Self v. Queen: Retaining Eighteenth Century Feudalistic Jurisprudence to Determine a Landowner's Duty of Care

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I. INTRODUCTION

I fail to understand why the invitee-licensee distinction should continue to exist, primarily because I don’t think landowners manage their property with these common-law distinctions in mind.¹

Should individuals who are injured while on the property of another go uncompensated for their injuries because of the purpose of their particular visit? Courts have dealt with this issue in a variety of ways: retaining the invitee, licensee, and trespasser categories; completely abandoning the common-law classifications;

and abrogating the invitee-licensee distinction while retaining the trespasser category. On February 24, 1997, the Supreme Court of Appeals of West Virginia elected to maintain the status quo and retain the common-law categories in determining a landowner's duty of care. The recent decision by the state supreme court marks the first time our court has addressed the issue of whether to retain the common-law categories or modify the manner in which a landowner's liability is determined. The majority opinion refused to alter the current system of determining a landowner's duty of care owed to others on his or her land.

This Case Comment will examine the decision of the state supreme court in *Self v. Queen*. It will also discuss alternative courses of action the court could have taken. Finally, it will offer a prediction as to the direction West Virginia would go if the court chose to modify the status quo.

II. STATEMENT OF THE CASE

The facts of *Self v. Queen* were simple and not in dispute. The plaintiff, Gaynelle Self, had returned to West Virginia from her home in Michigan to visit friends, relatives, and her mother in Wayne County. While at her sister's house, the plaintiff agreed to purchase some milk for her mother, who lived next door. The plaintiff's mother is Mayme Queen, the defendant in the case. As the plaintiff was getting into her car to go to the store, her mother, the defendant, called out to

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3 See *Self*, 487 S.E.2d at 299 (per curiam).


5 See *Self*, 487 S.E.2d at 299.

6 Id. at 296.

7 Id.

8 Id.
her to come get money to pay for the milk.9 Walking across her mother's yard to get the money, Ms. Self broke her ankle after stepping in a "deep hole" and falling.10

The plaintiff brought a negligence action against her mother for the injuries she suffered because of the fall.11 The defendant filed a motion for summary judgment, arguing that Ms. Self was a "mere licensee" at the time of the incident, and that the only duty that her mother owed her was to refrain from willful or wanton misconduct.12 After hearing arguments, the Circuit Court of Wayne County granted the defendant's motion for summary judgment, holding that Ms. Self "occupied the status of a licensee at the time of the fall and that her mother was not guilty of willful or wanton misconduct in the maintenance of the premises on which the fall occurred."13 Because the plaintiff's visit was merely a social one, the circuit court entered summary judgment for the defendant, Ms. Queen.14

Ms. Self appealed to the state supreme court claiming that the circuit court incorrectly classified her as a licensee rather than an invitee.15 In addition, Ms. Self urged the court "to change the established law in this state relating to liability involving invitees and licensees."16 The court found that the plaintiff was a licensee, and because the defendant did not act in a willful or wanton manner, the trial court was correct in granting the motion for summary judgment.17 Further, the court refused to adopt the position urged by the plaintiff and retained the distinction between invitees, licensees, and trespassers in order to maintain a "more exact and specific rule" as opposed to a "vague and indefinite" one.18

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9 Id.
10 Id. at 297.
11 See id.
12 See id.
13 Id.
14 See id.
15 Id.
16 Id.
17 See id. at 298.
18 Id.
III. BACKGROUND OF THE LAW

A. History of Recovery for Injuries Sustained on the Premises of Another

When the English common law was defining the landowner's duty of care to visitors on the landowner's property, the landowner was "the backbone of the social system" and "land ownership was synonymous with power and importance."\(^9\) As a result, the landowner was afforded "many rights and privileges," and significant focus was placed on his "proprietary interests."\(^2\) As the common law developed, landowners occupied a "privileged position" in society; in addition, the principle of imposing liability for foreseeable damages was "hesitatingly recognised."\(^21\)

With these attitudes prevalent in society,\(^22\) the judiciary, beginning in the nineteenth century and continuing into modern times, classified persons entering land, and from there determined the duties owed by the landowner.\(^23\) Typically, visitors onto land are categorized as either trespassers, licensees, or invitees.\(^24\) Generally, these categories create a "rough sliding scale, by which, as the legal status of the visitor improves, the possessor of the land owes him more of an obligation of protection."\(^25\)


\(^{20}\) Id.


\(^{22}\) Brooks, supra note 19, at 202.

\(^{23}\) 2 Fowler V. Harper & Fleming James, Jr., LAW OF TORTS § 27.1, at 1430 (1956).

\(^{24}\) Id.

B. Standards for Liability in Actions Against Land Owners

1. Trespasser

The trespasser is placed at the lowest end of the aforementioned scale.26 "A trespasser is a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise."27 A landowner has a "legally protected interest in the exclusiveness of his possession."28 Thus, intruders who enter without the landowner's consent may not request that the possessor maintain a "safe place to trespass," or that the landowner provide protection for their unlawful use of his property.29 As a result, a landowner is generally not liable to trespassers for injuries sustained because he failed to use "reasonable care" in maintaining his land in a "safe condition," or to behave "in a manner which does not endanger them."30 However, the "discovered [adult] trespasser" exception31 has altered the Restatement rule and resulted in the frequently stated rule that a possessor only owes to a trespasser a duty to refrain from willful or wanton misconduct.32

Different rules are applicable to a trespassing child.33 The "attractive nuisance" doctrine has been developed by courts to protect children because they are unable to perceive or appreciate the "dangers which [they] may encounter in

26 Id.
28 KEETON, supra note 25, § 58, at 393.
29 Id.
30 Id. at 393-94; RESTATEMENT (SECOND) OF Torts § 333 (1965). See generally Fleming James, Jr., Tort Liability of Occupiers of Land: Duties Owed to Trespassers, 63 YALE L.J. 144 (1953).
31 See KEETON, supra note 25, § 58, at 396-97. This exception to the trespasser rule requires "that the occupier exercise reasonable care for his safety once his presence is known." Id.
32 See id. § 58, at 397.
33 See id. § 59, at 400.
trespassing,” or make wise choices “as to the chances [they] will take.”

Most jurisdictions have adopted the approach set forth in the Restatement. West Virginia treats intruders in a similar fashion. The state supreme court has defined a trespasser as an individual “who goes upon the property of another without invitation, express or implied, and does so out of curiosity, or for his own purpose or convenience, and not in the performance of any duty to the owner.”

Further, West Virginia affords trespassers protections similar to those in other jurisdictions. Specifically, landowners do not owe a trespasser a duty of due care. “[O]rdinarily, with regard to a trespasser, a possessor of property only need refrain from willful or wanton injury.” As a result, a landowner will not be held liable for injuries suffered by trespassers because he failed to exercise “reasonable

34 See id. § 59, at 399-402 (discussing the development of the attractive nuisance doctrine on the federal and state levels).

35 See id. The Restatement defines the “attractive nuisance” doctrine as follows: 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 the reasonable care to eliminate the danger or otherwise to protect the children.


37 See supra note 26 and 32 and accompanying text (discussing duty owed to a trespasser).

38 Huffman, 415 S.E.2d at 148.

care" in maintaining his land in a "reasonably safe condition," or to behave in a manner which does not "endanger them."\(^{40}\)

West Virginia does differ from the majority of jurisdictions with regard to the "attractive nuisance" doctrine. Indeed, West Virginia does not recognize the "attractive nuisance" doctrine, but has instead adopted the "dangerous instrumentality" doctrine.\(^{41}\) The court has stated, "[a]n owner or proprietor of a dangerous instrumentality must exercise reasonable care to avoid injury to a trespassing child, whose presence at the time and place of danger was either known to the proprietor or might reasonably have been anticipated."\(^{42}\) The court has established this less restrictive rule based on similar policy reasons as the "attractive nuisance" doctrine.\(^{43}\) The exception was created because children are seen as "heedless," and their "inexperience and immaturity" prevents them from "fully appreciat[ing]" the harm that can result from "a dangerous condition or instrumentality."\(^{44}\)

2. Licensee

A licensee is the common-law category used to describe an individual who enters land with the consent of the owner "and nothing more."\(^{45}\) Licensees have the landowner's permission to enter the land; however, they do so only "for their own

\(^{40}\) Huffman, 415 S.E.2d at 149. See generally Restatement (Second) of Torts § 333 (1965); 65 C.J.S. Negligence §§ 63(7), 63(9) (1966).

\(^{41}\) See Hatten v. Mason Realty Co., 135 S.E.2d 236, 241 (W. Va. 1964). See also Waddell, 93 S.E.2d at 476-77.

\(^{42}\) Hatten, 135 S.E.2d at 241 (citations omitted). The West Virginia Supreme Court of Appeals has elaborated on the "dangerous instrumentality" doctrine as follows: where a dangerous instrumentality or condition exists at a place frequented by children who thereby suffer injury, the parties responsible for such dangerous condition may be held liable for such injury if they knew, or should have known, of the dangerous condition and that children frequented the dangerous premises either for pleasure or out of curiosity. Huffman, 415 S.E.2d at 153 (W. Va. 1991); see also Sutton v. Monongahela Power Co., 158 S.E.2d 98, 104 (W. Va. 1967).

\(^{43}\) See supra notes 33-35 and accompanying text.

\(^{44}\) Huffman, 415 S.E.2d at 153.

\(^{45}\) Keeton, supra note 25, § 60, at 412. See Restatement (Second) of Torts § 330 (1965) (defining a licensee as "a person who is privileged to enter or remain on land only by virtue of the possessor's consent").
purposes,” which are unrelated to the landowner’s “interests."\(^{46}\) Included in this category are social guests of the landowner.\(^{47}\) Legally, a guest is “nothing more than a licensee, to whom the possessor owes no duty of inspection nor affirmative care to make the premises safe for his visit."\(^{48}\) Similar to trespassers,\(^{49}\) the only duty a landowner owes a licensee is to refrain from willful or wanton misconduct.\(^{50}\)

West Virginia follows similar ideas with respect to licensees. In order to be considered a licensee, a person must have the permission of the landowner or the landowner's authorized agent to enter upon the land.\(^{51}\) Further, the court has likewise classified a social guest as a licensee.\(^{52}\) With respect to licensees, West Virginia courts do not require a landowner to protect them from “dangers which arise out of the existing condition of the premises inasmuch as the licensee goes upon the premises subject to all of the dangers attending such entry."\(^{53}\) Thus, the only duty owed a licensee is to refrain from willful or wanton misconduct.\(^{54}\)

3. Invitee

The final common-law category is that of invitee. An invitee is an individual who enters upon the premises of the landowner for business purposes and

\(^{46}\) HARPER & JAMES, supra note 23, § 27.1, at 1431.

\(^{47}\) See KEETON, supra note 25, § 60, at 414.

\(^{48}\) Id.

\(^{49}\) See supra notes 26-44 and accompanying text.

\(^{50}\) See KEETON, supra note 25, § 60, at 415.


\(^{52}\) See Jack v. Fritts, 457 S.E.2d 431, 436 (W. Va. 1995). In Jack, the court relied on the RESTATEMENT (SECOND) OF TORTS § 330 cmt. h(3). Id. at 436-37.

\(^{53}\) Miller, 403 S.E.2d at 410-11; Hamilton, 207 S.E.2d at 925; Wellman, 126 S.E.2d at 379.

upon the landowner’s invitation, either expressed or implied.\textsuperscript{55} With respect to an invitee, the landowner does not ensure “the safety of invitees,” but has a duty “to exercise reasonable care for their protection.”\textsuperscript{56} Thus, an invitee is “placed on a higher footing than a licensee.”\textsuperscript{57}

Again, West Virginia conforms to the majority rule throughout the country with respect to invitees. In \textit{Burdette v. Burdette},\textsuperscript{58} the court defined an invitee as an individual who enters the premises or “uses a place of business” for business purposes.\textsuperscript{59} The landowner owes an invitee a duty of “ordinary care to keep and maintain the premises in a reasonably safe condition.”\textsuperscript{60} As a result, although the owner is not an ensurer of an invitee’s safety, the landowner is not liable for the invitee’s injuries if the owner is not negligent or does not act in a willful or wanton manner.\textsuperscript{61}

IV. THE DECISION

The Wayne County Circuit Court granted summary judgement in Queen’s favor because it found that Self was a licensee at the time of her injury and Queen “was not guilty of willful or wanton misconduct in the maintenance of the premises on which the fall occurred.”\textsuperscript{62} In reviewing this decision, the state supreme court was forced to consider the common-law distinctions of invitee and licensee and the different duties of care imposed on possessors of land with regard to these

\textsuperscript{55} See \textit{Keeton}, supra note 25, § 61, at 419. This description of an invitee traces its origin to the English case of \textit{Indermaur v. Dames}, L.R. 1 C.P. 274, 35 L.J.C.P. 184, aff’d L.R. 2 C.P. 311, 36 L.J.C.P. 181 (1866). \textit{Keeton}, supra note 25, § 61, at 419. See also \textit{Restatement (Second) of Torts} §332 (1965) (defining an invitee as either a public invitee or a business visitor).

\textsuperscript{56} \textit{Keeton}, supra note 25, § 61, at 425.

\textsuperscript{57} \textit{Id.}

\textsuperscript{58} 127 S.E.2d 249 (W. Va. 1962).


\textsuperscript{61} \textit{See Estate of Helmick}, 453 S.E.2d at 339; \textit{McDonald}, 444 S.E.2d at 59.

\textsuperscript{62} \textit{Self}, 487 S.E.2d at 296.
categories. The Self court examined the duties of care imposed on landowners with regard to licensees and invitees. Specifically, the court held that Self was a social guest of Queen and was thus a licensee. Therefore, Queen owed a duty only to refrain from willful and wanton misconduct and "the record failed to show that" Queen acted in a willful or wanton manner. Further, the court rejected Self's proposal to abrogate the common-law status-based duties in favor of a single standard of care. Consequently, the court agreed with the circuit court and affirmed the entry of summary judgment against Self.

The majority opinion was issued per curiam. Justice Starcher, joined by Chief Justice Workman, wrote a concurring opinion suggesting that the court may someday abandon the status-based standard of liability imposed on possessors of land. The separate opinions illustrate the difficulty courts face when confronted with the question of whether to retain or abandon the common-law distinctions of invitee, licensee, and trespasser.

A. Per Curiam Majority Opinion

In Self, the state supreme court decided to retain the different categories in determining the duty imposed on land owners for injuries suffered on their property. The Self opinion examined the current state of the law in West Virginia and elected to maintain the status quo. This decision to retain the common-law

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63 Id. at 297.
64 Id.
65 See id. at 298.
66 Id.
67 See id.
68 See id.
69 Id. at 296.
70 See id. at 302.
71 See id. at 299.
72 See id. at 297-99.
categories of invitee and licensee places West Virginia in the minority of states unwilling to abandon the old common-law rule for a single standard of negligence.\textsuperscript{73}

After a discussion of the facts and procedure of the case,\textsuperscript{74} the Self court addressed the appropriate standard for granting summary judgment.\textsuperscript{75} The Self court then focused its attention on the true legal issue of the case: whether Self should be classified as an invitee or a licensee.\textsuperscript{76}

The Self court initially explained that the distinction between the invitee and licensee classifications is important in West Virginia because of the “different duties of care” imposed on landowners “with regard to licensees and invitees.”\textsuperscript{77}

In making its decision, the court turned to \textit{Cavender v. Fouty}\textsuperscript{78} to describe the specific duties owed to persons injured on the property of another.\textsuperscript{79} The court reiterated the long-standing principle that a landowner owes an invitee the duty to exercise ordinary care to keep and maintain the premises in a reasonably safe condition.\textsuperscript{70} The Self court then distinguished this duty of care owed to an invitee from that owed to a licensee.\textsuperscript{81} A licensee “is a person on another’s property with expressed or implied permission.”\textsuperscript{82} Thus, unlike the owner’s duty to an invitee,

\textsuperscript{73} \textit{See id.} at 301-02.

\textsuperscript{74} \textit{See supra} notes 6-18 and accompanying text.

\textsuperscript{75} \textit{See Self}, 487 S.E.2d at 297. \textit{See also} \textit{Painter v. Peavy}, 451 S.E.2d 755, 759 (W. Va. 1994): Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

\textit{Id.}

\textsuperscript{76} \textit{See Self}, 487 S.E.2d at 297.

\textsuperscript{77} \textit{Id.}

\textsuperscript{78} 464 S.E.2d 736, 740 (W. Va. 1995).

\textsuperscript{79} \textit{See Self}, 487 S.E.2d at 297.

\textsuperscript{80} \textit{Id.} \textit{See Morgan v. Price}, 150 S.E.2d 897, 901 (W. Va. 1966) (defining the duty owed to an invitee when injured on the premises of another).

\textsuperscript{81} \textit{See Self}, 487 S.E.2d at 297.

\textsuperscript{82} \textit{Id.}
“the property owner does not have to correct the dangers arising from existing conditions” where the person is a licensee. The court noted that

[m]ere permissive use of the premises, by express or implied authority ordinarily creates only a license, and as to a licensee, the law does not impose upon the owner of the property an obligation to provide against dangers which arise out of the existing condition of the premises . . . subject to all the dangers attending such conditions.

After reviewing the limited duty of care owed to licensees, the court turned to identifying the proper classification of a social guest. The Self court noted that West Virginia follows the same rule as a majority of jurisdictions in the United States classifying a social guest as “nothing more than a licensee.”

After this conclusion, the court turned its attention to the facts of the present case. The court reasoned that, although Self was in the process of performing a service for Queen at the time of her injury, she was nonetheless a social guest. The court justified its conclusion that Self was a licensee by noting that Self was actually “gratuitously performing an incidental service for her hostess, her mother.”

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83 Id.
85 See Self, 487 S.E.2d at 297.
86 Id. See Jack v. Fritts 457 S.E.2d 431, 437 (W. Va. 1995) (holding that social guests are afforded the classification of a licensee). The court turned to Professor Keeton for guidance in this area of the law: “The guest is legally nothing more than a licensee, to whom the possessor owes no duty of inspection nor affirmative care to make the premises safe for his visit.” KEETON, supra note 25, § 60, at 414.
87 See Self, 487 S.E.2d at 298.
88 See id.
89 Id.
After making this determination, the court proceeded to examine Queen’s conduct leading up to the date of the injury. The Self court concluded that Queen did not act in a willful or wanton manner and that “no fair” review of the record would reveal such behavior. Consequently, the court concluded that the entry of summary judgment for Queen was proper.

The Self court then addressed the “extraordinary proposal” of Self’s attorney to revisit the common-law distinctions of invitee, licensee, and trespasser in determining the duty of a land owner. The court relied on the fact that West Virginia has recognized the differences between invitees, licensees, and trespassers “since we left the Mother State.” The court based its analysis on the law’s preference for “the more exact and specific rule as opposed to the vague and indefinite.”

The court dismissed Self’s argument to abandon the distinction between invitees and licensees in favor of a “single reasonable care standard.” In doing so, the Self court stressed that our jurisprudence favors more specific rules, noting that the common-law categories of invitee and licensee “provide us with a precise, definite gauge by which to measure the extent of the duty of care owed the visitor and clearly defines the precaution to be taken. The standard is precise and not vague.” The court reasoned that altering the rule from a “specific and definite standard” to a “vague single, reasonable care standard would in effect, leave ‘every case, without rudder or compass, to the jury.’” Thus, the court refused to follow

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90 See id.
91 Id.
92 See id.
93 Id.
94 Id.
95 Id.
96 Id.
97 Id.
98 Id. at 299 (quoting O. Holmes, Jr., The Common Law 112 (1909)). The court noted that Holmes labeled the reasonable care standard “a featureless generality.” Id. (quoting Holmes, supra, at 111).
the suggestion of Self’s attorney and, in the court’s language, “change the rule from specific to vague.”

In summary, the court held that because Self was a mere social guest, she was a licensee. Therefore, Queen was only required to refrain from willful or wanton misconduct. Because the record revealed no proof of willful or wanton misconduct, the court affirmed the trial court’s award of summary judgment. Furthermore, the court refuted Self’s suggestion to abrogate the common-law categories of invitee and licensee in favor of a single reasonable care standard.

B. Justice Starcher’s Concurring Opinion

Justice Starcher began his concurring opinion by noting his agreement with the conclusion of the majority; however, Justice Starcher stated entirely different reasons for this conclusion. Starcher declined to consider Self’s “extraordinary proposal” because the issue was never raised at the trial court. Justice Starcher expressed his disapproval of the majority’s reasoning in retaining the common-law distinctions between invitees, licensees, and

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99 Self, 487 S.E.2d at 298-99. In making this determination, the Supreme Court of Appeals of West Virginia placed significant reliance in the writings of Oliver Wendell Holmes, Jr. “[S]tatutes and decisions have busied themselves... with substituting for the vague test of the care exercised by a prudent man, a precise one of specific acts of omissions.” Id. See also HOLMES, supra note 98, at 112. The court further relied on Holmes in stating, “[I]t is equally clear that the featureless generality, that the defendant was bound to use such care as a prudent man would do under the circumstances, ought to be continually giving place to the specific one, that he was bound to use this or that precaution under these or those circumstances.

Self, 487 S.E.2d at 298-99. See also HOLMES, supra note 98, at 111.

100 Self, 487 S.E.2d at 298.

101 Id.

102 Id. at 299.

103 Id.

104 Id. at 298.

105 Id. at 299. In his decision to concur, Justice Starcher noted that the “[c]ourt will usually decline to address a legal position when it was not addressed below.” Id. Justice Starcher indicated a propensity to agree with the position advanced by Self on appeal; however, he felt “compelled to accept the majority’s position that this is not the right case for taking that step.” Id.
He criticized the majority's reliance on the works of Holmes because Justice Holmes composed his writings when "the harsh rules of contributory negligence, assumption of the risk, and the fellow-servant doctrine" were becoming embedded in the law. Justice Holmes composed his writings when "the harsh rules of contributory negligence, assumption of the risk, and the fellow-servant doctrine" were becoming embedded in the law. Justice Holmes composed his writings when "the harsh rules of contributory negligence, assumption of the risk, and the fellow-servant doctrine" were becoming embedded in the law. Starcher noted that the attitudes prevalent in Holmes' time "have weathered and fallen in the face of time, reason, and a growing intolerance for human suffering that has accompanied the post-industrial era.

Further, Justice Starcher criticized the majority's reliance on Holmes for guidance in this case by noting that the behavior and activity outside of a courtroom are not governed by "rules and ready-made generalizations." Rather than follow the reasoning of Holmes, Starcher turned to Justice Benjamin Cardozo, who urged courts to abolish "artificial rules and precedents that have nothing to do with the way people order their affairs" for guidance. Based on these principles, Starcher concluded that the common-law categories used to determine a land owner's duty of care rarely dictate the actions of the parties.

Although advocating the retention of the trespasser category, Justice Starcher expressed doubt as to whether the invitee-licensee distinctions should

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106 Id.
107 Id.
109 Id. In making this determination, Starcher examined the works of Justice Cardozo: I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment...There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of years.
110 Id. See also B. Cardozo, The Nature of the Judicial Process 150-51 (1949).
111 Self, 487 S.E.2d at 300.
continue to exist. Justice Starcher explained that the retention of the status-based categories places West Virginia among the minority of jurisdictions in the United States. Further, Starcher supported his reasoning by turning to the letters of Thomas Jefferson: "We should not look at our constitutions and laws with 'sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched.'" In conclusion, Justice Starcher indicated that at some time in the future, the court might address the "possibility" of abolishing the common-law categories.

In summary, Justice Starcher, joined by Chief Justice Workman, agreed with the result of the majority opinion; however, they criticized the reasoning of the majority. The concurring justices refused to consider Self's proposition to abolish the common-law categories of invitee, licensee, and trespasser because the appellant failed to raise the issue at trial. However, the justices indicated a

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112 Id. In his reasoning, Starcher noted that "a landowner doesn't owe a trespasser the time of day." Id. On the other hand, the invitee-licensee distinctions should be abolished because, in his words, "landowners [do not] manage their property with these common-law status distinctions in mind." Id. "No one declines to clean the garage, shovel snow off a sidewalk, or fill in potholes in a yard with the licensee-invitee rule in mind." Id. at 301.

113 Id. Starcher explained that "at least twenty-five of our sister states plus the District of Columbia have already abandoned the licensee-invitee status distinction in premises law cases." Id. This statement may be somewhat erroneous. The concurring justices refer to Connecticut as one of at least two states enacting statutes to abolish the distinction between licensees and invitees. Id. at 302 (citing CONN. GEN. STAT. ANN. § 52-557a (West 1991)). The Supreme Court of Connecticut has held that section 52-557a "manifests no legislative undertaking to abrogate all distinctions between licensees and invitees." Furstein v. Hill, 590 A.2d 939, 945 (Conn. 1991). Conversely, the court held that the statute was "intended to require a landowner to exercise the same standard of care toward social guests and business invitees." Id. at 946. See Gulbis, supra note 2, at 53 (Supp. Sept. 1997).

114 Self, 487 S.E.2d at 302 (quoting Letter to Samuel Kercheval, July 12, 1816 published in WRITINGS OF THOMAS JEFFERSON 10:42-43 (Paul L. Ford ed. 1899)).

116 Self, 487 S.E.2d at 302. The concurring justices qualified this statement by noting that the proposition must "first cogently [be] addressed at the circuit court level." Id. Further, the opinion reasoned that if the evidence failed to show that the parties' behavior was "based . . . on the licensee-invitee-trespasser distinctions," and if the "rule is 'inconsistent with the sense of justice or with the social welfare,'" the court should not hesitate to abandon the "common-law status distinctions in premises liability cases." Id.

117 Id. at 299.

118 Id.
willingness to abrogate the classifications if property owners fail to base their conduct on these status-based distinctions.\textsuperscript{119}

V. ALTERNATIVE COURSES OF ACTION\textsuperscript{120}

Courts have reached different conclusions when confronted with the legal question of abolishing the common-law categories in determining the duty of care owed by a landowner.\textsuperscript{121} These conclusions can be grouped into three areas: (1) retention of the common-law categories, (2) complete abrogation of status-based liability, and (3) retention of only the trespasser category. Further, courts in each category have reasoned similarly in coming to their decisions.

A. Retention of the Common-law Categories

Several jurisdictions have decided to retain the status-based system of liability that the three categories provide.\textsuperscript{122} Courts following this school of thought frequently offer similar justifications for refusing to abandon the long-standing common-law categories.

\textsuperscript{119} Id. at 300.

\textsuperscript{120} See generally Gulbis, supra note 2, for discussion of different jurisdictional treatment of landowners’ standard of care.

\textsuperscript{121} See supra note 113 and accompanying text.

For example, in *Caroff v. Liberty Lumber Co.*, the Superior Court of New Jersey, Appellate Division, declined to abrogate the common-law categories for determining the duty owed by landowners. In *Caroff*, the plaintiff was a governmental official who was required to visit the premises of the defendant as a part of his public duties. While on an inspection visit, the plaintiff fell on the premises of the defendant and severely injured his knee. The trial court classified the plaintiff as a licensee and granted the defendant's "motion for an involuntary dismissal." On appeal, the plaintiff urged the court to abolish the "historical distinctions between the invitee, licensee, and the trespasser," in favor of a single standard of "reasonable care." Relying heavily on an earlier decision, the New Jersey court refused to "enunciate a new rule of law."

Additionally, in *Snyder v. I. Jay Realty Co.*, the New Jersey Supreme Court noted the state's long-time adherence to the common-law categories. The court reasoned that the "common law classifications are sufficiently flexible to fulfill the purposes of our legal system in serving the needs of present day society." Further, the court concluded that the retention of the historical classifications provides predictability in the law and assists in the "proper distribution of trial functions between judge and jury." Thus, the New Jersey

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124 *Id.* at 985.
125 *Id.* at 984.
126 *Id.*
127 *Id.* at 984-85.
128 *Id.* at 985.
129 *Id.* at 985-86.
131 *Id.* at 5.
132 *Id.*
133 *Id.*
court in *Carof* and *Snyder* applied the common-law status-based standard of liability.

Similar to the reasoning used by the New Jersey court, West Virginia has also decided to retain the common-law categories for landowner liability. In *Self v. Queen*, the West Virginia Supreme Court of Appeals refused to follow the suggestion of the plaintiff-appellant and abolish the classifications. In doing so, the court noted the predictability provided by the invitee, licensee, and trespasser categories. Further, the court reasoned that the classifications lend a "specific" and "precise" measure of liability.

Other reasons have been offered by advocates of retaining the common-law classifications. Some courts have found that the adoption of a single standard of reasonable care "would replace a stable and established system of loss allocation with one devoid of standards for liability." In addition, courts have reasoned that the "harshness" caused by the classifications has been lessened because of "exceptions" and "sub-classifications" created by the judiciary. Finally, some argue that this decision, because of the magnitude of the ramifications from "such
a restructuring of the bases for premises liability," should be the responsibility of the legislature.\textsuperscript{142}

\textbf{B. Modification of the Common-law Classifications}

Some jurisdictions have decided to alter the common-law categories in some manner. Two significant legal events preceded this trend and had some influence on the decision to modify the classifications.\textsuperscript{143} In 1957, England, the birthplace of the common law, passed the Occupiers' Liability Act of 1957,\textsuperscript{144} which abolished the distinction between licensees and invitees, and imposed a "common duty of care" on landowners.\textsuperscript{145}

Second, in \textit{Kermarec v. Compagnie Generale Transatlantique},\textsuperscript{146} the United States Supreme Court declined to adopt the common-law categories into admiralty law.\textsuperscript{147} The Court reasoned that

\begin{quote}
[the distinctions which the common law draws between licensee and invitee were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism. In an effort to do justice in an industrialized urban society, with its complex economic and individual relationships, modern common-law courts have found it necessary to formulate increasingly subtle verbal refinements, to create subclassifications among traditional common-law categories, and to delineate fine gradations in the standards of care which the landowner owes to each. Yet even within a single jurisdiction, the classifications and subclassifications bred by the common law have produced
\end{quote}

\textsuperscript{142} Gulbis, \textit{supra} note 2, at 300.

\textsuperscript{143} \textit{See generally}, e.g., \textit{Jones}, 867 P.2d 303; Ouellette v. Blanchard, 364 A.2d 631 (N.H. 1976) (mentioning both the Supreme Court decision and the English statute); Peterson v. Balach, 199 N.W.2d 639 (Minn. 1972); Pickard v. City and County of Honolulu, 452 P.2d 445 (Haw. 1969); Rowland v. Christian, 443 P.2d 561 (Cal. 1968).

\textsuperscript{144} Occupiers' Liability Act of 1957, 5 & 6 Eliz. 2, ch. 31 (Eng.).


\textsuperscript{146} 358 U.S. 625 (1959) (holding common-law categories are not applicable in admiralty law and that ship owner owes duty of reasonable care to those lawfully aboard ship).

\textsuperscript{147} \textit{Id.} at 631-32.
confusion and conflict. As new distinctions have been spawned, older ones have become obscured. Through this semantic morass the common law has moved, unevenly and with hesitation, towards ‘imposing on owners and occupiers a single duty of reasonable care in all the circumstances.’\footnote{Id. at 630-31 (citations omitted).}

Based on this disdain for the common-law classifications, the Supreme Court refused to apply the categories in admiralty law.\footnote{Id. at 631-32.}

1. Complete Abrogation of Status-based Liability

Following the rationale of both the Occupiers Liability Act of 1957\footnote{See supra notes 143-44 and accompanying text.} and Kermarec,\footnote{See supra notes 145-48 and accompanying text.} the Supreme Court of California reached the landmark decision of \textit{Rowland v. Christian}.\footnote{443 P.2d 561, 566-68 (Cal. 1968).} In this momentous decision, California became the first jurisdiction to abolish the common-law categories of invitee, licensee, and trespasser.\footnote{Id. at 568.} In \textit{Rowland}, the plaintiff was injured when a bathroom fixture malfunctioned and severed tendons and nerves in his right hand.\footnote{Id. at 562.} In reaching this unprecedented decision, the court turned to statutory law, which provides that individuals are liable for acts of negligence.\footnote{Id. at 563-64. The court began its analysis by examining section 1714 of the California Civil Code. \textit{Id.} The statute provides, \begin{quote} [e]very 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 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. \end{quote} \textsc{Cal. CIV. Code} § 1714(a) (Deering 1994).} Further, the court noted the “confusion and complexity” that existed in applying the common-law
The court reasoned that this "complexity and confusion" was a result of the difficulty in applying the "ancient terminology" to our "modern society." The court summarized its basis for abandoning the classifications as follows:

[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.

Thus, the court abandoned the common-law classification system for determining a landowner’s duty and adopted, pursuant to statute, the single standard of reasonable care.

The Rowland decision was a catalyst for similar judicial decisions across the country. The Supreme Court of Colorado followed the lead of California and abandoned the status classification system because of the "confusion and judicial waste" created by the system; in addition, the classification system precludes a jury from "applying changing community standards to a landowner's duties." The court reasoned that a "modern legal system" should not permit these harsh results.

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156 Rowland, 443 P.2d at 566.

157 Id. at 567. The court discussed that the "historical justifications for the common law distinctions" are no longer "justified in the light of our modern society." Id.

158 Id. at 568.

159 Id.

160 See, e.g., Pickard v. City and County of Honolulu, 452 P.2d 445, 446 (Haw. 1969); Mile High Fence Co. v. Radovich, 489 P.2d 308, 313 (Colo. 1971) (abolishing the classifications in favor of a single standard of reasonable care).

161 Mile High Fence Co., 489 P.2d at 311-312.

162 Id.
The District of Columbia has also eliminated the classifications because eighteenth century rules are not "the proper tools with which to allocate the costs and risk of loss for human injury." The Supreme Court of New Hampshire also recognized that the categories may be obsolete. The "social and policy considerations" that created the categorical "immunities" are no longer valid in today's society "and it is fitting and proper that they be laid to judicial rest." The New Hampshire court further noted that while the force of precedential law is a key concern, it should be "balanced" with the recognition "of the need for responsible growth and change in rules," which have not kept pace "with modern developments in social and juridical thought." Finally, the Supreme Court of Nevada abandoned the classifications in favor of the traditional negligence standard of care analysis, reasoning that this is "a more enlightened and equitable means for ascertaining liability."

2. Retention of Only the Trespasser Category

Instead of totally rejecting the common-law distinctions in determining a landowner's liability, some jurisdictions have instituted an "intermediate position" and abandoned the invitee and licensee status classifications while maintaining the trespasser common-law category. Most of these jurisdictions follow the reasoning used by courts who have abandoned all three classifications, except that the trespasser category was retained because the courts felt that this classification still has "significance in contemporary society."


165 Id.

166 Id. (quoting Sargent v. Ross, 308 A.2d 528, 534 (N.H. 1973)).


168 Gulbis, supra note 2, at 299.

169 Id. (noting that foreseeability of the injury as opposed to the status of the visitor should be determinative). See, e.g., Jones v. Hansen, 867 P.2d 303, 310 (Kan. 1994) (noting "that the status of a trespasser retains significance in our contemporary society.").
After a discussion of the decisions and reasons for abandoning the common-law classifications, the Supreme Judicial Court of Massachusetts decided to retain the trespasser category because the court reasoned that "there is a significant difference in the legal status of one who trespasses on another's land as opposed to one who is on the land under some color of right — such as a licensee or invitee." In Florida, the trespasser classification was retained because a landowner has a right to "privacy" with regard to his "own premises" and should not be held liable to individuals "who choose to avail themselves of it at will." Also, the Supreme Court of Rhode Island, which had previously abrogated all three classifications, resurrected the trespasser category reasoning that "[p]roperty owners have a basic right to be free from liability to those who engage in self-destructive activity on their premises without their permission."

In O'Leary v. Coenen, the Supreme Court of North Dakota abandoned the classifications of licensee and invitee because the categories preclude a jury "from applying changing community standards ...;" the classifications "can mislead a jury;" and the "distinctions and exceptions" render using the categories "complex, confusing, and inequitable." However, the court noted the "significant difference between the status of one who trespasses on the property of another and one who enters under some color of right to do so." Thus, North Dakota abrogated the licensee and invitee categories while retaining the trespasser classification.

170 See supra notes 143-67 and accompanying text.
172 Wood v. Camp, 284 So.2d 691, 696 (Fla. 1973).
173 Mariorenzi v. Joseph DiPonte, Inc., 333 A.2d 127, 133 (R.I. 1975). The court gave "a final but fitting interment to the common-law categories of invitee, licensee, and trespasser as well as their extensions, exceptions, and extrapolations." Id.
174 Tantimonico v. Allendale Mutual Ins. Co., 637 A.2d 1056, 1061 (R.I. 1994). The court noted that "[t]he common-law rule developed over the centuries accomplishes this purpose clearly and without equivocation." Id.
175 251 N.W.2d 746 (N.D. 1977).
176 Id. at 752.
177 Id. at 751 n.6.
178 Id. at 752.
Recently, Nebraska has abandoned the common-law distinctions with respect to invitees and licensees while retaining the trespasser category. The Supreme Court of Nebraska held that the common-law distinctions “should not . . . shield those who would otherwise be held to a standard of reasonable care but for the arbitrary classification of the visitor as a licensee.” The court justified retaining the trespasser category because a landowner should not be required to exercise reasonable care “to those not lawfully on one’s property.”

VI. PREDICTION FOR WEST VIRGINIA LAW

Recently, the West Virginia Supreme Court of Appeals rejected the suggestion of abrogating the common-law classifications. The court based its decision on the specific measure provided by the distinctions. Further, the court has expressed great interest in maintaining the categories for determining a landowner’s duty of care. Based on these decisions, West Virginia is unlikely to abandon the common-law categories in favor of a single standard of reasonable care for landowners.

However, if the issue were to be properly raised before the court, it seems that West Virginia would likely take the intermediate position and abrogate the distinction between the invitees and licensees while retaining the trespasser distinction. In the Self decision, Justice Starcher advocated the position of retaining the trespasser category while adopting a single standard of reasonable care for premises owners in other situations. Starcher reasoned that landowners do not

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179 Heins v. Webster County, 552 N.W.2d 51, 57 (Neb. 1996).

180 Id.

181 Id. The court noted that the key factor in determining liability is the foreseeability of the injury. Id.

182 See supra notes 93-99 and accompanying text.


184 Miller v. Monongahela Power Co., 403 S.E.2d 406, 411 (W. Va. 1991). The court reasoned that “[t]he court has] consistently recognized and applied the distinctions for liability purposes among trespassers, licensees, and invitees.” Id. The court noted that “[w]ith regard to ordinary possessors of land, we enthusiastically reaffirm the common law distinctions among trespassers, licensees and invitees.” Id. See also Cavender v. Fouty, 464 S.E.2d 736, 739 (W. Va. 1995); Jack v. Fritts 457 S.E.2d 431, 437 (W. Va. 1995) (quoting Miller as reaffirming the common-law classifications).

185 Self, 487 S.E.2d at 300-02 (Starcher, J., concurring).
manage their property with these common-law status distinctions in mind. On the other hand, because "a landowner doesn’t owe a trespasser the time of day," the landowner should only be required to refrain from willful and wanton misconduct when dealing with trespassers. Based on the concurring opinion of Justice Starcher and Chief Justice Workman, the intermediate approach will likely be the system adopted by West Virginia, if a majority of the court would follow the reasoning of these two justices.

VII. CONCLUSION

With the Self decision, the state supreme court has retained an area of jurisprudence which was developed in feudal England. As a result, individuals in West Virginia who have been injured as a result of the negligence of others will go uncompensated solely because they were on the property for the "wrong" reasons. However, it is unlikely that landowners and visitors will alter their behavior as a result of the Self court’s holding.

While the majority contends that the common-law distinctions provide a "rudder or compass" to a jury, the categories preclude a jury from determining the appropriate standards of behavior a member of the community should exercise. This task would be accomplished if a single standard of reasonable care were used in premises-injury cases as in most other negligence cases. Perhaps West Virginia should place more trust in juries to decide what constitutes reasonable behavior rather than relying on eighteenth century common law to do so.

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