier of land and whether the status of the entrant in this case was correctly determined. We answer both questions affirmatively and affirm the trial court.

Appellant Lisa Younce appeals the dismissal of respondents Charles, Thelma, and Dean Strunk from the suit. Lisa was injured when a car driven by Tamera Ferguson ran into her on a parcel of Strunk property, where a high school graduation "kegger" party was being held.

Dean Strunk, the son of Charles and Thelma Strunk, was a member of the 1977 Evergreen High School graduating class. Class members planned a graduation party to follow commencement exercises on June 7, 1977. Tickets to the party were sold for \$4.00 to purchase beer, food, and music. Dean made arrangements to and did buy 15 kegs of beer from a local tavern for the party with ticket proceeds. The party was originally scheduled to be held on another class member's property, but during the commencement exercises it was generally agreed that the party would be moved to the Strunk property on 109th Avenue.

The 109th Avenue property was the largest of

eight parcels of land that Charles and Thelma Strunk had under lease for farming purposes. The property was located 6 miles or 8-9 minutes driving time from the Strunk residence. Dean and his younger brother, Brad, took care of family duties at the property.

Following commencement exercises, Dean went home, changed clothes, and transported the kegs to the 109th Avenue property. Charles and Thelma returned home from the commencement exercises around 10:20 p.m. to 10:30 p.m. From about 11 p.m. to 11:10 p.m., four or five carloads of people arrived at the Strunk residence asking the location of the party. The Strunks also received a phone call from someone looking for the site. More than one inquirer advised the Strunks that the party was on Strunk property. Charles Strunk drove to 4 parcels within 1 mile of the family residence to see if there was a party, testifying he would have run the kids off the property if he had found them. He did not, however, check the 109th Avenue property.

When Dean arrived at the 109th Avenue property around 11 p.m. with the kegs, 100-400 minors were present, including graduating seniors, school mates, students from other schools, and other minors not attending school. Brad was collecting tickets, directing cars to parking areas, and advising cars' occupants of the kegs' location.

Tamera Ferguson, a minor, paid for attendance when she arrived. Lisa Younce, a minor, arrived around 11:30 p.m. with Judy Bock, who had previously bought two tickets for their admission. Lisa and Judy had had one mixed drink before arriving. They mixed another after arriving but Lisa

did not drink it.

When the accident occurred, at approximately 12:15 a.m., drinking had been going on at the site for at least an hour, but the party attendees were well behaved. There had been no excessive drinking except for Dean and Tamera, who both admitted they were intoxicated from alcohol consumed at the party site. No automobile had been driven through the area where party attendees were standing. Lisa was standing in a dimly lit grassy and gravel area near the main barn and approximately 150 feet away from the kegs. Lisa was hit from behind by a Volkswagen driven by Tamera. The car hit her in the right knee and knocked her to the ground. Lisa was not under the influence of or affected by alcohol at the time she was hit. Tamera left or was taken from the scene. Lisa was taken to the hospital. Charles and Thelma Strunk were notified of the accident. They went to the 109th Avenue property with cooking utensils and prepared hamburgers from 1:30 a.m. to 5:30 a.m. when the kegs were emptied and the last attendees left.

Dean and Lisa both knew that when minors drink they become intoxicated, and when they become intoxicated they will drive. Charles and Thelma Strunk knew that minors drink at parties.

Lisa sued Tamera. The trial court found that Tamera had negligently injured Lisa and entered judgment for \$69,543.31. Tamera did not appear at trial and has not appealed.

Lisa also sued the Strunks. Her first theory alleged negligence per se based on a violation of R.C.W. 26.28.080 (selling or furnishing intoxicating liquor to a minor). Based on the case of *Hulse v. Driver*, 11 Wash. App. 509, 524 P.2d 255 (1974), the trial court dismissed this portion of the plaintiff's complaint with prejudice. This issue has not been appealed, and no argument has been presented. Lisa's second theory which is the basis of the entire appeal relates to the common law classifications between invitee, licensee, and trespasser and the duty of care owed by the owner or occupier of land.

The trial court found that liability on the part of the Strunks depended upon Lisa's status on the property. The court found Lisa was a social guest, and therefore only a licensee. Applying the duty of care applicable to licensees and articulated in RESTATEMENT (SECOND) OF TORTS § 332 (1965), the trial court found the duty had not been

breached. The Strunks were dismissed with prejudice. The court explained in its memorandum opinion, however, that if Lisa had been an invitee and the duty of care therefore had been one of reasonable care under all the circumstances, the court would have concluded that the Strunks had breached their duty to Lisa. The court also noted, however, that this was a case where Lisa could appreciate the dangers or conditions of the premises. Lisa appealed. The case is before this court on an administrative transfer from the Court of Appeals, Division Two.

Two issues must be addressed. First, we must decide whether in a claim for injury against an owner or occupier of land, the standard of care owed should continue to turn upon the common law distinctions between invitee, licensee, and trespasser, or whether such distinctions should be replaced by a negligence standard of reasonable care under all the circumstances. Because we retain the common law classifications, we must also decide whether Lisa Younce was properly characterized as a licensee or whether she should have been characterized as an invitee.

Lisa argues that the common law distinctions of invitee, licensee, and trespasser should no longer determine the applicable standard of care owed by an owner or occupier of land in Washington. She urges they be abandoned and replaced by a standard of reasonable care under all the circumstances. *See* 16 GONZ. L. REV. 479 (1981). Washington relies upon and has adopted many of the definitions and corresponding duties outlined in RESTATEMENT (SECOND) OF TORTS (1965). *Egede-Nissen v. Crystal Mt., Inc.*, 93 Wash. 2d 127, 131-32, 606 P.2d 1214 (1980).

In *Egede-Nissen* we acknowledged past questioning of the common law classification scheme, *see Ward v. Thompson*, 57 Wash. 2d 655, 660, 359 P.2d 143 (1961) ("timeworn distinctions"); *Mills v. Orcas Power & Light Co.*, 56 Wash. 2d 807, 820, 355 P.2d 781 (1960) ("ancient categories"), but decided that we were not ready then to totally abandon the traditional categories and adopt a unified standard. *Egede-Nissen*, 93 Wash. 2d at 131, 606 P.2d 1214. We still are not ready and reaffirm use of common law classifications to determine the duty of care owed by an owner or occupier of land.

A recent annotation, Annot., *Modern Status of Rules Conditioning Landowner's Liability Upon*

Status of Injured Party as Invitee, Licensee, or Trespasser, 22 A.L.R.4TH 294 (1983), outlines the current positions of the different jurisdictions on this issue. Retention of the common law classifications continues to be the majority position.

Nine jurisdictions have abolished use of the common law classifications of invitees, licensees, and trespassers as determinative of the landowner's or land occupier's duty of care. *See* Annot., at 301-307; *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97, 32 A.L.R.3d 496 (1968); *Pickard v. City & Cy. of Honolulu*, 51 Hawaii 134, 452 P.2d 445 (1969); *Mile High Fence Co. v. Radovich*, 175 Colo. 537, 489 P.2d 308 (1971); *Smith v. Arbaugh's Restaurant, Inc.*, 152 U.S. App. D.C. 86, 469 F.2d 97 (D.C. Cir. 1972); *Mariorenzi v. Joseph Diponte, Inc.*, 114 R.I. 294, 333 A.2d 127 (1975); *Ouellette v. Blanchard*, 116 N.H. 552, 364 A.2d 631 (1976); *Basso v. Miller*, 40 N.Y.2d 233, 352 N.E.2d 868, 386 N.Y.S.2d 564 (1976); *Cates v. Beauregard Elec. Coop., Inc.*, 328 So. 2d 367 (La. 1976); *Webb v. Sitka*, 561 P.2d 731 (Alaska 1977); *Hudson v. Gaitan*, 675 S.W.2d 699 (Tenn. 1984).

The typical analysis in these cases includes noting that England, where the distinctions originated, has abolished them by statute. Occupiers' Liability Act, 1957, 5 and 6 Eliz. 2, ch. 31. The cases also note that the United States Supreme Court refused to adopt the rules relating to the liability of a possessor of land for the law of admiralty. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630-31, 79 S. Ct. 406, 409-10, 3 L. Ed. 2d 550 (1959).

The cases rejecting the classifications list the subtleties and subclassifications created in their respective jurisdictions. The opinions explain that it is difficult to justify a system with so many exceptions and that while the distinctions were justified in feudal times, they are not justified in modern society. As explained in *Rowland*, 69 Cal. 2d at page 118, 443 P.2d 561, 70 Cal. Rptr. 97, the first case to reject the classifications:

A man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose. Reasonable people do not ordinarily vary

their conduct depending upon such matters, and to focus upon the status of the injured party as a trespasser, licensee, or invitee in order to determine the question whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values. The common law rules obscure rather than illuminate the proper considerations which should govern determination of the question of duty.

Rowland then announced the standard for determining the liability of the possessor of land would be "whether in the management of his property he 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." *Rowland*, at 119, 443 P.2d 561, 70 Cal. Rptr. 97. The principle is generally referred to as the reasonable care under all of the circumstances standard.

Six jurisdictions have abolished the distinction between licensee and invitee. *See* Annot., at 307-10; *Peterson v. Balach*, 294 Minn. 161, 199 N.W.2d 639 (1972); *Mounsey v. Ellard*, 363 Mass. 693, 297 N.E.2d 43 (1973); *Wood v. Camp*, 284 So. 2d 691 (Fla. 1973) (extending reasonable care to social guests or invited licensees but retaining distinction for uninvited licensees and trespassers); *Antoniewicz v. Reszczyński*, 70 Wis. 2d 836, 236 N.W.2d 1 (1975); *O'Leary v. Coenen*, 251 N.W.2d 746 (N.D. 1977); *Poulin v. Colby College*, 402 A.2d 846 (Me. 1979). The rationales for abandoning the distinction between invitee and licensee are the same as the rationales given by the cases abolishing the distinction between all three classifications. The reason given for not extending the standard of reasonable care to trespassers is that even in modern society it is significant that a trespasser does not come upon property under a color of right or that a trespasser was not involved in the case where the distinction between licensee and invitee was abolished.

However, the majority of jurisdictions have not rejected the classifications. *See* Annot., at 310-12. Some have directly confronted the issue of whether to abandon the distinctions and have declined to do so. *Whaley v. Lawing*, 352 So. 2d 1090 (Ala. 1977); *Bailey v. Pennington*, 406 A.2d 44 (Del.

1979); *Huyck v. Hecla Mining Co.*, 101 Idaho 299, 612 P.2d 142 (1980); *Hessler v. Cole*, 7 Ill. App. 3d 902, 289 N.E.2d 204 (1972); *Gerchberg v. Loney*, 223 Kan. 446, 576 P.2d 593 (1978); *Murphy v. Baltimore Gas & Elec. Co.*, 290 Md. 186, 428 A.2d 459 (1981) (choose not to abandon at least with respect to trespassers); *Astleford v. Milner Enters., Inc.*, 233 So. 2d 524 (Miss. 1970); *Steen v. Grenz*, 167 Mont. 279, 538 P.2d 16 (1975); *Buchanan v. Prickett & Son, Inc.*, 203 Neb. 684, 279 N.W.2d 855 (1979); *Moore v. Denune & Pipic, Inc.*, 26 Ohio St. 2d 125, 269 N.E.2d 599 (1971); *Sutherland v. Saint Francis Hosp., Inc.*, 595 P.2d 780 (Okla. 1979); *Buchholz v. Steitz*, 463 S.W.2d 451 (Tex. Civ. App. 1971); *Tjas v. Proctor*, 591 P.2d 438 (Utah 1979); *Yalowizer v. Husky Oil Co.*, 629 P.2d 465, 22 A.L.R.4th 285 (Wyo. 1981). Some without directly confronting the issue, or by deferring to a higher appellate court, continue to adhere to the common law classifications. *Nicoletti v. Westcor, Inc.*, 131 Ariz. 140, 639 P.2d 330 (1982); *Ramsey v. Mercer*, 142 Ga. App. 827, 237 S.E.2d 450 (1977); *Barbre v. Indianapolis Water Co.*, 400 N.E.2d 1142 (Ind. App. 1980); *Champlin v. Walker*, 249 N.W.2d 839 (Iowa 1977); *Davis v. Jackson*, 604 S.W.2d 610 (Mo. App. 1980); *Caroff v. Liberty Lumber Co.*, 146 N.J. Super. 353, 369 A.2d 983 (1977); *Andrews v. Taylor*, 34 N.C. App. 706, 239 S.E.2d 630 (1977); *Taylor v. Baker*, 279 Or. 139, 566 P.2d 884 (1977); *Crotty v. Reading Indus., Inc.*, 237 Pa. Super. 1, 345 A.2d 259 (1975); *Copeland v. Larson*, 46 Wis. 2d 337, 174 N.W.2d 745 (1970).

The reasons proffered for continuing the distinctions include that the distinctions have been applied and developed over the years, offering a degree of stability and predictability and that a unitary standard would not lessen the confusion. Furthermore, a slow, piecemeal development rather than a wholesale change has been advocated. Some courts fear a wholesale change will delegate social policy decisions to the jury with minimal guidance from the court. See Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions* UTAH L. REV. 15 (1981). Also, it is feared that the landowner could be subjected to unlimited liability.

We find these reasons to be compelling. As noted by the Kansas court in *Gerchberg*, 223 Kan. at pages 450-51, 576 P.2d 593: "The traditional

classifications were worked out and the exceptions were spelled out with much thought, sweat and even tears". We are not ready to abandon them for a standard with no contours. It has been argued that jury instructions can provide adequate guidance. In fact, amicus has suggested and other courts have found that the following factors should be considered by the jury: (1) the circumstances under which the entrant was on the property; (2) the foreseeability of the injury or damage given the type of condition involved; (3) the nature of the property and its uses; (4) the feasibility of either correcting the condition on the property or issuing appropriate warnings; and (5) such other factors as may be relevant in the particular case. These factors are similar to the concerns being addressed by the current RESTATEMENT rules and caselaw. We do not choose to erase our developed jurisprudence for a blank slate. Common law classifications continue to determine the duty owed by an owner or occupier of land in Washington.

Lisa argues alternatively that, if the common law classifications are retained, she was incorrectly characterized as a licensee at trial. Lisa argues that she should have been characterized as an invitee under the facts of this case. Lisa's status on the property determines the standard of care owed her by the Strunks.

In *McKinnon v. Washington Fed. Sav. & Loan Ass'n*, 68 Wash. 2d 644, 650, 414 P.2d 773 (1966), this court adopted the RESTATEMENT (SECOND) OF TORTS § 332 (1965) definition of invitee. An invitee is owed a duty of ordinary care.

Section 332 defines an invitee as follows:

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

A licensee is defined as "a person who is privileged to enter or remain on land only by virtue of the possessor's consent." RESTATEMENT, § 330. A licensee includes a social guest, that is, a person

who has been invited but does not meet the legal definition of invitee. In *Memel v. Reimer*, 85 Wash. 2d 685, 689, 538 P.2d 517 (1975), this court replaced the willful and wanton misconduct standard of care toward licensees with a duty to exercise reasonable care toward licensees where there is a known dangerous condition on the property which the possessor can reasonably anticipate the licensee will not discover or will fail to realize the risks involved. *Memel* specifically adopted the standard of care for licensees outlined in RESTATEMENT, § 342:

A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,

- (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
- (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
- (c) the licensees do not know or have reason to know of the condition and the risk involved. (Italics ours.) *Memel*, at 689, 691, 538 P.2d 517.

The possessor fulfills his duty by making the condition safe or warning of its existence.

Lisa contends that she was a member of the public on the land for a purpose for which the land is held open and therefore is an invitee. We disagree. The facts of this case do not parallel the facts of other cases where the plaintiff was found to be a public invitee. In *McKinnon*, a federal savings and loan association posted a sign saying it had meeting rooms available for public use. The plaintiff in *McKinnon* was part of a Girl Scout group using the room for Scout meetings. In *Fosbre v. State*, 70 Wash. 2d 578, 424 P.2d 901 (1967), the plaintiff was injured at a recreational area on a National Guard fort. The area had been improved and maintained for use by National Guard families of which plaintiff was a member. In these "invitee" cases, "the occupier, by his arrangement of the premises or other conduct, has

led the entrant to believe that the premises were intended to be used by visitors, as members of the public, for the purpose which the entrant was pursuing, and that reasonable care was taken to make the place safe for those who enter for that purpose." (Italics ours.) *McKinnon*, 68 Wash. 2d at 649, 414 P.2d 773. See W. PROSSER, TORTS § 61, at 388-89 (4th ed. 1971); RESTATEMENT, § 332, comment d.

This implied assurance helps to distinguish between invitees and social guests, who are considered licensees. As explained in comment h(3) to RESTATEMENT, § 330:

The explanation usually given by the courts for the classification of social guests as licensees is that there is a common understanding that the guest is expected to take the premises as the possessor himself uses them, and does not expect and is not entitled to expect that they will be prepared for his reception, or that precautions will be taken for his safety, in any manner in which the possessor does not prepare or take precautions for his own safety, or that of the members of his family.

Under the facts of this case, it is hard to imagine how the Strunks could have prepared or could have been expected to prepare a dairy farm for a kegger.

We are not persuaded by Lisa's argument that payment of a \$4.00 admission price made her an invitee. Analysis in cases where an admission was paid and the plaintiff was characterized as an invitee did not focus on the money as indicative of the plaintiff's status as an invitee. *Hooser v. Loyal Order of Moose, Inc.*, 69 Wash. 2d 1, 416 P.2d 462, 15 A.L.R.3d 1008 (1966) (\$1.00 for New Year's Eve Party held at Moose Lodge); *Dickinson v. Tesia*, 2 Wash. App. 262, 467 P.2d 356 (1970) (\$2.00 for picnic in recreational area).

The trial court correctly identified Lisa as a licensee. She was privileged to enter or remain on the land only by virtue of the owner's consent. We question whether Charles and Thelma did consent to her presence on the property, but recognize that Dean did consent. In any event, we find the duty owed licensees was not breached because no known dangerous condition existed of which Lisa was not aware or of which she did not realize the risks involved. Lisa had knowledge of the risks

involved by staying on the property. We affirm the trial court.

DOLLIVER, C.J., and PEARSON, UTTER, CALLOW, BRACHTENBACH, ANDERSEN, DORE and DURHAM, JJ.

ROWLAND v. CHRISTIAN

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

PETERS, Justice

Plaintiff appeals from a summary judgment for defendant Nancy Christian in this personal injury action.

In his complaint plaintiff alleged that about November 1, 1963, Miss Christian told the lessors of her apartment that the knob of the cold water faucet on the bathroom basin was cracked and should be replaced; that on November 30, 1963, plaintiff entered the apartment at the invitation of Miss Christian; that he was injured while using the bathroom fixtures, suffering severed tendons and nerves of his right hand; and that he has incurred medical and hospital expenses. He further alleged that the bathroom fixtures were dangerous, that Miss Christian was aware of the dangerous condition, and that his injuries were proximately caused by the negligence of Miss Christian. Plaintiff sought recovery of his medical and hospital expenses, loss of wages, damage to his clothing, and \$100,000 general damages....

Section 1714 of the Civil Code provides: "Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself...." This code section, which has been unchanged in our law since 1872, states a civil law and not a common law principle. (*Fernandez v. Consolidated Fisheries, Inc.*, 98 Cal. App. 2d 91, 96, 219 P.2d 73.)

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California cases have occasionally stated a similar view: "All persons are required to use ordinary care to prevent others being injured as the result of their conduct." Although it is true that some exceptions have been made to the general

principle that a person is liable for injuries caused by his failure to exercise reasonable care in the circumstances, it is clear that in the absence of statutory provision declaring an exception to the fundamental principle enunciated by section 1714 of the Civil Code, no such exception should be made unless clearly supported by public policy.

A departure from this fundamental principle involves the balancing of a number of considerations; the major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved....

One of the areas where this court and other courts have departed from the fundamental concept that a man is liable for injuries caused by his carelessness is with regard to the liability of a possessor of land for injuries to persons who have entered upon that land. It has been suggested that the special rules regarding liability of the possessor of land are due to historical considerations stemming from the high place which land has traditionally held in English and American thought, the dominance and prestige of the landowning class in England during the formative period of the rules governing the possessor's liability, and the heritage of feudalism. (2 HARPER AND JAMES, *THE LAW OF TORTS*, *supra*, p. 1432.)

The departure from the fundamental rule of liability for negligence has been accomplished by classifying the plaintiff either as a trespasser, licensee, or invitee and then adopting special rules as to the duty owed by the possessor to each of the classifications. Generally speaking a trespasser is a person who enters or remains upon land of another without a privilege to do so; a licensee is a person like a social guest who is not an invitee and who is privileged to enter or remain upon land by virtue of the possessor's consent, and an invitee is a business visitor who is invited or permitted to enter or remain on the land for a purpose directly or indirectly connected with business dealings between them. (*Oettinger v. Stewart*, 24 Cal. 2d

133, 136, 148 P.2d 19, 156 A.L.R. 1221.)

* * *

The courts of this state have also recognized the failings of the common law rules relating to the liability of the owner and occupier of land. In refusing to apply the law of invitees, licensees, and trespassers to determine the liability of an independent contractor hired by the occupier, we pointed out that application of those rules was difficult and often arbitrary....

* * *

Without attempting to labor all of the rules relating to the possessor's liability, it is apparent that the classifications of trespasser, licensee, and invitee, the immunities from liability predicated upon those classifications, and the exceptions to those immunities, often do not reflect the major factors which should determine whether immunity should be conferred upon the possessor of land. Some of those factors, including the closeness of the connection between the injury and the defendant's conduct, the moral blame attached to the defendant's conduct, the policy of preventing future harm, and the prevalence and availability of insurance, bear little, if any, relationship to the classifications of trespasser, licensee and invitee and the existing rules conferring immunity.

Although in general there may be a relationship between the remaining factors and the classifications of trespasser, licensee, and invitee, there are many cases in which no such relationship may exist. Thus, although the foreseeability of harm to an invitee would ordinarily seem greater than the foreseeability of harm to a trespasser, in a particular case the opposite may be true. The same may be said of the issue of certainty of injury. The burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach may often be greater with respect to trespassers than with respect to invitees, but it by no means follows that this is true in every case. In many situations, the burden will be the same, *i.e.*, the conduct necessary upon the defendant's part to meet the burden of exercising due care as to invitees will also meet his burden with respect to licensees and trespassers. The last of the major factors, the cost of insurance, will, of course, vary depending upon the rules of liability adopted, but there is no persuasive evidence that applying ordinary principles of

negligence law to the land occupier's liability will materially reduce the prevalence of insurance due to increased cost or even substantially increase the cost.

Considerations such as these have led some courts in particular situations to reject the rigid common law classifications and to approach the issue of the duty of the occupier on the basis of ordinary principles of negligence. (*E.g.*, *Gould v. DeBeve*, 117 U.S. App. D.C. 360, 330 F.2d 826, 829-830; *Anderson v. Anderson*, *supra*, 251 Cal. App. 2d 409, 413, 59 Cal. Rptr. 342; *Taylor v. New Jersey Highway Authority*, 22 N.J. 454, 126 A.2d 313, 317, 62 A.L.R.2d 1211; *Scheibel v. Lipton*, 156 Ohio St. 308, 102 N.E.2d 453, 462-463; *Potts v. Amis*, 62 Wash. 2d 777, 384 P.2d 825, 830-831; *see* Comment (1957) 22 MO. L. REV. 186; Note (1958) 12 RUTGERS L. REV. 599.) And the common law distinctions after thorough study have been repudiated by the jurisdiction of their birth. (Occupiers' Liability Act, 1957, 5 and 6 Eliz. 2, ch. 31.)

A man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose. Reasonable people do not ordinarily vary their conduct depending upon such matters, and to focus upon the status of the injured party as a trespasser, licensee, or invitee in order to determine the question whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values. The common law rules obscure rather than illuminate the proper considerations which should govern determination of the question of duty.

It bears repetition that the basic policy of this state set forth by the Legislature in section 1714 of the Civil Code is that everyone is responsible for an injury caused to another by his want of ordinary care or skill in the management of his property. The factors which may in particular cases warrant departure from this fundamental principle do not warrant the wholesale immunities resulting from the common law classifications, and we are satisfied that continued adherence to the common law distinctions can only lead to injustice or, if we are to avoid injustice, further fictions with the resulting complexity and confusion. We decline to follow and perpetuate such rigid classifications.

The proper test to be applied to the liability of the possessor of land in accordance with section 1714 of the Civil Code is whether in the management of his property he 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.

Once the ancient concepts as to the liability of the occupier of land are stripped away, the status of the plaintiff relegated to its proper place in determining such liability, and ordinary principles of negligence applied, the result in the instant case presents no substantial difficulties. As we have seen, when we view the matters presented on the motion for summary judgment as we must, we must assume defendant Miss Christian was aware that the faucet handle was defective and dangerous, that the defect was not obvious, and that plaintiff was about to come in contact with the defective condition, and under the undisputed facts she neither remedied the condition nor warned plaintiff of it. Where the occupier of land is aware of a concealed condition involving in the absence of precautions an unreasonable risk of harm to those coming in contact with it and is aware that a person on the premises is about to come in contact with it, the trier of fact can reasonably conclude that a failure to warn or to repair the condition constitutes negligence. Whether or not a guest has a right to expect that his host will remedy dangerous conditions on his account, he should reasonably be entitled to rely upon a warning of the dangerous condition so that he, like the host, will be in a position to take special precautions when he comes in contact with it.

* * *

The judgment is reversed.

TRAYNOR, C.J., and TOBRINER, MOSK and SULLIVAN, JJ., concur.

BURKE, Justice (dissenting)

I dissent. In determining the liability of the occupier or owner of land for injuries, the distinctions between trespassers, licensees and invitees have been developed and applied by the courts over a period of many years. They supply a reasonable and workable approach to the problems

involved, and one which provides the degree of stability and predictability so highly prized in the law. The unfortunate alternative, it appears to me, is the route taken by the majority in their opinion in this case; that such issues are to be decided on a case by case basis under the application of the basic law of negligence, bereft of the guiding principles and precedent which the law has heretofore attached by virtue of the relationship of the parties to one another.

Liability for negligence turns upon whether a duty of care is owed, and if so, the extent thereof. Who can doubt that the corner grocery, the large department store, or the financial institution owes a greater duty of care to one whom it has invited to enter its premises as a prospective customer of its wares or services than it owes to a trespasser seeking to enter after the close of business hours and for a nonbusiness or even an antagonistic purpose? I do not think it unreasonable or unfair that a social guest (classified by the law as a licensee, as was plaintiff here) should be obliged to take the premises in the same condition as his host finds them or permits them to be. Surely a homeowner should not be obliged to hover over his guests with warnings of possible dangers to be found in the condition of the home (*e.g.*, waxed floors, slipping rugs, toys in unexpected places, etc., etc.). Yet today's decision appears to open the door to potentially unlimited liability despite the purpose and circumstances motivating the plaintiff in entering the premises of another, and despite the caveat of the majority that the status of the parties may "have some bearing on the question of liability..." whatever the future may show that language to mean.

In my view, it is not a proper function of this court to overturn the learning, wisdom and experience of the past in this field. Sweeping modifications of tort liability law fall more suitably within the domain of the Legislature, before which all affected interests can be heard and which can enact statutes providing uniform standards and guidelines for the future. I would affirm the judgment for defendant.

McCOMB, J., concurs.

Questions and Notes

1. Would you retain, modify or abolish the distinctions between invitee, licensee and trespasser?

2. Since the modification of the landowner's duty to a visitor is justified by an implied agreement between the visitor and the landowner, what rules would you predict to apply when a condition of the land injures someone outside the land (*e.g.*, where a tree limb falls from the owner's property onto a passing motorist)?

2. How is the Visitor's Status Determined?

MARKLE v. HACIENDA MEXICAN RESTAURANT

570 N.E.2d 969 (Ind. App. 1991)

MILLER, Judge

Robert Markle, Plaintiff-appellant, appeals the grant of a summary judgment in favor of Hacienda Restaurant, Prairie Jackson Corp., Miller Monuments, M.E. Miller Testamentary Trust and Easy Shopping Place Businessmen's Association (collectively referred to as the Shopping Center), Defendants-Appellees. Markle claimed he was injured in the parking lot of Easy Shopping Place Shopping Center and alleged that the Shopping Center's negligent maintenance of the parking lot led to his injuries. The trial court determined Markle was a licensee at the time he was injured. Therefore, the only affirmative duty the Shopping Center owed to Markle was to refrain from willfully or wantonly injuring him. The court then granted summary judgment in favor of the Shopping Center. Markle now appeals, arguing that the question of his status at the time of the injury—invitee or licensee—is a question of fact, making summary judgment inappropriate. He also requests this court to abandon the common law distinction between invitee and licensee.

We reverse, holding that Markle's status at the time of his injury is a question of fact. Therefore, summary judgment should not have been granted.

Facts

These facts are not disputed: On July 11,

1986, Markle, a salesman for Ron's Painting, was returning to Elkhart, Indiana, after making sales calls, when he decided to eat at the Hacienda Restaurant in the Shopping Center in Elkhart. When he turned into the parking lot, he noticed Tim Lusher, a friend and co-worker, sitting in his truck in the parking lot. Markle stopped his car next to Lusher's truck, which was parked in a marked parking spot at the end of a row of parking spaces. When Markle pulled up next to it, he was not in a marked parking spot. Markle asked Lusher if he would take a twenty-five pound piece of steel that Markle had in his car to work the next morning. Lusher agreed, and Markle got out of the car to move the steel from his car to Lusher's truck. As he was lifting the steel into Lusher's truck, Markle stepped into a chuckhole with his right foot. He fell, injuring his knee.

On February 12, 1987, Markle brought suit against Hacienda, Prairie Jackson Corporation as owners of the Shopping Center, and John Does. He amended his complaint in February, 1988, to include Miller Monument, Inc., and M.E. Miller Testamentary Trust as parties, alleging the parties had an ownership interest in the shopping center. The Elkhart Superior Court granted summary judgment in favor of the Shopping Center on September 6, 1989. The court entered the following order:

On April 27, 1989, this cause came on for hearing on a Motion for Summary Judgment by defendants. The facts are as follows: On July 11, 1986 the plaintiff, Robert Markle, went to the Easy Shopping Place Center to eat at the Hacienda Restaurant. When the plaintiff arrived at Easy Shopping Place he saw a fellow employee in the parking lot. The plaintiff had a piece of sample steel that he wished to transfer from his car to the fellow employee's pickup truck. The plaintiff stepped in a chuckhole with his right foot while he was putting the steel from his car into the pickup truck. The plaintiff allegedly sustained injury as a result of the fall.

The central issue in this case is whether the plaintiff is an invitee, trespasser, or licensee. *Barbre v. Indianapolis* [sic] (1980) Ind. App., 400 N.E.2d 1142. The

duty owed by an owner or occupant of land to one coming on the premises depends largely on the relationship between them. *Fort Wayne National Bank v. Doctor*, (1971) 149 Ind. App. 365, 272 N.E.2d 876; *Olson v. Kushner*, (1965) 138 Ind. App. 73, 211 N.E.2d 620. Under Indiana law, an invitee is a person who goes onto the land of another at the express or implied invitation of owner or occupant either to transact business or for the mutual benefit of invitee and owner or occupant. *Clem v. United States*, 601 F. Supp. 835 (1985). A licensee is one who enters premises of another for his own convenience, curiosity, or entertainment. *Id.* at 836.

The facts of this case show the plaintiff entered the defendant's premises as an invitee. This is clearly demonstrated by the plaintiff's intention to eat at the Hacienda Restaurant. However, once the plaintiff decided to move the steel from his car, his status changed to that of a licensee. The transferring of the steel was of no benefit to the owner of the premises, but rather the action was of benefit to the plaintiff and his employer. It is possible for a person's status to change once he has entered the land of another. *Standard Oil Company of Indiana v. Scoville*, 132 Ind. App. 521, 175 N.E.2d 711 (1961).

The plaintiff cites *Silvestro v. Walz*, (1943) [222] Ind. [163], 51 N.E. [2d] 629 as support for his case. The plaintiff's argument is that the main relationship between plaintiff and defendant was that of invitee and the transferring of the piece of steel was incidental to the main relationship of the invitee. The *Silvestro* case is clearly distinguishable from the case at bar. The Indiana Supreme Court held the defendant liable because defendant should have reasonably expected invitees to wander the entire business premises. The question is whether the defendant in this case could have reasonably expected plaintiff to transfer steel in this parking lot.

Where controlling facts are undisputed,

the determination of the status is for the court to determine. *Standard Oil, supra*. The plaintiff was not performing an action incidental to his primary intention when he entered the premises. An incidental task is an instance whereby a business invitee does something which he could reasonably be expected to do under the circumstances. The deviation from his main intention when he entered the business premises is only slight. For example, in the *Silvestro* case, the plaintiff used the rest room facilities while waiting for car repairs. In that case, the owner of the premises could have reasonably expected the business invitee to do this.

The transferring of the steel was not incidental to the plaintiff's main purpose. The facts of the case at bar more closely resemble the facts of the *Standard Oil* case, *supra*. The plaintiff in the case at bar changed his status once he entered the premises. The facts of this case are undisputed.

A summary judgment motion may be entered only where there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *First Savings and Loan Ass'n v. Treater [Treater]*, (1986) Ind. App., 490 N.E.2d 1149.

The Court now holds that the plaintiff held the status of licensee at the time of the accident. The only affirmative duty a landowner owes a licensee is to refrain from willfully or wantonly injuring him in a way which would increase the licensee's peril. *French v. Sunburst Properties Inc.*, (1988) Ind. App., 521 N.E.2d 1355. There being no material dispute as to the facts, as a matter of law, summary judgment must be granted for the defendant. (R. 110-12).

Decision and Discussion

When we review a motion for summary judgment, we apply the same standards employed by the trial court. Ind. Trial Rule 56(C), *Travel Craft v. Wilhelm Mende GMBH* (1990), Ind., 552 N.E.2d 443. Summary judgment may be granted only if the pleadings, depositions, answers to

interrogatories, and admissions on file, together with affidavits and testimony, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. The court must liberally construe all evidence in favor of the non-movant. Even if there are no conflicting facts, summary judgment is inappropriate where the undisputed facts lead to conflicting inferences. *Id.*

In Indiana, the status of a person when he is injured on the premises of another determines the duty owed to that person by the owner of the property. *Barbre v. Indianapolis Water Co.* (1980), Ind. App., 400 N.E.2d 1142. A person entering the land of another is either a trespasser, a licensee or an invitee. *Burrell v. Meads* (1991), Ind., 569 N.E.2d 637. A landowner owes a trespasser the duty to refrain from willfully or wantonly injuring him after discovering his presence and owes a licensee the duty to refrain from willfully or wantonly injuring him or acting in a manner to increase his peril. *Id.* However, a landowner owes an invitee a duty to exercise reasonable care for the invitee's protection while the invitee is on the landowner's premises. *Id.*

In *Burrell*, our supreme court was faced with the question of how to determine whether one entering the land of another is an invitee. Burrell and Meads were friends who, over the years, helped each other perform various tasks. One afternoon, Burrell worked on his car in Meads' garage. As Burrell was preparing to leave, Meads told Burrell he would be installing a drop ceiling in the garage later that day. Burrell agreed to help. Later, Burrell climbed a ladder to remove some items which were stored on top of the garage rafters. He was injured when he fell to the floor of the garage from the rafters.

Burrell sued Meads for negligence, and the trial court granted summary judgment for Meads. This court affirmed, holding that Burrell, a social guest, was a licensee at the time of his injury and that Meads owed him only the duty to refrain from willfully or wantonly injuring him or acting in a way to increase his peril.

Our supreme court vacated this court's decision, holding that invited social guests are invitees and are entitled to a duty of reasonable care from landowners. In reaching its decision, the court examined the two tests which have been used by Indiana courts in determining invitee status —

the "economic benefit test" and the "invitation test". The theory behind the "economic benefit test" is to impose affirmative obligations on the landowner only in exchange for some consideration or benefit. *See, e.g., Hammond v. Allegretti* (1974), 262 Ind. 82, 311 N.E.2d 821; *Standard Oil Co. of Indiana v. Scoville* (1961), 132 Ind. App. 521, 175 N.E.2d 711. The court rejected the "economic benefit test" and instead adopted the "invitation test" as defined in the RESTATEMENT (SECOND) OF TORTS § 332:

- (1) An invitee is either a public invitee or a business visitor.
- (2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.
- (3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land. RESTATEMENT (SECOND) OF TORTS § 332, quoted in *Burrell, supra*, at 642.

Thus, an examination of the invitation itself must be the first step of any inquiry into invitee status. *Burrell, supra*, at 641.

Markle argues that it is undisputed that when he entered the parking lot, he was an invitee and that a trier of fact could infer from the facts that his actions were incidental to his main reason for coming to the Shopping Center. After all, he argues, friends often see each other in the local shopping center and may talk to each other or conduct some type of business — such as stopping to write a check to one whom he owes money or transferring packages from one car to another. He argues that a jury could find that the Shopping Center could have reasonably expected such a routine, incidental action; therefore, his status did not change from that of an invitee to that of a licensee. He cites *Silvestro v. Walz* (1943), 222 Ind. 163, 51 N.E.2d 629, to support his argument.

In *Silvestro*, the plaintiff was injured when he went beyond the repair area of the defendant's car repair shop in search of a washroom while waiting for his car to be repaired. The court held that although the plaintiff was not engaged in activity which directly benefitted the defendant, his trip to

the washroom was merely incidental to his reason for being at the shop. The court reasoned:

A customer is invited to all parts of the premises that may reasonably be expected to be used in the transaction of the mutual business, those incidental and those necessary.

Nor would it seem unreasonable to hold that the owner of the premises should anticipate what is usually and customarily done by an invitee within the scope of, and to carry out the purpose of, the invitation.

The proprietor of any automobile repair shop may reasonably expect that his customers will not sit or stand in one place awaiting completion of the repairs. Appellant could not be blind to this common practice. *Id.* at 171, 51 N.E.2d at 632 (citations omitted).

Thus, the court focused on the invitation extended by the car repair shop owner to his customers instead of whether the shop owner received a direct benefit from the plaintiff's action to determine whether the plaintiff was an invitee or a licensee. The court concluded that a visitor to another's property does not lose his status as an invitee as long as the visitor is engaged in activity reasonably related—or incidental to—the invitation extended by the owner.

The Shopping Center, however, argues that the activity in which Markle was engaged when he was injured was purely for his own benefit and convenience and not for the mutual benefit of Markle and the Shopping Center. Further, the Shopping Center argues that the parking lot was held open for parking for customers of the tenants of the Shopping Center, as evidenced by a posted sign which limited parking to customers only. When Markle transferred the piece of steel from his car to Lusher's truck, he was not a customer of any of the Shopping Center tenants. The Shopping Center also argues that Markle was using the parking lot for a purpose other than that for which the lot was held open to the public. Finally, the Shopping Center argues that Markle's activities are substantially different from the acts in which the plaintiff in *Silvestro* engaged. Therefore, Markle's action could not be considered incidental to his

invitation.

First of all, we note that the Shopping Center's first argument centers on economic benefit, which, under *Burrell*, is not the proper focus of the discussion. However, the Shopping Center's other arguments center on the invitation, or its reason for holding the lot open.

We agree that even though a visitor may be an invitee when he comes on to the property, his status may change to that of a licensee while he is on the premises if the use to which he puts the property does not correspond to the owner's reason for holding the property open. *See, e.g., Hoosier Cardinal Corp. v. Brizius* (1964), 136 Ind. App. 363, 199 N.E.2d 481 (holding that although workman removing a conveyor belt from defendant's property was an invitee, he stepped out of that role when he made an unusual, unanticipated or improbable use of structures on the defendant's property).¹ *See also* 62 AM. JUR.

¹ *See also Dry v. Ford* (1960), 238 Miss. 98, 117 So. 2d 456 (holding that the plaintiff, who was helping his employer install a dimmer switch in the employer's truck on the defendant's property, was a licensee when he was injured, because, even though he had gone to the defendant's car repair shop with his employer to purchase the switch, and was therefore an invitee at that time, his status changed once he and his employer decided to install the switch themselves when they learned that the mechanics would not have time to install it until the next day); *Gavin v. O'Conner* (1923), 99 N.J.L. 162, 122 A. 842 (holding that injured person was not an invitee when he was killed swinging from a clothesline because, although he was impliedly invited to play in the yard, he was not using the clothesline in a manner consistent with the owner's purpose for erecting the line and was therefore a licensee at the time of his injury); *Bird v. Clover Leaf-Harris Dairy* (1942), 102 Utah 330, 125 P.2d 797 (holding that although employee was clearly an invitee to the extent he worked at defendant's dairy, his use of the premises—parking a car in an area forbidden by the defendant—was not using the property in the usual, ordinary and customary way; therefore, when the car was damaged, the employee was a licensee as a matter of law); *Robbillard v. Tillotson* (1954), 118 Vt. 294, 108 A.2d 524 (holding that although a husband and his wife were invitees while buying something at defendant's service station, they could no longer be considered invitees when the husband, after concluding his business, waited in the car in the parking lot of the service station, while she conducted business at another location).

The trial court cited *Standard Oil Co. of Indiana v. Scoville* (1961), 132 Ind. App. 521, 175 N.E.2d 711, for the proposition that a person's status can change once he is on the premises of another. Scoville had gone into Standard Oil's bulk plant in Bloomington, Indiana, to pay

(continued...)

2D *Premises Liability* §§ 105, 107 (1990).

Thus, an invitation may be limited as to the manner in which the invitee may use the premises:

An invitation to come on premises for one purpose does not invite entry for all purposes. The status of an invitee continues only as long as he is using the premises for a purpose reasonably intended by the invitation, and when used for another purpose the invitee loses the status of invitee. The invitee must use the owner's premises in the usual, ordinary, and customary way. "The inviter is under a duty to keep the premises which are within the scope of the invitation safe for all uses by the invitee, and he is not bound to keep them safe for uses which are outside the scope and purpose of the invitation, for which the property was not designed, and which could not reasonably have been anticipated, except where he is present and actively co-operates with the invitee in the particular use of the premises." 65 C.J.S. *Negligence* § 63(52) (1966) (emphasis supplied, footnotes omitted).

Here, it is not disputed that, because Markle originally went into the Shopping Center to eat at the Hacienda, he was an invitee when he first entered the parking lot. However, Markle's status—invitee or licensee—at the time he was allegedly injured is disputed. In other words, were Markle's business activities—taking a piece of steel from his car to put in a friend's truck—activities which

the Shopping Center could reasonably anticipate from customers coming to their property and which could be considered incidental to its invitation to customers to park in its lot and shop in its stores?

We do not agree with the Shopping Center's argument that Markle was acting entirely outside of the scope of the Shopping Center's invitation. This is not a situation where Markle went into the parking just to give his friend the piece of steel he had in his car. Rather, the evidence is undisputed that Markle went into the parking lot to eat at the restaurant—a reason clearly within the scope of the invitation. The question that must be asked therefore, is whether Markle's activity was merely incidental to this purpose. Under *Silvestro, supra*, this is a question of what could be reasonably expected to be within the scope of the invitation. The question of what is reasonable under these circumstances is a question more properly left to the trier of fact.

The Shopping Center also argues that *Silvestro* limits the types of activities which may be considered as incidental to the main purpose of the invitation. However, a careful reading of *Silvestro* reveals that the case limited activities which could be considered "incidental" to those activities which are "usually and customarily" carried on by visitors to a particular location. This would necessarily depend on the particular location. The activities which could be considered incidental to a visit to a car repair shop would necessarily vary greatly from those activities which could be considered incidental to a visit to a shopping center. One might expect any number of social or business activities to be conducted between patrons of a shopping center—planned and unplanned. For example, a patron, who has gone to the center to shop, may meet a business associate by chance and discuss a business matter. On the other hand, two business associates may plan to meet at the restaurant to have a business dinner, and one of them steps into the same chuckhole into which Markle fell. Or, two patrons may meet by chance and discuss a purely social matter. While this may be a common occurrence at shopping centers, the same activity might not commonly occur at another location. What is "usual" and "customary", therefore, would be a question of fact to be determined from all of the surrounding circumstances.

In conclusion, we find that although the

¹(...continued)

his gas bill. After parking his car in the lot, Scoville ascended a flight of stairs into the building, and went to the office to pay the bill. He returned to his car safely, but returned to the office to discuss a personal matter with an employee. Upon returning to his car the second time, Scoville fell on the steps and was injured. The trial court granted judgment in favor of Scoville. This court reversed, holding that because Scoville returned to the office for his own convenience and not to transact business, he was clearly a licensee at the time of his injury. Scoville, however, is distinguishable from the case at bar. First of all, the court there focused on the "economic benefit test" which was expressly rejected by our supreme court in *Burrell*. Secondly, there were two distinct entries into the building for two distinct purposes. Here, however, Markle was injured on his original trip to the Shopping Center.

material facts are not in dispute, we find that a trier of fact could reach the conclusion opposite that reached by the trial court and could infer Markle's actions were incidental to his reason for going to the Shopping Center.²

Markle also argues that this court should abandon the distinction between invitees, licensees and trespassers. Our supreme court has recently declined the invitation to abandon these distinctions. *See Burrell, supra*. We likewise decline the invitation.

Reversed and remanded.

CHEZEM and CONOVER, JJ., concur.

Questions and Notes

1. In the following two cases, evaluate the facts and analyze the plaintiff's status at the time of the injury.

HOSTICK v. HALL

386 P.2d 758 (Okla. 1963)

PER CURIAM

Betty Jo Hall, a 17 months old child at the time of the injuries involved herein, together with her mother, had gone to the Speed Queen Coin-O-Matic laundry in Bartlesville, which was open to the public for washing, drying and starching clothes for a charge. The plaintiff was awarded damages for injuries received when she was scalded and severely burned when she turned on a hot water faucet at the sink...

² We would reach this same result if, for instance, Markle was discussing business with an associate while eating dinner at the restaurant and injured himself in the same parking lot by stepping into the same chuckhole when going out to his car for some papers to use in the discussion. One could say that Markle stepped out of his role as an invitee —although briefly —by leaving the restaurant to get the papers. However, it is also reasonable that the owners could anticipate patrons would meet to discuss business over dinner. Thus, the question of whether the patron who has left the restaurant to get some papers from his car has stepped out of his role as invitee is one properly left to the trier of fact. Likewise, the question of whether the Shopping Center could have anticipated that Markle —or any other customer —would transact business in the parking lot is one properly left to the trier of fact.

Plaintiff's petition alleged in substance that the laundry in question was open to the public for washing, starching and drying clothes and that it was the custom of parents to bring their small children with them when doing their laundry in said place of business; that small children were daily in and about said premises with their parents with the knowledge and consent of the owner defendant. That the defendant maintained a scalding hot water faucet on the sink which was unattended and unguarded and that the faucets as maintained by the defendant were constructed in a negligent and improper manner and that the easy access thereto created an attractive nuisance and that the defendant was negligent in not maintaining a reasonably safe condition for a child of plaintiff's age. That plaintiff crawled upon a chair which was near the sink, turned on the hot water faucet causing severe and serious burns and permanent scars from the hot water emitted therefrom.

* * *

GUILFORD v. YALE UNIVERSITY

128 Conn. 449, 23 A.2d 917 (1942)

JENNINGS, Judge

The plaintiff, a graduate of Sheffield Scientific School of Yale University of the class of 1899, while visiting the university during the commencement period on June 20, 1939, fell on premises owned by the defendant and was injured. He brought this action claiming that his injuries were due to the negligence of the defendant. The case was tried to the jury and a verdict rendered in favor of the plaintiff. The defendant has appealed, the only ground of error claimed being the refusal of the trial court to set aside the verdict upon the defendant's motion. Unless otherwise indicated, defendant refers to the named defendant.

Viewing the evidence in the light most favorable to the plaintiff, the jury might reasonably have found the following facts: The Yale University authorities, upon the application of the chairman of the reunion committee of any class, assign to it a building owned by the university as headquarters for members of the class returning to the reunion. Pursuant to that custom, a building formerly occupied by an organization known as the Wolf's Head Society had been assigned to the class of 1936 as reunion headquarters. It is customary

for members of classes having reunions to visit the headquarters of other classes, and it is also the custom for those attending reunions to use the grounds about the headquarters building as a general gathering place, as the university authorities knew.

In the basement of the building in question was a toilet room and dining room and on the ground floor two club rooms. It was of substantial stone construction. The entrance was at the corner and consisted of two paved walks extending from the door of the building to Trumbull and Prospect Streets, respectively. Between these entrance walks was a circular grass plot. On the Trumbull Street side the entrance walk was bordered by a curb; next east of the curb was a grass plot twenty-two feet and two inches in length. The width of the grass plot was eleven feet eight inches measured from the face of the building to a stone wall on the Trumbull Street boundary line. At the east end of the grass plot was a retaining wall, the top of which formed a parapet extending from nine and one-half inches to eleven and one-half inches above the level of the ground on the west side. On the east of the retaining wall there was a perpendicular drop from its top to the ground below of ten feet six inches, thus forming a pit.

The plaintiff had returned to New Haven for the fortieth reunion of his class. On the night in question, at about 12 o'clock, he, accompanied by one of his classmates, proceeded to these premises and there met a number of younger men of the class of 1936. After arriving he spent a pleasant period with those gathered there, remaining until about 2 o'clock, at which time it was suggested that the place be closed. Those of the party then remaining left the building and proceeded to the sidewalk in the street where they talked for five or ten minutes. While they were conversing, the plaintiff expressed a desire to urinate and was informed that there was a toilet in the basement. At this time, the lights in the building had been turned out. The plaintiff did not re-enter the building but stepped back upon the premises, crossed the curb between the Trumbull Street walk and the grass plot and proceeded across the grass plot, walking about midway between the side of the building and the stone wall enclosing the property on the Trumbull Street side. There was a tree growing from the lower level beyond the retaining wall at the east of the grass plot. The shape of the tree was

such that its top projected above the level of the top of the retaining wall. The plaintiff thought that the top of this tree was a bush growing on the grass plot, and walked towards it. He tripped over the parapet at the top of the retaining wall and fell to its bottom at the lower level. The region generally was well lighted at the time, but the plaintiff claimed that, while he was able to see the street and the sidewalk very well, the ground under his feet was in a dark shadow and that he was walking into the shadow to find a secluded place near the bush to urinate.

* * *

Questions and Notes

1. When the owner transfers possession of the property to another, the new possessor usually assumes the duties of the owner, such as to warn of hidden dangers, to inspect for defects, etc. It depends, however, on the structure of the relationship. In many rental contracts or leases the owner will retain some duties to repair, and to the extent he does, his negligent failure to do so may create liability, perhaps in addition to the possessor's duty to warn visitors or to make repairs himself.

2. For a review of the history of a lessor's obligations to tenants and to other visitors, see *Bellikka v. Green*, 306 Or. 630, 762 P.2d 997 (1988). For a discussion of the landlord's duty to the tenant, see Neisser, *The Tenant as Consumer: Applying Strict Liability Principles to Landlords*, [64 ST. JOHN'S L. REV. 527](#) (1990).

3. Courts have been troubled by cases where the visitor is unexpected, but provides substantial benefits to the property owner. Public employees that enter property in connection with business being conducted there are usually thought of as invitees. However, the usual definitions of invitee and licensee are strained as public employees carry out their public duties. To a landowner, the tax collector or building inspector may represent an intrusion. At the same time, such employees may be authorized to make such intrusions and can anticipate being expected by the landowner — possibly raising their status to that of invitees. But

firefighters and police officers have traditionally been held to be licensees, to whom a lesser duty of care is owed. This status has usually only been applied to situations in which the firefighter or officer is injured by the thing she was there to investigate. A landowner may possibly be held liable for failure to warn of other hazards. *See generally*, PROSSER AND KEETON, § 61. In one sense it matters very little whether a firefighter is considered a licensee or an invitee, since a reasonable person would hardly exert much care to keep the premises safe for unexpected visitors. For that matter, even someone who is expected and who is clearly a business visitor (like a plumber called to deal with a burst pipe in the basement) may not require much care. After all, a plumber could hardly complain that the owner failed to fix the flooded basement when that is the condition that the plumber had been hired to deal with.

4. Business and public invitees are owed reasonable care. That includes an obligation to inspect as well as to repair (at least so far as a reasonable person would do so). This distinguishes the invitee from the licensee, whom the owner or occupier need only warn of hidden perils. At the same time, even invitees cannot complain about a dangerous condition of the premises unless there has been "notice" to the owner. For example, if a customer slips and falls in a grocery store because someone dropped a bottle of distilled water, leaving a puddle on the floor, the injured party must establish that the puddle was there long enough that the owner had "notice" and therefore was negligent in failing to correct the condition. Some jurisdictions have modified this rule by considering "self-service" operations to be exempt from the notice rule.

3. An Exception for Trespassing Children — "Attractive Nuisance"

OSTERMAN v. PETERS

260 Md. (App.) 313, 272 A.2d 21 (1971)

SINGLEY, Judge

This case is the aftermath of the tragic death of Lawrence Bruce Osterman, a four and a half year old boy, who was drowned when he fell into the swimming pool at a neighbor's vacant house while attempting, with a friend, to retrieve a ball. The boy's father, as administrator of his son's estate, and in his own right as parent, brought suit for damages in the Circuit Court for Montgomery County against Mr. and Mrs. Barry J. Peters, the owners of the property upon which the pool was located. At the end of the entire case, the Peters' motion for a directed verdict was granted and judgment was entered in their favor for costs, from which Dr. Osterman has appealed.

In *Hensley v. Henkels & McCoy, Inc.*, 258 Md. 397, 265 A.2d 897 (1970), decided seven months ago, in *Mondshour v. Moore*, 256 Md. 617, 261 A.2d 482 (1970) and in *Hicks v. Hitaffer*, 256 Md. 659, 261 A.2d 769 (1970), both decided less than a year ago and in *Herring v. Christensen*, 252 Md. 240, 249 A.2d 718 (1969), decided less than two years ago, we had occasion to reiterate the Maryland rule that the owner of land owes no duty to a trespasser or licensee, even one of tender years, except to abstain from willful or wanton misconduct or entrapment, since trespassers or bare licensees, including trespassing children, take the premises as they find them. Judge Smith, who wrote the Court's opinion in *Hicks, supra*, collected and categorized our prior decisions extending over a period of 75 years involving injuries to trespassing children, 256 Md. at 669-670, 261 A.2d 769.

Dr. Osterman, doubtless aware that Maryland is one of only seven states which reject the doctrine of attractive nuisance without qualification, PROSSER, LAW OF TORTS § 59, at 373, n.44 (3d ed. 1964), argues that there are four reasons why this case should be taken from under the rule of our prior decisions and should have gone to the jury on the issue of negligence.

First, he relies on the age of the child, who was four and a half. However, in both *Herring v.*

Christensen, supra, 252 Md. 240, 249 A.2d 718 and *Barnes v. Housing Authority of Baltimore City*, 231 Md. 147, 189 A.2d 100 (1963), we declined to make an exception for a three year old child, and our predecessors were unwilling to except a mentally subnormal boy of 11 years of age in State, to Use of *Alston v. Baltimore Fidelity Warehouse Co.*, 176 Md. 341, 4 A.2d 739 (1939).

Next, the appellant argues that the child came on the Peters' property for the sole purpose of retrieving a ball, and not to play or swim in the pool. We view this argument as inapposite, since it is reminiscent of the concept of allurements, once thought to be essential to recovery in attractive nuisance cases, but now largely discredited in states which accept the attractive nuisance doctrine, *McGettigan v. National Bank of Washington*, 115 U.S. App. D.C. 384, 320 F.2d 703 (1963); PROSSER, *supra*, § 59 at 374, and particularly the cases collected in notes 46, 48 and 50. Compare, however, State to Use of *Potter v. Longeley*, 161 Md. 563, 569, 158 A. 6 (1932) which found demurrable a declaration which failed to allege that the hazard was in sight of any place where the plaintiff's decedent could be without trespassing.

There was testimony that the Peters had vacated their house on 9 May, three days before the accident, leaving the pool filled with water for the convenience of the new occupants, who planned to move in on 2 June. This, the appellant argues, was "almost criminal indifference" to the rights of the Peters' neighbors. Assuming for purposes of argument that it was an act of indifference, this is not the sort of willful or wanton misconduct or entrapment identified in our prior decisions. In *Hensley, supra*, 258 Md. 397, 412, 265 A.2d 897, 905, we held that a contracting firm which left unguarded a rope dangling between transmission towers, within reach of a 10 year old boy who was injured when swinging on the rope, created "no covert change or entrapment" and "no hidden danger or secret pitfall." It seems to us that the filled swimming pool may well have been less of a hazard than the dangling rope.

Finally, the appellant points out that Montgomery County Code (1965) § 105-2 requires that private pools be fenced or surrounded with impenetrable planting, and that gates be equipped with self-closing and self-latching devices. The Peters' pool was fenced, but there was testimony that there were apertures about twelve inches high

in the fence and that the gate was kept closed by placing a stone in front of it. The boys had pushed the stone aside to gain access to the pool itself. The Peters' violation of this statute, the appellant says, is evidence of negligence. And so it may be, assuming that there was a violation, *McLhinney v. Lansdell Corp. of Maryland*, 254 Md. 7, 14-15, 254 A.2d 177 (1969); *Aravanis v. Eisenberg*, 237 Md. 242, 259, 206 A.2d 148 (1965); *Gosnell v. Baltimore & O. R.R. Co.*, 189 Md. 677, 687, 57 A.2d 322 (1948). The difficulty with the appellant's contention is that this precise point was made in State to Use of *Potter v. Longeley, supra*, 161 Md. 563, 158 A. 6 where it was alleged that a 12 year old boy had drowned in an abandoned quarry which the owners had failed to inclose with a six foot fence, as required by a Baltimore City ordinance. In rejecting this contention, our predecessors said:

The ordinance in this case was passed for the benefit of the public. Any violation of it subjects the owner of a quarry to a fine. But, before an individual can hold such owner liable for an injury alleged to have resulted from such violation, there must be shown a right on the part of the plaintiff, a duty on the part of the defendant with respect to that right, and a breach of that duty by the defendant whereby the plaintiff has suffered injury. *Maenner v. Carroll, supra* (46 Md. 193 (1877)). A trespasser can acquire no such right except in case of willful injury. The mere violation of a statute would not give it. The effect of such violation is only to raise a presumption of negligence in favor of one entitled to assert it. See an interesting discussion on 24 HARVARD LAW REVIEW, p. 333." 161 Md. at 569-570, 158 A. 8.

For these reasons, we conclude that Dr. Osterman could no more take his case from under the Maryland rule than could the plaintiff in *Hensley v. Henkels & McCoy, Inc., supra*, 258 Md. 397, 265 A.2d 897, who attempted to do so by alleging that the contractor knew that the area where the accident occurred was customarily traversed by children.

What Chief Judge McSherry, speaking for the Court, said in *Demuth v. Old Town Bank of Baltimore*, 85 Md. 315, 37 A. 266 (1897), which

we referred to in *Mondshour v. Moore*, *supra*, 256 Md. 623-624, 261 A.2d 482, is equally appropriate to the distressing situation which this case presents:

This is a case of exceedingly great hardship, and we have diligently, but in vain, sought for some tenable ground upon which the appellants could be relieved from the loss that an affirmance of the decree appealed from will necessarily subject them to. But hard cases, it has often been said, almost always make bad law; and hence it is, in the end, far better that the established rules of law should be strictly applied, even though in particular instances serious loss may be thereby inflicted on some individuals, than that by subtle distinctions, invented and resorted to solely to escape such consequences, long-settled and firmly-fixed doctrines should be shaken, questioned, confused, or doubted. *Lovejoy v. Ireelan*, 17 Md. (525) 527. It is often difficult to resist the influence which a palpable hardship is calculated to exert; but a rigid adherence to fundamental principles at all times, and a stern insensibility to the results which an unvarying enforcement of those principles may occasionally entail, are the surest, if not the only, means by which stability and certainty in the administration of the law may be secured. It is for the legislature, by appropriate enactments, and not for the courts, by metaphysical refinements, to provide a remedy against the happening of hardships which may result from the consistent application of established legal principles." 85 Md. at 319-320, 37 A. at 266.

Judgment affirmed, costs to be paid by appellant.

HOFER v. MEYER

295 N. W.2d 333 (1980)

HERTZ, Circuit Judge

At a pretrial conference the trial court granted summary judgment in favor of defendants (Clifford and Evelyn Meyer and Richard and Dorothy

Kiefer) as to Counts 2, 3, 5, 6 and 7 of the complaint. The trial court ruled that trial would proceed on Counts 1 and 4. At the close of the trial, defendants' motions for directed verdict were granted, and judgment was entered accordingly. Plaintiffs (Myron and Doreen Hofer for themselves and on behalf of their son Jason) appeal. We affirm the judgment as to Counts 1 and 4 and remand the matter to the trial court for trial on Count 6, which alleged a cause predicated upon RESTATEMENT (SECOND) OF TORTS § 339.

On January 16, 1974, Jason Hofer, then three years of age, was found injured and semi-conscious on premises owned by the Kiefers. There were no eyewitnesses to the incident. The evidence shows that Mrs. Hofer was employed as a nurse and that Jason stayed with a babysitter while she was at work. On the day of Jason's injury, he and his mother had returned home. The weather was pleasant for that time of the year and Mrs. Hofer permitted Jason to remain outside while she changed her clothes. Jason had never left the yard before, but when Mrs. Hofer checked a short time later, he had disappeared. Jason was subsequently found lying within a barbed wire enclosure on the Kiefer property, which was within a few blocks of the Hofer residence. The enclosure was used by Meyers to contain their horse. The horse was a seven-year-old gelding, and it is undisputed that he was an extremely gentle horse and that he was used by the children and grandchildren of the Meyers and Kiefers for riding purposes. To the north of the enclosure, on property owned by Winston Olson, two other horses were kept. The Kiefer and Olson properties were separated by two strands of barbed wire. The testimony at trial indicates that the Kiefer enclosure consisted mostly of a two-strand barbed wire fence and that in one area there was only a single barbed wire. The Meyers apparently maintained the fence because their horse was kept in the enclosure.

There was evidence from which the jury could have found that Jason had been kicked by Meyers' horse.

The Kiefer property is within the city limits of Rapid City, South Dakota. There was testimony indicating that on three sides of the premises where Jason was found there were a number of other residences and that there were a number of children living in the area. There was a hill on the fourth side of the property. Mr. Olson testified that

during the wintertime "some kids" would play there and slide down the hill. Mr. Meyer testified as follows:

- Q.** To your knowledge, were there ever any strange children other than your own that you didn't know or weren't acquainted with back in that area?
- A.** Not in Dick's area. I saw one little boy over in Mr. Olson's pasture chasing the horses one day, and I run him out, but that's about the only one I could say.

Both Mr. Kiefer and Mr. Meyer testified that they had never seen other children on the Kiefer property, nor had they ever received any complaints about children being in the area.

Mrs. Ormie Martin, a neighbor to the immediate west of Kiefers, testified with regard to an event she witnessed on the day of the accident:

Well, I saw —I was sitting in the chair, and all I saw was two little red clad legs in front of the garage, and it flashed through my mind that Tricia was there, their little granddaughter, and that's all I saw. I couldn't tell you what the top part was, I just saw the little legs.

There is evidence that Jason's little dog accompanied him when he left the yard that day, although the dog was not found near Jason after the accident. Mr. Meyer testified that he was aware of the danger created by horses trying to defend themselves from dogs and that on at least one occasion he had witnessed dogs and the horses facing off.

At the pretrial conference, the trial judge ruled on the counts in the complaint as follows:

Count 1 was construed by the court to be a general negligence cause of action and the Hofers were permitted to proceed to trial on that count.

Count 2 alleged certain city ordinance violations, and the court ruled, as a matter of law, that these were health ordinances, not safety ordinances, and that no private action for damages could be maintained.

Count 3 was held by the trial court to be a

claim based upon a violation of city ordinance and alleging a public nuisance. The court held that no private right of action existed on behalf of the Hofers.

Count 4 was an allegation that Jason was a licensee on the Kiefer property. The trial court held that this was essentially a negligence claim and permitted the Hofers to proceed to trial on that count.

Count 5 alleged an attractive nuisance, and the court ruled, as a matter of law, that the horse in question was not an artificial condition within the attractive nuisance doctrine and that no cause of action was stated.

Count 6 was determined by the court to allege a cause of action based upon RESTATEMENT (SECOND) OF TORTS § 339, and it ruled, as a matter of law, that § 339 was not applicable.

Count 7 was construed by the court to allege a cause of action based upon the "playground" doctrine, but the court determined that the allegation did not state a cause of action.

Counts 1 and 4 proceeded to trial. After all parties had rested, defendants renewed their motions for directed verdict made at the close of plaintiffs' case. The trial court found that there was no evidence that would raise Jason's status above that of trespasser and that, accordingly, the only duty owed by defendants was to avoid wanton or willful conduct that would cause injury. The trial court further held that there was no evidence to show any knowledge on the part of the Kiefers that anyone was trespassing on their property. With regard to the Meyers, the trial court held that owners of a domestic animal must have reason to have knowledge of a dangerous propensity of the animal or of that class of animals as a whole and that there was simply no evidence to show such knowledge on the part of the Meyers or to put them on notice of any problem with the horse in question. The court further stated that mere inference when all other possible causes are equal is not sufficient to present the matter to the jury. The trial court granted defendants' motions for directed verdict.

This case is a classic example of the confusion

created by the land entrance concepts embodied in those classifications still persisting in South Dakota, namely, "invitee," "licensee," and "trespasser." The Hofers urge that these classifications have now outlived their usefulness and that they should be abolished and the case decided as in other negligence cases. This would mean that cases such as this one would be determined under the theory of ordinary negligence or, as sometimes stated, "due care under the circumstances." Because of our determination that a cause of action exists under the attractive nuisance doctrine, we decline to consider rejection of the various classifications above noted.

At oral argument, counsel for plaintiffs admitted that Jason was a trespasser at the time of his injury. Even so, we are of the opinion that plaintiffs have stated a cause of action under the attractive nuisance doctrine. In South Dakota that doctrine is the same as that stated in RESTATEMENT (SECOND) OF TORTS § 339:

A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if

- (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
- (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
- (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and
- (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
- (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the

children.

See: Cargill, Incorporated v. Zimmer, 374 F.2d 924 (8th Cir. 1967), and *Morris v. City of Britton*, 66 S.D. 121, 279 N.W. 531 (1938).

In our opinion, the facts elicited at the trial were sufficient to present a jury issue under appropriate instructions embodying the elements set forth in RESTATEMENT (SECOND) OF TORTS § 339.

The trial court found as a matter of law that the horse owned by the Meyers and kept in the yard owned by the Kiefers was not an "artificial condition" upon the land. We, however, conclude that whether a horse is an "artificial condition" within the meaning of RESTATEMENT (SECOND) OF TORTS § 339, is a matter to be determined by the special facts in each case. It is said that when a condition on the land is created by the action of man, the condition is "artificial" and not "natural" for the purposes of the attractive nuisance doctrine. *Clarke v. Edging*, 20 Ariz. App. 267, 512 P.2d 30 (1973). In the *Cargill* case, *supra*, a twelve-year-old boy climbed the ladder up the side of a seventy-two-foot silo. His climb resulted in a fall, and the court held that the pigeons at the top of the silo constituted a distraction that obscured the present danger of excessive height. Consistent with RESTATEMENT (SECOND) OF TORTS § 339, the court held that the pigeons constituted an artificial condition upon the land.

In the instant case, defendants placed a horse in a poorly fenced yard easily accessible to children. A child of three, indeed even older children, would not perceive the horse as being imminently dangerous. Add to the child's presence that of his little dog, and you have the ingredients of a foreseeably dangerous condition in that defendants had prior knowledge of dogs disturbing the tranquility of the Olson horses located on property adjacent to the Kiefer property. Further, even a gentle horse may kick when startled by the sudden presence of a little boy appearing without warning.

RESTATEMENT (SECOND) OF TORTS § 339(a) requires that the possessor "knows or has reason to know that children are likely to trespass." Here, there is evidence that children occasionally were seen in the area, albeit, not specifically on the Kiefer property. There were residential areas on at least two sides of the property. Mr. Meyer testified that on at least one occasion he saw a little boy

chasing the horses in the Olson pasture, which is immediately adjacent to the Kiefer property. The fence around the Kiefer yard consisted of only one or two strands of barbed wire, admittedly inadequate protection against the curiosity of the children in the area. The evidence, as a whole, is sufficient, under appropriate instructions, to put the foreseeability issue to the jury.

RESTATEMENT (SECOND) OF TORTS § 339(b) requires that the condition be one that the possessor knows or has reason to know involves an unreasonable risk of death or serious bodily harm to children. Here, the horse was placed within the city limits of Rapid City in a poorly fenced yard near other residences with children nearby. A horse situated thusly could be found by the jury to be an unreasonable risk, and the condition created by the presence of the horse constituted a submissible issue under the facts presented.

RESTATEMENT (SECOND) OF TORTS § 339(c) requires that a determination be made that because of his youth, the child was unable to discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it. Here we have a three-year-old boy certainly unable to comprehend the danger involved in coming near what was then a gentle and peaceful animal. Jason was obviously at an age where he could not comprehend that his sudden presence or that of his little dog would change the demeanor of an otherwise gentle horse.

RESTATEMENT (SECOND) OF TORTS § 339(d) requires the possessor to eliminate the danger where the cost of doing so is slight as compared with the risk to children in the area. Here it was just a matter of some additional wiring that would have been adequate to keep little children out of the horse yard.

RESTATEMENT (SECOND) OF TORTS § 339(e) requires plaintiffs to show that defendants failed to exercise reasonable care to eliminate the danger or otherwise protect the children. This issue, under all of the facts, was one that should have been submitted to the jury.

In *Cargill, Incorporated v. Zimmer*, it was stated:

South Dakota law does not require a landowner to make his land "child-proof." But at the same time we recognize that modern decisions in this area of the law

increasingly acknowledge the humanitarian viewpoint that the life of a child is to be balanced as a heavy interest when weighed against the utility of simple precautions to guard against danger. In applying the RESTATEMENT, § 339, no one of the five factors can be given isolated treatment in determining defendant's negligence. Their relationship is closely interwoven with one another in determining the basic question of whether there is a foreseeable harm. 374 F.2d at 930.

The question presented is whether there was sufficient evidence from which the jury could reasonably find that defendants could have foreseen that an unreasonable risk of harm to trespassing children existed under the facts and the law stated. We hold that a submissible issue did exist and that the trial court erred in granting defendants' summary judgment motions as to Count 6 of the complaint. The issue should have been resolved by the jury. We find the other errors claimed by plaintiffs to be without merit.

Accordingly, the judgment as to Counts 1 and 4 is affirmed, and the matter is remanded to the trial court for trial of plaintiffs' cause of action predicated on RESTATEMENT (SECOND) OF TORTS § 339.

DUNN, MORGAN and FOSHEIM, JJ., concur.
WUEST, Circuit Judge, concurs specially.

Questions and Notes

1. In *Henry v. State*, 406 N.W.2d 608, two young boys were camping with their parents at a state park. During the night, a storm hit, causing a tree branch to fall on the boys' tent. One of the boys eventually died from the incident, and the other was seriously injured. The parents brought suit against the state and a tree service, both of which took care of the park. The parents alleged that the park was an artificial condition, and soil compaction caused by the creation of the park weakened the tree's health and began internal decay. The court held:

Even if the construction of the park affected the health of the tree, this is not

an artificial condition. Cases from this and other jurisdictions indicate that changes in natural environments do not create an "artificial" condition where the affected terrain duplicates nature, except that an artificial condition will be found if there is some type of trap or concealment.

Other jurisdictions that agree with this holding include Florida in *Cassel v. Price*, 396 So. 2d 258, 264 (Fla. Dist. Ct. App.), and New Jersey in *Ostroski v. Mt. Prospect Shop-Rite, Inc.*, 94 N.J. Super. 374, 380-81, 228 A.2d 545.

2. Most jurisdictions have adopted the RESTATEMENT test regarding attractive nuisance. *See, e.g., Ochampaugh v. City of Seattle*, 91

Wash. 2d 514, 588 P.2d 1351 (1979); *Barnhizer v. Paradise Valley Unified School District*, 123 Ariz. 253, 599 P.2d 209 (1979); *Lister v. Campbell*, 371 So. 2d 133, (Fla. App. 1979); and *Gerchberg v. Loney*, 223 Kan. 446, 576 P.2d 593 (1978).

3. Note that the RESTATEMENT test *does not* include a requirement that the dangerous condition "allure" the child. You will recall that Justice Holmes made allurements the basis (and thus the limitation) of the attractive nuisance doctrine. Some states require it. But most do not. *See, generally, Gurwin, The RESTATEMENT's Attractive Nuisance Doctrine: An Attractive Alternative for Ohio*, [46 OHIO ST. L.J. 135](#) (1985).

§ B. When Does Premises Liability Govern the Case?

HERRICK v. WIXOM

121 Mich. 384, 80 N.W. 117 (1899)

MONTGOMERY, J.

This is an action of trespass on the case, brought in the circuit court for the county of Shiawassee. Defendant was possessed of and managed a tent show or circus, September 18, 1897, which he exhibited from place to place, and on the afternoon of this day at Bancroft. Plaintiff went to the circus grounds on the afternoon of this day in company with his cousin. There is testimony to show that while there he and his cousin were invited by a son of the defendant, who had been selling tickets in the ticket wagon, to enter the tent with him, the entertainment being in progress. This plaintiff did, taking a seat on the lower tier of seats. The testimony on the part of defense tended to show that plaintiff was not invited into the show, and that the son of defendant had no authority to invite him in. There was also evidence that plaintiff had attended a similar exhibition given by defendant the spring before. A part or feature of the entertainment consisted in the ignition and explosion of a giant firecracker attached to a pipe set in an upright position in one of the show rings. This was done by one of the clowns. There is testimony to show that plaintiff sat 30 or 40 feet

from the place where the cracker was exploded, but when the same was exploded a part of the firecracker flew and struck plaintiff in the eye, putting it out, whereby he lost the sight and use of the eye. For this injury action was brought against defendant for damages as a result of defendant's negligence in permitting a dangerous explosive to be used in a dangerous manner, which subjected those present to hazard and risk of injury. Upon the trial of the cause a verdict of no cause for action was rendered, and judgment for the defendant entered accordingly. Plaintiff brings error.

* * *

The circuit judge charged the jury as follows: "The negligence charged in this case is, gentlemen, that Mr. Wixom exploded a firecracker, of the dimensions that the plaintiff claims this firecracker was, in the inside of this tent, and in the presence of his audience.... Now, you must further find, in order that the plaintiff recover, that the plaintiff was in the tent, where he was injured, by the invitation of some person having authority to allow him to go in there. If he was a mere trespasser, who forced his way in, then the defendant owed him no duty that would enable him to recover under the declaration and proofs in this case;..." We think this instruction faulty, in so far as it was

intended to preclude recovery in any event if the plaintiff was found to be a trespasser. It is true that a trespasser who suffers an injury because of a dangerous condition of premises is without remedy. But, where a trespasser is discovered upon the premises by the owner or occupant, he is not beyond the pale of the law, and any negligence resulting in injury will render the person guilty of negligence liable to respond in damages. BEACH, CONTRIB. NEG. p. 68, § 50; WHART. NEG. § 346; *Marble v. Ross*, 124 Mass. 44; *Railway Co. v. Sympkins*, 54 Tex. 615; *Brown v. Lynn*, 31 Pa. St. 510; *Needham v. Railroad Co.*, 37 Cal. 409; *Davies v. Mann*, 10 Mees. & W. 546; SHEAR. & R. NEG. § 99. In this case the negligent act of the defendant's servant was committed after the audience was made up. The presence of plaintiff was known, and the danger to him from a negligent act was also known. The question of whether a dangerous experiment should be attempted in his presence, or whether an experiment should be conducted with due care and regard to his safety, cannot be made to depend upon whether he had forced himself into the tent. Every instinct of humanity revolts at such a suggestion. For this error the judgment will be reversed, and a new trial ordered.

Questions and Notes

1. Was *Herrick* correctly decided? Why or why not?
2. What principle of law can you derive from this case? Is it sound?
3. Eminent authorities have frequently echoed the comment that a discovered trespasser may be owed a duty of reasonable care. *See* PROSSER AND KEETON, § 58 (after transients are discovered on train tracks, they are no longer simple trespassers, but reasonable care must be used in the operation of trains to avoid injury to them). Is this correct? Why should a "bare licensee," who is given permission to enter the premises but is not an invitee, expect a level of care lower than one whose permission is at best implied?

HUMPHREY v. TWIN STATE GAS & ELECTRIC CO.

100 Vt. 414, 139 A. 440 (1927)

POWERS, J.

This is a tort action brought to recover for personal injuries sustained by the plaintiff from the accidental electrification of a wire fence with which he came in contact while hunting on the premises of one Thomas, in the town of Brattleboro. The defendant is a corporation engaged in the business of generating and distributing electrical energy for heating, lighting, and power purposes. It owns and maintains a plant at West Dummerston, from which its transmission line, carrying a current of 11,000 volts, extends to a substation in Brattleboro.

This line ran along the right of way of the West River Railroad, but in the spring of 1925 the high water carried out a part of the roadbed, taking a section of the defendant's pole line with it. Thereupon, the defendant, having obtained Thomas' permission so to do, effected a temporary repair by stringing its wires on poles and trees across Thomas' wood lot, intending to rebuild its line on its former location as soon as the roadbed was repaired. In constructing this temporary line, a cross-arm was attached to a tree on the Thomas land near a barbed wire fence which separated that land from the railroad right of way. The wire, as strung by the defendant's servants, was attached by a tie wire to an insulator mounted on this cross-arm. On October 28, 1925, this tie wire broke, and the live feed wire which it held pulled off and sagged onto the wire fence, charging it with a deadly current of electricity. On the day specified, the plaintiff and a companion named Brothers were out hunting and passed over the Thomas land. They pursued a well-worn path or road which took them to the wire fence. The attempted to pass through or over this fence and came in contact with it. Brothers was instantly killed by the current and the plaintiff was severely injured thereby.

The parties disagree as to the plaintiff's standing while he was on the Thomas land: The plaintiff says he was there by an implied license; the defendant says he was a trespasser. We do not stop to consider this question. He was not an invitee, and for the purposes of this discussion we will assume that he was a trespasser. Being such, *he could recover nothing from Thomas for injuries*

resulting from the condition of the premises, though these existed through the latter's carelessness. This result follows from the fact that Thomas owed him no duty to keep the premises safe for his unlawful use. The defendant takes the position that, so far as the plaintiff's rights go, it stands in Thomas' position and can make the same defense that he could; that it owed the plaintiff no duty, and consequently any negligence proved against it is not actionable so far as the plaintiff can assert. Many cases sustaining this doctrine are to be found in the books. They are carefully collected and analyzed as the defendant's brief. Indeed, some say that the weight of authority is in favor of the rule contended for. However, upon careful consideration, we are unwilling to follow them. Traced to its source, the rule exempting a landowner from liability to a trespasser injured through the condition of the premises is found to have originated in an overzealous desire to safeguard the right of ownership as it was regarded under a system of landed estates, long since abandoned, under which the law ascribed a peculiar sanctity to rights therein. Under the feudal system as it existed in western Europe during the Middle Ages, the act of breaking a man's close was an invasion of exaggerated importance and gravity. It was promptly resented. It was under this system that the action of trespass *quare clausum* developed—beginning as a penal process, and so criminal in essence, and finally becoming a means of redressing a private wrong. Happily, in these more neighborly times, trespasses merely technical in character are usually overlooked or excused, unless accompanied with some claim of right. The object of the law being to safeguard and protect the various rights in land, it is obviously going quite far enough to limit the immunity to the one whose rights have been invaded. Nor does logic or justice require more.

A trespass is an injury to the possession; and, as it is only he whose possession is disturbed who can sue therefor, so it should be that he, alone, could assert the unlawful invasion when suit is brought by an injured trespasser. One should not be allowed "to defend an indefensible act" by showing that the party injured was engaged in doing something which, as to a third person, was unlawful.

* * *

The question we have discussed is one quite

HUMPHREY v. TWIN STATE GAS & ELECTRIC CO.

apart from that of the defendant's negligence or that of proximate cause, though closely related to them. Whenever the issue is one of negligence *vel non*, there is involved a consideration of what the person charged should have anticipated as to the results of his act or omission. Thus far, *the existence of actionable negligence depends, not upon what actually happened, but upon what reasonably might have been expected to happen.* Unless it be shown that a prudent man, situated as the defendant was at the time of his alleged default, knowing what he knew or should have known, would have regarded injury to the plaintiff or to one of the class to which he belonged as likely to result from the act or omission complained of, actionable negligence is not made out. And though this be shown, it remains for the plaintiff to establish the fact that some legal injury resulted to him as a proximate consequence of such act or omission. All we have herein decided is that the mere fact that this plaintiff was a trespasser on the Thomas land does not, *ipso facto*, preclude him from a recovery in this action.

POTTS v. AMIS

62 Wash. 2d 777, 384 P.2d 825 (1963)

ROSELLINI, Judge

In this personal injury action, the plaintiff alleged that the defendant had negligently struck him in the jaw with a golf club while he was a guest at the defendant's summer home. The trial court found that, while engaged in demonstrating the proper use of the club, the defendant had failed to exercise ordinary care and had struck the plaintiff, but that his action was not wilful or wanton. The court further found that the plaintiff had exercised ordinary care for his own safety, but had not exercised extraordinary care.

Upon these findings, the court held that the defendant was not liable for the injuries, inasmuch as he had no duty to exercise ordinary care to avoid inflicting harm upon his guest. The correctness of this holding is challenged on appeal.

We have adopted the general rule that a social guest, although he is invited to the premises, is a licensee, rather than an invitee, as regards his host's duties toward him. *Dotson v. Haddock*, 46 Wash. 2d 52, 278 P.2d 338; *McNamara v. Hall*, 38 Wash. 2d 864, 233 P.2d 852.

Traditionally, owners and occupiers of land have been accorded a certain immunity from tort liability, especially where injuries result from the condition or use of the premises. It has been felt that one in possession of land should not be required to take affirmative steps to make the premises safe for trespassers or gratuitous licensees. In accord with this view, we have consistently stated the rule to be that the duty toward a licensee or trespasser is not to wilfully or wantonly injure him. *Hanson v. Freigang*, 55 Wash. 2d 70, 345 P.2d 1109; *Dotson v. Haddock*, *supra*; *McNamara v. Hall*, *supra*; *Deffland v. Spokane Portland Cement Co.*, 26 Wash. 2d 891, 176 P.2d 311; *Christensen v. Weyerhaeuser Timber Co.*, 16 Wash. 2d 424, 133 P.2d 797; *Schock v. Ringling Bros. and Barnum & Bailey Combined Shows*, 5 Wash. 2d 599, 105 P.2d 838; *Garner v. Pacific Coast Coal Co.*, 3 Wash. 2d 143, 100 P.2d 32; *Holm v. Investment & Securities Co.*, 195 Wash. 52, 79 P.2d 708; *Buttnick v. J. & M., Inc.*, 186 Wash. 658, 59 P.2d 750; *Kinsman v. Barton & Co.*, 141 Wash. 311, 251 P. 563; *Hiatt v. Northern Pac. R. Co.*, 138 Wash. 558, 244 P. 994; *Bolden v. Independent Order of Odd Fellows*, 133 Wash. 293, 233 P. 273; *Waller v. Smith*, 166 Wash. 645, 200 P. 95; *Smith v. Seattle School Dist.*, 112 Wash. 64, 191 P. 858; *Gasch v. Rounds*, 93 Wash. 317, 160 P. 962; and *McConkey v. Oregon R. & Nav. Co.*, 35 Wash. 55, 76 P. 526.

However, in *Christensen v. Weyerhaeuser Timber Co.*, *supra*, exceptions to this rule were noted. This court said:

[T]he only duty which the owner of premises, or the proprietor of a business conducted thereon, owes to a mere licensee is the duty not to injure such licensee wantonly or willfully.... The rule as thus expressed does not exclude liability on the part of the owner proprietor for extraordinary concealed perils ... or for unreasonable risks incident to the possessor's activities.

It is the contention of the plaintiff in this action that his injuries were the result of an 'unreasonable risk incident to the possessor's activities,' and that it was the duty of the defendant to exercise ordinary care, knowing that if he did not wield the golf club with care he might injure the plaintiff.

The defendant argues that this court has never applied the exception relating to activities and has in fact rejected it. It is true that this court has never expressly applied the rule, but it has rendered decisions in which its applicability has been tacitly recognized. In *Schock v. Ringling Bros. and Barnum & Bailey Combined Shows*, *supra*, children who had come to watch the unloading of a circus train were injured when they were struck by the tongue of a runaway wagon. This court said that the unloading operation was not an attractive nuisance, and that the defendant was liable only for wilful and wanton injury. However, it held as a matter of law that the defendant did all that reasonable care required, saying:

If we look at the matter wholly aside from the relevancy of the attractive nuisance doctrine, and consider the case simply from the standpoint of appellant's duty under the circumstances to the spectators in general, whether adults or minors, we come to the same conclusion. If we proceed upon the theory that appellant was bound by the rule of reasonable care rather than by the 'wilful and wanton negligence' rule, we are convinced that appellant fully complied with its duty when it repeatedly warned the multitude to stay away from the platform. Appellant was not an insurer, and in the exercise of reasonable care it was not required to suspend its operations until, by inspection and test, it had found every piece of machinery and equipment to be free from all possible defects.

In the case of *Waller v. Smith*, *supra*, the plaintiff had parked his automobile in an area where logging operations were being carried on. A falling tree damaged the car. While this court said, in exonerating the logging operator, that his only duty was not to wilfully or wantonly injure the plaintiff's property, it held as a matter of law that there was no negligence. Again, the statement regarding the duty of the logger was not necessary to the decision.

Our research and that of counsel have revealed only two other cases involving alleged active negligence on the part of a defendant. In *Hiatt v. Northern Pac. R. Co.*, *supra*, the plaintiff, a trespasser, was killed by a train as he was

proceeding along a railway track. This court held that it was for the jury to decide whether the crew of the train were guilty of wilful and wanton negligence, when they must have seen the plaintiff and other trespassers and a very short time thereafter made a flying switch, sending a car along after them without any lights or anyone on board to give warning.

This court was asked to apply the dictum of the *Christensen* case, *supra*, in *McNamara v. Hall*, 38 Wash. 2d 864, 233 P.2d 852. There, the plaintiff was injured when an overloaded elevator in defendants' home fell. It was found that the complaint fell short of alleging that the defendants knew of the defective condition of the elevator; therefore, the act of the defendants in inviting the plaintiff to ride in it was not wilful or wanton.

In speaking of the exceptions to the rule set forth in the dictum of the *Christensen* case, this court said that the first exception required actual knowledge. In regard to the second exception, it said that the overloading of the elevator was only an action in entertaining guests, and

Whether this second exception is or is not recognized in this state, we need not now determine since we do not consider that the actions of the occupier in entertaining and accommodating his guests constituted an 'activity' within the meaning of the rule.

In all the other cases proclaiming that an owner or occupier is liable only for wilful and wanton conduct, the injuries complained of have been caused, not by an activity of the defendant, but by some condition of the premises.

* * *

In *Mills v. Orcas Power & Light Co.*, cited in the above quotation, this court imposed upon the owner of an easement the duty of giving warning of the presence of its power lines, because of the risk of harm to passengers in airplanes flying over it. In the opinion written by Judge Foster, it was said:

The imposition of such duties accords with the foreseeability criterion of requiring a duty of care. It is also in conformity with the well-settled common-law principle that one must exercise reasonable care to maintain his property so as not to injure

those using the adjacent highway. [citing cases.]

Also in Sherman v. Seattle, 57 Wash. 2d 233, 356 P.2d 316, we applied the doctrine of foreseeability in a case where a child was injured by a lift apparatus at a dam site owned by the city. We held that the apparatus was not an attractive nuisance because it was not enticing to young children. Liability was imposed nevertheless, the court saying:

In view of the peculiar facts of this case, we feel that the standard of care owed respondent by appellant cannot be made to depend upon respondent's technical status on appellant's premises at the time of the accident. On the contrary, we think that regardless of respondent's status — be it that of an invitee, licensee, or trespasser — appellant owed him the duty to use reasonable care.

It is this duty which the plaintiff seeks to have imposed in this case. There is no question but that the harm which was inflicted upon him was foreseeable; and the trial court's findings show that the defendant failed to exercise ordinary care to avoid injuring the plaintiff, while the plaintiff did exercise ordinary care for his own safety. Under the well-established principles of the law of negligence, the plaintiff is entitled to recover. The mere fortuitous circumstances that this injury occurred while the plaintiff stood upon land belonging to the defendant should not relieve the latter of liability.

We need not determine at this time whether the rule applicable to injuries resulting from the condition of the premises should be revised. But we hold that, an owner or occupier of land has a duty to exercise reasonable care to avoid injuring a person who is on the land with his permission and of whose presence he is, or should be, aware. This holding is in accord with the second exception mentioned in the dictum of the *Christensen* case. Insofar as *McNamara v. Hall*, *supra*, *Waller v. Smith*, *supra*, and *Schock v. Ringling Bros. and Barnum & Bailey Combined Shows*, *supra*, are inconsistent with this holding, they are hereby overruled.

The judgment is reversed and the cause remanded with directions to determine the

plaintiff's damages and enter judgment accordingly.

* * *

Questions and Notes

1. In *Zuniga v. Pay Less Drug Stores, N.W., Inc.*, [82 Wash.App. 12](#), 917 P.2d 584 (1996), a case arose based on the following facts described by the court of appeals: "Jose Zuniga is a

homeless person living in Seattle. On the night of March 8, 1993, he went to sleep near a loading dock off an alley in downtown Seattle. The loading dock is leased and used by Pay Less Drug Stores. At about 5 a.m., Robert Huff, a driver for Pay Less, arrived at the dock with a truckload of merchandise. As Huff backed the tractor-trailer up to the dock, a wheel on the trailer ran over Zuniga's leg. Zuniga sued." Based on *Potts v. Amis*, can you predict what result the court would reach?

