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Licensee, Invitee and Trespasser: Archaic Classes?

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the criminal act, and a principal in the second degree being one who, while actually or constructively present, aids or abets the commission of the act but does not himself commit it. It was thus the element of presence or absence which effectively determined whether a given party was to be classified as a principal or as an accessory under the common law. Historically, this accessory-principal distinction benefited those charged as accessories in several ways: (1) accessories were distinguished as such in the indictment and were therefore given notice of the nature and seriousness of the charges against them, (2) accessories, in most cases, were allowed the benefit of clergy and (3) accessories could not be tried until after the principal was convicted.

Although Mrs. Williamson's contention that she could not have been convicted of first degree murder because the state did not establish her constructive presence at the scene of the crime raised the question of the applicability of the common law distinctions between principal and accessory to Maryland case law, the Court of Appeals found it unnecessary to determine whether these common law distinctions are still in effect in Maryland. According to the narrow holding of the court, Mrs. Williamson "having been indicted for the murder of her husband in a form which permitted proof either that she was a principal or an accessory, and the evidence adduced having been sufficient to convict her as an accessory before the fact, there was no error."

The interesting aspect of *Williamson* is not so much the narrow disposition of the case itself, but rather what it might have been had a majority squarely faced those very issues which it successfully avoided. Had the express language of §616 (a) not provided the necessary grounds for upholding Mrs. Williamson's conviction, the Court of Appeals might have been able to take advantage of the opportunity to lift the burdens which the common law distinctions continue to impose upon Maryland criminal courts. As outlined briefly in the concurring opinion to *Williamson*, under this common law view, accessories could be tried only in the jurisdiction where the act of accessoryship was committed, without regard to where the felony itself was committed; if the principal was acquitted or never discovered, the accessory could never be brought to trial; and one charged as a principal cannot be convicted as an accessory if the evidence shows only that he had acted as an accessory before the fact. The opinion suggests as well that the constitutional restraints upon the use of the death penalty in recent years have rendered void the historical foundations upon which the common law distinctions were originally founded. Maryland is indeed the only state which has not modified the common law in some respect; all other jurisdictions have to some extent taken measures (either by statutory enactment or by judicial decision) to erase the restrictions which the common law of parties to crime had imposed upon them. For the most part this has been accomplished without any noticeable detrimental effect on the rights of defendants and to the added benefits of judicial efficiency and, to some extent, simplicity.

There is, however, no indication either in *Williamson* or in any preceding case that the common law rules have been modified in Maryland at all, and it seems, therefore that the doctrine of accessoryship continues to remain the law in Maryland. This will be the case until either legislation or a Court of Appeals decision finally inters this persistent remnant from our legal past. Perhaps the needlessness of the doctrine is best summarized by a passage from Bishop's *Criminal Law* as quoted in the concurring opinion to *Williamson:* "This distinguishing of the accessory before the fact from the principal is a pure technicality. It has no existence either in natural reason or the ordinary doctrines of the law. For in natural reason the procurer of a crime is not chargeable differently from the doer; and a familiar rule of the common law is that what one does through another's agency is regarded as done by himself. . ."

—James F. Kuhn

Licensee, Invitee and Trespasser: Archaic Classes?

In a 5-2 decision, the Court of Appeals decided that the abolition of the common law classifications of invitee, licensee and trespasser in considering the liability of a property owner was not properly preserved for appeal. The majority in *Sherman v. Suburban Trust Company,* 282 Md. 238, 384 A.2d 76 (1978), asserted that they were precluded from considering the question because of Plaintiff's failure to request a jury instruction specifically predicating the tort liability of an owner or occupier of land upon principles of ordinary negligence as opposed to the technical classifications of invitee, licensee, and trespasser. The dissenting opinion, however, asserted that the issue was proper and that the common law distinctions should be abolished.

In this case, the Court of Appeals was confronted with the question of whether the property owner owed a duty to a police officer injured on a nonpublic segment of an owner's premises while in his official capacity.

The plaintiff, a plainclothes policeman on patrol, received a radio call that an attempt was being made to negotiate a forged check at the Suburban Trust Company (defendant). After identifying himself and another to the bank teller, he and his fellow officer were permitted to enter the six by eight foot teller's cage. The teller accidentally dropped the alleged forged check onto the floor. Attempting to pick up the check, the Plaintiff stepped back two or three feet. As he did so the officer struck part of his body on the coin changing machine's scoop arm, which he did not see.

The plaintiff in this case sued the Bank claiming in part that the defendant ". . .failed to give adequate warning of its (the coin changing machine's) placement and further placed it in a negligent position where it could cause injury to individuals. . ."

The plaintiff excepted to the Circuit Court's jury instruction and claimed that a police officer was either an invitee or in a class *sui generis,* and was not a licensee. The plaintiff sought an instruction that would give the Bank an affirmative duty both to excercise ordinary care to keep the premises reasonably safe for him and to refrain from negligence.

According to the present law in Maryland, the liability of a property owner to an injured party is dependent upon whether the latter is an invitee, licensee or trespasser. After the injured party is classified, the courts then apply the appropriate standard of care.

In Maryland, a trespasser is generally one who enters or remains upon land of another without privilege to do so. The trespasser takes the property as he finds it in so far as any alleged defective condition may exist on the property. The possessor of the land owes him only the duty of refraining from wanton or wilfull injury. *Duff v. U.S.,* 171 F.2d 846 (4th Cir. 1949).

A licensee is a person who enters the property with the knowledge and consent of the owner and for the licensee's own

purpose. *Peregoy v. Western Maryland Ry. Co.*, 202 Md. 203, 95 A.2d 867 (1953). The only duty the occupier of the land owes to a licensee is that if he becomes aware of the licensee's presence he must not injure him wilfully or wantonly or entrap him. *Bramble v. Thompson*, 264 Md. 518, 287 A.2d 265 (1972).

An invitee is one who is invited or permitted to enter or remain on another's property for purposes connected with or related to the owner's business. The property owner must use reasonable care to keep his premises safe for the invitee and to protect him from harm caused by an unreasonable risk, which the invitee will not discover even when ordinary care is excercised on part of the invitee. *Gray v. Sentinel Auto Parks Co.*, 265 Md. 61, 288 A.2d 121 (1972); *Lloyd v. Bowles*, 260 Md. 568, 273 A.2d 193 (1971).

Traditionally, policemen have been held in most jurisdictions to be licensees. The rationale for this classification is that they are likely to enter at unforeseeable times, upon unusual parts of the premises and during emergencies. The authorities state that placing a duty upon the property owner to keep his premises reasonably safe would be too severe.

The plaintiff in this case advanced two principle arguments. First, he asserted that the licensee status given him had changed to invitee after the initial period of his anticipated occupational risk had passed. That is, when the suspects had been apprehended. The court was of the opinion, however, that the plaintiff was injured during, and not after, the initial period of his anticipated occupational risk and from a hazard reasonably foreseeable as a part of that risk. Therefore, the plaintiff was not afforded the invitee status.

The plaintiff's second argument was that Maryland should abolish the common law classifications of invitee, licensee and trespasser and instead hold the property owners to a general negligence standard of ordinary reasonable care.

The trend now exists where courts have either abandoned in part or in whole the common law status classifications. The trend's driving force began in *Rowland v. Christian*, 69 Cal.2d 108, 443 P.2d 561, 70 Ca. Rptr. 97 (1968), where the common law classifications were rejected. The court stated that:

> "A man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose. Reasonable people do not ordinarily vary their conduct depending upon such matters, and to focus upon the status of the injured party as a trespasser, licensee, or invitee in order to determine the question whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values."

69 Cal. 2d 118, 443 P.2d 568, 70 Cal. Rptr. 104.

Instead of using the standard of classifications the California Court found the proper test to be:

> "whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others, and although the plaintiff's status as a trespasser, licensee, or invitee may in the light of the facts giving rise to such status have some bearing on the question of liability, the status is not determinative."

Id. at 119, 443 P.2d 568, 70 Cal. Rptr. 104.

In *Woodward v. Newstein*, 37 Md.App. 285, 377 A.2d 535 (1977), The Maryland Court of Special Appeals took note of the modern trend of cases that would abolish the classes of invitee, licensee, and trespassers. In that case the Court declined to rule on the merits of the new wave of cases as the question was not properly raised in the Court below. The court further noted that the Court of Appeals should bear the burden of deciding the issue.

The dissent by Judge Levine, in which Judge Eldridge joined, strongly urged the abolition of the common law classification status in exchange for the acceptance of general negligence as the standard of care for the property owner. The dissent stated that the common law approach was necessary to protect a landowner's right to free use and enjoyment of his property, but now, society's interest in the safety of people outweighs its interest in the property owner's unrestricted use of his premises. Applying the common law classification generally results in the inordinately severe treatment of the injured entrants. The distinctions between the classifications is inconsistent with contemporary thinking about the function of tort law in society. The dissent argues that the traditional rule affords a property owner a special privilege to be careless.

It is only a matter of time before this jurisdiction imposes upon landowners a duty not to create unreasonable risks of harm to persons entering upon their premises. The dissenting opinion suggests that the standard of care would depend upon such factors as: (1) The likelihood that the conduct in question will result in harm to others; (2) The gravity of such harm; and (3) The cost of preventing the risks of injury.

Resolution of the issue presented here must wait for another day. When that day arrives, and the issue is properly presented, the Maryland Court will probably abandon the old common law status of invitee, licensee, and trespasser and apply instead the standard of ordinary negligence in determining the liability of landowners to persons injured on their property.

—Ronald Frank Greenbaum

Unreasonably Dangerous Products in Strict Tort Liability: The Search for a Standard

In products liability design defect cases, in order for a seller to be strictly liable under Section 402A of the Restatement (Second) of Torts, it generally must be shown that: (1) the product was in a defective condition at the time it left the possession or control of the seller; (2) that it was unreasonably dangerous to the user or consumer; (3) that the defect was a cause of the injuries; and (4) that the product was expected to and did reach the consumer without substantial change in its condition.

California, however, holds otherwise. In *Barker v. Lull Engineering Company, Inc.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978), the Supreme Court of California restated its elimination of the unreasonably dangerous requirement, and further held that a trial judge may properly instruct the jury that a product is defective in design if (1) the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended and reasonably foreseeable manner, or if (2) the plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove that, on balance, the benefits of the