SMITH v. ARBAUGH'S RESTAURANT, INC., AND THE INVITEE-LICENSEE-TRESPASSER DISTINCTION

In *Smith v. Arbaugh's Restaurant, Inc.*,[1] a three-judge panel of the Court of Appeals for the District of Columbia has followed the lead of the Supreme Court of California[2] in abolishing the common law status distinctions between invitees, licensees, and trespassers, as determinative of the duty of care owed by a land occupier to entrants on his land. Plaintiff in the case was a health inspector who had come to inspect the defendant restaurant's barbecue pits. Descending metal stairs, he slipped on a worn, greasy step, and was injured. At the trial on the negligence action, the court left to the jury the issues of the plaintiff's status (licensee or invitee) and the defendant's compliance with the corresponding duty of care. The jury found for the defendant and the plaintiff appealed, arguing that the trial court should have ruled as a matter of law that the plaintiff was an invitee.[3] In an opinion by Chief Judge Bazelon, the court of appeals reversed and remanded for a jury finding on the defendant's compliance with a duty of "maintaining its property in a condition reasonably safe under all the circumstances," without the defendant's duty being defined by the plaintiff's entrant status.[4]

Previous District of Columbia law,[5] consistent with the common law of nearly all American jurisdictions,[6] held that a land occupier's[7]

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[1] No. 23,748 (D.C. Cir., June 30, 1972).

[2] Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). In form, but not in substance, *Rowland* was the result of statutory interpretation rather than common law. *See* 44 N.Y.U.L. REV. 426, 432 (1969). Three courts have followed *Rowland* purely as a matter of common law: Mile High Fence Co. v. Radovich, — Colo. —, 489 P.2d 308 (1971); Pickard v. City & County of Honolulu, 51 Hawaii 134, 452 P.2d 445 (1969); Peterson v. Balach, — Minn. —, 199 N.W.2d 639 (1972) (abolishing distinction between licensees and invitees without reaching question of trespassers). The *Rowland* decision has received considerable comment in the reviews, *e.g.*, 44 N.Y.U.L. REV. 426 (1969); 25 VAND. L. REV. 623 (1972). In view of the existing commentary, much of the discussion herein is devoted to an analysis of the novel approach taken in the concurring opinion of Judge Leventhal. *See* note 27 *infra* & accompanying text.

[3] Smith v. Arbaugh's Restaurant, Inc., No. 23,748, at 1-4; *see* note 11 *infra*.

[4] *Id.* at 21. Judge Wright joined with Chief Judge Bazelon to form the majority. Judge Leventhal concurred in a separate opinion.

The court also approved, giving the matter only footnote treatment, an instruction by the trial court "that if the jury found that there was a foreign substance on the staircase, that it must also find that someone in charge 'had sufficient time to ascertain that condition.'" *Id.* at 3-4 n.2. The cases cited by the court, however, do not support that conclusion unless it is assumed that the substance on the steps was left by an outsider. Such an assumption would seem unjustified based on the court's description of the facts.

[5] *See id.* at 5-6.

[6] *See* RESTATEMENT (SECOND) OF TORTS §§ 328E-350 (1965) [hereinafter cited as RESTATEMENT]; W. PROSSER, HANDBOOK OF THE LAW OF TORTS 351-99 (4th ed. 1971) [hereinafter cited as W. PROSSER, TORTS]. The exceptions are California, Colorado, Connecticut, Hawaii, Louisiana, and, since the date of decision in *Arbaugh's Restaurant*, Minnesota. *See* note 27 *infra*. *See generally* Green, *Landowner v. Intruder; Intruder v. Landowner: Basis of Responsibility in Tort*, 21 MICH. L. REV. 495 (1923); Hughes, *Duties to Trespassers: A Comparative Survey and Revaluation*, 68 YALE L.J. 633 (1959);

duty of care to an entrant upon his property was determined solely by the entrant's technical status as a trespasser,[8] licensee[9] (including social guests[10]), or invitee.[11] Originally, a land occupier was bound to exercise ordinary care toward invitees, but was only required to avoid willful or wanton injury to trespassers or licensees.[12] This immunity[13] from the duty of reasonable care toward trespassers and licensees was based on the concept of a land occupier's right to complete freedom in the use and exploitation of his own property, a notion that solidified in the law prior to the crystallization of the general negligence standard.[14] The harshness[15] and inflexibility[16] of this doctrine generated a spate of exceptions for artificial conditions on the land, child trespassers, known or constant trespassers, dangerous activities, known dangers, and active negligence,[17] and differentiations between the standard of care owed to licensees and that owed to trespassers. The continuing process

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James, *Tort Liability of Occupiers of Land: Duties Owed to Trespassers*, 63 YALE L.J. 144 (1953) [hereinafter cited as James, *Trespassers*]; James, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 YALE L.J. 605 (1954) [hereinafter cited as James, *Licensees & Invitees*]; Marsh, *The History and Comparative Law of Invitees, Licensees and Trespassers*, 69 L.Q. REV. 182, 359 (1953); Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573 (1942) [hereinafter cited as Prosser, *Invitees*].

[7] For the precise meaning of "land occupier" as used in this context, see Smith v. Arbaugh's Restaurant, Inc., No. 23,748, at 5 n.5; James, *Trespassers*, *supra* note 6, at 146-48. The court does not refer to the standard of care owed an entrant on personal property such as an automobile. *See generally* W. PROSSER, TORTS, *supra* note 6, at 357 n.66, 382-84; Occupiers' Liability Act, 5 & 6 Eliz. 2, c. 31, § 1(3)(a) (1957).

[8] "A trespasser is a person who enters or remains upon land in the possession of another without a privilege to do so . . . ." RESTATEMENT, *supra* note 6, § 329.

[9] "A licensee is a person who is privileged to enter or remain on land only by virtue of the possessor's consent." *Id.* § 330.

[10] *Id.* § 330, comment *h*.

[11] Invitees include business visitors and public invitees. *Id.* § 332(1). "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." *Id.* § 332(3). "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." *Id.* § 332(2). *See* notes 34-36 *infra* & accompanying text. The status of a public health inspector has not been determined in the District of Columbia. *See* Smith v. Arbaugh's Restaurant, Inc., No. 23,748, at 4 n.3. While there is some controversy as to the status of public employees in general, Prosser, *Invitees*, *supra* note 6, at 608-11, health inspectors differ from firemen or policemen entering at unexpected hours, Note, *Landowner's Negligence Liability to Persons Entering as a Matter of Right or Under a Privilege of Private Necessity*, 19 VAND. L. REV. 407, 428-31 (1966), and should be treated as invitees. RESTATEMENT, *supra* note 6, § 345, comment *c*.

[12] Bohlen, *Fifty Years of Torts*, 50 HARV. L. REV. 725, 739 (1937); *see* Sweeny v. Old Colony & N.R.R., 92 Mass. (10 Allen) 368, 372-73 (1865). *See generally* authorities cited note 6 *supra*.

[13] The lower standards of care required are correctly considered immunities rather than attempts to define foreseeability. *See* Rowland v. Christian, 69 Cal. 2d 108, 117-18, 443 P.2d 561, 567, 70 Cal. Rptr. 97, 103 (1968); 44 N.Y.U.L. REV. 426, 431 n.42 (1969). *But cf.* Smith v. Arbaugh's Restaurant, Inc., No. 23,748, at 11.

[14] Bohlen, *The Duty of a Landowner Toward Those Entering His Premises of Their Own Right*, 69 U. PA. L. REV. 237, 237-39 (1921); Marsh, *supra* note 6, at 183-86.

[15] *See* Hughes, *supra* note 6, at 686.

[16] *See* Robert Addie & Sons (Collieries), Ltd. v. Dumbreck, [1929] A.C. 358, 371.

[17] *See* RESTATEMENT, *supra* note 6, §§ 333-42, 343B, 345.

of expanding the categories of exceptions and straining the limits[18] of the established exceptions in an attempt to reach a fair determination, has resulted in a complexity[19] and artificiality[20] of rules which has received considerable criticism.[21]

The court of appeals specifically noted in *Arbaugh's Restaurant* the confusion in the law as developed in the District of Columbia and elsewhere,[22] but its decision to dismantle the status distinctions rested primarily on a conviction that the common law system of immunities failed to comport with modern values and reality. No longer, said the court, could "the preeminence of land over life," be automatically accepted.[23] By lifting the status distinction rules, the jury, as the community's representative, can serve fully and flexibly in each case as the arbiter of reasonable standards of care.[24]

In his concurring opinion, Judge Leventhal advocated that the rules of entrant classifications be abolished only with respect to entrants on the property of a business establishment.[25] Rejecting the majority's conclusion that modern values dictated a duty of reasonable care by all land occupants to all entrants, Judge Leventhal relied on two distinctions between business and residential property. First, given business realities and the ambiguities of such values as goodwill, almost any person's presence on a business establishment's property confers some benefit on the business; thus trespassers and licensees on business property are indistinguishable from invitees. Secondly, a business establishment can efficiently distribute the liability burden through insurance or self-insurance, spreading the cost among its customers. Conversely, it is argued that neither of these generalizations holds true as applied to residential property.[26] Both the respect generally due the

[18] *See, e.g.*, Gould v. DeBeve, 330 F.2d 826 (D.C. Cir. 1964); Hansen v. Richey, 237 Cal. App. 2d 475, 46 Cal. Rptr. 909 (Dist. Ct. App. 1965); Benedict v. Podwats, 57 N.J. 219, 222-24, 271 A.2d 417, 419-21 (1970) (Hall, J., dissenting).

[19] *See, e.g.*, Daisey v. Colonial Parking, Inc., 331 F.2d 777 (D.C. Cir. 1963).

[20] *See, e.g.*, West v. Tan, 322 F.2d 924 (9th Cir. 1963) (restaurant patron, invitee in dining room, held to be licensee on band platform where she was permitted to play piano); Walsh v. Sun Oil Co., 437 Pa. 80, 89-90 n.4, 262 A.2d 128, 132 n.4 (1970) (Roberts, J., concurring & dissenting) (duty of care might "depend on the scope of the fire and the location of the victim"). *Compare* Braun v. Vallade, 33 Cal. App. 279, 164 P. 904 (Dist. Ct. App. 1917), *with* Kneiser v. Belasco-Blackwood Co., 22 Cal. App. 205, 133 P. 989 (Dist. Ct. App. 1913) (duty of care owed to one who buys drink in tavern differs from duty owed to one whose drinks were purchased by another).

[21] *E.g.*, Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630-31 (1959) (declining to import into admiralty law a system of distinctions it termed a "semantic morass"). *See generally* Rowland v. Christian, 69 Cal. 2d 108, 115-16, 443 P.2d 561, 566, 70 Cal. Rptr. 97, 102 (1968); Hughes, *supra* note 6, at 648-49.

[22] Smith v. Arbaugh's Restaurant, Inc., No. 23,748, at 10, 12-15.

[23] *Id.* at 8. "With urbanized society comes closer living conditions and a more gregarious population. The trespasser who steps from a public sidewalk onto a private parking lot today is not the 'outlaw' or 'poacher' whose entry was both unanticipated and resented in the nineteenth century." *Id.* at 11.

[24] *Id.* at 9-10. The presence of status distinction rules alters the jury's function from one of determining reasonableness to one of defining status. *Id.* at 14 n.32.

[25] *Id.* at 21-23.

[26] *Id.*

writer's opinions, and the novelty of the position,[27] demand an analysis of Judge Leventhal's position. This discussion should also illuminate the basis and the effects of the majority decision.

The immediate objection to a distinction between residential and business property in this context, noted by the majority,[28] is that its implementation would generate further complexity in an already confusing area. Initial difficulty arises in defining the term business establishment and determining whether it should apply normatively, as the term is commonly used, or functionally. Although, for example, the same difficulties encountered in the business context may exist in classifying the status of an entrant on certain government or church owned property,[29] and although those owners may be capable of supporting and distributing the burden of risk of entrant injuries, such property is not generally considered a business establishment. Furthermore, Judge Leventhal would eliminate status distinctions for businesses which do not deal with the public, despite the facility with which the status of entrants on such property can be determined. The difficulty is aggravated by the apparent assumption that land must either support a business establishment or be residential. Under this dichotomy the status of land held for investment or sale, for example, is uncertain,[30] and residential property used partially for business, such as a doctor's office, would apparently be considered a business establishment in relation to certain entrants.[31] If the status of such multi-use property is to vary according to the reason for the visitor's presence, then the determination of whether that property is business or residential will generally be nothing more than a determination of whether the visitor is a business invitee or social guest.[32] Moreover,

[27] No jurisdiction has adopted the distinction proposed by Judge Leventhal. California, Colorado, and Hawaii have entirely abolished the status distinctions as determinative of the standard of care due an entrant upon land. *See* note 2 *supra*. The Supreme Court of Minnesota has abolished the distinction between licensees and invitees. Peterson v. Balach, — Minn. —, 199 N.W.2d 639 (1972). The standard of care distinction between invitees and social guests has been abolished in Connecticut and Louisiana. CONN. GEN. STAT. ANN. § 52-557a (Supp. 1972); Daire v. Southern Farm Bureau Cas. Ins. Co., 143 So. 2d 389 (La. Cir. Ct. App. 1962); Alexander v. General Accident Fire & Life Assurance Corp., 98 So. 2d 730 (La. Cir. Ct. App. 1957). In Great Britain the distinction between standards of care due invitees and licensees has been abolished by statute. Occupiers' Liability Act, 5 & 6 Eliz. 2, c. 31 (1957). *But see* Gould v. DeBeve, 330 F.2d 826, 830 (D.C. Cir. 1964): "One who puts his land to profitable use by building apartments and inviting significant numbers of people to lead their lives therein inevitably takes on an aspect different from the country squire who wants mainly to be left alone on his rural acres."

[28] Smith v. Arbaugh's Restaurant, Inc., No. 23,748, at 19-20.

[29] *Cf.* Firfer v. United States, 208 F.2d 524 (D.C. Cir. 1953).

[30] Arguably the categorization of land held for investment might depend on whether or not the land was developed, and whether it was owned by an individual, a trust, or a corporation.

[31] *Cf.* RESTATEMENT, *supra* note 6, § 332, comment *e*.

[32] Other problems of classification could occur if invitees on multi-use property exceed the scope of their invitation. If a door-to-door salesman invited into a doctor's home enters the separate office without authorization should the office be considered business property, thus resulting in a different standard of care than if the visitor had

under such a distinction, unequal standards would be perpetuated,[33] although on a different theory, in apartment house cases, where the standard of care of the lessor to a lessee's social guest would be higher than that of the lessee to his guest, because what is business property as to the former is residential property as to the latter.

Thus, Judge Leventhal's approach would implant a further obstacle in the path of a jury determination of negligence. First, a determination of the type of land must be made. Then, if the land is found to be residential, a determination of the plaintiff's status at the time of the accident must follow. Only then is it possible that the jury could reach the fundamental question of reasonable care under the circumstances.

The proposed distinction between residential and business property is not only overly complex, but is based on inaccurate analysis, and thus does not represent the appropriate reformation of the common law. Judge Leventhal's first argument for treating the two types of property differently, that with regard to business property the traditional status distinctions are "mischievous" due to the inherent difficulty in distinguishing among trespassers, licensees, and invitees, assumes that the purpose heretofore served by such classification was to identify those entrants who conferred a benefit on the land occupier, and that only those entrants who conferred such a benefit were due reasonably safe premises. But this ignores the now generally accepted view that one who is invited onto property simply as a member of the public is also an invitee,[34] even if "the visitor's presence is in no way related . . . to any possibility of benefit or advantage, present or prospective, pecuniary or otherwise, to the possessor."[35] Thus, the basis of the invitation theory is not that the visitor confers a benefit on the possessor, but, that the occupier has led the entrant to believe that the premises were intended for visitors to use, and, by implication, has represented it as safe.[36] Although social guests have been afforded invitee protections on this theory in only a few jurisdictions,[37] it is reasonably argued that social guests rely on the same implied rep-

entered a bedroom without authorization? A similar question arises if a social guest is given a tour of his accountant's home: should it matter whether the guest is injured in the kitchen or the office?

[33] *See* RESTATEMENT, *supra* note 6, § 332, comment *k; cf.* Solon Serv., Inc. v. Cook, 223 F.2d 317 (D.C. Cir. 1955).

[34] *See* RESTATEMENT, *supra* note 6, § 332(2). This position was advocated in Prosser, *Invitees*, *supra* note 6, at 602, and adopted in the District of Columbia in Firfer v. United States, 208 F.2d 524 (D.C. Cir. 1953).

[35] RESTATEMENT, *supra* note 6, § 332, comment *d* at 179.

[36] *See* W. PROSSER, TORTS, *supra* note 6, at 385-91; James, *Licensees & Invitees*, *supra* note 6, at 612-23. It is unclear whether the original distinction between licensees and invitees was based on the financial benefit conferred by the invitee or the implied representation that a place held open to the public was safe. *See* Peterson v. Balach, — Minn. —, —, 199 N.W.2d 639, 645 (1972).

[37] *See* note 27 *supra*.

resentations of safety.[38] Additionally, if occupant benefit is to be relevant to a determination of duty, it can be argued persuasively that most social guests confer real benefits upon their hosts, and should therefore receive the protection of invitee status.[39]

Judge Leventhal's second argument, that, in general, only business use of property allows for efficient distribution of liability losses, underestimates the significance of low-cost liability insurance for residential land occupiers.[40] Admittedly, unlike the occupier of business property, the occupier of residential property cannot distribute the cost of insurance or self-insurance among customers, but liability insurance is, in itself, a sufficient method for distributing loss. Once injuries are sustained, it is no more costly for the land occupier, rather than the injured entrant, to bear the loss caused by the occupier's carelessness.[41] Nor should it generally be more costly for one party rather than the other to prepare for and distribute such costs through insurance. Most importantly, placing liability on the land occupier for injuries suffered on property not reasonably safe, places the cost where it belongs, and lays the incentive for precaution on the party best able to prevent accidents. Even if the occupier has insurance, the desire to avoid lawsuits, and the fear that the insurance company will increase its premium rates if it believes the insured's premises are unsafe, will provide an incentive for safe maintenance of the property.[42]

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[38] *See* McCleary, *The Liability of a Possessor of Land in Missouri to Persons Injured While on the Land*, 1 Mo. L. REV. 45, 58 (1936); *cf.* Prosser, *Invitees*, *supra* note 6, at 604.

[39] "It would seem that in the usual case such [social] visits may very well be to the mutual advantage of the parties, although not in the commercial or business conception of advantage." McCleary, *supra* note 38, at 58. *Cf.* Daire v. Southern Farm Bureau Cas. Ins. Co., 143 So. 2d 389 (La. Cir. Ct. App. 1962); Alexander v. General Accident Fire & Life Assurance Corp., 98 So. 2d 730 (La. Cir. Ct. App. 1957). The courts have stretched the notion of benefit in order to allow a recovery in certain cases where the entrant was similar to a social guest. *See, e.g.*, McCulloch v. Horton, 102 Mont. 135, 56 P.2d 1344 (1936); Benedict v. Podwats, 109 N.J. Super. 402, 263 A.2d 486 (App. Div.), *aff'd per curiam*, 57 N.J. 219, 271 A.2d 417 (1970). *But see* Benedict v. Podwats, 57 N.J. 219, 219, 271 A.2d 417, 417 (1970) (Hall, J., dissenting); W. PROSSER, TORTS, *supra* note 6, at 378 (distinguishing cases where social guest performs an incidental chore from those where entrant comes onto property to provide a personal service, and questioning that distinction). The commentators have also noted that the invitation theory serves as a better explanation of the results in certain other applications of the benefit theory, such as those based on a finding of good will. *See id.* 385-91; James, *Licensees & Invitees*, *supra* note 6, at 612-19.

[40] *See* Hughes, *supra* note 6, at 691; James, *Trespassers*, *supra* note 6, at 152; James, *Licensees & Invitees*, *supra* note 6, at 611-12. The availability of insurance was a factor considered by the California Supreme Court in determining whether the status distinctions should be perpetuated. Rowland v. Christian, 69 Cal. 2d 108, 118, 443 P.2d 561, 567, 70 Cal. Rptr. 97, 103-04 (1968). *See* notes 54-56 *infra* & accompanying text.

[41] The exception to this generalization is for the cost involved in a litigation or settlement process.

[42] Extending the duty of reasonable care may result in increased costs of liability insurance, but such increases may well be slight. *See* Rowland v. Christian, 69 Cal. 2d 108, 117-19, 443 P.2d 561, 567-68, 70 Cal. Rptr. 97, 103-04 (1968). Increased premiums should not be allowed to prevent the placing of liability on the negligent party. Furthermore, as part of the reallocation of risk, if liability insurance rates go up because of

It is upon this issue of the allocation of the costs of injury that the majority opinion bases its conviction that the land occupier immunities are contrary to modern policy.[43] And it is at this point that the concurring opinion fundamentally differs from the majority. Judge Leventhal's conclusion must rest finally upon his perception of the controlling policies that "rough common sense" supports "the notion that a social guest, broadly, takes a host as he is, expecting that the host will take as much care of his guest as he takes of himself . . . ."[44] The majority observes, more realistically, that whether such care as a host may pay himself is sufficient as due a guest is a question of the circumstances.[45] Certainly a guest who relies upon his host, as he must, to provide safe premises cannot be said to assume the burden of risk of injury simply because his host carelessly neglects to look out for himself as well. Judge Leventhal more strenuously objects to the notion that a homeowner might be required specially to prepare his property for the safety of trespassers.[46] Again, this possibility must be tested against the standard of reasonability. Special precautions are not required for unexpected trespassers.[47] However, in a society where technical trespass is often harmless, condoned, and even expected, there is little justice in providing a blanket immunity for injuries to all types of trespassers, without distinction, for many reasonably avoidable injuries.[48] It is far better to accept the majority's position that the circumstances of entry are only relevant to a determination of foreseeability of presence, and thus one factor to be considered by the jury in determining the reasonableness of the defendant's conduct.

Judge Leventhal notes that application of a general negligence standard will expose residential property owners to suits not previously permitted and encourage homeowners to concede fault readily when they are insured.[49] The first objection could be made to any expansion in the law, proper or improper, and should not control here so as to deny a remedy to injured parties. And, the possibility of fraud or collusion exists under any standard of care[50] and is best left to the crim-

more successful claims, by hypothesis, the cost of personal injury insurance should go down, since fewer accidents will require payment under such policies.

[43] Smith v. Arbaugh's Restaurant, Inc., No. 23,748, at 9-12.

[44] *Id.* at 23 (Leventhal, J., concurring).

[45] *Id.* at 20 (majority opinion).

[46] *Id.* at 23 (Leventhal, J., concurring).

[47] *Cf. id* at 19 (majority opinion). *See generally* James, *Trespassers*, *supra* note 6, at 151-52.

[48] *See* Green, *supra* note 6, at 516; Hughes, *supra* note 6, at 686-88; James, *Trespassers*, *supra* note 6, at 153. In an effort to avoid inequitable results in trespasser cases, the courts have strained the traditional status classifications, *see, e.g.*, Muldrow v. Daly, 329 F.2d 886 (D.C. Cir. 1964); Daisey v. Colonial Parking, Inc., 331 F.2d 777 (D.C. Cir. 1963); and the definition of willful or wanton negligence, *cf., e.g.*, Gould v. DeBeve, 330 F.2d 826 (D.C. Cir. 1964).

[49] Smith v. Arbaugh's Restaurant, Inc., No. 23,748, at 22-23 (Leventhal, J., concurring).

[50] *Cf.* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 16.15, at 961 (1956): "The

inal courts rather than being used to justify unwarranted limitations on land occupiers' duty.[51]

Judge Bazelon's opinion for the court, in changing the common law, leaves some confusion as to the proper standard for the jury to apply in determining a land occupier's liability. The court, in specifying the role of the jury, adopts at one point the standard of "reasonable care under all the circumstances,"[52] under which the jury should balance the likelihood and seriousness of injury against the sacrifice required to avoid the risk.[53] Elsewhere the court purports to follow the California Supreme Court in stating that, "the jury should consider 'the closeness of the connection between the injury and the defendant's conduct, the moral blame attached to the defendant's conduct, the policy of preventing future harm, and the prevalence and availability of insurance.' "[54] Clearly the former is the proper standard.[55] As to the latter, it is apparent that the court has misread the California opinion and confused the jury's considerations for determining liability under the law with the court's considerations for deciding whether a common law immunity should be perpetuated.[56] Properly considered, the morality of a defendant's activities and the availability of insurance to a defendant are not relevant, as such, to the narrow determination of a defendant's reasonable care or negligence.

The majority's opinion in *Arbaugh's Restaurant* also offers little insight as to how the general negligence principles will apply to land occupier liability cases. Apparently the care formerly due invitees will now be due all entrants.[57] Three limitations of such easy application, however, deserve mention. First, as the court notes, the circumstances of entry will often bear some relation to the foreseeability of an entrant's presence, and thus the degree of care required under the circumstances.[58] Secondly, under all the circumstances, "what might be a

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purposes of the [automobile guest] statutes were to [avoid] . . . dishonest collusion between guest and host against the host's insurance carrier. But if there is dishonesty, it will not stick at fabricating whatever relationship the law requires." Under the traditional status distinction rules in real property cases, a host wishing to allow his guest to recover from his insurance company can falsify both the guest's status and his own culpability.

[51] *Cf.* White, *The Liability of an Automobile Driver to a Non-paying Passenger*, 20 VA. L. REV. 326, 333 (1934); 54 NW. U.L. REV. 263, 273-74 (1959).

[52] Smith v. Arbaugh's Restaurant, Inc., No. 23,748, at 17; *see id.* at 7, 20-21.

[53] *Id.* at 17-18, 20.

[54] *Id.* at 11 (quoting in part Rowland v. Christian, 69 Cal. 2d 108, 117, 443 P.2d 561, 567, 70 Cal. Rptr. 97, 103 (1968)).

[55] *See* Conway v. O'Brien, 111 F.2d 611, 612 (2d Cir. 1940).

[56] *Compare* Rowland v. Christian, 69 Cal. 2d 108, 112-13, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968), *with id.* at 117, 443 P.2d at 567, 70 Cal. Rptr. at 103.

[57] *See generally* RESTATEMENT, *supra* note 6, §§ 341A, 343-44; authorities cited note 6 *supra*. The opinion of the Colorado Supreme Court in Mile High Fence Co. v. Radovich, — Colo. —, 489 P.2d 308 (1971), is particularly unhelpful on this aspect, as it is apparently based on a faulty analysis of the *Restatement* position. 25 VAND. L. REV. 623, 634-35 (1972).

[58] Smith v. Arbaugh's Restaurant, Inc., No. 23,748, at 19; *cf.* Rowland v. Christian, 69 Cal. 2d 108, 117-18, 443 P.2d 561, 567, 70 Cal. Rptr. 97, 103 (1968). *But cf.* RESTATE-

'reasonable' maintenance burden for one homeowner may require unreasonable sacrifices for another."[59] This should not be construed, however, as relieving any land occupier from the duty of at least warning known entrants of risks or defects not corrected.[60] Thirdly, it seems proper that a land occupier may continue to assume that trespassers and those licensees who should be aware that their presence on the property is unknown and unforeseen, will ordinarily exercise considerable caution of their own, in the realization that the premises were not prepared for them.[61] Of course, the usefulness of this generalization is somewhat diminished when applied to children.[62] Although the circumstances of entry continue to be relevant, the new approach will not merely duplicate the old mesh of rules since foreseeability is not equivalent to status and is only one of many factors the jury should consider.[63] Generally, application of the reasonable care standard should have its most dramatic impact in cases involving foreseeable trespassers,[64] social guests,[65] and invitees who exceed the scope of their invitation and become technical licensees or trespassers.[66]

In brief reiteration, two basic arguments are generally marshalled against the traditional doctrine regarding the liability of land occupiers for injuries sustained by entrants on their land. First, it is said that the general negligence standard should apply to liability for injuries connected with land occupancy because that standard represents a

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MENT, *supra* note 6, § 333, comment *b* (occupier privileged to ignore actual probability of trespassers). Some trespassers are in fact foreseeable. *See, e.g.*, Muldrow v. Daly, 329 F.2d 886 (D.C. Cir. 1964); Daisey v. Colonial Parking, Inc., 331 F.2d 777 (D.C. Cir. 1963). The circumstances of entry, under the majority's holding, are relevant to the foreseeability of the plaintiff's presence on the property, but are not relevant to the further question whether the reasonable man would have foreseen that his conduct would cause injury to anyone who was on the premises. *See* 44 N.Y.U.L. REV. 426, 431-32 n.42 (1969).

[59] Smith v. Arbaugh's Restaurant, Inc., No. 23,748, at 20.

[60] *Cf.* RESTATEMENT, *supra* note 6, § 343, comment *d*.

[61] *See* James, *Trespassers*, *supra* note 6, at 158; RESTATEMENT, *supra* note 6, § 335, comment *f*, § 342, comment *f*; *cf.* Peterson v. Balach, — Minn. —, —, 199 N.W.2d 639, 647 (1972) (trespassers expected to exercise reasonable care). *See also* Prosser, *Invitees*, *supra* note 6, at 604 (questioning the rationalization given by the courts that social guests expect no more than the care due licensees).

[62] *Cf.* Beard v. Atchison, T. & S.F. Ry., 4 Cal. App. 3d 129, 136-37, 84 Cal. Rptr. 449, 454 (Dist. Ct. App. 1970); McGettigan v. National Bank, 320 F.2d 703, 707 (D.C. Cir. 1963). *Compare* RESTATEMENT, *supra* note 6, § 339, *with id.* § 343B, comment *c*. It is relevant in this regard that the English statute abolishing the licensee-invitee distinction specifically mentions that an occupier must take into account that children will be less careful than adults. Occupiers' Liability Act, 5 & 6 Eliz. 2, c. 31, § 2(3)(a) (1957). Prosser has questioned "whether the rules as to trespassing children . . . will be jettisoned completely in favor of a free hand for the jury." W. PROSSER, TORTS, *supra* note 6, at 399 n.4.

[63] *See* Gibo v. Honolulu, 51 Hawaii 299, 301, 459 P.2d 198, 200 (1969) (foreseeability of entrance held not to depend on status).

[64] *See* note 58 *supra*.

[65] *See* Peterson v. Balach, — Minn. —, 199 N.W.2d 639 (1972); Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

[66] *E.g.*, Firfer v. United States, 208 F.2d 524 (D.C. Cir. 1953); *see* RESTATEMENT, *supra* note 6, § 332, comment *l*.

flexible vehicle for a fair determination of proper care and an equitable allocation of the costs of injury in accordance with prevailing community standards, and because there is no reason for making exceptions based on feudalistic classifications.[67] Alternatively, it is said that a duty of reasonable care is due to social guests, on the theory that they, like public invitees, rely upon a host's implied affirmation of the safety of his property, or that they, like business invitees, do provide certain real benefits to their host.[68]

Judge Leventhal, in his concurrence, rejected both arguments. It is respectfully submitted, however, that although his concurring opinion properly noted the difficulty in classifying entrants on business property, it fails to provide an adequate rationale for continuing to ignore the ambiguity of the status distinctions for entrants on other property. More broadly, it is submitted that Judge Leventhal's rejection of the general negligence standard was based on unrealistic policy considerations.

The majority opinion in *Arbaugh's Restaurant*, more soundly, embraced the standard of "reasonable care under all the circumstances." That opinion, however, is marred in its specification of the proper jury standards by an apparent misinterpretation of the California decision in *Rowland v. Christian*, an ambiguity which should be corrected at the first opportunity.[69]

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[67] *Cf.* Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630-32 (1959).

[68] *See* notes 36-38 *supra* & accompanying text; *cf.* Peterson v. Balach, — Minn. —, 199 N.W.2d 639 (1972); Occupiers' Liability Act, 5 & 6 Eliz. 2, c. 31 (1957) (abolishing distinctions between invitees and licensees).

[69] Any clarification may have to come from the District of Columbia Court of Appeals.

One district judge, sitting in a diversity case, has held that *Smith v. Arbaugh's Restaurant, Inc.*, did not alter the common law of the District of Columbia because the decision was made after the effective date of the District of Columbia Court Reorganization Act of 1970, D.C. CODE ANN. §§ 11-101 et seq. (Supp. V, 1972), which, in § 11-102, proclaimed that the District of Columbia Court of Appeals, rather than the United States Court of Appeals for the District of Columbia Circuit, was that jurisdiction's highest court, with review only in the Supreme Court. Luck v. Baltimore & O.R.R., 41 U.S.L.W. 2346 (D.D.C., Dec. 13, 1972). *See* M.A.P. v. Ryan, 285 A.2d 310, 312 (D.C. Ct. App. 1971) ("[W]e are not bound by the decisions of the United States Court of Appeals rendered after [February 1, 1971]."). Appellee's request in *Arbaugh's Restaurant* for either a rehearing or a rehearing en banc to consider this issue, and to reconsider the substantive issues, was denied. Smith v. Arbaugh's Restaurant, Inc., No. 23,748 (D.C. Cir., Jan. 5, 1973).

Whatever the precedential value of the decision, the opinions in *Smith v. Arbaugh's Restaurant, Inc.*, will be valuable for other courts, including the District of Columbia Court of Appeals, should they reevaluate the common law status distinctions of entrants on land.