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1. [*Basso v. Miller, 40 N.Y.2d 233*](#)

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Basso v. Miller

Court of Appeals of New York

March 29, 1976, Argued ; June 17, 1976, Decided

No Number in Original

Reporter

40 N.Y.2d 233 *; 352 N.E.2d 868 **; 386 N.Y.S.2d 564 ***; 1976 N.Y. LEXIS 2882 ****

Stephen Basso, Respondent, v. William A. Miller et al.,
Appellants

Prior History: [****1] *Basso v Miller*, 47 AD2d 812.

Appeal, by permission of the Appellate Division of the Supreme Court in the Second Judicial Department, from an order of said court, entered March 12, 1975, which unanimously affirmed an interlocutory judgment of the Supreme Court in favor of plaintiff, entered in Kings County upon a verdict rendered at a Trial Term (Bernard Klieger, J.), following a trial on the issue of liability only. The following question was certified by the Appellate Division: "Was the order of this court dated March 12, 1975 properly made?"

Disposition: Order modified and the case remitted to Supreme Court, Kings County, for a new trial in accordance with the opinion herein, with costs to abide the event, and, as so modified, affirmed with costs to plaintiff against defendant Miller. Question certified answered in the negative.

Core Terms

Mountain, licensee, invitee, trespasser, possessor, common-law, premises, motorcycle, circumstances, guest, reasonable care, rescue, cases, trap, single standard, duty owed, foreseeability, landowner, season, reasonably safe condition, social policy, new trial, Occupiers', categories, passenger, injuries, arrived, invited, visitor, willful

Case Summary

Procedural Posture

In a personal injury action involving landowner liability, defendant appealed a decision that the Appellate Division of the Supreme Court in the Second Judicial Department (New York) entered in favor of plaintiff.

Overview

Plaintiff sued defendant after being injured in a motorcycle accident on defendant's property. The jury returned a verdict in favor of plaintiff, and the intermediate court affirmed. The court of appeals reversed and remanded the case for a new trial, holding that the court should abandon the classification of plaintiffs in regard to landowner liability and adopt a single standard of reasonable care under the circumstances whereby foreseeability would be the measure of liability. Thus, the trial court was directed to apply the new standard to the case on remand.

Outcome

The court of appeals reversed and remanded the case for a new trial, holding that in place of the common law rules of classification of plaintiffs in regard to landowner liability, the court should apply a single standard of reasonable care under the circumstances whereby foreseeability would be the measure of liability.

LexisNexis® Headnotes

Torts > ... > Comparative Fault > Common Law Concepts > Assumption of Risk

Torts > ... > Defenses > Comparative Fault > General Overview

Torts > ... > Defenses > Contributory Negligence > General Overview

Torts > ... > Standards of Care > Reasonable Care > General Overview

Torts > Premises & Property Liability > General Premises Liability > General Overview

[HN1](#) **Common Law Concepts, Assumption of Risk**

While the Court of Appeals of New York has demonstrated its inclination to correlate the duty of care owed a plaintiff with the risk of harm reasonably to be perceived, regardless of status, and concurrently consider the question of foreseeability, it is, for the first time, abandoning the classifications entirely and announcing its adherence to the single standard of reasonable care under the circumstances whereby foreseeability shall be a measure of liability. To be sure, this standard of reasonable care should be no different than that applied in the usual negligence action. Contributory and, now, comparative negligence, as well as assumption of the risk, all fit into their respective places, to be invoked when appropriate.

Torts > ... > Comparative Fault > Common Law Concepts > Assumption of Risk

Torts > ... > Defenses > Comparative Fault > General Overview

Torts > ... > Defenses > Contributory Negligence > General Overview

Torts > ... > Standards of Care > Reasonable Care > General Overview

Torts > Premises & Property Liability > General Premises Liability > General Overview

Torts > ... > General Premises Liability > Duties of Care > General Overview

[HN2](#) **Common Law Concepts, Assumption of Risk**

In regard to the duty of care owed by the owner or occupier of land to one upon his property, the courts adhere to the single standard of reasonable care under the circumstances whereby foreseeability shall be a measure of liability. This standard of reasonable care should be no different than that applied in the usual negligence action. Contributory and comparative negligence, as well as assumption of the risk, all fit into their respective places, to be invoked when appropriate.

Torts > ... > General Premises Liability > Dangerous

Conditions > Duty to Maintain

Torts > ... > Standards of Care > Reasonable Care > General Overview

Torts > Premises & Property Liability > General Premises Liability > General Overview

[HN3](#) **Dangerous Conditions, Duty to Maintain**

A landowner must act as a reasonable man in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk.

Torts > ... > Standards of Care > Reasonable Care > General Overview

Torts > Premises & Property Liability > General Premises Liability > General Overview

[HN4](#) **Standards of Care, Reasonable Care**

While the likelihood of a plaintiff's presence had been an implicit consideration in the determination of status and the duty commensurate therewith, it now becomes a primary independent factor in determining foreseeability and the duty of the owner or occupier will vary with the likelihood of plaintiff's presence at the particular time and place of the injury. While status is no longer determinative, considerations of who plaintiff is and what his purpose is upon the land are factors which, if known, may be included in arriving at what would be reasonable care under the circumstances.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Torts > Premises & Property Liability > General Premises Liability > General Overview

[HN5](#) **Jury Trials, Province of Court & Jury**

In actions regarding landowner liability, the court, as it would in the usual negligence action, must make the threshold determination as to whether the plaintiff, by introducing adequate evidence on each element, has made out a case sufficient in law to support a favorable jury verdict. Only in those cases where there arises a

real question as to the landowner's negligence should the jury be permitted to proceed. In all others, where proof of any essential element falls short, the case should go no further. While the rigid status classifications are to be dispensed with, the function of the court and the standard of proof remain the same.

Torts > ... > Defenses > Comparative
Fault > General Overview

Transportation Law > Private
Vehicles > Motorcycles > General Overview

Torts > ... > Defenses > Contributory
Negligence > General Overview

[HN6](#) [📄] Defenses, Comparative Fault

N.Y. Veh. & and Traf. Law [§ 1251\(a\)](#) prohibits a passenger from riding on a motorcycle unless such motorcycle is designed to carry more than one person.

Torts > ... > Elements > Causation > General
Overview

Torts > ... > Causation > Proximate
Cause > General Overview

Torts > ... > Defenses > Comparative
Fault > General Overview

Torts > ... > Defenses > Contributory
Negligence > General Overview

Torts > ... > Motor Vehicles > Particular Actors,
Circumstances, & Liabilities > Personal Vehicle
Operators & Owners

[HN7](#) [📄] Elements, Causation

While the violation of a statute may constitute negligence or contributory negligence as a matter of law, the facts must be found proving a violation and the violation must be shown to be the proximate cause of the injury.

Headnotes/Summary

Headnotes

Negligence -- maintenance of premises -- duty of care -- in negligence action, trial court erroneously charged that, if plaintiff were licensee, then defendant park owner would have duty to warn of any dangerous condition, while duty of care in New York has been to refrain from affirmative negligence and to warn of known concealed danger; since plaintiff [**2] could have been found to be trespasser, licensee or invitee, it cannot be said if error was significant, and there should be new trial in which single standard of care should be applied, without distinction among categories of use; duty of landowner should be to act reasonably to maintain safe conditions in view of all circumstances including likelihood of injury, seriousness thereof and burden of avoiding risk, with likelihood of plaintiff's presence primary factor in determining foreseeability -- since defendant driver of motorcycle, upon which plaintiff was injured while passenger riding in park, never raised at trial issue of violation of statute prohibiting passenger use of one-person vehicle, and only evidence thereon was plaintiff's statement that it was two-passenger vehicle, capacity of motorcycle was question of fact, and there was, accordingly, no error in judgment of liability against defendant driver -- upon new trial of issue of landowner's liability, any such liability found should be apportioned.**

1. In an action for negligence the trial court erroneously charged the jury that if plaintiff were held to be a licensee or social guest in defendant's park, then defendant's [****3] duty of care would be to warn of any dangerous conditions. The standard of care in New York has been to refrain from affirmative acts of negligence and to warn of traps or known concealed danger unlikely to be reasonably discovered. Under the circumstances, that plaintiff could have been found to be a trespasser, since he entered against the wishes of one of defendant's employees, or a licensee, since he was allowed to stay by a second employee, or an invitee, since he was thereupon employed in a rescue operation, it is impossible to say whether the erroneous charge was significant. There should be a new trial in which a single standard of care should be applied without distinction among licensees, trespassers, or invitees, rather than an attempt to fit plaintiff into one of the three rigid categories. The duty of the landowner should not vary with the person using the property, but he should act reasonably to maintain safe conditions in view of all the circumstances, including the likelihood of injury, the seriousness thereof and the burden of avoiding the risk, and the likelihood of the plaintiff's

presence should be a primary independent factor in determining foreseeability.

[****4] 2. Since the defendant driver of a motorcycle, upon which plaintiff was injured while riding as a passenger on a park road, never raised the issue at trial of whether plaintiff violated subdivision (a) of [section 1251 of the Vehicle and Traffic Law](#) by riding as a passenger on a motorcycle designed for one person, and the only evidence in regard thereto was plaintiff's statement that it was a two-passenger vehicle and a magazine photograph showing it as having one long seat, the capacity of the motorcycle became a question of fact. Accordingly, there was no error and the judgment of liability against the defendant driver was proper.

3. Upon a new trial of the issue of the defendant landowner's liability, there should be an apportionment between the defendants of any such liability found.

Counsel: William F. McNulty, Daniel J. Coughlin and Anthony J. McNulty for William A. Miller, appellant. I. The complaint herein should have been dismissed against Miller on the ground that plaintiff Basso was guilty of contributory negligence as a matter of law in violating [section 1251](#) (subd [a]) of the Vehicle and Traffic Law. II. Assuming *arguendo* that plaintiff established a prima [****5] facie case against Miller, the trial court committed error, highly prejudicial to said defendant, in refusing to submit to the jury the issue raised by Miller's affirmative defense of assumption of risk. ([McFarlane v City of Niagara Falls](#), 247 NY 340; [Wunsch v Colonial Sand & Stone Co.](#), 257 App Div 857; [Lutzker v Board of Educ. of City of N. Y.](#), 262 App Div 881, 287 NY 822; [Roots v Claremont Riding Academy](#), 20 AD2d 536, 14 NY2d 827; [Di Lorenzo v Cimmaron Ranch](#), 16 AD2d 630; [Murphy v Steeplechase Amusement Co.](#), 250 NY 479; [Kimbar v Estis](#), 1 NY2d 399.)

John F. Haggerty and John J. Corcoran for Ice Caves Mountain, Inc., appellant. I. The trial court committed substantial errors in its charge to the jury and during the trial. These errors were prejudicial to defendant Ice Caves Mountain, Inc. ([Levine v Barfus](#), 28 AD2d 896; [Velez v City of New York](#), 45 AD2d 887; [Orlick v Granit Hotel & Country Club](#), 30 NY2d 246; [Cady v City of New York](#), 35 AD2d 202; [Hamilton v Presbyterian Hosp. of City of N. Y.](#), 25 AD2d 431.) II. Plaintiff, a trespasser or licensee, failed to establish a prima facie case as a matter of law. ([Vaughan v Transit](#) [****6]

[Development Co.](#), 222 NY 79; [Beedenbender v Midtown Props.](#), 4 AD2d 276; [Adams v Ferraro](#), 41 AD2d 578; [Mendez v Goroff](#), 25 Misc 2d 1013, 13 AD2d 705; [Nicoletti v General Linen Supply Laundry Co.](#), 285 App Div 957; [Brzostowski v Coca-Cola Bottling Co.](#), 16 AD2d 196; [Breeze v City of New York](#), 249 App Div 856, 275 NY 528; [Garthe v Ruppert](#), 264 NY 290; [Schanberg v State of New York](#), 58 Misc 2d 605; [Parry v State of New York](#), 193 Misc 875; [Rutherford v N & R Equip. Corp.](#), 32 AD2d 980.) III. Plaintiff's testimony was incredible as a matter of law. ([Matter of Case](#), 214 NY 199; [Bacon v Altamont Farms](#), 33 AD2d 708, 27 NY2d 936.)

Bernard S. Epstein and Abraham Epstein for respondent. I. Appellant's arguments based upon the facts found at the trial are irrelevant in view of the affirmance of such findings by the court below. ([Simon v Electrospace Corp.](#), 28 NY2d 136.) II. The evidence conclusively established that plaintiff's status was nothing less than that of an invitee. The court's instructions as to any other status was mere surplusage. ([Woodson v New York City Housing Auth.](#), 10 NY2d 30; [Meiers v Koch Brewery](#), 229 NY [****7] 10; [Miller v Roman Catholic Church of St. Stephen](#), 18 NY2d 974; [Colon v Margolis](#), 17 NY2d 798; [Bernal v Baptist Fresh Air Home Soc.](#), 275 App Div 88; [Smiraldo v Lashins Constr. Ind.](#), 24 AD2d 740.) III. The duty of care owed to plaintiff by defendant Ice Caves Mountain, Inc., should be correlated to the risk of harm reasonably to be perceived, regardless of plaintiff's technical status. ([Martinez v Kaufman-Kane Realty Co.](#), 34 NY2d 819; [Mevorah v Garyn](#), 35 NY2d 934; [Collentine v City of New York](#), 279 NY 119; [Jacques v Village of Lake Placid](#), 39 AD2d 163; [Christian v City of Binghamton](#), 28 AD2d 611; [Le Roux v State of New York](#), 307 NY 397.) IV. Exclusive control of the motorcycle being in the hands of defendant Miller, the jury was justified in finding that plaintiff did not assume the risk of Miller's operating the same in a careless manner. The court's charge on the subject was full and complete. ([Ottmann v Village of Rockville Centre](#), 275 NY 270; [Piarulli v Lason](#), 35 AD2d 605.) V. Defendant Ice Caves Mountain, Inc.'s, offer of proof of the absence of prior accidents, was improper as to form and content. The objection was properly sustained. [****8] ([Brady v Manhattan Ry. Co.](#), 127 NY 46; [Jasinski v New York Cent. R. R.](#), 21 AD2d 456; [Kaplan v City of New York](#), 10 AD2d 319; [Schabel v Onseyga Realty Co.](#), 233 App Div 208.)

Judges: Judges Gabrielli, Jones, Wachtler and

Fuchsberg concur with Judge Cooke; Chief Judge Breitel concurs in result in a separate opinion in which Judge Jasen concurs.

Opinion by: COOKE

Opinion

[*235] [**869] [***564] Ice Caves Mountain, Inc., operates a large scenic park as a tourist attraction on property leased from the Village of Ellenville. During the summer months the premises [***565] are open to the public from approximately 8 a.m. until a half hour before dark on the payment of an admission fee. Although the witnesses differed on certain points, the record [*236] reveals relevant events of the late afternoon and early evening of September 3, 1972.

In the late afternoon of that September day, Jeffrey Shawcross, a patron, walked off the main trail up the hillside and fell into a 40-foot crevice, where he remained until rescued about four and a half hours later. Another customer, 17-year-old Frederick Coutant, after hearing of the accident, went down into the hamlet of Cragmoor [****9] and told "a couple of people" about it, among them the plaintiff and defendant Miller. These two, riding on Miller's motorcycle, proceeded up to Ice Caves Mountain. Miller drove, plaintiff sat behind as passenger on the single seat, with his arms wrapped around Miller's midriff and his feet on the exhaust pipes. It was still daylight when the two arrived at the entrance. Plaintiff testified that Miller stopped the motorcycle, got off, went into the house where tickets were sold, spoke to the girl on duty, returned and the two, plaintiff and Miller, proceeded by motorcycle through the raised barrier along the mountain drive to the parking lot. After waiting about 45 minutes, plaintiff testified that he received instructions pursuant to which he carried first aid equipment and rope down to the fissure into which Shawcross had fallen. On a second trip, plaintiff testified he carried a stretcher and additional equipment, assisted a nurse and eventually helped carry Shawcross, on the stretcher, to the ambulance. Once the rescue was completed, plaintiff and Miller returned to the motorcycle, resumed the riding position as previously described and, following the road traveled on earlier, [****10] left the parking area at what plaintiff estimated to be a speed of 20-30 miles per hour. It was now 9:30 or 10:00 p.m. As the motorcycle approached a curve, plaintiff testified that it hit a series of holes, went out of control, slipped from one side of the road to the

other and threw both driver and passenger out onto rocks. Plaintiff testified that he had been a summer resident of Cragmoor for the past 16 years, had been to Ice Caves Mountain several times, that he had a 1972 season's pass but had been there only once before during that summer.

Defendant William Miller's testimony as to the day's events was similar to that of plaintiff. He also testified to having a season's pass, to making frequent trips up the mountain and to knowing the area "like the back of my hand." Miller related his conversation with Annette Ballentine, the girl on duty in the tollhouse, stating that when he told her that he [*237] was going up to help with the rescue, she answered, "Don't. They have enough help." To that Miller testified he responded "something like, 'I am going up anyway. I don't think there is enough help. I could help anyway.'"

Annette Ballentine's recollection of the events [****11] differed from that of plaintiff and Miller in that, although the substance of the conversation was the same, she testified that Miller had driven his motorcycle through the open doors and into the gift shop where she was on duty. Both Miller and his passenger remained seated on the cycle during the conversation and, at its end, after her admonition not to go up, Miller backed the motorcycle out of the shop and proceeded through the space in the gate, which she testified was not raised to permit vehicles to pass through, but lowered. This witness also testified that after learning of the Shawcross accident and prior to plaintiff's arrival she had telephoned her boss, Fred Grau, as well as the Ellenville Rescue Squad, the Cragmoor Fire Department and the State Police. As [**870] the summoned rescuers arrived, the witness explained that she pushed the button which raised the gate, permitting them into the premises. Although the practice may not have been always followed, there was testimony that visitors with season passes were required to stop and sign in at the gatehouse.

[***566] Fred Grau, president of Ice Caves Mountain, Inc., testified that after learning of the accident [****12] he came to the scene to direct the rescue operation but permitted the fire department to take over when the fire chief arrived with approximately 20 men. When Miller drove into the parking lot, Grau told him to move as he, Miller, had placed his cycle in the spot reserved for the ambulance.

Ralph Stedner, chief of the Cragmoor Volunteer Fire Department, testified that of the 13 men who responded

to the emergency, 8 were used and the rest sent back to the firehouse as they were not needed. The witness could recall Grau as the only "civilian" helping and, in response to questions by the court, Stedner testified that he tried to keep all of the volunteer civilians back because even though they wanted to help, they did not know what to do.

While there was additional testimony, the foregoing suffices for this review. The court charged the jury to the effect that the plaintiff's status on the mountain was determinative of the duty of care owed to him by the defendant Ice Caves [*238] Mountain. The court described the status and commensurate duties in this fashion:

"With respect to the Ice Caves Mountain, now we get into his status on the mountain. You have three options that [****13] you can find. You can find that when he was up on that mountain, he was a trespasser. That is, that he had no right to be there. If you find that he was a trespasser without any right to be on that mountain, then the duty of the people who operated Ice Caves Mountain is not to do any willful or wanton or aggressive act with respect to his safety, and I am telling you now that as a matter of law, if you find that Basso was a trespasser on that night, September 3, 1972, he cannot recover against Ice Caves Mountain * * *

"The second thing that he could have been is equivalent to a guest. That is, that he went up to the mountain to watch what was going on and that against the wishes of Miss Ballentine, under instructions from her superiors and that when he got up there, instead of being thrown out, his presence was accepted as a mere watching, as a mere observing of what was going on. In that case, Ice Caves Mountain had a duty to him which was to make sure that if there were any dangerous conditions existing on the roadway that they should let him know. In other words, they owed him some duty not to let him get harmed because of a dangerous condition which existed on the mountain, [****14] to advise him of the conditions that may have caused him harm. That is, if he was a mere guest.

"Your third option is that if he was there for the business of the Ice Caves Mountain, that is -- and the third option, there are two ways that he could have been there under the business of Ice Caves Mountain; one is that he was there as a patron; he had a season pass and he was entitled -- if you believe that he had a season pass, if you believe that he had a season pass, he could have been up there as an observer under the season pass

which entitled him to the use of the roadways or he could have been a rescuer helping in the rescue of Mr. Shawcross, which is the business of Ice Caves Mountain. That is, if somebody gets trapped in a crevice on Ice Caves Mountain, getting him out of there is the business of Ice Caves Mountain, and anybody who is there in assisting in that rescue is doing it for the business of Ice Caves Mountain and in those two circumstances, whether he was legally there as a patron of Ice Caves Mountain or as a rescuer, then the duty [*239] owed to him is a little bit more than for the other two. [**871] Then the duty is to act -- then the duty is to keep [****15] the premises in a reasonably safe condition so as to prevent anybody lawfully on the premises from becoming injured. They were under a duty to exercise reasonable care to keep the premises in a reasonably safe condition for the use of a person such as the plaintiff coming on the premises."

Ice Caves Mountain took exception to the charge as to duty owed to a social [***567] guest or, as more frequently denominated, a licensee, claiming it placed too great a duty upon it. Ice Caves contends, and correctly so, that the New York standard has been that as a licensee a plaintiff must take the premises as he finds them, and that the owner thereof is liable only if he is found to have committed affirmative acts of negligence or if a trap existed or there was concealed danger not likely to be discovered ([Krause v Alper](#), 4 NY2d 518; [Levine v Barfus](#), 28 AD2d 896). There is only a duty to warn of known dangerous defects which the defendant "should know or suspect that the licensee will not discover himself after a reasonable inspection of the premises" ([Velez v City of New York](#), 45 AD2d 887).

Based on the charge as given, the jury returned a verdict for plaintiff, on the issue [****16] of liability, and made an apportionment whereby 60% of the verdict was to be borne by defendant Miller and 40% by defendant Ice Caves Mountain. Both defendants appealed from the interlocutory judgment of liability and apportionment. Although the Appellate Division unanimously affirmed, it granted both defendants leave to appeal, certifying the following question: "Was the order of this court dated March 12, 1975 properly made?"

While several issues are raised, the one of paramount importance relates to the duty of care owed by the owner or occupier of land to one upon his property. In New York, for long, it has been the status of the plaintiff which has been determinative of the duty and, often, the ascribing of status has been a difficult task. In the instant case, for example, much of the testimony in the

nearly 1,000-page record was elicited in order to enable the jury to classify the plaintiff as a trespasser, licensee or invitee. As a further complication, not only did the jury have to weigh and evaluate the differing testimony as to status at any particular time, but also had to determine whether the status of the plaintiff shifted as the afternoon turned to evening. As [****17] the trial court explained, under one view of the facts, it was possible for the jury to [*240] have labeled plaintiff a trespasser when he entered without permission and against the wishes of Ms. Ballentine, a licensee when seen but not ejected by Mr. Grau, the "boss", in the parking lot, and an invitee when assisting in the rescue. This being so, it remains a curiosity of the law that the duty owed to plaintiff on exit may have been many times greater than that owed him on his entrance, though he and the premises all the while remained the same.

Rather than to demand continued attempts to fit a plaintiff into one of the three rigid categories, the court pauses instead to reflect, to reconsider the necessity for such classification and to state today that the distinctions need no longer be made. Taking a broad view, we note that nearly 20 years have passed since the distinctions between licensees and invitees have been abolished by statute in England (Occupiers' Liability Act [1957], 5 & 6 Eliz 2, ch 31) and since the United States Supreme Court in *Kermarec v Compagnie Generale* (358 U.S. 625, 630-631) leveled direct criticism at this aspect of tort law. In its determination [****18] that such categories have no place in admiralty law, the *Kermarec* court made these cogent comments (pp 630-631): "The distinctions which the common law draws between licensee and invitee were inherited from a culture deeply [**872] rooted to the land, a culture which traced many of its standards to a heritage of feudalism. In an effort to do justice in an industrialized urban society, with its complex economic and individual relationships, modern common-law courts have found it necessary to formulate increasingly subtle verbal refinements, to create subclassifications among traditional common-law categories, and to delineate fine gradations in the standards of care which the landowner owes to each. Yet even within a single jurisdiction, the classifications and subclassifications bred by the common law have produced confusion and conflict. As new [***568] distinctions have been spawned, older ones have become obscured. Through this semantic morass the common law has moved, unevenly and with hesitation, towards 'imposing on owners and occupiers a single duty of reasonable care in all the circumstances.'"

New York courts are not unmindful of the adoption of the single [****19] standard of care in several of our sister States. Beginning with the 1968 California Supreme Court decision in *Rowland v Christian* (69 Cal 2d 108) we have observed the growing number of well-reasoned decisions abandoning the common-law distinctions and adopting the simple rule of [*241] reasonable care under the circumstances (see, e.g., *Pickard v City & County of Honolulu*, 51 Haw 134; *Mile High Fence Co. v Radovich*, 175 Col 537; *Smith v Arbaugh's Rest.*, 469 F2d 97; *Mariorenzi v Joseph Di Ponte, Inc.*, 114 RI 294; compare *Mounsey v Ellard*, 297 NE2d 43 [Mass]). HN1[↑] While we have demonstrated our inclination to correlate the duty of care owed plaintiff with the risk of harm reasonably to be perceived, regardless of status, and concurrently consider the question of foreseeability (*Martinez v Kaufman-Kane Realty Co.*, 34 NY2d 819), we have not, until today, * HN2[↑] abandoned the classifications entirely and announced our adherence to the single standard of reasonable care under the circumstances whereby foreseeability shall be a measure of liability. To be sure, this standard of reasonable care should be no different than that applied in the usual negligence action. [****20] Contributory and, now, comparative negligence, as well as assumption of the risk, all fit into their respective places, to be invoked when appropriate.

Indeed as the duty was so clearly stated in *Smith v Arbaugh's Rest.* (*supra*, p 100): HN3[↑] "A landowner must act as a reasonable man in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk". Application of the single rule in the instant case exemplifies its good sense, for the duty of keeping the roads of Ice Caves Mountain in repair should not vary with the status of the person who uses them but, rather, with the foreseeability of their use and the possibility of injury resulting therefrom. HN4[↑] While the likelihood of a plaintiff's presence had been an implicit consideration [****21] in the determination of status and the duty commensurate therewith, it now becomes a primary independent factor in determining foreseeability and the duty of the owner or occupier will vary with the likelihood of plaintiff's presence at the particular time and place of the injury. While status is no longer determinative, considerations of who plaintiff

*(See concurring opns of Wachtler, J., in *Martinez v Kaufman-Kane Realty Co.*, *supra*, at pp 821-822, and *Mevorah v Garyn*, 35 NY2d 934, 936-937.)

is and what his purpose is upon the land are factors which, if known, may be included in arriving at what would be reasonable care under the circumstances.

Of course, [HN5](#)^(↑) before it becomes appropriate for the jury to [*242] consider all such questions, the court, as it would in the usual negligence [**873] action, must make the threshold determination as to whether the plaintiff, by introducing adequate evidence on each element, has made out a case sufficient in law to support a favorable jury verdict. Only in those cases where there arises a real question as to the landowner's negligence should the jury be permitted to proceed. In all others, where proof of any essential element falls short, the case should go no further. While the rigid status classifications are to be dispensed with, the function of the court and the standard [****22] of proof remain the same.

The failure of the court to properly instruct the jury on the duty owed to a licensee [***569] coupled with the jury's rendering of a general verdict, the latter making it impossible for this court to determine whether the erroneous charge was significant in the determination, mandates a reversal and new trial as to liability, wherein the standard enunciated today should be applied.

A second issue, one raised by defendant Miller, apparently for the first time on appeal, relates to his claim that the complaint should have been dismissed as against him on the ground that the plaintiff was guilty of contributory negligence as a matter of law. [HN6](#)^(↑) Subdivision (a) of [section 1251 of the Vehicle and Traffic Law](#) prohibits a passenger from riding on a motorcycle unless such motorcycle is designed to carry more than one person. [HN7](#)^(↑) While the violation of a statute may constitute negligence or contributory negligence as a matter of law, the facts must be found proving a violation and the violation must be shown to be the proximate cause of the injury ([Martin v Herzog](#), [228 NY 164](#); [Ortiz v Kinoshita & Co.](#), [30 AD2d 334, 335](#)). Here, although the only testimony as [****23] to the capacity of the motorcycle to carry a passenger was given by plaintiff, who stated that it was a two-passenger motorcycle and described his riding position, a magazine photograph of the motorcycle, marked as an exhibit by defendant Ice Caves Mountain, showed said cycle as having one long seat. In the context of this case, the capacity of the motorcycle became a question of fact and it was for the jury to determine whether said vehicle was designed to carry more than one person. Since this issue of contributory negligence was never raised by defendant Miller, the questions

relevant to its determination were never considered and the Vehicle and Traffic Law was neither requested nor charged. As there were no errors which [*243] require reversal with respect to the finding of liability as against defendant Miller, that portion of the judgment was properly affirmed by the Appellate Division. However, if at the new trial there is a finding of liability as against defendant Ice Caves Mountain, then pursuant to defendant Ice Caves Mountain's cross claim, the jury must continue their deliberations, making an apportionment.

The order of the Appellate Division should be modified [****24] so as to provide: (1) that there be stricken from the judgment entered at trial term the provision that plaintiff have judgment on the issue of liability against the defendant Ice Caves Mountain, Inc., (2) that a new trial be ordered in Supreme Court, Kings County, on the issue of liability against the defendant Ice Caves Mountain, Inc., and (3) that there be an apportionment made between defendants at said new trial in the event that defendant Ice Caves Mountain, Inc., is found to be liable; and, except as so modified, the order of the Appellate Division is affirmed. The question certified is answered in the negative.

Concur by: BREITEL

Concur

Chief Judge Breitel (concurring). I concur in the result reached by the majority but for different reasons.

Abandoning all the rules governing liability of a possessor to one injured on his property, rules evolved progressively in the common-law process over the past 200 years, the court substitutes an amorphous "single standard" of "reasonable care under [**874] the circumstances". Apart from being unnecessary to decide this case, the substitution is deceptively simple; it raises more problems than it solves. Of course, any generality, if [****25] broad enough, will cover all cases, but no guidance is offered courts or juries for particular cases or classes of cases. Moreover, by sweeping generalization the court overreacts to the conceded need for re-evaluation of the rules. While still vulnerable to criticism and deserving of modification to adapt to social and economic change, the rules in this State have produced both progressive evolution and a predictive stability. Finally, and perhaps most important, the majority would delegate to the jury the responsibility to determine the applicable social policy, thus abdicating

the **[**570]** judicial role where not controlled by legislative primacy in determining public policy.

Under traditional common-law analysis, in actions based on negligence, a possessor's duty to one on his property is measured by the status of that person, namely, by the circumstances **[*244]** under which he came or remained on the property. The injured person is classified as trespasser, licensee or invitee, that is, how did he come there or what was he doing there -- burglar, social guest, or one on the possessor's business, or the like.

Generally, a trespasser is one who enters upon or remains **[****26]** on property without privilege or the consent of the owner (*Vaughan v Transit Development Co.*, 222 NY 79, 82; *Restatement, Torts 2d*, § 329). A possessor has a duty to refrain only from inflicting "willful, wanton or intentional injuries" upon a trespasser (see, e.g., *Beauchamp v New York City Housing Auth.*, 12 NY2d 400, 405; *Lo Casto v Long Is. R. R. Co.*, 6 NY2d 470, 474). Maintenance of an artificially created, inherently dangerous but deceptively innocent instrumentality or condition, commonly referred to as a "trap", is equated to a willful, wanton or intentional act (see *Beauchamp v New York City Housing Auth.*, *supra*, at p 405; *Mayer v Temple Props.*, 307 NY 559, 563).

A licensee is one who is permitted to enter upon or remain on property with the possessor's consent, express or implied (see *Vaughan v Transit Development Co.*, 222 NY 79, 82, *supra*; *Restatement, Torts 2d*, § 330; Prosser, *Torts* [4th ed], § 60, at p 376). The duty of care owed to a licensee is sometimes said to be much the same as that owed to a trespasser, that is, to refrain from inflicting willful, wanton or intentional injury, or maintaining a "trap" (see *Lo Casto v Long Is. R. R. Co.*, 6 NY2d 470, 474, *supra*; *Vaughan v Transit Development Co.*, 222 NY 79, 83, *supra*; Prosser, *op. cit.*, § 60, at p 379). Other cases have, however, imposed a broader duty which includes the obligation to refrain from committing acts of "affirmative negligence" and to exercise reasonable care to disclose dangerous defects known to the possessor and unlikely to be discovered by the licensee (see, e.g., *Merriman v Baker*, 34 NY2d 330, 334-335; *Krause v Alper*, 4 NY2d 518, 521; *Higgins v Mason*, 255 NY 104, 109; *Restatement, Torts 2d*, §§ 341, 342). This seemingly broader duty is in effect an expansion of the concepts of "wanton" or "willful" conduct or a "trap" (see *Brzostowski v Coca-Cola Bottling Co.*, 16 AD2d 196, 199; Prosser, *op. cit.*, at p 379).

An "invitee" is subdivided into two categories, a public invitee and a business visitor (see *Restatement, Torts 2d*, § 332, *subd* [1]). A public invitee is one who, as a member of the public, is invited to enter or remain on property which is **[*245]** held open to the public (*Restatement, Torts 2d*, § 332, **[**875]** *subd* [2]; see *Haefeli v Woodrich Eng. Co.*, 255 NY 442, 448; Prosser, **[****28]** *op. cit.*, § 61, at pp 386-389; 46 NY Jur, Premises Liability, § 54, pp 153-154). A business visitor is one who is invited to remain on property for a purpose directly or indirectly connected with business dealings with the possessor of the property (*Restatement, Torts 2d*, § 332, *subd* [3]; *Meiers v Koch Brewery*, 229 NY 10, 13-14).

The duty owed to an invitee is to use due care to keep the property in a reasonably safe condition so that invitees will not unnecessarily be exposed to danger (see *Haefeli v Woodrich Eng. Co.*, 255 NY 442, 448, *supra*; *Restatement, Torts 2d*, §§ 341A, 343, 343A; Prosser, *op. cit.*, § 61, at pp 392-394). This includes an obligation to warn an invitee of any hidden danger if the possessor is unable to maintain the property in a reasonably safe condition **[**571]** (see *Schwab v Rubel Corp.*, 286 NY 525, 529-530; Prosser, *op. cit.*, at p 393).

As Prosser has noted, the three categories "make out, as a general pattern, a rough sliding scale, by which, as the legal status of the visitor improves, the possessor of the land owes him more of an obligation of protection" (Prosser, *op. cit.*, § 58, at p 357). The sliding scale **[****29]** thus reflects the foreseeability of injuries to others, the obligation of the injured person to foresee the precautions likely to be taken for his benefit, and the varying economic burdens justifiably placed on the possessor to protect those on his property against harm. Because they are elaborations of rules of law they are given to the fact finders to guide them in applying the social policy embraced in the rules to the facts as they find them.

The roots of the common-law principles largely antedate the development of modern negligence law (see Marsh, History and Comparative Law of Invitees, Licensees and Trespassers, 69 LQ Rev 182, 184; Hughes, Duties to Trespassers: A Comparative Survey and Revaluation, 68 Yale LJ 633, 694). In nineteenth century England and America, when the economy was largely agrarian and land formed the principal basis of wealth, it was considered socially desirable policy to allow a landowner to use and exploit his land as he saw fit, without need for vigilance or protection for those who

came upon the property without privilege or consent (see [Fisher v Clark](#), 41 Barb 329, 330-331; 2 Harper and James, Torts, § 27.1, p 1432; Bohlen, Fifty Years of Torts, [****30] 50 Harv L Rev 725, 735). Thus, rigid rules then virtually immunizing the landowner from [*246] liability for injuries sustained on his property were formulated to effectuate that policy (see, e.g., [Addie & Sons v Dumbreck](#) [1929], AC 358, 371; Prosser, *op. cit.*, § 58, p 357).

As the economy shifted from an agrarian to an industrial base and personalty replaced realty as the principal basis of wealth, a corresponding change in social policy, one less favorable to the landowner or possessor occurred. No longer does the policy of unrestricted freedom to use one's land, which has usually meant no more than a desire to be free of the burden and expense of taking precautions, inevitably outweigh considerations of human safety (see Bohlen, Fifty Years of Torts, 50 Harv L Rev, at p 736).

The law, of course, has not been insensitive to this shift in social policy. Instead, the courts, through the common-law process, have progressively struck a better balance between the competing social policies. This has been done on a case-by-case basis by eliminating the common-law distinctions in the case of children, by broadening the more favored categories to include persons who [****31] in the past would not have been included, or by expanding the concept of a "trap" and thereby increasing the possessor's liability for injuries caused by dangerous conditions on his land (see Bohlen, Fifty Years of Torts, 50 Harv L Rev, at p 740; 46 NY Jur, Premises Liability, § 32, p 94, n 13).

[**876] Thus, for example, the "child trespasser" doctrine has been developed to impose, in appropriate circumstances, liability upon a possessor for injuries sustained by children on his property regardless of whether they are trespassers (see concurring opn in [Barker v Parnossa](#), 39 NY2d 926, decided herewith). The "economic benefit" theory which predicated invitee status upon the economic benefit the possessor may derive from the visitor's presence, has been supplanted by the "public invitation" theory, which confers invitee status upon those who come upon the possessor's property at the encouragement of the possessor (see [Restatement, Torts 2d, § 332](#); Prosser, *op. cit.*, at pp 388-389). In some States, social guests have been elevated from the licensee to the invitee category (Prosser, *op. cit.*, at pp 378-379). Public employees, such as firemen and policemen, have been [****32] placed in a *sui generis* class, to whom is owed a duty of

reasonable care to keep in a safe condition [***572] those parts of the premises which are used as the ordinary means of access, and to warn such employees, known to be on the property, of unforeseeably dangerous [*247] conditions (see [Beedenbender v Midtown Props.](#), 4 AD2d 276, 281). And the concept of a "trap" has been expanded far beyond its origins in the ancient spring gun cases (see concurring opn in [Barker v Parnossa](#), 39 NY2d 926, *supra*, decided herewith).

As noted by the majority, there has been criticism of the common-law approach (see, e.g., [Kermarec v Compagnie Generale](#), 358 U.S. 625, 630-631; 2 Harper and James, Torts, § 27.1, p 1432). The thrust of the criticism is that the common-law rules are complex and often susceptible of wooden application (e.g., [Kermarec v Compagnie Generale](#), 358 U.S. 625, 630-631, *supra*). In some jurisdictions, the common-law approach has been abandoned and replaced by a "single" standard, it is said, of reasonable care under the circumstances (see [Rowland v Christian](#), 69 Cal 2d 108, 118; [Pickard v City & County of Honolulu](#), 51 Haw 134, 135; [****33] [Mile High Fence Co. v Radovich](#), 175 Col 537, 542; [Mariorenzi v Joseph Di Ponte, Inc.](#), 114 RI 294, 307; Premises Liability -- Claimant's Status, Ann., 32 ALR3d 508, 520-529; cf., e.g., Occupiers' Liability Act [1957], 5 & 6 Eliz 2, ch 31; [Mounsey v Ellard](#), 297 NE2d 43 [Mass], abolishing the distinction between licensees and invitees only).

As indicated earlier, the criticism has basis, but the cure may be radically destructive in ignoring the evolved and evolving principles, the elastic genius of the common-law process.

Most of the criticism was focused on the confusion caused by nomenclature, namely, "trespasser", "licensee", "invitee", "affirmative negligence", "trap", and the like. The criticism is partly justified. But it must be seen for what it is -- a logomachy over labels and not a disagreement with underlying policy. Thus, the critics have recognized that a person's "status", that is, the purpose for which he has come upon the property, is a significant element in determining foreseeability, and therefore the liability of a possessor ([Rowland v Christian](#), 69 Cal 2d 108, 117-118, *supra*). Other elements, such as the closeness of the connection between [****34] the injury and the defendant's conduct, the moral blame attached to the defendant's conduct, and the policy of preventing future harm, despite assertion to the contrary, are in fact subsumed in the status of the party and the duty owed to one of that status.

The "single standard", appealingly simple, is actually deceptively so. It has been observed that abolition of all developed [*248] rules and principles in favor of a broad "single" standard of care is an illusory reform. Abolition, it is said, will engender only an evolution of a new set of rules under [**877] the "single" standard (see Payne, Occupiers' Liability Act, 21 Mod L Rev 359, 362). If this be true, the single standard, like any monistic methodology, will hardly be a simplification but an enigma masked in an elusive generalization, so broad, that there are no articulated exceptions. The solution offered is that the jury will know and will decide.

Of course, candor compels recognition of the propensity of juries, motivated by sympathy, to allow injured plaintiffs, especially children, to recover even when the law would seem to suggest an opposite result (see *Toomey v London, Brighton & South Coast Ry. Co* [****35] .., 140 Eng Rep 694, 696 [CP; Williams, J.]; Marsh, History and Composite Law of Invitees, Licensees and Trespassers, 69 LQ Rev, at pp 185-186; Hughes, Duties to Trespassers: A Comparative Survey and Revaluation 68 Yale LJ, at pp 699-700). The "single standard" provides hospitable ground for the play of jury *ad hoc* promulgation of "rules" of law, social policy, and sometimes humane but ungoverned and ungovernable sympathy.

[***573] The abolition of the common-law rules regarding deliberate adult trespassers is a good example. Surely a landowner is not obligated, even under the single standard, to make his property safe for adult trespassers entering upon the property to pursue criminal ends. It is no answer to say that the jury will take care of the problem by denying recovery to such a trespasser as a matter of fact. The role of the jury in our system is to find facts and not to make the law. The lawmaking function is the province of the Legislature and the courts. Where society has, for reasons of policy, given the lawmaking power to the jury, it has done so by provision in the organic law of the State (see *NY Const, art I, § 8* [in criminal libel cases, the jury [****36] determines both the law and the facts]).

But all this is not to say that the rules, as presently formulated, are not in need of reform, judicial reform in the absence of legislative reform. Indeed, as noted earlier, beneath the nomenclature, and on a case-by-case basis in the Anglo-American judicial lawmaking process, reform has been taking place. It may be that further reform in this State is needed. Thus, for example, in the proper cases, many if not all, of the distinctions between licensees and invitees could be

modified or should be eliminated.

[*249] The rule of *Krause v Alper* (4 NY2d 518, 521, *supra*), which treats a social guest as a mere licensee, is illustrative of a problem ripe for re-examination. It has been said that the treatment of a social guest as a mere licensee ignores modern social customs, under which a social guest, expressly invited and even urged to come for the "social" and perhaps the indirect potential "economic" benefit of the possessor, expects more than mere inactivity for his safety (Prosser, *op. cit.*, at p 379). Indeed, some jurisdictions have placed social guests within the category of invitees (see, e.g., *Conn Gen Stat Ann, [****37] § 52-557-a*; *Genesee Merchants Bank & Trust Co. v Payne*, 6 Mich App 204, *affd* 381 Mich 234; *Daire v Southern Farm Bur. Cas. Ins. Co.*, 143 So 2d 389 [La]; cf. the cases noted *supra* abolishing the common-law distinctions partially or entirely). In the proper case, therefore, the rule treating invited guests as licensees deserves re-examination (see the exhaustive opn by J. Irwin Shapiro, J., in *Sideman v Guttman*, 38 AD2d 420, 423-425; Prosser, *op. cit.*, at p 379, n 88; *Restatement, Torts 2d, § 330, Comment h*, par 3).

But such a re-evaluation in the instant case is unnecessary. The jury could properly have found that Basso was a public invitee in that he presented himself to the rescuers and was enlisted in aid of their rescue operation. In such circumstances, the property owner owed Basso a duty to keep the premises reasonably safe for his [**878] use. Thus, it was a question of fact, properly resolvable by the jury, whether the road was maintained in a reasonably safe condition. But it is not a proper jury function to determine the rules or the duties owed by the possessor toward others or which the injured person owed to himself to save himself [****38] from harm.

However, as the majority has stated, the charge, on any view, with respect to the duty owed to a licensee was incorrect, and thus the defendant Ice Caves Mountain, Inc., is entitled to a new trial.

Accordingly, I concur in the result and vote to modify the order of the Appellate Division and order a new trial with respect to defendant Ice Caves Mountain, Inc.