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Elimination of the Distinctions between Trespassers, Licensees, and Invitees - Landowner Has a Duty of Reasonable Care to Foreseeable Entrants.

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TORTS—Elimination of the Distinctions Between Trespassers, Licensees, and Invitees—Landowner Has a Duty of Reasonable Care to Foreseeable Entrants

Mariorenzi v. Joseph Di Ponte, Inc.,
333 A.2d 127 (R.I.1975).

Plaintiff, Biagio Mariorenzi, brought an action for the wrongful death of his five year old son, caused by drowning in a water-filled excavation on land owned by the defendant, Joseph Di Ponte, Inc. Mariorenzi's son had entered upon the property without the defendant's knowledge or permission. The defendant, however, was aware of the fact that children often played on the property. Despite this knowledge, the defendant made no effort to protect children from the water hazard, justifying his failure to do so by claiming that the children were trespassers. The trial court granted the defendant's motion for a directed verdict, classifying the child as a trespasser to whom no duty was owed other than to refrain from willfully or wantonly injuring him. On appeal, the plaintiff contended that the distinctions recognized at common law between a trespasser, a licensee, and an invitee should no longer be determinative of the duty owed by a landowner toward an entrant onto his land as they have no place in contemporary society. Held—*Judgment Vacated.* The common law status of an entrant onto the land of another is no longer determinative of the degree of care owed by the owner, but rather the question to be resolved is whether the owner used reasonable care for the safety of all persons reasonably expected to be upon the premises.[1]

For approximately the last 100 years the traditional common law distinctions between trespassers, licensees, and invitees have been the determining factor in judicial decisions regarding the duty of care owed by a landowner to entrants upon his property.[2] The distinctions were first formulated in England circa 1870, where the law favored property owners. The 20th century brought with it an increased social awareness and concern for the

1. Mariorenzi v. Joseph Di Ponte, Inc., 333 A.2d 127 (R.I. 1975).

2. The trial court in *Mariorenzi* classified the plaintiff as a trespasser. "A trespasser is a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise." RESTATEMENT (SECOND) OF TORTS § 329 (1965). *See* Snyder v. I. Jay Realty Co., 153 A.2d 1, 5-6 (N.J. 1959); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 58, at 357 (4th ed. 1971). The general rule, subject to a number of qualifications, is that a possessor of land is not liable for injuries occurring to trespassers upon his land. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 27.1, at 1430-31 (1956); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 58, at 357-58 (4th ed. 1971).

injured plaintiff.[3] The judiciary, realizing the lack of adequate protection given to an injured plaintiff by the traditionally inflexible classifications, began to limit the landowner's immunity to trespassers and licensees by formulating various exceptions and subcategories within the firmly established threefold classification system. Even in the least favored category—trespasser—the courts began to develop the subclassifications of child trespassers,[4] trapped trespassers,[5] and frequent trespassers on a limited area.[6] Some jurisdictions, short of abolishing the classifications, have disregarded them by stating that a case is "*sui generis*." Thus, the courts are not bound by the old common law distinctions.[7]

The category least affected by the various exceptions is that of the trespasser.[8] The principal exception to the limited duty of care that a landowner owes to a trespasser involves the child trespasser and is based upon three main theories: (1) attractive nuisance doctrine,[9] (2) foreseeability,[10] and (3) *Restatement (Second) of Torts* Section 339.[11] Regardless of the more

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3. *See* McNeice & Thornton, *Is the Law of Negligence Obsolete?*, 26 ST. JOHN'S L. REV. 255, 258-77 (1952).

4. *See, e.g.*, Sioux City & Pac. R.R. v. Stout, 84 U.S. (17 Wall.) 657, 660-61 (1873) (first United States decision to apply a different standard of liability in regard to a child trespasser); Thompson v. Reading Co., 23 A.2d 729, 731 (Pa. 1942).

5. *See, e.g.*, Pridgen v. Boston Housing Authority, 308 N.E.2d 467, 475-76 (Mass. 1974) (duty of reasonable care is owed to a trespasser who is trapped on the owner's premises and the owner has knowledge of the situation); Lyshak v. City of Detroit, 88 N.W.2d 596, 606-607 (Mich. 1958).

6. *See* Palmer v. Gordon, 53 N.E. 909 (Mass. 1899); *accord*, Gulf Ref. Co. v. Beane, 133 Tex. 157, 161-62, 127 S.W.2d 169, 171 (1937) (frequent known trespasser is regarded as a licensee).

7. *See* Boyer v. Guidicy Marble, Terrazzo & Tile Co., 246 S.W.2d 742, 748 (Mo. 1952); Scheibel v. Lipton, 102 N.E.2d 453, 462-63 (Ohio 1951).

8. *See* Dobb v. Baker, 505 F.2d 1041, 1043 (1st Cir. 1974); Mounsey v. Ellard, 297 N.E.2d 43, 51-52 (Mass. 1973).

9. The theory originated in Sioux City & Pac. R.R. v. Stout, 84 U.S. (17 Wall.) 657 (1873), where a child who was technically a trespasser recovered for injuries received upon defendant's land. The doctrine acquired the misnomer of attractive nuisance in Keefe v. Milwaukee & S.P.R.R., 18 Am. Rep. 393 (Minn. 1875) (child invited onto the land by an alluring turntable). The rule was limited in application by United Zinc & Chem. Co. v. Britt, 258 U.S. 268, 276 (1922), in which the Court stated: "[t]here can be no general duty on the part of a landowner to keep his land safe for children . . . if he has not directly or by implication invited or licensed them to come there." Today the requirement of allurement has all but disappeared in most jurisdictions. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 59, at 365-66 (4th ed. 1971).

10. The necessity of original allurement onto the land was discarded with the basis of liability becoming the reasonable foreseeability of harm to the child. Prosser, *Trespassing Children*, 47 CAL. L. REV. 427, 431-32 (1959); *see* Kahn v. James Burton Co., 126 N.E.2d 836, 842 (Ill. 1955); Sherman v. City of Seattle, 356 P.2d 316, 320-22 (Wash. 1960).

11. RESTATEMENT (SECOND) OF TORTS § 339 (1965) provides:

Artificial Conditions Highly Dangerous to Trespassing Children

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

liberal attitude toward child trespassers, some jurisdictions still refuse to make a distinction between adult and child status, holding both to be entitled to the same limited duty of care.[12]

The once uncomplicated system for determining a landowner's duty of care toward entrants upon his land has become an obvious target of judicial dissatisfaction. Unfortunately, this dissatisfaction has been expressed within the traditional threefold framework, thus adding to the apparent chaos in this area of the law. It has only been within the last 10 years that four jurisdictions have eliminated the common law categories, substituting in their place the doctrine that "a landowner must act as a reasonable man in maintaining his property in a reasonably safe condition in view of *all* the circumstances . . . ."[13] The circumstances which are to be taken into consideration include: the occupier's knowledge of a dangerous condition on his property,[14] anticipation that persons will be upon the premises,[15] the foreseeability of substantial harm to such individuals,[16] and the interest which the landowner must sacrifice to avoid the risk of harm.[17] Other jurisdictions

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(a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and

(b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and

(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and

(d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and

(e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

Comment a and b of § 339 RESTATEMENT (SECOND) OF TORTS discusses section 339 as the culmination of the attractive nuisance doctrine.

12. *See* Prudhomme v. Calvine Mills, Inc., 225 N.E.2d 592 (Mass. 1967); Trudo v. Lazarus, 73 A.2d 306, 307 (Vt. 1950). Although most jurisdictions recognize the special status of a child trespasser, this exception does not always apply in the case of death or injury caused by a water hazard on the occupant's land. Earnest v. Regent Pool, Inc., 257 So. 2d 313, 317 (Ala. 1972) (attractive nuisance not applicable where the danger is patent and obvious to a trespassing child); RESTATEMENT (SECOND) OF TORTS § 339 comment j (1965); Prosser, *Trespassing Children*, 47 CAL. L. REV. 427, 456 (1959). However, the water hazard exception has developed subclassifications. For example, landowners have been held liable if a floating object in the water concealed an otherwise apparent danger. Gustafson v. Consumers Sales Agency, Inc., 110 N.E.2d 865, 872 (Ill. 1953). *See also* Pocholec v. Guistina, 355 P.2d 1104, 1107 (Ore. 1960) (liability for an artificial water hazard).

13. Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 106 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973) (emphasis added); *accord*, Rowland v. Christian, 70 Cal. Rptr. 97, 104 (1968); Mile High Fence Co. v. Radovich, 489 P.2d 308, 314 (Colo. 1971); Pickard v. City and County of Honolulu, 452 P.2d 445, 446 (Hawaii 1969).

14. Taylor v. New Jersey Highway Authority, 126 A.2d 313, 317 (N.J. 1956).

15. Gibo v. City & County of Honolulu, 459 P.2d 198, 200 (Hawaii 1969).

16. Mile High Fence Co. v. Radovich, 489 P.2d 308, 314 (Colo. 1971).

17. Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973).

hesitating to abolish completely the traditional classifications have done so in part[18] or have expressed a prospective willingness to do so.[19]

In *Mariorenzi v. Joseph Di Ponte, Inc.*,[20] Rhode Island joined the jurisdictions that have abolished the traditional classifications which determined the duty of care that a landowner owed to an entrant upon his property. In *Mariorenzi* the Rhode Island Supreme Court was faced with a situation involving a child trespasser, an ill-favored category under prior Rhode Island law.[21] With this decision, Rhode Island became the first jurisdiction to dismiss the traditional distinctions in an action involving a trespasser.[22] This decision is based upon a perception that 19th century classifications have little applicability to a 20th century society. Regrettably, the majority of jurisdictions have failed to make such a recognition and continue to adhere to a 19th century classification system.[23] Their rationale has been that the traditional categories are desirable due to their gradual development and the degree of predictability which they bring to this area of the law.[24] The persuasiveness of this argument is diluted by a detailed examination of judicial application of the classifications. The rigid lines which once separated the classifications are now blurred, causing judicial confusion.[25] Even if the factor of predictability remained viable through adherence to the system of cate-

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18. *See* Mounsey v. Ellard, 297 N.E.2d 43 (Mass. 1973); Peterson v. Balach, 199 N.W.2d 639, 642 (Minn. 1972) (abolished distinctions between invitees and licensees).

19. *See* Gould v. De Beve, 330 F.2d 826 (D.C. Cir. 1964). "The concept of trespass like other abstractions casts its net very widely indeed . . . meaningful classifications . . . begin after the catch and not before." *Id.* at 829.

20. 333 A.2d 127 (R.I. 1975).

21. Zoubra v. New York & N.H. & H.R.R., 150 A.2d 643, 645 (R.I. 1959) (no duty owed to a trespasser other than to refrain from willfully injuring him); Plante v. Lorraine Mfg. Co., 82 A.2d 893, 896 (R.I. 1951) (child trespasser regarded the same as an adult trespasser). In Haddad v. First Nat'l Stores, Inc., 280 A.2d 93, 98 (R.I. 1971) Rhode Island adopted Section 339 of the RESTATEMENT (SECOND) OF TORTS for application to child trespassers. However, the court in *Haddad* stipulated that the rule was to be applied prospectively. Since Mariorenzi v. Joseph Di Ponte, Inc., involved a death which occurred in 1961 the court was unable to apply Section 339 of the RESTATEMENT (SECOND) OF TORTS.

22. Other jurisdictions abolished the traditional classifications in actions not involving trespassers. Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 106 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973) (licensee); Rowland v. Christian, 70 Cal. Rptr. 97 (1968) (social guest); Mile High Fence Co. v. Radovich, 489 P.2d 308, 311 (Colo. 1971) (policeman injured in the performance of duty); Pickard v. City & County of Honolulu, 452 P.2d 445, 446 (Hawaii 1969) (abolished the distinctions instead of classifying plaintiff as a licensee).

23. *See, e.g.*, Dobbs v. Baker, 505 F.2d 1041 (1st Cir. 1974); Shannon v. Butler Homes, Inc., 428 P.2d 990 (Ariz. 1967); Lunney v. Post, 248 So. 2d 504 (Fla. Ct. App. 1971); *aff'd*, 261 So. 2d 146 (Fla. 1972); J. Weingarten, Inc. v. Razey, 426 S.W.2d 538 (Tex. 1968).

24. Snyder v. I. Jay Realty Co., 153 A.2d 1, 5 (N.J. 1959); *cf.* Rowland v. Christian, 70 Cal. Rptr. 97, 105 (1968) (dissenting opinion).

25. Mile High Fence Co. v. Radovich, 489 P.2d 308, 311 (Colo. 1971).

gorization, it is of questionable value if it prevents a court from applying new community standards to classifications created over a century ago.

The court in *Mariorenzi* decided that the existing standards of care toward trespassers conferred upon a landowner the privilege of indifference toward the welfare of others, including foreseeable child trespassers. Such a privilege is not in keeping with the general development of negligence law, and no more justifiable in regard to land than it is in the case of other injury-causing activities.[26]

Since the *Mariorenzi* decision was based upon the court's apparent perception of a new social consciousness held by today's society, it follows that if their perception was inaccurate, then the resulting legal conclusion could have serious defects. Unfortunately, the court failed to explain the specific economic and social factors existing in Rhode Island that caused them to abrogate established precedent, and then to couch their holding in the following undefined general language: [W]hether the owner has used reasonable care for the safety of *all persons* reasonably expected to be upon the premises."[27] The absence of an explanation by the court weakens the *Mariorenzi* decision as persuasive authority in future attempts to abolish the categories in other jurisdictions. For example, in a jurisdiction such as Texas the following observation could be offered: Although in an urban, densely populated state like Rhode Island abolition of the categories may be necessary, it is unnecessary and undesirable in a jurisdiction characterized by extensive land holdings, and a predominant agrarian and ranching class.

The proposition that it would be economically unfeasible to expect landowners with vast holdings to take the steps necessary to meet the *Mariorenzi* standard of reasonable care toward all foreseeable entrants deserves careful consideration. Presumably, if the Texas Supreme Court were faced with a landowner immunity question it would continue to adhere to the classifications, or create a new subclass if the harshness or inequity of the situation dictated such a development. Contrary to the premise that continual subclassification only adds to the confusion in this area, a cogent argument can be offered that the judiciary creates exceptions within the classification system in an attempt to meet perceived social needs in specific limited instances. This judicial action may be contrasted to extensive modifications of tort law which should be left to the legislature. Undoubtedly the court in *Mariorenzi* has taken a drastic step in completely overturning established law within its jurisdiction. However, although the ultimate effects of the decision remain in some aspects undeterminable, the predictable results should be beneficial.

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26. *See* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 27.3, at 1440 (1956). *See generally* Calabresi, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970); 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 16.1, at 896-962 (1956); McNeice & Thornton, *Is the Law of Negligence Obsolete?*, 26 ST. JOHN'S L. REV. 255, 261-62 (1952).

27. Mariorenzi v. Joseph Di Ponte, Inc., 333 A.2d 127, 133 (R.I. 1975) (emphasis added).

Under the classification system the duty of a landowner was often established as a matter of law.[28] With the abolition of the categories in Rhode Island and the resultant increase in jury trials, the triers of fact will now have the burden of deciding not only what the facts are, but whether the defendant's conduct has conformed to that of a reasonable prudent man under like or similar circumstances. Such a development is in accordance with general negligence law.[29] Whether or not the increased frequency of jury trials will affect the outcome of particular cases remains to be seen. Continuing controversy exists concerning the often repeated proposition that the use of a jury will result in more verdicts for the plaintiff.[30] This proposition remains to be proven conclusively, and even if true, no legitimate objection should be encountered. The court in *Mariorenzi* apparently believed that the liability of a landowner for injuries to entrants upon his property should be decided according to the "reasonable prudent man" standard. The proper body for deciding whether an individual has acted in accordance with that standard is the jury.

Rhode Island apparently dispensed with the common law classifications, while simultaneously referring to the "status of the invitee" as continuing to have evidentiary value; therefore, the question remains as to what effect the classifications will have upon future decisions. The types of entrants which will receive the greatest benefit under the new standard of care are both the adult and the child trespasser. Formerly in Rhode Island both categories received the same extremely limited duty of care.[31] The benefit which a future child trespasser will receive under the reasonable care standard is exemplified by the *Mariorenzi* case. Presumably, under previous Rhode Island law, the plaintiff would have been unable to recover for his child's wrongful death. Even if the court had been able to apply Section 332 of the *Restatement (Second) of Torts* retroactively, recovery would have been allowed only if that section's specific conditions had been met.[32] The *Restatement* frequently has not been applied when the cause of a plaintiff's injury was a natural as opposed to a man-made condition on the defendant's land, or

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28. *E.g.*, Dodge v. Church of Transfiguration, 259 A.2d 843, 845 (R.I. 1969); Carlisle v. J. Weingarten, Inc., 137 Tex. 220, 221, 152 S.W.2d 1073, 1074 (1941).

29. *See* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 102 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973); Beauchamp v. Los Gatos Golf Course, 77 Cal. Rptr. 914, 919 (Dist. Ct. App. 1969).

30. *See* Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055 (1964). The author in commenting upon the University of Chicago Jury Project states that their survey revealed that in a personal injury case the judge and jury would have agreed in 79% of the cases, and "that the judge disagrees with the jury because he is more pro-plaintiff about as often as the jury disagrees with him because it is more pro-plaintiff." *Id.* at 1064-65. *See generally* C. JOINER, CIVIL JUSTICE AND THE JURY 65 (1962).

31. Cases cited note 21 *supra*.

32. RESTATEMENT (SECOND) OF TORTS § 332 (1965).

when the cause of the injury was a water hazard such as the one in *Mariorenzi*.[33]

The foreseeable adult trespasser is a category which has caused some jurisdictions to delay abolishing the common law distinctions, because of the belief that an overly severe burden upon landowners will be created.[34] In jurisdictions which do not permit exceptions to the trepasser category, the sole imposition of a standard of reasonable care conceivably could result in a great number of recoveries which under the common law classification system would never have proceeded past the preliminary pleadings. Some jurisdictions, however, have carved out liberal exceptions to the duty owed to a trespasser.[35] Examination of these exceptions reveals that they are based upon the element of foreseeability. In these jurisdictions, decisions under a reasonable care standard, similar to that found in *Mariorenzi*, would probably be consistent with those arrived at under the traditional classification system.

Although injured plaintiffs should benefit under the new standard of care, the *Mariorenzi* decision might impose an overly severe burden upon property owners. A landowner's liability, however, will now be based upon the general rules of negligence; a plaintiff must still be able to prove that a duty existed and a breach occurred, factors heavily dependent upon the nature of the plaintiff's entry.[36]

Some jurists have contended that by abolishing the classification system, the courts are usurping a legislative function.[37] Legislation is the most direct method for achieving such abolition, but as emphasized by Mr. Justice Sutherland, writing for the United States Supreme Court in *Funk v. United States*,[38] while legislative bodies have the power to change old rules of law, nevertheless when they fail to act, it is the duty of the court to bring the law "in accordance with present day standards of wisdom and justice rather than with some outworn and antiquated rule of the past."[39] The court in *Mariorenzi* adopted the dictum of Mr. Justice Sutherland and cast aside a judicial creation which it believed was no longer suited to contemporary society.

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33. Cases cited note 12 *supra*.

34. Mounsey v. Ellard, 297 N.E.2d 43 (Mass. 1973); Peterson v. Blalach, 199 N.W.2d 639, 642 (Minn. 1972).

35. *See* Southern Ry. v. Campbell, 309 F.2d 569, 572 (5th Cir. 1962) (reasonable care due to frequent known trespassers); Gulf, C. & S.F. Ry. v. Russell, 125 Tex. 443, 447, 82 S.W.2d 948, 951 (1935) (duty of reasonable care arises if trespassers are anticipated and dangerous activities are being conducted).

36. *See* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 99 (D.C. Cir. 1972) (concurring opinion), *cert. denied*, 412 U.S. 939 (1973); McGarvey v. Pacific Gas & Elec. Co., 95 Cal. Rptr. 894, 898-99 (Dist. Ct. App. 1971).

37. Rowland v. Christian, 70 Cal. Rptr. 97, 105 (1968) (dissenting opinion); Mariorenzi v. Joseph Di Ponte, Inc., 333 A.2d 127, 135 (R.I. 1975) (dissenting opinion).

38. 290 U.S. 371 (1933).

39. *Id.* at 381-82.