

NOTES

PREMISES LIABILITY: A CRITICAL SURVEY OF INDIANA LAW

It is surprising how much may sometimes be discovered by reading the cases. When, in the development of a rule over the course of a century, the courts have assigned a particular reason for it, it need not be concluded that the reason for it is the only one, or that it is the right one; but surely it is entitled to respectful consideration, and to some attempt to discover what it means, and what may lie behind it.¹

I. INTRODUCTION

Duty has been said to be an “expression of the sum total of those policy considerations which leads the law to say that a particular plaintiff is entitled to protection.”² The development of the law of negligence during the nineteenth century marked the inception of a judicial policy towards requiring all citizens to behave as reasonable and prudent men.³ At the same time, however, the social desirability of permitting the possessor⁴ to use his land

¹Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573, 611 (1942).

²W. PROSSER, LAW OF TORTS § 54, at 325-26 (4th ed. 1971) [hereinafter cited as PROSSER].

³In *Heaven v. Pender*, 11 Q.B.D. 503 (1883), the court first enunciated this policy when it stated:

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

Id. at 509.

⁴RESTATEMENT (SECOND) OF TORTS § 328E (1965) states:

A possessor of land is

(a) a person who is in occupation of the land with intent to control it, or

as he saw fit remained deeply rooted in English and American jurisprudence. In balancing these interests, common law judges developed certain rules of law which made the concept of negligence more compatible with the traditional notion that "the owner was sovereign within his own boundaries and . . . might do what he pleased on or with his own domain."⁵ By classifying entrants as invitees, licensees, and trespassers and ascribing a gradient duty of care according to status, courts exempted the landowner from the obligation of a single duty of care to all persons under all circumstances. The province of the jury was thus circumscribed, and the scope of the possessor's duty was based entirely upon the category in which the entrant belonged. The effect of the classification system is the retention of greater power in the hands of judges to protect the interest of land ownership than would have been possible under the law of negligence.⁶ A substantial proportion of cases are disposed of by directed verdicts and summary judgments without reference to the reasonableness of the defendants' conduct.⁷ Premises liability remains today the largest area of the

(b) a person who has been in occupation of the land with intent to control it, if no other person has subsequently occupied it with intent to control it, or

(c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).

⁵F. BOHLEN, *STUDIES IN THE LAW OF TORTS* 163 (1926).

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Even if the judges had been mentally prepared to assess the liability of the landowner towards visitors simply by reference to the conduct of the reasonable man, they would not have been willing to leave the landowner to the verdict of a jury belonging, as a general rule, to the class of potential visitors to property rather than to that of landowners.

Marsh, *The History and Comparative Law of Invitees, Licensees and Trespassers*, 69 L.Q. REV. 182, 185 (1953).

Dean Green has described the functions of the judge and jury in negligence cases as follows:

The judge passes his judgment on so-called questions of law—rights and duties; the jury on the so-called questions of fact—negligence, damage and causal relation. The judge is the dominant factor in this arrangement. He not only passes judgment first, but determines in what cases a jury can properly pass judgment at all

Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1023 (1928).

⁷In abrogating the common law rules, courts have expressed concern that the use of summary judgments, nonsuits, and directed verdicts had been excessive. See *Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97 (D.C. Cir.

law in which the concept of duty operates as a limitation upon negligence liability.⁸

The policy reasons behind protecting the interest of land ownership with minimal regard for the interest of human safety have lost their persuasive force. Contemporary societal values no longer reflect a reluctance to protect personal rights at the expense of property rights.⁹ Reasonable people do not vary their conduct solely on the basis of whether an entrant is an invitee, a licensee, or a trespasser.¹⁰ The general availability of liability insurance at inexpensive rates presents a legitimate but seldom mentioned policy consideration.¹¹ There is a trend in Indiana law towards a fuller application of the standard of reasonable care under the circumstances in other areas of tort liability. Technical status classifications that have in the past insulated certain entities from the duty of due care have been eliminated in the areas of governmental immunity,¹² interspousal immunity,¹³ and products liability.¹⁴

The trend towards broader negligence liability has not left unscathed the possessor's special privilege to be careless. The tendency of the law today is to impose upon the possessor, like other members of society, a duty to use reasonable care to avoid

1972); *Rowland v. Christian*, 69 Cal. 2d 108, 111, 443 P.2d 561, 563, 70 Cal. Rptr. 97, 99 (1968).

⁸PROSSER § 57, at 351.

⁹"[A] man's life or limb does not become less worthy of protection by the law . . . because he has come upon the land of another without permission or with permission but without a business purpose." *Rowland v. Christian*, 69 Cal. 2d 108, 118, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968).

¹⁰*Id.*

¹¹Dean Prosser concludes that the availability of liability insurance serves as a valid additional reason for abrogating obsolete rules long under attack because of their own inherent weakness and lack of logic or policy. See PROSSER § 83, at 535. See also Comment, *Liability of a Land Occupier to Persons Injured on His Premises: A Survey and Criticism of Kansas Law*, 18 U. KAN. L. REV. 161, 162 (1969).

¹²*Campbell v. State*, 284 N.E.2d 733 (Ind. 1972) (tort immunity of state abolished with reservations); *Perkins v. State*, 252 Ind. 549, 251 N.E.2d 30 (1969) (tort immunity of state abolished as to proprietary functions).

¹³*Brooks v. Robinson*, 284 N.E.2d 794 (Ind. 1972) (doctrine of interspousal immunity abrogated in Indiana).

¹⁴*J.I. Case Co. v. Sandefur*, 245 Ind. 213, 197 N.E.2d 519 (1964) (privity requirement for negligence actions stricken). See also Note, *Products Liability in Indiana: Can the Bystander Recover?*, 7 IND. L. REV. 403 (1973).

injury to others.¹⁵ In the landmark case of *Rowland v. Christian*,¹⁶ the California Supreme Court abrogated the common law classification system and now requires that the possessor exercise reasonable care toward any entrant. Under the *Rowland* approach, the status of the entrant is but one factor to be considered in determining liability. Several jurisdictions have followed *Rowland*,¹⁷ and others have abolished the licensee—invitee distinction by statute¹⁸ or judicial decision.¹⁹ In England, a common duty of care was imposed by statute upon possessors of land toward all visitors, whether licensees or invitees.²⁰ The United States Supreme Court has termed the common law system a “semantic morass” and has refused to extend its application to the law of admiralty.²¹ In Indiana, however, the transition toward holding the possessor to a single duty of care under all circumstances has been a piecemeal process. As courts have perceived the harshness of the present system, they have carved out exceptions to the general rules and have misapplied existing standards to reach a desired result.

¹⁵The United States Supreme Court has suggested that the common law is moving toward the imposition of “a single duty of reasonable care in all circumstances.” *Kermarec v. Compagnie Generale*, 358 U.S. 625, 630-31 (1959). See also *Simmel v. New Jersey Co-op. Co.*, 47 N.J. Super. 509, 136 A.2d 301 (1957), *rev'd on other grounds*, 28 N.J. 1, 143 A.2d 521 (1958).

¹⁶69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). The *Rowland* approach has received considerable praise from the commentators. See, e.g., Comment, *Rowland v. Christian and Washington Land Occupiers Liability*, 5 GONZAGA L. REV. 235 (1970); Comment, *A Re-Examination of the Land Possessor's Duty to Trespassers, Licensees, and Invitees*, 14 S.D.L. REV. 332 (1969); Comment, *Liability of a Land Occupier to Persons Injured On His Premises: A Survey and Criticism of Kansas Law*, 18 U. KAN. L. REV. 161 (1969); Comment, *Smith v. Arbaugh's Restaurant, Inc., and the Invitee-Licensee-Trespasser Distinction*, 121 U. PA. L. REV. 378 (1972); 44 N.Y.U. L. REV. 426 (1969); 41 TENN. L. REV. 190 (1973); 25 VAND. L. REV. 623 (1972).

¹⁷See *Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97 (D.C. Cir. 1972); *Mile High Fence Co. v. Radovich*, 489 P.2d 308 (Colo. 1971); *Pickard v. City of Honolulu*, 452 P.2d 445 (Hawaii 1969). See also *Roseneau v. City of Estherville*, 199 N.W.2d 125 (Iowa 1972).

¹⁸See CONN. GEN. STAT. REV. § 52-577a (Supp. 1974).

¹⁹See *Alexander v. General Accident Fire & Life Assurance Corp.*, 98 So. 2d 730 (La. App. 1957); *Peterson v. Balach*, 199 N.W.2d 639 (Minn. 1972). See also 25 VAND. L. REV. 623, 629 (1972).

²⁰Occupiers' Liability Act, 5 & 6 Eliz. 2, c. 31 (1957).

²¹*Kermarec v. Compagnie Generale*, 358 U.S. 625, 631 (1959).

Rather than assuring consistency and stability in the law, the common law system has bred confusion and complexity.

The purpose of this Note is to survey the law of premises liability in Indiana in an effort to demonstrate that adherence to the common law classification system no longer serves a rational purpose. The results attained by misapplying the common law rules and establishing exceptions thereto approximate the results that would be attained by applying a standard of reasonable care under the circumstances. The law of negligence has permeated the area of premises liability to such an extent that a more rational process is needed to facilitate judicial expression of policy changes which have occurred in Indiana law since the common law system was adopted.

II. TRESPASSERS

A. *The Wilful-Wanton Rule*

A trespasser is an unwelcome intruder upon the property of another.²² He enters without right, express or implied consent, or express or implied invitation. The status of trespasser is the lowest on the legal scale of the common law classification system. The general rule as stated by Indiana courts is that the only duty owed to a trespasser by the possessor is to refrain from wilful, wanton, or intentional injury.²³ The trespasser assumes all risks incident to his presence and is required to take precautions for his own safety. Accordingly, the possessor is under no duty to anticipate the presence of trespassers, to maintain a lookout for them, to guard against their intrusion, or to keep his property in such a safe condition as to not endanger them.²⁴

It has been said that a function of the common law is to develop rules which constitute the "most desirable and practicable

²²See, e.g., *Chicago, S.S. & S.B.R.R. v. Sagala*, 140 Ind. App. 650, 221 N.E.2d 371 (1966). See also RESTATEMENT (SECOND) OF TORTS § 329 (1965).

²³E.g., *Calvert v. New York Cent. R.R.*, 210 Ind. 32, 199 N.E.2d 239 (1936) (conduct of the possessor); *Lingenfelter v. Baltimore & O.S.W. Ry.*, 154 Ind. 49, 55 N.E. 1021 (1900) (condition of premises). It is often stated that the only duty owed by the possessor is to refrain from wilful or intentional injury. See, e.g., *Chicago, S.S. & S.B.R.R.*, 140 Ind. App. 650, 221 N.E.2d 371 (1966); *Standard Oil Co. v Scoville*, 132 Ind App. 521, 175 N.E.2d 711 (1961). However, a reckless disregard of the consequences may be so great as to imply a willingness to injure and entitle a trespasser to recover. *Palmer v. Chicago, St. L. & P.R.R.*, 112 Ind. 250, 14 N.E. 70 (1887).

²⁴*Neal v. Home Builders, Inc.*, 232 Ind. 160, 111 N.E.2d 280 (1953).

compromise from a social standpoint between conflicting interests, and to modify these from time to time to meet changing social conditions and needs"²⁵ Such an endeavor necessarily involves judicial reexamination of the rationales behind the common law rules in light of changing social conditions. Unfortunately, few Indiana courts have supplemented their verbal allegiance to the wilful-wanton rule with an effort to justify its application.²⁶ The commentators, in criticizing the rule, have offered several possible justifications for the disjunction between the law of premises liability, which emphasizes status, and the law of negligence, which emphasizes reasonableness.²⁷ Most agree that the difference exists because the rules pertaining to premises liability predate the development of negligence theory.²⁸ On this basis, the wilful-wanton rule can no longer be said to be a legitimate compromise between the competing social interests of land ownership and human life. It is but an historical remnant of a society deeply rooted in the concept of land ownership. In modern society, at least three reasons can be offered for replacing the wilful-wanton rule with the general rules of negligence.

²⁵Eldredge, *Tort Liability to Trespassers*, 12 TEMPLE L.Q. 32 (1937).

²⁶The limited duty accorded the possessor cannot be based upon the premise that the law does not require him to anticipate the presence of others since the wilful-wanton rule has been applied with equal vigor to licensees. See *Cannon v. Cleveland, C.C. & St. L. Ry.*, 157 Ind. 682, 62 N.E. 8 (1901). The presence of a licensee is always to be expected. F. BOHLEN, *STUDIES IN THE LAW OF TORTS* 61 (1926). Dicta in older cases suggest that the trespasser is a wrongdoer unworthy of being treated with reasonable care. See *Brooks v. Pittsburgh, C.C. & St. L. Ry.*, 158 Ind. 62, 68, 62 N.E. 694, 696 (1904) (a trespasser can assert but a wrongdoer's right). This rationale is based upon the notion of wrongdoing of a society in which the trespasser was an outlaw or poacher whose entry was both unanticipated and resented. See *Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97 (D.C. Cir. 1972).

²⁷Professor James systematically refutes the following justifications for the limited duty of care owed to trespassers by possessors: (1) people are not likely to trespass, so the possessor may disregard their possible presence, (2) the duty of due care would impose an unreasonable burden on land use, (3) the trespasser is a wrongdoer whose presence amounts to contributory negligence, and (4) the trespasser assumes all risks incident to his presence. See James, *Tort Liability of Occupiers of Land: Duties Owed to Trespassers*, 63 YALE L.J. 145, 150-53 (1953). See also PROSSER § 58, at 366-68; Keeton, *Assumption of Risk and the Landowner*, 22 LA. L. REV. 108 (1961); 25 VAND. L. REV. 623, 625 (1972).

²⁸See, e.g., Hughes, *Duties To Trespassers*, 68 YALE L.J. 633, 694 (1959); Marsh, *supra* note 6, at 184.

First, the wilful-wanton rule is harsh²⁹ and inflexible.³⁰ Its application substitutes the standard of care of a society in which the trespasser was an "outlaw or poacher whose entry was both unanticipated and resented . . ." ³¹ for modern community standards of care. The jury, the final arbiter of community standards in our system of jurisprudence, must restrict its inquiry to questions of status rather than questions of reasonableness.³² As a result, the possessor is not required by law to act reasonably toward trespassers, a proposition quite inconsistent with the values of a civilized society. Secondly, the liability of a possessor to an injured trespasser could be harmoniously and beneficially absorbed into negligence theory with minimal adverse effect upon the interest of land ownership.³³ In numerous cases in which the wilful-wanton rule has been applied, the same result of nonliability could have been reached had the court applied the general rule of reasonable care under the circumstances. When the trespasser is contributorily negligent,³⁴ or when his presence is unknown and could not reasonably have been anticipated,³⁵ it is unlikely that recovery

²⁹See *Neal v. Home Builders, Inc.*, 232 Ind. 160, 111 N.E.2d 280 (1953). In *Neal*, a young mother was killed while attempting to rescue her three year old child who was trapped inside a semicompleted dwelling house. Recovery was denied, although the house was unattended and unsecured and children were known to play therein. Compare *Wilinski v. Belmont Builders, Inc.*, 143 N.E.2d 69 (Ill. Ct. App. 1957).

³⁰Perhaps the most extreme reflection upon the rigidity of the common law classification system is Lord Dunedin's statement in *Robert Addie & Sons v. Dumbreck*, [1929] A.C. 358: "Now the line that separates each of these three classes [invitees, licensees and trespassers] is an absolutely rigid line. There is no half-way house, no no-man's land between adjacent territories." *Id.* at 371. See PROSSER § 58, at 357 n.63.

³¹*Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97, 102-03 (D.C. Cir. 1972).

³²See *id.* at 104. When the evidence concerning the status of the entrant is conflicting or inconclusive, status is a question of fact for the jury. *Silvestro v. Walz*, 222 Ind. 163, 51 N.E.2d 629 (1943).

³³See Hughes, *Duties to Trespassers*, 68 YALE L.J. 633, 634 (1959).

³⁴See, e.g., *Krenzer v. Pittsburgh, C.C. & St. L. Ry.*, 151 Ind. 587, 52 N.E. 220 (1898) (person sleeping on a railroad track); *Dull v. Cleveland, C.C. & St. L. Ry.*, 21 Ind. App. 571, 52 N.E. 1013 (1899) (person standing on track without taking precautions as train approached). Assumption of risk has also been invoked to deny recovery, especially when the entrant has proceeded across premises in the dark. See, e.g., *Lingenfelter v. Baltimore O.S.W. Ry.*, 154 Ind. 49, 55 N.E. 1021 (1900).

³⁵See, e.g., *Jordon v. Grand Rapids & I. Ry.*, 162 Ind. 464, 70 N.E. 524 (1904).

would be permitted under any standard of care short of strict liability. Thirdly, the cases reflect a judicial disenchantment with the privilege to be careless which the strictly applied wilful-wanton rule confers upon the possessor. The harsh and often unjust results of applying the wilful-wanton rule have engendered exceptions for child trespassers,³⁶ dangerous conditions,³⁷ and dangerous activities.³⁸ Moreover, the misdefinition of the terms "wilful" and "wanton,"³⁹ and the elevation of a trespasser to the status of an invitee⁴⁰ have emerged as judicial techniques which mitigate the harsh operation of the wilful-wanton rule. Although such exceptions and techniques enable courts to move closer to the issues worthy of scrutiny in a given case, their artificiality and complexity are unfortunate. The Indiana judicial process should not be burdened with the confusion which stems from the adherence to a rule which, in fact, often results in misrepresentations of the true basis of a court's decision.

B. *Judicial Modification of the Wilful-Wanton Rule*

Indiana courts have not been hesitant to strictly apply the wilful-wanton rule to situations in which the presence of trespassers was unknown and unforeseeable.⁴¹ Under these circumstances, there is no reason to depart from the rule since the same result of nonliability is reached whether it be said that the possessor was not guilty of wilful and wanton misconduct or that he exercised reasonable care under the circumstances.⁴² Under either standard it would be manifestly unjust to require a possessor to conduct his activities or make his premises safe on the basis of a remote likelihood that someone might intrude thereon and be

³⁶See, e.g., *Pier v. Shultz*, 243 Ind. 200, 182 N.E.2d 255 (1962).

³⁷See, e.g., *Harris v. Indiana Gen. Serv. Co.*, 206 Ind. 351, 189 N.E. 410 (1934).

³⁸See, e.g., *Indiana Harbor Belt R.R. v. Jones*, 220 Ind. 139, 41 N.E.2d 361 (1942).

³⁹See, e.g., *Cannon v. Cleveland, C.C. & St. L. Ry.*, 157 Ind. 682, 62 N.E. 8 (1901).

⁴⁰See, e.g., *New York, C. & St. L. Ry. v. Mushrush*, 11 Ind. App. 192, 37 N.E. 954 (1894).

⁴¹See, e.g., *Jordon v. Grand Rapids & I. Ry.*, 162 Ind. 464, 70 N.E. 524 (1904) (railroad company not required to anticipate the presence of a child sitting on top of freight car on a sidetrack). This type of case is easily disposed of with a status determination followed by the assertion that the possessor owed no duty to the trespasser.

⁴²See Peaslee, *Duty to Seen Trespassers*, 27 HARV. L. REV. 403 (1914).

injured. However, when a possessor does not take due precautions for the safety of trespassers he knows are present or are likely to be present upon his premises, his conduct moves into the realm of unreasonableness. At this point, the courts have retreated from a strict application of the wilful-wanton rule and have moved toward the standard of reasonable care under the circumstances.

Under a strict interpretation of the wilful-wanton rule, the possessor may assume, as a matter of law, that trespassers are not present or likely to be present upon his premises.⁴³ This is a reasonable assumption, however, only to the extent it is in accord with the facts of the case at hand. If the facts are such that the possessor knows that the likelihood of intrusion is high, the assumption is based upon a premise of nonexistent fact. Thus, a number of jurisdictions have imposed a duty of care upon the possessor when the burden of anticipation is slight when compared with the probability of harm.⁴⁴ Often termed the "frequent trespassers upon a limited area" exception to the wilful-wanton rule, it invokes the negligence formula when the possessor is aware that a substantial number of persons are in the habit of intruding upon his premises at a particular point.⁴⁵ In regard to such persons, the possessor is under a duty of reasonable care to discover their presence and to conduct his activities with regard for their safety. In Indiana, the wilful-wanton rule is generally invoked to deny the existence of a duty of due care and the possessor is not required to anticipate the presence of trespassers. Before such a duty will be found to exist, the circumstances must be such that an invitation can be implied.⁴⁶ In a few cases, however, the invitation fiction has been attenuated to encompass situations in which the possessor's conduct could hardly be said to constitute "inducement" to enter. For example, persons crossing railroad tracks have been held to be invitees of a railroad company,⁴⁷ while common sense

⁴³*E.g.*, Cannon v. Cleveland, C.C. & St. L. Ry., 157 Ind. 682, 62 N.E. 8 (1901).

⁴⁴PROSSER § 58, at 360-61. Prosser states that most courts have adopted this rule.

⁴⁵*Id.*

⁴⁶*See, e.g.*, Chicago & E.I.R.R. v. Hedges, 105 Ind. 398, 7 N.E. 801 (1885) (persons crossing tracks to approach depot held to be licensees by invitation). *But see* Pittsburgh, C.C. & St. L. Ry. v. Philpot, 75 Ind. App. 59, 127 N.E. 827 (1920) (accident in switchyard).

⁴⁷*See* New York, C. & St. L. Ry. v. Mushrush, 11 Ind. App. 192, 37 N.E. 954 (1894) (railroad company derived economic benefit from persons crossing track at a particular point since it was spared the expense of building a public crossing).

dictates that their presence is both unwelcome and costly to the company.⁴⁸ Invoking the creative power of the courts to elevate the status of a trespasser to that of an invitee is a cumbersome means for reaching reasonable results. It is a means which is made necessary by continued adherence to the wilful-wanton rule. The better reasoned Indiana cases have imposed a duty of anticipation simply on the basis of probable presence upon premises where a dangerous activity is being carried on⁴⁹ or where a highly dangerous condition exists.⁵⁰

A more significant erosion of the wilful-wanton rule in Indiana occurs when the presence of a trespasser is clearly known by the possessor. In this situation, courts frequently misdefine the terms "wilful" and "wanton" to deny the substance of the rule. Strictly applied, the terms "wilful" and "wanton" are used to characterize a state of mind indicating a conscious and reckless indifference to the consequences of one's act.⁵¹ If the possessor were indeed exempt from the standard of reasonable care, he would not be held liable for injuring a trespasser unless his conduct transcended negligence.⁵² However, in *Cannon v. Cleveland, Chicago & St. Louis Railway*,⁵³ a case in which recovery was denied

⁴⁸"Railroad companies are not eleemosynary institutions interested in shortening the weary stranger's number of steps home by throwing their private property open as a short-cut." Eldredge, *Tort Liability to Trespassers*, 12 TEMPLE L.Q. 32, 36 (1937).

⁴⁹See *Indiana Harbor Belt R.R. v. Jones*, 220 Ind. 139, 41 N.E.2d 361 (1942); *Cleveland, C.C. & St. L. Ry. v. Means*, 59 Ind. App. 383, 104 N.E. 785 (1915).

⁵⁰See *Harris v. Indiana Gen. Serv. Co.*, 206 Ind. 351, 189 N.E. 410 (1934).

⁵¹*Wyant v. Lobdell*, 277 N.E.2d 595 (Ind. Ct. App. 1972) (words "wilful" and "wanton" relate to the state of the actor's mind rather than to the nature of his act); *Bybee v. Brooks*, 123 Ind. App. 129, 106 N.E.2d 693 (1952) (reckless indifference to consequences under circumstances which show actor has knowledge of situation and that injury is probable to result).

⁵²

Wilfullness and negligence are diametrically opposite to each other. One imports inattention, inadvertence and indifference, while the other imports intention, purpose and design. There can be no negligence with intent, and no wilfullness without intent.

Barrett v. Cleveland, C.C. & St. L. Ry., 48 Ind. App. 668, 671, 96 N.E. 490, 492 (1911). Under code pleading, wilfulness and negligence could not be pleaded in the same paragraph. *Kizer v. Hazelett*, 221 Ind. 575, 49 N.E.2d 543 (1943).

⁵³157 Ind. 682, 62 N.E. 8 (1901).

because the presence of a trespasser was unknown to the possessor, the court stated that the only duty owed to trespassers and bare licensees is "not to injure them wilfully or wantonly, but to use reasonable care to avoid injury after their danger is discovered."⁵⁴ As a practical matter, this is simply another way of stating that the possessor is bound by a duty to conduct his activities with reasonable care under the circumstances.⁵⁵ The results of cases involving known trespassers have generally been consistent with the results that would have been reached had the general rules of negligence been forthrightly applied. The possessor may reasonably assume that once cognizant of the danger, the trespasser will take precautions for his own safety.⁵⁶ Accordingly, the duty of care imposed upon the possessor will generally be fulfilled by a warning.⁵⁷ If the trespasser is a child⁵⁸ or a helpless adult,⁵⁹ the possessor cannot reasonably assume that he will remove himself from his position of peril. In this situation, and in situations in which it is clear that the warning has not been heard,⁶⁰ the possessor must use every means at hand to prevent injury.⁶¹

The duty of due care arising from the possessor's knowledge of a trespasser's presence is generally justified on the basis of the "last clear chance" doctrine.⁶² Since the doctrine applies only

⁵⁴*Id.* at 689, 62 N.E. at 11, quoting 3 B. ELLIOTT & W. ELLIOTT, LAW OF RAILROADS § 1250, at 589 (2d ed. 1907). See also *Parker v. Pennsylvania Co.*, 134 Ind. 673, 34 N.E. 504 (1893).

⁵⁵For an excellent discussion of how the duty owed to known trespassers approximates a duty of reasonable care under the circumstances, see Peaslee, *Duty to Seen Trespassers*, 27 HARV. L. REV. 403 (1914).

⁵⁶*E.g.*, *Ullrich v. Cleveland, C.C. & St. L. Ry.*, 151 Ind. 358, 51 N.E. 95 (1898); *Palmer v. Chicago, St. L. & P.R.R.*, 112 Ind. 250, 14 N.E. 70 (1887).

⁵⁷See, *e.g.*, *Pittsburgh, C.C. & St. L. Ry. v. Judd*, 10 Ind. App. 213, 36 N.E. 775 (1894).

⁵⁸*Indianapolis, P. & C.R.R. v. Pitzer*, 109 Ind. 179, 6 N.E. 310 (1886). However, if it is shown that the child was actually aware of the danger, the actor is entitled to assume that the child will exercise care for his own safety. *Chicago, S.S. & S.B.R.R. v. Sagala*, 140 Ind. App. 650, 221 N.E.2d 371 (1966).

⁵⁹*E.g.*, *New York, C. & St. L. Ry. v. Ault*, 56 Ind. App. 293, 102 N.E. 998 (1913) (railroad company moved train without taking reasonable precautions for the safety of trespasser pinned under engine).

⁶⁰*E.g.*, *Lake Erie & W.R.R. v. Brafford*, 15 Ind. App. 655, 43 N.E. 882 (1896) (engineer made no effort to stop until train was within forty feet of deaf mute who could not hear warning).

⁶¹*New York Cent. R.R. v. Green*, 105 Ind. App. 488, 15 N.E.2d 748 (1938).

⁶²The elements of the last clear chance doctrine are: (1) plaintiff must be in a position of peril, (2) defendant must have actual knowledge of plain-

in situations in which the possessor is engaged in an activity⁶³ and has the last opportunity to avoid injury, it can not be used to depart from the wilful-wanton rule when a trespasser is injured due to a static condition of the premises. For a number of reasons, courts find the wilful-wanton rule more palatable when a trespasser is injured by a static condition of the land, and have been reluctant to depart from its strict application. Here, as in many other areas, courts traditionally have been more willing to control conduct rather than compel it.⁶⁴ Moreover, trespassers should generally realize that the land has not been made safe for their unwelcome intrusions,⁶⁵ and in requiring the trespasser to look out for himself, Indiana courts have placed significant emphasis on the likelihood that trespassers will observe and avoid dangerous conditions on the premises.⁶⁶ For these reasons, and perhaps because courts fear the imposition of unreasonable burdens upon the possessor,⁶⁷

tiff's peril, (3) defendant must have opportunity later than plaintiff to avoid injury, and (4) plaintiff must make all possible effort to extricate himself from his position of peril. *Bayne v. Turner*, 142 Ind. App. 580, 236 N.E.2d 503 (1968). The peril of plaintiff may be one of two types: by his own negligence or by his inadvertence to the surroundings, he has placed himself in a position of danger from which he is physically unable to extricate himself. *Harper, Development in the Law of Torts in Indiana 1940-1945*, 21 IND. L.J. 447, 460 (1946). Liability is imposed, notwithstanding plaintiff's contributory negligence, if the defendant could have avoided harming him in the exercise of reasonable care. *L.S. Ayres & Co. v. Hicks*, 220 Ind. 86, 40 N.E.2d 334 (1942).

⁶³Even if a case were to arise in which the possessor had the "last clear chance" to prevent a trespasser from being injured by a condition of the premises, such as by shouting a timely warning, recovery would be denied since Indiana law imposes no affirmative duty to aid one in peril. See *L.S. Ayres & Co. v. Hicks*, 220 Ind. 86, 40 N.E.2d 334 (1942). In *Hicks*, the court stated that the duty to avoid aggravation of another's injury is similar to that imposed by the last clear chance doctrine, but the latter is a "negative" rather than an "affirmative" obligation and does not depend upon the relationship of the parties. *Id.* at 95-96, 40 N.E.2d at 338.

⁶⁴See *Bohlen, The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 316, 324-25 (1908).

⁶⁵*James, supra* note 27, at 158.

⁶⁶Note how the court in *Plotzki v. Standard Oil Co.*, 228 Ind. 518, 92 N.E.2d 632 (1950), emphasized the likelihood that trespassing children would observe dangerous conditions.

⁶⁷In *Neal v. Home Builders, Inc.*, 232 Ind. 160, 111 N.E.2d 280 (1953), the court showed open hostility to an enlargement of the possessor's scope of liability on the basis of unreasonableness:

Restrictions upon the use of property diminishes [sic] pro tanto the beneficial character of the use, and hence the law imposes restric-

a trespasser injured by a natural condition of the land stands little chance of recovery in Indiana.⁶⁸ This fear, however, is unfounded, since the standard of reasonable care only requires reasonable precautions in light of foreseeable risks of harm. It would seem that in most instances, the burden of altering land in its natural state would be sufficiently heavy to preclude recovery under negligence theory, particularly when the likelihood of trespass was not great.

However, when an artificial condition of the land presents a high danger of very great harm to intruders, Indiana courts have again retreated from the strict application of the wilful-wanton rule. If the possessor knew of a dangerous condition upon his premises, and he reasonably could have anticipated that intruders would be likely to come in contact with it, and that such contact would be reasonably sure to inflict serious injury, a duty of due care will be imposed upon him.⁶⁹ Accordingly, he is required to guard the dangerous condition, give timely warning of it, and take whatever additional steps are reasonably necessary to protect persons likely to be injured by it.⁷⁰ The "dangerous condition" rule has been sparingly applied in Indiana. Since an intruder generally would be contributorily negligent in encountering an obviously dangerous condition, it has been suggested that the danger must be concealed or unexpected.⁷¹ At least when children are involved, "concealed" has been interpreted to mean not likely to be appreciated. Thus, a fire⁷² and a large dog⁷³ have been held to be conditions potentially dangerous to children within the mean-

tions as seldom as possible and never except upon the strongest grounds. The law which is reluctant to impose restraint upon an owner's use of his land even when causing damage beyond his boundary, is more unwilling to impose restraint upon a user which is dangerous only to those who intrude upon his land.

Id. at 185, 111 N.E.2d at 292, quoting from *Holstine v. Director Gen. of R.R.*, 77 Ind. App. 582, 593, 134 N.E. 303, 307 (1922). See Hughes, *Duties to Trespassers*, 68 YALE L.J. 633, 646 (1959).

⁶⁸See *Harness v. Churchmembers Life Ins. Co.*, 241 Ind. 672, 175 N.E.2d 132 (1961).

⁶⁹*Harris v. Indiana Gen. Serv. Co.*, 206 Ind. 351, 189 N.E. 410 (1934).

⁷⁰*Id.* at 359, 189 N.E. at 413.

⁷¹See James, *supra* note 27 at 156.

⁷²*Wozniczka v. McKean*, 144 Ind. App. 471, 247 N.E.2d 215 (1969).

⁷³*Keane v. Schroeder*, 148 Ind. App. 131, 264 N.E.2d 95 (1970).

ing of the rule, whereas a semiconstructed dwelling house⁷⁴ and a step ladder⁷⁵ have been held not to be. Dicta in some cases⁷⁶ suggest that the condition must be "inherently dangerous," although the original formulation of the rule did not contain such a limitation. Even with such a limitation, the dangerous condition rule is capable of typical common law growth.⁷⁷

The significance in the application of the dangerous condition rule is that it allows the plaintiff to surmount the duty hurdle and recover from the possessor when the possessor has acted unreasonably. Recovery is not denied simply because the entrant bore the status of a trespasser. Under the negligence formula the interests of the landowner are adequately protected and the interest in human life receives its due consideration. The flexibility inherent in the dangerous condition rule was well demonstrated in *Echevarria v. United States Steel Corp.*⁷⁸ In *Echevarria*, an eight year-old boy chased a pigeon to a location deep within defendant's property until the bird flew atop an electrical transformer. In an attempt to capture the bird, he climbed to the roof of an adjacent building and descended to the transformer platform. Upon coming in contact with the transformer, he was shocked and fell to the ground. In affirming the trial court's judgment for the plaintiff on the basis of the dangerous condition rule, the Seventh Circuit Court of Appeals emphasized the fact that the defendant had left a ladder on the premises which made the top of the building easily accessible,⁷⁹ a factor which would have been precluded from consideration under the traditional classification system. Although the defendant's maintenance of the transformer had high social utility, the burden of removing the ladder and thus eliminating the danger to foreseeably trespassing children⁸⁰ was slight compared to the gravity of potential harm to human life.

⁷⁴*Neal v. Home Builders, Inc.*, 232 Ind. 160, 111 N.E.2d 280 (1953).

⁷⁵*Id.*

⁷⁶*Id.* See also *Wozniczka v. McKean*, 144 Ind. App. 471, 247 N.E.2d 215 (1969).

⁷⁷In *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), Judge Cardozo extended the "inherently dangerous articles" exception of the privity requirement to anything which would be dangerous if negligently made. The effect was to "swallow up" the general rule. See PROSSER § 96, at 642-43.

⁷⁸392 F.2d 885 (7th Cir. 1968) (applying Indiana Law).

⁷⁹*Id.* at 893.

⁸⁰The premises were located near a park. *Id.* at 887.

The wilful-wanton rule is the remnant of a legal system which traced many of its standards to a heritage of feudalism. In modern society, the sanctity once attributed to land ownership no longer outweighs the interest in human safety. The application of the rule involves a cumbersome status determination that frequently makes it more difficult to decide into what category an intruder fits than it is to decide the case.⁶¹ This determination pays little attention to the decisive issues in a negligence case—the foreseeability of presence, the risk of substantial injury, and the reasonableness of imposing a burden to take precautions. If a duty were recognized in all men to behave reasonably, these issues would be questions of fact for the jury. If tighter control of the jury were deemed necessary to protect the possessor's interest, the unforeseeability of a trespasser's presence could be made a rebuttable presumption within the framework of negligence theory.⁶² It is not suggested that courts should ignore the status of the entrant as a trespasser. However, the character of the trespasser's entry should be no more than a relevant circumstance to be considered in determining whether the possessor had exercised reasonable care in light of all relevant circumstances.

C. *Trespassing Children*

The "attractive nuisance" doctrine has long been accepted in Indiana,⁶³ although the more precise version of the doctrine as formulated in the *Restatement of Torts*⁶⁴ has been rejected.⁶⁵ In

⁶¹The line between the various classifications is often very difficult to draw. See *Hollowell v. Greenfield*, 142 Ind. App. 344, 216 N.E.2d 537 (1966).

⁶²Professor James has suggested that this approach be taken. James, *supra* note 27, at 150.

⁶³*Binford v. Johnson*, 82 Ind. 426 (1882). Earlier courts suggested that they might be receptive to a doctrine of this nature. See *Young v. Harvey*, 16 Ind. 314 (1861); *Durham v. Musselman*, 2 Blackf. 96 (Ind. 1827). The attractive nuisance doctrine was first set forth in *Sioux City & P.R.R. v. Stout*, 17 Wall. 657 (1873). Space does not allow proper consideration of the Indiana cases decided prior to 1962. For a discussion of these cases and the history of the attractive nuisance doctrine in Indiana, see Note, *The Attractive Nuisance Doctrine*, 32 IND. L.J. 75 (1956); Note, *Landowner's Liability for Infant Drowning in Artificial Pond*, 26 IND. L.J. 266 (1951); 8 IND. L.J. 508 (1933).

⁶⁴RESTATEMENT (SECOND) OF TORTS § 339 (1965).

⁶⁵*Harness v. Churchmembers Life Ins. Co.*, 241 Ind. 672, 175 N.E.2d 132 (1961). Despite the urging of plaintiff's counsel, the court refused to adopt the doctrine as set forth in RESTATEMENT OF TORTS § 339 (1934). Justice Arterburn dissented.

Pier v. Schultz,⁸⁶ the Indiana Supreme Court set forth the elements necessary to a cause of action based upon the attractive nuisance doctrine. Although the *Pier* court's statement of the doctrine is cumbersome and confusing, it is the most recent Indiana authority on the doctrine and must be considered in its entirety. First, the structure or condition complained of must be particularly attractive to children and provide a special enticement for them to sport or play thereon.⁸⁷ The *Pier* court's insistence that the element of allurement be present has arguably aligned Indiana with the small minority of jurisdictions which resort to a legal fiction to justify the theoretical basis of the doctrine. The allurement requirement originated with common law judges who agreed with the result achieved by the doctrine but found its theoretical basis unacceptable. In seeking a doctrinal rationale more palatable to their adherence to the common law classification system, they created a fiction. By implying an invitation from the alluring situation created by the possessor, the child trespasser was elevated to the status of invitee.⁸⁸ Thus, the duty hurdle was surmounted and negligence theory became relevant. The logical extension of this reasoning led to the rule in some jurisdictions that the trespassing child must have been injured by the condition which actually induced the trespass; if he discovered the condition after he became a trespasser, an invitation could not be implied.⁸⁹ The fallacy of this fictional basis

⁸⁶243 Ind. 200, 182 N.E.2d 255 (1962). For clarity of presentation, the elements of the doctrine will be discussed in a different sequence than set forth in the opinion. The actual holding of the *Pier* court was:

The courts of this state have consistently held that in order for the doctrine of attractive nuisance to apply, the following facts must be made to appear: (1) The structure or condition complained of must be maintained or permitted upon the property by the owner or the occupant thereof. (2) It must be peculiarly dangerous to children and of such nature that they will not comprehend the danger. (3) It must be particularly attractive to children and provide a special enticement for children to play or sport thereon. (4) The owner must know, or the facts alleged must be such as to charge him with constructive knowledge, of the existence of such structure or condition, and that children do or are likely to trespass upon his property and be injured by such structure or condition. (5) The injury sustained must be the natural, probable and foreseeable result of the original wrong complained of.

Id. at 205, 182 N.E.2d at 258.

⁸⁷*Id.* at 205, 182 N.E.2d at 258.

⁸⁸See Green, *Landowners' Responsibility to Children*, 27 TEXAS L. REV. 1, 4-5 (1948).

⁸⁹*United Zinc & Chem. Co. v. Britt*, 258 U.S. 268 (1922). *Britt* was apparently overruled by implication in *Best v. District of Columbia*, 291 U.S.

of duty is obvious, and accordingly is presently rejected in the great majority of jurisdictions.⁹⁰ Prior to *Pier*, support for it could be found mostly by dicta in cases in which recovery was seemingly denied on other grounds.⁹¹ Indeed, had the *Pier* court accepted the doctrine in its original simplicity it could have found the element of allurement to be unnecessary.⁹² Other Indiana courts which first recognized the doctrine experienced little difficulty in basing the resultant duty on the value of child life to the

411 (1934). Later courts have held that *Britt* is no longer in effect. *Eastburn v. Levin*, 113 F.2d 176 (D.C. Cir. 1940); *McGettigan v. National Bank*, 320 F.2d 703 (D.C. Cir. 1963). See PROSSER § 59, at 365-66; Green, *supra* note 88, at 8-12.

⁹⁰PROSSER § 59, at 366.

⁹¹In *Indianapolis Water Co. v. Harold*, 170 Ind. 170, 83 N.E. 993 (1908), a nine year-old boy drowned while attempting to cross a log footbridge over defendant's canal. In reversing a judgment for plaintiff because the evidence was insufficient to sustain the verdict, the court noted that the boy was not lured to the canal by the log. However, the true basis for the holding seems to have been that the boy heedlessly encountered an appreciated risk. See *id.* at 177, 83 N.E. at 995. In *Indianapolis Motor Speedway Co. v. Shoup*, 88 Ind. App. 572, 165 N.E. 246 (1929), the court recognized the allurements requirement in dictum, but held that the attractive nuisance doctrine had no application to the facts and circumstances of the case. *Id.* at 578, 165 N.E. at 248. In *Holstine v. Director Gen. of R.R.*, 77 Ind. App. 582, 134 N.E. 303 (1922), a child was hit by a train while playing upon a pile of sawdust situated near the tracks. The court held the attractive nuisance doctrine inapplicable because the child was not injured by the sawdust. *Id.* at 591, 134 N.E. at 306. However, the true basis for nonliability seems to have been that the railroad had exercised reasonable care. The court held that a presumption exists that a child is under the supervision of an adult, and absent an allegation that the child was unattended and that the railroad was aware of this fact, a demurrer to a complaint based upon negligence would be properly sustained. *Id.* at 605-06, 134 N.E. at 311. It is significant that the *Holstine* court found the status of the child to be irrelevant since the action was brought by its parents. *Id.* at 598, 134 N.E. at 309.

Two early "turntable" cases, however, relied strongly upon the allurements fiction, and could be said to support such a requirement. See *Lewis v. Cleveland, C.C. & St. L. Ry.*, 42 Ind. App. 337, 84 N.E. 23 (1908); *Chicago & E.R.R. v. Fox*, 38 Ind. App. 268, 70 N.E. 81 (1904). However, in *Drew v. Lett*, 95 Ind. App. 89, 182 N.E. 547 (1932), the court held that a child killed by poisonous gas while playing in a mine could recover on the basis of the attractive nuisance doctrine. This holding is contrary to *United Zinc & Chem. Co. v. Britt*, 285 U.S. 268 (1922), the leading authority for the old rule that the child must be injured by the condition which induced the trespass.

⁹²See Green, *Landowners' Responsibility to Children*, 27 TEXAS L. REV. 1, 4-5 (1948).

community and the probability of harm to that interest.⁹³ It is readily understandable how common law judges, not yet fully appreciative of the implications of negligence theory, resorted to a fiction to justify the imposition of a duty of reasonable care. Today, however, the concept of negligence is basic in our legal system and the acceptance of such a fiction is without justification. The element of allurements is significant only to the extent that it bears upon the factual issue of whether the possessor reasonably could have anticipated the presence of children upon his premises.⁹⁴ This is more appropriately a negligence consideration and should not bear on the issue of whether a duty of care exists. It is submitted that *Pier* should be interpreted in this light.

Secondly, the structure or condition alleged to be an attractive nuisance must be maintained or permitted upon the property by the possessor.⁹⁵ The application of the doctrine is limited to artificial conditions. It does not apply to natural conditions⁹⁶ or conditions which merely duplicate those commonly found in nature.⁹⁷ The reason generally advanced by Indiana courts for imposing this limitation upon the doctrine is that if parents fail to supervise or warn their children of natural dangers, they should not expect a stranger to do so.⁹⁸ This rationale ignores the possibility that a trespassing child may have disobeyed his parents instructions or escaped their vigilance.⁹⁹ To hold the parents contributorily negligent as a matter of law runs contrary to the policy considerations which give rise to the doctrine. It seems that if the child

⁹³See, e.g., *Cincinnati & Hammond Spring Co. v. Brown*, 32 Ind. App. 58, 69 N.E. 197 (1903).

⁹⁴See *James*, *supra* note 27, at 164.

⁹⁵243 Ind. at 205, 182 N.E.2d at 258.

⁹⁶*Harness v. Churchmembers Life Ins. Co.*, 241 Ind. 672, 175 N.E.2d 132 (1961).

⁹⁷*Plotzki v. Standard Oil Co.*, 228 Ind. 518, 92 N.E.2d 632 (1950) (water). See also *Evansville v. Blue*, 212 Ind. 130, 8 N.E.2d 224 (1937) (water); *Lockridge v. Standard Oil Co.*, 124 Ind. App. 257, 114 N.E.2d 807 (1953); *Anderson v. Reith-Riley Constr. Co.*, 112 Ind. App. 170, 44 N.E.2d 184 (1942) (soil).

⁹⁸See, e.g., *Lockridge v. Standard Oil Co.*, 124 Ind. App. 257, 114 N.E.2d 807 (1953).

⁹⁹In *Indiana Harbor Belt R.R. v. Jones*, 220 Ind. 139, 41 N.E.2d 361 (1942), the court refused to hold the mother of an eight year-old boy contributorily negligent as a matter of law because the child played in a railroad yard. The court noted that children may escape the due diligence of their parents. This seems to be a realistic approach.

is to be protected at all, he should be protected by the person who can do so with the least inconvenience. If the law does not expect a child to appreciate the dangers of playing in a freight yard¹⁰⁰ or playing with fire,¹⁰¹ it can hardly expect him to appreciate the danger of water. Even if the doctrine were extended to apply to natural conditions under the general negligence formula, the interest of the landowner would be adequately protected. The burden of improving land in its natural state would be sufficiently heavy in many instances to preclude the imposition of more than a cursory duty of care.¹⁰² Only when the possessor could have readily and inexpensively eliminated the danger would recovery be permitted.¹⁰³

The third element that the *Pier* court held to be necessary to a cause of action based upon the attractive nuisance doctrine is that the structure or condition must be peculiarly dangerous to children and of such a nature that they will not comprehend the danger.¹⁰⁴ By first insisting that the structure or condition be peculiarly dangerous, the court seems to have recognized that a child with meddling propensities can injure himself upon virtually any object. Accordingly, the emphasis is placed upon objects which create an unreasonable risk of harm. By further requiring that the structure or condition be of a such a nature that a child will not comprehend its danger, the court has adopted the basic negligence concept that one owes a duty to himself to avoid appreciated dangers.¹⁰⁵ One of the basic reasons for distinguishing between the duties owed to an adult and a child trespasser is a

¹⁰⁰*Id.*

¹⁰¹*Wozniczka v. McKean*, 144 Ind. App. 471, 247 N.E.2d 215 (1969).

¹⁰²*See James, supra* note 27, at 151.

¹⁰³Justice Arterburn supported this view in his dissenting opinion in *Harness v. Churchmembers Life Ins. Co.*, 241 Ind. 672, 175 N.E.2d 132 (1961):

The doctrine does not make a landowner an insurer of trespassing children With that thought in mind, the law looks at the measure of care required and the relatively inexpensive measures which may be used to avoid the risk of danger to children.

Id. at 681, 175 N.E.2d at 136.

¹⁰⁴243 Ind. at 205, 182 N.E.2d at 258.

¹⁰⁵*See Indianapolis Water Co. v. Harold*, 170 Ind. 170, 83 N.E. 993 (1908), in which recovery was denied because an infant trespasser actually recognized the danger of drowning. *See also Note, Landowner's Liability for Infant Drowning in Artificial Pond*, 26 IND. L.J. 266, 271 (1951). In assessing whether the child reasonably could have been expected to appreciate the risk,

recognition of the child's inability to protect himself.¹⁰⁶ Therefore, the attractive nuisance doctrine does not apply to situations in which the condition involves dangers that are or should be obvious to children. The child's failure to make the responsible choice to avoid appreciated dangers bears little relation to whether a duty of care in the first instance ever existed. A duty is more logically imposed by an objective assessment of the possessor's conduct. Thus, the real inquiry should be whether the possessor reasonably could have expected a trespassing child to comprehend the dangers attendant to the structure or condition.¹⁰⁷ Rather than making this a factual determination on a case-by-case basis, Indiana courts have established arbitrary categories of structures or conditions which as a matter of law the possessor may expect children to appreciate. Thus, a possessor may always assume that children will avoid conditions which involve the risks of drowning,¹⁰⁸ falling from a height,¹⁰⁹ and being injured by a soil cave-in.¹¹⁰ If a trespassing child is injured by such a condition, recovery will be denied for want of duty unless a "latent" danger which a child is not likely to avoid can be shown to exist.¹¹¹

The consequences of requiring such an arbitrary barrier of duty to be crossed before negligence principles become relevant are well illustrated in *Plotzki v. Standard Oil Co.*¹¹² In *Plotzki*, an eleven year-old boy drowned by stepping into an abrupt drop-off while wading in a water-filled excavation owned by the defendant. Recovery was denied for want of duty since children are held as a matter of law to appreciate the dangers of water. In

the age of the child is very important. Indiana apparently has not set a fixed age limit on the application of the doctrine. See *Lockridge v. Standard Oil Co.*, 124 Ind. App. 257, 267, 114 N.E.2d 807, 812 (1953).

¹⁰⁶See PROSSER § 59, at 373.

¹⁰⁷*Id.* § 59, at 371.

¹⁰⁸*Plotzki v. Standard Oil Co.*, 228 Ind. 518, 92 N.E.2d 632 (1950); *Lockridge v. Standard Oil Co.*, 124 Ind. App. 257, 114 N.E.2d 807 (1953).

¹⁰⁹*Neal v. Home Builders, Inc.*, 232 Ind. 160, 190, 111 N.E.2d 280, 294 (1953).

¹¹⁰*Anderson v. Reith-Riley Constr. Co.*, 112 Ind. App. 170, 44 N.E.2d 184 (1942).

¹¹¹*Lockridge v. Standard Oil Co.*, 124 Ind. App. 257, 114 N.E.2d 807 (1953) (raft on pond held not to constitute a latent danger).

¹¹²228 Ind. 518, 92 N.E.2d 632 (1950). For a criticism of *Plotzki*, see Note, *Landowner's Liability for Infant Drowning in Artificial Pond*, 26 IND. L.J. 266 (1951).

so holding, the *Plotzki* court ignored the allegations that the drop-off was concealed by the murkiness of the water, that the excavation was in plain view from a sidewalk only fifty yards away, and that it was located in an urban area frequented by large numbers of children. The burden of fencing the small area and the utility of maintaining the condition were never considered. One year later an eight year-old boy drowned in the same unguarded excavation, and recovery was again denied.¹¹³

The final element that the plaintiff must establish in order to recover on the basis of the attractive nuisance doctrine bears heavily upon the possessor's knowledge of the circumstances. To be liable, the possessor must have actual or constructive knowledge that: (1) children do or are likely to trespass upon his premises, (2) an attractive nuisance exists thereon, and (3) it is likely to injure them.¹¹⁴ In addition, the child's injury must be the natural and probable consequence of the possessor's conduct.¹¹⁵ This is simply the issue of negligence. If the possessor does not know or have reason to know that the above circumstances exist he is not required to take precautions. The standard of due care does not generally burden him in the first instance to police his premises to discover if these circumstances exist.¹¹⁶ But once he is placed on notice, he must take reasonable precautions to protect trespassing children from unreasonable risks of harm. The utility of maintaining such a condition and the burden of eliminating its attendant risks are balanced against the probability of harm in determining whether the possessor acted reasonably under the circumstances.¹¹⁷ Unlike the question of duty, this determination generally is made by the jury.

The attractive nuisance doctrine as it is presently applied in Indiana is needlessly complex and restrictive. Before a duty of due

¹¹³*Lockridge v. Standard Oil Co.*, 124 Ind. App. 257, 114 N.E.2d 807 (1953).

¹¹⁴243 Ind. at 205, 182 N.E.2d at 258.

¹¹⁵*Id.*

¹¹⁶PROSSER § 59, at 369.

¹¹⁷*See, e.g., Indianapolis Water Co. v. Harold*, 170 Ind. 170, 83 N.E. 993 (1908) (log on canal served beneficial purpose for defendant). *See also* RESTATEMENT (SECOND) OF TORTS § 339(d) (1965). When the risk of danger is great, the probability of presence need not be high. *Cf. Harris v. Indiana Gen. Serv. Co.*, 206 Ind. 351, 189 N.E. 410 (1933). On the other hand, a slight risk of harm when the probability of presence is high will be sufficient. *Cf. Cincinnati & Hammond Spring Co. v. Brown*, 32 Ind. App. 58, 69 N.E. 197 (1903).

care can be applied, the plaintiff must satisfy three arbitrary hurdles that limit the just application of the doctrine. The factors which are first considered as determinants of duty are reconsidered under the issue of whether a duty has been violated. Perhaps in recognition of these shortcomings, Indiana courts have been unwilling to adhere to the doctrine when its application would yield an unjust result. For example, in *Indiana Harbor Belt Railroad v. Jones*,¹¹⁸ the Indiana Supreme Court held the possessor to a duty of due care simply on the basis of the foreseeability of the presence of a child at a place where he was exposed to an unreasonable risk of harm. In *Jones*, an eight year-old boy who was playing in a freight car on defendant's switch track was killed when the freight car door fell upon him. The attractive nuisance doctrine was inapplicable to the facts of the case, so the court set forth another basis of recovery. In sustaining the complaint against a demurrer, the *Jones* court held that the "probable presence of children upon property where a dangerous activity is being carried on imposes a duty of ordinary care upon the owner to anticipate their presence by keeping a lookout for them."¹¹⁹ The court rejected the distinction between "active" and "passive" negligence and applied the same principle to conditions of the land by stating:

[I]f the probable presence of children raises a duty to them of ordinary care, this may be violated before the children arrive by leaving things undone which ought to have been done in anticipation of their coming.

. . .

Whatever duty exists is not absolute but relative. . . . It is just another way of stating that the standard of care is that which would be exercised by an ordinary prudent person under the same or similar circumstances.¹²⁰

The simplicity and forthrightness of *Jones* marked a refreshing departure from the cumbersome duty requirements of the attractive nuisance doctrine. Although *Jones* was once expected to eliminate much confusion in Indiana law,¹²¹ it has been virtually ignored by the courts. Its most recent application of any consequence in the area of premises liability is found in *Neal v.*

¹¹⁸220 Ind. 139, 41 N.E.2d 361 (1942). See also *Cleveland, C.C. & St. L. Ry. v. Means*, 59 Ind. App. 383, 104 N.E. 785 (1914).

¹¹⁹220 Ind. at 145, 41 N.E.2d at 363.

¹²⁰*Id.* at 145-46, 41 N.E.2d at 364.

¹²¹See Harper, *Development in the Law of Torts in Indiana 1940-1945*, 21 IND. L.J. 447, 469 (1946).

*Home Builders, Inc.*¹²² In a somewhat confused opinion, the *Neal* court apparently limited *Jones* to negligent acts other than a failure to keep trespassing children off the premises. This is inconsistent with the flexible approach taken by the *Jones* court. If *Jones* were correctly applied, there would be little need to adhere to the fiction of the attractive nuisance doctrine.

The harsh operation of the attractive nuisance doctrine has also been avoided by resort to the dangerous condition exception to the wilful-wanton rule. In *Wozniczka v. McKean*,¹²³ a five year-old child was injured upon coming in contact with a burning trash container located in the back of defendant's yard. It was not alleged that the child's presence was induced by attraction to the fire, and the child testified that his mother had warned him of the dangers of fire. The trial court granted defendant's motion for summary judgment on the ground that the case did not fall within the attractive nuisance doctrine. Conceding that the child was at best a licensee and possibly a trespasser, the court of appeals reversed and held that a duty of care arises when children and persons *non sui juris* are likely to come in contact with a dangerous force. Although this rule has been inappropriately termed an extension of the attractive nuisance doctrine,¹²⁴ it is clearly distinct in practical application.

III. LICENSEES

A. Licensees and the Wilful-Wanton Rule

A licensee by permission, or a bare licensee, is a person who is present upon the premises of another for his own convenience, curiosity, or entertainment.¹²⁵ He is distinguished from a trespasser only by virtue of the possessor's express or implied consent¹²⁶ or by a privilege conferred by law.¹²⁷ A licensee may be

¹²²232 Ind. 160, 111 N.E.2d 280 (1953).

¹²³144 Ind. App. 471, 247 N.E.2d 215 (1969).

¹²⁴*Neal v. Home Builders, Inc.*, 232 Ind. 160, 172, 111 N.E.2d 280, 287 (1953). In *Terre Haute E. & I. Traction Co. v. Stark*, 74 Ind. App. 669, 127 N.E. 460 (1920), the court specifically held that the dangerous condition rule is not what is termed an "attractive nuisance." *Id.* at 671, 127 N.E. at 461. See also *Harris v. Indiana Gen. Serv. Co.*, 206 Ind. 351, 189 N.E. 410 (1934) ("we doubt if this complaint could be sustained upon what is known as an attractive nuisance"); *Cleveland, C.C. & St. L. Ry. v. Means*, 59 Ind. App. 383, 104 N.E. 785 (1914).

¹²⁵*E.g.*, *Brown v. Kujawa*, 142 Ind. App. 310, 234 N.E.2d 509 (1968).

¹²⁶*Faris v. Hoberg*, 134 Ind. 269, 33 N.E. 1028 (1893).

¹²⁷*Woodruff v. Bowen*, 136 Ind. 431, 34 N.E. 1113 (1893) (fireman).

an invitee who has either exceeded the scope of invitation¹²⁸ or has entered the possessor's premises for a purpose to which public invitation did not extend.¹²⁹ Although the social guest is generally the recipient of an invitation in fact, he is classified as a licensee in Indiana law.¹³⁰

The law in Indiana is unclear as to what constitutes the duty owed by a possessor of land to a licensee. Many of the cases are couched in language equally apt to designate trespassers and licensees.¹³¹ Thus, it is frequently held that the possessor owes the same duty to licensees that he owes to trespassers—he need only refrain from wilful or wanton conduct to escape liability.¹³² As in cases involving trespassers, the wilful-wanton rule has been diluted to approximate a standard of reasonable care under the circumstances when the possessor is engaged in an activity and the licensee's presence is known or may reasonably be expected.¹³³ Additional exceptions to the wilful-wanton rule have evolved to mitigate its harsh operation when justice so requires. These exceptions are applicable to licensees as well as trespassers, and have been considered in the discussion of the duty owed to trespassers. The emphasis here will be placed upon the differences in Indiana law between the duty owed to licensees and that owed to trespassers.

B. *The Duty Owed To Licensees*

In *Fort Wayne National Bank v. Doctor*,¹³⁴ the court of appeals held that the law of negligence is irrelevant to the licensor-licensee relationship in Indiana. As a practical matter, this assertion of the law ignores the realities of the decision-making process. For many years the law of negligence has permeated the licensor-licensee relationship under the guise of the common law rules. As a doctrinal matter, the *Doctor* court reaffirmed the vitality of the common law classification system in the express

¹²⁸PROSSER § 60, at 376.

¹²⁹*East Hill Cemetery Co. v. Thompson*, 53 Ind. App. 417, 97 N.E. 1036 (1912) (person walking through cemetery).

¹³⁰*Fort Wayne Nat'l Bank v. Doctor*, 272 N.E.2d 876 (Ind. Ct. App. 1971).

¹³¹*See, e.g., Pittsburgh, C.C. & St. L. Ry. v. Simmons*, 38 Ind. App. 427, 76 N.E. 883 (1906).

¹³²*E.g., Lingenfelter v. Baltimore & O.S.W. Ry.*, 154 Ind. 49, 55 N.E. 1021 (1900).

¹³³*See* p. 1011 *supra*.

¹³⁴272 N.E.2d 876 (Ind. Ct. App. 1971).

language of Indiana law. Accordingly, Indiana judges must continue to manipulate ancient terminology that was designed to protect feudal notions of land ownership to adequately protect the interest in human safety. An analysis of *Doctor* is highly instructive in revealing the inadequacies of the common law approach. The *Doctor* court examined Indiana law in an effort to ascertain what constituted the duty owed by a possessor to a licensee. Unlike most courts, it recognized that "at this point . . . the law in Indiana becomes snarled."¹³⁵ The decision in *Doctor* exemplifies the conceptual and semantic difficulties inherent in the common law approach. Confused by precedent, the *Doctor* court declined to decide which existing standard was most desirable or what exactly constituted the duty owed by a possessor to a licensee. With little elaboration, the court simply held that in this case the possessor was not liable under any existing standard.¹³⁶ The same result could have been reached by holding the possessor to a standard of reasonable care under the circumstances.

In *Doctor*, plaintiff-administrator brought an action for wrongful death arising out of the decedent's fatal fall down a stairway in defendant's home. The trial court granted summary judgment for the defendant. A primary issue on appeal was whether defendant had breached a duty that she owed to plaintiff. Relying on precedent, the *Doctor* court found that the Indiana Supreme Court had previously adopted at least four different tests to determine whether a possessor had breached a duty owed to a licensee. In *Woodruff v. Bowen*,¹³⁷ the court held that the possessor owed a licensee no duty other than to refrain from a positive wrongful act which may result in injury. Five years later, in *Barman v. Spencer*,¹³⁸ the court held that the possessor's only duty was to refrain from acts which would constitute gross negligence. In *Lingenfelter v. Baltimore & Ohio Southwestern Railway*,¹³⁹ an exception was noted to the general rule of nonliability in that the possessor must not wilfully or wantonly injure a licensee. More recently, in *Pier v. Schultz*,¹⁴⁰ the court held that a com-

¹³⁵*Id.* at 880.

¹³⁶*Id.* at 882.

¹³⁷136 Ind. 431, 34 N.E. 1113 (1893).

¹³⁸49 N.E. 9 (Ind. 1898).

¹³⁹154 Ind. 49, 55 N.E. 1021 (1900).

¹⁴⁰243 Ind. 200, 182 N.E.2d 255 (1962). This is a paraphrase of the holding of *Pier*. The actual holding of the court was as follows:

plaint based on injury to a licensee must contain one of the following allegations to state a cause of action: (1) that the possessor committed a positive act, (2) that the possessor exercised control over an instrumentality, regardless of its character, or (3) that the condition complained of created a situation comparable to entrapment.

The court of appeals, on the other hand, "had begat a new doctrine," which the *Doctor* court concluded "had debauched the principle of wilfulness and wantonness."¹⁴¹ In *Cleveland, Cincinnati, Chicago & St. Louis Railway v. Means*,¹⁴² a case in which duty of care was held to arise from an unreasonable risk of foreseeable harm to children, the court alluded to the phrase "passive negligence" in a general statement of nonliability. With the impetus of this dictum, later courts utilized the phrase to support a finding of nonliability when licensees were injured by mere conditions of the premises.¹⁴³ Although liability for "active negligence" was implicit in these holdings, the active negligence doctrine was not relied upon by counsel until *Olson v. Kushner*.¹⁴⁴ In *Olson*, plaintiff was injured upon falling down a wet and slippery stairway at defendant's home. Plaintiff alleged, among other things, that defendant had provided him with a defective umbrella which would collapse when exposed to air currents. Finding this to be

Since it is not alleged that the instrumentality, of which appellant complains, was of such a character that its presence upon the property of appellees created a condition comparable to entrapment, and since it is not alleged that the appellees, as owners of the property, committed any positive act or exercised any positive control over the instrumentality, regardless of its character, and since it affirmatively appears from the complaint that the person injured was either a trespasser or a mere licensee by permission upon the property of appellees, the complaint does not state facts sufficient to constitute a cause of action *under the general rules of negligence*.

Id. at 204, 182 N.E.2d at 257 (emphasis added). Although the *Pier* court seemingly held that a positive negligent act was sufficient to constitute a cause of action, the *Doctor* court interpreted this holding to require a positive wilful act before recovery would be permitted. 272 N.E.2d at 882.

¹⁴¹272 N.E.2d at 881.

¹⁴²59 Ind. App. 383, 104 N.E. 785 (1914).

¹⁴³*Olson v. Kushner*, 138 Ind. App. 73, 211 N.E.2d 620 (1965); *Millsbaugh v. Northern Ind. Pub. Serv. Co.*, 104 Ind. App. 540, 12 N.E.2d 396 (1938); *Thistlethwaite v. Heck*, 75 Ind. App. 359, 128 N.E. 611 (1920); *East Hill Cemetery Co. v. Thompson*, 53 Ind. App. 417, 97 N.E. 1036 (1912). The *Doctor* court overruled these cases insofar as they applied a standard of active-passive negligence. 272 N.E.2d at 882.

¹⁴⁴138 Ind. App. 73, 211 N.E.2d 620 (1965).

the only allegation of active negligence, the *Olson* court sustained defendant's demurrer to the complaint since it did not allege that defendant knew, or in the exercise of reasonable care should have known, that the umbrella would collapse.

This apparent recognition of the active negligence doctrine by the *Olson* court aligned Indiana with the prevailing view that "as to any active operations which the occupier carries on, there is an obligation to exercise reasonable care for the licensee."¹⁴⁵ The growth of the active negligence doctrine as a mechanism of providing relief from the harsh operation of the common law rules parallels the growth of negligence law generally. At common law, there was a fundamental distinction between misfeasance and nonfeasance.¹⁴⁶ Essential to liability for nonfeasance was a relationship between the parties giving rise to a duty to act.¹⁴⁷ Since the licensee is on the premises for his own convenience, the licensor-licensee relationship is insufficient to support an affirmative duty of care. Absent an obligation to act, the possessor's failure to act cannot be regarded as negligence. Liability for misfeasance, on the other hand, was imposed when one engaged in active conduct injured another.¹⁴⁸ The positive act itself gave rise to a duty of care. Accordingly, courts, disenchanted with the limited duty conferred upon the possessor, were far readier to invoke the law of negligence when an injury arose from active conduct as opposed to a condition of the premises.¹⁴⁹

Rather than simply accept the active negligence doctrine and hold it inapplicable to the facts at hand, the *Doctor* court engaged in "a process of partial disentanglement" in an effort to eliminate confusion from existing law. *Barman* was easily disposed

¹⁴⁵PROSSER § 60, at 379. See also Annot., 49 A.L.R. 778 (1927); Annot., 156 A.L.R. 1226 (1945).

¹⁴⁶See Bohlen, *Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217 (1908).

There is no distinction more deeply rooted in the common law and more fundamental than that between mis-feasance and non-feasance, between active misconduct working positive injury to others and passive inaction, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant.

Id. at 219.

¹⁴⁷PROSSER § 56, at 339.

¹⁴⁸*Id.*

¹⁴⁹See James, *supra* note 27, at 174.

of since degrees of negligence are not recognized in Indiana. *Means* and other cases¹⁵⁰ recognizing the active negligence doctrine were overruled insofar as they applied a standard of active-passive negligence. Such a distinction, the court noted, "is inconsistent with the holdings of our Supreme Court on the same subject, violates the prohibition against degrees of negligence, and created an *undefined negligence doctrine* where no logical basis exists for so doing."¹⁵¹ The basis of this holding has little support. In *Indiana Harbor Belt Railroad v. Jones*,¹⁵² the supreme court also found that no sound basis existed for the distinction between active and passive negligence. However, the *Jones* court did not consider the law of negligence irrelevant to the licensor-licensee relationship. It simply applied a standard of ordinary care under the circumstances. To hold that the active negligence doctrine is undefined disregards the fact that the distinction is applied in numerous jurisdictions¹⁵³ and is recognized by the commentators.¹⁵⁴ The logical basis for applying the doctrine is that it provides relief from the harsh operation of the common law classification system in jurisdictions unwilling to directly confront precedent.

In noting that the active-passive distinction could arguably be said to denote types rather than degrees of negligence, the *Doctor* court advanced the soundest reason for abrogating the active negligence doctrine—"this argument is too fine spun to do anything more than add to the existing confusion in this area of the law."¹⁵⁵ Had the court replaced the doctrine with the standard of reasonable care under the circumstances, as the *Jones* court did, it would have achieved its goal of clarifying Indiana law. Attempted definitions of active and passive conduct have relied heavily on discerning the point in time at which the possessor's activity occurred prior to the injury.¹⁵⁶ On this basis, the difference is simply one of degree which varies infinitely with the cir-

¹⁵⁰See cases cited note 143 *supra*.

¹⁵¹272 N.E.2d at 882.

¹⁵²220 Ind. 139, 41 N.E.2d 361 (1942).

¹⁵³See Annot., 49 A.L.R. 778 (1927); Annot., 156 A.L.R. 1226 (1945).

¹⁵⁴See PROSSER § 60, at 379; James, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 YALE L.J. 605, 610 (1954).

¹⁵⁵272 N.E.2d at 882.

¹⁵⁶See Smith, *Liability of Landowners to Children Entering Without Permission*, 11 HARV. L. REV. 349 (1898):

The first case is that of a known, present and immediate danger, one which is imminent and reasonably certain to result in harm, un-

cumstances. This approach becomes arbitrary when the possessor, by his affirmative conduct, creates a condition which results in injury. For example, in *Lingenfelter v. Baltimore & Ohio Southwestern Railway*,¹⁵⁷ defendant permitted the public as licensees to cross its premises. Defendant obstructed the path with a freight car, and plaintiff, in attempting to go around it, fell into an unguarded pit. Recovery was denied because a licensee cannot "recover for injuries caused by obstructions or pitfalls thereon."¹⁵⁸ On the other hand, in *Midwest Oil Co. v. Storey*,¹⁵⁹ the possessor dug an excavation upon his premises in an area which licensees were in the habit of crossing. Plaintiff, unaware that the change of condition had taken place, fell into the excavation and was severely injured. In finding for the plaintiff, the court held that the possessor was under a duty not to do any *positive act* which would increase the licensee's hazard. In both *Lingenfelter* and *Storey*, the possessor had failed to warn a licensee of a change made in the condition of the premises. Under similar circumstances, different results were reached. The characterization made by the *Storey* court was but an indirect way of requiring the possessor to conduct himself with ordinary care when the presence of licensees was foreseeable and it could reasonably have been anticipated that the change of condition would not be observed. The same result has been reached in similar cases by applying the wilful-wanton rule.¹⁶⁰

less the owner then and there does, or omits to do, some act, the doing or omitting of which would avoid the danger. In the second case the danger may be said to exist chiefly in anticipation. It depends on the course of future events, upon circumstances as yet unknown and fortuitous. In the first case the duty imposed upon the landowner involves simply a temporary, generally only a momentary, interruption of his user In the second case the duty sought to be established is to guard against future dangers. It must frequently involve permanent changes in the mode of user, sometimes necessitating such expense and trouble as would be practically prohibitive of certain modes of user, and in some cases compelling the abandonment of all profitable use.

Id. at 364-65. See also James, *supra* note 27, at 174-75.

¹⁵⁷154 Ind. 49, 55 N.E. 1021 (1900).

¹⁵⁸*Id.* at 52, 55 N.E. at 1022.

¹⁵⁹134 Ind. App. 137, 178 N.E.2d 468 (1961).

¹⁶⁰See *Penso v. McCormick*, 125 Ind. 116, 25 N.E. 156 (1890) (mound of hot embers on lot frequented by licensees); *Graves v. Thomas*, 95 Ind. 361 (1883) (excavation for cellar made upon lot adjoining sidewalk); *Carskaddon v. Mills*, 5 Ind. App. 22, 31 N.E. 559 (1892) (barbed wire fence erected with-

Ostensibly in an effort to avoid the conceptual and semantic difficulties involved in defining active and passive negligence, the *Doctor* court found the law of negligence irrelevant to the licensee-licensor relationship.¹⁶¹ With this accomplished, the court capitulated and set forth its own ambiguous rule in holding that the possessor would only be liable for *action* "which would constitute either a positive wrongful act or wilful or wanton misconduct or conduct which would amount to entrapment."¹⁶² In each of these theories the court found the element of wilfulness and held that the possessor would only be liable when his conduct transcended negligence.¹⁶³

A more logical approach than *Doctor* would have been to resolve the case under the ordinary rules of negligence. The alleged defect in the condition of the stairway was either obvious or was within the knowledge of the decedent.¹⁶⁴ Therefore, the possessor was free to assume that the decedent would take reasonable precautions for her own safety. Whether it be held that the possessor exercised reasonable care in relying upon this assumption, or simply was under no duty to act, the same result is attained. The confusion in this area of Indiana law is not caused by the quantum of standards recognized by the courts. The nature of these standards is the heart of the problem. The arbitrary rules of the common-law classification system have become so embedded in Indiana law that the judges find it easier to manipulate the older concepts than to directly confront precedent. *Pierce v. Walters*,¹⁶⁵ decided one year after *Doctor*, supports this conclusion.

In *Pierce*, the plaintiff, one of fifteen grandchildren visiting defendant's farm, was hiding in tall grass and weeds on a pond dam when he was run over by a truck driven by defendant. The record indicated that the defendant was working on a portion of the premises which was accessible only by crossing the dam, and that he had heard the child being admonished to stay away

out notice over path used by licensees). In permitting recovery, the courts emphasized the foreseeability of grave harm.

¹⁶¹272 N.E.2d at 883.

¹⁶²*Id.*

¹⁶³*Id.* This holding seems contrary to the holding in *Pier*. See note 140 *supra*.

¹⁶⁴The stairway was well lit and the decedent had descended it on numerous occasions. *Id.* at 878.

¹⁶⁵283 N.E.2d 560 (Ind. Ct. App. 1972).

from the dam on the date of the accident. Finding that no material fact existed from which a jury could find that defendant had breached a duty owed to plaintiff, the trial court granted defendant's motion for summary judgment. In reversing the judgment, the court of appeals unequivocally set forth the common law rule that "the only duty of the owner of the property upon which the licensee enters is to refrain from wilfully or intentionally injuring the licensee," and stated that this "law is so well established in this state that it needs no citation of authority."¹⁶⁶ On its face, this statement of the law should have precluded the consideration of the issue of negligence. Indiana courts have long held that "wilfulness and negligence are diametrically opposed."¹⁶⁷ However, the *Pierce* court made it clear that it was holding defendant to a duty of reasonable care under the circumstances. Upon reviewing the evidence, the court found that questions of fact existed as to whether defendant had actual or constructive knowledge of the plaintiff's presence. However, the issues of fact would be immaterial unless a jury could infer that defendant had breached his duty to refrain from wilful or intentional injury. Although the facts in evidence seemed to indicate nothing more than an honest mistake in judgment on the part of the defendant, the trial court's refusal to submit the case to the jury was held to be reversible error. The court held that if the jury were to find that defendant had actual or constructive knowledge of the plaintiff's presence, then its function would be to determine whether defendant had been "wilfully or wantonly negligent."¹⁶⁸ Thus, questions of fact existed as to whether defendant acted as a reasonable and prudent person when he drove his truck across the dam without taking precautions.

The exceptions that have been carved from the wilful-wanton rule have rendered it more a formality than a legal reality. The most significant change that would occur by applying a standard

¹⁶⁶*Id.* at 562.

¹⁶⁷*Barrett v. Cleveland, C.C. & St. L. Ry.*, 48 Ind. App. 668, 96 N.E. 490 (1911); *Stauffer v. Schlegel*, 74 Ind. App. 431, 129 N.E. 44 (1920). "Negligence and wilfulness are incompatible, and the former cannot be to such a degree as to become the latter. . . ." *Id.* at 435, 129 N.E. at 46.

¹⁶⁸283 N.E.2d at 562. Other courts have justly criticized the self-contradictory use of this phrase. "Negligence and wilfulness are as unmixable as oil and water. 'Wilful negligence' is as self-contradictory as 'guilty innocence.'" *Kelly v. Malott*, 135 F. 74, 76 (7th Cir. 1905). Professor Eldredge stated that to "speak of 'wilful negligence' is like talking of a 'black white' object." Eldredge, *Tort Liability to Trespassers*, 12 TEMPLE L.Q. 32, 33 (1937).

of ordinary care to the licensor-licensee relationship would be honesty of expression. The active negligence doctrine has reappeared under *Pierce* by the misnomer of "wilful and wanton negligence." Thus, the possessor is required to conduct his activities with the thought in mind that licensees may be within the zone of danger. The duty of care may require the possessor to maintain a lookout for licensees, a precaution not generally required for the benefit of trespassers.¹⁶⁹ When it is difficult to ascertain whether the licensee has been injured by an activity of the possessor or by a condition of the premises,¹⁷⁰ recovery may be permitted under either the wilful-wanton rule or the positive wrongful act rule. However it is labeled, the true basis for recovery in this instance is the creation of a foreseeable and unreasonable risk of harm without taking reasonable precautions.

The rule that the licensee takes the premises as he finds them has been modified to require the possessor to disclose concealed dangerous conditions that are known to him. Frequently termed the "concealed trap doctrine," the rule reflects a judicial consensus that licensees are at least entitled to equal knowledge of the dangers of the premises.¹⁷¹ The possessor need not warn of known or obvious dangers,¹⁷² and the licensee generally assumes the risk of dangers concealed only by darkness.¹⁷³ The cases indicate an effort on the part of the courts to find known concealed dangers in order to invoke the law of negligence. For example, in *Carrano v. Scheidt*,¹⁷⁴ the plaintiff was injured when she slipped upon a throw rug on a highly polished floor in defendant's home. The trial court granted summary judgment in favor of defendant since plaintiff was a licensee who took all risks as to the condition of the premises. The Seventh Circuit Court of Appeals reversed, holding that under Indiana law "a knowing owner may be held liable for injury to a licensee if the owner does not warn the unwitting licensee of a hidden peril."¹⁷⁵ The backing had worn off the rug after numerous washings, and defendant was previously

¹⁶⁹PROSSER § 60, at 380.

¹⁷⁰See notes 157, 159 *supra* & accompanying text.

¹⁷¹See PROSSER § 60, at 381.

¹⁷²*E.g.*, *Standard Oil Co. v. Meissner*, 102 Ind. App. 552, 200 N.E. 445 (1936).

¹⁷³See *Lingenfelter v. Baltimore & O.S.W. Ry.*, 154 Ind. 49, 55 N.E. 1021 (1900).

¹⁷⁴388 F.2d 45 (7th Cir. 1967).

¹⁷⁵*Id.* at 47.

informed of the dangerous condition. Since the defendant had accompanied the plaintiff to the room prior to the injury, a warning would not have been unduly burdensome. The court held that under these circumstances a jury should be permitted to determine whether defendant had been negligent in failing to warn of the dangerous condition.

C. *The Social Guest*

While persons with whom the possessor maintains a social relationship are commonly "invited" to enter his premises, Indiana law classifies the social guest as a licensee.¹⁷⁶ The purpose of the social guest's visit is to confer social rather than economic benefit upon the possessor, and this is insufficient to satisfy the present tests of invitee status.¹⁷⁷ A social guest cannot elevate his status by performing gratuitous tasks for his host.¹⁷⁸ The reason advanced by the courts for denying the social guest the preferred status of invitee is that he cannot and does not expect to be treated any differently than a member of the host's family.¹⁷⁹ Rather than determining the expectations of the parties as a matter of law, it would be more reasonable to determine the duty of care required on a case-by-case basis. Suits by social guests against their hosts did not arise in Indiana until the past decade.¹⁸⁰ Professor James has attributed the similar national trend to the fact that a host is usually in no better financial position to bear the loss than the guest.¹⁸¹ However, the recent availability of inexpensive liability insurance has emerged as an important reason for eliminating the immunity of the host.¹⁸² Moreover, holding the possessor liable for injuries suffered by social guests on property not reasonably safe places the incentive for precaution upon the party best suited to prevent accidents.

¹⁷⁶Fort Wayne Nat'l Bank v. Doctor, 272 N.E.2d 876 (Ind. Ct. App. 1971); Brown v. Kujawa, 142 Ind. App. 310, 234 N.E.2d 509 (1968); Olson v. Kushner, 138 Ind. App. 73, 211 N.E.2d 620 (1965).

¹⁷⁷See note 183 *infra* & accompanying text.

¹⁷⁸Fort Wayne Nat'l Bank v. Doctor, 272 N.E.2d 876, 883 (Ind. Ct. App. 1971).

¹⁷⁹See *id.* at 880.

¹⁸⁰The social guest was not classified as a licensee in Indiana until 1965. See Olson v. Kushner, 138 Ind. App. 73, 75, 211 N.E.2d 620, 621 (1965).

¹⁸¹James, *supra* note 154, at 611-12.

¹⁸²See Comment, *Status of the Social Guest: A New Look*, 7 WM. & MARY L. REV. 313, 319 (1966).

IV. INVITEES

A. *The Tests of Invitee Status*

In determining whether an entrant is entitled to the status of invitee most courts apply one or both of two tests: "economic benefit" and/or "public invitation."¹⁸³ While the satisfaction of either test yields the same result—an affirmative duty to make the premises safe for the invitee's reception—the rationales relied upon for imposing this obligation are distinctly different. The economic benefit test proceeds upon the assumption that the duty to make the premises safe is assumed by the possessor only in return for some consideration or benefit.¹⁸⁴ This duty of care is "the price he must pay for the benefit, present or prospective, to be derived from the visitor's presence."¹⁸⁵ To satisfy this test, the possessor must have a real or potential pecuniary interest in the visitor's presence, and the purpose of the visit must be to confer such a benefit. The public invitation test, on the other hand, derives the basis of duty from the invitation itself, and the assurance that it carries, rather than from a bargained for exchange. The rationale behind this test is that when one expressly or impliedly invites the public to enter his land or parts thereof, he impliedly represents that reasonable care has been exercised to make it safe for public reception.¹⁸⁶ The duty is limited to members of the public who use the land for the purpose for which it was opened.¹⁸⁷ The accrual of economic benefit automatically qualifies the entrant as an invitee under the public invitation

¹⁸³PROSSER § 61, at 389; James, *supra* note 154, at 612-14; Comment, *supra* note 11, at 163.

¹⁸⁴Bohlen, *The Basis of Affirmative Obligations in the Law of Tort*, 53 U. PA. L. REV. 209, 337 (1905). Professor Bohlen was perhaps the leading proponent of the economic benefit test. As Reporter for the first *Restatement*, Bohlen no doubt influenced its exclusive adoption of the economic benefit test. RESTATEMENT OF TORTS § 332 (1934).

¹⁸⁵PROSSER § 61, at 386.

¹⁸⁶For an exhaustive analysis of the rationale and history of the public invitation test, see Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573 (1942). Prosser traced the origin of both tests to the English case of *Parnaby v. Lancaster Canal Co.*, 11 Ad. & El. (1839). See also Comment, *supra* note 11, at 163.

¹⁸⁷See, e.g., *East Hill Cemetery Co. v. Thompson*, 53 Ind. App. 417, 97 N.E. 1036 (1912) (person walking through cemetery for purpose other than paying respect to the dead classified as licensee). The purpose for which the premises were opened is viewed objectively. See James, *supra* note 154, at 618-19.

test.¹⁸⁸ An invitation requires more than consent, and the circumstances must be such as would lead a reasonable man to believe that his presence is welcome—not just tolerated.¹⁸⁹ While an invitation is an essential element of each test, it alone is insufficient to give rise to a duty of care. The social guest, while clearly invited, is considered a licensee by the great majority of jurisdictions.¹⁹⁰ His invitation is generally a private one, and his relationship with the possessor is one of social rather than pecuniary interest.

The economic benefit test has been expressly recognized by Indiana courts, and its scope modified to include common interest and mutual benefit as factors giving rise to a duty of care.¹⁹¹ Many of the recent cases contain language which, arguably, recognizes the economic benefit test as the sole determinant of invitee status.¹⁹² If a technical invitation can only be found on the basis of the economic benefit test, the application of the rule poses several problems. First, exclusive reliance upon economic benefit cannot be reconciled with precedent. Dean Prosser convincingly demonstrated that public invitation was the first test of invitee status recognized by the common-law courts.¹⁹³ As applied to the develop-

¹⁸⁸See Comment, *supra* note 11, at 163.

¹⁸⁹Prosser, *supra* note 186, at 586.

¹⁹⁰*E.g.*, Olson v. Kushner, 138 Ind. App. 73, 211 N.E.2d 620 (1965).

¹⁹¹*E.g.*, Beaning v. South Bend Elec. Co., 45 Ind. App. 261, 90 N.E. 786 (1910) (utility companies and city had common interest in having employee of city repair defective wires on utility pole). Common interest generally is interpreted to mean common pecuniary interest. See, *e.g.*, Verplank v. Commercial Bank, 145 Ind. App. 324, 251 N.E.2d 52 (1969).

¹⁹²Only two recent cases have used language which suggests that public invitation may be a legitimate determinant of invitee status. See Rust v. Watson, 141 Ind. App. 59, 217 N.E.2d 859 (1966) (area occupied by public as invitees); New York Cent. R.R. v. Wyatt, 135 Ind. App. 205, 184 N.E.2d 657 (1962) (person crossing railroad tracks while making delivery to distillery).

¹⁹³Prosser, *supra* note 186. Prosser's article appeared at a time during which the economic benefit test was considered the only test of invitee status by most commentators. See R. CAMPBELL, LAW OF NEGLIGENCE, 29-30 (1871); F. HARPER, LAW OF TORTS § 98 (1933); J. SALMOND, LAW OF TORTS § 162 (11th ed. 1953); Bohlen, *The Basis of Affirmative Obligations in the Law of Tort*, 53 U. PA. L. REV. 239, 337 (1905). The first *Restatement* also adopted this approach. RESTATEMENT OF TORTS § 332 (1934).

After an exhaustive analysis of the case law, Prosser concluded that the "Restatement of the Law of Torts is wrong." Prosser, *supra* note 186, at 612. Prosser later became Reporter for the second *Restatement* and the pub-

ment of a test in Indiana, Prosser's analysis seems significantly on point. An examination of early Indiana cases indicates that economic benefit received little or no mention. For example, in *Howe v. Ohmart*,¹⁹⁴ a person attending a free college literary society meeting was deemed an invitee without reference to potential pecuniary gain. Had the *Howe* court applied the economic benefit test, it is doubtful that the plaintiff would have recovered. When economic benefit was considered by the courts, it was primarily in dicta and was referred to simply because its presence gave rise to the inference of an invitation.¹⁹⁵ The prime concern of most courts was whether a representation of safety could be inferred from the circumstances surrounding the invitation.¹⁹⁶ Support for this conclusion can readily be found in *Lake Erie & Western Railroad v. Fleming*,¹⁹⁷ wherein the Indiana Supreme Court held:

[I]f mutuality of interest is one of the essential facts from which to infer an invitation, then it sufficiently appears But this court has expressly denied the doctrine which prevails in some jurisdictions that mutual advantage must appear before an invitation can be implied. . . .¹⁹⁸

Despite this clear statement of authority, Indiana courts began to insist that some form of pecuniary advantage or common interest be shown before the status of invitee would be conferred.¹⁹⁹

lic invitation test was incorporated as a determinant of invitee status. RESTATEMENT (SECOND) OF TORTS § 332 (1965).

¹⁹⁴7 Ind. App. 32, 33 N.E. 466 (1893).

¹⁹⁵See, e.g., *Baltimore & O.S.W. Ry. v. Slaughter*, 167 Ind. 330, 79 N.E. 186 (1906); *Pittsburgh, C.C. & St. L. Ry. v. Simons*, 168 Ind. 333, 79 N.E. 911 (1907); *Bartholomew v. Grimes*, 51 Ind. App. 614, 100 N.E. 12 (1912). In one case, the plaintiff argued both theories of status determination, but the court held that he could not recover under either theory since he was injured by a known and appreciated risk. *Clark v. City of Huntington*, 74 Ind. App. 437, 127 N.E. 301 (1920).

¹⁹⁶See, e.g., *Indiana, B. & W. Ry. v. Barnhart*, 115 Ind. 399, 16 N.E. 121 (1888) (without mention of economic benefit the court found invitation by enticement and inducement).

¹⁹⁷183 Ind. 511, 109 N.E. 753 (1915).

¹⁹⁸*Id.* at 519-20, 109 N.E. at 756.

¹⁹⁹Prosser has concluded that the notion the economic benefit test is exclusive originated in the minds of a long forgotten treatise writer, Robert Campbell. Prosser, *supra* note 186, at 583. R. CAMPBELL, *LAW OF NEGLIGENCE* (2d ed. 1878) was a popular authority for the test in some early Indiana

The exclusive reliance upon the economic benefit test has caused Indiana courts to attenuate the concept of economic benefit to unreasonable extremes. A child accompanying a parent to a store²⁰⁰ or a person waiting at a railroad depot for a friend²⁰¹ can hardly be said to have conferred a real pecuniary benefit upon the possessor. Persons crossing railroad tracks at a particular point have been found to have conferred economic benefit upon the railroad because the railroad was saved the expense of providing public crossings.²⁰² Similarly, the guest of a social club president²⁰³ and a mourner at a funeral service²⁰⁴ have been held to qualify as invitees. It seems that in these situations the potential economic benefit is negligible or nonexistent, and the public invitation test would more appropriately apply. However, the economic benefit test more legitimately explains an entrant's status when a private invitation has been extended. In this instance, the affirmative duty of care cannot be based upon a broad representation to the public that the premises are in safe condition. The courts must look to the terms of the invitation rather than the fact of invitation to imply a representation of safety. Thus, the personal relationship between the entrant and possessor and the circumstances under which the invitation was extended are of great significance.²⁰⁵ Employees of the possessor²⁰⁶ and persons invited upon the premises to make repairs²⁰⁷ easily qualify as invitees on this basis.

Both theories of status determination readily explain the entrant's status of invitee when the possessor has held his premises open to the public with the expectation of deriving pecuniary

cases. *See* Cleveland, C.C. & St. L. Ry. v. Powers, 173 Ind. 105, 88 N.E. 1073 (1909); East Hill Cemetery Co. v. Thompson, 53 Ind. App. 417, 97 N.E. 1036 (1912).

²⁰⁰L.S. Ayres & Co. v. Hicks, 220 Ind. 86, 40 N.E.2d 334 (1942).

²⁰¹New York, C. & St. L. Ry. v. Mushrush, 11 Ind. App. 192, 37 N.E. 954 (1894).

²⁰²Pittsburgh, C.C. & St. L. Ry. v. Simons, 168 Ind. 333, 79 N.E. 911 (1907).

²⁰³Rush v. Hunziker, 216 Ind. 529, 24 N.E.2d 931 (1940).

²⁰⁴Hickey v. Shoemaker, 132 Ind. App. 136, 167 N.E.2d 487 (1960).

²⁰⁵Prosser, *supra* note 186, at 602.

²⁰⁶*See, e.g.*, Tyler v. Nolen, 144 Ind. App. 665, 248 N.E.2d 186 (1969) (maid).

²⁰⁷*See, e.g.*, Rink v. Lowry, 38 Ind. App. 132, 77 N.E. 967 (1906) (person invited to repair telephone injured while inside elevator shaft).

gain.²⁰⁸ This is the most common situation encountered by the courts, and perhaps explains why Indiana courts seem content to ignore the public invitation test. However, the status of invitee has been conferred upon persons whose presence cannot reasonably be accounted for under either test. For example, in *Hollowell v. Greenfield*,²⁰⁹ an eleven year-old boy was injured at his father's place of employment while playing with a machine. Recognizing that the line between the status of invitee and licensee is often difficult to draw, the court held that the jury could properly have found the child to be an invitee. In so holding, the court paid particular attention to the fact that the boy's father had occasionally paid him twenty-five cents for his assistance, and the fact that the father's employer had observed the boy either playing or working on at least four previous occasions. Under existing case law,²¹⁰ however, the mere rendering of minor services for the benefit of the possessor should not have been sufficient to elevate his status from that of licensee to invitee. Only by attenuating the economic benefit test could the court deem negligence a relevant consideration.

Under either the economic benefit test or the public invitation test the purpose of the entrant's visit is determinative of duty.²¹¹ Accordingly, the courts have placed great emphasis upon the entrant's state of mind at the time of injury. *Standard Oil Co. v. Scoville*²¹² presents a striking example of how a shift in mental attitude affects liability. The plaintiff had paid his fuel bill at defendant's office and was walking to defendant's parking lot when he decided to return inside to discuss a personal matter. Upon leaving the building for the second time he slipped while descending a wet and muddy stairway and was injured. Although he had never left defendant's premises, recovery was denied for want of duty. Conceding that the plaintiff was an invitee the first time he walked down the stairs, the court held that when he returned inside for the second time he was a mere licensee. By

²⁰⁸See, e.g., *Robertson Bros. Dep't Store v. Stanley*, 228 Ind. 372, 90 N.E.2d 809 (1950); Comment, *supra* note 11, at 164-65.

²⁰⁹142 Ind. App. 344, 216 N.E.2d 537 (1966).

²¹⁰*Fort Wayne Nat'l Bank v. Doctor*, 272 N.E.2d 876 (Ind. Ct. App. 1971).

²¹¹See, e.g., *Standard Oil Co. v. Henninger*, 100 Ind. App. 674, 196 N.E. 706 (1935); *East Hill Cemetery Co. v. Thompson*, 53 Ind. App. 417, 97 N.E. 1036 (1912).

²¹²132 Ind. App. 521, 175 N.E.2d 711 (1961). See Annot., 32 A.L.R.3d 496 (1970).

placing such emphasis on the entrant's subjective state of mind, the unscrupulous plaintiff is encouraged to fabricate, *ex post facto*, a purpose sufficient to withstand a status determination.²¹³ Moreover, it obfuscates the real issues that should be considered in permitting or denying recovery.

Although the formal pronouncement of the public invitation test as a valid determinant of duty would eliminate a great deal of confusion in Indiana law, this approach is not wholly satisfactory. The common-law classification system is already replete with arbitrary rules of status determination that the courts often must misinterpret to reach a just result. Only by abrogating the common-law classification system and replacing it with the standard of ordinary care, would the courts have a workable approach which would permit factual variations to be placed in their proper perspectives. The factors of economic benefit, public invitation, and purpose of entrance would retain their importance. The basic difference under a negligence framework would be that these factors would no longer determine whether the issue of negligence would even be reached. The foreseeability of harm, the gravity of potential harm, and the burden of taking precautions would receive due consideration. If the real basis of duty is the reasonable expectations of the parties, their actual expectations are more logically considered on a case-by-case basis.

B. The Duty Owed to Invitees

Once an entrant attains the status of invitee, he is entitled to assume that the possessor has exercised reasonable care to make the premises safe for his reception.²¹⁴ The duty owed by the possessor is simply one of reasonable care under the circumstances. The various rules that have developed in this area are but specific

²¹³PROSSER § 61, at 387. In *Standard Oil Co. v. Henninger*, 100 Ind. App. 674, 196 N.E. 706 (1935), plaintiff was injured while searching for a toilet at a gasoline station. The complaint alleged that plaintiff was an invitee on the ground that defendant induced his customers to enter by advertising free maps and toilet facilities. The whole trial was conducted upon this theory. However, plaintiff's attorney failed to introduce evidence supporting this allegation. Instead, he introduced evidence that plaintiff decided to buy gasoline from the defendant prior to the injury. Recovery was denied. The case could have been sound authority in Indiana for the public invitation test had not plaintiff's attorney relied solely upon an alleged change of mind in an effort to fit the facts of the case to the economic benefit test.

²¹⁴*Robertson Bros. Dep't Store v. Stanley*, 228 Ind. 372, 90 N.E.2d 809 (1950).

clarifications of this standard.²¹⁵ Since one ground for imposing the duty of care is the possessor's superior knowledge of the premises,²¹⁶ he must have actual or constructive knowledge that the premises are unsafe before he can be held liable for his negligence.²¹⁷ The possessor is required to anticipate which parts of the premises will be traversed both incidentally and necessarily by an invitee acting within the purpose and scope of the invitation.²¹⁸ The duty extends to all such areas, and the possessor must make them accessible by providing a safe and suitable means of ingress and egress.²¹⁹ The duty of care is an active and continuous one.²²⁰ Accordingly, the possessor is affirmatively bound to make such inspections as a reasonable and prudent man would make to discover defects of which he is unaware.²²¹ The duty of inspection arises from the possessor's knowledge of possible defects and their reasonable probability,²²² and he will be charged with such knowledge if either he or his agents could have discovered the defect in the exercise of reasonable care.²²³ The emphasis here is on reasonableness, and in the absence of notice the possessor need not make inspections of a minute character to discover latent defects.²²⁴ However, the continued use of an object over a long period of

²¹⁵*Rust v. Watson*, 141 Ind. App. 59, 217 N.E.2d 859 (1966) (duty to inspect is further clarification of the standard of reasonable care under the circumstances).

²¹⁶*See, e.g., Clark v. City of Huntington*, 74 Ind. App. 437, 127 N.E. 301 (1920).

²¹⁷*E.g., Great A. & P. Tea Co. v. Custin*, 214 Ind. 54, 13 N.E.2d 542 (1938); *Kroger Co. v. Troy*, 122 Ind. App. 381, 105 N.E.2d 174 (1952).

²¹⁸*E.g., Silvestro v. Walz*, 222 Ind. 163, 51 N.E.2d 629 (1943). *But cf. Standard Oil Co. v. Henninger*, 100 Ind. App. 674, 196 N.E. 706 (1935).

²¹⁹*E.g., F.W. Woolworth Co. v. Moore*, 221 Ind. 490, 48 N.E.2d 644 (1943) (stairway); *Verplank v. Commercial Bank*, 145 Ind. App. 324, 251 N.E.2d 52 (1969) (sidewalk).

²²⁰*E.g., Robertson Bros. Dep't Store v. Stanley*, 228 Ind. 372, 90 N.E.2d 809 (1950).

²²¹*Id.*; *F.W. Woolworth Co. v. Moore*, 221 Ind. 490, 48 N.E.2d 644 (1943).

²²²*Evansville Am. Legion Home Ass'n v. White*, 239 Ind. 138, 154 N.E.2d 109 (1958).

²²³*E.g., Robertson Bros. Dep't Store v. Stanley*, 228 Ind. 372, 90 N.E.2d 809 (1950).

²²⁴*Evansville Am. Legion Home Ass'n v. White*, 239 Ind. 138, 154 N.E.2d 109 (1958) (defective chair).

time may in and of itself be sufficient to constitute notice that a defect exists.²²⁵

Even if a diligent search would not have disclosed the dangerous condition, the possessor will be charged with knowledge of its existence if it was created or permitted to exist by him or by persons under his control.²²⁶ If the condition was created by third parties not under his control, he will be subject to liability only if he knows of the condition or could have known of it in the exercise of reasonable care.²²⁷ In determining whether a reasonable inspection would have disclosed the condition, the courts will consider the character of the condition and the length of time it has been in existence. For example, in *Vaughn v. National Tea Co.*,²²⁸ the plaintiff slipped on a lettuce leaf while shopping at defendant's store. Defendant argued on appeal that the evidence presented at trial was insufficient to show that he had breached a duty owed to plaintiff. Although there was no evidence showing that defendant had actual knowledge of the condition, the appellate court held that a jury could properly find that he had constructive knowledge of it. The lettuce leaf was shown to have been discolored and rotten at the time of the injury, which gave rise to the inference that it had been on the floor long enough to impose a duty upon the defendant to discover and remove it.

Since the rules of negligence are determinative of liability, the possessor is not an insurer of the invitee's safety.²²⁹ While he may place his own terms upon the invitation, the invitee is entitled to full and open disclosure of these terms. The possessor may generally assume that the fully informed invitee will take precautions for his own safety.²³⁰ Accordingly, a warning will generally

²²⁵*Rust v. Watson*, 141 Ind. App. 59, 217 N.E.2d 859 (1966) (cable for lowering chandelier used thirty-four years). *But see Clark Fruit Co. v. Stephan*, 91 Ind. App. 152, 170 N.E. 558 (1930) (elevator gate).

²²⁶*E.g.*, *William Laurie Constr. Co. v. McCullough*, 174 Ind. 477, 90 N.E. 1014 (1910) (oiled floor); *Thompson v. F.W. Woolworth Co.*, 100 Ind. App. 386, 192 N.E. 893 (1934) (obstructed aisle).

²²⁷*E.g.*, *Kroger Co. v. Ward*, 148 Ind. App. 399, 267 N.E.2d 189 (1971) (customers tracked water from parking lot into store).

²²⁸328 F.2d 128 (7th Cir. 1964).

²²⁹*E.g.*, *Great A. & P. Tea Co. v. Custin*, 214 Ind. 54, 13 N.E.2d 542 (1938).

²³⁰*Cf. Gwaltney Drilling, Inc. v. McKee*, 148 Ind. App. 1, 259 N.E.2d 710 (1970).

be sufficient to fulfill the duty of care.²³¹ A warning may not even be necessary if the dangerous condition is known or is likely to be obvious to the invitee.²³² If, however, a warning is likely to go unheeded,²³³ or if the condition is of such a nature that it cannot be encountered with reasonable safety even if known and appreciated,²³⁴ greater care than a warning is required.

Generally, the possessor is liable only for his own negligence and the negligence of his agents.²³⁵ However, he may be negligent in failing to exercise reasonable care to protect the invitee from the negligent or intentional acts of the third parties not under his control whom he knowingly permits upon the premises.²³⁶ He is bound to control or expel such persons if through his past experience or present observation he has reason to believe that they present an unreasonable risk of harm to the invitee.²³⁷ He will not be liable if he could not reasonably have anticipated or guarded against such harm's occurring.²³⁸

Courts frequently fall into the trap of erecting rigid rules on the basis of one particular circumstance rather than following the basic principle of reasonable care under all circumstances. In the recent case of *Hammond v. Allegretti*,²³⁹ the Indiana Supreme Court renounced this practice by reversing a line of appellate court decisions²⁴⁰ which held that the possessor owed no duty as

²³¹PROSSER § 61, at 394.

²³²*Cf.* *Christmas v. Christmas*, 305 N.E.2d 893 (Ind. Ct. App. 1974).

²³³*Kroger Co. v. Ward*, 148 Ind. App. 399, 267 N.E.2d 189 (1971) (signs warning of wet floor at store entrance held to be insufficient to satisfy duty of reasonable care under the circumstances).

²³⁴*See Hickey v. Shoemaker*, 132 Ind. App. 136, 167 N.E.2d 487 (1960) (ice at entrance to funeral home).

²³⁵*E.g.*, *Glen Park Democratic Club, Inc. v. Kylsa*, 139 Ind. App. 393, 213 N.E.2d 812 (1966).

²³⁶*Id.* (hotel owner owed duty of reasonable care to protect patrons from injury and insult at the hands of irresponsible persons whom he knowingly permitted on premises).

²³⁷PROSSER § 61, at 395.

²³⁸*Yingst v. Pratt*, 139 Ind. App. 695, 220 N.E.2d 276 (1966) (tavern owner justified in using force to repel robber and not liable for failure to exercise reasonable care).

²³⁹311 N.E.2d 821 (Ind. 1974).

²⁴⁰*Hammond v. Allegretti*, 288 N.E.2d 197 (Ind. Ct. App. 1972); *Kalicki v. Beacon Bowl, Inc.*, 143 Ind. App. 132, 238 N.E.2d 673 (1968). *See also*

a matter of law to remove natural accumulations of ice and snow from private parking lots. The *Hammond* court found that such a rule unjustifiably diluted well established tort principles, and the presence of such conditions should in no way diminish the duty of reasonable care.²⁴¹ What is reasonable in one situation may be unreasonable in another, and ultimate liability is a matter separate and distinct from the existence of a legal duty. Thus, the court emphasized that its holding should not be construed as an inflexible rule requiring the immediate removal of ice and snow.²⁴² The trier of fact must consider the vast range of evidence in arriving at a determination of liability or nonliability. The duty of ordinary care does not subject the possessor to strict liability. Recovery will be denied if the invitee is injured while outside the scope of his invitation²⁴³ or while carrying out a purpose of his own.²⁴⁴ As in negligence actions generally, contributory negligence²⁴⁵ and incurred risk²⁴⁶ are valid defenses. Unreasonable burdens are not imposed upon the possessor, and the burden of precaution must be equitable and reasonable in light of foreseeable risks of harm.²⁴⁷

Indiana judges have experienced little difficulty in applying the standard of ordinary care to find specific duties owed to an invitee. The standard was designed to accommodate an infinite variety of factual settings. The desirability of using the standard of ordinary care is easily seen by comparing the clarity of Indiana law as to what duties are owed to invitees with the confusion in the law regarding duties owed to licensees and trespassers. However, the present approach requires that a cumbersome status

Boss-Harrison Hotel Co. v. Barnard, 148 Ind. App. 406, 266 N.E.2d 810 (1971); *Halkias v. Gary Nat'l Bank*, 142 Ind. App. 329, 234 N.E.2d 652 (1968).

²⁴¹311 N.E.2d at 826-28.

²⁴²*Id.* at 826.

²⁴³*See Thistlethwaite v. Heck*, 75 Ind. App. 359, 128 N.E. 611 (1920).

²⁴⁴*See Standard Oil Co. v. Scoville*, 132 Ind. App. 521, 175 N.E.2d 711 (1961) (person entering defendant's place of business to discuss personal problem).

²⁴⁵*E.g.*, *Standard Oil Co. v. Meissner*, 102 Ind. App. 552, 200 N.E. 445 (1936). Assumption of risk is also a defense. *See Tyler v. Nolan*, 144 Ind. App. 665, 248 N.E.2d 186 (1969).

²⁴⁶*See Christmas v. Christmas*, 305 N.E.2d 893 (Ind. Ct. App. 1974).

²⁴⁷311 N.E.2d at 826. *See also Hickey v. Shoemaker*, 132 Ind. App. 136, 167 N.E.2d 487 (1960) (accumulation of ice at entrance to funeral parlor).

determination be made before the rules of negligence are permitted to operate. The public invitation test and the economic benefit test seem to be nothing more than legal fictions utilized to measure the reasonable expectations of the parties. The expectations of parties are more logically considered with the factual issues of foreseeability of harm, the burden of taking precautions, and other negligence considerations than with legal questions of status. The flexibility of the negligence formula is unnecessarily impeded by requiring that a status determination be made.

V. THE IMPLICATIONS OF THE NEGLIGENCE APPROACH

The duty of care owed by the possessor to an entrant is best determined on the basis of ordinary care in light of the circumstances. In reiteration, five basic arguments point strongly in favor of the abrogation of the common law classification system: (1) the policy rationale behind the common law system is no longer relevant to modern society,²⁴⁸ (2) the negligence formula is a flexible vehicle for a fair determination of liability since it permits the determination of liability to be made on the basis of community standards,²⁴⁹ (3) meritorious claims will no longer be denied solely on the basis of the entrant's status and more cases of this nature will progress beyond the pleading stage,²⁵⁰ (4) the judicial waste involved in a preliminary status determination which serves to obscure rather than illuminate the issues worthy of scrutiny in a given case will be mitigated,²⁵¹ and (5) the confusion and the inconsistencies incident to judicial implementation of the common law system will to a large extent be eliminated.²⁵²

However, new problems of policy and law may be expected to arise with the implementation of the negligence approach. It has been suggested that actuarial realities may dictate a cost increase of landowner's insurance premiums.²⁵³ Such an objection may be made to any expansion of the scope of tort liability, and should in no way diminish the desirability of the negligence ap-

²⁴⁸See *Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97, 101 (D.C. Cir. 1972). Hughes, *Duties To Trespassers*, 68 YALE L.J. 633, 694 (1969).

²⁴⁹*Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97, 102 (D.C. Cir. 1972).

²⁵⁰See, e.g., 25 VAND. L. REV. 623, 636 (1972).

²⁵¹See, e.g., *id.* at 634.

²⁵²See, e.g., *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); 25 VAND. L. REV. 623, 635 (1972).

²⁵³25 VAND. L. REV. 623, 635 (1972).

proach in the area of premises liability. Society is largely predicated upon the allocation of burdens and responsibilities among its members,²⁵⁴ and insurance is a viable means of transferring the risks incident to such burdens at a moderate cost.²⁵⁵ The increase in the number of collusive claims has also been deemed an unfortunate potential consequence of the abrogation of the common law system.²⁵⁶ However, this possibility exists under any standard of care, and is more appropriately dealt with by the criminal law than the law of premises liability.²⁵⁷

Perhaps the most difficult task that the courts will encounter in utilizing the negligence approach is the formulation of instructions which determine the extent to which the status of the entrant should bear upon the issue of liability. The negligence standard could readily be subverted by judicial reinstatement of the common-law rules through jury instructions which overly emphasize the character of entry.²⁵⁸ The major decisions²⁵⁹ which abrogated the common-law system have offered little insight as to how much weight would be given to the character of entry. It would seem, however, that the standard of care previously owed to invitees would be owed to entrants generally.²⁶⁰ Three principles have been offered to facilitate the just application of the general rules of negligence to premises liability cases.²⁶¹ First, the circumstances

²⁵⁴Hammond v. Allegretti, 311 N.E.2d 821, 826 (Ind. 1974).

²⁵⁵In a concurring opinion in *Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97, 107 (D.C. Cir. 1972), Judge Leventhal advocated that the common-law system be abolished only with regard to entrants upon the property of a business establishment. A primary rationale behind this approach is that business establishments can distribute the burden of liability through insurance or self insurance by spreading the loss among its customers. For a criticism of Judge Leventhal's approach, see Comment, *Smith v. Arbaugh's Restaurant, Inc., and the Invitee-Licensesee-Trespasser Distinction*, 121 U. PA. L. REV. 378 (1972).

²⁵⁶See Comment, *supra* note 255, at 384-85; 25 VAND. L. REV. 623, 637 (1972).

²⁵⁷See Comment, *supra* note 255, at 385.

²⁵⁸See 25 VAND. L. REV. 623, 638 (1972).

²⁵⁹See *Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97 (D.C. Cir. 1972); *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); *Mile High Fence Co. v. Radovich*, 489 P.2d 308 (Colo. 1971); *Pickard v. City of Honolulu*, 452 P.2d 445 (Hawaii 1969).

²⁶⁰The jury instructions suggested by the court in *Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97, 106 (D.C. Cir. 1972), were instructions previously used to define the duty of care owed to invitees.

²⁶¹See Comment, *supra* note 255, at 385-87.

of entry will generally bear a relation to the foreseeability of an entrant's presence. This should be balanced with the foreseeable risk of harm and the burden of taking precautions in determining whether the possessor exercised reasonable care.²⁶² Secondly, what is a reasonable burden upon one possessor might be an unreasonable burden upon another, and the law of negligence should allocate burdens fairly and equitably. Thirdly, the possessor may continue to assume that trespassers and licensees who should realize that their presence is unknown and unforeseeable will exercise reasonable care for their own safety. By adhering to these principles, courts will impose liability only when the possessor acted unreasonably, and the interest in human safety will be considered as well as the interest in the free and open use of one's land.

VI. CONCLUSION

The common-law classification system enjoys continued formal acceptance by Indiana courts. On the other hand, the mores of modern society demand that current policy factors receive greater consideration than is possible by rigidly adhering to the common law rules. The result is a gulf between judicial thought and judicial expression.²⁶³ The courts have created exceptions, resorted to fictions, and misapplied existing doctrines to mitigate the harsh operation of the classification system. The results achieved by this process fairly approximate the results that would be achieved by holding the possessor to a standard of due care. However, the continued use of fictions requires that inquiries be made that have little relevance to the vital policy considerations of the day, and on occasion arbitrary and harsh results are attained. The misapplication of existing doctrine and the creation of exceptions thereto breeds confusion and complexity in the law

²⁶²See *Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97, 105-06 (D.C. Cir. 1972).

²⁶³Professor Eldredge has aptly depicted the effect of the gulf between thought and expression:

[A] developing law of negligence has battered continually at the gates guarding the immunities of possessors of land. Compromise after compromise has been effected between the social value of human life and the social value of the unrestricted use of land. The last chapter is not yet written. . . . In studying the cases the trouble too frequently is in the difference between what the courts say and what they decide. Too often the terminology is still in eighteenth or nineteenth century phrasing.

Eldredge, *Tort Liability to Trespassers*, 12 TEMP. L.Q. 32, 34 (1937).

without accomplishing a workable approach to determining the duty of care owed by the possessor. A more rational method of imposing or denying liability in the area of premises liability is needed in Indiana law. The most rational method at the disposal of the courts is the application of the general rules of negligence.²⁶⁴ There are no policy reasons in existence today which justify the exemption of the landowner from the standard of care demanded of enterprises generally.²⁶⁵

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²⁶⁴If Indiana courts are reluctant to make such a doctrinal departure from existing law, a second alternative exists. The *Restatement of Torts* provides a coherent body of law which approximates the standard of ordinary care in determining the duty owed by the possessor. See RESTATEMENT (SECOND) OF TORTS §§ 328E-62 (1965). However, the adoption of the *Restatement* approach would tend to perpetuate rather than eliminate adherence to the ancient terminology of the common law system. On this basis, the *Restatement* approach has been justly criticized. See Hughes, *Duties to Trespassers*, 68 YALE L.J. 633, 648-49 (1959).

²⁶⁵See James, *supra* note 27, at 153.