Duty of Owners and Occupiers of Land to Persons Entering the Premises: Should Pennsylvania Abandon the Common Law Approach?

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Comments

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I. INTRODUCTION

When a person is injured while on the property of another, the common law approach to determining liability has been to focus primarily on the status of the entrant rather than the conduct of the owner or occupier. Under the common law, a landowner's duty depended on whether the entrant was classified as a trespasser, licensee, or invitee. Although this approach is still followed by a majority of jurisdictions, including Pennsylvania, it has been and continues to be extensively criticized.

In 1968, in the landmark decision of Rowland v. Christian, California became the first common law jurisdiction to abandon the classification system and determine landowner liability to entrants based on ordinary negligence standards. Since then, the District of

1. Hereafter the terms "owner" or "landowner" will be used when referring to occupiers as well as owners of land.
2. "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).
3. "A licensee is a person who is privileged to enter or remain on land only by virtue of the possessor's consent." Restatement (Second) of Torts § 330 (1965).
4. (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 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 dealings with the possessor of the land.
Restatement (Second) of Torts § 332 (1965).
5. See note 88 infra.
6. See notes 76-79 and accompanying text infra.
8. The court held:
   The proper test to be applied . . . is whether in the management of his property [the landowner] 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
Columbia Circuit and five other states have followed California’s lead. In the area of landowner liability to entrants, the competing interests are the free use of property by owners and the safety of persons entering thereon. The aim of this comment is to examine the two approaches to deciding liability and to determine which one more effectively serves the interests of landowner and entrant in Pennsylvania and elsewhere.

II. THE COMMON LAW CLASSIFICATION SYSTEM APPROACH

A. Historical Background

While the origins of the common law entrant classification system are somewhat uncertain, it apparently emerged from a culture deeply rooted to land which traced many standards to a heritage of feudalism. This is understandable since land was once the basis for all class distinctions, thereby causing agrarian societies to place great emphasis on its ownership. The landowner was accorded such deference that he was considered to be a sovereign, to some extent, within his own territory. The theory behind the classification system seemed to be to promote the free use of property by not imposing stringent duties on the landowner to insure the safety of

question of liability, the status is not determinative.

Id. at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104.

Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959), an earlier admiralty jurisdiction case, paved the way for the decision in Rowland. The Supreme Court concluded that the common law entrant classification system was alien to the law of the sea. 358 U.S. at 632.


10. See Comment, The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?, 36 Md. L. Rev. 816, 836 (1977) [hereinafter cited as Common Law Tort Liability]. The common law system arguably promotes freer use of property because the duty of the landowner to exercise reasonable care only applies to invitees. See notes 18-23 and accompanying text infra.


all entrants, particularly those entering without permission.\(^4\)

A major reason for the emergence of the classification system, in addition to the emphasis on land ownership, was that the law of negligence was undeveloped at that time.\(^5\) When negligence principles finally evolved, the field of landowner liability was already occupied by the firmly entrenched common law system.\(^6\) Given the judicial respect for the principle of stare decisis, which promotes predictability and stability in the law, it was clear that any changes in this area would be slow in coming.

**B. The Common Law System Applied**

The common law system denominates three principal categories for purposes of describing the status of entrants on the property of others. Under this system an entrant is either a trespasser, licensee, or invitee.\(^7\) The landowner's duty varies depending on the status of the entrant.

The least duty owed is to the trespasser. All that a landowner must do with regard to trespassers is to refrain from intentionally injuring them.\(^8\) This standard was apparently derived from the Crown's asserted power to punish misconducts or breaches of the peace even if committed on the property of a nobleman.\(^9\)

With regard to licensees, the landowner's duty is to warn of concealed dangers and to refrain from dangerous active conduct.\(^10\) The

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15. See Hughes, Duties to Trespassers: A Comparative Survey and Revaluation, 68 YALE L.J. 633, 694 (1959) [hereinafter cited as Hughes]; Marsh, The History and Comparative Law of Invitees, Licensees and Trespassers, 69 L.Q. REV. 182, 184 (1953). When the common law categories were being developed the privileged position of the landowner was taken for granted, whereas the principle that a man should be responsible for damages he reasonably should have foreseen was inconceivable and only hesitatingly recognized in a limited number of cases. Marsh, supra at 184.
16. The king's law stopped at the boundary of the owner's sovereign territory.
17. These terms are defined at notes 2-4 supra.
18. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 27.1 (1956) [hereinafter cited as HARPER AND JAMES].
19. See BOHLEN, supra note 13, at 163.
20. See HARPER & JAMES, supra note 18. See also ROBERT LEVIN, RUSSELL LEVIN and L. LEVIN, 1 SUMMARY OF PENNSYLVANIA JURISPRUDENCE §§ 26, 28 (1958).
reason that the duty owed a licensee is so slight is because of the terms and conditions of the entrance. A licensee enters with the bare permission of the owner and confers no pecuniary benefit upon him.

The highest duty owed is to the invitee, requiring the landowner to use reasonable care to discover dangerous conditions on the property and either remedy them or give a warning. A confusing aspect of this category is that it does not encompass all persons invited onto the premises, just those entering for a business purpose or for the purpose for which the property is maintained.

Sweeny v. Old Colony and Newport Railroad is generally regarded as the first case to adopt the common law classification system in this country. In Sweeny the plaintiff, who was driving a horse and wagon, was struck by a train while crossing the tracks after the railroad’s flagman indicated it was safe to cross. The court stated that generally no duty of reasonable care is owed to a trespasser or licensee; but, if there is an invitation, due care is required to keep the premises safe. The inducement of the flagman was held to have made the plaintiff an invitee, therefore subjecting the landowner railroad to the higher standard.

Most jurisdictions adopted the classification system set forth in Sweeny and approached landowner liability cases by focusing primarily on the status of the entrant as determined thereunder. The three entrant categories were applied rigidly, at least initially, and the characterization of the entrant as either trespasser, invitee, or

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21. See Bohlen, supra note 13, at 157.
22. A noted jurist made the remark that, “Any complaint by a licensee may be said to wear the colour of ingratitude.” Bohlen, supra note 13, at 157. Invitees generally confer a pecuniary benefit on the landowner. A business visitor, because he enters the property for business purposes, creates the potential for commercial gain to the landowner. A public invitee, who is in many cases a taxpayer may be said to be paying for the privilege of entering public lands. Conversely, a social guest does not generally compensate the landowner in exchange for permission to enter his property. See notes 3 & 4 supra.
24. See note 4 supra. A social guest is not an invitee. This distinction “has puzzled generations of law students, and even some lawyers.” W. Prosser, Handbook of the Law of Torts § 60, at 378 (4th ed. 1971) [hereinafter cited as Prosser].
26. Id. at 372-73.
27. Id. at 376-77.
28. “[T]he line that separates each of these three classes is an absolutely rigid line. There is no half-way house, no no-man’s land between adjacent territories.” Robert Addie & Sons v. Dumbreck, as cited in Prosser, supra note 24, at § 58 n.63.
licensee was, in most cases, determinative of liability.29

However, courts were quick to carve out exceptions and create subclassifications30 to deal with special situations, thus avoiding harsh results that would potentially follow from a strict application of the tripartite classification system. In certain cases the concept of invitation is stretched to the breaking point to reach a just result.31 An example of this is the manner in which courts classify public employees, such as policemen and firemen. Even though they often fail to meet the traditional criteria, they are sometimes given the highest protection—that of an invitee.32 As a result, the law in every state following the common law approach has become riddled with exceptions to the general rule.33

III. THE ORDINARY NEGLIGENCE APPROACH

The initial assault upon the common law classification system occurred in 1959 in Kermarec v. Compagnie Generale Transatlantique,34 which originated in the admiralty jurisdiction. The Court maintained that the use of classifications and subclassifications produced confusion and conflict, and, further, that such a legal system was alien to the law of the sea.35 The Court suggested that even the common law jurisdictions, while nominally following the classification system to determine liability, were actually taking

29. The court in Rowland was concerned with this when it stated the test it would apply in determining landowner's liability to injured entrants. See Rowland v. Christian, 69 Cal.2d 108, 118, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968).

30. Examples of these are business invitee, business visitor, bare licensee, social guest, gratuitous licensee, licensee by invitation, social licensee, implied licensee, implied invitee and licensee by permission. These subcategories were variations of the same theme and were indications that the categorization of entrants onto land may have been too diverse for meaningful classification. 18 How. L.J. 220, 221 (1973).

31. See BOHLEN, supra note 13, at 160.

32. See Common Law Tort Liability, supra note 10, at 827. Policemen and firemen are generally not invited onto the premises. Nevertheless, courts supply that missing element by employing the legal fiction of constructive invitation.

33. See 37 La. L. Rev. 1174, 1178 (1977). The Supreme Court of Minnesota has observed, "Today, there are so many exceptions that it is nearly impossible to record all of them." Peterson v. Balach, 294 Minn. 161, 199 N.W.2d 639, 644 (1972).

34. 358 U.S. 625 (1959). Since Kermarec merely refused to extend the common law approach to landowner liability in the admiralty area, but did not say this approach was impermissible for the states in terrestrial matters, the case represents persuasive rather than binding authority for state courts. Id. at 631.

35. Id. at 631-32.
an ordinary negligence approach.\textsuperscript{36}

Nine years later, California, in the case of Rowland \textit{v.} Christian,\textsuperscript{37} became the first state to depart from the common law system of landowner liability and adopt an ordinary negligence standard. The \textit{Rowland} case involved an individual who injured his hand on a cracked faucet while in the defendant's apartment as a social guest.\textsuperscript{38} In rejecting the common law approach, the court maintained that to focus on the \textit{status} of the injured party to determine whether the landowner has a duty is contrary to modern social mores and humanitarian values.\textsuperscript{39} The court considered the relevant factors in determining liability to be the connection between the injury and the defendant's \textit{conduct}, the moral blame related to such conduct, the policy or preventing future harm and the availability of insurance.\textsuperscript{40} As support for its decision, the court referred to the state Civil Code and claimed that it imposed a duty of reasonable care on landowners.\textsuperscript{41}

In a brief dissent, Justice Burke declared the common law system to be a reasonable and workable approach to the problems involved, and one which provides the degree of stability and predictability so highly prized in the law.\textsuperscript{42} He expressed the concern that the decision of the majority might open the door to potentially unlimited landowner liability.\textsuperscript{43}

\textsuperscript{36} The Court declared, "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 the circumstances." \textit{Id.} at 631.
\textsuperscript{37} 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).
\textsuperscript{38} Id. at 110, 443 P.2d at 562, 70 Cal. Rptr. at 98. A social guest is generally considered to be a licensee. \textit{See} notes 3 & 24 \textit{supra}.
\textsuperscript{39} Id. at 118, 443 P.2d at 568, 70 Cal. Rptr. at 104.
\textsuperscript{40} Id. at 117, 443 P.2d at 567, 70 Cal. Rptr. at 103. The \textit{Rowland} test for liability under the ordinary negligence approach is set forth at note 8 \textit{supra}.
\textsuperscript{41} 69 Cal.2d at 111-12, 443 P.2d at 563-64, 70 Cal. Rptr. at 99. The Code states that: 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 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. The extent of liability in such cases is defined by the Title on Compensatory Relief. \textit{CAL. CIVIL CODE} \textsection{1714} (West 1973).
\textsuperscript{42} 69 Cal. 2d 108, 120, 443 P.2d 561, 569, 70 Cal. Rptr. 97, 105 (Burke, J., dissenting).
\textsuperscript{43} Id. at 121, 443 P.2d 561, 569, 70 Cal. Rptr. 97, 105 (Burke, J., dissenting). This observation seemed to be grounded in his statement that subsequent issues of landowner liability would be decided on an \textit{ad hoc} basis, bereft of the guiding principles and precedent which the law has heretofore attached by virtue of the relationship of the parties to one another. \textit{But see} note 100 \textit{infra}. 
The Supreme Court of Hawaii, in *Pickard v. City and County of Honolulu*44 followed *Rowland* and held that landowners had a duty to use reasonable care for the safety of all persons reasonably anticipated to be on the premises.45 The court merely stated, without other support, that the common law distinctions had no logical relationship to the exercise of reasonable care for the safety of others.46

In 1971 Colorado abrogated the common law classifications in *Mile High Fence Company v. Radovich*.47 This case involved a police officer who broke his leg when he stepped into a post hole dug by the defendant company. The court held that it could no longer permit a landowner’s liability to depend solely on the status of the plaintiff.48 The court noted that it had departed from the common law distinctions in the past without actually confronting the problem.49 The stated reasons for abandoning the common law approach were that it led to confusion and judicial waste and that harsh results could occur because the approach could keep meritorious cases away from the jury.50 Because of the focus on status under the common law approach, the court observed that the reasonableness of defendant’s conduct was often not discussed.51 Lastly, the court pointed out that an in depth analysis of the Second Restatement of Torts shows that foreseeability of harm, rather than status, is the controlling determinant of liability under the common law approach.52

The District of Columbia was next in joining the minority of jurisdictions employing the ordinary negligence approach through its decision in *Smith v. Arbaugh’s Restaurant, Inc.*53 The court stated that the pre-eminence of land over life could no longer be

45. *Id.* at 135, 452 P.2d at 446 (plaintiff injured from falling through a hole in the floor of an unlighted restroom).
46. *Id.* at 135, 452 P.2d at 446.
47. 175 Colo. 537, 489 P.2d 308 (1971).
48. *Id.* at 541, 489 P.2d at 311.
49. *Id.* at 541-42, 489 P.2d at 311. This concern was also expressed in *Kermarec*. See note 36 and accompanying text *supra*.
50. 175 Colo. at 542-43, 489 P.2d at 311.
51. *Id.* at 543, 489 P.2d at 312-13.
52. *Id.* at 547, 489 P.2d at 314. See, e.g., *Restatement (Second) of Torts* §§ 334, 336, 337, and 339 (1965).
53. 469 F.2d 97 (D.C. Cir. 1972). In *Smith* a health inspector was injured when he slipped on the greasy stairs of defendant’s restaurant.
accepted.\textsuperscript{54} Because standards for determining negligence are firmly established, the court rejected the argument that the elimination of the classifications would leave a jury without standards.\textsuperscript{55}

New Hampshire also followed those jurisdictions which had abandoned the common law approach. In an opinion which was limited in its analysis, the New Hampshire Supreme Court held that in determining the liability of a landlord for persons injured on the leased premises, the landlord must act as a reasonable person under all circumstances.\textsuperscript{56}

In 1975, Rhode Island, by its decision in \textit{Mariorenzi v. Joseph DiPonte, Inc.},\textsuperscript{57} became the fifth state to adopt the ordinary negligence approach. In this wrongful death action, plaintiff's five year old son drowned when he fell into a water-filled leaching field on defendant's property. The trial judge denied recovery, holding the child to be a trespasser to whom no duty was owed.\textsuperscript{58} In reversing, the Rhode Island Supreme Court held that the common law status would no longer be determinative of duty, but the question to be resolved is whether the owner has used reasonable care for the safety of all persons reasonably expected upon his premises.\textsuperscript{59}

Justice Joslin, dissenting, argued that it was socially desirable to allow the free use of land for which the common law system provided. Moreover, he claimed that such a substantial change in the law should be left to the legislature.\textsuperscript{60}

New York, in \textit{Basso v. Miller},\textsuperscript{61} has been the jurisdiction to most

\textsuperscript{54} Id. at 101.
\textsuperscript{55} Id. at 105. \textit{See} 45 \textit{Ford. L. Rev.} 682, 690 (1976). Conduct can be assessed by using the ordinary tort standard of reasonableness.
\textsuperscript{56} Sargent \textit{v. Ross}, 113 N.H. 388, 397, 308 A.2d 528, 534 (1973) (plaintiff's child fell to her death from an outdoor stairway of an apartment building).
\textsuperscript{57} 114 R.I. 294, 333 A.2d 127 (1975). \textit{Mariorenzi} can be considered the only authoritative precedent for abrogating the common law approach because it was the only case to do so which involved a trespasser, the category accorded the least duty under the common law. \textit{See} Hughes, supra note 15, at 633, and 7 St. Mary's L.J. 440 (1975).
\textsuperscript{58} Id. at 298, 333 A.2d at 129. Rhode Island's trespassing child doctrine, which would have placed a higher duty of care upon the landowner, was not applicable to this case because the injury occurred prior to the adoption of the doctrine which was given a strictly prospective application. \textit{Id.} at 300 n.1, 333 A.2d at 130 n.1.
\textsuperscript{59} Id. at 307, 333 A.2d at 133.
\textsuperscript{60} 114 R.I. 294, 310, 333 A.2d 127, 136 (Joslin, J., dissenting).

The New York Court of Claims has subsequently decided to disregard the \textit{Basso} ordinary negligence standard in a decision concerning a snowmobiler injured when his vehicle struck a state-owned and maintained dock on a lake. The court referred to § 9-103 of the General Obligations Law as a codification of the common law rules and declared that the judiciary
recently change to the ordinary negligence approach. In *Basso*, the plaintiff entered a scenic park at night on a motorcycle operated by defendant Miller to assist in the rescue of a park patron. He was injured, while leaving the park, when the motorcycle struck a series of holes in the road, causing both him and the driver to fall.\textsuperscript{82} In alluding to the confusion created by the common law approach, the *Basso* court observed that it was possible for the plaintiff to have been a trespasser when he entered the property, but an invitee at the time of injury.\textsuperscript{83}

Two other jurisdictions, Massachusetts and Minnesota, adopted the ordinary negligence approach with respect to licensees and invitees, but retained the common law trespasser rule.\textsuperscript{84} The Massachusetts case, *Mounsey v. Ellard*,\textsuperscript{85} involved a police officer who was injured when he fell on some ice which had accumulated on the defendant's premises. The court, in rejecting the common law approach, stated that the licensee-invitee distinction tended to "obscure rather than illuminate the relevant factors which should govern determination of the question of duty."\textsuperscript{86} However, the court stopped short of extending the ordinary negligence approach to trespassers. This decision was predicated on the reasoning that there is a significant difference in the legal status of one who trespasses as opposed to one who enters another's land under some color of right.\textsuperscript{87} The court cited no precedent for making this distinction, but merely stated that it was not pursued by the logic and reasoning in

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\textsuperscript{62} Id. at 236, 352 N.E.2d at 869, 386 N.Y.S.2d at 565.

\textsuperscript{63} Id. at 239-40, 352 N.E.2d at 871, 386 N.Y.S.2d at 567. The plaintiff would have been a trespasser when he entered the park premises against the wishes of the person at the ticket gate, a licensee when seen but not ejected by the boss in the parking lot, and an invitee when assisting in the rescue. \textit{Id.}

\textsuperscript{64} This result was also reached statutorily in England. Occupiers' Liability Act, 5 & 6 Eliz. 2, c. 31 (1957).

\textsuperscript{65} 363 Mass. 693, 297 N.E.2d 43 (1973).

\textsuperscript{66} Id. at 706, 297 N.E.2d at 51.

\textsuperscript{67} Id. at 707 n.7, 297 N.E.2d at 51 n.7. While this may be true, it is illogical because it prevents examination into all the circumstances behind the trespasser's presence. A burglar should be accorded a different duty than an inadvertent trespasser. \textit{See} notes 72 & 73 and accompanying text \textit{infra}. Justice Kaplan criticized the court for retaining the trespasser rule because he thought it tended to perpetuate the kind of tradition-bound and mistaken analysis the court was supposedly aiming to correct. 363 Mass. at 717, 297 N.E.2d at 57 (Kaplan, J., concurring).
Rowland. The Minnesota Supreme Court in Peterson v. Blach also refused to follow the common law approach in a case involving a social guest who was asphyxiated by gas leaking from a stove while staying overnight at a friend’s cabin. The court, in adopting the ordinary negligence standard, expressly limited the new standard to cases concerning licensees and invitees. The implication was that the court would defer ruling on that question until a case involving a trespasser was at issue.

The operation of the ordinary negligence approach is simple. Some critics say it is deceptively simple. Basically, it involves assessing the defendant’s conduct in light of all the circumstances to determine whether it is reasonable. Status of the plaintiff, although no longer the primary determinant of liability, is still relevant to the inquiry. In fact, analysis under the negligence standard involves the consideration of all the circumstances behind the plaintiff’s presence. For instance, a burglar would be differentiated from an inadvertent trespasser, even though both are trespassers. Nevertheless, even though status is relevant under the ordinary negligence approach, its importance has been greatly diminished, and the primary concern is with the conduct of the defendant rather than the status of the plaintiff.

IV. COMMON LAW APPROACH V. ORDINARY NEGLIGENCE APPROACH

The argument most frequently offered in support of the common law approach is that it promotes predictability and stability in the law. Many critics have taken issue with this conclusion, insisting

68. 294 Minn. 161, 199 N.W.2d at 642. See note 57 supra.

69. The court also stated, without citing any authority, that there is often good reason to distinguish between a trespasser and a social guest. Lastly, the court pointed out that its action paralleled changes made in England under the Occupiers' Liability Act. 294 Minn. at 165, 199 N.W.2d at 642.

70. See 45 Ford. L. Rev. 682, 689 (1976). The approach is claimed to be deceptively simple because the broad, general negligence standard provides no guidance to courts or judges for particular cases. See Basso v. Miller, 40 N.Y.2d 233, 243, 352 N.E.2d 868, 874, 386 N.Y.S.2d 564, 569 (1976) (Breitel, J., concurring). But see note 55 and accompanying text supra.

71. See text accompanying note 48 supra.

72. See Common Law Tort Liability, supra note 10, at 839.


74. See notes 39 & 40 and accompanying text supra.

75. See, e.g., Rowland v. Christian, 69 Cal. 2d 108, 120, 443 P.2d 561, 569, 70 Cal. Rptr. 97, 105 (Burke, J., dissenting). But see Common Law Tort Liability, supra note 10, at 823
instead that it has led to confusion.\textsuperscript{76} The confusion purportedly arises because of the number of exceptions and subclassifications. Although criticized for this reason, it has been argued that without them the common law system would never have survived.\textsuperscript{77}

Despite its professed simplicity, the common law approach has been criticized as being difficult of application.\textsuperscript{78} In addition to the complexity introduced by the numerous exceptions and subclassifications, difficulty in reaching a proper result arises when the entrant’s status changes during his stay on the premises.\textsuperscript{79} In such instances it is often difficult to clear the first hurdle of determining the status of the entrant.

On the other hand, the ordinary negligence approach has also been subject to criticism. A major asserted weakness of this approach is that too many cases go to the jury, which traditionally favors plaintiffs, thereby wresting control away from the courts.\textsuperscript{80} If this happens, the right of landowners to make free use of their land is seriously eroded. This concern may be unfounded because courts have ample means to either withdraw a case from the jury, if necessary,\textsuperscript{81} or set outer limits upon the exercise of their discretion.\textsuperscript{82} Moreover, juries are routinely trusted to decide cases impartially in other areas of the law.\textsuperscript{83}

Beyond the differences in the two approaches, a fundamental question is whether they result in the application of significantly different standards. The Court in \textit{Kermarec} clearly maintained that

\begin{itemize}
\item \textsuperscript{76} This is often advanced as a reason for changing to the ordinary negligence approach. \textit{See Common Law Tort Liability, supra} note 10, at 819; 25 \textit{Ala. L. Rev.} 401, 414 (1973).
\item \textsuperscript{77} \textit{See} 44 \textit{U. Cin. L. Rev.} 124, 130 (1975).
\item \textsuperscript{78} \textit{See} Hughes, \textit{supra} note 15, at 693.
\item \textsuperscript{79} \textit{See} 45 \textit{Ford. L. Rev.} 682, 685 (1976). \textit{See also} note 63 and accompanying text \textit{supra}.
\item \textsuperscript{80} Any rule of substantive law or procedure which enlarges the jury’s theoretical sphere tends to extend liability, whereas any rule which restricts that sphere tends to restrict liability. \textit{See} James, \textit{Functions of Judge and Jury in Negligence Cases}, 58 \textit{Yale L.J.} 667, 669 (1949) [hereinafter cited as \textit{James}]; \textit{Common Law Tort Liability, supra} note 10, at 848 (plaintiffs may be favored because of expanding role of juries in the decision process); 45 \textit{Ford. L. Rev.} 682, 689 (1976).
\item \textsuperscript{81} \textit{See} James, \textit{supra} note 80, at 679. A court may direct a verdict, grant a nonsuit, or order a new trial in appropriate circumstances. For example, if there is no genuine issue as to a material fact or if reasonable persons could not differ regarding an issue of fact it would be proper to withdraw these matters from the jury.
\item \textsuperscript{82} \textit{Id.} at 677.
\item \textsuperscript{83} The choice seems to be either to trust juries or discontinue using them. \textit{See} Hughes, \textit{supra} note 15, at 700.
\end{itemize}
they did not. The common law jurisdictions, in many cases, apply a de facto ordinary negligence approach while paying lip service to the common law classifications. Cases in which an entrant's status is considered to change during his stay on the premises demonstrate the primacy of the landowner's state of knowledge of the entrant's presence, rather than his status, in imposing liability. Because the standards being applied under both approaches are functionally almost identical, though nominally different, it is said that courts in both common law and ordinary negligence jurisdictions reach the same results. Why then is one approach to be preferred over the other? First, predictability in the law demands that the subjective rationale in support of court decisions coincides with the expressed rationale. Second, and more important, plaintiffs with meritorious causes of action may still be barred from recovery under the common law system based on their entrant status if they fail to fit within a suitable exception or subclassification. An approach which allows for such a result, by placing courts in an analytical straitjacket, is abhorrent to any enlightened system of jurisprudence.

V. CURRENT STATUS OF THE LAW IN PENNSYLVANIA

At the present time, Pennsylvania, along with the majority of jurisdictions, follows the common law entrant classification approach to landowner liability. Whether this is because an appropri-

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84. See note 36 and accompanying text supra. The exceptions to the common law classifications, many of which take into account the foreseeability of the entrant, show that considerations fundamental to the law of negligence are pertinent. See Hughes, supra note 15, at 545.
85. See Common Law Tort Liability, supra note 10, at 818.
87. Two California cases serve as an example whereby status was exalted to the exclusion of common sense. In one case an individual buying a drink in a local tavern recovered damages when he was injured by falling into a concealed trap. In another, recovery was denied under nearly identical circumstances because the plaintiff's friend bought the drink for him, making him a licensee rather than invitee. See Comment, Torts—Abrogation of Common Law Entrant Classes of Trespasser, Licensee, and Invitee, 25 Vand. L. Rev. 623 (1972) (citing Bram v. Vallade, 33 Cal. App. 279, 164 P. 904 (1919) and Kneuser v. Belasco-Blackwood Co., 22 Cal. App. 205, 133 P. 989 (1913)). See also note 49 and accompanying text supra.
88. See, e.g., Crotty v. Reading Industries, Inc., 237 Pa. Super. Ct. 1, 8, 345 A.2d 259, 263 (1975). This is the only Pennsylvania case to date to even make reference to Rowland and its progeny. Id. at 8 n.5, 345 A.2d at 262 n.5. The court cites Rowland for the proposition that liability to entrants on land is not always dependent on status. However, the court was careful to affirm its allegiance to the common law system. See also Crane v. I.T.E. Circuit
ate case has not arisen to serve as a vehicle for bringing about a change in the law is a matter of speculation. It is doubtful that a case involving an invitee would be suitable since the duty owed to an invitee closely parallels reasonable care—the ordinary negligence standard. In this type of case, recovery would be possible under either standard, so there would be no need for a change in the law. The ideal vehicle is a case involving either a trespasser or licensee in which the plaintiff has a meritorious claim, but cannot recover under the common law system because he does not fit within an exception or subclassification, hence is not entitled to a higher duty than either licensees or trespassers in general.

If the proper case were to arise, Pennsylvania might conceivably join the minority of jurisdictions which have adopted the ordinary negligence approach. Pennsylvania cases in this area often contain cryptic language which could indicate that concepts of ordinary negligence are already being applied in the decisions. This might presage a willingness to adopt the ordinary negligence approach if a suitable case comes before the courts. The reference in Crotty v. Reading Industries, Inc. to Rowland and its progeny can be read as support for this conclusion. Although the Crotty court affirmed its allegiance to the common law system, the court was careful not to criticize Rowland.

VI. CONCLUSION

The foregoing analysis has revealed that the claimed advantages...
of the common law approach to landowner liability are suspect. The approach, though simple in theory, has proven to be complex and confusing in operation.\textsuperscript{94} As a result, it is doubtful that it has led to predictability and stability in the law.\textsuperscript{95} Additionally, many courts appear to be applying a negligence standard while purporting to follow the common law standard.\textsuperscript{96} Obviously, this does not promote predictability and stability, nor does it result in simplicity. The real reason, therefore, that so many jurisdictions retain the common law approach seems to be primarily attributable to judicial inertia.\textsuperscript{97}

In contrast, the advantages of the ordinary negligence approach are substantial. It focuses primarily on the conduct\textsuperscript{98} of the defendant rather than the status of the plaintiff. In our democratic society, which stresses individual rights over property rights, it would seem that this emphasis would be almost mandated. The criticism that this approach leaves the jury without any standards is totally unfounded.\textsuperscript{99} The fear that landowners will become insurers appears equally groundless.\textsuperscript{100} Courts have ample means\textsuperscript{101} to assure that recovery is permitted only in cases where an entrant has a meritorious claim based on the landowner acting unreasonably. Harsh results are avoided, since plaintiffs are not non-suited, as a matter of law because of a failure to fit within an exception or subclassification which would allow recovery.\textsuperscript{102}

On balance, the common law approach has little to recommend

\textsuperscript{94}. See notes 78 & 79 and accompanying text supra.
\textsuperscript{95}. Predictability and stability are claimed to be virtues of the common law approach. See note 75 supra.
\textsuperscript{96}. See note 84 and accompanying text supra. See also text following note 86 supra.
\textsuperscript{97}. "The law governing the liability of an occupier to persons injured while on his property seems to have been perdurably frozen in the trident of channels dug by judges of the nineteenth century." Hughes, supra note 15, at 633. While stare decisis has a valuable role to play in the decision making process, it should not be the sole determinant.

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule persists from blind imitation of the past.

Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897). "A rapid paced urban society, such as ours, should not be forced to follow an outmoded English status system when even that country has repudiated its worth." 22 N.Y.L.S.L. Rev. 370 (1976).

\textsuperscript{98}. See text accompanying note 40 supra.
\textsuperscript{99}. See note 55 supra.
\textsuperscript{100}. The adoption of the negligence standard in France did not increase pro plaintiff verdicts by a substantial amount. See Common Law Tort Liability, supra note 10, at 848.
\textsuperscript{101}. See note 81 and accompanying text supra.
\textsuperscript{102}. See note 87 and accompanying text supra.
it. Conversely, the ordinary negligence approach seems to strike a proper balance between assuring the safety of persons entering the premises of others and allowing landowners to make free use of their property, provided they act reasonably towards entrants. Pennsylvania courts, and others, would be well advised to adopt the ordinary negligence approach at the earliest possible opportunity.

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