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unconvincing, stated that the "retraction inculpated . . . [the defendant] to the same extent that it exculpated . . ." the witness.[206] The Court rejected the idea that the right of confrontation in a criminal trial can be governed by such an "unrealistic definition of the word 'against.' "[207]

It is submitted that if the New York courts apply the "affirmative damage" rule of *Fitzpatrick* in a mechanical manner they may well run afoul of the *Chambers* decision. Such questions, however, will be definitively answered only in subsequent cases.

DEVELOPMENTS IN NEW YORK PRACTICE

Landowners held to single duty of reasonable care towards all entrants.

Through a series of cases decided over the course of the past century, common law courts developed a complex system whereby the degree of duty owed by a landowner[208] to a person upon his premises varied with the classification of that person.[209] At common law, a trespasser was one who entered or remained upon the premises without privilege or the consent of the owner.[210] To him the occupier owed only the slight duty to refrain from inflicting wanton or wilful injury.[211] In contrast, a licensee was defined as

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[206] *Id.* at 297.

[207] *Id.* at 298. *See* United States v. Norman, 518 F.2d 1176 (4th Cir. 1975) (a party does not "vouch" for the testimony of his witnesses); United States v. Perez, 493 F.2d 1339 (10th Cir. 1974) (denial of right of confrontation to permit government agent to testify as to what an informer told him without producing the informer at trial).

[208] Although considerable legal differences may exist between the status of land owner and land occupier, for the purposes of this Survey the terms are used interchangeably to denote one in control of real property.

[209] *See, e.g.*, Haefeli v. Woodrich Eng'r Co., 255 N.Y. 442, 175 N.E. 123 (1931); Vaughan v. Transit Dev. Co., 222 N.Y. 79, 118 N.E. 219 (1917); Indermaur v. Dames, L.R. 1 C.P. 274 (1866), *aff'd*, L.R. 2 C.P. 311 (Ex. 1867). *See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 351-415 (4th ed. 1971) [hereinafter cited as PROSSER]; Marsh, *The History and Comparative Law of Invitees, Licensees and Trespassers*, 69 L.Q. REV. 182 (1953) [hereinafter cited as Marsh].

[210] Vaughan v. Transit Dev. Co., 222 N.Y. 79, 118 N.E. 219 (1917); RESTATEMENT (SECOND) OF TORTS § 329 (1965). Consent may be implied when a landowner has knowledge that persons enter and use a particular area in substantial numbers. Such persons are then treated as licensees. *Id.* § 330.

[211] Mendelowitz v. Neisner, 258 N.Y. 181, 179 N.E. 378 (1932); Marsh, *supra* note 209, at 187. An early exception to the rule equated the setting of a spring-gun to trap a trespasser with the intentional infliction of injury. Bird v. Holbrook, 130 Eng. Rep. 911 (C.P. 1828). New York courts have expanded the notion of trap to include deceptively innocent, artificially created dangerous conditions in the land. Mayer v. Temple Props., Inc., 307 N.Y. 559, 122 N.E.2d 909 (1954) (55-foot-deep hole covered with flimsy piece of wood). The concept of trap also includes the negligent control of a dangerous instrumentality. Kingsland v. Erie County Agricultural Soc'y, 298 N.Y. 409, 84 N.E.2d 38 (1949) (fireworks). Another early exception to the rule prohibiting recovery for injuries sustained by trespassers can be found in Barnes v. Ward, 137 Eng. Rep. 945 (C.P. 1850), wherein the court held an unfenced excavation on the side of a road to be a nuisance, for which the occupier would be liable to anyone injured by it. Another exception differentiated between discovered and

one who entered or remained on the premises for his own purposes, with the owner's permission, either express or implied, but without invitation.[212] Here, the law imposed a broader duty on the owner, requiring him to refrain from acts of "affirmative negligence"[213] and to disclose dangerous conditions known to the owner and unlikely to be discovered by the licensee.[214] Finally, an invitee was defined as one who entered either in connection with the business of the owner[215] or under an implied invitation to the public to enter for the purpose for which the premises were held

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undiscovered trespassers, with New York courts holding that the occupier may not use unreasonable force to expel a discovered trespasser. Ansteth v. Buffalo Ry., 145 N.Y. 210, 39 N.E. 708 (1895). Furthermore, the discovered trespasser may not be injured recklessly or negligently by an act directed towards him. Magar v. Hammond, 183 N.Y. 387, 76 N.E. 474 (1906). An important exception has also been created to account for the cases of child trespassers who are foreseeably attracted to the accessible property by some artificial condition which the child does not fully comprehend, or which is highly dangerous. Sioux City & Pac. R.R. v. Stout, 84 U.S. (17 Wall.) 657 (1874); Patterson v. Proctor Paint & Varnish Co., 21 N.Y.2d 447, 235 N.E.2d 765, 288 N.Y.S.2d 622 (1968).

[212] Vaughan v. Transit Dev. Co., 222 N.Y. 79, 118 N.E. 219 (1917); Meyer v. Manzer, 179 Misc. 355, 39 N.Y.S.2d 5 (Sup. Ct. Oneida County 1943). Among the persons classified as licensees are servants, Priestly v. Fowler, [1837]All E.R. 449 (Ex.), guests of the household, Southcote v. Stanley, 156 Eng. Rep. 1195 (Ex. 1856), employees whose assumption of danger is bargained for, Indermaur v. Dames, L.R. 1 C.P. 274 (1866), *aff'd,* L.R. 2 C.P. 311 (Ex. 1867), and persons using the property with permission but for their own convenience, Sutton v. New York Cent. & Hudson River R.R., 66 N.Y. 243 (1876). There has been a recent trend toward treating social guests as invitees rather than licensees. *See, e.g.,* CONN. GEN. STAT. ANN. § 52-557a (Supp. 1975); Alexander v. General Accident Fire & Life Assurance Corp., 98 So. 2d 730 (La. App. 1957). *See also* Mounsey v. Ellard, 363 Mass. 693, 297 N.E.2d 43 (1973) (abolishing distinction between invitees and licensees).

[213] *See, e.g.,* Corby v. Hill, 140 Eng. Rep. 1209 (C.P. 1858). *Compare* Nicholson v. Erie Ry., 41 N.Y. 525 (1870) (licensee injured by rolling car cannot recover since failure to set brakes on railroad car is passive negligence), *with* Barry v. New York Cent. & Hudson River R.R., 92 N.Y. 289 (1883) (when operating train, one must exercise reasonable care to avoid injuring licensee). Deficient maintenance of a machine or structure was considered passive negligence and did not provide a basis of recovery by a licensee. *See, e.g.,* Cusick v. Adams, 115 N.Y. 55, 21 N.E. 673 (1889) (hole in private bridge); Larmore v. Crown Point Iron Co., 101 N.Y. 391, 4 N.E. 752 (1886) (defective machine); Southcote v. Stanley, 156 Eng. Rep. 1195 (Ex. 1856) (defective glass door).

[214] The requirement that the landowner must disclose the existence of dangerous hidden defects is an expansion of the trap exception discussed in note 211 *supra.* 33 ALBANY L. REV. 230, 234 (1968). There is no duty to warn of patent defects which are already known to the licensee or could be discovered with reasonable care. *Compare* Sardo v. Lascalza, 236 N.Y.S.2d 650 (Sup. Ct. Queens County 1962) (duty not to direct guest into unlighted area without warning of known dangers), *with* Kreger v. Ladd, 30 Misc. 2d 736, 216 N.Y.S.2d 866 (Sup. Ct. Nassau County 1961) (no duty to warn guest of defective metal stripping at exit door which was lighted and visible). *See also* Velez v. City of New York, 45 App. Div. 2d 887, 358 N.Y.S.2d 18 (2d Dep't 1974); Hirschman v. Hirschman, 4 App. Div. 2d 630, 168 N.Y.S.2d 153 (1st Dep't 1957).

[215] *See, e.g.,* Haefeli v. Woodrich Eng'r Co., 255 N.Y. 442, 175 N.E. 123 (1931); Vaughan v. Transit Dev. Co., 222 N.Y. 79, 118 N.E. 219 (1917). Early invitees included the user of a boat canal, Parnaby v. Lancaster Canal Co., 113 Eng. Rep. 400, 408 (Ex. 1839), and an independent contractor, Indermaur v. Dames, L.R. 1 C.P. 274 (1866), *aff'd,* L.R. 2 C.P. 311 (Ex. 1867). The invitee classification has since been expanded to situations providing only tenuous economic benefit to the occupier. *See, e.g.,* Hickey v. Shoemaker, 132 Ind. App. 136, 167 N.E.2d 487 (1960) (viewing body in funeral home); Powell v. Great Lakes Transit Corp., 152 Minn. 90, 188 N.W. 61 (1922) (seeing passenger off aboard a boat).

open.[216] Because the invitee's entry in most cases was both highly predictable and beneficial to the occupier, courts imposed a duty of reasonable care, requiring that the owner make the premises safe.[217]

In the recent case of *Basso v. Miller*,[218] New York joined the ranks of a small but growing number of jurisdictions that have abandoned these traditional common law classifications.[219] The Court of Appeals, in a decision written by Judge Cooke, has adopted a single standard of care applicable whenever a party enters a landowner's premises, *viz.*, reasonable care under the circumstances. Thus, the landowner's liability to any person injured on his premises will now be based upon the foreseeability of the injured person's presence at the place of injury, regardless of that person's status under the common law. Among the circumstances to be considered are "the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk."[220]

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[216] *See, e.g.*, Caldwell v. Village of Island Park, 304 N.Y. 268, 107 N.E.2d 441 (1952) (using village park); Abbott v. New York Pub. Library, 263 App. Div. 314, 32 N.Y.S.2d 963 (1st Dep't 1942) (using public library); Guilford v. Yale Univ., 128 Conn. 449, 23 A.2d 917 (1942) (attending college reunion); Geiger v. Simpson Methodist-Episcopal Church, 174 Minn. 389, 219 N.W. 463 (1928) (attending church service). In these cases liability is predicated on the implicit representation that reasonable care has been exercised to make the premises safe. PROSSER, *supra* note 209, at 388.

[217] The owner owed to invitees the duty to inspect the premises, remedy defects, and warn of potential hazards. *See, e.g.*, Indermaur v. Dames, L.R. 1 C.P. 274, 288 (1866), *aff'd*, L.R. 2 C.P. 311 (Ex. 1867) (failure to warn contractor of open shaft); Parnaby v. Lancaster Canal Co., 113 Eng. Rep. 400 (Ex. 1839) (failure of canal operator to remove sunken wreck or mark its location). *See also* McNally v. Oakwood, 210 App. Div. 612, 206 N.Y.S. 759 (4th Dep't 1924), *aff'd*, 240 N.Y. 600, 148 N.E. 722 (1925); Lindsley v. Stern, 203 App. Div. 615, 197 N.Y.S. 106 (1st Dep't 1922). Although bound to exercise reasonable care for their protection, the occupier is not an insurer of an invitee's safety. Thus, where a risk could not be anticipated or where the invitee had knowledge of the danger, the occupier is not liable. Powers v. Montgomery Ward Co., 251 App. Div. 120, 295 N.Y.S. 712 (4th Dep't), *aff'd*, 276 N.Y. 600, 12 N.E.2d 595 (1937); PROSSER, *supra* note 209, at 392-93. In New York, persons accompanying invitees, such as children or spouses, will be treated as invitees. Davis v. Ferris, 29 App. Div. 623, 53 N.Y.S. 571 (2d Dep't 1898).

[218] 40 N.Y.2d 233, 352 N.E.2d 868, 386 N.Y.S.2d 564 (1976).

[219] *E.g.*, Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973); Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); Mile High Fence Co. v. Radovich, 175 Colo. 537, 489 P.2d 308 (1971); Pickard v. Honolulu, 51 Hawaii 134, 452 P.2d 445 (1969); Sargent v. Ross, 113 N.H. 388, 308 A.2d 528 (1973); Mariorenzi v. DiPonte, Inc., 114 R.I. 294, 333 A.2d 127 (1975). Courts in several other jurisdictions have questioned the common law categories without overruling them. *E.g.*, Boyer v. Guidicy Marble, Terrazo & Tile Co., 246 S.W.2d 742, 748 (Mo. 1952); Taylor v. New Jersey Highway Auth., 22 N.J. 454, 126 A.2d 313 (1956); Potts v. Amis, 62 Wash. 2d 777, 384 P.2d 825 (1963).

[220] 40 N.Y.2d at 241, 352 N.E.2d at 872, 386 N.Y.S.2d at 568, *quoting* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 100 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973). The California Supreme Court has also suggested that consideration be given to the moral blame connected with the conduct, the connection between injury and conduct, the policy of preventing future harm, and the prevalence and availability of insurance. Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

The *Basso* plaintiff was a passenger on a motorcycle driven by William Miller. The two were returning from a rescue operation on the grounds of Ice Cave Mountains, a scenic park. As they rounded a curve on a park road, the motorcycle hit a series of holes and spun out of control, throwing both driver and plaintiff onto the rocks. The plaintiff sought to recover damages on the theory that the defendant park had negligently failed to maintain its road in a safe condition. Highly conflicting testimony was offered at the trial as to the circumstances under which the plaintiff had entered and remained upon the property.[221] A serious dispute arose, therefore, as to the plaintiff's actual status and the degree of care owed him by the park.[222]

In the majority's view, the conflict of evidence made it clear that a person's status often does not fit neatly into one of the three common law categories. In the instant case, it was possible "to have labeled the plaintiff a trespasser when he entered without permission . . . a licensee when seen but not ejected . . . and an invitee when assisting in the rescue."[223] Rather than attempting to fit the plaintiff into a traditional category, the majority paused to reflect on the origin of these rules. The Court found the common law distinctions to be rooted in the law's feudal and agrarian heritage, and no longer applicable in a society in which human safety is emphasized to a greater extent than is the unfettered use of private property.[224] Furthermore, as the Court indicated in *Scurti v. City of*

[221] Testimony differed concerning whether Basso had a season's pass to use defendant's property, whether the gate was open when the plaintiff first entered the property to assist in the rescue, whether he had been told by an attendant not to enter, whether he was told to leave, and whether he actually assisted in the rescue or merely stood by and watched. 40 N.Y.2d at 235-37, 352 N.E.2d at 869-70, 386 N.Y.S.2d at 564-66.

[222] Over defendant's objection, the trial judge erroneously instructed the jury that the defendant had a duty to warn plaintiff of defects in the road if they found plaintiff to be a licensee. *Id.* at 239, 352 N.E.2d at 871, 386 N.Y.S.2d at 567.

[223] *Id.* at 239-40, 352 N.E.2d at 871, 386 N.Y.S.2d at 567; *accord,* Dunster v. Abbott, [1953] 2 All E.R. 1572 (C.A.).

[224] 40 N.Y.2d at 240, 352 N.E.2d at 871-72, 386 N.Y.S.2d at 567. The classification system antedates current negligence theory. Marsh, *supra* note 209, at 184. It was thought overly burdensome to force landowners to restrict the full development of the land by taking safety precautions or avoiding dangerous activities. *See* Hughes, *Duties to Trespassers: A Comparative Study and Revaluation,* 68 YALE L.J. 633 (1959) [hereinafter cited as Hughes]; PROSSER, *supra* note 209, at 357-59. But, as Chief Judge Bazelon has noted, "[t]he trespasser who steps from a public sidewalk onto a private parking lot today is not the 'outlaw' or 'poacher' whose entry was both unanticipated and resented in the nineteenth century." Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 102 (D.C. Cir. 1972), *cert. denied,* 412 U.S. 939 (1973). Moreover, "only an extreme theory of retribution could transform any taint of illegality into a bar against damages for injury." Hughes, *supra* at 686. The historical progression from an agrarian to an urban industrialized society has forced the courts to develop numerous refinements and exceptions to the classification system. *See* notes 211-17 *supra.* The United States Supreme Court has characterized the system as a "semantic morass" and refused to adopt such standards within the framework of its admiralty jurisdiction. Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630-31 (1959).

New York,[225] a companion case to *Basso*, the assumptions underlying the various classifications do not always hold true in particular factual settings.[226] Finally, the *Basso* Court noted that the amount of time spent on determining status is often monumental.[227] Thus, the Court ruled that all landowners will henceforth be under a single duty to use reasonable care based on foreseeability of the plaintiff's presence, regardless of the injured person's common law status.[228] The Court thereupon remanded the case to the trial court for reconsideration in light of the new standard of care.

In a separate opinion, Chief Judge Breitel, although concurring in the result, vigorously dissented from the decision to abolish the common law classifications.[229] The Chief Judge contended that the result could have been reached within the existing common law framework.[230] Defending the traditional categories as being valuable for the predictive stability and guidance they offer, he argued that the majority's substitute was a vague generalization likely to produce more problems than it would solve. Moreover, the Chief Judge criticized the majority for surrendering to the sympathies of the jury the courts' role in applying social policies and determining the existence of a duty.[231]

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[225] 40 N.Y.2d 433, 354 N.E.2d 794, 387 N.Y.S.2d 55 (1976).

[226] *Id.* at 440, 354 N.E.2d at 796, 387 N.Y.S.2d at 58.

[227] 40 N.Y.2d at 239, 352 N.E.2d at 871, 386 N.Y.S.2d at 567. *See* note 232 and accompanying text *infra*.

[228] As Judge Cooke pointed out in *Basso*, this rule is no different from ordinary negligence theory, *see, e.g.*, Conway v. O'Brien, 111 F.2d 611, 612 (2d Cir. 1940) (L. Hand, J.), *rev'd on other grounds*, 312 U.S. 492 (1941), and the doctrines of comparative negligence and assumption of risk may be invoked when appropriate. 40 N.Y.2d at 241, 352 N.E.2d at 872, 386 N.Y.S.2d at 568.

[229] 40 N.Y.2d at 243, 352 N.E.2d at 873, 386 N.Y.S.2d at 569. (Breitel, C.J. & Jasen, J. concurring).

[230] *Id.*, 352 N.E.2d at 874, 386 N.Y.S.2d at 569. In *Basso*, the Chief Judge suggested that the plaintiff could have recovered as an invitee. Similarly, in *Scurti*, he maintained that the principles applicable to child trespassers and maintenance of public parks could have resolved the case in favor of the plaintiff. 40 N.Y.2d at 443, 354 N.E.2d at 798-99, 387 N.Y.S.2d at 59.

[231] 40 N.Y.2d at 243, 352 N.E.2d at 874, 386 N.Y.S.2d at 569-70. As was noted by the Chief Judge, juries are often overly influenced by emotion. *See, e.g.*, Toomey v. London, Brighton & S. Coast Ry., 140 Eng. Rep. 694 (C.P. 1857), where the court, holding as a matter of law that there was no evidence of negligence, declared that "every person who has had any experience in courts of justice knows very well that a case of this sort against a railway company could only be submitted to a jury with one result." *See also* Hardcastle v. South Yorkshire Ry. & River Dun Co., 157 Eng. Rep. 761, 764 (Ex. 1859), where the court noted "it would be very dangerous if . . . in every case [liability] was to be left as a fact to the jury . . . ."

It is submitted that this concern is inappropriate. Under traditional negligence theory, the question of duty is ordinarily a preliminary question for the court to decide. Once it is determined that a duty exists, it is for the jury to determine whether the defendant's specific conduct has satisfactorily discharged his general duty of care. PROSSER, *supra* note 209 at 205-08. By basing the existence of a duty on the foreseeability of the plaintiff's presence, the Chief Judge declared, the question of duty has been transformed into an issue of fact for the

It is submitted that the rule announced by the *Basso* Court is a welcome and laudable one. Most of the 1000-page trial record in the instant case was developed in an effort to determine plaintiff's common law status. One direct and positive result of the *Basso* and *Scurti* approaches should be the elimination of such judicial effort by avoiding the need for a lengthy examination of status. It should also prevent the numerous appeals resulting from alleged errors in determining status and in jury instructions concerning the correlative duties owed to different classes of entrants.[232] Concededly, the number of claims filed may rise as the probable decrease in the number of complaints summarily dismissed encourages the filing of suits which previously would not have been brought.[233] Nevertheless, those who fear a sharp increase in liability as a result of *Basso* might be comforted by the experience of the State of California, which has used a similar rule for nearly a decade without any

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jury in all cases where the plaintiff's presence was not unforeseeable as a matter of law. Whether this is more than a mere difference of semantics is disputable since, by determining a plaintiff's status under prior law, the jury would indirectly decide the question of duty. In cases where the issue of status was submitted to the jury along with the issue of care, this decision was not as indirect as it might seem. Moreover, as one commentator has declared, "we must either trust the jury or get rid of it." Hughes, *supra* note 224, at 700. The *Basso* Court properly noted that if occasional damage awards are excessive, or if the plaintiff fails to submit sufficient evidence to support the existence of every element of a negligence action, the court must still set aside the verdict as against the weight of the evidence. 40 N.Y.2d at 242, 352 N.E.2d at 873, 386 N.Y.S.2d at 568. Further room for judicial guidance and supervision will be afforded in the development of appropriate jury instructions. Indeed, in Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973), Chief Judge Bazelon offered some model jury instructions:

> A [landowner] is not an insurer of the condition of his [property]. His duty is to exercise reasonable care to keep [his property] safe [in view of the foreseeability of the presence of others on his land]. He is responsible, of course, for injuries resulting from risks created personally or by his employees. Moreover, his obligation of due care extends to reasonable supervision and inspection of the premises to identify and protect against potential perils [in view of the probability of injury to others]. For this reason, liability may also spring from a negligent failure to safeguard against dangers born of the activities of [others]. But negligence can be found in relation to a [visitor]-created hazard only if it is known, or because of its duration should have been discovered, in time to afford a fair opportunity to remove it.

469 F.2d at 106 n.48, *quoting* Seganish v. District of Columbia Safeway Stores, Inc., 406 F.2d 653, 655-56 (D.C. Cir. 1968) (changes by the court). Landowners should also be entitled to an instruction to the effect that they are not expected to assume burdens which are unreasonably expensive and difficult when compared to the probability of harm and seriousness of injury if it happens. 469 F.2d at 106 n.49. Sufficient flexibility is also inherent in a standard of reasonableness to avoid undue harshness to homeowners and apartment dwellers of limited means. *Id.* at 106. In no case, however, would the occupier be entitled to an instruction indicating he had no duty to repair, or warn entrants of defects. Fitch v. LeBeau, 1 Cal. App. 3d, 81 Cal. Rptr. 722 (1969).

[232] In Mile High Fence Co. v. Radovich, 175 Colo. 537, 489 P.2d 308 (1971), the Colorado Supreme Court noted that one recent case had been before the court four times on the issue of status. The *Basso* appeal also resulted from an erroneous jury instruction on the question of the appropriate duty. *See* note 222 *supra*.

[233] *Cf.* 25 VAND. L. REV. 623, 636 (1972).

apparent major problems.[234] Similarly, the French civil law system holds landowners to a high degree of responsibility, and yet has not experienced "incessant verdicts in favor of the plaintiff."[235] If, in fact, insurance rates do rise, the increase might be absorbed by industrial and commercial concerns.[236] This would be indicative of *Basso* and *Scurti's* most important result — the partial shifting of risk by expanding the duty of care on the parties who will, in many cases, be able to prevent, insure against, and absorb the financial loss of property-related injuries. Commercial entities can treat such losses or insurance premiums as a cost of doing business. The homeowner or apartment dweller of limited means, on the other hand, may be protected by flexibility in the general standard of reasonableness,[237] as well as by joint landlord liability. Hopefully, the increase in potential liability will yield a decrease in future injuries by placing landowners on notice that they will be held to reasonable standards of care in the maintenance of their premises.[238] The holding of the Court of Appeals in *Basso* is a welcome step toward conforming the law to modern socio-economic conditions and demands. Application of a single duty of reasonable care will simplify litigation in the area of property-related injuries while shifting liability to those who should properly bear its burden.

Jury need not be instructed as to the tax-exempt status of personal injury awards.

Damages awarded in personal injury actions are exempt from both federal[239] and New York State income taxation.[240] Whether a jury should be informed of this fact has presented considerable difficulty for the courts. Recently, in *Coleman v. New York City Transit Authority*,[241] the Court of Appeals, following the view of a majority of jurisdictions,[242] held that a trial judge is not required to

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[234] *Cf., e.g.*, Minoletti v. Sabini, 27 Cal. App. 3d 321, 103 Cal. Rptr. 528 (1972); Cappaa v. Oscar C. Holmes, Inc., 25 Cal. App. 3d 978, 102 Cal. Rptr. 207 (1972); Fitch v. LeBeau, 1 Cal. App. 3d 320, 81 Cal. Rptr. 722 (1969).

[235] Hughes, *supra* note 224, at 684.

[236] 25 VAND. L. REV. 623, 637 (1972). *See also* 44 N.Y.U.L. REV. 426, 432 (1969).

[237] Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 106 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973).

[238] Hughes, *supra* note 224, at 691.

[239] INT. REV. CODE OF 1954, § 104(a).

[240] N.Y. TAX LAW § 359(2)(e) (McKinney 1975).

[241] 37 N.Y.2d 137, 332 N.E.2d 850, 371 N.Y.S.2d 663 (1975).

[242] The majority of state and federal jurisdictions clearly prohibit any instruction to the jury on the tax-exempt status of personal injury awards. *See, e.g.*, Prudential Ins. Co. of America v. Wilkerson, 327 F.2d 997 (5th Cir. 1964) (per curiam); Gerham v. Farmington Motor Inn, Inc., 159 Conn. 576, 271 A.2d 94 (1970); Hall v. Chicago & N.W. Ry., 5 Ill. 2d 135, 125 N.E.2d 77 (1955). Some jurisdictions, however, have adopted the contrary position,