St. Mary's Law Journal

Volume 5 | Number 3 Article 9

9-1-1973

Constructive Knowledge of Defective Condition Is Imposed upon Landowner.

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Finally, this further strengthening of the federal policy of disclosure maintains the balance between the private interest of the inventor in protection of his investment and the public interest of the government in the enrichment of the public domain. It also stabilizes the balance between the states' interest in protection of contract and agency law and the federal interest in dissemination of knowledge and its use to the public. *Kewanee* attempts to strengthen and clarify all these varied interests, while also re-enforcing their interdependent relationships.

Margaret Gray Knodell

TORTS—Duty Of Care—Constructive Knowledge Of Defective Condition Is Imposed Upon Landowner

State v. Tennison, 496 S.W.2d 219 (Tex. Civ. App. — Austin 1973, no writ).

Judyth Tennison, a state employee, was seriously injured when she slipped and fell on an oily floor in a state-owned building. As a result, she underwent spinal surgery, and will require medical treatment for the rest of her life. Since an employee of the state was negligent in his maintenance of the floor, the issue of the case became what duty of care the state owed to the plaintiff.

The Texas Tort Claims Act[1] provides that the state owes only that duty of care which a landowner owes to a licensee on his land. The state argued this to be a duty not to injure the plaintiff willfully, wantonly, or through gross negligence.[2] The trial court, however, applied the standard of care set out in the *Restatement (Second) of Torts*,[3] concluding that if a licensor

1. TEX. REV. CIV. STAT. ANN. art. 6252-19, § 18(b) (1970), states that "As to premise defects, the unit of government shall owe to any claimant only the duty owed by private persons to a licensee on private property . . . ."

2. *See* Renfro Drug Co. v. Lewis, 149 Tex. 507, 235 S.W.2d 609 (1950); Carlisle v. J. Weingarten, Inc., 137 Tex. 220, 152 S.W.2d 1073 (1941); St. Clergy v. Northcutt, 448 S.W.2d 847 (Tex. Civ. App.—Beaumont 1969, no writ); Mendez v. Knights of Columbus Hall, 431 S.W.2d 29 (Tex. Civ. App.—San Antonio 1968, no writ); Chekanski v. Texas & N.O.R.R., 306 S.W.2d 935 (Tex. Civ. App.—Houston 1957, writ ref'd n.r.e.).

3. RESTATEMENT (SECOND) OF TORTS § 342 (1965) which proposes that:

> A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, and only if,
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> (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
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> (b) he fails to exercise reasonable care to make the premises safe, or to warn

knows of a dangerous condition on his land, a duty arises to warn a licensee or to make the condition reasonably safe. The defendant appealed, claiming lack of actual knowledge of the hazard. HELD—*Affirmed.* Where a licensee is involved, constructive knowledge is sufficient to impose a standard of ordinary care on a landowner.[4]

The common law distinctions of invitees and licensees, and a landowner's duty of care toward each, originated in England and were significantly influenced by feudal concepts concerning the sanctity of land.[5] In a society where emphasis was placed on land ownership and possession, courts were hesitant to impose liability on the upper class citizens for injuries sustained by entrants on the land even if the harm resulted from the landowner's negligence.[6] Accompanying this notion of the sanctity of land was the related idea that economic benefit was to be gained only from the free use and exploitation of realty.[7] This economic aspect was emphasized further during the 19th century by the demands of the landowning class for limitations on the scope of their liability.[8] Thus, in 1856, a court concluded that

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the licensees of the condition and the risk involved, and

(c) the licensees do not know or have reason to know of the condition and the risk involved.

4. The court of appeals in State v. Tennison, 496 S.W.2d 219 (Tex. Civ. App.—Austin 1973, no writ) found that the employee who was responsible for the maintenance of the floor was charged with actual knowledge that a dangerous condition existed due to his negligence, and thus the State was charged with constructive knowledge. *Id.* at 222.

5. Bohlen, *The Duty of a Landowner Toward Those Entering His Premises of Their Own Right*, 69 U. PA. L. REV. 237, 237-39 (1921); Marsh, *The History and Comparative Law of Invitees, Licensees, and Trespassers*, 69 L.Q. REV. 182, 183-86 (1953).

6. The landowner was considered sovereign within the boundaries of his land and therefore was allowed to do as he wished on or with his own domain. F. BOHLEN, STUDIES IN THE LAW OF TORTS 163 (1926). *See generally* Bohlen, *The Duty of a Landowner Toward Those Entering His Premises of Their Own Right*, 69 U. PA. L. REV. 237, 238-39 (1921); Marsh, *The History and Comparative Law of Invitees, Licensees, and Trespassers*, 69 L.Q. REV. 182, 183-86 (1953).

7. 2 F. HARPER & F. JAMES, THE LAW OF TORTS 1432 (1956); Note, *Negligence —Occupiers of Land*, 3 SUFF. L. REV. 432, 433 (1969).

8. Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 101 (D.C. Cir. 1972). The lack of adequate transportation has also been cited as a reason for limiting a landowner's liability because of the sparseness of land settlements and the resulting inability of owners to inspect or maintain distant holdings. *Id.* at 101. The increasing influence of the jury during the 19th century also contributed to the limitation on the liability of owners and occupiers. The privileged position of the landowner was taken for granted and juries, seldom comprised of the aristocracy, envisioned themselves injured in their roles as potential land visitors. Thus, Justice Williams held as a matter of law that there was no negligence when an illiterate fell down the defendant's stairway, stating, "Every person who has any experience in courts of justice knows very well that a case of this sort against a railway company could only be submitted with one result." Marsh, *The History and Comparative Law of Invitees, Licensees, and Trespassers*, 69 L.Q. REV. 182, 185-86 (1953), *quoting* Toomey v. London, B. & S.C. Ry., 140 Eng. Rep. 694 (C.P. 1857). There was obviously a need to alleviate the burden on the defendant and it proved easier to submit questions to the jury by devising standards to be met by the occupier.

a social guest was a mere licensee and the landowner was not obligated "to make the place safe" for him.[9] However, a division of opinion developed as to who qualified as an invitee and a licensee and what standard of care was to be extended to each. *Indermaur v. Dames*[10] established that invitees are persons who go upon land for business purposes in which both the entrant and the landowner share an interest.[11] Concurrently, it was decided that if a place is held out as being public, there is an implied invitation to come upon the land, and the entrant has a right to expect the premises to be safe.[12] This "public invitation" led to an increased standard of care for many landowners even though they received no direct benefit from the plaintiff's visit.

Although these distinctions originated in England, American courts readily adopted them as part of the common law.[13] It was discovered, however, that these classifications were too rigid and often led to inequitable results.[14]

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9. Sideman v. Guttman, 330 N.Y.S.2d 263, 266 (Sup. Ct. 1972), *citing* Southcote v. Stanley, 156 Eng. Rep. 1195 (Ex. 1856). The plaintiff was classified as a social guest because he was merely visiting the defendant hotel owner when he was injured by a piece of falling glass.

Although the reason usually given for classifying a social guest as a mere licensee is that the guest is expected to take the premises as he finds them, and that he should not expect precautions to be taken that would give him better safety than members of the owner's family, Dean Prosser wonders if this is in accord with present social customs. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 379 (4th ed. 1971). *See* RESTATEMENT (SECOND) OF TORTS § 330, comment *h* (1965).

10. L.R. 1 C.P. 274 (1866). Plaintiff, a gas-fitter, was injured while making repairs in defendant's sugar-refining factory.

11. *Id.*

12. Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573, 578 (1942), *citing* Corby v. Hill, 140 Eng. Rep. 1209 (C.P. 1858). In *Corby*, the plaintiff was injured while traveling on a road leading from the public highway to a public asylum in order to visit the asylum's superintendent. The court found for the plaintiff claiming the defendants had induced him to travel on the road and consequently into a stack of slates left on the unlighted road.

13. RESTATEMENT (SECOND) OF TORTS § 330 (1965) defines a licensee as one "privileged to enter or remain on land only by virtue of the possessor's consent." Originally, the only duty of care owed to a licensee was not to injure him willfully, wantonly, or by gross negligence. *See, e.g.*, Cudahy Packing Co. v. McBride, 92 F.2d 737 (8th Cir. 1937), *cert. denied*, 303 U.S. 639 (1938). An invitee is either a "public invitee . . . invited to enter or remain on land as a member of the public" for a public purpose, or a "business visitor . . . invited . . . for a purpose directly or individually connected with business dealings with the possessor of the land." RESTATEMENT (SECOND) OF TORTS § 332 (1965). A landowner owes an invitee a duty to exercise ordinary care and prudence to keep the premises reasonably safe, and also a duty to warn the invitee of all known dangers. *See* Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573 (1942). The absence of business dealings generally distinguishes a licensee from an invitee, and the element of consent distinguishes him from a trespasser who "enters or remains upon land in possession of another without a privilege to do so created by the possessor's consent or otherwise." RESTATEMENT (SECOND) OF TORTS § 329 (1965).

14. The dissatisfaction with the rigidity of the distinctions has been noted. Comment, *Negligence—Occupiers of Land*, 3 SUFF. L. REV. 432, 434 (1969), *citing* Dunster v. Abbott [1953] 2 All E. R. 1572 where Lord Denning stated:

Consequently, a myriad of subclassifications developed which has produced an extremely complex system of determining a landowner's liability toward entrants upon his land.[15] Various jurisdictions began to develop exceptions to the common law in cases involving "dangerous instrumentalities,"[16] "concealed traps,"[17] and "active negligence."[18] The doctrine of the "attractive nuisance" was developed, imposing further liability on unforeseeing landowners.[19]

Because this type of patchwork theory was difficult to apply, it encouraged courts to develop other exceptions to bypass inevitably harsh and inequitable results.[20] Exceptions to the classifications have since become so readily available that the firmness and consistency of the law are constantly being challenged.[21] Because the subclassifications and distinctions are shadowy

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A canvasser who comes on your premises without your consent is a trespasser. Once he has your consent he is a licensee. Not until you do business with him is he an invitee. Even when you have done business with him, it seems rather strange that your duty towards him should be different when he comes up to your door from what it is when he goes away.

Another result has been the expanding of the duty owed to licensees. Thus, the court in Shaw v. Weigartz, 135 N.W.2d 565, 568 (Mich. Ct. App. 1965), *quoting* Annot., 25 A.L.R.2d 602, declared that the host owes the duty not to injure, by either active or passive negligence, a guest whose presence is known. It also stated that a host can not set a trap or pitfall, and that he must warn against, or remove harmful defects which the guest is not likely to discover for himself.

Also, several jurisdictions have reclassified the social guest as an invitee. Lunney v. Post, 248 So. 2d 504 (Dist. Ct. App. Fla. 1971); Alexander v. General Acc. Fire & Life Assurance Corp., 98 So. 2d 730, 732 (La. Ct. App. 1957); Preston v. Sleziak, 167 N.W.2d 477 (Mich. Ct. App. 1969); CONN. GEN. STAT. REV. § 52-557a (Supp. 1973).

15. *See* Note, 37 FORDHAM L. REV. 675-77 (1969); Note, *Torts*, 44 N.Y.U.L. REV. 426, 427 (1969).

16. *E.g.*, Beauchamp v. New York City Housing Auth., 240 N.Y.S.2d 15 (1963).

17. *E.g.*, Warner v. Lieberman, 253 F.2d 99 (7th Cir.), *cert. denied*, 357 U.S. 920 (1958).

18. *E.g.*, Dillingham v. Smith-Douglass Co., 261 F.2d 267 (4th Cir. 1958); Bylling v. Edwards, 14 Cal. Rptr. 760 (Dist. Ct. App. 1961).

19. *E.g.*, Johnson v. United States, 163 F. Supp. 388 (D. Mont. 1958), *aff'd*, 270 F.2d 488 (9th Cir.), *cert. denied*, 362 U.S. 924 (1959); Banker v. McLaughlin, 146 Tex. 434, 208 S.W.2d 843 (1948).

20. In Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir. 1972) the court stressed this viewpoint saying:

> A further indication that the classifications have become increasingly difficult to apply is that the current trend in modern tort law is a process of erosion of the once sharply defined categories into "increasingly subtle verbal refinements, . . . subclassifications among traditional common-law categories . . . [and] fine graduations in the standards of care which the landowner owes to each." There are two reasons for this: first, the harsh results produced by rigid classification cause courts to broaden certain classifications and expand the duties owed; and second, this expansion has produced even further confusion and conflict and a toleration of exceptions which apply only to individual cases.

Id. at 103 (citations omitted).

21. In discussing the problems of the subclassification system, the court in Peterson v. Balach, 199 N.W.2d 639, 644 (Minn. 1972) opined:

> While, admittedly, such a policy is better than a strict adherence to the classification system, it is unsatisfactory because it creates a rigid system which is at

and indistinct,[22] it is often difficult to determine the landowner's duty or liability. The courts have continued to create a maze of confusing exceptions to reach a desirable result rather than to abrogate the rigid distinctions of the common law.[23] In 1957, however, the United States Supreme Court in *Kermarec v. Compagnie Generale Transatlantique* [24] recognized that a trend toward a uniform duty of due care might abate the complexity of determining liability:

> [T]he classification and subclassifications bred by the common law 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, unevenly and with hesitation, towards "imposing on owners and occupiers a single duty of reasonable care in all circumstances."[25]

Additionally, considerations of humanity, equity, and logic have inspired this current movement toward the abandonment of the common law distinctions and the varying liability of landowners.[26] An increasing regard for human safety has also led to a realization of the inequalities existing in the present ambiguity-ridden system:

> A man's life or limb does not become less worthy of protection by the

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the same time complex, confusing, inequitable, and, paradoxically, nonuniform. Today, there are so many exceptions that it is nearly impossible to record all of them.

22. Alexander v. General Acc. Fire & Assurance Corp., 98 So. 2d 730, 733 (La. Ct. App. 1957).

23. *See* Note, *Negligence—Occupiers of Land*, 3 SUFF. L. REV. 432, 437 (1969).

24. 358 U.S. 625 (1959).

25. *Id.* at 631.

26. In Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir. 1972), the court discusses the distinctions:

> The realities of modern life teach us that these labels are today irrelevant to the jury's task. Personal status no longer depends on one's relation to real property. With urbanized society comes closer living conditions and a more gregarious population. The trespasser who steps from a public sidewalk onto a private parking lot today is not the "outlaw" or "poacher" whose entry was both unanticipated and resented in the nineteenth century. It is contrary to reason to accept as a settled principle of law that a parking lot owner actually varies his conduct according to the status of those who walk across his boundaries.

Id. at 102-03 (citations omitted).

Legal authorities are almost unanimously in accord in their criticism of the common law distinctions, feeling that they are the product of a forgotten era and finding very few reasons for continuing to adhere to its principles. *See* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir. 1972); Rowland v. Christian, 70 Cal. Rptr. 97 (1968); F. BOHLEN, STUDIES IN THE LAW OF TORTS 163 (1926); 2 F. HARPER & F. JAMES, THE LAW OF TORTS 1430, 1432 (1956); Bohlen, *The Duty of a Landowner Towards Those Entering His Premises of Their Own Right*, 69 U. PA. L. REV. 142 (1921); Keeton, *Torts, Annual Survey of Texas Law*, 25 SW. L.J. 1, 5 (1971); Marsh, *The History and Comparative Law of Invitees, Licensees, and Trespassers*, 69 L.Q. REV. 182, 359 (1953); Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573 (1942); Comment, *The Outmoded Distinction Between Licensees and Invitees*, 22 MO. L. REV. 186 (1957); Note, *Torts—Liability to Social Guests*, 33 ALBANY L. REV. 230 (1968); Note, 23 ARK. L. REV. 153 (1969); Note, *Negligence*, 47 J. URBAN L. 203 (1969); Note, *Negligence—Occupiers of Land*, 3 SUFF. L. REV. 432 (1969).

> law . . . because he has come upon the land of another without permission or with permission but without a business purpose. *Reasonable people do not ordinarily vary their conduct depending upon such matters,* and to focus upon the status of the injured party . . . in order to determine the question whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values. The common law rules obscure rather than illuminate the proper considerations which should govern determination of the question of duty.[27]

Presently, Texas does not adhere to the trend espoused by *Kermarek* and the California decision of *Rowland v. Christian.*[28] Texas courts have held that the duty which a landowner owes to an invitee, expressed or implied,[29] is a duty to use ordinary care to keep the premises in a reasonably safe condition[30] and to give adequate and timely notice and warning of concealed or latent perils known to him but unknown to the entrant.[31] If the entrant is a licensee, however, the only duty is not to injure him willfully, wantonly, or through gross negligence.[32] To this general rule, Texas has added an exception that if a licensor has *knowledge* of a dangerous condition, and the licensee does not, a duty arises on the part of the licensor to warn or make the condition reasonably safe.[33]

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27. Rowland v. Christian, 70 Cal. Rptr. 97, 104 (1968) (emphasis added). It does not require any more effort to prepare one's premises for a social guest or a licensee than it does for a business invitee. To allow the business visitor the "luxury" of ordinary care without affording a social guest the same protection is without legal logic. As one critic pointed out:

> It is customary for possessors to prepare as carefully, if not more carefully, for social guests as for business guests; furthermore, the social guest has reasons to believe that his host will either make conditions on the premises safe or at least warn of hidden danagers.

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

28. 70 Cal. Rptr. 97 (1968).

29. Generally, it has been held that to claim the status of an implied invitee, it must appear that the purpose for going on premises owned by another, or under the control of another, was for the benefit of the owner. Renfro Drug Co. v. Lewis, 149 Tex. 507, 235 S.W.2d 609 (1950); Taylor v. Fort Worth Poultry & Egg Co., 112 S.W.2d 292 (Tex. Civ. App.—Fort Worth 1937, writ dism'd); Kruse v. Houston & T.C.R.R., 253 S.W. 623 (Tex. Civ. App.—Galveston 1923, no writ); Shawver v. American Ry. Express Co., 236 S.W. 800 (Tex. Civ. App.—Dallas 1921, writ ref'd). This rule, however, has been relaxed. In Carlisle v. J. Weingarten, Inc., 137 Tex. 220, 223, 152 SW.2d 1073, 1075 (1941), the court said the essential factor was whether the premises were public or private. *See* Kallum v. Wheeler, 129 Tex. 74, 101 S.W.2d 225 (1937).

30. Renfro Drug Co. v. Lewis, 149 Tex. 507, 235 S.W.2d 609 (1950); Walgreen-Texas Co. v. Shivers, 137 Tex. 493, 154 S.W.2d 625 (1941); Carlisle v. J. Weingarten, Inc., 137 Tex. 220, 152 S.W.2d 1073 (1941); Kallum v. Wheeler, 129 Tex. 74, 101 S.W.2d 225 (1937).

31. Triangle Motors v. Richmond, 152 Tex. 354, 258 S.W.2d 60 (1953); Gulf Prod. Co. v. Quisenberry, 128 Tex. 347, 97 S.W.2d 166 (1936).

32. Renfro Drug Co. v. Lewis, 149 Tex. 507, 516, 235 S.W.2d 609, 615 (1950); Carlisle v. J. Weingarten, Inc., 137 Tex. 220, 221, 152 S.W.2d 1073, 1074 (1941); Dobbins v. Missouri, K. & T. Ry., 91 Tex. 60, 41 S.W. 62 (1897); Galveston Oil Co. v. Morton, 70 Tex. 400, 404, 7 S.W. 756, 757 (1888).

33. Gulf Ref. Co. v. Beane, 133 Tex. 157, 127 S.W.2d 169 (1937) (unguarded

This was the status of the law when Judyth Tennison was injured and the Austin Court of Civil Appeals declared that *constructive knowledge* was sufficient to impose a duty of ordinary care toward a licensee.[34] Constructive knowledge has been defined as that knowledge which "could be acquired by the exercise of ordinary care . . . ."[35] Thus, the court seems to be requiring that a landowner should exercise a duty of ordinary care so that he might have real or constructive knowledge of dangerous conditions on his premises. If he has such knowledge, either real or constructive, he is under a duty of ordinary care to make the premises safe or to warn the licensee of the danger, which is the same standard of care which a landowner owes to an invitee. Although the decision did not directly condone an abrogation of the common law distinctions, it appears that the court came remarkably close to adopting a uniform standard of ordinary care with regard to the liability of landowners to entrants upon their land.

Several jurisdictions have repealed the common law distinctions and established a uniform standard of ordinary care in their place. It is ironic, though significant, that the first jurisdiction to abolish the classifications was England.[36] Two years later a revolutionary step was taken by the United States Supreme Court in *Kermarec v. Compagnie Generale Transatlantique*[37] where the Court refused to apply the common law distinctions to admiralty law, claiming that the common law presently favors a duty of ordinary care in all circumstances.[38]

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hole on filling station premises); Gonzalez v. Broussard, 274 S.W.2d 737 (Tex. Civ. App.—San Antonio 1954, writ ref'd n.r.e.) (rocks on theatre playground); Texas-Louisiana Power Co. v. Webster, 59 S.W.2d 902 (Tex. Civ. App.—Dallas 1933), *aff'd* 127 Tex. 126, 91 S.W.2d 302, 306 (1936) (dangerous condition of power line). RESTATEMENT (SECOND) OF TORTS § 342(a) (1965) suggests the defendant must not only have actual knowledge of the condition, but actual realization of the danger it involves.

34. State v. Tennison, 496 S.W.2d 219, 222 (Tex. Civ. App.—Austin 1973), no writ).

35. Ebersole v. Sapp, 208 S.W. 156, 157 (Tex. Comm'n App. 1919, opinion adopted).

36. Rowland v. Christian, 70 Cal. Rptr. 97, 104 (1968), *citing* The Occupier's Liability Act, 5 & 6 Eliz. 2, C. 31 (1957); *see* Payne, *The Occupier's Liability Act*, 21 MODERN L. REV. 359 (1958). *See also* J. FLEMING, AN INTRODUCTION TO THE LAW OF TORTS 81 (1967), where he comments:

> Mounting irritation with the exceeding complexity, fragmentation, and even occasional capriciousness of the common law, combined with a lessening sense of the need to protect occupiers against the exactations of the general negligence standard (especially now that the civil jury had virtually disappeared from the scene) eventually prompted the passage in 1957 of the Occupiers Liability Act, with the avowed aim of admitting occupiers to full membership in the family of those acknowledging allegiance to the "neighbourly" obligation of reasonable care.

37. 358 U.S. 625 (1959). The plaintiff went aboard the S.S. Oregon to visit a crew member and, while leaving, fell down a stairway. He based his cause of action on the negligence of the crew in affixing a canvas runner to the stairway.

38. *Id.* at 631.

In 1968, the California Supreme Court adopted a single standard of due care under the circumstances in *Rowland v. Christian*[39] which has been the most far-reaching and influential decision regarding the abrogation of the common law standards.[40] The plaintiff, a social guest, was injured by a damaged faucet handle in the defendant's lavatory. Although the defendant knew of the faulty condition, he never warned the plaintiff of the danger. The court discarded the common law distinctions and applied the general doctrine of negligence embodied in California's civil code,[41] and further provided that "[t]he proper test to be applied . . . is whether in the management of his property [the owner or occupier] has acted as a reasonable man in view of the probability of injury to others . . . ."[42]

The decisions in these cases have produced a rational approach in determining landowners' liability for harm done to entrants upon their land, and results have been favorable in the cases following the new standards.[43] One

39. 70 Cal. Rptr. 97 (1968).

40. *Rowland* was first followed by Hawaii which abolished the distinctions in Pickard v. Honolulu, 452 P.2d 445 (Hawaii 1969). In *Pickard*, the plaintiff fell through a hole in the courthouse's unlighted restroom, and the court concluded that a landowner or occupier has a duty to exercise reasonable care for the safety of persons reasonably expected to be upon the premises, regardless of the status of the individual. In Mile High Fence Co. v. Radovich, 489 P.2d 308 (Colo. 1971), the Colorado Supreme Court reasoned that although the status of the injured person might be considered by the fact finders, the principal issue would be whether the owner acted in a reasonable manner in view of the probability of injury to persons entering upon the property. *Accord*, Smith v. Mill Creek Court, Inc., 457 F.2d 589 (10th Cir. 1972). The Minnesota Supreme Court, in Peterson v. Balach, 199 N.W.2d 639 (Minn. 1972), was next to adopt a standard of ordinary care after a young girl was killed in her sleep by gas from a leaking refrigerator. *Accord*, Krengel v. Midwest Automatic Photo, Inc., 203 N.W.2d 841 (Minn. 1973). The Court of Appeals for the District of Columbia also rejected the common law distinctions in Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir. 1972) and supplied excellent guidelines to aid the jury in its determination of reasonable conduct. These included the likelihood that the owner's conduct will cause injury, the seriousness of the injury if it occurs, and balanced against the interest which the landowner must sacrifice to avoid the risk or dangerous condition. *Id.* at 105.

41. CAL. CIV. CODE § 1714 (Deering 1971) provides that:

> Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself.

42. Rowland v. Christian, 70 Cal. Rptr. 97, 104 (1968). *Accord*, Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir. 1972); Brown v. Merlo, 106 Cal. Rptr. 388 (1973); Mark v. Pacific Gas & Elec. Co., 101 Cal. Rptr. 908 (1972); Mile High Fence Co. v. Radovich, 489 P.2d 308 (Colo. 1971); Pickard v. Honolulu, 452 P.2d 445 (Hawaii 1969); Rosenau v. City of Estherville, 199 N.W.2d 125 (Iowa 1972); Peterson v. Balach, 199 N.W.2d 639 (Minn. 1972). *Contra*, Epling v. United States, 453 F.2d 327 (9th Cir. 1971); Robles v. Severyn, 504 P.2d 1284 (Ariz. Ct. App. 1973); Werth v. Ashley Realty Co., 199 N.W.2d 899, 907 (N.D. 1972).

43. *See* Mark v. Pacific Gas & Elec. Co., 101 Cal. Rptr. 908 (Supp. 1972) where the fact that a college student was illegally unscrewing a street lamp when he was electrocuted was one of several factors to be weighed in determining liability when it was discovered that the defendant knew that the unscrewing of the lights was a

case which particularly demonstrates the equities achieved by the use of a single standard of ordinary care as to licensees and invitees is *Hurst v. Crowtero Boating Club, Inc.*[44] Defendant, a boating club, maintained a boat ramp and dock for the purpose of loading and unloading its members' boats. A "no swimming" sign had been located in the immediate area, but it had been missing for several months with no apparent effort by the club to replace it. Several members of the defendant club noticed the plaintiff and his friend swimming in the dock area, but no one bothered to warn them of the danger or to insure that the drivers of incoming boats saw the boys. Plaintiff was seriously injured when he was struck by a boat. Although the trial court found for the defendant, a Colorado Court of Appeals reversed, noting that the jury had been instructed incorrectly.[45] The status of the plaintiff as licensee, which barred his recovery in the trial court, was just one factor to be considered, and not conclusive of the liability of the defendant.[46] The new standard of due care prevented a great injustice, since defendant knew of the danger yet failed to replace the warning sign or caution the boys about swimming in the area.

The rationale is further revealed by examining *Gould v. DeBeve,*[47] decided in 1964, in which a 2-year-old "trespasser" fell out of a loosely screened window. The Court of Appeals for the District of Columbia failed to change the test of liability, but found in favor of the child claiming that his presence was foreseeable.[48] This merely created another subclassification, that of the foreseeability of 2-year-olds falling out loosely screened windows. Today this court could apply the standards established in *Smith v. Arbaugh's Restaurant, Inc.*[49] and might easily reach the same decision by weighing the foreseeability of injury and the likely seriousness of the injury against the inconvenience of the owner in amending the dangerous condition. This is a more equitable, less confusing method of determining liability than adherence to the subclassification system.

Other jurisdictions have either partially abrogated the distinctions or have

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frequent occurrence. In Titan Constr. Co. v. Nolf, 500 P.2d 377 (Colo. Ct. App. 1972) an employer was held liable because he failed to use reasonable care in providing an employee with a safe place to work, and in Minoletti v. Sabini, 103 Cal. Rptr. 528 (Cal. App. 1972), whether a landlord had violated his duty of care to a lessee when he failed to properly repair a window was held to be a question for the jury.

44. 496 P.2d 1054 (Colo. Ct. App. 1972).

45. *Id.* at 1055. The trial court had instructed that the duty owed to a licensee is "not to injure him by a wilful or wanton act or by an affirmative act of negligence." The Colorado Supreme Court, however, had abolished this strict adherence to the classification system and had established a uniform duty of ordinary care in Mile High Fence Co. v. Radovich, 489 P.2d 308 (Colo. 1971).

46. *Id.* at 1055.

47. 330 F.2d 826 (D.C. Cir. 1964).

48. *Id.* at 830.

49. 469 F.2d 97 (D.C. Cir. 1972).

expressed a desire to do so.[50] In 1955, the Supreme Court of Missouri emphasized its reluctance to depend completely on the classification system,[51] and four other states have declared that a social guest is an invitee.[52] Courts in New York,[53] Iowa,[54] and Washington[55] have also expressed discontent with the common law distinctions.

State v. Tennison[56] provides the Supreme Court of Texas with an excellent opportunity to reject the common law distinctions of invitee and licensee as the main criterion for recovery and to adopt a uniform standard of ordinary care. To the general rule that the only duty owed to a licensee is not to injure him willfully, wantonly, or through gross negligence,[57] Texas courts have added the exception that if a "licensor has *knowledge* of a dangerous condition, and the licensee does not, a duty arises on the part of the licensor to

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50. Dean Prosser notes that this system has incurred the displeasure of legal writers, several courts, and has started on its way to complete disregard. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 58, at 357 (4th ed. 1971).

In Louisville Trust Co. v. Nutting, 437 S.W.2d 484 (Ky. 1968), Kentucky may have abrogated the distinctions, but because it involved a child, the court's position can not yet be accurately determined.

States which have refused to adopt the *Rowland* doctrine and abolish the distinctions include Arizona, Mississippi, North Dakota, Ohio, and thus far, Texas. Robles v. Severyn, 504 P.2d 1284 (Ariz. Ct. App. 1973); Astleford v. Milner Enterprises, Inc., 233 So. 2d 524 (Miss. 1970); Werth v. Ashley Realty Co., 199 N.W.2d 899 (N.D. 1972); DiGildo v. Caponi, 247 N.E.2d 732 (Ohio 1969); Buchholz v. Steitz, 463 S.W.2d 451 (Tex. Civ. App.—Dallas 1971, writ ref'd n.r.e.).

51. Wolfson v. Chelist, 284 S.W.2d 447 (Mo. 1955). The court remarked:

> [W]e have not considered the classification . . . so inflexible as to preclude recovery where the facts merit an exception. In treating with cases where economic or social conditions create new and sound humanitarian bases for invoking a duty to take precautionary measures over and beyond those imposed upon an occupier in a particular occupier-entrant relationship, we think we have not and we trust we shall not too rigidly apply the law applicable to the entrant's legal status.

Id. at 451.

52. Cases cited note 13 *supra*. In addition, Ohio has created a special category for social guests. As the court said in Scheibel v. Lipton, 102 N.E.2d 453, 462 (Ohio 1951):

> A reasonable solution of the difficulty of forcing social guests into any one of the three molds commonly recognized, to wit, trespasser, licensee or invitee, is solved by ceasing such effort and merely considering and discussing social guests as social guests and by referring to the one owing the duty and obligation to the guest as the host.

53. Sideman v. Guttman, 330 N.Y.S. 263, 266 (Sup. Ct. 1972) where the court stressed:

> [T]he judge-made rule that a social guest is a licensee who must take the premises as he finds them and is entitled to no greater protection than that owing to a member of the owner's family has no basis in logic and should no longer be accorded any legal validity.

54. Rosenau v. City of Estherville, 199 N.W.2d 125, 136 (Iowa 1972); Ives v. Swift & Co., 183 N.W.2d 172, 178 (Iowa 1971) (concurring opinion).

55. Potts v. Amis, 384 P.2d 825 (Wash. 1963), *citing* Sherman v. Seattle, 356 P.2d 316 (Wash. 1960).

56. 496 S.W.2d 219 (Tex. Civ. App.—Austin 1973, no writ).

57. Renfro Drug Co. v. Lewis, 149 Tex. 507, 235 S.W.2d 609 (1950); Carlisle v. J. Weingarten, Inc., 137 Tex. 220, 152 S.W.2d 1073 (1941).

warn or make the condition reasonably safe."[58] *Tennison* has now expanded the exception to include *constructive knowledge*.[59] It is believed that eventually the totality of the exceptions will themselves create a uniform standard of ordinary care, but one so complicated that its application will be confusing, irrational, and ambiguous. A declaration of a standard duty of care would eliminate the confusion and allow the courts a readily workable solution.[60]

The major fear concerning the adoption of a standard duty of ordinary care is that not only will litigation greatly increase, but also that an abundance of plaintiff-verdicts will occur. This, however, seems to be an unfounded complaint. First, it is extremely doubtful that many legitimate claims have been abandoned because the injured party realized he was a licensee and not entitled to due care. Secondly, the standard of ordinary care is the identical standard used in other tort injury cases where the status of the plaintiff is not in issue.[61] It does not seem logical, in view of the acceptability of this standard, that a preponderance of plaintiff-verdicts would occur just in cases involving owners and occupiers of land. Thirdly, the jury usually has done a more than adequate job in determining the actions of reasonable men, and it is probable that they will continue to do so.[62]

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58. Gonzalez v. Broussard, 274 S.W.2d 737, 738-39 (Tex. Civ. App.—San Antonio 1954, writ ref'd n.r.e.) (emphasis added).

59. State v. Tennison, 496 S.W.2d 219, 222 (Tex. Civ. App.—Austin 1973, no writ).

60. In Rowland v. Christian, 70 Cal. Rptr. 97, 103 (1968) it was said:

> There is another fundamental objection to the approach to the question of the possessor's liability on the basis of the common law distinctions based upon the status of the injured party as a trespasser, licensee, or invitee. Complexity can be borne and confusion remedied where the underlying principles governing liability are based upon proper considerations. Whatever may have been the historical justifications for the common law distinctions, it is clear that those distinctions are not justified in the light of our modern society and that the complexity and confusion which has arisen is not due to difficulty in applying the original common law rules—they are all too easy to apply in their original formulation—but is due to the attempts to apply just rules in our modern society within the ancient terminology.

61. The court, in Smith v. Arbaugh's Restaurant, 469 F.2d 97, 106 n.48 (D.C. Cir. 1972), stressed the fact that the elements of negligence must be established before a plaintiff will be allowed to recover. This emphasizes the idea that just because an entrant is injured on a landowner's premises, does not mean that the owner will be automatically held liable.

62. For instance, in Kaffel v. Cloverleaf Kennel Club, 504 P.2d 374 (Colo. Ct. App. 1972), the plaintiff, a business invitee, was injured at a race track when a keg of beer fell off a cart in a passageway. Judgment was rendered for the defendant with the jury finding that its employee acted in a reasonable, prudent manner in view of the probability of injuries which can be foreseen by a reasonably prudent man. The court added:

> One is bound to anticipate and provide against what usually happens, and what is likely to happen; but it would impose too heavy a responsibility to hold him bound in like manner to guard against what is unusual and unlikely to happen, or what, as it is sometimes said, is only remotely and slightly probable.

Id. at 375-76. In Rodrick v. J.C. Penney Co., 505 P.2d 973 (Colo. Ct. App. 1973), a defendant department store was found not to be liable when a 3-year-old caught

A less potent argument against establishing a standard duty of ordinary care is the fear of a financial disaster occurring to the landowner.[63] Low cost liability insurance is readily available for landowners and occupiers.[64] Further, once the injury is sustained, the expenses are just as costly to the injured party as they would be to the landowner, so placing the cost with the negligent party will not only encourage the prevention of accidents but will also give an incentive for the safe maintenance of property.[65]

It has been stated that only the legislature has the authority to change such a firmly established rule.[66] This is, however, court-made law and the courts do have the power, indeed the duty, to overrule stare decisis when a legal concept has outdated its purpose.[67] As Justice Sutherland declared for the Supreme Court in his opinion in *Funk v. United States*:[68]

> [I]f Congress fail to act . . . and the court be called upon to decide the question, is it not the duty of the court . . . to decide it in accordance with present-day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past.[69]

By adopting the standards emphasized by the decisions in other jurisdictions,[70] the jury in Texas would be able to consider the foreseeability of the possible harm,[71] the seriousness of the injury should it occur, and balance

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his fingers in an escalator skirt, and in Trevino v. Hirsch, 492 P.2d 899 (Colo. Ct. App. 1971), the defendant was said to have acted in a prudent manner even though a 2-year-old child was badly burned from a gas fire. These examples illustrate that the jury will continue to investigate the actions of a reasonable man with care as it is done in other negligence cases.

63. *See* Comment, *Smith v. Arbaugh's Restaurant, Inc., and the Invitee-Licensee-Trespasser Distinction*, 121 U. PA. L. REV. 378, 383-84 (1972).

64. *See* James, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 YALE L.J. 605, 612 (1954).

65. *See* Comment, *Smith v. Arbaugh's Restaurant, Inc., and the Invitee-Licensee-Trespasser Distinction*, 121 U. PA. L. REV. 378, 383 (1972). The insurance question was mentioned in Rowland v. Christian, 70 Cal. Rptr. 97 (1968), and the court concluded that insurance is easily obtained, and even if the rates did increase, the rise would be slight or negligible. *Id.* at 103-4. This slight increase in insurance premiums can easily be justified when human safety and well-being are concerned.

For an opposing viewpoint on the allocation of costs, *see* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 107-8 (D.C. Cir. 1972) (concurring opinion).

66. *See* State v. Tennison, 496 S.W.2d 219, 223 (Tex. Civ. App.—Austin 1973, no writ) (dissenting opinion); Buchholz v. Steitz, 463 S.W.2d 451, 454 (Tex. Civ. App. —Dallas 1971, writ ref'd n.r.e.).

67. Common law classifications are judicial creations capable of being cast aside by judicial action when their purpose is no longer served. *See* Annot., 25 A.L.R.2d 29, 44 (1952).

68. 290 U.S. 371 (1933).

69. *Id.* at 382.

70. Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir. 1972); Rowland v. Christian, 70 Cal. Rptr. 97 (1968); Mile High Fence Co. v. Radovich, 489 P.2d 308 (Colo. 1971).

71. Wigmore lists four kinds of circumstances (events or things) which may point to the probability that a defendant had knowledge of a condition:

(1) the direct exposure of the fact to his senses;