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Cornelius: Torts--Landowner's Standard of Care Based on Ordinary Principles

ness world must adapt to the *Texas Gulf Sulphur* restrictions and requirements.

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Torts—Landowner's Standard of Care Based on Ordinary Principles of Negligence

Plaintiff, a social guest of defendant, suffered injury when a cracked porcelain handle of a bathroom water faucet broke in his hand. Defendant had been aware of the defective condition of the handle for several weeks but failed to warn the plaintiff. There was no showing that the faucet handle crack was obvious. Defendant's motion for a summary judgment was sustained, and plaintiff appealed. *Held,* reversed. The proper test of liability to be applied to the possessor of land is whether, in the management of his property, he has acted as a reasonable man in view of the probability of injuries to others. The plaintiff's status as a trespasser, licensee, or invitee is not determinative of the occupier's liability. The two dissenting justices contended that liability based on the historical visitor distinctions provided stability and predictability to this area of the law, and supplied a workable approach to the problems involved. *Rowland v. Christian,* 70 Cal. Rptr. 97, 443 P.2d 561 (1968).

This case is significant since it abolishes in California the old tests for standard of care owed to a trespasser, a licensee, and an invitee, and establishes a single new test based on ordinary principles of negligence. Analysis of the decision requires consideration of three aspects of the problem raised by it: the history of the visitor distinctions, the value of the visitor distinctions today and the validity of the new California test.

I. History of the Visitor Distinctions

The privileged position of the landowner[1] was taken for granted when the distinctions in the liability of the occupier were developed in the middle of the nineteenth century. Several factors account for this treatment. At that time the principle that a man should be

[1] The term "landowner" is used interchangeably in this comment with "occupier," "occupant," and "possessor." These terms all refer to that person who is in possession and control of the premises.

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responsible for damage he should have foreseen was inconceivable as a general principle of liability and only hesitatingly recognized.[2] The limited extent of liability for reasonably foreseeable damage made it inevitable that courts would only cautiously impose new liabilities on the landowner. Moreover, even if courts were prepared to apply the reasonable man standard to the liability of the landowner, they were not willing to subject him to the verdict of a jury usually composed of potential visitors to property rather than landowners.[3] Consequently, the judges, by devising legal categories of visitors to whom landowners owed different standards of conduct, limited juries to the consideration of whether the particular standard of conduct required had in fact been followed.[4] Thus, at its inception the resort to classifying visitors on land was an administrative device.

In addition to the fear of the jury's power, the mid-Victorian judge was also influenced by the belief that liability could be established only by existing legal principles.[5] In an effort to make the negligence concept more adaptable to the landowner's control, the courts used, as the foundation on which to build the whole new scheme of categories, the early common law trespass idea—the landowner owes the trespasser no duty other than not to intentionally harm him.[6] Upon this foundation, four existing principles of law were extended by the judges in favor of visitors to property. These principles involved nuisance on the highway, contractual liability, fraudulent conduct and the distinction between wrongs of commission and wrongs of omission.[7]

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[2] Marsh, *The History and Comparative Law of Invitees, Licensees and Trespassers,* 69 L.Q. REV. 182, 184 (1953).

[3] This feeling is illustrated in Toomey v. London & Brighton Ry., 140 Eng. Rep. 694, 696 (1857), when the judge in holding, as a matter of law, there was no evidence of negligence to be considered by the jury said: "[E]very person who has had any experience in courts of justice knows very well that a case of this sort against a railway company could only be submitted to a jury with one result."

[4] Marsh, *supra* note 2, at 186.

[5] *Id.*

[6] Green, *The Duty Problem in Negligence Cases: II,* 29 COLUM. L. REV. 255, 271 & n.56 (1929).

[7] Marsh, *supra* note 2, at 186-98.

Some protection was afforded to a user of the highway if his presence on the occupier's land could be explained as incidental to his rights on the highway. If his presence could not be so explained, he was assumed to be a trespasser, in respect of which there was no liability except when the injury was intentionally inflicted by direct physical action, Deane v. Clayton, 129 Eng. Rep. 196 (1817), or by setting up a dangerous device such as a spring-gun or a man-trap, Bird v. Holbrook, 130 Eng. Rep. 911 (1828).

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II. VALUE OF VISITOR DISTINCTIONS TODAY

American law has adopted from English law the three classifications of visitors (trespasser, licensee, invitee) to property. Generally speaking a trespasser is one who enters or remains upon another's land without having a privilege to do so; a licensee may be generally defined as one who is privileged to enter or remain upon land with the possessor's consent; an invitee is a business visitor who is invited or allowed to enter or remain on the land for a direct or indirect business purpose.[8]

The establishment of a legal standard of conduct by the occupier towards visitors on his premises involves a reconciliation of two conflicting social values: the sanctity of landed property, and the protection of individuals from physical injury caused by another's negligence. It has been shown in the preceding discussion that the distinctions between invitees, licensees, and trespassers, with their accompanying legal doctrines, did not arise as the result of the careful weighing of these conflicting values, but as the result of

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If the entry upon the land was contractual in nature or somehow involved the occupier's consent, liability could be imposed if the occupier failed to use reasonable care. This influence of contractual liability is shown by the language used in Intermaur v. Dames, L.R. 1 C.P. 274, 287 (1866): "This protection [of the invitee] does not depend upon the fact of a contract being entered into in the way of the shopkeeper's business during the stay of the customer, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper, with a view to business which concerns himself." One unfortunate consequence of the contractual analogy was the distinction drawn between an invitee and a licensee. The licensee category did not develop as a separately conceived group, but rather as a residual category for those not fortunate enough to be termed invitees. The residual licensee class could only claim the limited protection afforded to a trespasser. Marsh, *supra* note 2, at 192-93. The earliest case of private invitation was that of a social guest. Southcote v. Stanley, 156 Eng. Rep. 1195 (1856). Ever since, social guests have been regarded as licensees.

An occupier might also be liable for misfeasance (and later nonfeasance) amounting to fraud. The duty to disclose known dangers was borrowed partly from the Roman law as to gratuitous contracts, Blakemore v. Bristol & Exeter Ry., 120 Eng. Rep. 385, 391 (1858), and partly from English cases in contract concerned with a shipper's duty to disclose the character of a dangerous cargo to ship-owners. Williams v. East India Co., 102 Eng. Rep. 571, 574 (1802).

In Gautret v. Egerton, L.R. 2 C.P. 371, 375 (1867), the judge said, "No action will lie against a spiteful man, who, seeing another running into a position of danger, merely omits to warn him. To bring this case within the category of actionable negligence, some wrongful act must be shown, or a breach of some positive duty. . . . " Duty could only be found in two circumstances: 1. where the visitor had entered on the business, or for the benefit, of the occupier; 2. where there had been fraudulent conduct on the part of the occupier.

[8] RESTATEMENT (SECOND) OF TORTS §§ 329, 330, 332 (1965).

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various attempts by mid-Victorian courts to extend certain principles of law in favor of visitors to property.[9] It has been said that these attempts resulted in the classification of intruders on land into "multiple useless and confusing categories."[10]

An analysis of some methods used to extend the occupier's liability illustrates the desire to mitigate the harsh results of the traditional approach of classifying visitors on another's property. A number of jurisdictions meet the argument that a trespasser is a wrongdoer to whom no duty is owed by a similar moral argument. It is contended that the landowner is also a wrongdoer by placing dangerous and attractive machinery on his land, thereby "inviting" young children into his "traps."[11] Other courts use the "dangerous instrumentality" doctrine to extend the landowner's liability. In commenting on the "dangerous instrumentality" doctrine, the West Virginia Supreme Court of Appeals defined the care to be used to protect children upon such property as the "care of an ordinarily prudent and cautious person under similar circumstances."[12] What constitutes a "dangerous instrumentality" is often a difficult question. Even an artificial pool of water may qualify if there exists in connection with it a hidden danger or trap.[13]

Another method of extending the occupier's liability has been to find some way to fit the social guest (licensee) into the protected invitee category. Two popular shoehorns are the economic benefit test,[14] which West Virginia applies,[15] and the invitation test.[16] Courts often strain to find some benefit or invitation by which the social guest may be elevated to the invitee status. The widely accept-

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[9] Marsh, *supra* note 2, at 198.

[10] Green, *supra* note 6, at 271.

[11] *Id.* This approach is often termed the "turntable" or "attractive nuisance" doctrine. *See* Keffe v. Milwaukee & St. P. Ry., 21 Minn. 207 (1875).

[12] Waddell v. New River Co., 141 W. Va. 880, 885, 93 S.E.2d 473, 476 (1956).

[13] Hatten v. Mason Realty Co., 148 W. Va. 380, 387, 135 S.E.2d 236, 241 (1964).

[14] RESTATEMENT (SECOND) OF TORTS § 332 (1965). Using the term "business visitor" to describe one type of invitee, the RESTATEMENT defines a business visitor as "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."

[15] Morgan v. Price, 151 W. Va. 158, 164, 150 S.E.2d 897, 901 (1966). "A person is an invitee when for purposes connected with the business conducted on the premises he enters or uses a place of business."

[16] *Supra* note 14. A public invitee is any person "who is invited to enter or remain on the land as a member of the public for a purpose for which the land is held open to the public."

ed invitation theory results in many visitors, from whose presence no shadow of economic benefit may be found, being classed as invitees.[17] Even where an invitation cannot be found, protection is sometimes extended against the occupier's active negligence when he knows of the danger.[18]

The compulsion on the courts to fit the individual into a desired classification makes judgment depend on one factor alone, even though many factors which should have some bearing on the judgment are present in nearly all cases. In contrast to this, the Rowland case lists some of the considerations to be balanced, such as the foreseeability of harm to the plaintiff, the certainty of plaintiff's injury, and the proximity of defendant's conduct with the injury sustained. Other factors deserving consideration include the desirability of extending liability in view of the burden on defendant and the effect on the community, and the availability, in terms of cost and prevalence, of insurance for the risk involved.[19]

III. Validity of the New California Test

The decision in Rowland marks a long anticipated application of the fundamental rule of liability for negligence in occupier liability cases. In shifting the burden of responsibility upon the wrongdoer, liability is imposed commensurate with the particular circumstances involved.[20] The flexibility thus attained enhances the prospect of a

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[17] W. Prosser, Law of Torts § 61, at 399 (3d ed. 1964).

[18] Hansen v. Richey, 46 Cal. Rptr. 909, 913 (1965). *See* Holcome v. Buckland, 130 F.2d 544 (4th Cir. 1942), for a good discussion of West Virginia decisions concerning the occupant's duty to licensees. The court made this observation: "In all of these formulae there is manifest an effort on the part of the courts to express the idea that a licensee is not entirely outside the pale of the protection of the law and that situations frequently occur in which the ordinary requirements of humanity give rise to a duty on the part of an occupant of premises to look out for the safety of one who comes upon the premises with the permission of the occupant." Holcome v. Buckland, *supra* at 547. The court in *Holcome* held that a possessor of land is liable for bodily harm caused to gratuitous licensees by a natural or artificial condition thereon only if he knows of the condition and realizes that it involves an unreasonable risk to them and has reason to believe that they will not discover the condition or realize the risk, and invites or permits them to enter or remain on the land, without exercising reasonable care to make the condition safe or to warn them of the risk involved. *See also* Perkins v. Henry J. Kaiser Constr. Co., 236 F. Supp. 484 (S.D.W. Va. 1964), and Restatement (Second) of Torts § 342 (1965).

[19] Rowland v. Christian, 70 Cal. Rptr. 97, 100, 443 P.2d 561, 564 (1968).

[20] 7 Wm. & Mary L. Rev. 313, 319 (1966). The validity of this purpose has been expressly acknowledged in West Virginia. Waddell v. New River Co., 141 W. Va. 880, 885, 93 S.E.2d 473, 476 (1956): "Reasonable care and negligence are relative terms, and the degree of care required must be commensurate with the dangers to be avoided."

desirable result. By classifying visitors on property and applying fixed principles of liability toward each classification, flexibility is thwarted. In applying the negligence formula of "reasonable care under the circumstances," it may be argued that both human rights and property rights receive a maximum of balanced protection. Not only would the judge and the jury have the same powers under the negligence formula as they now have under the confusing categorical approach, but also they would seemingly enjoy a much greater opportunity for exercising their powers rationally.[21] However, it may be argued that the more flexibility a court has, the greater is its opportunity to act arbitrarily, thus lessening the prospect of certainty and uniformity in the administration of justice. This was the position adopted by the dissenting judges in *Rowland.*

Those favoring the categorical approach argue that a social guest must take the premises as he finds them. However, the majority opinion in *Rowland* takes the position that 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 one comes upon another's property without permission or with permission but without a business purpose. The *Rowland* court pointed out that focusing upon the injured party's status to determine if the landowner has a duty of care is contrary to our modern social mores and humanitarian values.[22] Similarily, one commentator has argued that social guest has good reason to expect that his host will make conditions safe or warn him of hidden dangers.[23]

A common argument of those opposed to the use of the "reasonable man" test of landowner's liability is that its application will cause a flood of litigation. A primary reason underlying the "floodgate" argument is the fear that by applying ordinary principles of negligence, the occupant will be made an insurer of his vistor's safety. However, it may be well argued that this fear is unfounded since the plaintiff must first prove the defendant owed him some legal duty which he violated. Sustaining an injury on another's premises is not in itself evidence of such a violation.[24] Also, no warning

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[21] Green, *supra* note 6, at 275.

[22] Rowland v. Christian, 70 Cal. Rptr. 97, 104, 443 P.2d 561, 568 (1968).

[23] McCleary, *The Liability of a Possessor of Land in Missouri to Persons Injured While on the Land,* 1 MO. L. REV. 45, 58 (1936).

[24] *See* 31 TENN. L. REV. 485 (1964).

is required where the dangerous condition is obvious to one exercising reasonable care for his own safety.[25]

That the abolition of the historical distinctions should be a legislative, rather than a judicial concern, is perhaps the most formidable argument of those opposed to the abolition. Critics of this argument point out that the very strength of the common law has been in its ability to expand and meet the demands of the age. It is contended that the demands of our modern society argue strongly for the abolition of the categorical standard of care and the substitution of one uniform duty of care to be tested under general principles of negligence.[26] However, in West Virginia, as well as other states, it is provided by constitutional and statutory provisions that the common law shall continue in force "until altered or repealed by the legislature."[27]

The California decision is not a radical departure from the prevailing position of other courts.[28] The ingenious methods used by today's courts to protect a visitor to property ("active negligence," "trap" doctrine, expansion of "invitee" class, etc.) evidence the direction in which the courts have moved. The reliance, however, on past distinctions and ancient terminology has prevented this movement from being orderly and uniform. In an attempt to protect individuals from the unfortunate consequences of the confusing traditional immunities, more categories and exceptions have been promulgated resulting in even more confusion. The judicial process does not require either the confusion or the bad habits resulting from the use of ancient phraseology, which misrepresents all that is being done.[29]

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[25] Nuckoles v. F. W. Woolworth Co., 248 F. Supp. 164, 165 (W.D. Va. 1965), *rev'd on other grounds*, 372 F.2d 286 (4th Cir. 1967).

[26] *See* Mo. L. Rev. 186, 200 (1957).

[27] W. Va. Const. art. VIII, § 21, and W. Va. Code ch. 2, art. 1, § 1 (Michie 1966). The Supreme Court of Appeals is sternly enjoined to leave drastic changes in the common law to the legislature. Cunningham v. County Court, 148 W. Va. 303, 308, 134 S.E.2d 725, 728 (1964). To modify a common law doctrine requires legislative action. Adkins v. St. Francis Hosp., 149 W. Va. 705, 143 S.E.2d 154 (1965).

[28] Some courts in particular situations have rejected the rigid common law classifications and approached the duty issue on the basis of ordinary principles of negligence. Rowland v. Christian, 70 Cal. Rptr. 97, 104, 443 P.2d 561, 568 (1968) (citing cases). One case cited is Taylor v. New Jersey Highway Authority, 22 N.J. 454, 463, 126 A.2d 313, 317 (1956) which contains the following statement: "In modern times the immunities have rightly, though gradually, been giving way to the overriding social view that where there is foreseeability of substantial harm landowners, as well as other members of society, should generally be subjected to a reasonable duty of care to avoid it."

[29] Green, *supra* note 6, at 275.