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Liability of Commercial Premises Owners to Injured Invitees: Estate of Starling v. Fisherman's Pier

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Abstract

In the early morning hours of December 24, 1978, John Starling, inebriated to the point of unconsciousness, rolled off a commercial fishing pier into the surrounding waters and drowned.

KEYWORDS: premises, owners, commercial

Liability of Commercial Premises Owners to Injured Invitees: Estate of Starling v. Fisherman's Pier

Introduction

In the early morning hours of December 24, 1978, John Starling, inebriated to the point of unconsciousness, rolled off a commercial fishing pier into the surrounding waters and drowned. His estate sued the pier for negligence because the pier employee failed to provide for John's safety after knowing of his drunken condition. This case comment explores the issues raised by *Estate of Starling v. Fisherman's Pier*¹ as they pertain to the duty owed by owners of commercial premises to invitees who become incapacitated and then injured. This comment also examines Florida courts' position in the area of premises liability² and analyzes traditional classifications of visitors with the concurrent duties and immunities these classifications confer upon premises owners and occupiers.

While not emphasizing the distinctions, *Estate of Starling* exemplifies the outmoded distinctions between certain classes of visitor plaintiffs. Plaintiff classification is often the critical element in determining landowner liability; thus this comment considers the different results courts can reach depending on plaintiff classification. Finally, since classification is frequently unjust and anachronistic in contemporary society, this comment advocates its replacement with a single duty of reasonable care in view of foreseeability of injuries to others.

Estate of Starling

On December 24, 1978, John Starling decided to walk out onto

1. *Estate of Starling v. Fisherman's Pier, Inc.*, 401 So. 2d 1136 (Fla. 4th Dist. Ct. App. 1981), *cert. denied*, 411 So. 2d 381 (Fla. 1981).

2. The Starling court did not elaborate on the distinctions between classifications of persons who come upon property. John Starling was classified as an invitee without any discussion. This case comment will expand the court's analysis and illustrate how different results may follow depending on the initial classification.

the fishing pier located off the City of Lauderdale-by-the-Sea. Perhaps John wanted to see whether the fish were biting or perhaps he wanted to “toast in” Christmas eve while out on the pier as he carried a bottle of liquor with him through the entrance pay booth. The pier employee and operator of the bait shop, August Poehler, apparently also wanted to join in the celebration. John and August partook in the drinking of the holiday spirits while in the bait shop.³ John, however, proceeded to get thoroughly drunk and stumbled back out onto the pier where he subsequently passed out near the pier’s edge.

August failed to take any precautions to safeguard his unconscious customer. Later, John Starling rolled off the fishing pier into the surrounding ocean waters and drowned.⁴ His estate sued the pier owner and August Poehler because as pier employee, August failed to take precautionary steps to provide for John’s safety after seeing John in a drunken condition.

The Lower Court

Starling’s estate claimed the pier was negligent in failing to remove Starling from a position of known danger when he could have been easily removed by the pier employee without any danger to that employee.

In defense, the pier relied principally on *Reed v. Black Caesar’s Forge Gourmet Restaurant, Inc.*,⁵ which involved an intoxicated restaurant patron who recovered his keys from the valet parking attendant and proceeded to drive his car into Biscayne Bay where he drowned. Florida’s Third District Court of Appeal found no restaurant liability because the proximate cause of Reed’s death was his own negligence in driving while intoxicated. Thus, the owners of the fishing pier in *Starling* argued the proximate cause of decedent’s death was his own negligence in becoming intoxicated.

To bolster its defense, the fishing pier proprietors in *Starling* argued that the liquor the deceased consumed was not sold or supplied by the pier.⁶ Since Florida does not have a Dram Shop Act, a bar is under

3. Brief for Appellants at 2.

4. *Id.*

5. 165 So. 2d 787 (Fla. 3d Dist. Ct. App. 1964).

6. Brief for Appellee at 5-6. The plaintiff in *Starling* cited a case in which a

no duty to protect an intoxicated person from injury to himself.⁷ Therefore, defendant contended, a fishing pier that did not serve alcoholic beverages would be under even less of a duty than a bar that supplied its patrons with intoxicating liquors.⁸ Additionally, argued the pier, neither the condition of the premises presented a danger nor did any act of the pier operator place Starling in a perilous situation.⁹ Had defendant not kept the premises in a safe condition, or failed to warn plaintiff of a hidden peril which defendant knew or should have known about, the breach of duty would have been clear.¹⁰

The only duty the pier recognized was the duty of a business establishment to protect its patrons from harm by other patrons or employees, when *notice* of a *specified* danger was apparent.¹¹ This duty arguably does not extend to a duty to protect a guest from himself. Generally, there is no duty "to come to the assistance of a person who is so ill or intoxicated as to be unable to look out for himself."¹² The Broward County Circuit Court, persuaded by the defendants' argument and reliance on *Reed*, dismissed the Starling estate complaint with prejudice for failure to state a cause of action.¹³

plaintiff was struck by an automobile after being ejected from a bar because he was intoxicated. One basis for liability was the violation of a statute prohibiting a bar from serving or selling liquor to an intoxicated person. *Pence v. Ketchum*, 326 So. 2d 831 (La. 1976).

7. Florida, along with more than half the states, does not have a Dram Shop Act. 4D PERSONAL INJURY ACTIONS, DEFENSES, DAMAGES § 1.02 (L. Frummer & M. Friedman eds. 1971). Such statutes impose liability on one who dispenses liquor to an already intoxicated person and are designed to protect, not the intoxicated person, but innocent bystanders who are injured by him. The primary purpose of the act is to protect the "economic, social and moral well-being and the safety of the state and all its people," *Hitson v. Dwyer*, 61 Cal. App. 2d 803, 143 P.2d 952 (3d Dist. Ct. App. 1943).

8. Brief for Appellee at 6.

9. *Id.* at 4. The defendant relied on the fact the open horizontal railing, in and of itself, presented no danger. He ignored the fact that it was this condition that became dangerous by being insufficient to prevent the victim from rolling off the pier.

10. 65 C.J.S. *Negligence* § 63 (1966).

11. Brief for Appellee at 2 (citing *Warner v. Florida Jai Alai, Inc.*, 221 So. 2d 777 (Fla. 4th Dist. Ct. App. 1969)).

12. Brief for Appellee at 203 (citing 57 AM. JUR. 2d *Negligence* § 41 at 389 (1971)).

13. Brief for Appellants at 3 (citing to the record at 33).

The Appellate Decision

Florida's Fourth District Court of Appeal reversed the Broward County Circuit Court's dismissal of Starling estate's complaint. The appellate court recognized the general rule that a chance bystander has no duty to come to the aid of an intoxicated person. However, the *business* relationship existing between the pier and the invited patron provided the necessary relationship in order to impose an ordinary duty of care.¹⁴ Accordingly, if the facts of *Reed* were altered, the Third District Court of Appeal probably would have held the restaurant liable. The Fourth District hypothesized that, if in *Reed* the restaurant had knowledge that an unconscious patron was left unattended in the restaurant parking lot and injury resulted, restaurant liability probably would lie. In other words, the *Starling* court implicitly recognized that both knowledge of the patron's incapacity coupled with control over the patron's actions are the requisite elements to find premise owner liability for injuries sustained by the patron.

A case factually similar to *Starling* aided the Fourth District Court of Appeal in the duty of care analysis, and the court looked to the West Virginia's Supreme Court of Appeals decision in *Hovermale v. Berkeley Springs Moose Lodge No. 1483*.¹⁵ In *Hovermale*, a Moose Lodge member was found dead in his car after drinking at the lodge bar the previous night. Whether the victim was ill or drunk was disputed at the trial. The evidence did show after a few drinks Hovermale collapsed at the bar and was taken to his car at the direction of the bartender in order to "sleep it off."¹⁶ When the lodge closed for the night no one checked the condition of the victim "asleep" in his car. When the lodge re-opened the next morning, Hovermale was found dead. He had suffered a heart attack within hours after being placed in his automobile.

The West Virginia court, relying on the Restatement (Second) of Torts, found the lodge owed Hovermale an ordinary duty of care:

[A] possessor of lands open to the public is under a duty to those members of the public who enter in response to its invitation to

14. 401 So. 2d. 1136.

15. 271 S.E.2d 335 (W. Va. 1980).

16. *Id.* at 337.

give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.¹⁷

Thus the supreme court considered whether under the circumstances defendant complied with its duty to render aid to an invitee known to be ill or injured and whether this factual question had been improperly taken from the jury. Finding that it had, the supreme court of appeals reversed the Morgan County Circuit Court and awarded a new trial.¹⁸

Starling and *Hovermale* may be distinguished to the extent that the plaintiffs' incapacities resulted from different causes.¹⁹ The *Starling* court said, however, that regardless of the initial reason for the disability, the end result — total incapacity — was the same. Liability to the business depends on the proprietor's knowledge of the victim's condition, the foreseeability of danger, and the ability to render aid to the intoxicated patron.

A proprietor simply cannot ignore and step over an unconscious customer lying in a dangerous place upon his premises and he must take some minimal steps to safeguard any customer upon his premises from extreme danger, even though the customer has allowed himself to be exposed to that danger in the first place.²⁰

Intoxication Issue

In *Starling*,²¹ Chief Judge Letts stated that gross misconduct on the part of the decedent might affect the case's outcome: "[W]e would expect that a jury would find the drowned man comparatively negligent

17. *Id.* at 338 (citing RESTATEMENT (SECOND) OF TORTS § 314A (1965)).

18. *Id.*

19. *See supra* text accompanying note 16.

20. 401 So. 2d 1136. On appeal to the Florida Supreme Court, Fisherman's Pier alleged a conflict between the *Reed* and *Starling* decisions. In *Reed*, a commercial establishment was under no duty to protect an intoxicated person from harm to himself, while in *Starling*, an affirmative duty was imposed. Brief for Petitioner at 2. The Florida Supreme Court denied certiorari based on jurisdictional grounds. *Starling*, 411 So. 2d 381 (Fla. 1981).

21. 401 So. 2d 1136.

in large or even total measure. . . ."²² However, the Chief Judge also stated the issue of comparative negligence was not the test of whether a cause of action was stated.²³

Prior to 1973, Florida followed the common law rule that any contribution by a plaintiff to his own injury, would totally bar the plaintiff from recovery, even though the defendant was clearly more at fault. However, with *Hoffman v. Jones*,²⁴ Florida adopted the law of comparative negligence which does not completely bar the negligent plaintiff's recovery but rather reduces it in proportion to the plaintiff's own contributory negligence. Florida's abrogation of the contributory negligence doctrine caused considerable modification in the assumption of risk defense as well. "Assumption of the risk in certain instances merges with comparative negligence . . . [and] the fact finder is entitled to consider all facts and circumstances in order to determine the extent to which the plaintiff may be at fault."²⁵ Still the standard of care for intoxicated plaintiffs is the same: that of sober individuals.²⁶ Therefore, because comparative negligence is not a total bar to recovery, a cause of action could exist for Starling's estate.

The issue of plaintiff's intoxication at the time of injury is properly a matter for the jury's consideration.²⁷ A jury might well deny recovery; however, plaintiff's *incapacity* precipitates a duty of care upon the defendant proprietor. "The evidence of intoxication goes to the jury question of whether [the defendant] should have known, in the exercise of reasonable care, that the deceased was in need of attention."²⁸

Total incapacity of a plaintiff renders a duty on the proprietor to take precautions to guard the plaintiff's safety.²⁹ Despite the fact that the plaintiff was initially negligent in becoming drunk, once he is in a

22. *Id.*

23. *Id.*

24. 280 So. 2d 431 (Fla. 1973).

25. *Hall v. Holton*, 330 So. 2d 81 (Fla. 2d Dist. Ct. App. 1976) *quoted in* *Heath v. First Baptist Church*, 341 So. 2d 265, 267 (Fla. 2d Dist. Ct. App. 1977).

26. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 283, comment d (1965).

27. *Chicago, Rock Island & Pac. Ry. Co. v. Houston*, 209 Ark. 217, 189 S.W.2d 904 (1945); *Mills v. Silbernagel & Co.*, 204 Ark. 734, 164 S.W.2d 893 (1942); *Sanders v. Brown*, 73 Ariz. 116, 238 P.2d 941 (1952).

28. 140 So. 2d 702 (La. Ct. App. 1962).

29. *Small v. Boston & Me. R.R.*, 85 N.H. 330, 159 A. 298 (1932).

drunken stupor the law recognizes the impossibility of requiring sober conduct.³⁰ Therefore, the question for the jury to decide was whether a breach of duty occurred under the circumstances. While it is true that a proprietor "is not an insurer and as such should not be held responsible for events over which he has no control and could not reasonably foresee,"³¹ in a particular situation a jury might well decide what actions a reasonable person would be expected to take.³² For instance, the pier proprietor in *Starling* knew the victim had passed out and was situated in a dangerous position. How far one must go to protect a person from injury depends on the foreseeability of injury, the plaintiff's capacity to watch out for his own safety, and what a reasonable person would do under the circumstances.

There are other special situations in which a higher duty of care may be imposed. For example, one charged with the custody of another, such as a police officer in a police-prisoner situation,³³ or a common carrier in service of a passenger,³⁴ has been held to a higher than ordinary duty of care.³⁵ Thus where an intoxicated prisoner was injured after a fall from his bunk bed, the jailer was found liable for failing to secure the plaintiff to prevent a foreseeable injury.³⁶ Putting a passenger off a train in the middle of the night when the passenger was so

30. *Id.*

31. 271 S.E.2d at 339.

32. The *Hovermale* court cited a case where a train conductor failed to render aid to a passenger suffering from a stroke, assuming that the man was drunk, and stated:

[t]he case turns, not on what the conductor assumed or thought, but on what he should, in the exercise of reasonable prudence, have done in light of the facts which were brought to his notice. . . . The fault of the conductor was not in making the wrong diagnosis, but in rashly assuming that he was competent to make any diagnosis at all.

Middle v. Whitridge, 213 N.Y. 499 at —, 108 N.E. 192 at 197 (1915) quoted in *Hovermale*, 271 S.E.2d at 339.

33. *Barlow v. City of New Orleans*, 228 So. 2d 47 (La. Ct. App. 1969); *Shuff v. Zurich-Am. Ins. Co.*, 173 So. 2d 392 (La. Ct. App. 1965); *Wilson v. City of Kotzebue*, 627 P.2d 623 (Alaska 1981).

34. *Swilley v. Economy Cab Co. of Jacksonville*, 46 So. 2d 173 (Fla. 1950).

35. *Barlow v. City of New Orleans*, 228 So. 2d 47 (La. Ct. App. 1969); *Swilley v. Economy Cab Co. of Jacksonville*, 46 So. 2d 173 (Fla. 1950); *Bourgeois v. Toyé Bros. Yellow Cab Co.*, 192 So. 379 (La. Ct. App. 1939).

36. *Shuff v. Zurich-Am. Ins. Co.*, 173 So. 2d 392 (La. Ct. App. 1965).

intoxicated as to be totally unaware of any danger was found to be a breach of duty owed by the train to its passenger.³⁷ One “whose mental and physical facilities are so impaired, that he is incapable of exercising due care for himself, where he is in the custody of another who is charged with the duty of caring for his safety,”³⁸ should not be subjected to rules of contributory or comparative negligence. Alternatively, where a plaintiff-prisoner was found not so drunk to be unable to protect himself, the burden on the defendant was correspondingly lighter and no breach of duty was found.³⁹

The degree of plaintiff’s incapacity determines whether a higher degree of care will be imposed in a custodial relationship. The “degree of vigilance and caution which is necessary . . . may vary according to the capacity of the person with respect to whom the duty to exercise care exists.”⁴⁰ Total incapacity, as in the *Starling* case, logically would require more care than that required toward one who was only slightly drunk. When the defendant knows of the plaintiff’s incapacity and then allows the plaintiff to expose himself to great peril, the defendant has committed a culpable act.⁴¹

Intoxication of a person does not relieve others of the obligation to exercise care to avoid injuring him, but may, on the contrary, impose a duty of exercising greater care than would otherwise be sufficient, where his appearance and actions indicate such a degree of

37. *Johnson v. Louisville & Nashville R.R.*, 104 Ala. 241, —, 16 So. 75, 77 (1894). In that case, the conductor ejected a drunk passenger in the middle of the tracks for not having the fare. *See also Pence*, 326 So. 2d 831. An additional basis for recovery in *Pence* was founded on the defendant’s duty to avoid affirmative acts which increase the peril to an intoxicated patron. The *Pence* court stated:

If it should be conceded that [plaintiff] contributed to his death by drinking until he became drunk and unconscious, it would not follow that the plaintiff would not be entitled to recover. If a person lies down upon a railroad track in a state of helpless intoxication, the company will not be justified in running a train over him, if it can be avoided in the exercise of reasonable care, after the person is discovered in his exposed condition.

Id. at 837 (quoting *Weymire v. Wolfe*, 52 Iowa 533, 3 N.W. 541, 542 (1879)).

38. *Wilson*, 627 P.2d at 631.

39. *Manuel v. United States Fire Ins. Co.*, 140 So. 2d 702 (La. Ct. App. 1962).

40. 65 C.J.S. *Negligence* § 12 at 587 (1956). *See generally* 58 AM. JUR. 2d *Negligence* § 39 (1971).

41. *Johnson v. Louisville & Nashville R.R.*, 104 Ala. 241, 16 So. 2d 75 (1894).

intoxication as affects his capacity to care for his own safety.⁴²

Liability to Trespassers, Licensees and Invitees

In his often-quoted concurring opinion from *Heaven v. Pender*,⁴³ Master of the Rolls Brett stated the basic negligence principle:

[W]henever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.⁴⁴

Premises liability, which departs in some respects from this principle, deals with the liability of owners or occupiers of real property to injured visitors or guests.⁴⁵

The status of the injured person, as invitee, licensee or trespasser, "affects to some degree the liability of the owner . . . since it may determine the extent of the obligation which the duty of due care imposes upon the possessor."⁴⁶ It is this status factor which distinguishes such cases from other negligence actions.

The special rules of premise liability are frequently said to be attributed to the special place in which land has historically "been held in English and American thought, the dominance and prestige of the landowning class in England during the formative period of the rules governing the possessor's liability, and the heritage of feudalism."⁴⁷

Traditionally, persons entering the premises of another have been

42. 65 C.J.S. *Negligence* § 12 at 587 (1966) (footnotes omitted).

43. 11 Q.B.D. 503, 509 (1883).

44. *Id.* as quoted in *Rowland v. Christian*, 69 Cal. 2d 180, 183, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968).

45. 62 AM. JUR. 2d *Premises Liability* § 215 at 226 (1971).

46. *Id.*

47. 69 Cal. 2d 180, 184, 443 P.2d 561, 565, 70 Cal. Rptr. 97, 101 (1968). The *Rowland* court refers to 2 HARPER AND JAMES, *THE LAW OF TORTS* at 1432 (1956). For discussion of the origins and history of premises liability, see W. L. PROSSER, *Business Visitors and Invitees*, 26 MINN. L. REV. 573 (1942). See also Comment, *The Outmoded Distinction Between Licensees and Invitees*, 22 MO. L. REV. 186 (1957).

divided into three categories: trespassers, licensees, and invitees. Each has commanded a different degree of care due from the owner or person in control of the premises. For example, a landowner owes the least duty to a trespasser. The landowner must warn of known dangers once he knows of the trespasser's presence, and must refrain from wantonly injuring the trespasser. A landowner owes the greatest duty to invitees. He must inspect the premises for unsafe conditions and repair any defects which are known or should be known,⁴⁸ "and . . . give timely notice of latent or concealed perils . . . not known to the [invitee]."⁴⁹ The duty owed to a licensee, one on the property for social purposes, falls somewhere between the duties owed to invitee and trespasser.

At times difficulties in classifying persons on others' property has led to confusion where premises owner liability has been at issue. Trespassers enter the land without the landowner's permission, licensees are tolerated, and invitees are desired or even asked to enter the premises for business purposes.⁵⁰ However, licensees may be designated as gratuitous, bare, or "mere" licensees.⁵¹ In an increasing tendency to find liability where none might otherwise exist, the courts have sometimes strained to include certain visitors⁵² in one category rather than another.

Typical of the difficulties in this classification system is the conflict of opinion over the definition of "invitee." One basis for invitee status rests upon an economic benefit theory.⁵³ The price for the economic

48. PROSSER, *supra* note 26, at 357.

49. *Waterman v. Graham*, 228 So. 2d 925 (Fla. 2d Dist. Ct. App. 1969) *quoted in* *Heath v. First Baptist Church*, 341 So. 2d 265, 267 (Fla. 2d Dist. Ct. App. 1977).

50. Annot., 95 A.L.R.2d 996 (1964).

51. 62 AM. JUR. 2d *Premises Liability* § 74 at 328. For further discussion of Florida's treatment of classifications of visitors upon the premises, see text at pp. 545-47 *infra*.

52. "While it has been said often enough that 'mutuality of interest' may be indirect and remote from the object of the particular visit, there is at least ground for suspecting that in some of these cases, at least, it has been dredged up for the occasion." PROSSER, *supra* note 22, at 388. *See, e.g., Cameron v. Abatiell*, 127 Vt. 111, 241 A.2d 310 (1968), holding a policeman on duty to be an invitee, rather than a licensee, and thus allowing recovery.

53. One authority discusses nineteenth century English contract law as one of the origins of premises liability. Comment, *supra* note 47, at 188. Other areas of the law which have been drawn upon and at times confounded by the then newly emerging

benefit derived from the visitor's presence is the landowner's duty to make the premises safe.⁵⁴ When there is no benefit to the landowner, generally, he is under no duty. Exactly what constitutes an economic benefit can also become a complex determination. Professor Prosser stated that economic benefit may take the form of good will, like merely making a public restroom available.⁵⁵ Other courts have found economic benefit as the possibility of future sales to an accompanying friend of a patron.⁵⁶ Some cases have applied merely a public invitation test.⁵⁷ There is an implied representation that one who holds his premises open to the public is presumed to have made them safe,⁵⁸ whether an economic benefit is involved or not.

Without much discussion Florida's Fourth District Court of Appeal in *Starling* classified Starling as an invitee. Presumably defendants could have argued that because Starling used the premises for drinking, a purpose not held out to the public, Starling lost his invitee status. Moreover, the pier could also have argued that by drinking Starling violated a local ordinance and therefore lost his invitee status.⁵⁹ Then the question would be whether Starling was a licensee or a trespasser and what effect this would have on the duty of the pier operator. Conceivably, defendant's duty might be diminished if Starling was classified a trespasser.

In Florida prior to 1972, a licensee was one who entered the premises for *his own* benefit, with the permission of the landowner. In *Post v. Lunney*,⁶⁰ Florida's mutual benefit test or economic benefit test for determining invitee status was replaced with the broader invitation test

principles of negligence include: the law of nuisance on the highway, the law of fraud, and the distinction between acts of omission and commission.

54. PROSSER, *supra* note 26 at 386, (citing FIRST RESTATEMENT OF TORTS §§ 332, 343, Comment a (1938)).

55. PROSSER, *supra* note 26, at 388.

56. *Id.*

57. Annot., 95 A.L.R.2d 996 (1964).

58. PROSSER, *supra* note 26 at 388.

59. The Chief Judge noted, but did not specifically address, the fact that the consumption of alcoholic beverages on the pier was in violation of a municipal ordinance. He also observed in a footnote that the pier operator had consumed alcoholic beverages with the drowned man. 401 So. 2d 1136.

60. 261 So. 2d 146 (Fla. 1972).

found in the Restatement (Second) of Torts § 332.⁶¹ This test qualified business invitees, public invitees, and social guests for the same degree of care from the landowner. The unjust results of the mutual benefit test were clearly illustrated by *Post v. Lunney* where Mrs. Lunney while on a garden club tour tripped on a piece of transparent vinyl protecting an oriental rug and sustained injury. Mrs. Lunney sued Mrs. Post, the owner of the home, who had offered her home to the tour for charitable purposes. Mrs. Post received no compensation for allowing the tour of her estate, though Mrs. Lunney had paid to go on the tour. Mrs. Lunney was in the home with Mrs. Post's permission but there was no business relationship between them and thus no invitee status. The trial court denied recovery but the Florida Fourth District Court of Appeal reversed holding the instruction to the jury, that plaintiff was a licensee, was incorrect. She was an invitee and should be allowed to recover. The plaintiff could have reasonably assumed she was an invitee and would be under the Restatement test.⁶² Public invitees and business invitees were found preferable to the exclusive use of the mutual benefit test formerly stated in *McNulty v. Hurley*.⁶³

Even though the class of business invitees was enlarged to include public invitees without the requirement of an economic benefit, in *Wood v. Camp*⁶⁴ the Florida Supreme Court confirmed its commitment to retain different degrees of care depending on the status of the plaintiff. The *Wood* case involved a father's action against a landowner for his child's death when a bomb shelter which the child had entered exploded. The child was an invited guest. At issue was the inclusiveness of the class of invitees and the appropriate standard of care. By revolving the distinction around the invitation, whether express or implied,

61. *Id.* at 148.

62. The RESTATEMENT (SECOND) OF TORTS § 332 defines invitee:

- (1) An invitee is either a public invitee or a business visitor.
- (2) A public invitee is a person who is invited to enter or remain on the land as a member of the public for a purpose for which the land is held open to the public.
- (3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealing with the possessor of land.

Id. at 176.

63. 97 So. 2d 185 (Fla. 1957).

64. 284 So. 2d 691 (Fla. 1973).

the supreme court expanded the group of invitees to include licensees and social guests applying to both a single standard of responsible care under the circumstances. But the Florida Supreme Court specifically retained the class of uninvited licensee and trespasser, although it admitted there is only a fine distinction between these latter two categories.⁶⁵ *Wood* then overruled *Cochran v. Abercrombie*⁶⁶ which had disallowed recovery for a licensee to whom there was only a duty not to purposely injure.⁶⁷

Argument for Elimination of Categories

While a person's status may be relevant in predicting the foreseeability of his presence, once his presence is known reasonable burdens upon the landowner vary with the circumstances.

Thus, although the foreseeability of harm to an invitee would ordinarily seem greater than the foreseeability of harm to a trespasser, in a particular case the opposite may be true. The same may be said of the issue of certainty of injury. The burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach may often be greater with respect to the trespassers than with respect to invitees, but it by no means follows that this is true in every case. In many situations, the burden will be the same, i.e. the conduct necessary upon the defendant's part to meet the burden of exercising due care as to invitees will also meet his burden with respect to licensees and trespassers.⁶⁸

The *Wood* court's main criticisms of abolishing the distinction are that once abolished, no guidelines can be offered to a jury, and the landowner would be subjected to too great a burden, making him an insurer of those who come upon his premises.⁶⁹ But a reasonable guide-

65. *Id.* at 695.

66. 118 So. 2d 636 (Fla. 2d Dist. Ct. App. 1960).

67. In *Cochran*, a case with facts strikingly similar to the *Wood* case, plaintiff was looking at the car motor upon defendant's request. When defendant started the car, which had been left in gear, plaintiff was injured. 118 So. 2d 636.

68. 69 Cal. 2d 180, 186, 443 P.2d 561, 567, 70 Cal. Rptr. 97, 103 (1968).

69. 284 So. 2d 691 (Fla. 1973).

line for a jury is that a defendant will only be held liable in those situations where a "reasonable [person] would have realized plaintiff's grave danger, and lack of danger to himself, and where reasonably effective means of rescue were easily accessible as defendant knew or should have known. . . ."70 If this reasoning were applied to the *Starling* case, regardless of how the decedent was classified, *liability would lie*. But if the status distinctions were retained and *Starling* had been *classified a trespasser*, perhaps because he went beyond the scope of his invitation, then *liability might not lie*, even though all other factors have remained constant.

A major problem with retaining different degrees of care is that at times an individual's status might change during the course of a single visit. That is, an invitee might become a licensee or trespasser because of changes in the reason for his visit, the scope of this invitation,⁷¹ the particular location of the premises where the injury occurred, or even the length of his stay.⁷² A good example of this status inconsistency is illustrated by the following fact pattern:

A canvasser who comes on your premises without your consent is a trespasser. Once he has your consent, he is a licensee. Not until you do business with him is he an invitee. Even when you have done business with him, it seems rather strange that your duty toward him should be different when he comes to your door from what it is when he goes away. Does he change his color in the middle of the conversation? What is the position when you discuss business with him and it comes to nothing? No confident answer can be given to these questions. Such is the morass into which the law has floundered in trying to distinguish between licensees and invitees.⁷³

In *Starling*, even though the plaintiff was not specifically invited to the pier to drink, and even if he stayed on the pier after closing hours,

70. Fowler V. Harper and Fleming James, Jr., 2 THE LAW OF TORTS, § 18.6 at 1046 (1956), (citing J. Ames, *Law and Morals*, 22 HARV. L. REV. 97, 112-13 (1908)).

71. Robillard v. Tillotson, 118 Vt. 295, 108 A.2d 524 (1954).

72. Hickman v. First Nat'l Bank of Great Falls, 112 Mont. 398, 117 P.2d 275 (1941).

73. Comment, *supra* note 47, at 193-94 n.31 (citing Dunster v. Abbott, 2 All E.R. 1572 (1953)).

the defendant knew of Starling's drunken condition and could foresee the likelihood of injury resulting. The pier operator was clearly in the better position to safeguard Starling without danger to himself. Whether Starling was originally an invitee who became an uninvited licensee or even a trespasser, is a purely academic question under these circumstances since the same duty of care should be imposed upon the pier and its operator.

*Prigden v. Boston Housing Authority*⁷⁴ presented the question of the duty owed a trespasser⁷⁵ known to be in a position of peril. After initially trespassing onto the premises, the child plaintiff was injured because the property owner failed to take safety precautions even after the condition of peril was known; the child fell down the elevator shaft of an apartment building. The agent of the premises owner knew of the child's position and refused to turn off the power to the elevator. A third person put the elevator into operation and serious injury resulted to the child. The court found inapplicable any rule which exempted a property owner who did not act when he was in a position to act where he could prevent injury or further injury. The Massachusetts Supreme Court therefore extended the duty of exercising reasonable care to prevent injury to include the *duty to take affirmative action* to protect a trespasser in a known position of peril. *Prigden* clearly exemplifies the reason to eliminate different duties of care owed to individuals on another's property. If the Massachusetts court had applied the traditional common law duty owed to a trespasser, that child would probably have been barred from recovery.

In 1963, the Massachusetts Supreme Judicial Court upheld a common duty to all lawful visitors,⁷⁶ but would not go as far as California

74. *Prigden v. Boston Housing Auth.*, 364 Mass. 696, 308 N.E.2d 467 (1974).

75. Another example of the duty owed to a trespasser who was intoxicated and allowed to remain in a place where injury was foreseeable is illustrated in the following case. An intoxicated passenger of another railroad company was aroused from a drunken stupor and placed on a depot platform. Shortly thereafter, he was observed by employees of the defendant company sleeping between the tracks. It was found that the employees had a duty to either see him safely out of the railroad yard or watch out for him as the engine moved. The employees did neither and the company was found liable, even though plaintiff was a trespasser. *Cincinnati, New Orleans & Tex. Pac. Ry. v. Marris' Adm'x.*, 27 Ky. 388, 85 S.W. 188 (1905).

76. *Prigden v. Boston Housing Auth.*, 364 Mass. 696, 697, 308 N.E. 2d 467, 477 (1974).

had in *Rowland v. Christian*⁷⁷ which placed a trespasser in the same category as licensee and invitee. While the California decision made status a factor in determining liability, status was not the dispositive factor.

In *Rowland v. Christian*, the California Supreme Court advocated a single duty of reasonable care in all circumstances⁷⁸ to replace the difficult and often arbitrary application of the common law's anachronistic distinctions.⁷⁹

Whatever may have been the historical justifications for the common law distinctions, it is clear that these distinctions are not justified in the light of our modern society and that the complexity and confusion which has arisen is not due to the difficulty in applying the original common law rules—they are all too easy to apply in their original formulation—but is due to the attempts to apply just rules in our modern society within the ancient terminology.⁸⁰

The factors that should be weighed in determining liability or immunity may or may not have anything to do with the original classifica-

77. 69 Cal. 2d 180, 184, 443 P.2d 561, 566, 70 Cal. Rptr. 98, 102 (1968).

78. *Id.*

79. *Id.*

80. *Id.* In refusing to adopt the rules relating to the liability of a possessor of land for the law of admiralty, the United States Supreme Court stated:

The distinctions which the common law draws between licensee and invitee were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism. In an effort to do justice in an industrialized urban society, with its complex economic and individual relationships, modern common-law courts have found it necessary to formulate increasingly subtle verbal refinements, to create subclassifications among traditional common-law categories, and to delineate fine gradations in the standards of care which the landowner owes to each. Yet even within a single jurisdiction, the classifications and subclassifications bred by the common law have produced confusion and conflict. As new distinctions have been spawned, older ones have become obscured. 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."

Id. (footnotes omitted in original). Note also that England has rejected the common law distinctions in the Occupiers' Liability Act, 1957, 5 and 6 Eliz. 2, ch. 31.

tions.⁸¹ “[T]o focus upon the status of the injured party as a trespasser, licensee, or invitee in order to determine whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values.”⁸² Plaintiff’s status is relevant insofar as it bears on the determination of what constitutes reasonable care.⁸³

Whether *Starling* was an invitee, a licensee, or a trespasser, the pier operator knew of his condition and the likelihood of injury. These are the gauges which should be used to measure degree of care. The jury should be asked if “an ordinary reasonable and prudent person under the same or similar circumstances, stand[ing] in the shoes of the defendant, could foresee a risk of some harm to the particular plaintiff?”⁸⁴

While Florida has not gone as far as California, and in fact has expressly repudiated the reasoning that favors discontinuing the classifications, the *Starling* case demonstrates that the duty owed by an occupier of premises should be expanded. A jury might well find no liability on the part of the pier operator depending upon the jury instructions given regarding the duty owed to invitees or licensees. If there was a single duty of care, the status of the injured person would be only a factor in determining whether the pier operator owed the plaintiff a duty of ordinary care. It would not only simplify the law, it would make it manifestly more just.

Conclusion

By finding that a cause of action had been stated, *Estate of Starling* demonstrated the Florida Fourth District Court of Appeal’s willingness to expand the liability of premises owners to those who lawfully come upon the premises.

The facts of this case illustrate the inadequacy of variously classifying persons for purposes of defining premise owners’ duty. Neither the victim’s classification nor the voluntariness of his condition should be the basis of liability. Once a presence is known, if the foreseeable

81. 69 Cal. 2d at 187, 443 P.2d at 568, 70 Cal. Rptr. at 105.

82. *Id.*

83. Comment, *supra* note 47 at 199.

84. *Id.*

danger is great, while the risk of preventing injury is small, the pier operator should be under a duty to act.

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