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PARKING IS A PROBLEM. In fact, it's one of the biggest problems faced by car owners. Too often a short drive is followed by a long search for a suitable parking place. Even once a driver has found a lot to park in, he and his passengers may find they face additional problems. In leaving the lot or returning later for their car, they run such risks as stepping in pits,[1] tripping over bull rails,[2] slipping on ice,[3] and even falling into sunken driveways.[4] These hazards, of course, are not confined to drivers and their passengers. They are equally present for other persons who find themselves in a parking lot. When a negligent injury occurs as a result of an encounter with such obstacles, the question presented is who, if anyone, is liable for the injury. This article will examine the current state of the law pertinent to the question of liability and discuss the adequacy of that law.

The Question of Liability

In assessing liability for a negligent injury, it must be shown that there is a duty owed.[5] The general rule in regard to the test of whether a duty is owed, and the duty itself, is set out in a leading English case, *Heaven v. Pender*:

> Whenever one person is placed by circumstances in such a position in regard to another that everyone of ordinary sense who did think would at once 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

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1 Lewis v. Gotham Garage Co., 83 Ohio App. 502, 84 N.E. 2d 310 (1948).

2 Costello v. Wyss, Inc., 200 Pa. Super. 568, 190 A. 2d 170 (1963); Geraghty v. Burr Oak Lanes, Inc., 5 Ill. 2d 153, 125 N.E. 2d 47 (1955); McClain v. Kroger Co., 114 Ohio App. 295, 175 N.E.2d 199 (1961); Cole v. McGhie, 59 Wash. 2d 436, 361 P. 2d 938 (1961).

3 Crawford v. Soennichsen, 175 Neb. 87, 120 N.W. 2d 578 (1963); Fitz Simons v. National Tea Co., 29 Ill. App. 2d 306, 173 N.E. 2d 534 (1961); Jeswald v. Hutt, 15 Ohio St. 2d 224, 239 N.E. 2d 37 (1968); Levine v. Hart Motors, 75 Ohio L. Ab. 265, 143 N.E. 2d 602 (1955); Wise v. Great Atlantic and Pacific Tea Co., 94 Ohio App. 320, 115 N.E. 2d 33 (1953); Zide v. Jewel Tea Co., 39 Ill. App. 2d 217, 188 N.E. 2d 383 (1963).

4 Burroughs v. Ben's Auto Park, Inc., 27 Cal. 2d 449, 164 P. 2d 897 (1947); Falen v. Monessen Amusement Co., 363 Pa. 168; 69 A. 2d 65 (1949); Leonardo v. Great A. & P. Tea Co., 340 Mass. 450, 164 N.E. 2d 900 (1960); Martin v. Fox West Coast Theatres Corp., 41 Cal. App. 2d 925, 108 P. 2d 29 (1940); Phillips v. Seltzer, 133 F. Supp. 721 (1955).

5 Principle established in Vaughn v. Menlove, 3 Bing. N.C. 468, 132 Eng. Rep. 490 (1837); Landgridge v. Levy, 2 M. & W. 519, 150 Eng. Rep. 863 (1837); Winterbottem v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (1842).

other, a duty arises to use ordinary care and skill to avoid such dangers.[6]

However, when it comes to determining the duty in cases concerning operation of a parking lot, this general rule may be severely limited. The law does not hold the occupier of land to the same duty of care in regard to all persons who may come on his property.[7] In such cases, courts determine the nature of the duty owed by applying the common law distinctions of trespasser, licensee and invitee.[8] The special rules which arise from these distinctions as to status, and which are applied in determining whether the parking lot operator is liable, have developed ". . . due to historical considerations from the high place which land has traditionally held in English and American thought, the dominance and prestige of the land holding class in England during the formative period of the rules governing the possessor's liability, and the heritage of feudalism." [9] Though these historical considerations may no longer be relevant, the rules of law they gave birth to are still with us.

The Law in Respect to Invitees

The invitee is one who is invited expressly or impliedly to enter the premises ". . . upon business which concerns the occupier." [10] Within the status of an invitee are parking lot patrons,[11] their passengers, and their intended passengers.[12] As stated above, such status is used to determine the parking lot operator's duty of care.[13] The duty which the operator owes the invitee is generally one of reasonable care.[14] It includes the duty to maintain the premises in a reasonably safe condition.[15] This means that the operator should exercise due care to prevent the existence of a situation which he knows or should know might result in injury,[16] and which he should foresee would not be discovered by the patron.[17] This duty is not limited to the parking area alone,

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[6] 11 Q.B.D. 503, 509.

[7] Crawford v. Soennichsen, *supra*, n. 3.

[8] Brush v. Public Service Co. of Indiana, 106 Ind. App. 554, 21 N.E. 2d 83 (1939); Williams v. Morristown Memorial Hospital, 59 N.J. Super. 384, 157 A. 2d 840 (1960).

[9] Rowland v. Christian, 40 Cal. Rptr. 97, 100, 443 P. 2d 561, 564 (1968).

[10] Prosser, Torts 395 (3rd ed., 1964).

[11] Girard v. Auto Specialties Athletic Association, 300 Mich. 272, 1 N.W. 2d 538 (1942).

[12] Goldsmith v. Cody, 351 Mich. 272, 88 N.W. 2d 268 (1958).

[13] Girard v. Auto Specialties Athletic Association, *supra* n. 11; Englehardt v. Phillips, 136 Ohio St. 73, 23 N.E. 2d 829 (1939).

[14] Bremer v. W. W. Smith, Inc., 126 Pa. Super. 408, 191 A. 395 (1937).

[15] Kelley v. Goldberg, 288 Mass. 79, 192 N.E. 513 (1934); Bremer v. W. W. Smith, Inc., *supra* n. 14.

[16] St. Louis v. Fisher & Co., 1 Mich. App. 55; 134 N.W. 2d 390 (1965); Siegal v. Detroit City Ice and Fuel Co., 324 Mich. 205, 36 N.W. 2d 719 (1949).

[17] Restatement (Second), Torts § 343 (1965).

but also extends to entrances and exits.[18] The duty applies not only to private operators, but also to cities operating lots in their proprietary capacity.[19] And, as the duty requires no more than the exercise of reasonable care, the operator is not an insurer.[20] For the injured invitee to recover, the injury resulting from the violation of the duty, and the operator's capacity as occupier, must be shown in addition to the existence of the duty itself.[21]

The patron enjoys the status of invitee only so long as he remains within the scope, in terms of physical area, period of time and purpose,[22] of the invitation to enter which he has received.[23] In a Massachusetts case, an operator who had no attendant on duty, and whose only posted sign read "Parking twenty-five cents," was held not liable to a patron who was injured as a result of backing his car into an excavation in a back area of the lot where no cars were parked.[24] The court held that the ". . . invitation did not go beyond permission to come upon the land and to leave the car in the space as it stood." [25] However, this limitation to the scope of the invitation is not to be strictly interpreted.[26] Thus where a parking lot patron mistakenly walked beyond his car to another in the lot and was injured after realizing his mistake and while returning to his own, he was held not to be beyond the scope of the invitation.[27]

Since the basis of the operator's liability is his superior knowledge of existing dangerous conditions,[28] a finding of liability on the part of the operator requires a showing that the operator knew of the condition or that the condition was present when it would have been discovered by reasonable inspection.[29] Thus, in a case where it was shown that there was an inspection of a guardrail and the inspection was reasonable, and subsequent to the inspection a patron was injured by a protruding splinter, a showing that the splinter was protruding at the time of the inspection was also required.[30] In another case where there was no inspection, the size of a chuckhole was held sufficient to show that

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[18] Parking, Inc. v. Dalrymple, 375 S.W. 2d 758 (Tex. Civ. App. 1964); Goldsmith v. Cody, *supra* n. 12.

[19] Rhodes v. City of Palo Alto, 100 Cal. App. 2d 336, 223 P. 2d 639 (1950).

[20] Fitz Simons v. National Tea Co., *supra* n. 3; Costello v. Wyss, Inc., *supra* n. 2.

[21] Englehardt v. Phillips, *supra* n. 13.

[22] Bass & Co. v. Parker, 208 Tenn. 38, 343 S.W. 2d 879 (1961).

[23] Costello v. Wyss, *supra* n. 2; Morris v. Great A. & P. Tea Co., 384 Pa. 464, 121 A. 2d 135 (1956).

[24] Fielding v. S. Z. Poli Realty Co., 274 Mass. 20, 174 N.E. 178 (1931).

[25] *Ibid.*

[26] Martin v. Fox West Coast Theatres Corp., *supra* n. 4.

[27] *Ibid.*

[28] Englehardt v. Phillips, *supra* n. 13.

[29] McClain v. Kroger Co., *supra* n. 2.

[30] McClain v. Kroger Co., *supra* n. 2.

reasonable inspection would have resulted in the discovery of its development.[31]

The same question of whether the operator had notice of the dangerous condition is often crucial in cases where injury results from a slip on an oil or grease spot.[32] Though the operator is required to anticipate the condition caused by oil leaks from cars,[33] it has been held that it would be unreasonable to require the operator to continuously inspect and sand down oil spots as soon as they occur.[34] His duty is one of reasonable periodic inspection.[35]

A review of cases which deal with claims of negligent injuries to parking lot patrons results in an emerging pattern of typical factual situations and similar contentions by plaintiffs. Often the injured patron claims he was unaware of the dangerous condition which subsequently caused his injury and contends such unawareness was reasonable.[35a] Such cases are typically concerned with injuries which occur at night,[36] often as a result of unseen physical obstructions or excavations,[37] or under slippery conditions caused by ice or snow,[38] or under a combination of these two conditions.[39] However, these cases do not always result in liability on the part of the operator, often as a result of a finding of contributory negligence on the part of the plaintiff.[40] Courts hold that there is no recovery when the patron has acted unreasonably when the condition was known to him, even though it was also known to the operator.[41] For example, ordinarily the operator does not owe a duty to his business invitees to clean up natural accumulations of ice and snow,[42] and courts hold that it is the invitee's duty to himself to anticipate the danger involved under such conditions.[43] However, when the operator does undertake cleaning ice and snow, and does so negli-

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[31] Rhodes v. City of Palo Alto, *supra* n. 19.

[32] De Soto Hotel, Inc. v. McDonough, 219 F. 2d 253 (6th Cir. 1955); St. Louis v. Fisher & Co., *supra* n. 16.

[33] Lexington Market Authority v. Zappala, 233 Md. 444, 197 A. 2d 147 (1964).

[34] *Ibid.*

[35] McClain v. Kroger Co., *supra* n. 2.

[35a] Crampton v. Kroger Co., 108 Ohio App. 476, 162 N.E. 2d 553 (1959); Costello v. Wyss, Inc., *supra* n. 2.

[36] Palmer v. Boston Penny Savings Bank, 301 Mass. 540, 17 N.E. 2d 899 (1938); Crampton v. Kroger Co., *supra* n. 35a.

[37] Burroughs v. Ben's Auto Park, *supra* n. 4; Costello v. Wyss, Inc., *supra* n. 2.

[38] Fitz Simons v. National Tea Co., *supra* n. 3; Levine v. Hart Motors, Inc., *supra* n. 3; Turoff v. Richman, 76 Ohio App. 83, 61 N.E. 2d 486 (1944).

[39] Jeswald v. Hutt, *supra* n. 3; Backman v. Vickers Petroleum Co., 187 Kan. 448, 357 P. 2d 748 (1960).

[40] Jeswald v. Hutt, *supra* n. 3.

[41] Crawford v. Soennichsen, *supra* n. 3.

[42] Jeswald v. Hutt, *supra* n. 3; Sidle v. Humphrey, 130 Ohio St. 2d 45, 233 N.E. 2d 589 (1968).

[43] Levine v. Hart Motors, Inc., *supra* n. 3; Turoff v. Richman, *supra* n. 38.

gently, his own negligence may be found to be the proximate cause of an injury.[44]

Also, the operator is under no duty to illuminate the lot at night,[45] and so caution is the watchword for nighttime parking patrons. The rule is that "darkness is always a warning of danger, and for one's own protection it may not be disregarded."[46] This is not to say that in all such cases the injured person will be denied recovery as a matter of law.[47] The degree of darkness,[48] the care exercised by the patron under the circumstances,[49] and the reasonable balance to be struck between the danger and the hardship of seeking ways out of such danger[50] are all relevant questions of fact to be weighed in assessing liability. For example, contributory negligence was held to be a question of fact for the jury in a case in which the patron, because of dim light, mistook the top of a restraining wall for the curb of a sidewalk and fell into a sunken stairway.[51]

The Law in Respect to Licensees and Trespassers—Why Not One Standard of Care?

As the foregoing discussion demonstrates, the patron of the parking lot operator is by no means automatically assured recovery for injuries sustained on a lot.[52] Even so, in the great majority of jurisdictions, the invitee has a much better chance of recovery than a licensee or trespasser who is similarly injured. The licensee is one who enters the premises with permission and for his own benefit.[53] The trespasser is one who comes on property without a privilege to do so.[54] The cause of this disparity in regard to chance of recovery is the limited duty owed by occupiers to licensees and trespassers, as compared to that owed invitees. An occupier of land owes a licensee only the duty not to injure him by willful or wanton misconduct or any affirmative act of negligence, and to warn him of any danger.[55] As for the trespasser, the occupier owes him only the duty to refrain from wanton,

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[44] Morris v. Great A. & P. Tea Co., *supra* n. 23.

[45] Warren v. Squire Road Cabin, Inc., 347 Mass. 764, 196 N.E. 2d 927 (1964); Jeswald v. Hutt, *supra* n. 3.

[46] Jeswald v. Hutt, *supra* n. 3.

[47] Martin v. Fox West Coast Theatre Corp., *supra* n. 4.

[48] Falen v. Monessen Amusement Co., *supra* n. 4.

[49] Murphy v. Bernheim & Sons, Inc., 327 Pa. 285, 194 A. 194 (1937).

[50] Morris v. Great A. & P. Tea Co., *supra* n. 23.

[51] Falen v. Monessen Amusement Co., *supra* n. 4.

[52] Beany v. Carlson, 174 Ohio St. 409, 189 N.E. 2d 880 (1963); Vukovic v. Walnut Grove Country Club, 69 Ohio L. Ab. 197, 124 N.E. 2d 463 (1953).

[53] Gladwin v. Hotel Band Co., 19 Conn. Super. 105, 110 A. 2d 481 (1954).

[54] Reasoner v. Chicago, R. I. & P. R.R. Co., 251 Iowa 506, 101 N.W. 2d 739 (1960); Rich v. Tite-Knot Pine Mill, 421 P. 2d 370 (Ore. 1966).

[55] Salemi v. Duffy Const., 3 Ohio St. 2d 169, 209 N.E. 2d 566 (1965).

willful or reckless misconduct which is likely to injure him.[56] So, for example, a patron recovered when injured as a result of stepping into a large chuckhole of which the operator was held to have notice.[57] Had the injured party had the status of a trespasser, however, he could not have recovered absent a showing that the operator had willfully injured or entrapped him.[58] As a trespasser, he would have taken the premises as he found them.[59] In another case, a shopper who was injured after parking in the lot of defendant store, intending to do business elsewhere, was held to be a licensee and therefore one who took the premises as she found them.[60] Had she been an invitee, the store would have owed her a duty of reasonable care to keep the premises safe.[61]

I contend that the distinctions the common law makes between trespasser, licensee and invitee, distinctions which are ". . . inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism," [62] have little relevance to the resolution of present day negligence claims, including those cases which concern parking lot injuries. This contention does not stand unsupported, as the trend of the law today is away from these distinctions. Witness:

> In an effort to do justice in an industrialized society with its complex economic and social relationships, modern common-law courts have found it necessary to formulate increasingly subtle verbal refinements, to create subclassification 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 bred by common law have produced confusion and conflict. As new distinctions have been spawned, older ones have become obscured. Through this semantic morass the common law has moved, unevenly and with hesitation, towards imposing upon owners and occupiers a single duty of reasonable care in all circumstances.[63]

In the case quoted above, the United States Supreme Court, in 1959, held it to be a principle of maritime law that a ship owner owes a duty of reasonable care to all those aboard its ships whose interests were not inimical to the owner's legitimate interests.[64] In England, the birthplace of the common law distinctions, a common duty of care on the part of the occupier was extended by a 1957 legislative act to licensees as

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56 Soles v. Ohio Edison Co., 144 Ohio St. 373, 59 N.E. 2d 138 (1945).

57 Rhodes v. City of Palo Alto, *supra* n. 19.

58 Daisey v. Colonial Parking, Inc., 331 F. 2d 777 (D.D.C. 1963).

59 *Ibid.*

60 Roberts v. Reuben A. Grossman, Inc., 346 Mass. 769, 193 N.E. 2d 676 (1963).

61 Rodgers v. Great A. & P. Tea Co., 148 Conn. 104, 167 A. 2d 712 (1961).

62 Kermarec v. Compagnie Generale, 358 U.S. 625, 630 (1959).

63 *Ibid.*

64 *Ibid.*

well as invitees.[65] In 1956, the New Jersey Supreme Court held that "where there is foreseeability of harm, landowners as well as other members of society should generally be subject to a reasonable duty of care to avoid it."[66] The court held that a landlord owed such a duty to a guest of his tenant who was injured in a common passageway of the landlord's apartment building.[67] The distinction between invitee and licensee was ended, and a duty of reasonable care extended to both, in Washington in 1963.[68] In 1964, in the District of Columbia, the Court of Appeals extended a duty of reasonable care to an injured child who was a trespasser.[69] Finally, in 1968, the California Supreme Court, in *Rowland v. Christian,* held that status was irrelevant in determining a standard of care and that a duty of reasonable care was owed to all those coming on another's land.[70] The Hawaii Supreme Court has cited and followed the *Rowland* holding.[71] Status, said the California court, may, in light of the facts giving rise to such status, have some bearing on liability, but only for purposes of determining whether the single standard of care was met.[72] Ohio maintains the distinctions.[73] However, the Ohio Supreme Court, in a 1969 decision, acknowledged the trend toward ending the distinctions, even though the court chose to defer deciding the question "to a later day and to another case."[74]

In discussing whether other than the single duty of care is appropriate in parking lot cases, the opinion in *Rowland* provides a useful analytic tool. In that case the court advocated certain considerations which it felt should be balanced in determining whether there are valid reasons for permitting an exception to the general rule of the duty to use reasonable care, such as is permitted in cases concerning licensees and trespassers:

> . . . the major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and blame attached to the defendant's conduct, the injury suffered, the moral policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach and the availability, cost and prevalence of insurance for the risk involved.[75]

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65 Occupiers Liability Act, 1957, 5 & 6 Eliz. 2 c. 31.

66 Taylor v. New Jersey Highway Auth., 22 N.J. 454, 458, 126 A. 2d 313, 317 (1956).

67 *Id.,* 460, 319.

68 Potts v. Amis, 62 Wash. 2d 777, 384 P. 2d 825 (1963).

69 Gould v. DeBeve, 330 F. 2d 826 (D.D.C. 1964).

70 Rowland v. Christian, *supra* n. 9.

71 Pickard v. City of Honolulu, 452 P. 2d 445 (1969).

72 Rowland v. Christian, *supra* n. 9.

73 DiGildo v. Caponi, 18 Ohio St. 2d 125, 247 N.E. 2d 732 (1969).

74 *Id.,* 736.

75 Rowland v. Christian, *supra* n. 9.

Each of these considerations will be discussed in relation to the distinctions of trespasser, licensee and invitee in the context of parking lot situations to determine if the exception provided by the common law in cases concerning trespassers and licensees is warranted.

Foreseeability of Harm to the Plaintiff

The invitee is no more susceptible to injury caused by dangerous conditions on the premises than the trespasser or licensee. To say that he is, is to say that whether or not a man on foot in a parking lot will step in a chuckhole is directly related to whether he is going to the store whose lot he parked in or to the store next door. Parking lots are so commonly used as shortcuts by the general public that when an injury to an invitee is foreseeable, injury to others should be equally foreseeable. This is particularly so in the open lots which surround shopping centers.

Degree of Certainty that the Plaintiff Suffered Injury

It is no easier nor harder to determine whether there is an actual injury to a trespasser or licensee than to an invitee. The presence of a guardrail splinter embedded in a leg is as readily ascertainable in the leg of a trespasser as in the leg of an invitee.

Closeness of the Connection Between the Defendant's Conduct and the Injury Suffered

Again the distinctions are not useful. The question of the closeness of the connection between an act and an injury is answered in terms of the interplay of cause and effect. The status of the injured person does not affect that interplay.

Moral Blame Attached to the Defendant's Conduct

The growing emphasis of modern morality on the worth of the individual as opposed to the protection of property provides one of the strongest arguments for discarding the common law distinctions.[76] This change of values is evidenced in the minority of jurisdictions which, as noted previously, now require the occupier of land to use reasonable care for the protection of not only invitees, but of licensees as well,[77] and even of all persons on the property, with no regard as to status.[78] The application of the general rule in cases concerning trespassers and licensees would prevent such morally irreconcilable results as holding

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[76] Oettinger v. Stewart, 24 Cal. 2d 133, 148 P. 2d 19 (1944).

[77] Good v. Whan, 183 Okla. 12, 335 P. 2d 911 (1959); Kermarec v. Compagnie Generale, *supra* n. 62; Potts v. Amis, *supra* n. 68; Taylor v. New Jersey Highway Auth., *supra* n. 66.

[78] Rowland v. Christian, *supra* n. 9; Pickard v. City of Honolulu, *supra* n. 71.

an operator liable for injury to a patron, but not liable to someone who is injured while using the lot for a shortcut, where the injury in both cases is caused by the same dangerous condition. The moral blame is the same, whether the injured party is a shortcutter or a patron, and the liability should also be the same. "Reasonable people do not ordinarily vary their conduct depending upon . . . the status of the injured party . . . [To do so] . . . is contrary to our modern social mores and humanitarian values." [79]

Policy of Preventing Future Harm

This policy would be best served by ending the distinctions and extending the duty of reasonable care to trespassers and licensees. Bringing all persons on the premises, regardless of status, within the scope of a lot operator's duty of reasonable care will serve to encourage him to maintain his property more carefully. As a result, the possibility of future harm will be reduced.

Extent of the Burden to the Defendant and Consequences to the Community of Imposing a Duty of Care With Resulting Liability for Breach

The invitor owes a duty to the invitee to use reasonable care not to injure him.[80] He must either correct a dangerous condition or warn the invitee of it.[81] In parking lots, the practical way to meet this duty is to remove the defect, as it would be difficult to warn each patron of every latent danger. By extending this duty to all who come on the lot, no greater burden is created, as an operator's removal of defects which meets the duty owed invitees would also meet the duty owed licensees and trespassers.

Availability, Cost and Prevalence of Insurance for the Risk Involved

Liability insurance for businesses is available. Any discussion here of the cost in light of the increased risk involved must be speculative. It would appear that expanding the number of people to whom a duty of reasonable care would be owed would result in more claims, more recoveries and resultant higher rates. However, even if this should be the case, the increased burden on lot operators would be offset by the benefit of society which would result from requiring a uniform duty of care.

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[79] Rowland v. Christian, *supra* n. 9 at 104, 568 (1968).

[80] Ingalls v. Western Reserve University, 61 Ohio L. Ab. 1, 102 N.E. 2d 605 (1951).

[81] Geraghty v. Burr Oak Lanes, Inc., *supra* n. 2.

Hopefully the preceding serves to demonstrate the increasing inapplicability of the exception to the general rule of a duty of reasonable care followed in cases concerning injury to trespassers or licensees. Ending this exception would encourage parking lot operators and other occupiers of land to make premises safer, thereby benefiting the general public through greater public safety and also assisting the courts and the cause of justice by eliminating the maze of distinctions which the courts now face.

Conclusion

The operator of a parking lot owes a duty of reasonable care to invitees. Liability for breach of this duty may be avoided where there is contributory negligence on the part of the invitee.

The duty owed trespassers and licensees is less burdensome in its requirements. This exception to the general rule of reasonable care has endured from feudal times. Today the reason which gave rise to this exception has little relevance, and the courts are properly moving toward holding such occupiers of land as parking lot operators to a uniform duty of reasonable care, regardless of the technical status of those coming on their land.