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California Applies Negligence Principles in Determining Liability of a Land Occupier

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CALIFORNIA APPLIES NEGLIGENCE PRINCIPLES IN DETERMINING LIABILITY OF A LAND OCCUPIER

In the past California has determined the duty owed to someone coming upon the land of an owner or occupier[1] by classifying the entrant as either an invitee, licensee, or trespasser and by applying the common law rules pertaining to such status.[2] Substantial criticism has been directed at the use of these common law rules. Courts and commentators alike have observed the frequent difficulty of accurately labeling the entrant as either an invitee, licensee, or trespasser. These same authorities have likewise criticized the use of the entrant's status to fix duty as arbitrary and inflexible.[3]

On August 8, 1968, the California Supreme Court abolished these common law rules as determinative of liability in the case of *Rowland v. Christian*.[4] The court, in a 5-2 decision with Justice Peters writing for the majority, reaffirmed Civil Code section 1714[5] and applied it with reference to the duty owed an entrant by a landowner.[6] Recognizing the confusion that results when courts attempt to apply these common law rules of liability in a modern setting, the court held that the proper test of liability is whether the owner or occupier has acted as a reasonable man in the management of his property in view of the likelihood of injury to others. The court added that while the entrant's status may be considered in determining liability, it is no longer conclusive.[7]

This comment will examine the repercussions of the *Rowland* decision, and, more particularly, will analyze the reduced effect of the entrant's status in determining landowners' liability.

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[1] When the term landowner is used in the text, it shall be synonymous with land occupier.

[2] Palmquist v. Mercer, 43 Cal. 2d 92, 105, 272 P.2d 26, 34 (1954) (concurring opinion); Note, 13 CALIF. L. REV. 72 (1924).

[3] *See, e.g.*, Palmquist v. Mercer, 43 Cal. 2d 92, 103, 272 P.2d 26, 33 (1954) (concurring opinion); Hanson v. Richey, 237 Cal. App. 2d 475, 478, 46 Cal. Rptr. 909, 911 (1965); Fernandez v. Consolidated Fisheries, Inc., 98 Cal. App. 2d 91, 96, 219 P.2d 73, 76-77 (1950); James, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 YALE L.J. 605, 610 (1954); Note, 22 S. CAL. L. REV. 318, 320 (1949); Note, 13 CALIF. L. REV. 72, 75 (1924).

[4] 69 A.C. 89, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

[5] CAL. CIV. CODE § 1714 (West 1954). 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. The extent of liability in such cases is defined by the Title on Compensatory Relief.

[6] 69 A.C. at 93, 443 P.2d at 564, 70 Cal. Rptr. at 100.

[7] *Id.* at 100, 443 P.2d at 568, 70 Cal. Rptr. at 104.

THE LAW PRIOR TO ROWLAND

Although Civil Code section 1714 has been on the books since 1872,[8] California courts have generally chosen to ignore it and apply instead the common law distinctions between trespasser, licensee, and invitee. The justification for using these rules was that they provided a more precise test of liability than the reasonable care requirement of section 1714.[9]

Trespassers have been protected by the landowner's duty to merely refrain from wanton or wilful conduct.[10] Some courts, however, mitigated the harshness of this rule by adopting the Restatement exception[11] where the landowner was actively negligent and knew or had reason to know of the trespasser's presence.[12]

Where the entrant is classified as an invitee, the landowner has been held to a duty of exercising ordinary care.[13] This has been interpreted to mean that he must correct or warn against known dangers and make reasonable inspection to discover defects not known.[14]

In the case of a licensee, the owner has been subject only to the duty of refraining from wanton or wilful conduct.[15] In *Palmquist v. Mercer*,[16] the California Supreme Court held that a landowner was *not* liable for an injury to a licensee resulting from a defective condition on the premises. There, the plaintiff was injured when he rode a horse under defendant's trestle which was nearly two and one half feet lower than authorized. The court stated: "Plaintiff was obliged to take the premises as he found them insofar as any alleged defective condition thereon might exist."[17]

As a corollary to the rule that a licensee takes the premises as

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[8] CAL. CIV. CODE § 1714 (West 1954).

[9] Note, 13 CALIF. L. REV. 72, 73 (1924).

[10] Palmquist v. Mercer, 43 Cal. 2d 92, 272 P.2d 26 (1954).

[11] "A possessor of land who knows or has reason to know of the presence of another who is trespassing on the land is subject to liability for physical harm thereafter caused to the trespasser by the possessor's failure to carry on his activities upon the land with reasonable care for the trespasser's safety." RESTATEMENT (SECOND) OF TORTS § 336 (1965).

[12] Fernandez v. Consolidated Fisheries, Inc., 98 Cal. App. 2d 91, 96-97, 219 P.2d 73, 77 (1950); *see, e.g.*, Marino v. Valenti, 118 Cal. App. 2d 830, 841, 259 P.2d 84, 90 (1953); Fernandez v. American Bridge Co., 104 Cal. App. 2d 340, 345, 231 P.2d 548, 551 (1951).

[13] Smith v. Kern County Land Co., 51 Cal. 2d 205, 331 P.2d 645 (1958); Miller v. Desilu Prods., Inc., 204 Cal. App. 2d 160, 22 Cal. Rptr. 36 (1962); 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW, 1454 (1960).

[14] *Id.*

[15] Palmquist v. Mercer, 43 Cal. 2d 92, 102, 272 P.2d 26, 32 (1954).

[16] 43 Cal. 2d 92, 272 P.2d 26 (1954).

[17] *Id.* at 102, 272 P.2d at 32.

he finds them, the court in *Fisher v. General Petroleum Corporation*,[18] held that defendant did not have a duty to warn a licensee of a dangerous condition on the land. In this case defendant granted decedent's employer a license to lay pipe across his land. While back-filling the trench, deceased struck a bull-plug concealed below the surface of the earth. Defendant had knowledge of the plug but failed to warn the employer. Oil and gas were released onto the bulldozer which ignited in flames, fatally burning deceased.

This rule, denying recovery for injury occasioned by a defective condition on the land, has frequently led to unjust results.[19] Consequently, the courts have created an exception to the rule where they find "active negligence" on the part of the landowner which, coupled with the defective condition, leads to the plaintiff's injuries.[20] The court in *Hansen v. Richey*[21] distinguished between mere passive negligence, consisting of the owner's maintenance of a partially filled swimming pool on his premises, and the active negligence of the owner in entertaining a large number of youthful guests without providing barriers barring access to the pool.[22] The appellate court's reversal was based on what the court termed the "active conduct" exception.[23]

Another exception to the traditional rule was recognized in those instances where a condition on the premises amounts to a "trap." A trap has been defined as "[A] concealed danger known to the defendant, that is, a danger clothed with a deceptive appearance of safety."[24] The courts have found a duty to inform the licensee of a concealed danger where its existence was known to the landowner.[25]

It has long been apparent that these common law rules of liability with their limited exceptions and difficulties of application

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[18] 123 Cal. App. 2d 770, 267 P.2d 841 (1954), *criticized in* Comment, *Landowners and Licensees in California*, 7 STAN. L. REV. 130 (1954).

[19] Fisher v. General Petroleum Corp., 123 Cal. App. 2d 770, 780, 267 P.2d 841, 847 (1954) (concurring opinion).

[20] Oettinger v. Stewart, 24 Cal. 2d 133, 148 P.2d 19 (1944); Howard v. Howard, 186 Cal. App. 2d 622, 9 Cal. Rptr. 311 (1960); *but cf.* Bylling v. Edwards, 193 Cal. App. 2d 736, 14 Cal. Rptr. 760 (1961).

[21] 237 Cal. App. 2d 475, 46 Cal. Rptr. 909 (1965).

[22] *Id.* at 480-81, 46 Cal. Rptr. at 912-13.

[23] *Id.* at 478, 46 Cal. Rptr. at 911.

[24] *Id.* at 480, 46 Cal. Rptr. at 912; *see* Nelsen v. Jensen, 177 Cal. App. 2d 270, 2 Cal. Rptr. 180 (1960); W. PROSSER, TORTS 390 (3d ed. 1964).

[25] Hall v. Barber Door Co., 218 Cal. 412, 23 P.2d 279 (1933). The effectiveness of the trap exception is limited by a lack of clarity in definition. *See, e.g.*, Anderson v. Anderson, 251 Cal. App. 2d 409, 412, 59 Cal. Rptr. 342, 344 (1967), where the court stated that the original meaning of a trap involved the use of spring guns and steel traps and, "[T]he lack of definiteness in the application of the term to any other situation makes its use argumentative and unsatisfactory."

were ineffective in justly assessing what should be the duty of care owed to an entrant by a landowner. Realizing the extent to which these rules had become entrenched in our Anglo-Saxon legal tradition,[26] it was likewise apparent that only an explosive reformation could permanently lay them to rest. Such an explosion occurred with the decision of the California Supreme Court in *Rowland v. Christian*.[27]

ROWLAND V. CHRISTIAN

In *Rowland*, plaintiff was invited into defendant's apartment and during his visit used defendant's bathroom. In the process of turning off the water faucet, the porcelain handle broke, severing tendons in plaintiff's right hand. He brought an action for personal injuries alleging: That defendant knew of the defective water faucet; that one month before the accident defendant told her lessors that the faucet was cracked and should be replaced; and that defendant did not warn plaintiff of the defect. Defendant moved for summary judgment, reciting in her supporting affidavit that the plaintiff was a social guest in her apartment when he was injured. In his counter-affidavit, plaintiff stated: That defendant knew of the defective condition; that he had mentioned to defendant his intention to use the bathroom; and that she failed to warn him of the defective faucet.

The trial court granted defendant's motion for summary judgment and the court of appeal affirmed.[28] Justice Rattigan, writing for the appellate court, held that plaintiff's counter-affidavit failed to show facts sufficient to present a triable issue.[29] Since plaintiff neither denied that he was a social guest nor alleged facts showing that he enjoyed any other status, it was assumed that he was a social guest.[30] The court said that "[A] licensee takes the premises as he finds them. The person in possession of the premises is not liable to him for injury caused by their defective condition."[31] This, of course, represents the traditional application of the common law rule. The court recognized the many criticisms directed at the ap-

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26 Rowland v. Christian, 69 A.C. 89, 94-95, 443 P.2d 564, 565, 70 Cal. Rptr. 97, 100-101 (1968); *see* 2 F. HARPER & F. JAMES, TORTS 1432 (1956).

27 69 A.C. 89, 443 P.2d 564, 70 Cal. Rptr. 97 (1968).

28 Rowland v. Christian, 63 Cal. Rptr. 98 (1967), *vacated.*

29 Defendant contended that a triable issue of fact existed as to whether the defective faucet amounted to a trap but the court held that he could not recover under any exception to the general rule since he failed to allege that the defective condition was concealed.

30 Social guest and licensee are used interchangeably. W. PROSSER, TORTS 386 (3d ed. 1964).

31 Rowland v. Christian, 63 Cal. Rptr. 98, 101 (1967), *vacated.*

plication of the rule but concluded that "[S]ubstantive law cannot be changed on the narrow evidentiary base presented by this record."[32]

The supreme court did not agree. In a 5-2 decision, the court reversed and held that the entrant's status will no longer be determinative of liability, but will be merely one of the factors considered in deciding whether the defendant breached a duty of ordinary care and skill in managing his property as set forth by Civil Code section 1714.[33]

> The proper test to be applied to the liability of the possessor of land in accordance with section 1714 of the Civil Code is whether in the management of his property he 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 question of liability, the status is not determinative.[34]

When applying ordinary principles of negligence law rather than the common law rules, the court found that there was indeed a triable issue of fact: "Where the occupier of land is aware of a concealed condition involving in the absence of precautions an unreasonable risk of harm to those coming in contact with it and is aware that a person on the premises is about to come in contact with it, the trier of fact can reasonably conclude that a failure to warn or to repair the condition constitutes negligence."[35]

Justice Burke, writing for the dissent, stated that the common law rules supply workable guidelines and suggested that the reaffirmation of negligence principles as determining liability might have the effect of opening the door to potentially unlimited liability.[36]

ANALYSIS

The *Rowland* court's rejection of the common law rules in favor of section 1714 is not totally revolutionary. The courts have already rejected the law of trespassers, licensees, and invitees in independent contractor cases[37] and in admiralty cases.[38] The *Row-*

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[32] *Id.* at 104.

[33] CAL. CIV. CODE § 1714 (West 1954).

[34] Rowland v. Christian, 69 A.C. 89, 100, 443 P.2d 564, 568, 70 Cal. Rptr. 97, 104 (1968).

[35] *Id.* at 101, 443 P.2d at 568, 70 Cal. Rptr. at 104.

[36] *Id.* at 102, 443 P.2d at 569, 70 Cal. Rptr. at 105 (dissenting opinion).

[37] Chance v. Lawry's, Inc., 58 Cal. 2d 368, 374 P.2d 185 (1962); Handley v. Capital Co., 152 Cal. App. 2d 758, 313 P.2d 918 (1957); *cf.* Hall v. Barber Door Co., 218 Cal. 412, 23 P.2d 279 (1933).

[38] Kermarec v. Compagnie Generale Transtlantique, 358 U.S. 625, 630-31 (1958);

land court itself noted that "[T]he common law distinctions after thorough study have been repudiated by the jurisdiction of their birth."[39] Commentators have also repeatedly urged rejection of the common law distinctions.[40]

With the implementation of section 1714, a general duty of ordinary care in managing his property is imposed on the landowner. However, according to modern California negligence law, it must be shown that the injury to him was reasonably foreseeable before this duty will arise in favor of a particular entrant.[41] This in turn requires a finding that the particular entrant's presence was reasonably foreseeable as well as a finding that, given his presence, he would reasonably be expected to encounter the dangerous condition.

In properly instructing a jury on what the "ordinary duty of care" to a foreseeable entrant entails, the trial courts of California may face some knotty problems. True, the problems will be minimal if the entrant is a business invitee since the duty owed to an invitee has always been one of ordinary care.[42] Thus, the courts will continue to instruct that the standard of ordinary care owed to an invitee includes the duty to correct or warn against known dangers and to make a reasonable inspection to uncover hidden dangers.[43]

But will the courts continue to instruct that the same duty

Fidelity & Casualty Co. of N.Y. v. C/B Mr. Kim, 345 F.2d 45, 50 (5th Cir. 1965); Olsen v. New York Cent. R.R. Co., 341 F.2d 233 (2d Cir. 1965).

[39] 69 A.C. 89, 100, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968); *see* Occupier's Liability Act, 5 & 6 Eliz. 2, c. 31 (1957).

[40] James, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 YALE L.J. 605 (1954); Note, 22 S. CAL. L. REV. 318 (1949); Note, 13 CALIF. L. REV. 72 (1924).

[41] This conforms to the modern approach and the California rule that the general test of negligence is foreseeability, and unless injury to a particular person could have been foreseen by a reasonably prudent person, the defendant owes no duty to that particular person. "[T]he risk reasonably to be foreseen not only creates the liability but defines its limits." Mosely v. Arden Farms Co., 26 Cal. 2d 213, 220, 157 P.2d 372, 376 (1945) (concurring opinion); *see also* Tucker v. Lombardo, 47 Cal. 2d 457, 464-65, 303 P.2d 1041, 1046 (1956), 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW, 1404 (1960). The foreseeability test has been suggested in previous cases involving a trespasser, invitee, or licensee. Palmquist v. Mercer, 43 Cal. 2d 92, 106, 272 P.2d 26, 34 (1954); Fernandez v. American Bridge Co., 104 Cal. App. 2d 340, 344, 231 P.2d 548, 550-51 (1951); Fernandez v. Consolidated Fisheries, Inc., 98 Cal. App. 2d 91, 99, 219 P.2d 73, 76-77 (1950). It has been recently applied to cases involving recovery for negligent infliction of emotional distress. Dillon v. Legg, 68 Cal. 2d 766, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (foreseeability test applied to recovery for emotional distress); Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 315, 379 P.2d 513, 525 (1963) (dissenting opinion).

[42] Smith v. Kern County Land Co., 51 Cal. 2d 205, 331 P.2d 645 (1958); Miller v. Desilu Prods., Inc., 204 Cal. App. 2d 160, 22 Cal. Rptr. 36 (1962); 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW, 1454 (1960).

[43] *Id.*

to inspect is *not* owed to a trespasser or licensee? In *Rowland*, the defendant had actual knowledge of the defective water faucet; thus the court did not consider the question of whether a duty to inspect is owed a licensee. The court simply said that the landowner must exercise "ordinary care" in the management of his property. If a court were to instruct on general negligence principles, the jury could properly consider whether, in the exercise of ordinary care, a duty to inspect had arisen. Whether ordinary care requires an inspection of the premises depends upon the circumstances of the particular case, not upon the status of the entrant.

In a situation where the landowner is aware of both the dangerous condition and the presence of the entrant, will the trial court instruct that the standard of ordinary care includes either a duty to warn or a duty to repair? *Rowland* strongly suggests that, at the very least, a failure to warn would constitute negligence: "Whether or not a guest has a right to expect that his host will remedy dangerous conditions on his account, he should reasonably be entitled to rely upon a warning of the dangerous condition so that he, like the host, will be in a position to take special precautions when he comes in contact with it."[44] While the duty to repair is always an alternative to the duty to warn, the converse is not always true. However, it is at least arguable that where a land occupier, under a similar situation, knows that it is unlikely that he will be available to warn the entrant or a warning could not be received in time to avoid possible injury, then his duty becomes one to repair a condition which involves an unreasonable risk of harm.

The application of negligence principles should not dramatically increase the burden on the landowner. "Entrant" verdicts that now appear recoverable under section 1714 were, in many cases, previously recoverable under exceptions to the common law rules. For instance, one of the exceptions to the rule of non-liability for a licensee's injuries was made when the landowner was "actively negligent."[45] In *Anderson v. Anderson*,[46] the court found a duty to warn a social guest on the basis of the active negligence of the landowner in specifically inviting the plaintiff to use the pool and in failing to disclose to him a hidden ledge at the bottom. In *Rowland*, the court suggests that the "ordinary care" now owed to a social guest would likely include a similar duty to warn against dangerous conditions known to the land owner. In *Anderson*, the court was

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[44] 69 A.C. at 101, 443 P.2d at 568, 70 Cal. Rptr. at 105.

[45] Oettinger v. Stewart, 24 Cal. 2d 133, 148 P.2d 19 (1944); Howard v. Howard, 186 Cal. App. 2d 622, 9 Cal. Rptr. 311 (1960); *but cf.*, Bylling v. Edwards, 193 Cal. App. 2d 732, 14 Cal. Rptr. 760 (1961).

[46] 251 Cal. App. 2d 409, 59 Cal. Rptr. 342 (1967).

forced to talk in terms of the separate "active negligence" of the landowner coupled with the failure to warn in order to find liability. Today, a similar result will be reached by simply recognizing that allowing a social guest to be exposed to a dangerous condition without a warning is failing to conform to a standard of ordinary care.

Where the entrant was a trespasser, the common law required only that the landowner refrain from wanton or wilful conduct.[47] However, under the *Rowland* rationale, where a trespasser's presence is known, the landowner's duty of ordinary care in the management of his property would attach if a reasonable person would have foreseen that the trespasser would be exposed to an unreasonable risk of harm. This would appear to be a rather extreme departure from prior California law were it not for the fact that some of California's lower courts seem to have anticipated the supreme court. In *Fernandez v. Consolidated Fisheries Incorporated*,[48] the appellate court reversed on the ground that the instruction that the only duty to a trespasser is to refrain from wilful acts was error.[49] The court based its decision on Civil Code section 1714 and held that the jury should determine whether defendant knew of the plaintiff's presence.[50] If he did have such knowledge, he must exercise ordinary care under the circumstances.

The common law rule relating to trespassers contained one notable exception, the attractive nuisance doctrine. The doctrine requires the exercise of ordinary care in the case where the trespasser was a child of sufficient youth to be enticed onto the land by the dangerous condition.[51] Generally, the dangerous condition has to be

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[47] Fernandez v. Consolidated Fisheries, Inc., 98 Cal. App. 2d 91, 96-97, 219 P.2d 73, 77; *see, e.g.*, Marino v. Valenti, 118 Cal. App. 2d 830, 259 P.2d 84 (1953); Fernandez v. American Bridge Co., 104 Cal. App. 2d 340, 345, 231 P.2d 548, 551 (1951).

[48] 98 Cal. App. 2d 91, 219 P.2d 73 (1950). Justice Peters has been in the vanguard of those who espouse the return to common law principles of negligence. Dillon v. Legg, 68 Cal. 2d 766, 441 P.2d 912 (1968); Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 315, 379 P.2d 513, 525 (1963) (dissenting opinion); Fernandez v. Consolidated Fisheries, Inc., 98 Cal. App. 2d 91, 219 P.2d 73 (1950).

[49] *Id.* at 99, 219 P.2d at 78.

[50] *Id.*

[51] Under the attractive nuisance doctrine, a landowner is liable for injuries to a trespassing child as stated in RESTATEMENT (SECOND) OF TORTS § 339 (1965), which is the law in California: "A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if

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

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

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

so uncommon, concealed, and highly dangerous that a child of a particular age would not recognize the peril.[52] By implementing the ordinary care standard of section 1714, *Rowland* merely reaffirms the basis of this doctrine.[53]

While the rules incident to *Rowland* remain to be formulated, some practical effects may be forecast.

By retaining the status of trespasser, licensee, and invitee as one of the factors in determining liability under Civil Code section 1714, the court is providing a workable guideline based on a consideration of foreseeability. The revised California Jury Instructions, based on the *Rowland* decision, implement this foreseeability consideration in the determination of the duty of an owner or occupant of premises:

> The [owner] [occupant] of premises is under a duty to exercise ordinary care in the management of such premises in order to avoid exposing persons thereon to an unreasonable risk of harm. A failure to fulfill this duty would be negligence. [This duty of care is owed only to such persons as the [owner] [occupant], as a reasonably prudent person under the same or similar circumstances, should have foreseen would be exposed to such a risk of harm.][54]

Where, for instance, the plaintiff is a customer in defendant's store, there would normally be no question of foreseeability unless the customer entered an area where he could no longer enjoy the status of an invitee. Since the duty is one to inspect as well as warn or repair,[55] the main consideration, in determining liability in the absence of a warning to the plaintiff, is whether the condition existed for such a length of time that a reasonable inspection would have disclosed it. If, however, the entrant is a trespasser or licensee, the foreseeability of his presence goes directly to the question of

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

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

See, e.g., Courtell v. McEachen, 51 Cal. 2d 448, 457-58, 334 P.2d 870, 875 (1959); Reynolds v. Willson, 51 Cal. 2d 94, 103, 331 P.2d 48, 51-52 (1958).

[52] The requirement as construed by Dean Prosser that "[s]ome possibility of danger, not unreasonably great, is not enough . . . ." is recognized as establishing a policy of recovery limited to uncommon, concealed, highly dangerous conditions of the land over and above the common, obvious dangers known to children of a particular age. W. PROSSER, TORTS 441 (2d ed. 1955).

[53] The basis of the attractive nuisance doctrine, as interpreted by Dean Prosser, is that the child, due to his immaturity and want of judgment, may be incapable of understanding and appreciating all of the possible dangers which he may encounter in trespassing, or of making his own intelligent decisions as to the chances he will take. W. PROSSER, TORTS 372 (3d ed. 1964).

[54] CAL. JUR. INST. CIV. No. 211-A (Revised 1968).

[55] *See* note 14 *supra* and accompanying text.

duty. Should the land owner or occupier expect that particular plaintiff to be on his land at that particular time? If so, should he reasonably expect the entrant to encounter that particular defective condition? It is to be noted that the revised jury instructions define the defective condition as involving an unreasonable risk of harm and require the jury to answer, in part, whether the risk of harm was one which a reasonable person should anticipate at all or would commonly disregard.[56]

CONCLUSION

The California Supreme Court could have resolved the controversy in *Rowland v. Christian* by following traditional California law. However, the court took the opportunity presented by *Rowland* to discard confusing and inflexible rules based on historical considerations and to replace them with principles of duty flexible enough to meet the needs of our modern society.

Under the old rules, the entrant's status determined the question of duty and liability. With *Rowland*, status is relegated to one of the factors which may be considered in *limiting* the duty but not *defining* it. The duty is to exercise ordinary care in the management of one's property regardless of whether the entrant is a trespasser, licensee, or invitee.

The *Rowland* decision in the light of *Dillon v. Legg*[57] decided by this same court in March of 1968, reflects a trend in modernizing antiquated tort law to conform with a determination of liability based on general principles of negligence and foreseeability. Yet, the court has overturned many years of traditional law and the ensuing effect on such factors as insurance and trial tactics remains to be seen. The *Rowland* rationale is no novelty in California law. As early as 1924, a commentator noted:

> After all, this branch of law is really a specialization of the law of negligence. The code does not require the distinction between trespasser, licensee, and invitee; the courts are free to proceed on the general doctrine of negligence. And, in applying the law to the particular case a determination may often be more easily reached by asking whether the owner has exercised reasonable care under the circumstances, than by asking whether the visitor is a trespasser, licensee, or invitee, and whether the owner has exercised that degree of care which should be shown the particular class in which he is placed.[58]

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[56] CAL. JUR. INST. CIV. No. 211-A.1 (New 1968).

[57] 68 Cal. 2d 766, 441 P.2d 912 (1968) (foreseeability test applied to recovery for emotional distress).

[58] Note, 13 CALIF. L. REV. 72, 75 (1924).