

December 1968

Negligence - Duty of Due Care-Invitee/Licensee/Trespasser Distinction Abolished - Rowland v. Christian, __Cal. 2d__ , 443 P. 2d 561, 70 Cal. Rptr. 97 (Cal. Sup. Ct. 1968)

Douglas Bergere

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Douglas Bergere, *Negligence - Duty of Due Care-Invitee/Licensee/Trespasser Distinction Abolished - Rowland v. Christian, __Cal. 2d__ , 443 P. 2d 561, 70 Cal. Rptr. 97 (Cal. Sup. Ct. 1968)*, 10 Wm. & Mary L. Rev. 495 (1968), <https://scholarship.law.wm.edu/wmlr/vol10/iss2/16>

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Since the employee must bear the risk that the official issuing the instructions does not have the proper authority, no government employee implementing orders can tell with certainty whether or not he will receive absolute immunity for his acts. Such uncertainty was noted by Mr. Chief Justice Warren in the standard formulated in *Barr v. Matteo*.²¹ Still unanswered under this formula is at what echelon of governmental duty the privilege inures.

Perhaps this recognition of the privilege for the subordinate, the uncertainty among scholars as to the reach of the absolute privilege, and the deliberate choice by the CIA of defamation as an instrument of national policy²² will lead to a reexamination by the Supreme Court of the language as well as the rationale of *Barr v. Matteo*.

DON SCEARCE

Negligence—DUTY OF CARE—INVITEE—LICENSEE—TRESPASSER: DISTINCTION ABOLISHED. Plaintiff, a social guest, sustained injuries when a knob of a faucet in defendant's bathroom broke while he was using it. Action was brought and summary judgment for the defendant was entered on the grounds that plaintiff, a licensee, took the premises as he found them and the only duty owed by the defendant was to refrain from wantonly injuring his guest. The Supreme Court of California,¹ two justices dissenting, reversed, holding that under section 1714 of the civil code a landowner is liable for all injuries occasioned by lack of ordinary care regardless of the status of the visitor.²

Liability of a landowner generally has been expressed in terms of classifying the visitor either as a trespasser, licensee, or invitee.³ At common law, a trespasser is one who has no right whatsoever to be on the property,⁴ and the landowner is under no duty except to refrain

21. 360 U.S. 564, 578 (1959).

22. See the dissenting opinion of Judge Craven in *Heine v. Raus*, No. 11,195 at 14.

1. *Rowland v. Christian*, — Cal.2d —, 443 P.2d 561, 70 Cal. Rptr. 97 (Cal. Sup. Ct. 1968).

2. § 1714 of the CAL. CIVIL CODE 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

3. See cases cited under 65 C.J.S. *Negligence* § 63(1) (1966); *Brush v. Public Serv. Co. of Ind.*, 106 Ind. App. 554, 21 N.E.2d 83 (1939); *Williams v. Morristown Memorial Hosp.*, 59 N.J. Super. 384 (1960).

4. RESTATEMENT (SECOND) OF TORTS § 329 (1965): "A trespasser is a person who

from wantonly injuring the intruder.⁵ The trespasser takes the premises as he finds them, and no liability attaches to the landowner for unsafe conditions thereon.⁶ However, should the owner discover the presence of a trespasser, he must exercise due care while engaging in a hazardous or dangerous activity.⁷ The doctrine of "attractive nuisance"⁸ has been applied in some jurisdictions in cases of child trespassers whereby a landowner who maintains an object in a dangerous condition which would normally be the subject of a child's curiosity may incur liability for injury to the child.⁹

The duty owed to a licensee has been held to be similar to that owed to a trespasser.¹⁰ A licensee is one who goes upon the land or premises of another by the express or implied consent of that other, but is not an invitee.¹¹ The licensee also takes the premises as he finds them,¹² enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise."

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

5. *Missouri-Kansas-Texas R.R. v. Mathis*, 349 F.2d 897 (10th Cir. 1965); *Daisey v. Colonial Parking, Inc.*, 331 F.2d 777 (D.C. Cir. 1963); *Smith v. John B. Kelly, Inc.*, 275 F.2d 169 (D.C. Cir. 1960); *Kanaley v. Delaware, Lackawanna, & W.R.R.*, 271 F.2d 657 (2d Cir. 1959); *Winter v. Mackner*, 68 Wash. 943, 416 P.2d 453 (1966); *Palmquist v. Mercer*, 126 Cal. App. 2d 455, 272 P.2d 26 (1954); *Boucher v. American Bridge Co.*, 95 Cal. App. 2d 659, 213 P.2d 537 (1950).

6. *Davis v. Goodrich*, 171 Cal. App. 2d 92, 340 P.2d 48 (1959); RESTATEMENT (SECOND) OF TORTS § 333(a) (1965): "A possessor of land is not liable to trespassers . . . by his failure to put land in a condition reasonably safe . . ."

7. RESTATEMENT (SECOND) OF TORTS § 334 (1965).

8. *Woods v. San Francisco*, 148 Cal. App. 2d 958, 307 P.2d 698 (1967); *Barrett v. Southern Pac. Co.*, 91 Cal. 296, 27 Pac. 666 (1891) (leading case); A similar rule exists in other jurisdictions known as the "dangerous instrumentality" doctrine. See *Buckley v. Valley Camp Coal Co.*, 324 F.2d 244 (4th Cir. 1963).

9. The factors to be considered in the application of this rule are: (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; (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; (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; (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 protect the children.

10. *Buckley v. Valley Camp Coal Co.*, 324 F.2d 244 (4th Cir. 1963); *Kanaley v. Delaware, Lackawanna, & W.R.R.*, 271 F.2d 657 (2d Cir. 1959); *Bronikowski v. Bigham*, 75 Ohio L. Abs. 220, 143 N.E.2d 490 (1955); *Palmquist v. Mercer*, 126 Cal. App. 2d 455, 272 P.2d 26 (1954).

11. "The object of a licensee is the mere pleasure or benefit of the visitor." *Cain v.*

however, should the landowner know of a dangerous condition on his property and knows or should know that the licensee will not discover the condition, an affirmative duty will be imposed upon the landowner to avoid the injury by the use of due care.¹³ There is no duty to warn a licensee of an obvious danger, but only of a "trap."¹⁴ The more recent cases distinguish between active and passive negligence on the part of the landowner,¹⁵ with liability imposed for active negligence.¹⁶

The highest degree of care is due an invitee.¹⁷ An invitee is either a member of the public who is upon the land for the purpose for which the land is open to the public, or a business visitor who is on the land to conduct business with the possessor.¹⁸ An invitee is due ordinary care;¹⁹ and the landowner is liable for harm to invitees resulting either from possessor's failure to carry on his activities with reasonable care or from his failure to remedy or give warning of dangerous conditions of which he knows or, in the exercise of reasonable care, should know.²⁰

California has had the civil code provision since 1872; and, although its courts have acknowledged the provision, the common law view has prevailed.²¹ Stating that public concern had changed from concern for the rights of the individual landowner to a greater concern for

Friend, 171 Cal. App. 2d 618, 619, 341 P.2d 753, 754 (1959). See Frankel v. Kurtz, 239 F. Supp. 713 (W.D. S.C. 1965); Aluminum Co. of America v. Walden, 230 Ark. 337, 322 S.W.2d 696 (1959); Snyder v. Jay Realty Co., 30 N.J. 303, 153 A.2d 1, 78 A.L.R. 95 (1959); Fanning v. Apawana Golf Club, 169 Pa. Super. 180, 82 A.2d 584 (1951).

12. Sockett v. Gottlieb, 9 Cal. Rptr. 831, 834 (1960); see Sokolski v. Pugliese, 149 Conn. 399, 179 A.2d 603 (1962).

13. RESTATEMENT (SECOND) OF TORTS § 343 (1965).

14. See cases cited under 65 C.J.S. *Negligence* § 63(23) (1966); The more recent cases consider any kind of hidden dangerous condition a "trap." See Shypulski v. Waldorf Paper Prod. Co., 232 Minn. 394, 45 N.W.2d 549 (1951); James, *supra* note 4.

15. E.g., Oettinger v. Stewart, 24 Cal.2d 133, 148 P.2d 19 (1954) (leading case).

16. Howard v. Howard, 186 Cal. App. 2d 622, 9 Cal. Rptr. 311 (1960) (sending guest into room with known grease on floor); Newman v. Fox West Coast Theatres, 86 Cal. App. 2d 428, 194 P.2d 706 (1948) (failure of manager of a theatre to clean a substance from floor when pointed out by a patron); Herold v. P.H. Mathews Paint House, 39 Cal. App. 489, 179 Pac. 414 (1919) (agent opening a door to an empty elevator shaft).

17. Graham v. Loper Elec. Co., 192 Kan. 558, 389 P.2d 750 (1964); see generally James, *supra* note 4.

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

19. Craft v. United States, 237 F. Supp. 717 (E.D. N.C. 1965); Florez v. Groom Dev. Co., 53 Cal.2d 347, 348 P.2d 200 (1959); Powell v. Vracin, 150 Cal. App. 2d 454, 310 P.2d 27 (1957); Romenici v. Trumbell Elec. Mfg. Co., 145 Conn. 691, 146 A. 416 (1958).

20. MacLean v. Parkwood, Inc., 354 F.2d 770 (1st Cir. 1967); see RESTATEMENT (SECOND) OF TORTS § 343 (1965).

21. Fernandez v. Consol. Fisheries, Inc., 98 Cal. App. 2d 91, 219 P.2d 73 (1950).

public safety,²² the court in *Rowland v. Christian*²³ held that the status of the visitor was of secondary importance to the following factors: (1) The closeness of the connection between the injury and the defendant's conduct; (2) The moral blame of the defendant's conduct; (3) The policy of preventing future harm; and (4) Prevalence and availability of insurance.²⁴

The abolition of the distinction between the duty owed to an invitee and licensee will probably gain wide acceptance, but the assertion that the same duty is owed to the trespasser will not be readily accepted. Whereas, the licensee and invitee are upon the premises by the invitation of the owner, the presence of the trespasser is illegal *ab initio*, and courts have always been hesitant to give a wrongdoer the same standing as an innocent party.

DOUGLAS BERGERE

22. *Rowland v. Christian*, — Cal. 2d —, 443 P.2d 561, 567, 70 Cal. Rptr. 97 (Cal. Sup. Ct. 1968).

23. — Cal. 2d —, 443 P.2d 561, 70 Cal. Rptr. 97 (Cal. Sup. Ct. 1968).

24. *Id.*, 443 P.2d at 567