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THE COMMON LAW TORT LIABILITY OF OWNERS AND OCCUPIERS OF LAND: A TRAP FOR THE UNWARY?

The tort liability of land occupiers to entrants injured on their property is governed in the majority of American jurisdictions by common law rules that were developed in nineteenth century case law. Depending upon the circumstances surrounding the entrant’s presence on another person’s property, he may be classified either as an invitee, a licensee, or a trespasser. Each of these categories prescribes a distinct standard of care for the landowner that determines whether he has fulfilled his legal obligations. This system has been significantly altered in many jurisdictions by the creation of exceptions to the common law status classifications. Strict adherence to the common law rules in other jurisdictions, including Maryland, has produced harsh and inequitable decisions. Several states recently have abolished the common law categories, substituting the general negligence standard of reasonableness. However, this new trend is not without its critics. It has generated considerable controversy among many state courts. This Comment will compare the merits of the negligence standard with the invitee, licensee, and trespasser classifications. Simplified judicial administration and jurisprudential considerations indicate that the negligence standard is a preferable alternative in light of the weaknesses of the common law system.

A PARADIGM OF THE JUDICIAL CONTROVERSY

A recent New York decision joining the trend of abolition, Basso v. Miller, illustrates the scope of the judicial debate over the continuing value of the invitee, licensee, and trespasser categories. Before Basso eliminated the categories, a defendant’s standard of care depended on the jury’s determination of the plaintiff’s status as either an invitee, licensee, or trespasser. If the plaintiff was considered an invitee, the occupier was obligated to exercise care sufficient to avoid any unnecessary exposure to


2. 40 N.Y.2d 233, 352 N.E.2d 868, 386 N.Y.S.2d 564 (1976). Both defendants, Miller and Ice Caves Mountain, Inc., appealed from verdicts against them. The court of appeals affirmed Miller’s liability in negligence, dismissing his affirmative defense of Basso’s contributory negligence because the issue had not been raised at trial. Id. at 242-43, 352 N.E.2d at 873, 386 N.Y.S.2d at 569.

3. See 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 27.1, at 1430 (1956) [hereinafter cited as HARPER & JAMES].

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danger. If the plaintiff was termed a licensee, the occupier had to refrain from intentionally injuring the licensee and was required to warn of concealed dangers that could not be reasonably discovered by the licensee from an inspection of the premises. Finally, if the plaintiff was classified a trespasser, the occupier's only duty was to refrain from wilfully or wantonly injuring the trespasser.

Despite the seeming simplicity of the categories, the facts in Basso made it difficult for the jury to identify the status of the plaintiff, for the exact nature of Basso and Miller's presence at the resort was obscured by conflicting testimony. The claim in Basso arose out of a motorcycle accident that occurred on the property of a large scenic park and hiking resort, Ice Caves Mountain. Upon learning that a small boy was trapped in a crevice at the resort, Basso and Miller, who were local residents, travelled to the resort on Miller's motorcycle to lend their aid. They gained admission to the resort, persuaded the supervisor to let them stay, and eventually contributed to the success of the rescue. As they were leaving the resort property, Miller's motorcycle, on which Basso was a passenger, encountered a series of holes in the road, and Basso was injured. Basso instituted a tort action, naming Miller and Ice Caves Mountain, Inc. as defendants. At trial the resort contended that their entrance had not been authorized. But even if Basso and Miller were trespassers at the time of their entrance onto the resort, the jury could have found that their status had shifted to that of licensees upon the acquiescence of the proprietor in their presence, and to that of invitees upon their aid to the rescue effort. Since the jury returned a general verdict for Basso, it is impossible to determine which status had been assigned to him. On appeal Ice Caves Mountain challenged the trial court's formulation of the standard of care owed to licensees.

Although the verdict against Ice Caves Mountain could have been reversed on other grounds, the majority seized upon the difficulty in determining Basso's status as an occasion to repudiate continued use of the invitee, licensee, and trespasser categories. In a case where both the permission for the plaintiff to be on the defendant's property and the nature of the use of the property is a matter of dispute, the majority believed that the categories of liability were unsuited to analysis. In any event, the majority concluded that the occupier was only required to exercise due care and to inspect the premises before granting permission to a trespasser.

4. 40 N.Y.2d at 245, 352 N.E.2d at 875, 386 N.Y.S.2d at 570.
5. Id. at 238–39, 352 N.E.2d at 870–71, 386 N.Y.S.2d at 566–67.
6. Id. at 244, 352 N.E.2d at 874, 386 N.Y.S.2d at 570.
7. Id. at 235–37, 352 N.E.2d at 869–70, 386 N.Y.S.2d at 565–66.
8. Id. at 236, 352 N.E.2d at 869, 386 N.Y.S.2d at 564–65.
9. Id. at 239–40, 352 N.E.2d at 871, 386 N.Y.S.2d at 567.
10. Id. at 239, 352 N.E.2d at 871, 386 N.Y.S.2d at 566–67.
11. Id. at 249, 352 N.E.2d at 877, 386 N.Y.S.2d at 573. The trial court assigned too great a standard of care to a land occupier with respect to licensees. The jury was instructed that the occupier must inspect the premises and warn the licensee of dangerous conditions. See note 5 and accompanying text supra.
12. 40 N.Y.2d 233, 240, 352 N.E.2d 868, 871–72, 386 N.Y.S.2d 564, 567–68 (1976). In two cases decided on the same day, the New York State Court of Appeals applied the negligence standard in two land occupier liability cases in which the plaintiffs would have been trespassers under the common law system. In Barker v. Parnossa, Inc., 39 N.Y.2d 926, 352 N.E.2d 880, 386 N.Y.S.2d 576 (1976), the court of appeals reversed a
of the plaintiff's presence on the property were contested, the common law scheme becomes cumbersome, rigid, and often inequitable. Indeed, the jury in Basso had sifted through a 1000 page record in order to assign a status to the plaintiff. Furthermore, the scope of the common law categories was not broad enough to allow the jury to consider the possibility that one or more classifications could properly be applied to Basso depending upon the time on which the inquiry focused.\textsuperscript{14} The court observed that applying these categories to the facts of the case meant "that the duty owed to plaintiff on exit may have been many times greater than that owed him on his entrance, though he and the premises all the while remained the same."\textsuperscript{14} This anomaly of shifting status demonstrates the primacy of the landowner's state of knowledge about the plaintiff's presence on his land in imposing liability under the common law categories. For the activities of the plaintiff and the condition of the defendant's premises did not become legally relevant until this initial determination of knowledge had been made. Under the negligence standard adopted by the court, however, the landowner's knowledge is only one of many factors considered under the label "foreseeability."\textsuperscript{15} As a test of the landowner's conduct, the court stated: "A landowner must act as a reasonable man in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, the burden of avoiding the risk."\textsuperscript{16} For example, in Basso, the jury would presumably consider such factors as the owner's past experience with rescue efforts, the dangers inherent in this particular resort, and the feasibility of minimizing these hazards.

Two broad policy grounds persuaded the New York court to abolish the status classifications and adopt a fault standard as a measure of liability. First, demographic changes were thought to have rendered the common law categories obsolete.\textsuperscript{17} The court of appeals did not elaborate this reasoning, though it did point out that the rigid categories could be traced to feudal

finding of no liability and granted a new trial to the administrator of the estate of a twelve year old boy who fell to his death from a poorly maintained catwalk in the interior of an abandoned coal silo while playing without permission on the defendant's property. In Scurti v. New York, 40 N.Y.2d 433, 354 N.E.2d 794, 387 N.Y.S.2d 55 (1976), the court of appeals reversed a judgment for the defendants and granted a new trial to the administrator of the estate of a fourteen year old boy who was electrocuted. Without any authorization, he had climbed atop a freight car in a county railroad yard and touched a high voltage power supply wire.

13. See 40 N.Y.2d at 240–41, 352 N.E.2d at 871–72, 386 N.Y.S.2d at 567–68. The problem of identifying the category of a plaintiff when his status as an entrant may vary over time is discussed briefly in Comment, Occupier of Land Held to Owe Duty of Ordinary Care to All Entrants — "Invitee," "Licensee," and "Trespasser" Distinctions Abolished, 44 N.Y.U. L. Rev. 426, 430 (1969).


15. Id. at 241, 352 N.E.2d at 872, 386 N.Y.S.2d at 568.

16. Id., 352 N.E.2d at 872, 386 N.Y.S.2d at 568 (quoting Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 100 (D.C. Cir. 1972)).

17. Id. at 240, 352 N.E.2d at 871–72, 386 N.Y.S.2d at 567.
times, when land was the principal object of value.\textsuperscript{18} This view presumed that the common law limitation on landowners' liability for injuries to entrants was based on the theory that it would have been difficult for the owner of a vast manorial estate to regulate incursions on distant portions of his property.\textsuperscript{19} In contrast to that era of large property holdings, the past two centuries of urbanization, industrialization, and population growth have led to more crowded living conditions.\textsuperscript{20} Recognizing that the modern occupant has a greater opportunity to supervise entrance upon smaller pieces of property and that the frequency of incursions upon private property increase as people live closer together, the court determined that an owner's interest in the unrestricted use of his property must accommodate the competing societal interests in preservation of human life.\textsuperscript{21}

The second reason for abolition was the desire to eliminate the complexity and confusion of rules and nomenclature that had developed under the common law system.\textsuperscript{22} Strict application of the common law rules proved to be impossible in light of modern social and economic relationships;\textsuperscript{23} consequently, many exceptions were created to mitigate harsh results. Although the refinements produced salutary results in some cases, they also created a "semantic morass" of confusion.\textsuperscript{24} These flaws in the rationale and operation of the common law rules persuaded the \textit{Basso} court to discard the status categories and endorse a fault standard as the measure of land occupier liability.

According to the \textit{Basso} court, the negligence test would elevate the issue of the likelihood of the plaintiff's presence on the defendant's property from an implicit consideration in determining the plaintiff's status to a "primary independent factor" in determining the defendant's liability.\textsuperscript{25} Although the \textit{Basso} opinion did not discuss extensively the differences between the application of the common law rules and the use of a negligence standard in land occupier liability cases, the court of appeals was more explicit in \textit{Scurti}

\textsuperscript{18} \textit{Id.}, 352 N.E.2d at 871-72, 386 N.Y.S.2d at 567-68.

\textsuperscript{19} \textit{Cf.} W. Prosser, \textsc{Law of Torts} §57 (4th ed. 1971) (liabilities of landowners related to degree of control over property and ability to prevent harm to others). See also note 119 infra.

\textsuperscript{20} E. Wrigley, \textsc{Population and History} 224-34 (1969).

\textsuperscript{21} \textit{Id.} at 240-41, 352 N.E.2d at 872, 386 N.Y.S.2d at 568. The \textit{Basso} court referred to one of the rationales given in \textit{Rowland v. Christian}, 69 Cal. 2d 108, 118, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968): "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." See also \textit{James, Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees}, 63 \textsc{Yale L.J.} 612, 628 (1954) [hereinafter cited as \textit{James, Licensees and Invitees}].

\textsuperscript{22} Basso v. Miller, 40 N.Y.2d at 240, 352 N.E.2d at 871-72, 386 N.Y.S.2d at 567-68.

\textsuperscript{23} \textit{Id.} at 240-41, 352 N.E.2d at 872, 386 N.Y.S.2d at 567.

\textsuperscript{24} \textit{Id.} at 240, 352 N.E.2d at 871-72, 386 N.Y.S.2d at 567-68 (quoting \textit{Kermarec v. Compagnie Generale Transatlantique}, 358 U.S. 625 (1959)).

\textsuperscript{25} Basso v. Miller, 40 N.Y.2d at 241, 352 N.E.2d at 872, 386 N.Y.S.2d at 568.
u. New York, a case decided the same day. Under the common law categories, once there was sufficient evidence for the jury to determine the plaintiff's status, the court resolved the question of the defendant's standard of care as a matter of law because the invitee, licensee, and trespasser categories by definition imposed a particular standard of care on the landowner. Thus, if status were not in controversy, the result would be foreordained. In applying a negligence standard, the court must first decide whether the evidence will support an inference of negligence or lack of negligence by the defendant. Evidence previously regarded as conclusive of status continues to be relevant to decision making under the negligence rule but is not dispositive on the issue of liability. Typically, such evidence includes proof of the circumstances of the plaintiff's entry onto the defendant's premises, the accessibility and location of the defendant's property, and the owner's knowledge of the entrant's presence. But not every case will raise a factual issue for the jury's consideration. Under the common law categories, the jury evaluated whatever proof of injury was offered in order to ascertain the plaintiff's status; with the application of a negligence standard to landowner liability cases, however, a plaintiff must introduce sufficient evidence to support a determination that the defendant failed to exercise reasonable care. Nevertheless, once the plaintiff raises an issue as to the defendant's negligence, the jury will exercise its judgment, drawing upon community standards, to determine whether the defendant has exercised the proper degree of care toward the plaintiff. The decision also indicated that the defenses of contributory negligence and assumption of risk would operate in land occupier liability cases in the same manner as in other negligence actions.

The concurring opinion of Chief Judge Breitel in Basso articulated the opposite side of the controversy over abolition of the common law

27. Id. at 439–41, 354 N.E.2d at 796–98, 387 N.Y.S.2d at 57–59.
28. Id. at 442, 354 N.E.2d at 798–99, 387 N.Y.S.2d at 59. See also RESTATEMENT (SECOND) OF TORTS § 328B (1965); James, Functions of Judge and Jury in Negligence Cases, 58 Yale L.J. 667, 672–74 (1949) [hereinafter cited as James, Functions of Judge and Jury].
30. James, Functions of Judge and Jury, supra note 28, at 679–85.
31. 40 N.Y.2d at 241–42, 352 N.E.2d at 872–73, 386 N.Y.S.2d at 568. Under a negligence standard, contributory negligence is often theoretically quite different from assumption of risk:
Assumption of risk involves the negation of defendant's duty; contributory negligence is a defense to a breach of such duty. Assumption of risk may involve perfectly reasonable conduct on plaintiff's part; contributory negligence never does. Assumption of risk typically involves the voluntary or deliberate incurring of known peril; contributory negligence frequently involves the inadvertent failure to notice danger.

classifications, arguing that abolition was both unwise and unnecessary to the decision of the case. Conceding that some defects existed in the old standard, the concurring opinion contended that the common law system was still viable and should be retained. According to Judge Breitel, the status-based classifications adequately consider the foreseeability of injury and reflect a proper allocation of risks and costs between landowner and injured entrant. Furthermore, he indicated that the exceptions to the status rules, such as those for trespassing children and for public employees, have satisfactorily accommodated changing times and values. In addition to his defense of the common law system, Judge Breitel raised two objections to the adoption of the negligence standard. He warned that abolition would create more problems than it would solve because a new set of rules would have to be developed in order to apply the “amorphous” negligence standard. Judge Breitel also criticized the leeway given to juries under the new standard. He apparently feared that this latitude would allow the reputed sympathy of jurors for plaintiffs to control the decision making. In

32. 40 N.Y.2d at 243, 249, 352 N.E.2d at 873-74, 877-78, 386 N.Y.S.2d at 569, 573. Judge Breitel supported the result, but not the reasoning, of the majority opinion. He stated in his concurring opinion that he would have found reversible error and granted a new trial only on the basis of the incorrect jury instructions. Id. at 249, 352 N.E.2d at 877-78, 386 N.Y.S.2d at 573.

33. 40 N.Y.2d at 246-47, 352 N.E.2d at 875-76, 386 N.Y.S.2d at 571-72.

34. Id. But see text accompanying notes 94 to 108 infra.

35. 40 N.Y.2d at 247-48, 352 N.E.2d at 876-77, 386 N.Y.S.2d at 572-73 (relying on arguments presented in Payne, Occupiers’ Liability Act, 21 MOD. L. REV. 359, 362 (1958)). Payne’s discussion of the administrative effects of the substitution by the English of the negligence standard for the common law categories of invitee and licensee, Occupiers’ Liability Act, 1957, 5 & 6 Eliz. 2, c. 31, which Judge Breitel uses as a basis for his criticism of the adoption of a negligence standard by the majority in Basso, is not analogous to the use of a negligence standard in land occupier liability cases in the United States. In the United States the change to a negligence standard involves only the expanded use of a judicially, not legislatively, created standard that has been regularly applied for many years. The American abolition situation is different in another respect. Although negligence terminology, such as “reasonableness,” is applied by juries using current community standards in the United States, the English statutory language is applied by judges, since few English negligence cases are tried by jury. Cf. Cooper v. Goodwin, 478 F.2d 653, 656 (D.C. Cir. 1973) (defending the propriety of leaving the issue of negligence to the jury); Marsh, The History and Comparative Law of Invitees, Licensees, and Trespassers, 69 LAW Q. REV. 182, 185-86 (1953) (noting the limited role of juries in negligence cases in England at that time). If Payne is simply dealing with a problem of statutory interpretation and application, cf. McDonald & Leigh, The Law of Occupiers’ Liability and the Need for Reform in Canada, 16 U. TORONTO L.J. 55, 66 (1965) (discussing the debate by the Law Reform Committee on the meaning of the statutory language “common duty of care”); Odgers, Occupiers’ Liability: A Further Comment, 1957 CAMB. L.J. 39, 41-42 (speculating about how courts will interpret the statutory language “common duty of care”), then Breitel’s fears are groundless. Cf. notes 191 to 195 and accompanying text infra (discussing the viability of the negligence standard).

36. 40 N.Y.2d at 248, 352 N.E.2d at 877, 386 N.Y.S.2d at 572. But see James, Functions of Judge and Jury, supra note 28, at 680-85, which demonstrates that there are several ways in which a judge can assure that the jury properly performs its functions; notes 184 to 187 and accompanying text infra.
addition, the new approach to land occupier liability cases would allow the jury to formulate the proper standard of care. Judge Breitel objected to this transfer of lawmaking function from the court to the jury on the grounds that juries are incapable of formulating sensible and consistent rules of law. It is noteworthy, however, that in the trial court disposition of Basso the jury returned a general verdict, making it impossible to ascertain which of the common law categories had been applied. Another flaw in this criticism is that it is not restricted to the landowner liability area; the logical implication of this argument is that the negligence standard is inappropriate in any case. The concurring opinion did not identify any characteristics peculiar to land occupier liability cases that make a negligence standard undesirable solely in that context. Judge Breitel’s failure to direct his criticism of the negligence standard to the context of land occupier liability weakens the force of his antiabolition argument in Basso; for this portion of the concurring opinion does not advance his position other than to express a general distrust of juries.

Both the majority and concurring opinions in Basso may be criticized for their lack of specificity. The majority did not adequately address the evidentiary and institutional implications of its decision to abolish the common law categories. It is remarkable that to justify such a significant change in the law, only general policy grounds were set forth and were not subjected to searching analysis. Much of the concurring opinion is an attack on the negligence standard rather than a specification of the reasons why the common law system is still preferable. Perhaps these omissions may be attributed to the relative novelty of the trend to discard the invitee, licensee, and trespasser categories. Although Basso v. Miller highlights the issues raised by abolition of the common law categories, it is necessary to examine the current application of the common law rules before evaluating their continued application.

**CURRENT USE OF THE INVITEE, LICENSEE, AND TRESPASSER CATEGORIES**

The common law categories, which originated in English case law, were first applied in the United States in 1865. Although still retained by

37. 40 N.Y.2d at 248, 352 N.E.2d at 877, 386 N.Y.S.2d at 572.
38. Id. at 247-48, 352 N.E.2d at 876-77, 386 N.Y.S.2d at 572.
40. Sweeney v. Old Colony & Newport R.R., 92 Mass. (10 Allen) 368 (1865) (railroad liable to plaintiff who was injured when hit by train as he was crossing
most American jurisdictions, including Maryland, the common law invitee, licensee, and trespasser classification system has encountered increasing judicial criticism. Application of these standards has so notoriously favored land occupiers that their position has been described as one of virtual immunity from prosecution. The exceptions carved out from these categories as a response to changing times are usually so numerous that the classifications no longer function as rules of law that can be applied consistently, uniformly, and predictably. The courts have also relied on legal fictions and distinctions to mitigate harsh results. For instance, child trespassers are treated as constructive invitees, and courts distinguish between active and passive negligence toward trespassers. These fictions


The Idaho Supreme Court recently rejected a request that it expand the use of the common law categories to cover the standard of care that an easement owner owed to the owner of the servient estate. The court’s refusal was based on Harper and James’ argument that enlarged application in this type of case would only serve to stimulate overzealous protection of property rights. Id. at 139 (citing Harper & James, supra note 3, § 27.2, at 1434 (1956)). Harper and James indicated that there would be no reason to decline application of the common law categories to determine the standard of care owed by an easement holder, or even an invitee or licensee on the premises, to a trespasser, since immunity in this case would reflect the unforeseeable presence of the plaintiff. Harper & James, supra note 3, § 27.2, at 1433. The enigma of the unforeseeable plaintiff has been enshrined in Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928) (Cardozo, J.).


44. See, e.g., Restatement (Second) of Torts § 339 (1965).

have been applied only sporadically, however, and do not form a coherent framework capable of replacing the general categories.  

Invitees

Persons who enter onto the property of another by express or implied invitation for a purpose related to the activities of the occupant are invitees.  The standard of care owed to an invitee is that of reasonable care in the circumstances.  This obligation may entail inspection of property, warnings, removal of dangerous conditions, or curtailment of dangerous activities, depending on the facts of the particular case.  There are two theories — economic benefit or invitation — that support the imposition of liability for injury to an invitee.  The economic benefit theory of classification regards entrance as a quid pro quo; because the occupier receives some actual or potential pecuniary benefit, he assumes an affirmative obligation to keep the premises reasonably safe for the entrant.  In application, some courts have strained to identify some mutual economic benefit that would qualify the plaintiff as an invitee.  The invitation theory, on the other hand, includes the idea of economic benefit yet extends the


47. See RESTATEMENT (SECOND) OF TORTS § 332 (1965). For an exhaustive recitation of the various types of factual situations in which an entrant has been labelled an invitee, see James, Licensees and Invitees, supra note 21, at 612-27. Among the classes of entrants held to be invitees are store customers, patients in a doctor's office, deliverymen, and postmen. Id. at 614-18.  

48. See generally HARPER & JAMES, supra note 3, § 27.12, at 1487; § 27.13, at 1489-95.  


50. See James, Licensees and Invitees, supra note 21, at 612-23. See also Annot., 95 A.L.R.2d 992 (1964).  


52. See generally HARPER & JAMES, supra note 3, § 27.12, at 1478; James, Licensees and Invitees, supra note 21, at 612-15. See also Comment, The Outmoded Distinction Between Licensees and Invitees, 22 MO. L. REV. 186 (1957). New Jersey's use of the economic benefit test is discussed in Note, Landowners' Liability in New Jersey: The Limitations of Traditional Immunities, 12 RUTGERS L. REV. 599, 611 (1958).  

53. See, e.g., Weil v. Smith, 469 P.2d 428, 433-34 (Kan. 1970); Mercer v. Tremont & Ga. Ry., 19 So. 2d 270, 275-76 (La. App. 1944) (entrant to shop office of railway company who came with the purpose of soliciting advertising from the train company held to be an invitee); James, Licensees and Invitees, supra note 21, at 616-18 nn.73-81.
basis of responsibility to an implied representation by the occupier that the premises will be reasonably safe for those whom he encourages to enter. Application of the economic benefit or invitation tests may sometimes overlap, leading to the same result. But a plaintiff may qualify as an invitee in the absence of any economic benefit. The latter situation is exemplified where the invitee is a visitor to a free public library or is a patron at a public playground or swimming pool. Although jurisdictions differ as to which of the two tests is employed, the invitation theory is more widely used at present.

Maryland law defines an invitee, or "business visitor," in terms of the economic benefit theory: an invitee is someone explicitly or implicitly invited to come onto property for purposes related to the owner's business. A business visitor is owed ordinary care while he is on the portion of the premises to which the invitation applies; he will not be denied compensation for injuries caused by a dangerous condition if he also exercises ordinary care for his own safety. Maryland law, however, limits the scope of the liability of land occupiers to injured business invitees. Although the occupier must exercise reasonable care for the safety of an invitee, his obligations are restricted to the area of the premises for which the invitation is given and to the time reasonably necessary to accomplish the purpose of

55. See James, Licensees and Invitees, supra note 21, at 614–15.
56. Id. at 617–18.
57. The original Restatement of Torts replaced the word "invitee" as used judicially with the term "business visitor." Restatement of Torts § 332 (1934). See Prosser, Business Visitors, supra note 39, at 574, 585. This modification excluded many persons characterized as invitees under the invitation theory, such as a person who enters a store only to have money changed or to use the telephone, or a person who comes to meet a passenger at a train station, id. at 588–91, because invitee status was defined solely in terms of the land occupier's pecuniary interest in the entrant's presence. Restatement of Torts § 332 (1934). The first Restatement rule was criticized as not representative of the majority of court decisions concerning invitees, Prosser, Business Visitors, supra note 39, at 611, which often found an invitation to exist where premises were open to the public, id. at 587–93, or where there was no possibility of pecuniary benefit to the occupier. Id. at 594. In response, the second edition of the Restatement of Torts added the view that an invitation constitutes an express or implied representation by the land occupier that his property is safe for the entrant. Id. at 612; Restatement (Second) of Torts § 332 & Comment b. (1965). The Restatement now defines an invitee in terms of the invitation and the economic benefit theories. Id. at § 332.
58. Prosser, Business Visitors, supra note 39, at 611. For a survey of the use of the economic benefit and invitation tests, see Annot., 95 A.L.R.2d 992 (1964).
the visit. If the invitee strays about the premises or remains for an unreasonable amount of time, his status may change to that of a licensee or even a trespasser. Because liability in Maryland is limited by the economic benefit test, certain plaintiffs may not qualify as deserving reasonable care who, under the invitation theory or the negligence standard, would otherwise be afforded that protection.

**Licensees**

Licensees may be present on the property of another for a variety of reasons: under express or implied permission, pursuant to a private conditional privilege, or as of right. The standard of care owed to licensees by landowners is usually described in one of two ways: in jurisdictions following the Restatement position, the occupier need not inspect the premises to discover dangers or warn the licensee of conditions or activities known or discoverable by the licensee; or, in jurisdictions that apply the status categories more strictly, the occupant must refrain from wilfully or wantonly injuring the licensee. Thus the degree of responsibility of a landowner in a given situation depends upon whether the licensee was injured by a dangerous condition maintained by the occupier on his land or


63. Restatement (Second) of Torts § 332 (1965) (Comment on Subsection (3)); see, e.g., Ortiz v. Greyhound Corp., 175 F. Supp. 14, 20 (D. Md. 1959) (applying Maryland law); Macke Laundry Service Co. v. Weber, 267 Md. 426, 432, 298 A.2d 27, 30–31 (1972) (general statement of Maryland law in dicta). See also Barnes v. Housing Auth., 231 Md. 147, 152, 189 A.2d 100, 102 (1963) (three year old boy invitee strayed off walkway at apartment complex and fell into a well; directed verdict for defendants affirmed); Pellicot v. Keene, 181 Md. 135, 139, 28 A.2d 826, 828 (1942) (six year old invitee went behind store counter and fell through trap door; judgment for plaintiff reversed; no implied invitation to plaintiff for area behind counter). But see Crown Cork & Seal Co. v. Kane, 213 Md. 152, 157–58, 131 A.2d 470, 472–73 (1957) (invitation found to extend impliedly to area where plaintiff was told to wait and where he was subsequently injured); Comment, Implied Invitation, 18 Md. L. Rev. 338 (1958). See also Levine v. Miller, 218 Md. 74, 79, 145 A.2d 418, 421 (1958) (appellant invitee left area of invitation, but returned six hours later and was injured; directed verdict for defendants affirmed; plaintiff's status changed to that of a licensee, or possibly a trespasser).

64. Restatement (Second) of Torts § 330 (1965); Harper & James, supra note 3, § 27.8, at 1470. Examples of different types of visitors whose presence may be permitted by the owner are social guests, unsolicited salesmen, and loiterers at a train station. Prosser, Business Visitors, supra note 39, at 573, 589.


66. See Restatement (Second) of Torts §§ 341, 342 (1965). See also Myszkiwicz v. Lord Baltimore Filling Stations, Inc., 168 Md. 642, 647–48, 178 A. 856, 858 (1935) (the presence of a bare licensee may require that the occupier give notice of new and abnormal conditions which increase the danger to the licensee); Harper & James, supra note 3, § 27.9, at 1471–72, 1474–78.

by an activity conducted by the occupier. Occupiers will be liable to licensees for injuries caused by dangerous conditions only if the occupier knew of the condition and could not reasonably expect the licensee to discover it. For example, the occupant must protect the licensee from a natural condition that constitutes a concealed trap. In addition, occupiers will generally be liable to licensees for failure to exercise reasonable care in conducting an activity that injures a licensee, if the licensee did not realize the danger and had no reason to know that it existed.

There is some controversy over the classification of public employees and social guests as licensees. Policemen and firemen traditionally have been classified as licensees, based on the negative rationale that since they enter onto unforeseeable areas of property and arrive at unforeseeable times, the land occupier could not have sufficient knowledge of the likelihood of their presence to be held to exercise reasonable care for their safety. However, some courts and commentators argue that the importance of the services rendered by policemen and firemen merit the higher degree of protection given to an invitee. Courts also differ on whether social guests

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68. See James, Licensees and Invitees, supra note 21, at 606-10. See also Restatement (Second) of Torts §§ 341, 342, 345 (Comment d) (1965); Harper & James, supra note 3, §§ 27.9, 27.10, at 1471-76; 25 Vand. L. Rev. 623, 625-26 (1972).

69. See, e.g., Harper & James, supra note 3, § 27.8, at 1472.

70. See, e.g., id. § 27.9, at 1474.

71. See, e.g., id. § 27.10, at 1476.

72. See Restatement (Second) of Torts § 341 (1965).

73. Maryland has encountered difficulty in classifying public employees. For instance, one student commentator has suggested that Aravanis v. Eisenberg, 237 Md. 242, 206 A.2d 148 (1965), dealing with landowner liability to injured firemen, could be interpreted as holding either that firemen were invitees or that they were licensees entitled to greater care than bare licensees. See Note, Firemen: Licensees or Invitees? Aravanis v. Eisenberg, 25 Md. L. Rev. 348, 350-52 (1965).


75. See generally Harper & James, supra note 3, § 27.14, at 1501-05. See also James, Licensees and Invitees, supra note 21, at 634-38 (public employees classified as licensees) and 633-34 (public employees classified as invitees). But cf. Note, Landowner's Negligence Liability to Persons Entering as a Matter of Right or Under a Privilege of Private Necessity, 19 Vand. L. Rev. 407, 408 (1966) (where premises open to the public, or where a commercial or industrial owner must exercise reasonable care for the safety of his own employees, the imposition of a reasonable care standard should not increase the owner's cost in making his property safe). The difficulty in classifying public employees who respond to emergencies is discussed in Mounsey v. Ellard, 363 Mass. 693, 697-703, 297 N.E.2d 43, 46-49 (1973), and in Prosser, Business Visitors, supra note 39, at 608-09. Some courts have had trouble categorizing public employees with routine jobs and ordinary working hours. See, e.g., Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 99-100 (D.C. Cir. 1972) (difficulty in classifying a health official inspecting the defendant landowner's business premises was one factor that contributed to decision to abolish all common law categories for entrants).

76. See Mounsey v. Ellard, 363 Mass. 693, 700 n.1, 701-03, 297 N.E.2d 43, 47 n.1, 48-50 (1973). See also Prosser, Business Visitors, supra note 39, at 608-09; Note,
should be classified as invitees or licensees. Some courts have classified social guests as invitees. Generally, unless the occupier has made special representations about the safety of the premises, social guests are considered licensees. Classifying guests as licensees places them on the same footing as members of the occupant's family, even though a guest may perform services for the occupant or confer some benefit by his presence. Nevertheless, the absence of a special obligation on the host to care for the safety of a social guest may not reflect reasonable community expectations, especially when this duty is compared with the standard of care owed to a business visitor.

Maryland has bifurcated the common law category of licensees. First, there are social guests, called "licensees by invitation"; the host must observe the same standard of care toward these persons that he would if he was dealing with his family. Firemen: Licensees or Invitees? Aravanis v. Eisenberg, 25 Md. L. REV. 348, 350 (1965); 18 How. L.J. 220, 226 (1973). Bohlen would have agreed with this position. Cf. Bohlen, The Duty of a Landowner Toward Those Entering His Premises of Their Own Right (pt. 2), 69 U. Pa. L. REV. 237, 250–51 (1921) (policemen and firemen should be treated as "licensees by acquiescence," requiring occupiers to notify them of new and concealed dangers on land). While not reclassifying the plaintiffs as invitees, some jurisdictions have required that an owner exercise reasonable care for the safety of persons performing, although not for pay, as firemen. See, e.g., Zuercher v. Northern Jobbing Co., 66 N.W.2d 892 (Minn. 1954) (volunteer fireman injured).

Maryland has bifurcated the common law category of licensees. First, there are social guests, called "licensees by invitation"; the host must observe the same standard of care toward these persons that he would
exercise for the safety of himself and his family. Second, there are “bare” licensees; the occupier’s sole duty toward those persons is to refrain from wilfully or wantonly injuring them, the same standard of care owed to trespassers. The Maryland rule for bare licensees is illogical because it does not recognize the difference in circumstances between the licensee, who enters with permission of the occupant, and the trespasser, whose presence on the property of another is entirely unlawful. Maryland applies the Restatement rule for liability to licensees for injuries from dangerous conditions in the context of the host/guest relationship. Although no Maryland cases have dealt with injuries to a social guest whose presence was unknown to the host, it is likely that the host would not be held liable in those circumstances. One reason for this social guest rule is that it would be unreasonable to require a host to provide more care for social guests than for his own family, for the social guest usually receives hospitality and other gratuitous benefits from his host. Another possible reason is the fear of


The degree of care that the host would have exercised if the guest had not been present is a question for the jury. Thus, procedurally the operation of the standard of care required with regard to a social guest resembles a negligence rule. A Maryland host would probably be held liable to a guest where the host had created and knew of unreasonable risks of harm which the guests could not reasonably discover, where the host failed to warn a guest of an unreasonable risk of harm, or neglected to keep the premises reasonably safe when the guest had no reason to know of a dangerous condition. Cf. Stevens v. Dovre, 248 Md. 15, 18, 234 A.2d 596, 598-99 (1967) (host not liable for injuries to guest who fell down steps because there was no defect or peculiarity in construction of the steps that created a hidden danger). In its standard of liability toward social guests, Maryland follows the Restatement rule. See Paquin v. McGinnis, 246 Md. 569, 572, 229 A.2d 86, 88 (1967).

83. The owner need not anticipate the licensee’s presence nor keep the premises safe for him. Duff v. United States, 171 F.2d 846, 850 (4th Cir. 1949) (applying Maryland law). See also Telak v. Maszczenski, 248 Md. 476, 483, 237 A.2d 434, 438 (1968); Fitzgerald v. Montgomery County Bd. of Educ., 25 Md. App. 709, 712-13, 336 A.2d 795, 798 (1975). A recent case in another jurisdiction dealt with an uninvited social guest in the same manner as a bare licensee is treated in Maryland. Wood v. Camp, 284 So. 2d 691, 695 (Fla. 1973). One commentator, however, has noted the English view that the bare licensee formula is “barbaric” because humanitarian concerns dictate the exercise of greater care toward someone who has permission to enter property than a mere abstention from the intentional infliction of harm. Bohlen, Fifty Years of Torts, 50 HARV. L. REV. 725, 739-40 (1937).


87. Paquin v. McGinnis, 246 Md. 569, 573-74, 229 A.2d 86, 89 (1967). But see id. at 572-73, 229 A.2d at 88, for a summary of the minority rule that hosts are required to
collusion between a host and his guests. Despite these justifications for restricting liability to social guests, the resulting disparity between the social guest rule and the treatment of business visitors is incongruous. If the visitor comes to another person's home to transact his business, he attains invitee status, on the theory that the home has become a place of business for the time of the transaction. In operation, the rule for liability of hosts for injuries sustained by their social guests appears to be an inverse formulation of the economic benefit test that governs care to invitees. Since social guests receive a gratuitous benefit of hospitality, they apparently have no warrant to claim special consideration from their host. Business invitees confer benefits, however, so they deserve the higher standard of care. The standard of care for "licensees by invitation" approximates the evaluation of various factors that would occur under a negligence test, except that the question of pecuniary benefit dictates the appropriate degree of care to guests.

Thus, adoption by the Maryland courts of a single test that would apply to all visitors who are invited, in the ordinary sense of the word, would involve only some modifications of the current standard of care owed to lawful entrants. This would be a desirable change for several reasons. First, a uniform rule would eliminate semantic anomalies such as the notion that social guests are "invited" in the ordinary sense of the word but not in a legal sense. Second, a broader rule would consider rewards other than pecuniary benefit that an entrant is capable of bestowing on the land occupier. Finally, if the broader rule were based on negligence theory, the factor of permission, which has become irrelevant to the standard of care towards a bare licensee, would be included in the evaluation of land occupier liability.

Trespassers

Trespassers enter onto land without the express or implied permission of the occupant. Consistent with the preeminence of property interests

take more active steps to protect the safety of their guests because a guest does not have an intimate knowledge of the physical characteristics of the home and because the homeowner can easily protect against loss from injuries to guests by carrying liability insurance.

89. This is the essence of the frequent comment that a social guest is an invitee who is not an invitee. See, e.g., Harper & James, supra note 3, § 27.11, at 1477; James, Licensees and Invitees, supra note 21, at 611; Prosser, Business Visitors, supra note 39, at 585. The Restatement (Second) of Torts § 332, Comment a (1965) addresses this issue:

"Invitee" is a word of art, with a special meaning in the law. This meaning is more limited than that of "invitation" in the popular sense, and not all of those who are invited to enter upon land are invitees. A social guest may be cordially invited, and strongly urged to come, but he is not an invitee.

90. See generally Harper & James, supra note 3, § 27.3, at 1435; Restatement (Second) of Torts § 329 (1965); James, Trespassers, supra note 46, at 144–46.
implicit in the common law scheme, the occupier has no affirmative duty to see that his premises are safe for a trespasser. A trespasser cannot demand that the occupier provide him safety when his presence is improper. Moreover, the trespasser's presence is not foreseeable since the occupier never gave permission to enter. Nevertheless, the occupier must refrain from willfully or wantonly injuring the trespasser.

Several exceptions to the trespasser rule result in the reclassification of an entrant without permission as a licensee: when the occupier knows of the trespasser's presence; when the occupier maintains an artificial condition on his property that trespassers who repeatedly travel across a confined area may not reasonably discover and which is likely to harm the entrants; and when the occupier conducts an activity on his property that

91. See Hughes, Duties to Trespassers, supra note 39, at 635, 690; James, Trespassers, supra note 46, at 144-45.

The traditional standard of care toward trespassers allows the land occupier to be negligent. He need only refrain from intentionally harming or entrapping the trespasser. Harper & James, supra note 3, § 27.3, at 1440-42; James, Trespassers, supra note 46, at 144-45. Keeton analyzes the trespasser status as a situation where the defendant's liability has been restricted purely for policy reasons, even though he may have been negligent:

The lack of a duty in such instances does not mean and should not mean that the defendant has acted prudently. It simply means that even though he was guilty of anti-social conduct and conduct that should be discouraged, the achievement of other socially desirable ends or objectives [e.g., unfettered enjoyment of property interests] that will be hindered by shifting the loss from the defendant to the plaintiff is a weightier consideration.

Keeton, Personal Injuries Resulting From Open and Obvious Conditions, 100 U. Pa. L. Rev. 629, 632 (1952).

92. For discussions of the morality of a trespasser's conduct, see, e.g., Gould v. DeBeve, 330 F.2d 826, 829 n.3 (D.C. Cir. 1964); Green, Landowner v. Intruder; Intruder v. Landowner: Basis of Responsibility in Tort, 21 Mich. L. Rev. 495 (1923); James, Trespassers, supra note 46, at 152.

93. But see James, Trespassers, supra note 46, at 150-51, where James argues that the presence of a trespasser is often foreseeable in fact.

94. The distinction between the active conduct of the land occupier and dangerous conditions maintained on his property exerts fundamental influence on the question of liability to trespassers. The Restatement embraces this distinction. See Restatement (Second) of Torts §§ 333-39 (1965): See generally, Eldredge, Tort Liability to Trespassers, 12 Temple L.Q. 32 (1937); James, Trespassers, supra note 46, at 148-51, 154-56.


95. See Herrick v. Wixom, 121 Mich. 384, 80 N.W. 117 (1899); Restatement (Second) of Torts §§ 336, 337, 338 (1965). But see Peaslee, Duty to See Trespassers, 27 Harv. L. Rev. 403 (1914) (discussing the Massachusetts rule, which does not hold the occupier to a higher standard of care if the presence of the trespasser is known).

96. See Wytupeck v. City of Camden, 25 N.J. 450, 460, 136 A.2d 887, 892-93 (1957); Restatement (Second) of Torts § 335 (1965).
is highly dangerous to constant trespassers. In these situations the occupier must exercise reasonable care to avoid injuring the trespasser. Trespassing children constitute another exception to the usual standard of care. This exception reflects a belief that the reasons for applying a lesser standard of care to trespassers do not apply to trespassing children. Children may not appreciate certain risks of harm and the occupier cannot reasonably expect them to protect themselves. Further, the important social interest in protecting the welfare of children outweighs the greater burdens on land occupiers from a higher standard of care. One expression of this exception has been the attractive nuisance doctrine, which treats children as constructive invitees. Under the attractive nuisance doctrine, the

98. See Harper & James, supra note 3, § 27.5, at 1455-56.
99. Hughes, Duties to Trespassers, supra note 39, at 691; see James, Trespassers, supra note 46, at 163.
100. The attractive nuisance doctrine developed as a reaction to a nineteenth century Supreme Court case, Railroad Co. v. Stout, 84 U.S. (17 Wall.) 657 (1873), in which a six year old trespasser recovered for injuries sustained while playing on an unguarded turntable in an unfenced yard. See generally Luck v. Baltimore & O.R.R., 510 F.2d 663, 666-67 (D.C. Cir. 1975). In Stout the Supreme Court did not base its decision on the boy’s status as a trespasser. Instead, the Court enunciated a broader rule of liability:

[If from the evidence given it might justly be inferred by the jury that the defendant, in the construction, location, management, or condition of its machine had omitted that care and attention to prevent the occurrence of accidents which prudent and careful men ordinarily bestow, the jury was at liberty to find for the plaintiff.]

Railroad Co. v. Stout, 84 U.S. (17 Wall.) 657, 661 (1873). Other courts sought to reach the same result as Stout by analogizing to cases where baited traps were set by a landowner to kill roaming dogs; turntables and similar objects were labelled “attractive nuisances,” which called for the land occupier to exercise reasonable care toward a child trespasser. James, Trespassers, supra note 46, at 162-63; Prosser, Trespassing Children, 47 Calif. L. Rev. 427, 430-31 (1959). The Supreme Court compared the attraction of some dangerous objects to children with baiting a hook to catch fish. United Zinc & Chemical Co. v. Britt, 258 U.S. 268, 275 (1922). The theory behind requiring the exercise of reasonable care toward a child trespasser in these circumstances was that the interesting object impliedly invited the child to come onto the occupant’s land. James, Trespassers, supra note 46, at 162-63. An alternate explanation offered for the attractive nuisance theory was that it represented a policy decision that society would benefit if landowners were encouraged to prevent injuries to small children. See Eastburn v. Levin, 113 F.2d 176, 178 (D.C. Cir. 1940).

The Supreme Court later narrowed its application of the attractive nuisance doctrine by requiring that the child know of the dangerous object or condition upon entering the defendant’s property. See United Zinc & Chemical Co. v. Britt, 258 U.S. 268 (1922). The concept of “allurement” — that the trespasser was induced to enter the land because he was attracted by an object on the land — has largely disappeared. See James, Trespassers, supra note 46, at 163 & n.7, 164; Prosser, Trespassing Children, 47 Calif. L. Rev. 427, 431-32 (1959). In Best v. District of Columbia, 291 U.S. 411, 419 (1934), the Supreme Court cited United Zinc with approval, but its decision centered on the attractiveness of a wharf to playing children rather than the children’s knowledge of a particular danger present on the wharf. The Best decision
child trespasser must show: that he was injured by a dangerous object, such as a turntable,\textsuperscript{101} or a dangerous condition, such as a pond,\textsuperscript{102} on the defendant's land; that he did not realize the risk of harm created by the object or condition; and that it was likely that children would play with the object, or be curious about the condition, if they trespassed on the defendant's land.\textsuperscript{103} The many circumstances in which trespassers receive special treatment indicate that a reasonableness standard is being applied. Although the widespread use of these doctrines may have mitigated harsh results, it has also undermined the substance of the original trespasser classification.\textsuperscript{104}

Maryland, however, has made no exceptions to its trespasser rule for over seventy years.\textsuperscript{105} Maryland recognizes neither the rule that raises the has been interpreted as overruling United Zinc. See Eastburn \textit{v. Levin}, 113 F.2d 176, 177 (D.C. Cir. 1940). The \textit{Restatement (Second) of Torts} formulates a negligence theory that resembles the attractive nuisance doctrine, balancing the interests of the occupant and child to raise the standard of care toward trespassing children when the occupier maintains a highly dangerous artificial condition on his premises. \textit{See Restatement (Second) of Torts} § 339 (1965).


102. See, e.g., United Zinc & Chemical Co. \textit{v. Britt}, 258 U.S. 268 (1922) (here, the "pond" was a water-filled cellar in an abandoned factory).

103. Under the \textit{Restatement (Second) rule}, occupiers may be liable to trespassing children for injuries caused by highly dangerous artificial conditions 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 of 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.


104. \textit{See discussions of mitigating doctrines in Harper & James, supra note 3, § 27.7, at 1467–70; Hughes, Duties to Trespassers, supra note 39, at 685, 702; Comment, Abolition of the Distinction Between Licensees and Invitees Entitles All Lawful Visitors to a Standard of Reasonable Care — Mounsey \textit{v. Ellard}, 8 SUFFOLK L. REV. 795, 808 (1975). However, the dissent in Ouellette \textit{v. Blanchard}, 364 A.2d 631, 635 (N.H. 1976), argued that the mitigating exceptions should be retained because it took many years to fashion them.}

105. Since Mergenthaler \textit{v. Kirby}, 79 Md. 182, 28 A. 1065 (1894), every trespasser case in Maryland has been tried according to the same legal standard. A recent
standard of care owed toward known trespassers\(^{106}\) nor the attractive nuisance doctrine.\(^{107}\) Although Maryland courts therefore may not be criticized for the doctrinal impurity that exists in the jurisdictions that apply numerous mitigating doctrines, they have failed to remedy the harshness of their strict application of the trespasser rule.\(^{108}\)

**TREND TOWARD ABOLITION OF THE COMMON LAW CLASSIFICATION SYSTEM IN THE UNITED STATES**

***Total Abolition***

To date, California, Colorado, the District of Columbia, Hawaii, New York, New Hampshire, and Rhode Island have completely abrogated the traditional classifications governing liability of landowners to invitees, licensees, and trespassers, replacing them with the general negligence test of reasonableness in the circumstances.\(^{109}\) The leading case in the abolitionist

example is Bramble v. Thompson, 264 Md. 518, 522, 287 A.2d 265, 268 (1972). Other recent cases provide an illustration of the great hardship that strict application of the trespasser category may inflict. See, e.g., Osterman v. Peters, 260 Md. 313, 272 A.2d 21 (1971) (judgment for defendant where four year old child drowned in neighbor's swimming pool which was left filled with water for the new residents who were to move into the house); Herring v. Christensen, 252 Md. 240, 249 A.2d 718 (1969) (judgment for defendant where an unsupervised trash fire that landowners had maintained on unfenced property burned a three year old boy).


108. Recent Maryland cases are collected in note 105 supra. The attitude of the Maryland courts was exemplified in Osterman v. Peters, 260 Md. 313, 317, 272 A.2d 21, 23 (1971), which expressed continuing support for the statement of Chief Judge McSherry in Demuth v. Old Town Bank, 85 Md. 315, 319–20, 37 A. 266, 266 (1897): 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 . . . loss . . . . But hard cases . . . almost always make bad law; and hence it is . . . 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.

trend, Rowland v. Christian, formulated the negligence test in the following manner:

[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.]

Several reasons have been advanced to justify abolition: the difficulty in working with the numerous exceptions to the common law rules, the anachronistic views of the preeminence of property interests on which the rules are based, and the harshness of treatment of litigants when the common law rules are applied.

Defects in the Common Law System

The abolitionist decisions advance two major criticisms of the common law categories. First, they observe that the numerous exceptions to the categories have increased the complexity of the rules and have fostered confusion in their application. The various modifications of the common law categories that have been fashioned to mitigate harsh results have undermined the uniform application of the invitee, licensee, and trespasser classifications. Reliance on the common law rules has therefore become increasingly difficult:

In an effort to do justice in an industrialized urban society, with its complex economic and individual relationships, modern courts have created subclassifications among the traditional common-law categories. Yet even within a single jurisdiction, the classifications

631 (N.H. 1976) (ten year old burned by unsupervised fire); Basso v. Miller, 40 N.Y.2d 233, 352 N.E.2d 866, 396 N.Y.S.2d 564 (1976) (adults allegedly came onto defendant's property to participate in rescue effort of accident victim and were injured when their motorcycle encountered hazardous road conditions on defendant's property); Mario-renzi v. Joseph DiPonte, Inc., 114 R.I. 294, 333 A.2d 127 (1975) (five year old trespasser drowned in water filled hole on defendant's property).

110. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). Rowland has been the subject of numerous student comments and notes. See, e.g., Comment, Occupier of Land Held to Owe Duty of Ordinary Care to all Entrants — "Invitee," "Licensee," and "Trespasser" Distinctions Abolished, 44 N.Y.U.L. Rev. 426 (1969). 111. 69 Cal. 2d at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104.

112. Many commentators endorse the abolitionist position. See, e.g., Hughes, Duties to Trespassers, supra note 39, at 633, 693-700; Marsh, supra note 35, at 182-83; Comment, The Outmoded Distinction Between Licensees and Invitees, 22 Mo. L. Rev. 186 (1957); Comment, California Applies Negligence Principles in Determining Liability of a Land Occupier, 9 SANTA CLARA LAW 179 (1968); Comment, Loss of the Land Occupier's Preferred Position — Abrogation of the Common Law Classifications of Trespasser, Invitee, Licensee, 13 ST. LOUIS L.J. 444 (1969).

and subclassifications . . . have produced confusion and conflict. As new distinctions have been spawned, older ones have become obscured. Through this semantic morass the common law has moved . . . towards "imposing on owners and occupiers a single duty of reasonable care in all the circumstances."  

This theoretical refinement of the common law categories may not even correspond to the actual behavior of occupiers of land and entrants on their property, for people seldom regulate their behavior according to subtle legal distinctions.  

Second, abolitionist decisions have been justified by the argument that the common law system, rooted in the feudal notions that land was of primary importance and that the landowner could not be expected to guard against encroachers, is no longer appropriate to the values and experience of a more crowded, industrialized, and urbanized society. In addition to being unreliable gauges of the behavior of modern land occupiers and entrants, the common law classifications do not reflect the current belief that a land occupier's unrestricted freedom in the use of his property must yield to the protection of personal safety. The common law rules that result in virtual immunity for land occupiers in some jurisdictions have been criticized because they do not permit consideration of important factors that should determine liability, such as prevention of human injury and the availability of insurance. 

The argument that contemporary conditions no longer supply any rational basis for the status rules is not particularly persuasive. Abolitionist decisions that contrast modern urban, industrialized conditions with those existing in feudal times have taken liberties with history. This reasoning
fails to recognize that current rural or suburban environments may more closely resemble the general physical characteristics of property holdings under the manorial system than property use in crowded urban settings. Since the historical justification for abolition relies in part upon this misconception, the historical rationale offers a policy basis narrower than the sphere to which the negligence rule applies: the negligence rule applies to all modern physical environments — urban, suburban, and rural — yet the historical rationale advanced for application of the negligence rule may be valid only with respect to modern urban property holdings. Furthermore, the abolitionist opinions never identified the precise characteristics of modern society, other than crowded living conditions in urban areas, that render the common law rules anachronistic. Instead, the critics of the common law categories have invoked several rather vague sources of social policy: "modern social mores and humanitarian values,"120 "industrialized urban society, with its complex economic and individual relationships,"121 or modern "accepted values and common experience."122

The other rationale for rejection of the common law categories concentrates on the results of application of the rules. Courts have noted that the procrustean application of the invitee, licensee, and trespasser categories has created harsh results.123 Inequitable verdicts have sometimes been attributed to the imposition on the jury of the artificial status categories as decision-making standards; if juries were to apply current

eighteenth and nineteenth centuries. 69 Cal. 2d at 113, 443 P.2d at 564–65, 70 Cal. Rptr. at 101. Some courts have been careless in their references to past systems of landholding, such as manorial estates. This type of land tenure system flourished principally in the tenth through twelfth centuries. See generally M. Keen, The Pelican History of Medieval Europe 47–60 (1969). Some of the vague references to "feudal" types of landholding in the case law might be historically accurate if the adjective were intended to describe manorial estates. But courts who use the term "feudal" seldom specify the type of estate in land to which they refer, so it is impossible to ascertain whether the discussions of past systems of landholding that appear in some opinions are well grounded. See, e.g., Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630 (1959); Antoniewicz v. Reszczynski, 70 Wis. 2d 836, 854, 236 N.W.2d 1, 14 (1975). One court associated manorial estates with eighteenth and nineteenth century England. Gould v. DeBeve, 330 F.2d 826, 829 (D.C. Cir. 1964). This is an inaccurate statement. By the eighteenth and nineteenth centuries, English society, economics, and landholding systems had changed so vastly that the large property holdings that remained in the hands of the nobility or wealthy entrepreneurs bore little resemblance to the manorial system of prior centuries. See G. Rudé, Revolutionary Europe 1783–1815, at 23 (1966).


community values, verdicts might be fairer.\textsuperscript{124} The nature of the inequitable results is particularly apparent in the context of the innocent child trespasser, where it seems unfair and unreasonable to permit his status to bar recovery for an injury resulting from an unreasonably dangerous activity or condition on a landowner's property.\textsuperscript{125} Classification of social guests as licensees also exemplifies the unfairness litigants encounter in application of the common law rules.\textsuperscript{126}

Recently, the common law system also has been criticized because it does not provide an equitable allocation of costs and risks of injury.\textsuperscript{127} Although the status approach antedated the use of the negligence concept,\textsuperscript{128} the former now appears anachronistic in the field of tort law; other types of tortious conduct have been analyzed under fault standards for many years.\textsuperscript{129} In his concurring opinion in \textit{Basso}, Chief Judge Breitel conceded that legal principles under the status classifications have not kept up with changes in societal perceptions of the landowner-entrant relationship.\textsuperscript{130} The fault basis of tort law is gradually shifting toward a theory of enterprise liability, with the goal of spreading costs of injury over larger portions of society and, when possible through insurance, reducing the financial impact of accidental injury.\textsuperscript{131} It has been suggested that application of the common


\textsuperscript{125} See note 105 supra.


\textsuperscript{127} See, \textit{e.g.}, Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 102 (D.C. Cir. 1972). \textit{But see id. at 108} (Judge Leventhal argued in his concurring opinion that the common law system does provide an equitable allocation of costs for injuries to third persons on residential premises, specifically excluding commercial property). The debate between Leventhal and the majority of the court on this and other issues is considered in Comment, Smith v. Arbaugh's Restaurant, Inc. \textit{and the Invitee — Licensee — Trespasser Distinction}, 121 U. PA. L. REV. 378 (1972).


\textsuperscript{129} See, \textit{e.g.}, Rowland v. Christian, 69 Cal. 2d 108, 111–12, 443 P.2d 561, 563–64, 70 Cal. Rptr. 97, 99–100 (1968) (discussion of common law categories in relation to §1714 of the California Civil Code). \textit{See also} HARPER \& JAMES, supra note 3, § 27.1, at 1432.


Law standards precluded explicit consideration of cost spreading or efficient allocation of societal resources.  

Application of the negligence standard would not impose undue burdens upon land occupiers because they would only be responsible for the precautions that were reasonably necessary in the circumstances of a specific case. Obligations of care would not be decided solely on the selection of a corresponding status label; instead, the legal standard of conduct would be shaped in light of the likelihood of the plaintiff's presence in the context of a particular case.  

**Effects of Change to Negligence Standard**  

Adoption of a negligence standard should produce more equitable results through the operation of the foreseeability test. One court emphasized that under a negligence rule, the key factor to be considered will be whether the visitor's presence was reasonably to be anticipated. Additional relevant factors include:  

- 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.  

Legal analysis under the negligence standard would involve consideration of all the circumstances behind the plaintiff's presence, rather than just a limited aspect of the relevant events.  

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132. Hughes, *Duties to Trespassers*, supra note 39, at 691, 700–01.  

133. Some skepticism has been expressed regarding the ability of residential occupants to absorb costs of injury on their property. Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 108 (D.C. Cir. 1972) (Leventhal, J., concurring). See Ouellette v. Blanchard, 364 A.2d 631, 636 (N.H. 1976) (dissenting opinion). But see Cooper v. Goodwin, 478 F.2d 653, 656 (D.C. Cir. 1973) ("financial hardship should be no excuse for failing to take those measures which are within a defendant's capacity").  


The negligence standard tends to simplify the law of land occupier liability by eliminating the exceptions and mitigating doctrines created and applied under the common law system. A negligence standard would have particularly desirable effects for different types of plaintiffs. The new rule would mean that landowners could no longer be assured of a relatively high degree of legal protection for their negligent acts toward trespassers. Juries would also be allowed to consider possible differences in motives and circumstances when entrants are present on land without the express or implied permission of the occupant, eliminating the need to mitigate the irrational results that flow from identical treatment of child and adult trespassers. For lawful entrants on property, recovery under a negligence standard will not depend upon the existence of a financial relationship between the parties because the economic benefit test will no longer be used. This change would also benefit persons who would otherwise be licensees by curtailing stress on permission, tied to the protection of the property owner's exclusive possession, and by concentrating on the likelihood of the presence of the entrant. The different focus of the negligence test would therefore terminate the sharp differentiation in treatment of social and business guests. Furthermore, liability to public employees such as firemen and policemen would be evaluated according to the foreseeability of their presence; the negligence test would allow consideration of issues of cost spreading, predicated on a recognition of the benefits received from emergency municipal services.

137. See note 91 and accompanying text supra.
138. See, e.g., Gould v. DeBeve, 330 F.2d 826, 829 (D.C. Cir. 1964) (footnote omitted): [T]he concept of trespass . . . casts its net very widely indeed . . . . There are, obviously, trespassers and trespassers. The poacher upon the manorial estate of 18th Century England — that figure about whom revolved so much of the developing law of landowners' liabilities to unauthorized visitors — defies identification with the child in this case, albeit a common legal label has been affixed to them.

Maryland law on this point is discussed at notes 105 to 108 and accompanying text supra.

The danger of application of legal fictions to mitigate harsh results to trespassers is examined in James, Trespassers, supra note 46, at 180–82. He argues that the decisive factor in most cases is the likelihood of the plaintiff's presence, an inquiry that suggests a negligence standard. Id. If fictions had been employed consistently, not sporadically, however, they might have become new rules of law. HARPER & JAMES, supra note 3, §27.7, at 1469.


140. Cf. HARPER & JAMES, supra note 3, §27.8, at 1471 (wider application of foreseeability in land occupier liability decisions has influenced licensee cases, so that the standard of care corresponds more to that owed to known or constant trespassers); James, Licensees and Invitrees, supra note 21, at 605–06 (permission is increasingly in disfavor as a basis for liability in personal injury).

Possible Parallel Development in the Field of Tort Liability of Landlords

Another aspect of abolition of judicially fashioned standards and introduction of a negligence test for landowners is the parallel development in landlord tort liability. Landlords have traditionally enjoyed an almost absolute immunity from tort liability for injuries attributable to defective conditions on leased property.\textsuperscript{142} Liability has been imposed only where injury resulted from hidden dangers which the tenant could not be reasonably expected to discover and which were known to the landlord, where injuries resulted from defects or dangerous conditions on premises leased for use by the public, and where injuries were sustained on premises negligently repaired by the landlord.\textsuperscript{143} Otherwise, the extent of a landlord's liability is commensurate with the degree of control retained over portions of the leased premises.\textsuperscript{144} Application of the control test, however, often amounts to a rule of caveat lessee.\textsuperscript{145}

New Hampshire, refusing to create further exceptions, repudiated the control test and replaced it with a negligence standard in \textit{Sargent v. Ross}.\textsuperscript{146} The rationale given in \textit{Sargent} for abolition of the control test parallels to a remarkable degree the reasons presented in cases abrogating entrant status. First, the current concern for human safety can no longer tolerate such tort immunity.\textsuperscript{147} Second, the historical basis for landlord immunity is no longer persuasive.\textsuperscript{148} At common law, the landlord was under no obligation to care for the leased premises because he could not re-enter the property until the lease expired.\textsuperscript{149} The \textit{Sargent} court also noted that it had previously ruled in favor of implied warranties of habitability, nullifying the rule of caveat emptor.\textsuperscript{150} Traditional criteria of liability in New Hampshire — control of the premises, common or public use, and hidden defects — which formerly had to be established before the question of the landlord's negligence would even be addressed, were retained in \textit{Sargent} as factors to be considered

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\textsuperscript{144} See 2 Fordham Urb. L.J. 647, 650 (1974).
\textsuperscript{146} 113 N.H. 388, 308 A.2d 528 (1973) (four year old girl killed in fall from negligently maintained outdoor stairway on common area of landlord's property).
\textsuperscript{147} Sargent v. Ross, 113 N.H. 388, 396, 308 A.2d 528, 533.
\textsuperscript{148} Id.
\textsuperscript{149} See 35 Ohio St. L.J. 212, 215 (1974).
\textsuperscript{150} 113 N.H. at 396–98, 308 A.2d at 533–34 (referring to Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971), which held that a lease includes an implied warranty of habitability).
\end{flushleft}
under the negligence standard, but only insofar as they were relevant to the issues of foreseeability and reasonableness of risks of harm.\textsuperscript{151} At least one commentator has suggested that other courts may implement the negligence standard for tort liability of landlords as a more desirable alternative than creating further exceptions to the control test.\textsuperscript{152} On the whole, abolition of landlord immunity for injuries to tenants or third persons may be viewed as part of a general erosion of the favored position enjoyed by land occupiers with regard to liability for injuries sustained on their property.\textsuperscript{153}

\textit{Partial Abolition}

Several jurisdictions — Connecticut, Louisiana, Massachusetts, Minnesota, and Wisconsin — have abandoned the invitee/licensee distinction and eliminated these categories completely, yet have refused to discard the trespasser classification.\textsuperscript{154} Rationales for abrogation of only the invitee and licensee categories closely resemble those given for complete abolition of the common law categories\textsuperscript{155} but relate more specifically to problems in differentiating between invitees and licensees. The partial abolition decisions commented on the highly technical and arbitrary nature of the status categories,\textsuperscript{156} the inequities that arise when similar factual situations

\begin{itemize}
\item \textsuperscript{151} 113 N.H. at 398, 308 A.2d at 534.
\item \textsuperscript{152} Love, \textit{supra} note 146, at 117; 43 U. CIN. L. REV. 218, 224 (1974).
\item \textsuperscript{153} See Sargent v. Ross, 113 N.H. 388, 397-98, 308 A.2d 528, 534 (1973); Love, \textit{supra} note 146, at 118-20.
\item \textsuperscript{154} Connecticut abolished the licensee/invitee distinction by statute. \textit{CONN. GEN. STAT. ANN.} § 52-557a (West Supp. 1977), which reads in pertinent part: “The standard of care owed to a social invitee shall be the same as the standard of care owed to a business invitee.” Unlike the cases in which the common law categories were completely abolished, the partial abolition decisions all involved situations in which the plaintiffs—would traditionally have been classified as licensees. Alexander v. General Accident Fire & Life Assurance Corp., 98 So. 2d 730 (La. App. 1957) (woman tripped on carpet while guest of son-in-law); Mounsey v. Ellard, 363 Mass. 693, 297 N.E.2d 43 (1973) (policeman fell on accumulation of ice as he was leaving defendant’s house after delivering summons); Peterson v. Balach, 294 Minn. 161, 199 N.W.2d 639 (1972) (eleven year old guest of daughter of owner of cabin asphyxiated by carbon monoxide released from gas refrigerator); Antoniewicz v. Reszczynski, 70 Wis. 2d 836, 236 N.W.2d 1 (1975) (friend of the family slipped on icy back porch when he came to pick up the defendant’s daughter).

Florida has expanded the land occupier’s obligation of reasonable care by treating licensees who are expressly or implicitly invited onto property as invitees. The categories of uninvited licensee and trespasser are still used. Wood v. Camp, 284 So. 2d 691, 695 (Fla. 1973). It is also interesting to note that although never expressly set forth as a rule, Montana courts may be working with only two categories of entrants on land, invitees and noninvitees. \textit{See Comment, Liability for Personal Injuries Caused by Use and Occupation of Real Estate}, 30 MONT. L. REV. 153 (1969). In operation this structure may accomplish the goal of formal partial abolition, but the categories that Montana has combined are those of licensee and trespasser. \textit{Id.} at 154.

\item \textsuperscript{155} See text accompanying notes 113, 116 & 123 \textit{supra}.
\item \textsuperscript{156} Alexander v. General Accident Fire & Life Assurance Corp., 98 So. 2d 730, 732-33 (La. App. 1957); Peterson v. Balach, 294 Minn. 161, 166-67, 199 N.W.2d 639,
result in inconsistent decisions,\textsuperscript{157} and the societal interests in personal welfare.\textsuperscript{158}

One reason for retention of the trespasser category was a perception that considerations governing the care owed trespassers may be fundamentally different from those establishing some degree of protection for lawful entrants.\textsuperscript{159} As a corollary to the "fundamental difference" argument, some courts characterize the differences between classes of trespassers as miniscule when compared with the disparities between individual invitees and licensees.\textsuperscript{160} This proposition overlooks the variety of possible circumstances in which a trespasser may enter upon land.\textsuperscript{161}

Notions of judicial restraint motivated the retention of the trespasser classification by some courts. Several decisions refused to consider the merits of the trespasser status in the abstract, choosing to defer the question until a case actually involved a trespasser.\textsuperscript{162} Conditions for decision making would then be optimal because the issues would be fully briefed and
argued. One court based its refusal to examine the trespasser classification in part on the ground that a criminal statute dealing with liability to trespassers existed in the jurisdiction.¹⁶³

Those partial abolition decisions that have been predicated on the existence of a fundamental difference between lawful and unlawful entrants on property apparently did not realize that these differences in circumstances would be considered under a negligence standard. Where judicial restraint influenced the refusal to abolish the trespasser category, courts have soundly exercised their discretion to preserve the integrity of their decision making. It is quite possible that when cases calling for application of the traditional trespasser classification arise, these courts will extend their appreciation of the significant improvements — enhancement of fairness to litigants, improved manageability of the law in its application, and clarification of legal standards — that adoption of the negligence standard can achieve.¹⁶⁴

**JUDICIAL CONTROVERSY CONCERNING ABOlITION OF THE COMMON LAW CATEGORIES**

Many courts that have refused to discard the traditional status-based system explicitly or implicitly concede that the overwhelming difficulties in assigning a plaintiff to a particular category will eventually compel abolition,¹⁶⁵ so that change will only be a matter of time. Once the decision to abandon the common law standards has been made, judges must decide how and when to modify the common law rules.

Opposing views on how and when to abolish the common law categories reflect philosophical differences about the judicial function in the legal process. In determining the manner in which the common law classifications may be abrogated, courts have displayed a concern for preserving the integrity of decision-making processes, maintaining respect for the judi-

¹⁶³. Peterson v. Balach, 294 Minn. 161, 164–65, 199 N.W.2d 639, 642 (1972). The dissent in Ouellette v. Blanchard, 364 A.2d 631, 637 (N.H. 1976), also noted the existence of a statute defining landowner liability to trespassers. The majority opinion did not consider this to be a controlling consideration; they refused to extend the criminal statute to govern a civil case.

¹⁶⁴. In Antoniewicz v. Reszczynski, 70 Wis. 2d 836, 236 N.W.2d 1 (1975) and in Peterson v. Balach, 294 Minn. 161, 199 N.W.2d 639 (1972), the courts did not refuse to abolish the trespasser category. They merely deferred consideration of the question until presented with a case that properly raised the trespasser issue. Accord, Cooper v. Goodwin, 478 F.2d 653, 658–59 (D.C. Cir. 1973) (Leventhal and Sobeloff, JJ., concurring).

¹⁶⁵. See, e.g., Mounsey v. Ellard, 363 Mass. 693, 717–18, 297 N.E.2d 43, 57–58 (1973) (Kaplan, J., concurring); Cunningham v. Hayes, 463 S.W.2d 555, 559 (Mo. 1971). Cf. Wood v. Camp, 284 So. 2d 691, 696 (Fla. 1973) (noting that the growth of population in the United States has been accompanied by increased crowding in living conditions, so that personal safety must be expressly considered in land occupier liability cases); Taylor v. New Jersey Highway Auth., 22 N.J. 454, 463, 126 A.2d 313, 317 (1956) (immunities have rightly been yielding to competing interests in personal safety).
Liability of Owners and Occupiers

The issue of when precedent should be overruled has been widely debated by judges and commentators. Proponents of the continued use of the common law classes have usually adopted a conservative outlook toward the constraints of precedent, while decisions abolishing the invitee, licensee, and trespasser categories have endorsed a more liberal view of stare decisis. The conservative view prefers a gradual evolution of the law through strict adherence to the doctrine of stare decisis; this method preserves the stability of the law, ensures predictable application of the law through respect for precedent, and minimizes any chances of egregious legal or policy errors as a result of hasty, comprehensive change. Adherents to this philosophy believe that sweeping changes in the law are properly the province of the legislature. However, some judicial critics of...
more rapid and broader change have acknowledged that the policy bases of the status and negligence theories are the same since both rules consider the purpose for entrance upon property, the prevention of future harm, and the moral blame attached to the defendant's conduct. It is doubtful, therefore, that extensive and rapid change in this area is likely to be accompanied by fundamental policy errors. In addition, fundamental alterations in tort law are hardly unprecedented.

The more liberal approach, on the other hand, favors the overruling of precedent when the reason for the rule no longer exists or when application of the rule is no longer feasible. If compelling reasons for change are evident and if the legislature has not yet acted to revise the law, liberal courts generally assume a more activist role and break with precedent.

The common law rules may no longer merit enforcement as rules of law.

First, the difficulty in applying the status distinctions and the logically inconsistent results in similar factual situations indicate that the categories


176. See cases collected in note 167 supra.

177. See Hughes, Duties to Trespassers; supra note 39, at 686.
do not promote the stability and predictability of law that the conservative viewpoint prizes. Second, strict application of the common law rules no longer reflects societal values, for the prevailing view is that a landowner should accommodate the competing interests in human safety when deciding how to use his property. Third, the operation of the three categories may produce arbitrary and harsh results that are inconsistent with the role of courts in promoting fairness and working justice between parties to litigation.

When replacing an old rule of law, it is important to consider whether the substituted rule will be susceptible to abuse in its application and whether the litigants will be treated at least as fairly as under the former standard. Although juries may be particularly suited to decision making under a negligence standard because reference to contemporary community values is indispensable to a determination of the proper degree of care owed by a defendant, they have also been viewed with skepticism and distrust. Adoption of the negligence standard may favor plaintiffs


181. This seems to be the essence of Breitel's concerns about the negligence standard in Basso v. Miller, 40 N.Y.2d 233, 243, 352 N.E.2d 868, 873–74, 386 N.Y.S.2d 564, 569 (1976). Cf. Payne, supra note 35, at 374 (the abolitionist approach ignores the continuing necessity for rules as a check on judicial discretion).

182. See O. Holmes, THE COMMON LAW 98 (1881). Cf. Cooper v. Goodwin, 478 F.2d 653, 656 (D.C. Cir. 1973) (jury members should be given wide latitude in exercising their common sense); James, Functions of Judge and Jury, supra note 28, at 685 (noting disagreement among commentators over juries' abilities to perform their fact-finding role).


Until comparatively recently it was thought . . . that courts had no power to find facts, but now it is universally recognized that courts not only may but often must make findings of fact . . . . There seems, therefore, no reason why it should not be recognized that the function which the jury exercises in defining standards of conduct is that of declaring the standard by which the consequence of some particular act or omission is to be determined. Whatever else this is, it is not that of finding the existence of any fact or facts, and is not a law-declaratory function as the term is ordinarily used. It is something between the two, necessary to the proper administration of the pre-existing broadly stated law by making it capable of application to the facts of specific litigated cases . . . . Bohlen, supra note 166, at 115. But see Ouellette v. Blanchard, 364 A.2d 631, 636–37 (N.H. 1976) (dissenting opinion), where it is urged that the necessary result of abolitionist decisions will be the complete withdrawal of the court from its traditional role. Elimination of judicial guidelines in setting rules of law would diminish the court's ability to control abuses and would open the way to ad hoc decision making. Compare Ouellette v. Blanchard, 364 A.2d 631 (N.H. 1976) with Hughes, Duties to Trespassers, supra note 39, at 700.
because juries, which are thought to favor plaintiffs, will have an expanded role in decision-making processes. Advocates of the negligence standard might challenge their critics, however, by pointing out that it was similarly possible for judges to apply the common law categories sympathetically to plaintiffs by artful phrasing of jury instructions. Under the status classifications, the judge determined the elements necessary to categorize a plaintiff; the only role of the jury beyond its usual fact-finding task was to determine the classification to which the plaintiff properly belonged based on the evidence presented in the case. In contrast, under a negligence standard, the jury determines what constitutes the proper standard of care according to what was reasonable in the circumstances.

Assuming that juries favor plaintiffs, there is evidence that this propensity may not be an unbridled force. Judges still play an important role under the negligence standard in limiting the possibilities of jury mischief. Directed verdicts, for instance, can effectively block jury action. Judicial implementation of a negligence standard in France did not increase the incidence of pro-plaintiff verdicts by any substantial amount. Moreover, one commentator has suggested that greater control of the jury can be achieved by careful phrasing of jury instructions and by the use of special or interrogatory verdicts. Other traditional means of checking irresponsible jury behavior are also available to judges, such as judgment non obstante veredicto.

Commentators disagree over the administrative effects of the adoption of a negligence standard for land occupier liability cases. It has been argued that adoption of a negligence standard would stimulate more appeals. Other purported drawbacks in application of the negligence standard may be illusory. For instance, there is no evidence to substantiate the claim that adoption of a negligence standard would spur more land occupier liability cases. And there is no reason to fear a greater than usual risk of collusion in this type of case, considering the mechanisms available to courts for guarding against fraud.

Despite some administrative and procedural disadvantages to the application of the negligence standard, there are ways to control the potential for abuse. In any case, the potential problems are no greater than

186. Hughes, Duties to Trespassers, supra note 39, at 684.
187. James, Functions of Judge and Jury, supra note 28, at 679–85.
188. Payne, supra note 35, at 374. Contra, Hughes, Duties to Trespassers, supra note 39, at 703–04. Nor is there any evidence that more lawsuits were filed in England after that country's change to the negligence standard. See McDonald & Leigh, supra note 35, at 66.
189. Hughes, Duties to Trespassers, supra note 39, at 702.
those for other types of negligence actions. Furthermore, the "opening of the floodgates" argument that use of the negligence standard will bring increased litigation seems implausible. The policy advantages of the substantive changes accomplished through abolition of the common law standards may outweigh the concern over the possible procedural abuse of the negligence standard.

Concurring and dissenting opinions in decisions that have abolished the common law rules have expressed a fear that the negligence standard is so vague that land occupier liability would be left in a vacuum if the invitee, licensee, and trespasser categories were discarded. The ability of the judiciary to decide confidently this type of case would be hampered, according to this view, because courts would have to wait until an adequate number of cases were decided so that new rules could be deduced. Nevertheless, it seems unlikely that the negligence standard would be unworkable in the context of land occupier liability, given its viability in other areas of tort law for many years. In applying negligence theory to a new area, courts can refer to an existing body of relevant concepts and policies with which they are already familiar. Use of the negligence standard in land occupier liability cases could be analogized to other torts analyzed on this basis. Although the common law doctrine implicitly considered certain issues — foreseeability, cost spreading, prevention of injury — that a negligence standard explicitly evaluates, those questions were never systematically weighed as they would be under a negligence standard. The wider scope of issues considered under the latter theory is more compatible with the complex range of competing interests in modern society.

**CONCLUSION**

The common law status system has been challenged by courts and commentators. Arbitrary and harsh results on one hand and the complexity of application on the other have led many courts to inquire whether any justification remains to support continued adherence to these rules. The common law system has been severely undermined in those jurisdictions

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195. See Rowland v. Christian, 69 Cal. 2d 108, 117, 443 P.2d 561, 567, 70 Cal. Rptr. 97, 103 (1968). Cf. Hughes, Duties to Trespassers, supra note 39, at 693 (noting that under a negligence standard all relevant factors will be considered, allowing judges and juries to pursue appropriate social policies with some degree of ability to modify their positions if conditions change).
that manufacture exceptions because of judicial concern for fairness to litigants. This suggests that some courts are willing to serve justice at the expense of strict adherence to the common law categories. Other jurisdictions, like Maryland, attempt to fit diverse cases into strict rules of law. These defects in the traditional system convinced courts in several jurisdictions to reject its continued use, adopting the negligence test of reasonableness in the circumstances. This trend has been based on the conclusion that favoring unrestricted use of property by a land occupier is unacceptable if not balanced against societal interests in protecting human safety. Although the historical bases for the traditional rule have sometimes been misinterpreted, the abolitionist decisions have relied heavily on the distinctions between contemporary and nineteenth century social and economic conditions to show that the reasons for the traditional rules no longer exist.

The weakness of the historical basis for the common law rules does not appear to be the most persuasive argument for their abolition. Since few jurisdictions have not expressed some dissatisfaction with the invitee, licensee, and trespasser categories, it appears that the real issue is the propriety of overruling the common law standards. Opinions reflect a basic disagreement over the strength of stare decisis in a situation where precedents have minimal rational merit. To those courts that decide according to the rules of stare decisis only when precedent is independently persuasive, the negligence standard appears to be theoretically and practically superior. Despite rhetoric emphasizing the values of predictable and stable application of rules of law, those jurisdictions that have adhered to the common law standards have usually made so many exceptions to the categories that this argument has little force. Abolition of the common law rules of status encourages simplified application of rules of law and sound social policy. It also represents a classic confrontation between liberal and conservative views on judicial process. In land occupier liability cases, it appears that the argument favoring the overruling of the common law rules is overwhelmingly persuasive.