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Torts - Negligence - Liability of an Occupier

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commanded a contrary result. While equity may well justify the result reached, the instant court has subjected its decision to critcism by reliance on seemingly inappropriate precedent rather than facing the problem before it. It is urged that with the reasoning set out above, the present case might have served as an appropriate vehicle to make a significant contribution in an area of the law which has developed on a matter-of-fact basis.

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TORTS—NEGLIGENCE—LIABILITY OF AN OCCUPIER—The California Supreme Court has stated that the proper test to be applied to the liability of a possessor of land is whether in management of his property he acted as a reasonable man in view of the probability of injuries to others, and plaintiff's status as a trespasser, licensee, or invitee is not determinative.

Rowland v. Christian, 70 Cal. Rptr. 97, 443 P.2d 561 (1968).

The Supreme Court of California had rejected the distinctions between trespasser, licensee, and invitee as determinative elements in deciding whether or not an occupier has been negligent in causing injuries to a person upon his land. Although section 1714[1] of the California Civil Code sets forth the standard of reasonable care under the circumstances, and there are no provisions in the code granting any exceptions to occupiers of land, California had heretofore made exceptions to section 1714 and followed the common law classifications of plaintiff together with the corresponding gradations of duty owed by an occupier.[2] In *Rowland*, the court declared that these exceptions were no longer justified, and that the proper test to be employed was whether in management of his property defendant had acted as a reasonable man in view of the probability of injuries to others. Section 1714 of the code so closely resembles the foundation of common law negligence that a study of the facts of this case and the doctrines

1. CAL. CIV. CODE § 1714 (West 1954), provides:
Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in 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 . . . .
2. Hansen v. Richey, 237 Cal. App. 2d 475, 46 Cal. Rptr. 909 (1965).

formerly applicable in California will reveal why this bold step should be acclaimed and followed by other states.

Plaintiff was injured in defendant's apartment when the handle of a porcelain water faucet in the bathroom broke in his hand while he was turning off the faucet. Plaintiff had been invited to defendant's apartment to wait while defendant prepared to take him to the airport. Defendant was present in the apartment and knew that plaintiff intended to use the bathroom. She also knew that the handle was cracked and failed to warn him of this condition.

The lower court granted a summary judgement on the facts alleged.[3] It held that since defendant was taking plaintiff to the airport as a favor, there was no triable issue relative to plaintiff's status as a licensee. Other issues discussed by the lower court were whether there was a duty to warn plaintiff of the condition and whether the cracked handle constituted a "trap" because defendant had knowledge of the dangerous condition and she had let defendant come in contact with it.[4] Both of these issues were held to be inapplicable because it was not established that the dangerous condition was concealed. Plaintiff appealed.

The Supreme Court of California said that plaintiff could establish at the trial that the dangerous condition was not obvious and that failure to state the appearance of the faucet was not sufficient ground for a summary judgement. Summary judgement was proper only if, after proof of such facts, a judgement would be required as a matter of law for defendant.

The court then examined the common law in regard to liability of an occupier as applied in California. The confusion and incongruities that were found are illustrative of the fact that these principles may need reexamination in other states also.

The initial confusion caused by the application of the common law in this area is seen in attempts of the courts to classify plaintiff into one of three classes: invitee, licensee or trespasser. California and the *Restatement (Second) of Torts* had agreed on the definition of a trespasser as one who enters or remains on land without privilege or

3. Rowland v. Christian, 63 Cal. Rptr. 98 (1967).

4. It has been suggested that both of these issues are essentially the same; the trap doctrine merely means that the occupier is under an obligation to disclose to the licensee any concealed dangerous condition of the premises of which he has knowledge. For a discussion of this theory as it relates to California law see an article by G. N. Rosenkrantz entitled, *Duty to Licensees in California: In Support of Open Adoption of Restatement 2d of Torts § 342*, 2 U. SAN. FRAN. L. REV. 230 (1968).

consent.[5] However the determination of the licensee and invitee classification was more difficult. In *Boucher v. American Bridge Co.*[6] the court went to great lengths to make clear the distinctions felt to exist between the *Restatement* and California cases concerning the definition of invitees and licensees together with the duty owed to each by the occupier. Then in *O'Keefe v. South End Rowing Club*[7] the Supreme Court of California adopted section 332 of the *Restatement*[8] which defines an invitee. This expanded the invitee class to include not only those upon the premises for the benefit of the occupier, but also those who could be considered to be on the land for the purpose for which it was held out to the public.[9] Hence, in California before the instant decision, a person who was on the property of another with his express or implied permission, but who could not be classified as an invitee would fall into the category of a licensee. This class became in effect a catchall for entrants not covered by the definition of trespasser or invitee.

Further complications arose in the common law in cases where courts were dealing with such persons as firemen, public officials, or children. Although an invitation and benefit could easily be found in the situation where a fireman is upon burning premises, he was considered to be a licensee.[10] Since the law required an occupier to expect a public official to come upon the premises for inspections, he was regarded as an invitee.[11] An exception to the duty owed a trespasser was made in favor of trespassing children under the attractive nuisance doctrine.[12] There was also the problem of the invitee who had exceeded the scope of his invitation. Thus, an invitee might during his stay, enter upon other parts of the premises where his status was

5. Boucher v. American Bridge Co., 95 Cal. App. 659, 213 P.2d 537 (1950).
6. *Id.*
7. 64 Cal. 2d 729, 51 Cal. Rptr. 534 (1966).
8. RESTATEMENT (SECOND) OF TORTS § 332 (1965), provides:
Invitee Defined
(1) An invitee is either a public invitee or business visitor.
(2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.
(3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealing with possessor of the land.
9. For example, a camper using a free public campground in a national forest could be considered a public invitee.
10. Pennebaker v. San Joaquin Light & Power Co., 158 Cal. 579, 112 P. 459 (1910).
11. Christy v. Ulrich, 113 Cal. App. 338, 298 P. 135 (1931).
12. Woods v. City and County of San Francisco, 198 Cal. App. 2d 958, 307 P.2d 698 (1957).

merely that of a licensee or even a trespasser. With each change of status correlative rights and obligations of the invitor and the invitee would vary as the orbit of the invitation was either adhered to or exceeded.[13]

California has been aware of the shortcomings of this system of classification and has criticized it in recent California cases prior to *Rowland.* In *Hession v. City and County of San Francisco*[14] the court refused to consider whether or not plaintiff was a guest, and quoting *Fernandez v. Consolidated Fisheries, Inc.*[15] applied the common rule of the code, i.e., reasonable care under the circumstances. The former case went so far as to ask whether a railroad could be considered a guest of the city since the city allowed it to construct a spur track on which plaintiff, a railroad employee, was injured. The latter case sought to extend the doctrines applied to occupiers of land into the area of personal property. This would have meant that a person on a truck could be a trespasser, licensee or invitee. It can be seen that while these cases did not change the occupier's rules, the court's dissatisfaction with the distinctions between classes of plaintiffs had led to a limitation of the doctrine.

Perhaps the strongest denunciation of the classification of plaintiff which was cited by the instant court was set forth by a federal court in *Gould v. DeBeve.*[16] Plaintiff was a 2½ year old trespasser who had fallen through a screen in a window. Contrasting plaintiff with the poachers in 18th century England, the court observed, "[t]he manifest differences between them suggest strongly that projecting the label from one to the other can not rationally be an automatic determinant of the result in each case in which injuries attributable to the landlord have been sustained."[17]

The problems and criticisms do not end with the determination of plaintiff's status. The liability of the occupier according to the rules of common law also entails the definition of the duty owed to plaintiff. California courts generally held that the duty to a trespasser was only to refrain from wilful and wanton acts of negligence.[18] Towards the

13. Powell v. Jones, 133 Cal. App. 2d 601, 284 P.2d 856 (1955).
14. 122 Cal. App. 2d 592, 265 P.2d 542 (1954).
15. 98 Cal. App. 2d 91, 219 P.2d 73 (1950).
16. 330 F.2d 826 (D.C. Cir. 1964).
17. 330 F.2d at 829.
18. Gordon v. Roberts, 162 Cal. 506, 123 P. 288 (1912).

invitee there was the duty to warn against all known dangers, and to exercise ordinary care and prudence to keep the premises in a reasonably safe condition.[19]

In a laudable effort to promote human safety, the California courts had tried to distinguish between active and passive conduct of the occupier toward the licensee. An occupier had an obligation to conduct his active operations with reasonable care for the protection of a licensee,[20] but he had not been liable for injuries caused by the condition of the premises.[21] Backing trucks into entrants was clearly active conduct.[22] However, the artificiality of the distinction became evident when the court faced the question of whether failure to act and speak up to warn a licensee of a dangerous condition of the premises was active or passive conduct. In *Fisher v. General Petroleum Corporation*,[23] a licensee was killed when a bulldozer he was operating struck a buried gas plug and exploded causing the plaintiff's death. The court held that failure to warn a licensee of the presence of a dangerous condition of which the owner had knowledge and which was hidden and likely to cause serious danger to the licensee was not active negligence.

Although section 342 of the *Restatement*[24] holds an occupier to the duty to warn under the above circumstances, the court in *Hansen v. Richey*[25] found that this section was precluded by California precedent.[26] After an analysis of the concepts of active and passive conduct the *Hansen* court said, "[a] rule which permits a landowner to remain passive in the face of his licensee's proximity to danger permits no

19. Johnstone v. Panama-Pacific Int. Exposition Co., 187 Cal. 323, 202 P. 34 (1921).
20. Oettinger v. Stewart, 24 Cal. 2d 133, 148 P.2d 19 (1944).
21. Sockett v. Gottlieb, 187 Cal. App. 2d 760, 9 Cal. Rptr. 831 (1960).
22. Turnipseed v. Hoffman, 23 Cal. 2d 532, 144 P.2d 797 (1944).
23. 123 Cal. App. 2d 770, 267 P.2d 841 (1954).
24. RESTATEMENT (SECOND) OF TORTS § 342 (1965), provides:
Dangerous Conditions Known to Possessor. A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,
(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
(b) he fails to exercise reasonable care to make the condition safe, or to warn 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.
25. 237 Cal. App. 2d 475, 46 Cal. Rptr. 909 (1965).
26. Whether or not this decision was necessary under California precedents has been discussed in an article by G. N. Rosenkrantz entitled, *Duty to Licensees in California: In Support of Open Adoption of Restatement 2d of Torts § 342*, 2 U. SAN. FRAN. L. REV. 230 (1968).

demand for affirmative action, either to remedy the danger or to warn of it."[27] Thus, a theory that was intended to extend the standard of reasonable care under the circumstances into those situations where the activities of the occupier could be distinguished from the conditions of the land resulted in an abrupt limitation.

Since there was no duty to warn licensees, the courts in order to reach more just conclusions in accord with present humanitarian standards, strained the construction of active negligence. The court in *Hansen*, where a youth was drowned in a partially empty swimming pool, found that active negligence might be found "in the *active conduct of a party* for a large number of youthful guests in the light of knowledge of the dangerous pool."[28] (Emphasis added.)

Nor was active negligence the only theory manipulated to allow recovery for licensees. As mentioned, the occupier had not been held liable for injuries sustained due solely to the condition of the premises where no active conduct on his part had contributed to the injury. The licensee was bound to accept the premises as he found them. This position was limited in *Newman v. Fox West Coast Theatres*.[29] That case held that since the dangerous condition was created *after* plaintiff's arrival at the theatre, active negligence could be found in the manager's failure to correct the condition after learning of it, or to warn the licensee of the condition. The licensee was bound to accept only those conditions present *at the time* of her arrival. This case does not seem to have been extended.[30]

Another theory related to the liability of an occupier was the trap doctrine. The trap doctrine provided that an occupier could not construct or maintain a trap or pitfall into which he knew or had reason to know that an entrant would probably fall.[31] However the difficulty in the defining of a trap led the court in *Rowland* to reject the trap doctrine as a basis for recovery. In *Anderson v. Anderson*[32] a trap was likened to a spring gun or steel trap. These instruments are artificial conditions of the land set by the occupier. However, in *Blaylock v. Coates*[33] a natural condition of the land, a tar sump, was held to be a

27. 237 Cal. App. 2d at 478, 46 Cal. Rptr. at 912.
28. *Id.* at 479, 46 Cal. Rptr. at 913.
29. 86 Cal. App. 2d 428, 194 P.2d 706 (1948).
30. *Newman* has been both distinguished and confined to its facts, Bylling v. Edwards, 193 Cal. App. 2d 736, 746, 14 Cal. Rptr. 760, 766 (1961); and questioned, Hansen v. Richey, 237 Cal. App. 2d 475, 479, 46 Cal. Rptr. 909, 911 (1965).
31. Blaylock v. Coates, 44 Cal. App. 2d 850, 113 P.2d 256 (1941).
32. 251 Cal. App. 2d 409, 59 Cal. Rptr. 342 (1967).
33. 44 Cal. App. 2d 850, 113 P.2d 256 (1941).

trap. The court in *Hall v. Barber Door Co.*[34] held that an incompletely installed door which appeared operative was a trap. It seemed that virtually anything could constitute a trap.

It was not solely the confusion or complexity of the preceding doctrines that led the present court to hold all occupiers to the same standard of reasonable care under the circumstances as prescribed in section 1714 and to reject the exceptions based on common law distinctions. As pointed out by Justice Peters, "[c]omplexity can be borne and confusion remedied where the underlying principles governing liability are based upon proper considerations."[35] The court mentioned the theory that the special rules applied to occupiers were due to the dominance of the landowning class in England during the formative period of the rules. The court went on to hold that such distinctions based on the status of the injured party were no longer justified in the light of modern society, regardless of their origin.

It is submitted that California's precedents reveal the efforts of courts to define the liability of an occupier in accordance to the standard of reasonable care under the circumstances without rejecting the common law principles on the liability of an occupier. Rather than continue to expand and strain the existing doctrines, the Supreme Court of California has chosen to look ahead to the goal sought, and having recognized it as the standard proclaimed in its Civil Code, has abandoned the common law exceptions. Other courts should also look to see if the present obscure distinctions and artificial constructions being applied in their states are not leading to a similar goal.

It should be remembered that the court has not precluded all considerations of the nature of plaintiff's visit. The court has recognized that plaintiff's status may have "some bearing on the question of liability."[36] The effect of this statement remains to be seen. It has been speculated that the abolishment of the distinctions between entrants would not make much difference in the results of the cases because the considerations used in determining plaintiff's status are the same factors involved in deciding whether a man has acted reasonably under the circumstances.[37] In the cases where this is true, little has been gained, but there are enough arbitrary and capricious results to

34. 218 Cal. 412, 23 P.2d 279 (1933).
35. 70 Cal. Rptr. at 103, 443 P.2d at 567.
36. *Id.* at 104, 443 P.2d at 568.
37. Payne, *The Occupiers' Liability Act*, 21 Mod. L. Rev. 359 (1958).

justify the declaration of the Supreme Court of California that plaintiff's status will no longer be determinative.

A. Kathleen Kelly

CONFLICT OF LAWS—DEATH IN STATE TERRITORIAL WATERS—The United States Court of Appeals for the Third Circuit held that Pennsylvania law governs an action commenced by the administrator of the estate of a Pennsylvania decedent killed in the crash of an aircraft into the harbor waters of Boston.

Scott v. Eastern Air Lines, Inc., 399 F.2d 14 (3d Cir. 1968), *cert. denied*, 37 U.S.L.W. 3208 (U.S. Dec. 9, 1968).

Plaintiff, administrator of the estate of a Pennsylvania resident killed in the crash of an Eastern Air Lines jet into Boston Harbor, filed suit on the "law side"[1] of the District Court for the Eastern District of Pennsylvania to recover damages for the death of the decedent. Jurisdiction was based on diversity of citizenship and an amount in excess of the statutory minimum. Plaintiff alleged that the fatality occurred as the result of Eastern's negligent operation of its jetliner and its breach of the contract with decedent for nonnegligent carriage.[2]

After hearing evidence as to liability, the jury returned a verdict for the plaintiff. The court then permitted testimony on damages, and over Eastern's objection, instructed the jury to award them in accordance with the law of Pennsylvania.[3] The jury returned with verdicts for plaintiff in the sum of $2,500 as compensation under the

1. Since the 1966 coalescence of civil and maritime procedure, this term has become somewhat imprecise. Today, all actions, whether cognizable as cases at law or in equity or in admiralty are governed by the same rules. FED. R. CIV. P. 1. However, cases brought pursuant to the admiralty jurisdiction of the district court are exempt from certain rules and subject to several others that do not affect other civil actions. For a complete discussion of the unification of the civil and admiralty procedures, *see* 7A J. MOORE, FEDERAL PRACTICE ¶ .01 *et seq.* (2d ed. 1966).

2. Plaintiff abandoned a breach of warranty theory before the case came to trial.

3. Eastern had requested the court to charge that damages were to be awarded in accordance with the law of Massachusetts. The Massachusetts statutes in effect at the time of the accident limited the liability of one whose negligence has caused the death of another to "damages in the sum of not less than two thousand dollars nor more than twenty thousand dollars to be assessed with reference to the degree of culpability" and also permitted recovery for expenses incurred as a result of the wrong. MASS. GEN. LAWS ANN. ch. 229, § 2 (1958). *See also*, MASS. GEN. LAWS ANN. ch. 228, § 1(2) (1958).