Washington Law Review

Volume 37
Issue 2 *Washington Case Law—1961*

7-1-1962

Torts—Occupier's Liability—The Licensee and Invitee in Washington

Dick Steincipher

only rationale which has been given for the doctrine of charitable immunity is that charities need financial encouragement and stimulation.[35] However, payment by the individual claimant does not substantially affect the financial need of the institution involved.

In Washington the basis of charitable immunity has been a policy of promoting charitable ministrations to "the halt, the lame and the blind, and to . . . those suffering from physical or mental disease and affliction."[36] Although charities no longer need special financial encouragement and stimulation,[37] a rule of liability rather than immunity in the case of the nonpaying beneficiary would be more consistent with this policy. As stated in the famous case, *President & Directors of Georgetown College v. Hughes:*

> Abolition of the immunity as to the paying patient is justified as the last short step but one to extinction. Retention for the nonpaying patient is the least defensible and most unfortunate of the distinction's refinements. He, least of all, is able to bear the burden. More than all others, he has no choice. He is the last person the donor would wish to go without indemnity. With everyone else protected, the additional burden of protecting him cannot break the trust. He should be the first to have reparation, not last and least among those who receive it. So stripped of foundation, the distinction falls. It should fall in line with, not away from, the trend which has brought it about. The immunity should go and the object of the charity should be placed on a par with all others.[38]

The error of the *Lyon* and *Pedersen* cases lies not only with the perpetuation of an outmoded and unjust doctrine of law, but with the lack of reasoned discussion. This defect is especially noticeable because of the excellence of the *Pierce* opinion. In this extensive opinion Judge Hamley disposed of every rationale upon which charitable immunity is based. In a page or two the *Lyon* and *Pedersen* cases, without discussion, have restored immunity. One may well ask, at this point, what *stare decisis* means in Washington.

CHARLES F. ABBOTT, JR.

Occupier's Liability—The Licensee and Invitee in Washington. Since their development by the English court in *Indermaur v. Dames,*[1]

[35] Magnuson v. Swedish Hosp., 99 Wash. 399, 408, 169 Pac. 828, 831 (1918).
[36] *Ibid.*
[37] Pierce v. Yakima Valley Memorial Hosp. Ass'n, 43 Wn.2d 162, 169-71, 260 P.2d 765, 769-70 (1953).
[38] 130 F.2d 810, 827 (D.C. Cir. 1942).

[1] L.R. 1 C.P. 247, 35 L.J.C.P. 184 (1866), *aff'd,* L.R. 2 C.P. 311, 36 L.J.C.P. 181 (1867).

the categories of trespasser, licensee and invitee have played a significant role in the law of torts. Though they were founded upon nineteenth century notions of liability, and reflect an age which had not yet discarded the feudal principles of landowner's sovereignty, these distinctions have persisted, plaguing courts and litigants alike. While other archaic rules have fallen before the demands of our industrial complex and rising social consciousness, these classifications have endured. Since few valid reasons can be given for their longevity, the distinctions are slowly losing standing under a seige of exception and modification. To request the modern jurist to conform to a rule which limits recovery to "wilful and wanton injury," to ask him to disregard the negligence principles so painstakingly developed through a century of litigation, seems too great a demand. Thus, with increasing frequency the categories have been eroded by exceptions or ignored, to be replaced by current negligence concepts. A recent Washington case, *Ward v. Thompson*,[2] presents a summary indication of this trend.

In *Ward*, the respondent, without payment and by request, was assisting his stepson in constructing a house, and was injured when a scaffolding upon which he stood collapsed. The trial court concluded that the stepfather was a business invitee and upon this ground entered judgment for the plaintiff. On appeal the stepson sought to prove his stepfather a licensee, who—under the Washington rule[3]—may hold the occupier accountable only for wilful or wanton injuries.

With the question thus presented, the court was afforded an opportunity to review and assess the current position of the licensee and invitee distinctions in determining a landoccupier's liability. The product of this review reflects the court's objection to the restrictions imposed upon it by these timeworn distinctions, and further diminishes their influence in resolving liability.

In order to be classified a business invitee, the Washington court requires a showing: "that the business or purpose for which the visitor comes upon the premises is of a material or pecuniary benefit, actual or potential, to the owner or occupier of the premises."[4] Essentially, this definition of invitee and the test by which such status is determined is the same as that adopted by the American Law Institute in the Re-

[2] 57 Wn.2d 655, 359 P.2d 143 (1961).

[3] In Porter v. Ferguson, 53 Wn.2d 693, 694, 336 P.2d 133, 134 (1959), the court pointed out that since "the occasion of the visit was social and not commercial or contractual in nature . . . the defendants, as occupiers, owed to the licensees only the duty of not willfully or wantonly injuring them under the Washington rule. . . ."

[4] Dotson v. Haddock, 46 Wn.2d 52, 55, 278 P.2d 338, 340 (1955).

statement of Torts[5] and a minority of American courts.[6] Under this economic benefit theory the occupier owes a duty of affirmative care as the price of the pecuniary benefit expected from the visit.[7]

In Washington the pecuniary requirement has had a particularly harsh effect; for all practical purposes the plaintiff has had to be an invitee in order to recover. The occupier owes the invitee an affirmative duty to inspect and discover hidden dangers on the land,[8] while his only duty to a licensee is to refrain from wilfully or wantonly injuring him.[9] To constitute a wilful or wanton injury, "the act which produced it must have been knowingly and intentionally committed or it must have been committed under such circumstances as to evince a reckless disregard for the safety of the person injured."[10] Because of this rule, the court has gone to great length to find the necessary economic benefit.[11] This tendency has led to much confusion in the Washington cases. Insofar as the rules are fairly explicit, there would be little difficulty if the categories were applied as they are defined; however, such is not the present practice. When cases invoking the "status rules of conduct" are examined, results which would almost uniformly be the same had ordinary negligence principles been employed are revealed. As a consequence, the wilful or wanton limitation is either ignored or dismissed in questionable cases and the plaintiff is declared a business invitee. The Washington court has recognized and has commented on this process.[12]

A curious development in this respect is the court's recent adoption of a rule which presumes that services between members of a family

---

[5] 2 RESTATEMENT, TORTS § 332, at 897 (1934). Comment *a* defines a business visitor as "a person who is invited or permitted to enter or remain on the land in the possession of another for a purpose directly or indirectly connected with business dealings between them."

[6] PROSSER, TORTS § 78, at 456 (2d ed. 1955). "The Restatement notwithstanding, the [invitation test] is now accepted by the great majority of the courts. . . ."

[7] 2 HARPER & JAMES, TORTS § 27.12, at 1478 (1956). "The economic benefit theory proceeds on the assumption that affirmative obligations are imposed on people only in return for some consideration or benefit." See also, PROSSER, TORTS § 78, at 454 & n.91 (2d ed. 1955).

[8] Dotson v. Haddock, 46 Wn.2d 52 55, 278 P.2d 338, 340 (1955).

[9] McNamara v. Hall, 38 Wn.2d 864, 867, 233 P.2d 852, 855 (1951).

[10] *Ibid.*

[11] Two interesting examples of this are: Kalinowski v. Y.W.C.A., 17 Wn.2d 380, 135 P.2d 852 (1943); and Heckman v. Sisters of Charity, 5 Wn.2d 699, 106 P.2d 593 (1940).

[12] In Garner v. Pacific Coast Coal Co., 3 Wn.2d 143, 149, 100 P.2d 32, 35 (1940), the court said, in reference to another of its opinions, "It is apparent . . . that the court felt that . . . the plaintiff should be permitted to recover. It is also apparent that the court was of the view that, if the plaintiff was a mere licensee, he could not recover. . . . The facts there undoubtedly presented what is often termed a 'hard case,' and in order to sustain a cause of action, the court was driven to the extreme of holding . . . that the plaintiff was an invitee."

are gratuitous and are not an economic benefit as that term is used in the test.[13] Yet in *Ward* the court made no mention of this presumption. The court looked to the economic benefit conferred upon the appellant, rather than to the gratuitous nature of the respondent's acts.

In concluding that Mr. Ward was an invitee, the court did not stop with satisfying the economic benefit test, but also applied the "invitation theory." This theory, currently followed in a majority of jurisdictions,[14] does not require economic benefit, even though that element may be present. The test is whether

> the occupier by his arrangement of the premises or other conduct has led the entrant to believe that [the premises] were intended to be used by visitors for the purpose which the entrant was pursuing, and that such was not only acquiesced in by the owner [or possessor] but that it was in accordance with the intention and design with which the way or place was adapted and prepared.[15]

Under this approach, liability is predicated upon an implied representation that reasonable care has been taken to make the place safe for those who come for the occupier's purpose and at his invitation.[16] Though the test has not been construed to include purely social visitors,[17] one writer points out that many visitors from whose presence no pecuniary benefit can be derived are nevertheless held to be invitees.[18] Further, in actual application, the invitation test accounts more satisfactorily than the economic benefit test for many of the decisions which hold the plaintiff to be a licensee. Professor James points out that,

> In a great many situations, these two tests will yield the same result, but they do not overlap each other completely. The adoption of either test alone will exclude from the class of invitees some entrants who would qualify as invitees under the other test. The actual course of

[13] See Porter v. Ferguson, 53 Wn.2d 693, 694, 336 P.2d 133, 134 (1959), a case of first instance on the status of parents when visiting a child's home. In denying the plaintiff recovery, the court cited 2 RESTATEMENT, TORTS § 331, at 896 (1934), which states that ordinarily members of the possessor's household are "gratuitous licensees." From this statement, the court has derived a "presumption that services between members of a family enjoying normal relationships are gratuitous." In Lucas v. Barner, 56 Wn.2d 136, 351 P.2d 492 (1960), the court held that the presumption of gratuity was not rebutted by evidence that the parties contemplated entering into a contractual relationship.

[14] PROSSER, TORTS § 78, at 456 (2d ed. 1955).

[15] 2 HARPER & JAMES, TORTS § 27.12, at 1479 (1956).

[16] PROSSER, TORTS § 78, at 455 (2d ed. 1955).

[17] See the discussion and cases cited in 2 HARPER & JAMES, TORTS § 27.12, at 1479-80 (1956). In Guilford v. Yale, 128 Conn. 449, 23 A.2d 917, 919 (1942), it was stated that "a mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability;" this seems the usual situation with regard to the purely social visitor.

[18] PROSSER, TORTS § 78, at 456 (2d ed. 1955).

> decisions has been towards broadening the class of invitees. It is submitted that under the rule today, the plaintiff may, and should be, classified as an invitee if either the economic benefit or invitation theory is satisfied.[19]

In *Ward,* the court found sufficient pecuniary benefit to satisfy the economic benefit test, yet it went on to discuss and apply the invitation theory.[20] While such a reference does not constitute a definite commitment to the invitation theory and does not insure its future application, it does indicate a desire to lay a broader and sounder foundation for the categories' application. Since an adoption of the invitation test would dispose of the pecuniary requirement and would afford the court a greater degree of latitude, it seems doubtful that the court will withdraw, having approached this position.

Ward is also significant because the court adopted for the first time a "dangerous condition or instrumentalities exception." After asserting that the respondent was an invitee under either the economic benefit or invitation tests, the court went on to state that

> aside from the technicalities of the respondent's legal status ... the appellants owed a duty to maintain the scaffolding in a reasonably safe condition.... The duty of the appellant ... cannot be altered on the basis of *timeworn distinctions between licensees and invitees....* Where the danger of harm is great ... public policy demands that the occupier take the utmost precaution to keep such equipment in a safe condition.[21] (Emphasis added.)

This "dangerous condition or instrumentalities exception" has often been applied in other jurisdictions.[22] Though it has been alluded to in previous Washington cases,[23] the court denied in 1955 that it had ever

---

[19] James, *Duties Owed to Licensees and Invitees,* 63 YALE L.J. 605, 612 (1954).

[20] Ward v. Thompson, 57 Wn.2d 655, 658-59, 359 P.2d 143, 145 (1961). "[R]egardless of which test we apply, respondent qualifies as a (business) invitee. . . . The fact that Respondent was not paid for his services is of no consequences under either of the above tests. At most, economic benefit to the occupier is required, and at the very least respondent conferred it in this case."

[21] Ward v. Thompson, 57 Wn.2d 655, 659-60. 359 P.2d 143, 145 (1961).

[22] PROSSER, *op. cit. supra* note 18, § 76 at 437-38.

[23] Clark v. Longview Pub. Serv. Co., 143 Wash. 319, 323, 255 Pac. 380, 381-82 (1927), ruled that "The duty which the owner of high-voltage electricity owes to all persons—whether invitees, licensees, or trespassers—who it may have reason to believe may come into its proximity, is to guard them from injury resulting from the dangerous appliances; and it cannot relieve itself from liability, even as against a trespasser, by showing that it merely refrained from inflicting wanton and wilful injury." This exception was also noted in Christensen v. Weyerhaeuser Timber Co., 16 Wn.2d 424, 432, 133 P.2d 797, 800 (1943), where the court stated that the wilful or wanton rule "does not exclude liability on the part of the owner or proprietor for extraordinary concealed perils against which the licensee cannot protect himself, or for unreasonable risks incident to the possessor's activities."

been called upon to decide if this exception obtains in Washington.[24] Indeed, in the 1951 decision of *McNamara v. Hall*,[25] counsel urged the adoption of a rule which would put the occupier under a duty to warn a licensee of any concealed or hidden dangers on the land. The court refused to accept this, on the ground that it would constitute an unneeded departure from the wilful or wanton limitation. In *Ward*, however, the court adopted a broader exception on its own motion. This proposition is based on the existence of a duty regardless of the time-worn invitee-licensee classifications. The rule thus announced has since been applied by the court in *Haugen v. Central Lutheran Church*,[26] and carries with it the earlier notion that, "though in fixing the measure of legal duty it is convenient to identify a particular relationship with one of the common-law labels, . . . it is not always practical to do so. Nor is this in all cases essential to a correct appraisal of correlative rights and duties."[27]

This is a recurring theme in many of the courts' recent opinions. For example, in *Mills v. Orcas Power and Light Co.*,[28] the defendant urged the court to apply the label "trespasser" to flying aircraft. The court refused to include aircraft in any of the established categories, stating that it would constitute "using the letter of the law to kill its spirit."[29] In *Sherman v. City of Seattle*,[30] the court ignored the classifications, saying that "regardless of the respondent's technical status—be it that of invitee, licensee, or trespasser—the appellant owed him the duty to use reasonable care,"[31] and in *Kidwell v. School Dist. No. 300*,[32] the court noted that although it had never discussed the matter, it had always *assumed* that children on school premises were invitees.

Thus, in several instances, the court has demonstrated its ability to manipulate the categories out of existence, or to avoid them when the case requires. The United States Supreme Court recently alluded to

---

[24] Dotson v. Haddock, 46 Wn.2d 52, 59-60, 278 P.2d 338, 342 (1955) did not discuss the *Clark* case, and dismissed the statement in *Christensen* as dictum.

[25] 38 Wn.2d 864, 868, 233 P.2d 852, 855 (1951).

[26] Haugen v. Central Lutheran Church, 158 Wash. Dec. 154, 361 P.2d 637 (1961). Here, the plaintiff was voluntarily doing some work on the church when the scaffolding upon which he was standing collapsed. The court said that *Ward* was decisive of the issues presented, and reversed a judgment of dismissal, remanding for a new trial on the theories set forth in *Ward*.

[27] Squires v. McLaughlin, 44 Wn.2d 43, 49, 265 P.2d 265, 269 (1953).

[28] 56 Wn.2d 807, 355 P.2d 781 (1960).

[29] Id. at 820, 355 P.2d at 788.

[30] 57 Wn.2d 233, 356 P.2d 316 (1960.)

[31] *Id.* at 233, 356 P.2d at 320.

[32] 53 Wn.2d 672. 355 P.2d 805 (1959).

and described this procedure in *Kermarec v. Compagnie General Transatlantique*,[33] where it pointed out that,

> the common law courts have found it necessary to formulate increasingly subtle verbal refinements, to create subclassifications among traditional common law categories, and to delieneate fine gradations in the standards of care which the landowner owes to each. Yet, even in a single jurisdiction, the classifications bred by the common law have produced confusion and conflict. As new distinctions have become spawned, older ones have become obscurred. 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 circumstances.

DICK STEINCIPHER

Recovery for Suicide—Wrongful Death. The Washington Supreme Court, by a 5-to-4 decision in *Orcutt v. Spokane County*,[1] made possible recovery by wrongful death action for negligent conduct resulting in suicide.

The plaintiff's decedent, while riding in a car driven by the defendant, received severe injuries which allegedly resulted in her suicide one year and nine months later. The administratrix of the deceased brought an action for pain and suffering, medical and hospital expenses, and wrongful death. Damages were allowed for pain and suffering and for medical and hospital expenses under RCW 4.20.060 (thus presenting an interesting example of survival of damages for pain and suffering, in Washington possible only in a wrongful death action).[2]

On the wrongful death issue, the court held that where there is medical testimony concluding that the suicide was the immediate result of an uncontrollable impulse ultimately caused by the defendant's negligence, the issue of proximate cause is for the jury's determination.

Since the Washington court is one of the few to grant recovery for suicidal death, a review of the legal developments in this area seems in order. Starting with the basic proposition that a defendant's conduct must have proximately caused an injury in order to make him liable,[3] the general rule in the majority of suicide-wrongful death cases has been to deny recovery.[4] Two theories support this result: (1) death by suicide cannot logically be regarded as the natural and probable conse-

[33] 358 U.S. 625, 631 (1961).

[1] 158 Wash. Dec. 842, 364 P.2d 1102 (1961).
[2] 36 WASH. L. REV. 331 (1961).
[3] GREEN, PROXIMATE CAUSE 132 (1927).
[4] 11 A.L.R.2d 751, 757 (1950).