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Pashinian v. Haritonoff - Premises Liability for Illinois Landowners Reaffirmed

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RECENT CASES

PASHINIAN V. HARITONOFF— PREMISES LIABILITY FOR ILLINOIS LANDOWNERS REAFFIRMED

Liability for negligence is based upon a duty to exercise reasonable care.[1] Under the common law doctrine of premises liability, however, a landowner's[2] responsibility for injury to an entrant upon his or her land depends upon the status of the entrant,[3] not the reasonableness of the landowner's conduct.[4] This exception to general negligence concepts arises from a confrontation of two societal interests: protecting the free use of land by its owner and preventing injury from tortious conduct. The premises liability doctrine has been the subject of considerable controversy during the past twenty years.[5] A number of jurisdictions have completely abandoned[6] or substantially modified[7] the common law status approach in favor of the sin-

1. *See* F. BOHLEN, STUDIES IN THE LAW OF TORTS 163 (1926); W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 30-32 (4th ed. 1971) [hereinafter cited as PROSSER].

2. As used here, the term "landowner" includes occupier, possessor, or one who has control of premises.

3. *See* notes 19-25 and accompanying text *infra*.

4. The common law doctrine of premises liability is derived from the feudal view that the landowner is sovereign of his or her premises and is entitled to special privileges and immunities. The focus on the status of the entrant emerged in the nineteenth century as a means of protecting landowners from liability and ensuring judicial control of the verdicts of juries composed of potential entrants. *See, e.g.*, 2 F. HARPER & F. JAMES, LAW OF TORTS 1432 (1956); Marsh, *The History and Comparative Law of Invitees, Licensees and Trespassers* (pts. 1 & 2), 69 L.Q. REV. 182, 357 (1923).

5. That controversy started twenty years ago when the Supreme Court, in refusing to apply the common law entrant categories to maritime torts, noted that the common law categories no longer comported with modern society. Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 631 (1959). *See generally* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?*, 36 MD. L. REV. 816 (1977); Note, *Tort Liability of Owners and Possessors of Land—A Single Standard of Reasonable Care under the Circumstances Toward Invitees and Licensees*, 33 ARK. L. REV. 194 (1979).

6. In the United States, nine jurisdictions have abandoned the use of the common law categories as the sole method of determining a landowner's duty to entrants upon his or her land. Smith v. Arbough's Restaurant, Inc. 469 F.2d 97, 100 (D.C. Cir. 1972) (landowner must act as a reasonable person in maintaining property in safe condition), *cert. denied*, 412 U.S. 939 (1973); Webb v. City & Borough of Sitka, 561 P.2d 731 (Alaska 1977); Mile High Fence Co. v. Radovich, 175 Colo. 537, 489 P.2d 308 (1971); Rickard v. City & County of Honolulu, 51 Hawaii 134, 452 P.2d 445 (1969); Cates v. Beauregard Elec. Corp., 328 So. 2d 367 (La. 1976); Ouellett v. Blanchard, 116 N.H. 552, 364 A.2d 631 (1976); Scurti v. City of New York, 40 N.Y.2d 433, 354 N.E.2d 794, 387 N.Y.S.2d 55 (1976); Mariorenzi v. Joseph DiPonte, Inc., 114 R.I. 294, 333 A.2d 127 (1975). *See also* Note, *Tort Liability of Owners and Possessors of Land–A Single Standard of Reasonable Care under the Circumstances Toward Invitees and Licensees*, 33 ARK. L. REV. 194 (1979).

7. *See, e.g.*, Scheibel v. Hillis, 531 S.W.2d 285 (Mo. 1976) (eliminating all distinctions once an entrant's presence is known); Antoniewicz v. Reszcynski, 70 Wis. 2d 836, 236 N.W.2d 1 (1975) (eliminating the distinction between licensees and invitees, while retaining the category of trespasser). *See also* O'Leary v. Coenen, 251 N.W.2d 746, 749 nn.3 & 4 (N.D. 1977) (discussing various modified approaches).

gle standard of care characteristic of contemporary negligence principles.[8] Recently, in *Pashinian v. Haritonoff*,[9] the Illinois Supreme Court addressed the issue of whether to abandon, or to modify, the common law status approach. In deciding to retain the common law categories, the supreme court perpetuated a legal doctrine that abounds in semantic confusion[10] and immunizes the landowner from liability for injuries to entrants of certain statuses.[11]

The facts in *Pashinian* were simple. Suren Pashinian, a social guest in Alex Haritonoff's home, fell down a flight of stairs leading to the basement while looking for the bathroom.[12] Pashinian brought an action for damages for the injuries sustained in the fall.[13] On defendant's motion,[14] the court dismissed the complaint on the ground that plaintiff, as a social guest, was a licensee and that the defendant did not owe him a duty to refrain from negligent conduct.[15] The Illinois Appellate Court for the Second District affirmed[16] and the Illinois Supreme Court granted the plaintiff leave to appeal.[17] The only issue on appeal was whether Illinois should modify or abandon the traditional classification of entrants and, as one alternative, adopt a single standard of care owed by landowners to all entrants on their property regardless of the status of the entrant.[18]

Retaining the common law principles of premises liability would mean that the duty owed to an entrant would continue to depend upon whether the entrant was a trespasser, a licensee or an invitee.[19] A trespasser (one who enters the land of another without license or permission) is owed no duty to

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8. In states that have adopted modern principles of negligence for premises liability, the test is whether the landowner acted reasonably under the circumstances in view of the probability of injury to others. The entrant's status is a factor but is no longer determinative. *See, e.g.*, Basso v. Miller, 40 N.Y.2d 233, 241, 352 N.E.2d 868, 872, 386 N.Y.S.2d 564, 568 (1976); Rowland v. Christian, 69 Cal. 2d 108, 119, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968).

9. 81 Ill. 2d 377, 410 N.E.2d 21 (1980).

10. *See* Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630-31 (1959); Mariorenzi v. Joseph DiPonte, Inc., 114 R.I. 294, 333 A.2d 127 (1975).

11. *See* Rowland v. Christian, 69 Cal. 2d 108, 117, 443 P.2d 561, 570, 70 Cal. Rptr. 97, 106 (1968); Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 101 (D.C. Cir. 1972); notes 19-25 and accompanying text *infra*.

12. 81 Ill. 2d at 377, 410 N.E.2d at 21.

13. The complaint alleged in one count willful and wanton conduct based upon defendant's failure to maintain the premises and alternatively based upon defendant's failure to warn. The second count characterized the conduct as negligent. *Id.* The allegations of willful and wanton conduct were voluntarily dismissed by plaintiff. *Id.*

14. *Id.*

15. *Id.*

16. Pashinian v. Haritonoff, 79 Ill. App. 3d 1203, 403 N.E.2d 140 (2d Dist. 1979).

17. 81 Ill. 2d at 379, 410 N.E.2d at 21.

18. *Id.* Plaintiff conceded that his complaint had been correctly dismissed under existing law, but urged the court to change the law. *Id.*

19. Trout v. Bank of Bellville, 36 Ill. App. 3d 83, 86, 43 N.E.2d 252, 264 (5th Dist. 1976) (holding that the landowner's duty varies according to the status of the injured party). *See also* PROSSER, *supra* note 1, § 58, at 361.

keep the land in a safe condition.[20] Of course, if the trespasser is known or anticipated, the landowner must refrain from willfully or wantonly causing injury, and if a landowner knows of a danger, he or she must exercise reasonable care.[21] The landowner's duty to a licensee (an entrant who has the landowner's express or implied consent to enter or remain on the premises)[22] is the same as the duty owed to a known or anticipated trespasser—only to refrain from willfully or wantonly causing injury.[23] Finally, the landowner's duty to an invitee (one who enters the property of another by express or implied invitation to transact business in the landowner's and invitee's mutual interest)[24] is to make the premises reasonably safe for the invitee's use.[25]

The *Pashinian* court, after a brief discussion of the premises liability doctrine, concluded that the circumstances giving rise to the entrant categories had not changed sufficiently to warrant a change in the law.[26] The court acknowledged that as conditions affecting ownership of land change, the law can be modified as needed, but concluded that a landowner still deserves some immunity from liability as provided by the premises liability doctrine despite the undisputed social value in holding an individual responsible for tortious conduct.[27] Thus, in the balance, the court concluded that the landowner's (Haritonoff's) liability for a licensee's (Pashinian's) injuries should lie only if the landowner's misconduct was willful and wanton.[28] Responding to

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20. *See* RESTATEMENT (SECOND) OF TORTS § 329 (1965) [hereinafter cited as RESTATEMENT].

21. Hessler v. Cole, 7 Ill. App. 3d 902, 289 N.E.2d 204 (1st Dist. 1972). *See also* PROSSER, *supra* note 1, § 58, at 357.

22. A licensee enters the premises of another by permission but for his or her own purposes. Madrazo v. Michaels, 1 Ill. App. 3d 583, 585, 274 N.E.2d 635, 638 (1st Dist. 1971).

23. *See* PROSSER, *supra* note 1, § 60, at 376. A duty is also imposed upon the landowner to warn a licensee of any hidden danger, concealed defects, or condition creating a danger unknown to the licensee of which the landowner has knowledge. Snow v. Judy, 96 Ill. App. 2d 420, 422, 239 N.E.2d 327, 329 (4th Dist. 1968). A failure to warn of such conditions might be willful and wanton conduct. Walton v. Norphlett, 56 Ill. App. 3d 4, 7, 371 N.E.2d 978, 980 (1st Dist. 1977). The rationale for treating a social guest as a licensee is that guests are considered one of the family and must take the premises as they find them. Madrazo v. Michaels, 1 Ill. App. 3d 583, 585, 274 N.E.2d 635, 638 (1st Dist. 1971). *See* PROSSER, *supra* note 1, § 60, at 378-79.

24. Ellguth v. Blackstone Hotel, Inc., 408 Ill. 343, 347, 97 N.E.2d 290, 294 (1951); Paukner v. Wackem, 231 Ill. 276, 83 N.E. 202 (1907). *See* RESTATEMENT, *supra* note 20, § 332.

25. Madrazo v. Michaels, 1 Ill. App. 3d 583, 585, 274 N.E.2d 635, 638 (1st Dist. 1971); Augsburger v. Singer, 103 Ill. App. 2d 12, 242 N.E.2d 436 (2d Dist. 1968).

26. 81 Ill. 2d at 381, 410 N.E.2d at 22. The court cited other jurisdictions which have refused to adopt a single standard of care for premises liability law. McMullan v. Butler, 346 So. 2d 950 (Ala. 1977); Mooney v. Robinson, 93 Idaho 676, 471 P.2d 63 (1970); Gerchberg v. Loney, 223 Kan. 446, 576 P.2d 593 (1978); Astleford v. Milner Enterprises, Inc., 233 So. 2d 524 (Miss. 1970); Werth v. Ashley Realty Co., 199 N.W.2d 899 (N.D. 1972).

27. 81 Ill. 2d at 381, 410 N.E.2d at 22. The court, relying upon Gerchberg v. Loney, 223 Kan. 446, 576 P.2d 593 (1978), took the position that a case by case approach would provide better understanding of the policy decisions affecting change and better guidance for future application than would a sweeping change in the law. 81 Ill. 2d at 381, 410 N.E.2d at 22.

28. 81 Ill. 2d at 381, 410 N.E.2d at 22.

the contention that the entrant categories generated confusion, the court maintained that these categories provided a coherent structure for both the jury and the judge.[29]

In reaffirming the premises doctrine, the court was selective and superficial in treating case law and neglected to discuss recent Illinois decisions illuminating the shortcomings of the common law status approach. The only Illinois case relied upon by the majority was *Biggs v. Bear*,[30] decided thirty-seven years ago, in which the appellate court ruled that a social guest has no greater status than a licensee and can recover only by showing willful and wanton conduct.[31] The rationale of *Biggs* was that a landowner is sovereign on his or her land and is entitled to certain privileges and immunities.[32] *Biggs* relied upon several nineteenth century cases from England and Massachusetts, all of which have been overruled in favor of a contemporary negligence standard.[33] In addition to *Biggs*, the *Pashinian* court cited five recent decisions from other jurisdictions where the courts refused to discard the common law doctrine.[34] As in *Biggs*, these cases found that the premises liability appropriately balanced the competing interests in unrestricted land use and liability for negligence and also provided the trier of fact with valuable guidance.[35] The *Pashinian* court either missed or ignored the overruling of *Werth v. Ashley Realty Co.*,[36] a case it cited to support its conclusion. Further, the remaining four decisions, though not overruled, fail to provide compelling authority to support the common law status approach.[37]

Finally, although the *Pashinian* court refused to concede that the common law entrant categories were outmoded, the Illinois Supreme Court had previously acknowledged the inadequacies of these categories in today's society.[38] Several Illinois decisions have attempted to alleviate the harshness of the rigid classifications by creating exceptions to the doctrine of

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29. *Id. But see* Gerchberg v. Loney, 223 Kan. 446, 450, 576 P.2d 593, 597 (1978) (a lay jury is not capable of balancing the factors affecting premises liability).

30. 320 Ill. App. 597, 51 N.E.2d 799 (1st Dist. 1943). The facts in *Biggs* are similar to those presented in *Pashinian*. In *Biggs*, the plaintiff was a social guest who, while looking for a bathroom, chose the wrong door and fell down the basement stairs. *Id.* at 598, 51 N.E.2d at 799.

31. *Id.* at 600, 51 N.E.2d at 800.

32. *See* note 4 *supra*.

33. In 1957, England adopted the Occupiers Liability Act, 1957, 5 & 6 Eliz. 2, c. 31, providing that a landowner owes the same duty of care to licensees and invitees. *Id.* § 2(1). Massachusetts has adopted a single standard of care for all entrants, except unknown trespassers. Pridgen v. Boston Hous. Auth., 364 Mass. 696, 308 N.E.2d 43 (1973).

34. *See* cases cited in note 26 *supra*.

35. *See* cases cited in note 26 *supra*.

36. 199 N.W.2d 899 (N.D. 1972). *See* O'Leary v. Coenen, 251 N.W.2d 746, 751 (N.D. 1977) (holding that a landowner is under a duty to act as a reasonable person toward licensees and invitees).

37. *See* cases cited in note 26 *supra*.

38. Dini v. Naiditch, 20 Ill. 2d 406, 416, 170 N.E.2d 881, 885-86 (1960) (abolishing the common law rule that a fireman on duty is a licensee). *See also* Washington v. Atlantic Richfield Co., 66 Ill. 2d 103, 110, 361 N.E.2d 282, 289 (1976) (Dooley, J., dissenting) (advocating abolition of the common law categories of premises liability); ADMINISTRATIVE OFFICE OF THE

premises liability for children,[39] public servants,[40] incompetents,[41] frequent trespassers,[42] and social guests who enter the premises to help the host move.[43] Further, a recent Illinois appellate court decision abandoned the common law distinction between artificial and natural conditions on the land when persons are injured outside the premises.[44] These exceptions vitiate the apparent simplicity of the three traditional categories. By using a case by case approach, the Illinois courts have failed to resolve the confusion and inequity bred by such attempts to accommodate the nineteenth century categories to contemporary society.

Other courts and commentators have recognized that the entrant categories emerged in an agrarian society and are no longer useful in an urban, industrial society where complex social and economic relationships make it difficult to define a person's status and where efforts to categorize render the landowner's duty uncertain.[45] The immunity accorded feudal landlords does not comport with contemporary values and methods of risk allocation. Today, human safety is often valued more than unrestricted use of land,[46] and the landowner can spread the cost and risk of injury through insurance.[47] Thus, a single standard of care for landowners has been advocated.[48]

Decisions in other states have adopted a single standard of care. For example, in *Rowland v. Christian*,[49] the California Supreme Court rejected traditional reliance upon the common law categories and held that the en-

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ILLINOIS COURTS, 1978 ANNUAL REPORT TO THE SUPREME COURT OF ILLINOIS 19 (1978) (discussing Annual Report of the Supreme Court to the General Assembly, which recommended legislative abolition or modification of the common law categories).

39. Kahn v. James Burton Co., 5 Ill. 2d 614, 126 N.E.2d 836 (1955).

40. Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E.2d 881 (1960).

41. Barnes v. Washington, 4 Ill. App. 3d 513, 281 N.E. 380 (1st Dist. 1947).

42. McDaniels v. Terminal R.R. Ass'n, 302 Ill. App. 332, 23 N.E.2d 785 (4th Dist. 1939).

43. Madrazo v. Michaels, 1 Ill. App. 3d. 583, 274 N.E.2d 635 (1st Dist. 1971).

44. Mahurin v. Lockhart, 71 Ill. App. 3d 691, 390 N.E.2d 523 (5th Dist. 1979).

45. *See, e.g.*, Mariorenzi v. Joseph DiPonte, Inc., 114 R.I. 294, 298, 333 A.2d 127, 133 ("[t]he time has come to extricate ourselves from a semantic quagmire that had its beginning in ancient and misleading phraseology"); Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?*, 36 MD. L. REV. 816 (1977); Recent Developments, *Torts—Abrogation of Common-Law Entrant Classes of Trespassers, Licensees, and Invitees*, 25 VAND. L. REV. 623 (1972).

46. *See, e.g.*, Rowland v. Christian, 69 Cal. 2d 108, 118, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968) (a person is not less deserving of protection because he enters the premises of another as a social guest and not as a business invitee).

47. The availability of liability insurance has been one of the factors courts have considered in abandoning the common law premises doctrine. *See, e.g.*, Antoniewicz v. Reszcynski, 70 Wis. 2d 836, 236 N.W.2d 1 (1975) (court abolished the distinction between licensees and invitees in premises liability relying in part upon an earlier decision to abolish the same distinctions in automobile liability which was based upon the availability of insurance). *But see* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir. 1972) (court expressed concern that the use of a single standard of care would lead to increased litigation and insurance rates, placing the cost of insurance beyond the reach of the average homeowner).

48. *See* notes 49-52 and accompanying text *infra*.

49. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal Rptr. 97 (1968) (guest was injured by defective faucet).

trant's status constitutes only one factor relevant to deciding a landowner's liability.[50] Many courts have adopted *Rowland's* holding in full,[51] while others have adopted a single standard of care for licensees and invitees, but have retained separate treatment of trespassers.[52]

Following *Pashinian*, however, Illinois courts will continue to struggle with the problems of fitting injured entrants into outdated and inappropriate categories. Because the *Pashinian* court refused to impose a single standard of care upon all landowners, Illinois courts must continue to apply common law premises liability doctrine although that doctrine is an anachronism perpetuated by stare decisis. As a result, many injured persons may be denied damages to which they would have been entitled under ordinary principles of negligence. Furthermore, landowners may escape liability even though contemporary values would dictate a contrary result. Both consequences undermine the public view of the law's ability to respond to social change. Nevertheless, experience shows that lower courts will continue to find the current law upheld in *Pashinian* inadequate, and inevitably, the Illinois Supreme Court will be faced with these issues again.

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50. *Id.* at 116, 443 P.2d at 568, 70 Cal. Rptr. at 104.

51. *See* cases cited in note 6 *supra*.

52. *See* note 7 *supra*.