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LAND OCCUPIER LIABILITY IN WASHINGTON

The rules of law governing the liability of an occupier of land to persons entering thereon were developed in England in the 19th century.¹ Most commentators have concluded that they were based on a *quid pro quo* rationale, the degree of care owing to an entrant by an occupier increasing as a function of the degree of benefit, real or potential, accruing to the occupier by reason of the entrance.² In order to facilitate application of the rules, the categories of trespasser, licensee, and invitee were used, occupiers owing a predetermined degree of care to persons in each category.³ Once an entrant was properly categorized, determining whether there was liability became a matter of "mechanical jurisprudence."⁴ Although modified in varying degrees, these rules remain the touchstone for determining land occupier liability in Washington as well as other American jurisdictions.⁵ Recent developments in the law of land occupier liability render appropriate a survey of the present rules in Washington.

I. DUTY TO TRESPASSING ADULTS

In Washington a trespasser is one who enters another's land without express or implied permission.⁶ The occupier of Washington land owes an adult trespasser a duty only to refrain from willfully and wantonly injuring him.⁷

The Washington Supreme Court has defined willful misconduct as an act involving knowledge of peril coupled with a conscious failure to avert injury.⁸ Wanton misconduct is an intentional act or omission

¹2 F. HARPER & F. JAMES, TORTS 1430 (1956) [hereinafter cited as HARPER & JAMES]; Marsh, *The History and Comparative Law of Invitees, Licensees, and Trespassers*, 69 L.Q. REV. 182 (1953); James, *Tort Liability of Occupiers of Land: Duties owed to Trespassers*, 63 YALE L.J. 144 (1953).

²W. PROSSER, TORTS 396 (3d ed. 1964) [hereinafter cited as PROSSER]; HARPER & JAMES 1430; Green, *Landowner v. Intruder; Intruder v. Landowner. Basis of Responsibility in Tort*, 21 MICH. L. REV. 495, 504 (1923); Bohlen, *The Basis of Affirmative Obligations in the Law of Tort*, 53 U. PA. L. REV. 209, 220 (1905).

³PROSSER 364; HARPER & JAMES 1430; Green, *Landowner v. Intruder; intruder v. Landowner. Basis of Responsibility in Tort*, 21 MICH. L. REV. 495, 503 (1923).

⁴Comment, *Liability of Landlord and Tenant to Persons Injured on the Premises*, 39 WASH. L. REV. 345 (1964).

⁵PROSSER 364; HARPER & JAMES 1430.

⁶Winter v. Mackner, 68 Wn. 2d 943, 945, 416 P.2d 453, 454 (1966), citing Schock v. Ringling Bros. and Barnum & Bailey Combined Shows, 5 Wn. 2d 599, 105 P.2d 838 (1940).

⁷*Id.*; Mail v. Smith Lumber & Shingle Co., 47 Wn. 2d 447, 449, 287 P.2d 877, 878 (1955); Schock v. Ringling Bros. and Barnum & Bailey Combined Shows, 5 Wn. 2d 599, 606, 105 P.2d 838, 842 (1940).

⁸Adkisson v. Seattle, 42 Wn. 2d 676, 684, 258 P.2d 461, 466 (1953).

with reckless disregard for consequences with knowledge that there is a high probability of substantial injury to someone.⁹ The essence of willfulness is intent to injure, whereas wantonness implies indifference as to whether an injury will occur.¹⁰ Digging a trench and leaving dirt piled in a city street without warning signs, barricades, or lights is wanton misconduct.¹¹ Causing a four-foot excavation to be made adjacent to a frequently used path from an apartment to garbage cans and failing to erect barricades or warnings is also wanton misconduct.¹² But leaving a large rock at the edge of an infrequently used parking area after tearing down a nearby rock wall is not wanton misconduct.¹³ The results follow from an application of the classic balancing test in which the probability of occurrence of the event is balanced against the gravity of the resulting injury.¹⁴ Because the pile of dirt and the excavation were both located on or adjacent to regularly traveled routes, there was a high probability that someone would be injured. And if an injury were to occur, it would probably be serious. On the other hand, the rock was not located on or adjacent to a regularly traveled route and, therefore, the probability of injury was low. Moreover, if any injury were to occur, it would probably not be serious.

⁹ *Id.* at 687, 258 P.2d at 467.

¹⁰ *Id.* at 684, 258 P.2d at 466 (citing 38 AM. JUR. *Negligence* § 48). The Washington definition of willfulness denotes a state of culpability akin to that of "knowingly" in the Model Penal Code, and the definition of wantonness corresponds closely to "recklessness" in the Code. MODEL PENAL CODE § 2.02 (Proposed Official Draft, 1962).

¹¹ *Adkisson v. Seattle*, 42 Wn. 2d 676, 258, P.2d 461 (1953). It should be noted that this case involved a municipality's liability for the condition of a public street, where the traditional categories of entrants are not applicable. *See, e.g., Owens v. Seattle*, 49 Wn. 2d 187, 299 P.2d 560 (1956), noted in 61 A.L.R. 2d 417. However the court has held that the same definition is applicable in cases where the injury was incurred on private property. *Greetan v. Solomon*, 47 Wn. 2d 354, 287 P.2d 721 (1955).

¹² *Greetan v. Solomon*, 47 Wn. 2d 354, 287 P.2d 721 (1955). In this case plaintiff had been visiting friends who were tenants in defendant's apartment house. The plaintiff was merely a licensee as to her hosts, whereas she was an invitee vis-à-vis the landlord. *See Comment, Liability of Landlord and Tenant to Persons Injured on the Premises*, 39 WASH. L. REV. 345 (1964). The trial court's finding of wantonness was necessary to recovery since it also found that the plaintiff was contributorily negligent, thus precluding recovery on a theory of negligence. The Washington Supreme Court affirmed the wantonness holding and therefore found it unnecessary to consider the negligence-contributory negligence issue.

¹³ *Benson v. South Kitsap School Dist.*, 63 Wn. 2d 192, 386 P.2d 137 (1963).

¹⁴ The principal exponent of this balancing approach was Judge Learned Hand. His formula contained three factors: 1) the probability of occurrence of the event; 2) the gravity of harm should the event take place; and 3) the burden on the defendant of taking adequate precaution to prevent the occurrence. *See, e.g., United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). In none of the three cases discussed above was the burden of correcting the hazardous situation of sufficient magnitude to be determinative of the issue of liability.

There have been no Washington appellate decisions turning on willful misconduct toward trespassers. Spring gun cases present the classic example of willful misconduct toward trespassers.¹⁵ Since Washington cases on the subject involved criminal prosecution of the occupiers,¹⁶ Washington has not explicitly considered the rules of land occupier liability in such circumstances. There seems little doubt, however, that if presented with the issue, the Washington Supreme Court would award damages for injuries suffered by a trespasser caused by an occupier's willful misconduct.¹⁷

The Restatement (Second) and some courts in other jurisdictions have ameliorated the strict willful and wanton rule by adopting exceptions to it in three circumstances. First, an occupier is held to a duty of reasonable care when he engages in a *dangerous activity* in a limited area upon which he knows or should know persons *regularly* trespass.¹⁸ Second, an occupier who has created highly *dangerous conditions* in a limited area on his land must exercise reasonable care to warn trespassers if he knows or should know that intrusions occur *regularly* in that limited area and that the trespassers are not likely to discover the conditions.¹⁹ Third, an occupier of land is held to a duty of reasonable care toward a trespasser of whose *presence* he knows or should have known.²⁰ The imposition of these exceptions appears to be an attempt to infuse a notion of reasonableness into the traditional rule of no liability.

The Washington court has apparently not had occasion to consider the "discovered trespasser" exception, and has rejected the exception where the occupier carries on a dangerous activity in a limited area

¹⁵ See Bohlen and Burns, *The Privilege to Protect Property By Dangerous Barriers and Mechanical Devices*, 35 YALE L.J. 525 (1926).

¹⁶ See, e.g., *State v. Barr*, 11 Wash. 481, 39 P. 1080 (1895).

¹⁷ The rule has historically been stated in terms of willful or wanton conduct, and the court has shown no hesitancy to impose liability in cases in which it found wanton conduct. See *Greetan v. Solomon*, 47 Wn. 2d 354, 287 P.2d 721 (1955). It follows a fortiori that liability would be imposed upon a defendant who had willfully injured a plaintiff, since a higher degree of culpability is involved in willfulness than in wantonness. See note 10, *supra*.

¹⁸ 2 RESTATEMENT (SECOND) OF TORTS § 334 (1965) [hereinafter cited as RESTATEMENT (SECOND)]; *Lyshak v. Detroit*, 351 Mich. 230, 88 N.W. 2d 596 (1958); *Cater v. Seaboard Air Line R. Co.*, 114 S.C. 517, 104 S.E. 186 (1920); *Cheslock v. Pittsburgh R. Co.*, 363 Pa. 157, 69 A.2d 108 (1949).

¹⁹ 2 RESTATEMENT (SECOND) § 335; *Savoie v. Littleton Construction Co.*, 95 N.H. 67, 57 A.2d 772 (1948); *Mix v. Minneapolis*, 219 Minn. 389, 18 N.W. 2d 130 (1945).

²⁰ 2 RESTATEMENT (SECOND) § 336; *Lyshak v. Detroit*, 351 Mich. 230, 88 N.W.2d 596 (1958); *Fernandez v. Consolidated Fisheries*, 98 Cal. App. 2d 91, 219 P.2d 73 (1950); *Kennedy v. Southern Pa. Traction Co.*, 333 Pa. 406, 3 A.2d 395 (1939).

upon which persons regularly trespass.²¹ Two early Washington cases involving high voltage power lines seemed to establish an exception to the willful and wanton rule where "dangerous instrumentalities" were involved.²² However, later trespasser cases involving power lines retreated from this position.²³ It thus appears that the Washington court will deny relief to an injured adult trespasser unless his injury is caused by an occupier's willful and wanton conduct.

II. DUTY TO TRESPASSING CHILDREN

When the injured trespasser is a child, courts have much more readily imposed liability on the occupier. Washington and a majority of other American jurisdictions apply the attractive nuisance doctrine in addition to the willful and wanton rule.²⁴ When applicable, the attractive nuisance doctrine imposes a duty of reasonable care on the occupier toward children, in effect raising them to the status of invitees.²⁵

Washington specifies five requirements for recovery under the attractive nuisance doctrine:²⁶ (1) the injury must have been caused by a dangerous instrumentality or condition; (2) that instrumentality or condition must have allured or enticed the child onto the premises; (3) the instrumentality or condition must be of such a nature that the child did not appreciate the hazard; (4) the instrumentality or condition must be unguarded and near a place at which it is reasonable to expect that young children will be present; and (5) access to the instrumental-

²¹ *Hiatt v. Northern Pac. R. Co.*, 138 Wash. 558, 244 P. 994 (1926). Here a railroad engine made a "flying switch" at night in an area where persons frequently crossed the railroad tracks; held—no recovery unless the act could be characterized as willful and wanton.

²² *Talkington v. Washington Water Power Co.*, 96 Wash. 386, 165 P. 87 (1917); *Clark v. Longview Public Service Co.*, 143 Wash. 319, 255 P. 380 (1927)

²³ *Hanson v. Washington Water Power Co.*, 165 Wash. 497, 5 P.2d 1025 (1931); *Kedziora v. Washington Water Power Co.*, 193 Wash. 51, 74 P.2d 898 (1937); *Deffland v. Spokane Portland Cement Co.*, 26 Wn. 2d 891, 176 P.2d 311 (1947).

²⁴ *Schock v. Ringling Bros. and Barnum & Bailey Combined Shows*, 5 Wn. 2d 599, 105 P.2d 838 (1940). The doctrine is commonly spoken of as applying to children who are trespassers, but it should apply a fortiori to children who are licensees. See Prosser, *Trespassing Children*, 47 CALIF. L. REV. 427 (1959); Green, *Landowner v. Intruder; Intruder v. Landowner. Basis of Responsibility in Tort*, 21 MICH. L. REV. 495 (1923); L. ELDRIDGE, *MODERN TORT PROBLEMS* 189-204 (1941); HARPER & JAMES 1447-61. The doctrine was apparently first applied in *Sioux City & Pacific R. Co. v. Stout*, 84 U.S. (17 Wall.) 657 (1873), a "turntable case."

²⁵ See HARPER & JAMES 1448; Prosser, *Trespassing Children*, 47 CALIF. L. REV. 427, 429 (1959); Comment, *The Attractive Nuisance Doctrine in Washington*, 22 WASH. L. REV. 45, 46-47 (1947); RESTATEMENT (SECOND) § 339.

²⁶ *Schock v. Ringling Bros. and Barnum & Bailey Combined Shows*, 5 Wn. 2d 599, 616, 105 P.2d 838, 846 (1940). The most recent case to apply the doctrine is *Mathis v. Swanson*, 68 Wn. 2d 424, 413 P.2d 662 (1966).

ity or condition could reasonably have been prevented by the occupier.

The dangerous instrumentality or condition mentioned in the first requirement does not include "simple tools and appliances used in the ordinary conduct of business" such as a pike pole used for moving logs in a mill pond.²⁷ Neither does it include a heavy skiff leaning against a wall.²⁸ It may include a steel I-beam lying on its flange²⁹ and a smoldering fire partially covered by dirt.³⁰

The requirement of allurement or enticement by the instrumentality or condition has been rejected by a majority of jurisdictions and the Restatement (Second).³¹ Washington, however, has retained the allurement requirement,³² although the court has been less than consistent in applying it. In one case the court reversed a summary judgment holding a land occupier not liable to a trespassing thirteen-year-old boy injured when a steel I-beam lying on its flange tipped over.³³ But in an earlier case the court affirmed a judgment of dismissal holding an occupier not liable to a trespassing five-year-old boy injured when a skiff leaning against a wall fell on him.³⁴ The requirement of allurement was, at first blush, satisfied in both cases because the instrumentality was visible and accessible from a public way.³⁵ A smoldering fire partially covered with dirt giving an appearance of smoke rising from the ground is also deemed capable of alluring or enticing young children.³⁶

²⁷ *Mail v. Smith Lumber Co.*, 47 Wn. 2d 447, 449-50, 287 P.2d 877, 878 (1955).

²⁸ *Holland v. Niemi*, 55 Wn. 2d 85, 345 P.2d 1106 (1959).

²⁹ *Mathis v. Swanson*, 68 Wn. 2d 424, 413 P.2d 662 (1966).

³⁰ *Brannon v. Harmon*, 56 Wn. 2d 826, 355 P.2d 792 (1960).

³¹ 2 RESTATEMENT (SECOND) § 339, comment *e* at 200; PROSSER 375; HARPER & JAMES 1450-51.

³² *Sherman v. Seattle*, 57 Wn.2d 233, 356 P.2d 316 (1960). The minority view is apparently based on the now discredited case of *United Zinc & Chemical Co. v. Britt*, 258 U.S. 268 (1922). It is generally conceded that *Britt* was overruled *sub silentio* by *Best v. District of Columbia*, 291 U.S. 411 (1934). See Prosser, *Trespassing Children*, 47 CALIF. L. REV. 427, 431 (1959).

³³ *Mathis v. Swanson*, 68 Wn. 2d 424, 413 P.2d 662 (1966). The lower court's granting of a motion for summary judgment was tantamount to a holding that as a matter of law the attractive nuisance doctrine did not apply to the facts of the case. By its reversal of this judgment the supreme court held that the minds of reasonable men might differ as to whether or not the doctrine was applicable.

³⁴ *Holland v. Niemi*, 55 Wn. 2d 85, 345 P.2d 1106 (1959). By so affirming the court held that as a matter of law the attractive nuisance doctrine was not applicable to the facts of the case.

³⁵ The *Mathis* court distinguished *Holland* on the ground that the *Mathis* I-beam was near a public sidewalk and therefore the presence of children was reasonably foreseeable. Seemingly overlooked was the fact that the *Holland* skiff was near an alley in which children frequently played. A skiff leaning against a wall would seem to a child to be an adequate hiding place or playhouse just as much as an I-beam would seem to present an interesting tight-rope problem.

³⁶ *Brannon v. Harmon*, 56 Wn. 2d 826, 355 P.2d 792 (1960) (reversing a summary judgment for the land occupier-defendant).

A fifteen-year-old boy of normal intelligence is too old as a matter of law to recover under the attractive nuisance doctrine.³⁷ He is old enough to appreciate most hazards. A thirteen-year-old boy, on the other hand, is not as a matter of law too old to recover under the doctrine.³⁸ The doctrine is not applied to conditions the dangerousness of which is apparent to the injured child, such as open fires³⁹ and open waterways.⁴⁰

The requirement that the instrumentality or condition be left unguarded is straightforward. And no case could be found which turned on the fifth consideration, the reasonableness of the burden on the occupier of preventing trespassing children from being exposed to dangers on his land. The court has discussed neither requirement at any length.

The Washington court has not restricted itself to application of the attractive nuisance doctrine as the only method of granting relief to injured trespassing children. In *Sherman v. Seattle*⁴¹ a three-year-old boy was injured when he was run over by a rail lift operated by the defendant. The court held that the attractive nuisance doctrine did not apply since the lift had not enticed the boy to be where he was, but nevertheless imposed liability on the defendant. The finding of liability was predicated on the child's presence on the lift site being reasonably foreseeable because of the site's proximity to a place where children were likely to be present. The court also emphasized the fact that the plaintiff had been injured by an activity of the occupant rather than by an existing condition on the premises. By engaging in a potentially harmful activity near where children are known to play the occupier is deemed to have more reason to foresee the possible harmful consequences. It thus appears that in Washington an occupant carrying on an activity near where children are likely to play owes a duty of reasonable care for their safety.⁴²

³⁷ *Hanson v. Freigang*, 55 Wn. 2d 70, 345 P.2d 1109 (1959).

³⁸ *Mathis v. Swanson*, 68 Wn. 2d 424, 413 P.2d 662 (1966).

³⁹ *Clark v. Bremerton*, 1 Wn. 2d 689, 97 P.2d 112 (1939).

⁴⁰ *Meyer v. General Electric Co.*, 46 Wn. 2d 251, 280 P.2d 257 (1955).

⁴¹ 57 Wn. 2d 233, 356 P.2d 316 (1960). See also *Helland v. Arland*, 14 Wn. 2d 32, 126 P.2d 594 (1942), in which the court held that a milk truck driver owed a duty of reasonable care to a five-year-old trespasser on his delivery truck, since "a child as young as [the decedent] can [not] be in any real sense a trespasser." *Id.* at 34, 126 P.2d at 595.

⁴² In *Sherman* the court also emphasized the unique circumstance involved in the case that the entire area was under control of the defendant city and the plaintiff resided with his family on the premises. This fact was not determinative of the issue of liability, however, and probably was relevant only to the foreseeability of the child's presence at the lift site. Properly read, therefore, the

This exception is apparently an application of the Restatement (Second) position, limited, however, to cases involving trespassing children.⁴³

The rule governing the liability of a land occupier to a trespassing child in Washington thus appears to generally impose a duty of refraining from willfully and wantonly injuring the child, modified by the attractive nuisance doctrine with respect to conditions or instrumentalities and the *Sherman* rule with respect to activities.

III. DUTY TO LICENSEES

A licensee in Washington is one who has either express or implied permission to enter an occupier's land.⁴⁴ The Washington court is apparently in agreement with the Restatement (Second) regarding the kinds of entrants which fall within this category.⁴⁵ Thus, a woman visiting in a hotel operated by her mother,⁴⁶ a social guest at a person's residence,⁴⁷ and a grandmother caring for her grandchildren in her daughter's home,⁴⁸ are all licensees.

The duty owed by an occupier to a licensee is generally only to refrain from willfully and wantonly injuring him.⁴⁹ Despite dicta to case is not an aberration, but rather is solid precedent for an expanded duty of an occupier to children.

⁴³ 2 RESTATEMENT (SECOND) § 336 is a codification of the "discovered trespasser" exception which imposes a duty of reasonable care upon an occupier who knows or should know of the presence of a trespasser. See note 20, *supra*. The *Sherman* rule appears to be an application of this section to situations involving trespassing children, imposing a duty of reasonable care on an occupier who engages in activities near where children play. In light of the natural curiosity of children one can reasonably foresee their venturing onto nearby premises for the purposes of investigation. See also note 18 and accompanying text, *supra*.

⁴⁴ *Steele v. Thorne*, 72 Wash. Dec. 2d 708, 710, 435 P.2d 544, 545 (1967); *Schock v. Ringling Bros. and Barnum & Bailey Combined Shows*, 5 Wn. 2d 599, 605, 105 P.2d 838, 841 (1940).

⁴⁵ 2 RESTATEMENT (SECOND) § 330, comment *h* at 175 states that the category of licensee includes three types of persons: (1) those who are on the land of another solely for the entrant's own purposes, and only by the express or implied consent of the occupier; (2) members of the occupier's household; and (3) social guests. The Washington court has quoted this passage with approval, most recently in *Steele v. Thorne*, 72 Wash. Dec. 2d 708, 710-11; 435 P.2d 544, 545 (1967). It is interesting to note the extent to which the Washington court has stretched the concept of "members of the household." It has been held to include the mother of a married daughter, even though the mother resided elsewhere and was only visiting the daughter, *Lucas v. Barner*, 56 Wn. 2d 136, 351 P.2d 492 (1960), and the married daughter of a mother, even though the daughter resided elsewhere and was only visiting the mother, *Steele v. Thorne*, 72 Wash. Dec. 2d 708, 435 P.2d 544 (1967).

⁴⁶ *Steele v. Thorne*, 72 Wash. Dec. 2d 708, 435 P.2d 544 (1967).

⁴⁷ *Dotson v. Haddock*, 46 Wn. 2d 52, 278 P.2d 338 (1955).

⁴⁸ *Lucas v. Barner*, 56 Wn. 2d 136, 351 P.2d 492 (1960). See also *Porter v. Ferguson*, 53 Wn. 2d 693, 336 P.2d 133 (1959).

⁴⁹ *Steele v. Thorne*, 72 Wash. Dec. 2d 708, 711, 435 P.2d 544, 546 (1967); *McNamara v. Hall*, 38 Wn. 2d 864, 867, 233 P.2d 852 (1951); *Garner v. Pacific Coast Coal Co.*, 3 Wn. 2d 143, 150, 100 P.2d 32, 35 (1940).

the contrary in some earlier cases,⁵⁰ the Washington court strictly applied the willful and wanton rule toward licensees until *Potts v. Amis*.⁵¹ In *Potts* the court drew a distinction between misfeasance and nonfeasance and found liability where a social guest was injured by active conduct of the occupier which was admittedly negligent, but which fell short of being willful and wanton.⁵² In thus imposing liability the court established an exception to the willful and wanton rule by holding an occupier engaged in active conduct to a duty of reasonable care toward a licensee of whose presence he is aware.⁵³

Another exception to the willful and wanton rule was established in *Miniken v. Carr*.⁵⁴ In *Miniken* the entrant was injured when she fell down a flight of stairs behind one of two adjacent unmarked doors while looking for a restroom. By imposing liability on the occupier, the court established a duty on the part of the land occupier to warn licensees of "concealed, dangerous conditions" of which the occupier knows or should know.

A third exception to the willful and wanton rule, closely related to the "concealed, dangerous condition" exception of *Miniken*, was included as one of three alternative holdings in *Ward v. Thompson*.⁵⁵ In *Ward* the plaintiff was injured when scaffolding upon which he was standing collapsed. After concluding that the entrant could be characterized as an invitee under either the economic benefit test or invitation test, the court went on to assert that even if the plaintiff were a licensee the occupier owed him a duty to maintain the scaffolding in a safe condition since it was a "dangerous condition or

⁵⁰ *Christensen v. Weyerhaeuser Timber Co.*, 16 Wn. 2d 424, 432, 133 P.2d 797, 800 (1943); *Clark v. Longview Pub. Service Co.*, 143 Wash. 319, 323, 255 P. 380, 381 (1927).

⁵¹ 62 Wn. 2d 777, 384 P.2d 825 (1963), noted in 39 WASH. L. REV. 345 (1964).

⁵² The occupier struck the plaintiff with a golf club while demonstrating the proper swing. *Id.* at 778, 384 P.2d at 826.

⁵³ Cf. the "discovered trespasser" rule mentioned in the text accompanying note 20 *supra*. And cf. *Sherman v. Seattle*, 57 Wn. 2d 233, 356 P.2d 316 (1960), discussed in text accompanying notes 41-43, *supra*.

⁵⁴ 71 Wash. Dec. 2d 317, 428 P.2d 716 (1967). Although the court recognized that the plaintiff could conceivably have been characterized as an invitee at the time of the accident and the defendant would therefore have had a duty to at least warn the plaintiff of the dangerous condition, there was no assurance that liability was imposed at trial on that theory alone. In affirming the lower court's finding of liability the court was cognizant of the possibility that liability had been predicated on the concealed, dangerous condition exception to the normal duty owed by an occupier to a licensee. The language and holding of the court explicitly incorporates this latter theory.

⁵⁵ 57 Wn. 2d 655, 359 P.2d 143 (1961), noted in 37 WASH. L. REV. 250 (1962). This exception to the general rule was approved in *Haugen v. Central Lutheran Church*, 58 Wn. 2d 166, 361 P.2d 637 (1961).

instrumentality."⁵⁶ By thus imposing liability the court established a duty on the part of a land occupier to maintain dangerous instrumentalities on his premises in a safe condition if a licensee might otherwise be injured thereby.

In Washington a land occupier thus owes a licensee a duty only to refrain from willfully and wantonly injuring him unless (1) a dangerous activity, (2) a concealed dangerous condition, or (3) a dangerous instrumentality is involved, in which case the occupier owes the licensee a duty of reasonable care. Washington therefore appears to have gone somewhat beyond the Restatement (Second) rule governing the land occupier's liability to a licensee.⁵⁷

IV. DUTY TO INVITEES

In Washington an invitee is either an entrant whose visit involves actual or potential pecuniary benefit to the occupier, or one who has responded to a public invitation which expressly or impliedly represents that reasonable care has been taken for persons so entering.⁵⁸ With the recent addition of the latter test the Washington rule is now in agreement with that of the Restatement (Second) and the majority of other jurisdictions.⁵⁹

⁵⁶ *Ward v. Thompson*, 57 Wn. 2d 655, 659-60, 359 P.2d 143, 145 (1961). The court stated that such a duty is demanded by public policy and could not be avoided "on the basis of time-worn distinctions between licensees and invitees." *Id.* at 660, 359 P.2d at 145.

⁵⁷ 2 RESTATEMENT (SECOND) § 341 deals with activities of the occupier which may be dangerous to the licensee, and 2 RESTATEMENT (SECOND) § 342 deals with dangerous conditions on the premises. Comment *d* to § 342 states:

[a] possessor of land owes to a licensee no duty to prepare a safe place for the licensee's reception or to inspect the land to discover possible or even probable dangers.

The *Ward* rule apparently imposes a higher duty of care by requiring the occupier to maintain an instrumentality in a safe condition. Proper maintenance would require both inspection and affirmative steps to make the instrumentality safe.

⁵⁸ *McKinnon v. Washington Fed. Sav. & Loan Ass'n*, 68 Wn. 2d 644, 414 P.2d 773 (1966), noted in 42 WASH. L. REV. 299 (1966).

⁵⁹ 2 RESTATEMENT (SECOND) § 332; HARPER & JAMES 1478; PROSSER 399. Undoubtedly in response to *McKinnon* the 1967 state legislature passed the so-called Timber Baron Statute, which limits the liability of landowners who permit their land to be used for recreational purposes by members of the public. Section 2 of the Act provides that:

[a]ny landowner who allows members of the public to use his agricultural or forest land for the purposes of outdoor recreation, which term includes hunting, fishing, camping, picnicking, hiking, pleasure driving, nature study, winter sports, viewing or enjoying historical, archeological, scenic, or scientific sites, without charging a fee of any kind therefor, shall not be liable for unintentional injuries to such users: PROVIDED, That nothing in this section shall prevent the liability of such a landowner for injuries sustained to users by reason of a known dangerous artificial latent condition for which warning signs have not been conspicuously posted; PROVIDED FURTHER,

Toward an invitee the occupier owes a duty to use ordinary care to keep the premises upon which the entrant is invited safe for the purpose of the invitation.⁶⁰ This duty includes an inspection of the premises to discover any dangerous conditions which are not readily apparent.⁶¹ Once a dangerous condition has been discovered by the occupier, however, it is unclear whether he can discharge his duty by merely warning the invitee of the condition, or whether he must take affirmative steps to remove the dangerous condition. The Restatement (Second) position is that a warning would normally be sufficient,⁶² but this position has been the object of much criticism.⁶³ Washington has not taken a position on the question.

V. SUMMARY

Since 1960 the Washington Supreme Court has gradually wrought a reformation in Washington land occupier liability law. The willful and wanton rule governing liability to licensees has been modified by *Ward v. Thompson*,⁶⁴ in which the occupier was held to have a duty to maintain dangerous instrumentalities in a safe condition for the licensee; by *Potts v. Amis*,⁶⁵ in which the occupier was held to have a duty to refrain from active conduct which might endanger the licensee; and by *Miniken v. Carr*,⁶⁶ in which the occupier was held to have a duty to warn the licensee of concealed, dangerous conditions. The rule governing liability to invitees has been modified by *McKinnon v. Washington Fed. Sav. & Loan Ass'n*,⁶⁷ which broadened the category of invitee to include persons responding to a public invitation.⁶⁸ Since no trespasser case has reached the court in recent times it is impossible to ascertain with much certainty whether the court's

That nothing in this act limits or expands in any way the doctrine of attractive nuisance.

Ch. 216, §2, [1967] Wash. Sess. Laws 1416.

⁶⁰ *McKinnon v. Washington Fed. Sav. & Loan Ass'n*, 68 Wn. 2d 644, 414 P.2d 733 (1966); *Phelps v. Wescott*, 68 Wn. 2d 11, 410 P.2d 611 (1966); *Buttnick v. J. & M. Inc.*, 186 Wash. 658, 59 P.2d 750 (1936).

⁶¹ The duty of inspection is one of the basic differences between the duties owed by an occupier to invitees and those owed licensees. However, there may be no such difference when dangerous instrumentalities and licenses are involved. See note 57, *supra*. See also HARPER & JAMES 1487-88.

⁶² 2 RESTATEMENT (SECOND) § 343, comment *b* at 216 and comment *d* at 217.

⁶³ See, e.g., HARPER & JAMES 1489-96.

⁶⁴ See discussion accompanying note 55, *supra*.

⁶⁵ See discussion accompanying note 51, *supra*.

⁶⁶ See discussion accompanying note 54, *supra*.

⁶⁷ See note, 58, *supra*.

⁶⁸ From these cases one can discern the basic pattern of evolution in this area of Washington law. Two phases are involved. First there is a gradual increase in the degree of care owed to licensees through the adoption of exceptions to the willful and

reform will extend to this area of law. The holding in *Sherman v. Seattle*⁶⁹ suggests an affirmative answer to this question.

The Washington court has not made clear the extent to which it is willing to reform land occupier liability law, but to date it seems to be satisfied with bringing Washington law into accord with the rules advocated by the Restatement (Second). This would mean a retention of the trespasser-licensee-invitee categorization, an approach which has been condemned by an increasing number of commentators.

Dean Prosser has been critical of the licensee-invitee distinction, but has not advocated complete abandonment of the traditional approach.⁷⁰ Professor Harper has advocated de-emphasis of the licensee-invitee distinction and in its stead a determination of liability based on the reasonable expectations of the entrant and "all the other pertinent facts of the case."⁷¹ Professor James has expressed his disapproval, arguing that fictions of "invitation" and "permission" tend to obscure the proper basis of liability, which is the occupier's foreseeability of harm to the entrant.⁷² Other writers have argued for outright abandonment of the distinction between licensees and invitees.⁷³

It is true that application of the Restatement (Second) rules would result in fewer negligent land occupiers escaping liability to injured entrants in Washington. For this reason a move toward the adoption

wanton rule. Second, as the degree of care owed by the occupier approaches that owed to invitees, the invitee category is broadened by assimilation of that portion of the licensee category to which the higher degree of care is applicable.

⁶⁹ See notes 41-43 and accompanying text *supra*.

⁷⁰ See Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573 (1942), in which the author argued for a return to the invitee-licensee language rather than the First Restatement's business visitor notion advocated by Professor Bohlen, the First Restatement's reporter. Prosser's thesis is that the traditional distinctions are permissible so long as the determinative factor for imposing liability is the reasonable expectations of the entrant. See *Id.* at 612.

⁷¹ Harper, *Laube v. Stevenson: A Discussion*, 25 CONN. B.J. 123, 133-34 (1951).

⁷² See HARPER & JAMES 1430-505.

⁷³ See, e.g., Comment, *The Outmoded Distinction Between Licensees and Invitees*, 22 MO. L. REV. 186 (1957); 12 RUTGERS L. REV. 599 (1958); Marsh, *The History and Comparative Law of Invitees, Licensees, and Trespassers*, 69 L.Q. REV. 182, 359 (1953). Salmond wrote:

The law on the whole subject is still in a confused state. The delimitation between the different categories is far from settled, nor is it possible to state with certainty the duties owed to persons falling under those categories. Had it been earlier and more generally recognized that the topic is only one branch of the law of negligence it might have been seen that the occupier's duties cannot conveniently be put into strait jackets to fit the character in which the plaintiff comes on to the premises, and the law would then have been freed of some needless refinements and profitless distinctions.

J. SALMOND, *LAW OF TORTS* 471 (10th ed. 1945). Pursuant to a recommendation by the Law Reform Committee the distinction between licensees and invitees was abrogated by statute in England. Occupiers' Liability Act, 5 & 6 Eliz. 2, c. 31 (1957).

of these rules should be applauded.⁷⁴ However it is submitted that not only does the Restatement (Second) stop short of the most desirable rules governing land occupier liability, but also that its method of dealing with land occupier liability law perpetuates a fundamentally undesirable approach to the problem by retaining the traditional categories of entrants and engrafting exceptions onto the traditional limited duties.

Commentators have generally given short shrift to the origin of the rules governing land occupier liability. They have dismissed the early English cases and the rules they first announced as anachronistic holdovers from an era and a society which put an inordinate value on land ownership and use, and which "therefore" generated special rules for land occupier liability.⁷⁵ It is suggested that such an analysis is inaccurate.

Negligence did not gain recognition as an independent basis for an action in tort until around 1825.⁷⁶ The rules governing the liability of an occupier of land to persons entering his premises were first clearly formulated in an 1866 English case.⁷⁷ Although the early decisions espouse no single rationale for the rules, many of them contain language which suggests that the rules were based at least in part on notions of negligence, *viz.*, the entrant's reasonable expectations of safety and the occupier's foreseeability of harm.⁷⁸ And in an

⁷⁴ As stated by Professor James,

... the traditional rule confers on an occupier of land a special privilege to be careless which is quite out of keeping with the development of accident law generally and is no more justified here than it would be in the case of any other useful enterprise or activity. HARPER & JAMES 1440.

⁷⁵ See authorities cited in note 2 *supra*.

⁷⁶ Winfield, *The History of Negligence in the Law of Torts*, 42 L.Q. REV. 184, 195 (1926); PROSSER 143.

⁷⁷ *Indermaur v. Dames*, L.R. 1 C.P. 274 (1866); *aff'd.*, L.R. 2 C.P. 311 (1867).

⁷⁸ In *Indermaur v. Dames*, *Id.* at 288 the court said:

... we consider it settled law, that [one who has been invited on the premises for business purposes] is entitled to *expect* that the occupier shall... use reasonable care to prevent damage for unusual danger, [of] which he knows or ought to know. (emphasis added.)

With respect to licensees the same court said: "One who comes upon another's land by the owner's permission or invitation has a *right to expect* that the owner will not dig a pit thereon... so that persons lawfully coming there may receive injury." *Corby v. Hill*, 140 Eng. Rep. 1209, 1213 (C.P. 1858) (emphasis added). Bramwell, B. in a case also involving a licensee said "... where a person is in the house of another... he has a *right to expect* that the owner of the house will take *reasonable care* to protect him from injury." *Southcote v. Stanley*, 156 Eng. Rep. 1195, 1197 (Ex. 1856) (emphasis added). And in a case involving a trespasser who had wandered far from the highway the court distinguished *Corby v. Hill* on the basis of the entrant's expectations. *Hounsell v. Smyth*, 141 Eng. Rep. 1003, 1008 (C.P. 1860). It was settled law in England that a trespasser who had deviated slightly from the highway and who encountered a peril such as an excavation could recover notwithstanding the fact that he was a trespasser. This rule was codified in the

era in which land ownership occupied an especially high economic and social status, it is likely that the rules did reflect the then-current notions of expectations and foreseeability.

Shortly after the formulation of these rules, Western legal thought became dominated by a spirit of extreme dogmatism which persisted well into this century.⁷⁹ Under the influence of this dogmatic spirit, application of *stare decisis* resulted in a judicial failure to adapt the rules to reflect the increasingly humanitarian aspects of an economically and socially evolving civilization. Today these rules probably do not accurately reflect the reasonable expectations or foreseeability of either the occupier or the entrant. Courts (and the Restatement (Second)) have attempted to make the rules more palatable by engrafting various exceptions onto them. While this process has averted injustice in many cases, its most obvious effect has been confusion and uncertainty.

It may be that if the Washington court were to re-examine the rationale which originally supported the rules governing land occupier liability, it would conclude that the rules were regarded as only particularizations of general negligence principles applied to the circumstances of land ownership and use. To the extent that the present Washington rules and those espoused by the Restatement (Second) reflect a different approach, the court would then be faced with a choice between the original policies and the current ones. It is submitted that the solutions advanced by nearly all the commentators better comport to the original intent of the courts which established the rules in the first instance. A policy of basing land occupier liability rules on a process of balancing (1) the reasonable expectations of an entrant with the reasonable expectations of an occupier, and (2) the seriousness of foreseeable harm with the burden of avoiding that harm, represents a viable approach in our society as it did in mid-nineteenth century England. The Washington Supreme Court should therefore not regard the Restatement (Second) as setting forth the best possible rules for determining liability. Rather, the court should consider adopting a different approach to this area of the law. In this case the best approach, interestingly enough, might well be that

General Highway Act, 5 & 6 Wm. 4, c. 50 §70 (1833), which established a distance of 25 yards on either side of a carriage way in which the occupier could not make an unguarded open excavation. The rationale behind both the common law rule and the statute would appear to be the reasonable expectations of the traveller-trespasser and the foreseeability of an accident on the part of the occupier.

⁷⁹ 1 R. Pound, *JURISPRUDENCE* 51-68 (1959); J. Stone, *SOCIAL DIMENSIONS OF LAW AND JUSTICE* 9 (1966).

adopted by the English courts in the mid-1800's, varied only by a refusal to adopt rigid, specific rules intended to reach all possible circumstances.⁸⁰

⁸⁰ Factors which the court should consider in determining liability include the following: (1) the location of the activity or condition, e.g. proximity to public ways (*see, e.g.*, text accompanying notes 11 & 12 *supra*); (2) the obviousness of the hazard, a consideration necessarily involving to some extent the age of the entrant (*see, e.g.*, text accompanying notes 27-30 *supra*); (3) the reason for the entrant's presence (e.g., a burglar should not be entitled to expect the same safety precautions as a doctor on a house call); (4) the utility of the activity or condition to the occupier and to the public generally (*see, e.g.*, note 59 *supra*); (5) the burden on the occupier of reducing the probability of injury to the entrant (e.g., by erecting fences or posting warning signs; and (6) the severity of injury which is likely to be incurred by the entrant.