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Torts - Duties of Owners and Occupiers of Land: The Impact of the Wyoming Supreme Court's Decision to Abolish a Portion of the Common Law Status Classifications - Clarke v. Beckwith

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TORTS—Duties of Owners and Occupiers of Land: The impact of the Wyoming Supreme Court's decision to abolish a portion of the common law status classifications. *Clarke v. Beckwith*, 858 P.2d 293 (Wyo. 1993).

Rex Beckwith invited Debra S. Clarke to attend his annual Christmas party which he hosted at his Sinks Canyon home on Monday, December 23, 1991.[1] Snow fell on Beckwith's property during the weekend preceding the party, and Beckwith attempted to clear this snow from his driveway prior to his party.[2]

Clarke arrived at Beckwith's home after dark and had to park near the top of his 400-foot long driveway which descended from the highway to Beckwith's house.[3] Although it was dark, Clarke later stated that the driveway appeared icy and "only the sidewalk in front of his house" appeared free of snow or ice.[4]

Clarke slipped twice before actually falling, and approximately fifteen minutes passed before help arrived.[5] Many people came to Clarke's aid as soon they heard her cries for help, and she was immediately taken to a hospital.[6] The fall broke Clarke's leg in seven places.[7] Treatment included surgical intervention; future surgery may be necessary.[8]

After her fall and resulting injury, Clarke filed a complaint against Beckwith in the district court, Ninth Judicial District, Fremont County, Wyoming.[9] The district court classified Clarke as a social guest[10] or licensee.[11] As such, the only duty Beckwith owed Clarke was to refrain from harming her

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1. Clarke v. Beckwith, 858 P.2d 293, 295 (Wyo. 1993).
2. *Id.*
3. Brief of Appellant at 2-3, Clarke v. Beckwith, 858 P.2d 293 (Wyo. 1993) (No. 92-288) [hereinafter Brief of Appellant].
4. *Clarke*, 858 P.2d at 295.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. Brief of Appellee at 5, Clarke v. Beckwith, 858 P.2d 293 (Wyo. 1993) (No. 92-288) [hereinafter Brief of Appellee].
10. *Clarke*, 858 P.2d at 295. *See infra* notes 41-45 and accompanying text.
11. *See infra* notes 37-57 and accompanying text.

willfully or wantonly.[12] The district court found that no genuine issue of fact existed relating to willful or wanton conduct by Beckwith, so it granted Beckwith's motion for summary judgment.[13]

Clarke appealed the district court's decision to the Wyoming Supreme Court,[14] raising the question of what duty an owner or occupier owes to those who enter upon his land.[15] The Wyoming Supreme Court reversed the district court's decision and remanded the case to the district court. In its decision, the court overruled established precedent and abolished the common law distinction between invitees and licensees in Wyoming.[16] While trespassers remain a distinct category, a landowner or occupier must exercise reasonable care under the circumstances with regard to all others who enter upon his land.[17]

This casenote examines the history and evolution of the liability of landowners and occupiers, and the three main approaches currently employed in the United States. It then evaluates the Wyoming Supreme Court's decision to abandon its prior approach to determining the duties of landowners and

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12. The Wyoming Supreme Court has defined "willful and wanton" misconduct to mean "that the actor has intentionally done an act of an unreasonable character in disregard of a risk known to him or so obvious to him that he must have been aware of it and so great as to make it obvious that harm would follow." Yalowizer v. Husky Oil Company, 629 P.2d 465, 470 n.6 (Wyo. 1981). *See also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 34, at 213 (5th ed. 1984).

13. *Clarke*, 858 P.2d at 295.

14. *Id.* at 294.

15. *Id.* Appellant Clarke stated the issues as:

> Did the trial court err when it granted Appellee's (Defendant below) Motion for Summary Judgment? Were there genuine issues of material fact which precluded the entry of summary judgment? Was Appellee entitled to judgment as a matter of law?

and also posed the following sub-issues:

> What duty of care is owed by the owner and occupant of premises who expressly invites persons to his or her premises? Was there a genuine issue of material fact as to whether Appellee breached that duty in this case, and was Appellee entitled to judgment as a matter of law?

Brief of Appellant, *supra* note 3, at 1. In response, Appellee Beckwith phrased the issues as:

> 1. Was Summary Judgment appropriately rendered in favor of Appellee Beckwith because
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> a. there were no genuine issues of material fact as to the legal status of Appellant Clarke at the time she fell on Appellee's driveway, and
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> b. there were no genuine issues of material fact supporting the contention that Appellee's conduct fell below the willful and wanton standard of care?
>
> 2. Should this Court abandon the common law classifications of trespasser, licensee, and invitee in favor of an ordinary negligence standard of care for entrants upon the land of others?

Brief of Appellee, *supra* note 9, at 5.

16. *Clarke*, 858 P.2d at 294.

17. *Id.* at 296.

occupiers for a more modern development, and the effect this decision will have on Wyoming landowners and occupiers.

BACKGROUND

There are three main approaches to determining the duties of landowners and occupiers in the United States today. The majority of jurisdictions still employ the common law status classification scheme where the landowner or possessor's[18] duty is determined by the entrant's status. A second group of jurisdictions have completely abandoned the common law scheme and require the possessor to exercise reasonable care under the circumstances. The final group of jurisdictions has abrogated the distinction between licensees and invitees, but continues to view trespassers as a distinct category.

Common Law Status Classifications

Many jurisdictions[19] still adhere to the common law classification scheme where the duty a possessor owes one who enters upon his land varies with the status of the entrant.[20] Entrants upon another's land are divided into three distinct categories: trespassers, licensees, and invitees, with different levels of care owed to each.[21] This categorical classification system creates a "sliding scale" whereby the duty owed or protection afforded increases as the entrant's presence becomes more legitimate.[22]

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18. The terms owner, landowner, occupier, and possessor are often used interchangeably in premises liability law. JOSEPH A. PAGE, THE LAW OF PREMISES LIABILITY § 1.3, at 2 (2d ed. 1988). The RESTATEMENT (SECOND) OF TORTS uses the term possessor:

> A possessor of land is
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> (a) a person who is in occupation of the land with intent to control it or
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> (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or
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> (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).

RESTATEMENT (SECOND) OF TORTS § 328 E (1981).

19. *See, e.g.*, Van Dinter v. City of Kennewick, 846 P.2d 522 (Wash. 1993); Baldwin by Baldwin v. Mosley, 748 S.W.2d 146 (Ark. 1988); Murphy v. Baltimore Gas & Electric Co., 428 A.2d 459 (Md. 1981). *See also* Vitauts M. Gulbis, Annotation, *Modern Status of Rules Conditioning Landowner's Liability upon Status of Injured Party as Invitee, Licensee, or Trespasser*, 22 A.L.R. 4th 294 (1983 & Supp. 1992).

20. PROSSER AND KEETON, *supra* note 12, § 58, at 393.

21. *Id.*

22. *Id.*

Trespassers

A trespasser enters or remains on the land of another without consent.[23] The general rule is that the possessor is not liable for harm suffered by a trespasser resulting from the possessor's failure to exercise reasonable care in the maintenance of his land.[24] In jurisdictions which adhere to the common law classification scheme, the possessor's only duty is to refrain from willfully or wantonly injuring the trespasser.[25] A possessor's duties are limited due to societal notions of private ownership of land and protection of private property rights.[26] A person should be able to make use of his land without worrying about those present on the land without permission.[27]

Dissatisfaction with the potential harshness of this general rule led to the development of several exceptions.[28] These exceptions are due in part to a more modern belief that the values of human life and protection of human safety outweigh the possessor's private property interests.[29] This is especially true where the burden of taking precautions is small compared to the risk faced by trespassers.[30]

A possessor may owe a greater duty of care to frequent, known, or discovered trespassers. Child trespassers are also usually entitled to a greater duty of care.[31]

A possessor generally has a duty to warn known or constant trespassers of highly dangerous or hidden artificial conditions.[32] The possessor is also

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23. § 329. Trespasser Defined
A trespasser is a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise.
RESTATEMENT (SECOND) OF TORTS § 329 (1981).

24. RESTATEMENT (SECOND) OF TORTS § 333 (1981).

25. *Van Dinter*, 846 P.2d at 524. *See also* PAGE, *supra* note 18, § 2.3, at 9.

26. PROSSER AND KEETON, *supra* note 12, § 58, at 395.

27. *Id.*

28. *Id. See also* RESTATEMENT (SECOND) OF TORTS §§ 334-339 (1981).

29. PROSSER AND KEETON, *supra* note 12, § 58, at 395.

30. *Id.*

31. *See* Thunder Hawk by and through Jensen v. Union Pacific Railroad Co., 844 P.2d 1045 (Wyo. 1992) and RESTATEMENT (SECOND) OF TORTS § 339 (1981) for a complete discussion of the rules and duties regarding child trespassers, and the "attractive nuisance" doctrine.

32. RESTATEMENT (SECOND) OF TORTS §§ 335 and 337 (1981). Note that the Restatement imposes no duty to warn of highly dangerous *natural* conditions. Wyoming does not seem to have followed the Restatement's requirement that a landowner warn known or frequent trespassers of highly dangerous artificial conditions. The cases repeatedly state that a possessor's *only* duty to a trespasser is to refrain from willful or wanton injury. *See, e.g.*, Yalowizer v. Husky Oil Co., 629 P.2d 465, 469 (Wyo. 1981); Maher v. City of Casper, 219 P.2d 125, 128 (Wyo. 1950).

usually required to exercise reasonable care when carrying on activities which pose a threat to known or constant trespassers.[33]

Another important exception to a possessor's lack of duty is that once the trespasser is discovered, the possessor must exercise reasonable care to ensure the trespasser's safety.[34] While a trespasser may be viewed as a wrongdoer, he is not an outlaw.[35] Once the trespasser's presence is either known to or reasonably ascertainable by the possessor, the possessor must take reasonable steps to prevent injury to the trespasser and may have to warn the trespasser of hidden dangers.[36]

Licensees

A licensee is a person who enters or remains on another's land by virtue of the possessor's consent.[37] This consent is all that distinguishes a licensee from a trespasser.[38] The purpose of the entrant's visit determines his status, and a licensee enters for his own purpose, not that of the possessor.[39]

A visitor whose presence the possessor expressly invites, but who enters for his own purpose and confers no economic benefit on the possessor is classified as a licensee.[40] Thus most jurisdictions which adhere to the common law status classification scheme categorize an expressly invited social guest as a licensee.[41] This somewhat paradoxical result rests on the idea that a social guest enters the premises on the same level as a member of the possessor's family and should accept the premises as used by the possessor and his family.[42] A social guest has no right to expect the possessor to take greater precautions for his guest's safety than he would for his own family.[43] A social guest

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33. RESTATEMENT (SECOND) OF TORTS §§ 334 and 336 (1981).

34. PROSSER AND KEETON, *supra* note 12, § 58, at 396-97.

35. *Id.*

36. *Id. See also* RESTATEMENT (SECOND) OF TORTS §§ 334-339 (1981).

37. § 330. Licensee Defined

A licensee is a person who is privileged to enter or remain on land only by virtue of the possessor's consent.

RESTATEMENT (SECOND) OF TORTS § 330 (1981).

38. PROSSER AND KEETON, *supra* note 12, § 60, at 412. The licensee who enters with permission but without invitation is often referred to as a "bare" or "naked" licensee because the possessor's consent alone distinguishes the licensee from the trespasser. *Id.*

39. PAGE, *supra* note 18, §§ 3.1 and 3.2, at 34-35.

40. *Id.* §3.3, at 35.

41. *See, e.g.*, Evans v. Parker, 323 S.E.2d 276 (Ga. App. 1984); Zuther v. Schild, 581 P.2d 385 (Kan. 1978); McMullan v. Butler, 346 So.2d 950 (Ala. 1977). *See also* PAGE, *supra* note 18, § 3.21, at 61; 5 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 27.11, at 215 (2d ed. 1986).

42. *Evans*, 323 S.E.2d at 277. *See also* PROSSER AND KEETON, *supra* note 12, § 60, at 414.

43. *Evans*, 323 S.E.2d at 277.

confers no economic benefit on the possessor.[44] The psychological or emotional benefit the visit confers is insufficient to convert the social guest to an invitee.[45]

Early cases in jurisdictions utilizing the common law status classifications held that a possessor had no greater duty than to refrain from intentionally, willfully, or wantonly injuring the licensee.[46] The licensee was viewed as assuming the risks of any dangers present on the land.[47] The *Restatement (Second) of Torts* modified this rule by requiring the possessor to conduct his activities with reasonable care[48] and to exercise reasonable care to warn the licensee of dangerous conditions on the land.[49]

While a possessor may lack actual knowledge of a hazard, a duty to warn the licensee will arise if the possessor has reason to know of the hazard or it is reasonably discoverable.[50] Likewise, a possessor need not have actual knowledge of the licensee's presence to incur a duty to warn.[51] The licensee, by definition, has the possessor's consent to enter the land, therefore the possessor should foresee that the licensee will make use of his license.[52] The

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44. *Zuther*, 581 P.2d at 386-87.

45. *Id.* at 387.

46. *See, e.g.*, Blackburn v. Colvin, 380 P.2d 432, 436 (Kan. 1963). *See also* PROSSER AND KEETON, *supra* note 12, § 60, at 415. Although a licensee enters another's land with permission, he was entitled to no greater duty than a trespasser. Licensees have been described as the "least favored by law of persons who are not actual wrongdoers." *Yalowizer*, 629 P.2d at 469.

47. PAGE, *supra* note 18, § 3.8, at 42.

48. § 341. Activities Dangerous to Licensees

A possessor of land is subject to liability to his licensees for physical harm caused to them by his failure to carry on his activities with reasonable care for their safety if, but only if,

(a) he should expect that they will not discover or realize the danger, and

(b) they do not know or have reason to know of the possessor's activities and of the risk involved.

RESTATEMENT (SECOND) OF TORTS § 341 (1981).

49. § 342. Dangerous Conditions Known to Possessor

A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,

(a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and

(b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and

(c) the licensees do not know or have reason to know of the condition and the risk involved.

RESTATEMENT (SECOND) OF TORTS § 342 (1981).

50. *Id.*

51. PAGE, *supra* note 18, § 3.11, at 48.

52. *Id.*

reasonableness of the licensee's actions will of course affect the level of care a possessor must exercise.[53]

A possessor has no duty to warn a licensee about risks of which the licensee knows or should know.[54] Thus no duty arises to warn of risks which are open or obvious.

A possessor may owe a child licensee a greater degree of care because a child may fail to appreciate a risk or warning which is obvious to an adult.[55] Likewise, the "attractive nuisance" doctrine[56] applies to child licensees as well as child trespassers.[57]

Invitees

To be classified as an invitee, the *Restatement (First) of Torts* required that the entrant provide an economic benefit, or at least a potential economic benefit, to the possessor.[58] The entrant's visit must in some way be related to a business transaction with the possessor.[59] The business aspect of the visit required the possessor to exercise reasonable care as consideration for (potential) economic gain.[60]

While the economic benefit test sufficiently resolved most cases, courts sometimes stretched the theory of economic gain to its limits to classify a visitor as an invitee.[61] Thus a child or friend who accompanied a customer into a store, though he had no intention of buying anything, was classified as an invitee. The possessor had a duty to treat the entrant as an invitee and

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53. *Id.* at 49. Consider, for example, a licensee with permission to conduct an excavation on another's land. The possessor could reasonably foresee that such a licensee might enter the land early in the morning and work throughout the day. The possessor probably would not expect this licensee to enter the land at 1:00 a.m. to begin work.

54. RESTATEMENT (SECOND) OF TORTS § 342(c) (1981).

55. PAGE, *supra* note 18, § 3.19, at 58.

56. *See supra* note 31.

57. PAGE, *supra* note 18, § 3.18, at 57-58.

58. § 332. Business Visitor Defined

A business visitor is a person who is invited or permitted to enter or remain on land in the possession of another for a purpose directly or indirectly connected with business dealings between them.

RESTATEMENT (FIRST) OF TORTS § 332 (1934). *See also* PROSSER AND KEETON, *supra* note 12, § 61, at 420.

59. PAGE, *supra* note 18, § 4.2, at 66.

60. *Id.*

61. PROSSER AND KEETON, *supra* note 12, § 61, at 420-21. *See also* Sinclair Refining Co. v. Redding, 439 P.2d 20 (Wyo. 1968). The Wyoming Supreme Court classified an automobile passenger using a service station restroom as an invitee. The passenger's only reason for being on the premises was to use the restroom, free of charge. *Id.* at 23.

exercise reasonable care even though he expected no economic benefit, potential or otherwise.[62]

William L. Prosser, the reporter to the *Second Restatement of Torts*, recognized the need to alter the invitee test:

> [T]he duty of the occupier toward his 'invitee' was not, in its inception, a matter of quid pro quo for a benefit conferred or hoped for. It rested rather upon an implied representation of safety, a holding out of the premises as suitable for the purpose for which the visitor came . . . .[63]

A visitor becomes an invitee when the possessor's actions lead the visitor to assume that the possessor intended that the premises be used by visitors.[64] The two key elements for determining invitee status are invitation and purpose.[65] An invitation may be express or may be implied if a reasonable person would be justified in believing that an invitation to enter the premises exists.[66]

To be classified as an invitee, the visitor must enter as a member of the public for the purpose for which the land is held open to the public[67] or for a purpose which is directly or indirectly connected with business dealings with the possessor.[68] If a visitor enters for the latter purpose, the potential economic benefit to the possessor again becomes crucial.[69] Since the land is not held open to the public, the invitation is a private one. A private invitation alone carries no guarantees,[70] so a potential economic benefit to the possessor is necessary to classify the visitor as an invitee.[71]

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62. *See, e.g.*, Anderson v. Cooper, 104 S.E.2d 90 (Ga. 1958). *See also* 5 HARPER, JAMES, & GRAY, *supra* note 41, § 27.12, at 224-29; PROSSER AND KEETON, *supra* note 12, § 61, at 420-21.

63. William L. Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573, 585 (1942).

64. § 332. Invitee Defined

(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 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 dealings with the possessor of the land.

RESTATEMENT (SECOND) OF TORTS § 332 (1981).

65. PAGE, *supra* note 18, § 4.3, at 68.

66. *Id.* at 69-70. For example a person would reasonably believe that the owner of a retail store desires the person to enter and browse as well as buy. *Id. See also* RESTATEMENT (SECOND) OF TORTS § 332 cmt. c (1981).

67. RESTATEMENT (SECOND) OF TORTS § 332(2) (1981).

68. RESTATEMENT (SECOND) OF TORTS § 332(3) (1981).

69. PAGE, *supra* note 18, § 4.3, at 73.

70. For a discussion of social guests, *see supra* notes 41-45 and accompanying text.

71. PAGE, *supra* note 18, § 4.3, at 73.

In jurisdictions which adhere to the common law classification scheme, a possessor owes the invitee a duty of reasonable care.[72] The possessor must exercise reasonable care in carrying out his activities on the land.[73] He must also warn the invitee of any hidden dangers of which he knows or which are reasonably discoverable by him, or exercise reasonable care to remove the dangerous condition.[74] The possessor has no duty to warn the invitee of risks of which the invitee is aware or which are open and obvious.[75]

In some jurisdictions, including Wyoming, the possessor has no duty to remove ice or snow which accumulates on his property due to natural forces.[76] The risks posed by ice and snow are also considered to be so well known and obvious that the possessor is not required to warn entrants of the conditions.[77]

Abolition of the Categories: A Negligence Standard

The common law status classifications have been criticized as too harsh, rigid, and inhumane.[78] Allowing an entrant's status to dictate the possessor's duty seemed to place the protection of property interests above concerns for

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72. PROSSER AND KEETON, *supra* note 12, § 61, at 425.

73. § 341 A. Activities Dangerous to Invitees

A possessor of land is subject to liability to his invitees for physical harm caused to them by his failure to carry on his activities with reasonable care for their safety if, but only if, he should expect that they will not discover or realize the danger, or will fail to protect themselves against it.

RESTATEMENT (SECOND) OF TORTS § 341 A (1981).

74. § 343. Dangerous Conditions Known to or Discoverable by Possessor

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

RESTATEMENT (SECOND) OF TORTS § 343 (1981).

75. PROSSER AND KEETON, *supra* note 12, § 61, at 427.

76. *See, e.g.*, Sherman v. Platte County, 642 P.2d 787 (Wyo. 1982). *See also* PAGE, *supra* note 18, § 4.6, at 84. Local ordinances may impose additional obligations on a possessor of land. In the absence of such an ordinance, however, a Wyoming landowner has no duty to remove natural accumulations of snow and ice. *See* Johnson v. Hawkins, 622 P.2d 941, 943 (Wyo. 1981). The Wyoming Supreme Court recently heard oral arguments to consider whether to abolish the rule that, in the absence of an ordinance, the possessor has no duty to remove a natural accumulation of snow and ice. Eiselein v. K-Mart, Inc., No. 92-43. No decision has come down as of November 15, 1993. If the court does not abandon this rule, Mrs. Clarke probably will be unable to recover for her injuries, because cases involving the natural accumulation of snow and ice suspend a landowner's duty to exercise reasonable care. *Clarke*, 858 P.2d at 300 (Golden, J., specially concurring).

77. Bluejacket v. Carney, 550 P.2d 494, 497 (Wyo. 1976).

78. PROSSER AND KEETON, *supra* note 12, § 62, at 432-33.

human welfare.[79] The numerous exceptions to the common law scheme lent support to claims that it was arbitrary and capricious. Finally, in *Rowland v. Christian*[80] the California Supreme Court abandoned the common law classification scheme.

The *Rowland* court, relying in part on § 1714 of the California Civil Code,[81] abandoned the common law distinctions deeming them confusing, unfair, and unworkable.[82] The California Supreme Court stated that:

> A man's life or limb does not become less worthy of protection . . . because he has come upon the land of another without permission or with permission but without a business purpose. Reasonable people do not ordinarily vary their conduct depending upon such matters, and . . . focus upon status of the injured party . . . to determine the question whether the landowner has a duty of care, is contrary to our modern . . . values. The common law rules obscure rather than illuminate the proper considerations which should govern determination of the question of duty.[83]

The court adopted a negligence standard to determine a possessor's liability. The possessor has a duty to act reasonably under the circumstances, and while the entrant's status is a factor to be considered when determining liability, it is not dispositive of the possessor's duty of care.[84]

The *Rowland* decision persuaded several states to abolish the common law status classifications and apply a negligence standard to possessors of land.[85] In these jurisdictions a possessor must exercise reasonable care under the circumstances to ensure the safety of those who enter his land. The traditional "tort test of foreseeability" determines the possessor's liability.[86]

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79. *Id.*

80. 443 P.2d 561 (Cal. 1968).

81. *Id.* at 563-64. "Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person . . . ." CAL. CIV. CODE § 1714 (WEST 1990).

The California Supreme Court attributed its decision in part to § 1714 of the California Civil Code, yet this particular section had been in effect since 1872. *Rowland*, 443 P.2d at 562. Some authors state that the court may have grown dissatisfied with the common law scheme and wanted to abolish it. PAGE, *supra* note 18, § 6.4, at 132.

82. *Rowland*, 443 P.2d at 566-67.

83. *Id.* at 568.

84. *Id.*

85. *See, e.g.*, Webb v. City and Borough of Sitka, 561 P.2d 731, 733 n.7 (Alaska 1977); Mariorenzi v. Joseph DiPonte, Inc., 333 A.2d 127, 131 (R.I. 1975). For a more complete list of the jurisdictions which have abolished the common law status classifications *see* Gulbis, *supra* note 19, 22 A.L.R. 4th 294 § 3[a].

86. Ouellette v. Blanchard, 364 A.2d 631, 634 (N.H. 1976).

Compromise: Partial Abrogation of the Categories

Several states have abolished the distinction between licensees and invitees, yet have retained trespassers as a distinct category.[87] These states recognize the problems inherent in the common law status classifications and dislike the notion of placing a higher value on a possessor's unrestricted freedom than on human safety.[88] However the trespasser remains in a distinct category because he is viewed in some sense as a wrongdoer. There is a "significant difference" between one who enters another's property lawfully and one who does so without permission or right.[89] A possessor need only refrain from willfully or wantonly injuring the trespasser, unless the trespasser's presence is known to the possessor.[90]

Ordinary negligence principles determine the possessor's liability to those previously classified as either licensees or invitees.[91] The possessor must act reasonably in light of all the circumstances.[92]

Duties of Wyoming Landowners Prior to Clarke

Prior to its decision in *Clarke*, the Wyoming Supreme Court relied on the traditional common law status classifications to determine the duty of care a possessor owed an entrant.[93] In 1981, the court explicitly refused to abandon the common law status classifications.[94] The *Yalowizer* court felt that the trend of abolishing the common law status classifications in favor of a uniform standard of care was, in fact, a minority position, and that the common law scheme enjoyed a "healthy following" in the United States.[95]

In 1989, the court stated that "the key to creation of a duty to invitees on the premises is foreseeability."[96] This seemed to hold out some hope to those who thought that the common law classifications should be abolished.

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87. *See, e.g.*, Hutchison v. Teeter, 687 S.W.2d 286 (Tenn. 1985); Flom v. Flom, 291 N.W.2d 914, 917 (Minn. 1980); Poulin v. Colby College, 402 A.2d 846, 851 (Me. 1979); O'Leary v. Coenen, 251 N.W.2d 746, 751 (N.D. 1977). *See also* Gulbis, *supra* note 19, 22 A.L.R. 4th 294 § 3[b].

88. *O'Leary*, 251 N.W.2d at 752.

89. *Id.* at 751 n.6.

90. *Id. See supra* notes 23-36 and accompanying text.

91. *O'Leary*, 251 N.W.2d at 751.

92. *Id.*

93. *Clarke*, 858 P.2d at 297 (Golden, J., specially concurring.) *See also* Maher v. City of Casper, 219 P.2d 125 (Wyo. 1950).

94. Yalowizer v. Husky Oil Co., 629 P.2d 465 (Wyo. 1981). "We conclude that the common-law principles . . . are still acceptable." *Id.* at 469.

95. *Id.* at 468.

96. Allen v. Slim Pickens Enterprises, 777 P.2d 79, 82 (Wyo. 1989).

However, the court's focus on the foreseeability aspect of duty was relevant only to invitees, and as recently as 1992, the court recognized that the common law status classifications were still the rule in Wyoming.[97]

PRINCIPAL CASE

The majority opinion in *Clarke* departed from established Wyoming precedent by abrogating the distinction between invitees and licensees.[98] Justice Cardine filed a short concurrence,[99] and Justice Golden concurred specially, writing a separate opinion which Justice Cardine joined.[100]

The majority acknowledged that it had taken a step it declined to take twelve years earlier in *Yalowizer v. Husky Oil Company*.[101] Chief Justice Macy characterized previous discussions of the invitee-licensee distinction as primarily dicta.[102] He stated that those previous cases involved injuries to trespassers, not invitees or licensees.[103] According to the majority, this area of the law had undergone "considerable development" subsequent to its decision in *Yalowizer* to retain the common law classification scheme, and its decision four years previously in *Allen v. Slim Pickens Enterprises*[104] foreshadowed its holding in *Clarke*.[105]

As previously discussed, the court recognized that the law in various jurisdictions can be grouped into one of three categories.[106] Some jurisdictions

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97. Thunder Hawk by and through Jensen v. Union Pacific R. Co., 844 P.2d 1045 (Wyo. 1992). The court recognized that the injured child plaintiff was either a trespasser or bare licensee and adopted the attractive nuisance doctrine as stated in RESTATEMENT (SECOND) OF TORTS § 339 as an exception to the common law status classifications in cases involving trespassing children. *Id.* at 1049.

98. *Clarke*, 858 P.2d at 294.

99. Justice Cardine wrote separately to emphasize his understanding that the court's decision in *Clarke* in no way altered or affected Wyoming's "natural accumulation of snow and ice" rule. *See supra* note 76. He also stated that the fact that either or both parties carried insurance could not be considered when determining liability. *Id.* at 296 (Cardine, J., concurring).

100. *Id.* at 296 (Golden, J., specially concurring).

101. 629 P.2d 465 (Wyo. 1981). In *Yalowizer* the court expressly refused to abandon the common law status classifications and reaffirmed that the common law scheme controlled in Wyoming. *Id.* at 468-69.

102. *Clarke*, 858 P.2d at 295.

103. *Id. Maher v. City of Casper*, 219 P.2d 125 (Wyo. 1950), involved two boys who drowned in an abandoned quarry; the injured party in *Yalowizer* took a short cut across an abandoned service station driveway. *Yalowizer*, 629 P.2d at 466.

104. 777 P.2d 79 (Wyo. 1989).

105. *Clarke*, 858 P.2d at 295-96. The majority focused on a single sentence from *Allen* in which the court stated that "[t]he key to the creation of a duty to the invitees on the premises is foreseeability." 777 P.2d at 82. *See infra* notes 136-138 and accompanying text.

106. *Clarke*, 858 P.2d at 296.

still utilize the common law status classifications;[107] some have abolished the classifications altogether and apply a negligence standard regardless of the entrant's status;[108] and the final cluster treats trespassers as a distinct category but applies a negligence standard to all other entrants.[109]

The Wyoming Supreme Court chose to move from the first group to the last. The majority quoted and adopted the rule stated by the North Dakota Supreme Court in *O'Leary v. Coenen*.[110] The Wyoming Supreme Court stated that trespassers will remain a distinct group, and the standards for determining landowner liability with regard to trespassers remain unchanged.[111] However, the distinction between invitees and licensees no longer applies. A landowner or occupier must exercise reasonable care under the circumstances to maintain his property in a reasonably safe manner.[112] Factors to be weighed include the likelihood of injury to another, the potential seriousness of such an injury, and the burden of avoiding or eliminating the risk. The foreseeability of the injury, not the status of the entrant, is the key to determining the liability of a landowner or occupier.[113]

While Justice Golden agreed with and concurred in the result of the case, he felt that the majority's decision went further than necessary to decide the issue presented.[114] Justice Golden agreed that landowners owe a duty of reasonable care to social guests on their premises, but he declined to join the "wholesale abolition" of the common law categories of invitee and licensee.[115] According to Justice Golden, this case presented only the narrow question of the duty owed an expressly invited social guest. Justice Golden stated that a landowner owes such a guest a duty of reasonable care.[116]

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107. *See supra* notes 19-75 and accompanying text.

108. *See supra* notes 78-86 and accompanying text.

109. *See supra* notes 87-92 and accompanying text.

110. 251 N.W.2d 746, 751 (N.D. 1977). The North Dakota Supreme Court stated:

> In the instant case, rather than continue to predicate liability on the status of an entrant, we have decided to apply the ordinary principles of negligence to govern a landowner's conduct as to a licensee and an invitee. We do not change our rule as to trespassers. An occupier of premises must act as a reasonable man in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to another, the seriousness of the injury, and the burden of avoiding the risk.

Id.

111. *Clarke*, 858 P.2d at 296.

112. *Id.* (citing *O'Leary*, 251 N.W.2d at 751).

113. *Clarke*, 858 P.2d at 296.

114. *Id.* at 297 (Golden, J., specially concurring).

115. *Id.*

116. *Id.*

Justice Golden also disputed the majority's claim that "considerable development" in the area of premises liability law since *Yalowizer* supported elimination of the common law distinction between invitee and licensee.[117] In fact, Justice Golden cited authority from several jurisdictions and authors indicating that many states, including most states in the Rocky Mountain region, still adhere to the common law status classifications and have rejected invitations to abandon or alter them.[118]

According to Justice Golden, the Wyoming Supreme Court has long held that the entrant's status is determinative of the landowner's duty of care.[119] Justice Golden concurred in *Clarke*'s result because of his dissatisfaction with the common law scheme's classification of a social guest as a licensee. Justice Golden quoted the Indiana Supreme Court's recent analysis of this issue in *Burrell v. Mead*.[120] The Indiana Supreme Court stated that classifying a social guest as a licensee is inconsistent with current social customs.[121] A landowner who invites a social guest onto his land leads the guest to believe that the land has been prepared for his safety, so the landowner should be required to exercise reasonable care to ensure the safety of his social guests.[122] Applying the Indiana Supreme Court's reasoning to the present case, Justice Golden believed that Beckwith owed his expressly invited guests a duty of reasonable care.[123]

ANALYSIS

The Wyoming Supreme Court correctly decided to abolish the portion of the common law classification scheme distinguishing licensees from invitees, but the reasons given by the court for doing so are not completely persuasive. This decision significantly affects Wyoming landowners and occupiers by increasing their potential exposure to liability. The court's decision in *Clarke* also presents a potential problem in that it requires landowners to exercise a greater degree of care for recreational users than is mandated by statute.[124]

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117. *Id.* at n.1.

118. *See, e.g.*, Moore v. Tucson Electric Power Co., 761 P.2d 1091 (Ariz. 1988); Tjas v. Proctor, 591 P.2d 438 (Utah 1979); Springer v. Pearson, 531 P.2d 567 (Idaho 1975). *See also* PAGE, *supra* note 18, § 6.7, at 139-40.

119. *Clarke*, 858 P.2d at 297 (Golden, J., specially concurring).

120. 569 N.E.2d 637 (Ind. 1991).

121. *Id.* at 643.

122. *Id.*

123. *Clarke*, 858 P.2d at 297.

124. *See infra* notes 163-174 and accompanying text.

The Court's Reasons for Abolishing the Distinction

The Wyoming Supreme Court properly abolished the distinction between licensees, but the court's justification for doing so is suspect. As Justice Golden correctly noted,[125] the trend of abolishing the common law status classifications ended in the late 1970's, several years prior to the Wyoming Supreme Court's decision in *Yalowizer*.[126] The current trend, if any trend exists, is to *retain* the common law status classifications.[127] In the last five years, six different states[128] have either specifically refused to abandon the common law classification scheme or have attempted to override judicial abrogation of the common law status classifications and reinstate the tripartite scheme.[129]

Several factors may underlie the apparent reluctance of many state courts to abandon the common law scheme. Prosser states that this reluctance may be due to:

> [A] more fundamental dissatisfaction with certain developments in accident law that accelerated during the 1960's—the reduction of whole systems of legal principles to a single, perhaps simplistic, standard of reasonable care, the sometimes blind subordination of other legitimate social objectives to the goals of accident prevention and compensation, and the commensurate shifting of the decisional balance of power to the jury from the judge.[130]

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125. *Clarke*, 858 P.2d at 297 n.1.

126. 629 P.2d 465 (Wyo. 1981). *See also* PAGE, *supra* note 18, § 6.7, at 139-40.

127. *See* Gulbis, *supra* note 19, 22 A.L.R. 4th 294 § 2.

128. Arizona, Arkansas, Colorado, Kentucky, Oklahoma, and Ohio.

129. Lohrenz v. Lane, 787 P.2d 1274, 1276 (Okla. 1990); Baldwin by Baldwin v. Mosley, 748 S.W.2d 146, 148 (Ark. 1988); Kirschner v. Louisville Gas & Elec. Co., 743 S.W.2d 840, 844 (Ky. 1988); Moore v. Tucson Elec. Power Co., 761 P.2d 1091, 1093 (Ariz. App. 1988); Preston v. Baltimore & Ohio R. Co., 550 N.E.2d 191, 194 (Ohio App. 1988).

The Colorado legislature attempted to reinstate the common law classification scheme in 1986. COLO. REV. STAT. § 13-21-115 (1986). The Colorado Supreme Court struck down the 1986 law as violative of the Equal Protection clauses of both the United States Constitution and the Colorado Constitution. Gallegos v. Phipps, 779 P.2d 856 (Colo. 1989). The Colorado Supreme Court interpreted the 1986 statute as affording "a higher degree of protection to licensees than to invitees." *Id.* at 862. The court stated that the legislature's attempt to resurrect the common law classification scheme was a legitimate and permissible goal, but the law as written was not rationally related to this goal. *Id.* A legislative attempt to restore the common law classification scheme would apparently be permissible if the statute were appropriately written.

130. PROSSER AND KEETON, *supra* note 12, § 62, at 433-34. *See also* James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467 (1976). Professor Henderson criticizes the abolition of the common law framework because he believes it may prevent courts from screening "potentially unmanageable" and open-ended questions of duty. Juries, lacking guidance from formal rules, will instead rely on intuition and a desire to compensate an injured party

Other justifications include a fear of upending established common law precedent by "needlessly inject[ing] uncertainty into . . . legal relations"[131] and a fear that landowners might "be subjected to unlimited liability."[132] Courts refusing to abandon the common law categories prefer "slow, piecemeal development" to a new and sweeping change.[133] These courts view the common law status classifications and exceptions as the result of years of judicial analysis and toil, and this judicial effort should not be abandoned to the discretion of an unguided jury.[134]

Contrary to the Wyoming Supreme Court's claim in *Clarke*, there has not been "considerable development of the law in this field"[135] since its decision in *Yalowizer*. Nor was its decision foreshadowed by its 1989 statement in *Allen v. Slim Pickens Enterprises* that "[t]he key to the creation of a duty to the invitees on the premises is foreseeability."[136] The court's statement specifically mentioned invitees, and therefore seems applicable only to entrants classified as invitees.[137] As mentioned previously, the court stated as recently as 1992 that Wyoming adhered to the common law status classifications.[138]

In short, the abolition of the distinction between licensees and invitees is a major decision, yet the reasons stated by the court to justify this change are disingenuous. *Clarke* may be a result of a change in the court's thinking, a belief that *Yalowizer* was misguided, or merely a change in the make-up of the court.[139] The court could have been more

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when determining the duties owed by landowners and occupiers. *Id.* at 511-12. *But see* Carl S. Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions*, 1981 UTAH L. REV. 15 (1981). Professor Hawkins' empirical research refutes Henderson's claims. Hawkins found that the jury control devices available to a judge in traditional negligence law, such as calculus of risk, adequately prevented "unfettered jury discretion" in premises liability cases. *Id.* at 61.

131. Adams v. Fred's Dollar Store of Batesville, 497 So.2d 1097, 1102 (Miss. 1986).

132. Younce v. Ferguson, 724 P.2d 991, 995 (Wash. 1986).

133. *Id.*

134. *Id.*

135. *Clarke*, 858 P.2d at 296. The majority cited four cases demonstrating "considerable development" but two of these four cases were decided prior to *Yalowizer*. *Id.* *See* Poulin v. Colby College, 402 A.2d 846 (Me. 1979); O'Leary v. Coenen, 251 N.W.2d 746 (N.D. 1977). The "development" illustrated by the other two cases is countered by the opinions of scholars who state that the movement to abolish the common law categories came to a "screeching halt" in 1979. PROSSER AND KEETON, *supra* note 12, § 62, at 433. *See also* PAGE, *supra* note 18, § 6.7, at 139-40.

136. *Allen*, 777 P.2d at 82.

137. *See Clarke*, 858 P.2d at 297 (Golden, J., specially concurring). Justice Golden correctly stated that the Wyoming Supreme Court's decision in *Allen* "offered no promise to abolitionists that this court was poised to repudiate decades of Wyoming jurisprudence following the common law classifications." *Id.*

138. Thunder Hawk by and through Jensen v. Union Pacific R. Co., 844 P.2d 1045, 1048 (Wyo. 1992).

139. *Yalowizer* was decided by Chief Justice Rose and Justices Raper, Thomas, Rooney, and

forthright about its reasons for making the change. The integrity of the judicial system rests in part on the doctrine of *stare decisis*, a doctrine which is "important in an organized society."[140] While precedent should not be adhered to blindly, major changes in the law should be legitimately justified and explained. To do otherwise reduces the predictability of our legal system and undermines public confidence in the judiciary.

Evaluation of the Change

Despite its questionable reasoning, the Wyoming Supreme Court was correct in deciding to abolish the distinction between licensees and invitees and to require landowners to exercise reasonable care under the circumstances. Its refusal to adopt *Rowland's* uniform standard of care[141] and to continue to treat trespassers separately is also appropriate.

Several factors support the court's decision to abolish a portion of the common law scheme. Human health and safety outweigh a possessor's unrestricted right to make use of his property.[142] The "circumstances of modern life" do not easily fit into a rigid classification scheme.[143] A person in today's society does not ordinarily focus on his status classification before entering another's property. Landowners probably do not predicate their actions on whether an entrant's presence confers an economic benefit.

In addition, the common law scheme is riddled with exceptions which only increase the complexity and confusion already present when a jury determines a landowner's liability.[144] Categorizing a social guest, even if expressly invited, as a licensee who is not entitled to a duty of reasonable care confuses juries,[145] judges, and lawyers.[146]

Classifying a social guest as a licensee "simply does not comport with modern social practices."[147] An invited guest should not have to

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Brown, none of whom dissented. Of these five, only Justice Thomas is still on the court. Justice Thomas joined the majority opinion in *Clarke*, but did not write separately to explain why he changed his position on landowner duties since *Yalowizer*. The other four justices on the *Clarke* court were Chief Justice Macy and Justices Cardine, Golden, and Taylor.

140. Adkins v. Sky Blue, Inc., 701 P.2d 549, 551 (Wyo. 1985).

141. *See supra* notes 80-86 and accompanying text.

142. O'Leary v. Coenen, 251 N.W.2d 746, 749 (N.D. 1977).

143. *Id.*

144. *O'Leary*, 251 N.W.2d at 749. The United States Supreme Court described the common law scheme and its exceptions as a "semantic morass" and refused to import the classifications into admiralty law. Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 631 (1959).

145. *O'Leary*, 251 N.W.2d at 749.

146. PROSSER AND KEETON, *supra* note 12, § 60, at 414.

147. Burrell v. Meads, 569 N.E.2d 637, 643 (Ind. 1991).

protect himself against unreasonable dangers on the host's property. A host should have to do more than refrain from inflicting willful and wanton injury on his social guests because an invitation leads a social guest to expect that the premises have been reasonably prepared for his safety.[148] For example the possessor should be required to exercise reasonable care in the maintenance of his stairs to protect his social guests. If a step is missing or the banister is loose, the possessor should be required to repair the problems or at least exercise reasonable care to warn of the potential dangers. The Wyoming Supreme Court's decision extends beyond social guests to all those previously classified as licensees. Justice Golden's concurring opinion indicated his apparent reluctance to afford bare licensees the same level of protection afforded social guests.[149] However to elevate social guests to the invitee category and otherwise retain the common law scheme would only increase its inherent complexity. The common law scheme is full of complex and confusing exceptions,[150] and this would only add one more to the list.[151]

Complete abolition of the distinction between licensees and invitees is appropriate because one who enters under some pretense of permission should be entitled to a duty of reasonable care. The foreseeability of the licensee's presence and the burden of alleviating the risk of harm should determine liability.[152] A salesperson, mail carrier, or meter reader is not an expressly invited social guest, yet his presence may be foreseeable. Mail carriers deliver mail to most homes six days a week. Everyone who receives this service knows that mail carriers will probably enter their property once a day. Likewise everyone knows that meter readers check meters approximately once a month, and that a door-to-door salesman may stop by on any given day. The possessor should exercise reasonable care to ensure their safety. This does not mean that a possessor must take every imaginable precaution, but rather that he act reasonably to maintain his property in a safe manner and warn entrants of potentially dangerous hidden conditions or activities in light of the foreseeability of the entrant's presence and the surrounding circumstances.

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148. *Id.*

149. *Clarke*, 858 P.2d at 296 (Golden, J., specially concurring).

150. Peterson v. Balach, 199 N.W.2d 639, 644 (Minn. 1972). The Minnesota Supreme Court in 1972 stated "Today, there are so many exceptions that it is nearly impossible to record all of them." *Id.*

151. Social guests would be categorized as invitees although they neither confer an economic benefit on their host nor are they a member of the public entering the land for a purpose for which the land is held open to the public. *See* RESTATEMENT (SECOND) OF TORTS § 332 (1981). *See supra* notes 41-45 and accompanying text.

152. *O'Leary*, 251 N.W.2d at 752.

The Wyoming Supreme Court's decision to continue separate treatment of trespassers is also justified. While Rowland's uniform standard of "reasonable care under the circumstances"[153] has some appeal and may arguably be simpler, there is an inherent difference between those who enter with permission and those who do not.[154] A trespasser enters the land of another without permission. The burden of any resulting consequences should be borne by the trespasser, not the landowner who is unaware of the trespasser's presence. Allowing a trespasser to recover for the harm he suffered while engaged in a wrongful act likely strikes most people as unjust and runs counter to society's general expectations. The exceptions developed to protect the trespasser within the common law scheme[155] adequately safeguard the trespasser's interests and protect the trespasser against traps and other unreasonable risks.[156]

Impact of Clarke on Wyoming Landowners and Occupiers

The Wyoming Supreme Court's holding in *Clarke* dramatically increases a landowner's exposure to potential liability. All persons previously classified as licensees, whether a social guest or bare licensee, are entitled to reasonable care under the circumstances.[157] Judicial expansion of potential liability could be considered an intrusion on the province of the legislature.[158] However the judiciary is an appropriate place to turn for relief from outmoded and outdated common law principles.[159]

Many landowners may need to increase their insurance coverage to protect against potentially large damage awards as a result of the court's decision in *Clarke*. The impact on society at large may not be readily apparent because the general public may favor spreading the loss across society via insurance companies instead of forcing the entrant to bear this

153. *See supra* notes 80-86 and accompanying text.

154. *O'Leary*, 251 N.W.2d at 751 n.6.

155. *See supra* notes 28-36 and accompanying text.

156. *O'Leary*, 251 N.W.2d at 751 n.6.

157. *Clarke*, 858 P.2d at 296. Factors to be considered when deciding whether a landowner acted reasonably include "the likelihood of injury to another, the seriousness of the injury, and the burden of avoiding the risk." *Id.* (citing *O'Leary*, 251 N.W.2d at 751).

158. This is the reason given by several courts which refuse to impose liability on homeowners for the actions of intoxicated guests to whom the homeowners served alcohol. *See, e.g.*, Cole v. City of Spring Lake Park, 314 N.W.2d 836 (Minn. 1982). These cases also impact the duties of a landowner. The reasoning could be analogized to the instant case. Landowners could conceivably argue that a change of this magnitude should only be made by a politically accountable legislature which has the ability and opportunity to conduct hearings and gather evidence so it can consider all the possible ramifications of such a change.

159. The common law is a product of judicial decisions, therefore the judiciary is an appropriate place to turn for relief. The judiciary may also be more responsive to the plight of a single individual than the legislature.

burden.[160] However, large damage awards paid by insurance companies usually result in higher insurance premiums to offset this cost.[161] All homeowners will feel the pinch which results from the negligent actions of the few.

In addition, landowners like Mr. Beckwith might want to consider all the possible ramifications of hosting an annual Christmas party. Increasing a landowner's duty of care does not mean that people will cease having parties or hosting social gatherings, but landowners may invite fewer people over and expend greater amounts to insure the safety of their guests.

Clarke does not impact social guests alone. Bare licensees such as meter readers, delivery-persons, and door-to-door salespersons, are now entitled to reasonable care.[162] Under *Yalowizer*, a landowner needed only to refrain from inflicting willful or wanton harm on these people. Now the landowner must do more to ensure their safety. A bare licensee's presence on the land probably is foreseeable, and an injured party is more likely to recover for harm suffered on another's land after *Clarke*. The landowner's actions may be scrutinized by a jury who may be sympathetic to an injured party.

A potentially troubling result of *Clarke* is that the Wyoming Supreme Court's holding apparently conflicts with the Wyoming statutes governing the liability of landowners who allow others to engage in recreational activities on their land.[163] *Clarke* requires such landowners to exercise a higher degree of care than the legislature requires. The Wyoming statutes limit a landowner's liability to those who enter his land for a recreational purpose[164] and effectively codify the common law classifica-

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160. *O'Leary*, 251 N.W.2d at 749.

161. Kelly v. Gwinnell, 476 A.2d 1219, 1235 (N.J. 1984) (Garibaldi, J., dissenting). In *Kelly*, the New Jersey Supreme Court imposed liability on social hosts who negligently provided alcohol to a guest. *Id.* at 1224. This liability was subsequently limited by the New Jersey legislature:

> No social host shall be held liable to a person who has attained the legal age to purchase and consume alcoholic beverages for damages suffered as a result of the social host's negligent provision of alcoholic beverages to that person.

N.J. STAT. ANN. § 2A:15-5.7 (Supp. 1993).

162. *Clarke*, 858 P.2d at 296. The court stated that while trespassers will still receive separate treatment, "reasonable care under the circumstances" will apply to *all others*. *Id.*

163. WYO. STAT. §§ 34-19-101 to 34-19-106 (1990).

164. WYO. STAT. § 34-19-101(a)(iii) (1990) states:

> 'Recreational purpose' includes but is not limited to, any one (1) or more of the following: hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, winter sports and viewing or enjoying historical, archaeological, scenic or scientific sites.

tion scheme with respect to persons engaging in recreational activities on another's land.

According to the statutes, a landowner is liable only for "willful or malicious failure" to warn or protect recreational users from "a dangerous condition, use, structure, or activity"[165] unless the landowner charges recreational users a fee for their use of his land.[166] In other words, Wyoming statutes require only that the landowner refrain from inflicting willful and wanton harm on recreational users unless such users confer an economic benefit on the landowner, in which case the common law scheme would classify the recreational users as invitees.[167]

The statutes governing landowner liability to recreational users specifically state that, except as provided in § 34-19-105, the fact that the landowner:

> [E]ither directly or indirectly invites or permits without charge any person to use the land for recreational purposes . . . does not thereby:
>
> (i) Extend any assurance that the premises are safe for any purpose;
>
> (ii) Confer upon the person using the land the legal status of an invitee or licensee to whom a duty of care is owed;
>
> (iii) Assume responsibility for or incur liability for any injury to person or property caused by an act of omission of the person using the land.[168]

Nor does the landowner have a duty of care to keep the premises safe for entry or warn of any dangerous conditions on the land.[169]

There is a tension between these statutes and *Clarke*, which requires landowners to exercise reasonable care to protect and warn all entrants who are not trespassers.[170] The court carved no exceptions for recreational users. The statutes state that a landowner who invites others onto his land to hunt, fish, or hike, for example, owes the entrants no duty of care.[171] However *Clarke* states that a landowner owes such expressly invited

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165. WYO. STAT. § 34-19-105(a)(i) (1990).

166. WYO. STAT. § 34-19-105(a)(ii) (1990).

167. RESTATEMENT (SECOND) OF TORTS § 332 (1981).

168. WYO. STAT. § 34-19-103 (1990).

169. WYO. STAT. § 34-19-102 (1990).

170. *Clarke*, 858 P.2d at 296.

171. A landowner has no duty except to refrain from willfully or maliciously injuring the entrants. WYO. STAT. §§ 34-19-102 to 105(a)(i) (1990).

guests a duty of reasonable care.[172] Likewise the statutes provide that a person who enters another's land for recreational purposes with permission, but without invitation, does not become an invitee or licensee entitled to reasonable care.[173] In contrast, those who enter with permission are not trespassers, and are therefore entitled to reasonable care according to *Clarke*.[174]

The court's broad language appears to conflict with the Wyoming statutes governing landowner liability to recreational users. Neither party briefed this issue on appeal, so it is unlikely that the court even considered this particular impact of its decision.[175] Future cases will determine whether the court adheres to the broad change announced in *Clarke* or carves out exceptions for landowners who allow others to engage in recreational activities on their land.

Retrospective v. Prospective Application

The Wyoming Supreme Court's decision to apply its holding prospectively except as to the parties involved[176] comports with most other jurisdictions which have abolished the common law distinction between invitees and licensees.[177] Such a decision is unfair to the individual landowner who is a party to the case, but is ultimately necessary.

Retrospective application to the parties prejudices the landowner because his past actions are judged according to a standard that did not exist at the time. Mr. Beckwith is exposed to liability which he had no reason to anticipate. Even if he was a "prudent Wyoming landowner . . . advised of judicial trends" he would not have anticipated the expansion of exposure to liability embodied in *Clarke*.[178] Mr. Beckwith had no reason to purchase additional insurance or take other steps to protect himself from such liability.

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172. *Clarke*, 858 P.2d at 296.

173. WYO. STAT. § 34-19-103(a)(ii) (1990).

174. *Clarke*, 858 P.2d at 296.

175. The *Yalowizer* court specifically recognized the existence of statutes governing landowner liability to recreational users. *Yalowizer*, 629 P.2d at 469. In overruling *Yalowizer*, the *Clarke* court could have acknowledged the existence of these statutes. Although discussion of these statutes in *Clarke* might have been considered dicta because they were not directly pertinent to the case, the *Clarke* court could have avoided the apparent conflict it created by discussing the relationship between the statutes governing landowner liability to recreational users and its holding in *Clarke*.

176. *Clarke*, 858 P.2d at 296.

177. *See, e.g.*, O'Leary v. Coenen, 251 N.W.2d 746, 751 (N.D. 1977); Peterson v. Balach, 199 N.W.2d 639, 647 (Minn. 1972).

178. *Clarke*, 858 P.2d at 297 (Golden, J., specially concurring). *See supra* note 137.

As unfair as such application may be to a landowner like Mr. Beckwith, it is necessary to provide injured parties with a suitable incentive to argue for reasonable changes in the law. Potential plaintiffs will probably be unwilling to endure the expense and hassle of litigating a claim and successfully changing the law only to be denied compensation. The legal system should not be so rigid that outmoded and outdated principles forever dictate landowner duties.

Overall, it is probably better to sacrifice the interests of *one* landowner for the good of society in general. A change which benefits many and makes sense is preferable to blind adherence to ancient rules.

CONCLUSION

Although the reasons stated are questionable, the Wyoming Supreme Court's decision to abolish the common law distinction between licensees and invitees, yet continue to treat trespassers separately, was appropriate and overdue. The common law scheme and its numerous exceptions is complex and often unfair.

Persons who enter another's land with permission, whether express or implied, are entitled to a reasonable amount of care. Those who enter without permission, however, should not benefit from their wrongful act.

Wyoming landowners and occupiers should be aware that they now owe entrants on their land a higher degree of care, and that their potential exposure to liability as landowners and occupiers has greatly increased. Increased homeowner's insurance and additional precautions may be necessary to ensure the safety of social guests and bare licensees and reduce a landowner's exposure to potential liability.

Wyoming landowners who invite or allow others to use their land for recreational purposes should be aware that the degree of care they owe recreational users may be markedly increased from that dictated by the Wyoming statutes. Such landowners may need to taker greater precautions to protect recreational users and may want to restrict such use of their land until either the Wyoming Supreme Court or the legislature addresses the tension between *Clarke* and the statutes governing landowner liability to recreational users.

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