primarily was conducted in the Rutland area prior to and during 1978 are more familiar with the standard of care then required of lawyers."

Defendants claim that the trial court was more concerned with the time frame of the alleged act of malpractice then the locale in which it occurred. We cannot agree. In ruling for the defendants, the court found the relevant standard of care to be limited to what a careful and prudent practitioner in the Rutland area would do under the circumstances. The court concluded:

> The *standard of care in the Rutland area* in 1978 required of an attorney did not require him to suggest or recommend to a purchasing client that a noncompete agreement be obtained from a seller who is a relative and who has been a business associate for several years, the transaction not being one at arms length. (Emphasis added).

In Hughes v. Klein, 139 Vt. 232, 233, 427 A.2d 353, 354 (1981), this Court held that the standard of care within the legal profession required lawyers to exercise "the customary skill and knowledge which normally prevails at the time and place." We are now asked to reexamine the underlying rationale and continued vitality of the so-called locality rule.

The locality rule is an exclusive product of the United States. It was first applied to the medical profession approximately a century ago when there existed a great disparity between standards of practice in large urban centers and remote rural areas. . . .

The shortcomings of the locality rule are well recognized. It immunizes persons who are sole practitioners in their community from malpractice liability and it promotes a "conspiracy of silence" in the plaintiffs' locality which, in many cases, effectively precludes plaintiffs from retaining qualified experts to testify on their behalf. Recent developments in technology and the trend toward standardization have further undermined support for the rule.

According to defendants, the reasoning of the courts which have rejected the locality rule in medical malpractice decisions is inapposite to legal malpractice. We disagree.

> The ability of the practitioner and the minimum knowledge required should not vary with geography. The rural practitioner should not be less careful, less able or less skillful than the urban attorney. The fact that a lower degree of care or less able practice may be prevalent in a particular local community should not dictate the standard of care.

Mallen & Levit, Legal Malpractice §254, at 334 (2d ed. 1981). Defendants correctly note that "knowledge of local practices, rules, or customs may be determinative of, and essential to, the exercise of adequate care and skill." Id. To argue this fact in support of continued application of the locality rule, however, is to confuse "the *degree* of 'skill and knowledge' and the relevance of local factors which constitute the *knowledge* required by the standard of care." Id. at 337. Although attorneys throughout this state may be required to familiarize themselves with local practices, rules or customs peculiar to their area, the crucial inquiry for malpractice purposes turns not on the substance of the underlying practice, rule, or custom but on whether a reasonable and prudent attorney can be expected to know of its existence and practical applications.

In selecting a territorial limitation on the standard of care, we believe that the most logical is that of the state. See Restatement (Second) of Torts §299A comment g (1965) (allowance for variations in type of community or degree of skill and knowledge

possessed by practitioners therein has seldom been made in legal profession as such variations either do not exist or are not worthy of recognition). In Vermont, the rules governing the practice of law do not vary from community to community but are the same throughout the state. Moreover, in order to practice law in Vermont attorneys must successfully complete the requirements for admission established by this Court and administered by the Vermont Board of Bar Examiners. Among these prerequisites is the requirement that all candidates for admission complete a study of law in the office of a judge or practicing attorney in this state.

The relevant geographic area then is not the community in which the attorney's office is located or the nation as a whole, but the jurisdiction in which the attorney is licensed to practice. Accordingly, we hold that the appropriate standard of care to which a lawyer is held in the performance of professional services is "that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in this jurisdiction." Cook, Flanagan & Berst v. Clausing, 73 Wash. 2d 393, 395, 438 P.2d 865, 867 (1968); see also Ramp v. St. Paul Fire & Marine Insurance Co., 254 So. 2d 79, 82 (La. App. 1971) (attorney liable for failure to exercise that degree of care, skill and diligence which is commonly possessed and exercised by practicing attorneys in his or her jurisdiction). . . .

In this case, defendant Griffin, in advising a family-held business on how to structure a buy-out and drafting the documents necessary to the transaction, failed to inform his clients of the possible need for, and implications of, a covenant not to compete. Both sides presented expert testimony addressing whether this failure constituted attorney malpractice. In answering this question, the trial court erroneously applied the locality rule in defining the applicable standard of care. This ruling clearly prejudiced the plaintiffs as the court chose to accept the testimony of defendants', rather than plaintiff's, expert witnesses on the rationale that they were from the Rutland area, and therefore were more familiar with the applicable standard of care. Accordingly, the decision of the superior court is reversed and the cause is remanded for a new trial.

NOTES TO RUSSO v. GRIFFIN

1. ***Elements of Malpractice Claim.*** In order to establish a claim of legal malpractice, a plaintiff client must demonstrate three basic elements: employment of the attorney or some other basis for a duty; the failure of the attorney to act as well as the standard of care required; and a causal connection between the negligence and the plaintiff's damage.

2. ***Standard of Care.*** The court adopts a standard of care from a Washington case that requires the "care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer," but cites as support of that standard a Louisiana holding that refers to "care, skill and diligence which is commonly possessed and exercised by practicing attorneys." One of these standards explicitly calls for "reasonable" conduct, and the other does not, but the court apparently considered them equivalent.

3. ***Geographic Scope.*** In selecting a statewide scope for its standard of care, the court rejected a suggestion in a concurring opinion (not reproduced here) that because

the state's bar exam incorporates multistate questions and because law schools are truly national, a national standard ought to be used.

4. ***Common Knowledge Exception to Requirement of Expert Testimony.*** As is true in medical malpractice cases, courts in legal malpractice cases require expert testimony when the challenged conduct is outside the knowledge of jurors, but they withdraw that requirement for conduct that can be evaluated with common knowledge. Allowing a statute of limitations period to elapse without filing a suit on behalf of a client is typical of conduct that can be held to violate the standard of care in the absence of expert testimony. See O'Neil v. Bergan, 452 A.2d 337 (D.C. App. 1982).

5. ***Problem: Analyzing a Lawyer's Quality of Conduct.*** A client told his lawyer that in connection with a planned land purchase, he wanted to limit his liability to $5,000 for cleaning up environmental contamination that might be there. He instructed his lawyer to prepare an indemnity agreement to accomplish that goal. The lawyer understood that a limit on the client's liability for cleaning up the site was a critical condition. The prospective seller rejected the indemnity agreement the lawyer had drafted and submitted another indemnity agreement at the closing meeting. Although the lawyer knew that the new indemnity agreement did not limit his client's liability to $5,000, he instructed the client to sign that agreement nonetheless. Costs of environmental work were more than $500,000. If the client seeks damages from the lawyer for the amount of expense over $5,000, should a court require the client to introduce expert testimony about the lawyer's work? See Vandermay v. Clayton, 984 P.2d 272 (Or. 1999).

FISHMAN v. BROOKS

487 N.E.2d 1377 (Mass. 1986)

WILKINS, J.

This appeal principally concerns the propriety of certain evidentiary rulings in the trial of a counterclaim for malpractice filed by Larimore S. Brooks against Irving Fishman, a member of the bar of the Commonwealth. Brooks persuaded the jury that (a) Fishman was negligent in representing Brooks in an action for personal injuries Brooks sustained when a negligently operated motor vehicle collided with the bicycle he was riding; (b) as a result of Fishman's negligence, Brooks was obliged to settle the personal injury action; and (c) the damages which Brooks should have recovered in that action were substantially greater than the amount of the settlement.

Fishman commenced this action by filing a complaint for declaratory relief against Brooks, who, after the settlement, had notified his health care providers that the case had been settled and they would be paid. Fishman alleged that Brooks had violated the terms of an agreement between them which would have given Fishman, as an additional fee, any amount he saved in negotiating settlements of Brooks's medical bills. Fishman voluntarily abandoned this claim shortly before Brooks filed his counterclaim. . . . On our own motion, we transferred Fishman's appeal to this court, and we now affirm the judgment in favor of Brooks.

We need recite the facts only in general terms in order to present the legal issues raised in Fishman's appeal. On the night of September 25, 1975, Brooks suffered serious injuries when a motor vehicle traveling in the same direction struck him as he rode his bicycle in the breakdown lane of Route Nine in Newton. Brooks wore dark

clothing, and his bicycle may have lacked proper light reflectors. Shortly after the accident Brooks retained Fishman to represent him.

The jury would have been warranted in finding various facts bearing on Fishman's negligence. Fishman had not tried a case of any sort since 1961. His part-time solo practice mainly involved real estate conveyancing. He did not commence suit until sixteen months after the accident and, for no apparent reason, did not obtain service on the driver defendant for more than ten months after filing the complaint, a delay which, by his own admission, interfered with his handling of the case. Fishman made no effort to examine the motor vehicle or to investigate in any detail what the driver had been doing immediately prior to the accident. He engaged in no useful pretrial discovery. Instead, he relied on information the driver's insurer volunteered. He did not learn, for example, that shortly after the accident the driver had stated that she neither saw Brooks nor the bicycle before her vehicle struck them.

In April, 1978, a Federal District Court judge assigned the case for trial on June fifth. Fishman thereupon consulted an able attorney experienced in personal injury litigation about referring the case to him, but the negotiations failed because Fishman would not agree to an even division of his one-third contingent fee.

In April, 1978, Fishman made a settlement demand of $250,000 on the driver's insurer. At various times the driver's insurer made offers of settlement. Fishman did not know what the available insurance coverage was. He told Brooks that only $250,000 was available when, in fact, $1,000,000 was available. Brooks rejected several offers of settlement, although Fishman had recommended that Brooks accept them. Finally, shortly before trial, after Fishman had told Brooks that he could not win if he went to trial, Brooks agreed to settle his personal injury claim for $160,000, knowing that Fishman was not prepared to try the case.

In the trial of this case, the jury answered special questions concerning the malpractice action. They found that Fishman was negligent in his handling of the personal injury action and that Brooks was damaged thereby in the amount of $525,000. The driver's negligence was 90% and Brooks's negligence was 10% of the contributing cause of his injuries. . . .

The judge entered judgment on the malpractice count by reducing Brooks's damages ($525,000) to reflect (a) his contributory fault (10% or $52,500), (b) the amount of medical expenses paid from the settlement ($32,000), and (c) the amount Brooks received personally from the settlement ($90,000) and by allowing interest on the balance. No reduction was allowed for Fishman's counsel fees collected in the earlier action.

An attorney who has not held himself out as a specialist owes his client a duty to exercise the degree of care and skill of the average qualified practitioner. An attorney who violates this duty is liable to his client for any reasonably foreseeable loss caused by his negligence. Thus an attorney is liable for negligently causing a client to settle a claim for an amount below what a properly represented client would have accepted. Although properly informed of all the relevant law and facts, an attorney may nevertheless cause a client to settle a case for an amount below that which competent counsel would approve. . . . The typical case of malpractice liability for an inadequate settlement involves an attorney who, having failed to prepare his case properly or lacking the ability to handle the case through trial (or both), causes his client to accept a settlement not reasonable in the circumstances.

A plaintiff who claims that his attorney was negligent in the prosecution of a tort claim will prevail if he proves that he probably would have obtained a better result had the attorney exercised adequate skill and care. Brooks's case was tried on this theory, and thus first involved the question of Fishman's negligence in the settlement of Brooks's claim and, second, if that were established, the question whether, if the claim had not been settled, Brooks would probably have recovered more than he received in the settlement. This is the traditional approach in the trial of such a case. The original or underlying action is presented to the trier of fact as a trial within a trial. If the trier of fact concludes that the attorney was negligent, a matter on which expert testimony is usually required, the consequences of that negligence are determined by the result of the trial within the trial. Thus, in the trial within the trial in this case, the jury had to determine whether the driver negligently caused Brooks's injury and, if so, the damages Brooks suffered and the comparative fault of Brooks and the driver. On this approach to the trial of a legal malpractice action, except as to reasonable settlement values, no expert testimony from an attorney is required to establish the cause and the extent of the plaintiff's damages.

Over Fishman's objection, the judge properly admitted expert testimony from an experienced tort lawyer and an experienced claims adjuster as to the reasonable settlement value of the underlying claim at the time it was settled. The attorney testified that such a case normally would have settled for $450,000 to $500,000. The claims adjuster estimated that such a case would have settled for $400,000 to $450,000.

Fishman argues that the settlement value of the underlying action was not a proper measure of damages. Brooks does not assert that it was; rather, he argues that proof of the fair settlement value of the underlying action was an important element of his case against Fishman. If, in spite of Fishman's negligent preparation of the personal injury case, settlement was made in an amount that properly prepared counsel reasonably could have recommended, Brooks would have suffered no loss from Fishman's negligence. Consequently, evidence of the fair settlement value of the underlying claim was admissible to prove not only Fishman's negligence but also that his negligence caused a loss to Brooks. In precisely these terms and without objection from Fishman, the judge submitted a special question to the jury as to whether $160,000 was a fair settlement. The reasonableness of the $160,000 settlement was relevant, therefore, and on that question expert testimony was appropriate.

Fishman also contends that admission of evidence concerning the fairness of the settlement was improper because it allowed the jury to impose liability by second-guessing the attorney's judgment. The answer is that no liability would have been imposed for a settlement made within the range of settlement values that an attorney exercising due care would have recommended. Like a member of any other profession, an attorney is not immune from liability for the consequences of a negligent exercise of professional judgment. The absence of any evidence that the insurer of the defendant in the underlying action would have settled for more than $160,000 is immaterial on the theory on which Brooks presented his case. If $160,000 did not equal or exceed the amount that a nonnegligent attorney would have recommended for settlement, the case should not have been settled.

If Fishman had wished the jury to understand that the experts' testimony was not to be considered on the issue of the damages that would have been recovered in the underlying action, he could have asked for a limiting instruction both at the time the evidence was admitted and in the judge's final charge. He did neither. In fact, the judge

instructed the jury on damages as in the typical personal injury tort action without reference to the settlement value of the underlying action. . . .

Judgment affirmed.

NOTES TO FISHMAN v. BROOKS

1. ***Trial Within a Trial.*** In most negligence cases, a jury must try to imagine what would have happened in the absence of the defendant's negligent conduct. In legal malpractice cases, the jury has a slightly different ability. Instead of deducing how a past jury would have responded to a case if it had been tried correctly, the current malpractice jury assumes the role of the past jury and decides the issues of the underlying claim by itself.

The "case within a case" requires a switch in what otherwise would have been the position of one of the parties. The malpractice plaintiff's original lawyer (now the malpractice defendant) would have sought to establish the validity of the plaintiff's claim if he or she had filed the case on time. In the malpractice case, the original lawyer must seek to refute the validity of the plaintiff's original claim.

2. ***Judgmental Immunity.*** A lawyer is ordinarily protected from liability for an error in judgment about an unsettled point of law. See, e.g., Baker v. Fabian, Thielen & Thielen, 578 N.W.2d 446 (Neb. 1998) (involving a claim that a lawyer had negligently failed to introduce evidence that an envelope had been placed in an authorized U.S. postal depository). If a lawyer is aware of an unsettled issue that could be of consequence to a client, the lawyer would be required to disclose the nature of the issue to the client. Failure to do so could be treated as malpractice, even though making a wrong prediction about the outcome of the issue would be protected by judgmental immunity. See, e.g., Wood v. McGrath, North, Mullin & Kratz, P.C., 589 N.W.2d 103 (Neb. 1999) (involving alleged negligence of lawyer in failing to properly advise divorcing client about unsettled nature of the law regarding stock options and their valuation).

3. ***Damages.*** The plaintiff's claim for damages in *Fishman* was supported by expert testimony provided by lawyers familiar with personal injury cases. In a case where a potential defendant's obligations might not be covered by insurance or where a defendant for some other reason might fail to pay a judgment, the fact that a legal victory might not have provided any financial return would be relevant to calculating malpractice damages. In some jurisdictions the plaintiff has the burden of showing that damages would have been collectible, while in others collectibility is assumed, and the malpractice defendant is entitled to rebut that presumption. See Kituskie v. Corbman, 714 A.2d 1027 (Pa. 1998) (involving alleged negligence of lawyer in failing to file a personal injury action within the applicable statute of limitations).

CHAPTER 10

OWNERS AND OCCUPIERS OF LAND

I. Introduction

The traditional approach to liability of landowners and occupiers categorizes the injured person as a trespasser, a licensee, or an invitee, and a different standard of care is applied for the protection of each kind. Modern doctrines in a number of jurisdictions abandon some or all of these classifications or change the standard of care for evaluating land possessors' conduct.

Under common law, landlords have responsibility for certain narrowly defined types of hazards on the land. Tenants have significant burdens for providing safe conditions. In a development parallel to modern changes for general landowner law, some jurisdictions have changed the standard of care for landlords' conduct as well.

II. Traditional Rules

In jurisdictions applying the traditional rules for land possessors' liability to land entrants, important issues concern identifying the status of the plaintiff-entrant and defining the degree of care the landowner must provide. To analyze the liability of a land possessor, a lawyer must determine the status of the person and then must identify the nature of the obligation to that person. The cases in this section illustrate the traditional approaches to these tasks. Additional doctrines supplement the basic status-related rules, for recurring situations such as trespasses by children, or entrants' encounters with open and obvious hazards.

A. Trespassers

Ryals v. United States Steel Corp. examines the traditional duty owed to trespassers and considers whether the traditional rules should apply when a trespasser has entered land to commit a crime. In Merrill v. Central Maine Power Co. and North Hardin Developers, Inc. v. Corkran, the courts explain and apply the *attractive nuisance*

doctrine, an exception to the usual treatment of trespassers that applies under certain conditions when the trespasser is a child.

RYALS v. UNITED STATES STEEL CORPORATION

562 So. 2d 192 (Alabama 1990)

JONES, J.

Wilson Ryals, Jr., as administrator of the estate of his brother, David Ryals, appeals from a summary judgment in favor of the defendant, United States Steel Corporation ("U.S. Steel"). The plaintiff alleged that the defendant caused the decedent's death by negligently or wantonly failing to maintain and secure a "switch rack."[1] Ryals later voluntarily dismissed the negligence claim, and the trial court entered summary judgment in favor of U.S. Steel on the wantonness claim.

Because this Court, by this opinion, recognizes two distinct classes of trespassers to land — (1) mere trespassers, to whom the landowner owes the duty not to wantonly injure them; and (2) trespassers who enter upon the land of another with the manifest intent to commit a criminal act and to whom the landowner owes only the duty not to intentionally injure them — we affirm the judgment.

On March 31, 1984, Wilson and David Ryals, as trespassers, went to U.S. Steel's Muscoda Mines switch rack for the purpose of "stripping out" copper, brass, and other salvageable metals. Wilson Ryals testified at his deposition that, when they arrived at the site, they found the base of the structure to be partially stripped; that they found one rusty warning sign, detached metals lying on the ground, dangling wires, garbage in and around the fenced area and wild vegetation growing around the fence; and that they found the gate leading into the switch rack to be "wide open." David Ryals contacted a 44,000-volt copper line; he suffered third degree burns over 95% of his body and died several days later as a result.

The only issue presented here is whether U.S. Steel was entitled to a summary judgment under the appropriate standard of care owed by U.S. Steel to David Ryals, as a trespasser, who, at the time of his injury, was engaged in the crime of theft of U.S. Steel's property. Rule 56, A.R. Civ. P., sets forth a two-tiered standard for granting summary judgment. That rule requires the trial court to determine 1) that there is no genuine issue of material fact, and 2) that the moving party is entitled to a judgment as a matter of law.

Necessarily antecedent to any evaluation of the facts, however, is a determination of the legal duty owed by a landowner to a trespasser. David Ryals was, without question, a trespasser. The standard of care that a landowner owes to a trespasser is generally recognized as the lowest standard of care owed to one who enters upon another's land. The landowner is bound only to refrain from reckless, willful, or wanton conduct toward the trespasser. . . .

It is noteworthy that the highest degree of care imposed upon a landowner by this traditional common law rule toward a *mere* trespasser, i.e., one who wrongfully comes upon the land of another but without any motive, design, or intent to engage in further wrongful conduct, is not to recklessly or wantonly injure that person. Ryals does not contend otherwise; rather, he argues that the facts, when construed most favorably to

[1] A "switch rack" is somewhat similar in function and appearance to an electrical substation.

him, support a finding of wantonness on the part of U.S. Steel, and, thus, that summary judgment was inappropriate. Admittedly, if all trespassers are to be treated equally, and if we agree that the conduct of U.S. Steel amounted to wantonness, then the summary judgment is due to be reversed.

"Wantonness" has been defined by this Court as follows:

> [Wantonness is] the conscious doing of some act or the omission of some duty under the knowledge of the existing conditions, and conscious that from the doing of such act or omission of such duty injury will likely or probably result. Wantonness may arise [when one has] knowledge that persons, though not seen, are likely to be in a position of danger, and[,] with conscious disregard of known conditions of danger and in violation of law[,] brings on the disaster. Wantonness may arise after discovery of actual peril, by conscious failure to use preventive means at hand. Knowledge need not be shown by direct proof, but may be shown by adducing facts from which knowledge is a legitimate inference.

Ryals contends that a genuine issue of material fact was presented on the question whether U.S. Steel wantonly caused the death of David Ryals. Ryals bases his wantonness argument primarily on his claim that when he and his brother arrived at the site they found it in the condition hereinabove set out. He also points out that agents of U.S. Steel acknowledged in deposition and in answers to interrogatories that there had been two prior deaths at the same switch rack under similar circumstances. He maintains, in light of those alleged and admitted facts, that the factfinder could reasonably infer that U.S. Steel had actual or constructive notice that persons might come into contact with the electrical lines at the switch rack.

We agree; if reckless or wanton conduct is the appropriate standard of care applicable to these facts, then a jury question has been presented as to U.S. Steel's conduct. We believe, however, that these facts strongly demonstrate a public policy justification for lowering the requisite degree of care due from a landowner to one who, as here, wrongfully enters upon the land of another to commit a crime. For public policy reasons, therefore, we hold that the duty owed by a landowner to an adult trespasser who comes upon the land and is injured while committing a crime is the duty not to *intentionally* injure such trespasser.

Applying this standard to the full context of the instant case, we conclude that a fact question was not presented on the issue whether U.S. Steel intentionally caused the death of David Ryals. The switch rack was surrounded by a chain link fence topped with barbed wire. On the fence surrounding the switch rack there was at least one sign warning of the electrical danger within. Given these conspicuous indications of danger, an unlocked gate would not imperil a person unless that person elected to disregard the obvious danger presented by the electricity. In summary, the evidence, as a matter of law, fails to suggest that U.S. Steel breached its duty not to intentionally injure David Ryals, who undisputedly, at the time of his injury, was an adult illegally upon U.S. Steel's property for the purpose of stealing copper wire. . . .

Accordingly, the judgment of the trial court is due to be, and it hereby is, affirmed.

NOTES TO RYALS v. UNITED STATES STEEL CORPORATION

1. *Basic Rules.* In some jurisdictions, all trespassers receive the treatment the *Ryals* court developed for individuals who trespass for the purpose of committing a crime. In other jurisdictions, all trespassers receive the treatment the *Ryals* court

described as the general rule in its state: a landowner can be liable to a trespasser only for intentional torts and for reckless or wanton conduct.

2. ***Rationale for Basic Rules.*** These rules maximize a land occupier's freedom of choice regarding how to use and maintain land. They facilitate a decision to ignore dangerous conditions that might be costly to remedy. Since trespassers may be difficult to anticipate, these rules may also be seen as a standardized application of the reasonable person test. If trespassers as a class are very difficult to anticipate, then protecting them from harm would be very expensive, and failing to protect them from harm could be reasonable.

3. ***Discovered, Frequent, or Tolerated Trespassers.*** Where trespassers are either discovered or are frequent or tolerated, many states require a landowner to use reasonable care in order to protect the trespasser from injuries caused either by the landowner's activities or by artificial conditions on the land. Under these rules, a possessor of land has a higher duty of care when engaged in "active conduct" than for just being the owner of land with "passive conditions." For example, operating a machine would be active conduct, while the presence of a cliff would be a passive condition. Jurisdictions that change their position on duty to trespassers when active conduct is involved and a trespasser's presence is known or easily anticipated may be reflecting the fact that it might be easier and cheaper to protect identified or identifiable trespassers from active conduct than to protect unidentified and unknown persons from passive conditions.

4. ***Exception for Criminal Trespassers.*** Most states have not confronted the question of a special rule for trespassers who commit crimes. For that circumstance, the *Ryals* court adopted an exception to its state's ordinary rules regarding trespassers to increase a landowner's protection from liability in cases where a trespasser enters the land to commit a crime. The court refers to "public policy" as the basis for its new rule but does not define that term. What policy arguments might support the decision?

MERRILL v. CENTRAL MAINE POWER COMPANY

628 A.2d 1062 (Me. 1993)

RUDMAN, J.

Douglas Merrill appeals from the summary judgment entered in the Superior Court . . . in favor of Central Maine Power Company (CMP), in Merrill's action seeking damages for personal injuries allegedly caused by an attractive nuisance located on CMP's property. We affirm the judgment of the Superior Court.

On June 13, 1976, Merrill, then nine years of age, entered CMP's property in South Berwick to fish in the Salmon Falls River. After catching an eel in the river, Merrill walked to the nearby CMP electrical sub-station, climbed the surrounding fence, and attempted to cook the eel by leaning over the top of the fence and placing the eel on a live electrical wire. Merrill received an electric shock and suffered severe burns.

Merrill's complaint alleges, inter alia, a cause of action under the theory of attractive nuisance. The court granted a summary judgment in favor of CMP, finding that (1) Merrill appreciated the risk at the time of the accident; [and] (2) electrical substations are not, as a matter of law, attractive nuisances; . . . This timely appeal followed.

In Jones v. Billings, 289 A.2d 39 (Me. 1972), we incorporated the attractive nuisance doctrine into Maine law by adopting the definition provided in the Restatement (Second) of Torts §339 (1965):

> A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if
>
> (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
>
> (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
>
> (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and
>
> (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
>
> (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

Jones, 289 A.2d at 42 (quoting Restatement). We will apply a strict interpretation of the Restatement criteria in determining whether a plaintiff has satisfied its burden of establishing the existence of an attractive nuisance. . . .

The present controversy surrounds the third element of the Restatement rule, namely, whether the child appreciated the risk at the time of the accident. A landowner is not required "to keep his land free from conditions which even young children are likely to observe and the full extent of the risk involved in which they are likely to realize." Restatement (Second) of Torts §339 comment m (1965). As one prominent commentator has recognized,

> [t]he child, because of his immaturity, either must not discover the condition or must not in fact appreciate the danger involved. Since the principal reason for the rule distinguishing trespassing children from trespassing adults is the inability of the child to protect himself, the courts have been quite firm in their insistence that if the child is fully aware of the condition, understands the risk which it carries, and is quite able to avoid it, he stands in no better position than an adult with similar knowledge and understanding.

W. Keeton, Prosser and Keeton on the Law of Torts §59 at 408 (5th ed. 1984) (footnotes & citations omitted). . . .

It is undisputed that Merrill appreciated the risk inherent in placing an eel on a live electrical wire. In deposition testimony, Merrill admitted that, at the time of the accident, he knew (1) that the purpose of the fence surrounding the sub-station was to keep people out; (2) that electricity could both burn and hurt him; (3) that he was careful not to touch the wire himself; and (4) that what he did was a "dumb idea." Thus, since Merrill was unable to generate a factual issue concerning an indispensable element of the attractive nuisance doctrine, and, therefore, was conclusively precluded from recovery, a summary judgment was properly granted. . . . See Lister v. Campbell, 371 So. 2d 133, 136 (Fla. Dist. Ct. App. 1979) ("[o]ften the child's own testimony is the best evidence of whether he possessed sufficient intelligence and knowledge to understand or avoid the danger").

Finally, because our finding that Merrill appreciated the risk posed by the substation disposes of the case, we need not reach the other [issue] raised by the parties on appeal.

The entry is: Judgment affirmed.

NOTES TO MERRILL v. CENTRAL MAINE POWER COMPANY

1. ***History of the Attractive Nuisance Doctrine.*** The attractive nuisance doctrine began at a time when many children trespassed onto the property of railroad companies and many were injured playing on large turntables, which railroads used to change the direction of locomotives. An engineer would drive onto the turntable, and the turntable could be turned to allow the locomotive to drive off onto another track or return to the first track headed in the opposite direction. The so-called *turntable doctrine* evolved into the common law rule of attractive nuisance. In Sioux City & Pacific RR. Co. v. Stout, 84 U.S. (17 Wall.) 657, 21 L. Ed. 745 (1873), the Supreme Court permitted recovery where a minor was attracted to the danger of an unlocked turntable.

2. ***Basic Rule.*** The traditional attractive nuisance doctrine created an exception to the usual rule that landowners owe trespassers only a duty to refrain from willful and wanton misconduct. A child trespasser could recover by proving (1) that the child was attracted onto the land by an artificial, rather than natural, condition on the land; and (2) the possessor of the land failed to use reasonable care. Some states, such as the jurisdiction in which *Merrill* was decided, have adopted §339 of the Restatement (Second) of Torts, representing a further evolution of the turntable doctrine. How would *Merrill* have been decided under the traditional attractive nuisance rule?

3. ***Policy Justification.*** The attractive nuisance doctrine was supported by the Ohio Supreme Court as necessary because "[d]espite our societal changes, children are still children. They still learn through their curiosity. They still have developing senses of judgment. They still do not always appreciate danger. They still need protection by adults." See Bennett, Admr. v. Stanley, 748 N.E.2d 41 (Ohio 2001).

NORTH HARDIN DEVELOPERS, INC. v. CORKRAN

839 S.W.2d 258 (Ky. 1992)

LAMBERT, J.

The issue here is whether horses or other domesticated livestock, without vicious propensities, kept on a farm which is in close proximity to two subdivisions should be considered as an attractive nuisance denying the landowner protection of KRS 381.231 and KRS 381.232. The trial court granted summary judgment to the landowner, but the Court of Appeals reversed and designated its opinions to be published. We granted discretionary review to resolve what may be some uncertainty in the law on this point.

Five-year-old Rachel Corkran was tragically injured by a horse kept on a 27-acre farm owned by North Hardin Developers. Testimony was presented that Rachel, on a dare made by other children to touch one of the horses, climbed through the barbed wire fence surrounding the farm and apparently approached the horse from behind. The horse, not known to be violent, struck Rachel with a hind leg [injuring her].

The 27-acre farm, owned by North Hardin, was located in a semi-rural area outside Radcliff, Kentucky. Adjoining the farm were two subdivisions, at least one of which had been developed by North Hardin. A few lots in the subdivision were directly adjacent to the farm which was enclosed with a barbed wire fence. A large number of small children lived in the immediate vicinity of the farm and it was known to the owner or its agents that trespassing by children had occurred. Notices had been posted warning trespassers to stay off and an individual had been hired on a part-time basis to chase the children away.

Reversing the trial court, a majority of the Court of Appeals panel recognized that the keeping of domestic animals without vicious propensities does not normally constitute a basis for damages for injury, but held the situation here to be different. It said:

> [W]hen a herd of horses is introduced into an area heavily populated with children by the very company which developed the adjacent subdivision where they live, a different situation is presented. . . . The maintenance of a herd of horses in the midst of two residential subdivisions may or may not involve an unreasonable risk of death or serious bodily harm to trespassing children. We believe that this is a matter to be determined by the special facts in each case and that the determination should be made by a jury.

The beginning point in analyzing this case is KRS 381.232, a statute which declares that the owner of real estate shall not be liable for damages to a trespasser for injury except in circumstances clearly inapplicable here. This rule of law is modified by the preceding statute, KRS 381.231(1) which defines trespasser but excludes from the definition "persons who come within the scope of the 'attractive nuisance' doctrine." . . .

From the foregoing, and as the evidence is undisputed that the child was a trespasser and that the horses were without any known vicious propensities, the case must be resolved on the attractive nuisance doctrine. Said otherwise, are horses in a pasture field an attractive nuisance under the law of Kentucky and if not, should the law be changed to declare them so?

The parties agree that the attractive nuisance doctrine is controlling, but disagree mightily about its application to the facts presented here. Both sides have recognized our decision in Louisville Trust Co. v. Nutting, Ky., 437 S.W.2d 484 (1968), and the Court of Appeals decision in Helton v. Montgomery, Ky. App., 595 S.W.2d 257 (1980), wherein the definition of attractive nuisance set forth in Restatement (Second) of Torts, §339, was followed. . . .

There is a paucity of authority on the question at hand. At 64 A.L.R.3d 1069 (1975), cases are collected in which courts have considered whether and under what circumstances an animal constitutes an attractive nuisance. The annotation recognizes that a majority of American jurisdictions have adopted the Restatement (Second) of Torts, §339, view and states:

> Only a few courts have considered the application of the above stated principle [Restatement, §339] in cases involving injury caused by animals, and of these a majority have held the attractive nuisance doctrine to be inapplicable as a matter of law. . . .

While the cases discussed and others we have considered hardly speak with a single voice, the predominant view appears to be that ordinary domesticated animals do not

constitute "an unreasonable risk of death or serious bodily harm to . . . children . . ." as required by the attractive nuisance doctrine. Moreover, we have difficulty characterizing domesticated animals, i.e. horses, cattle, hogs, sheep, and chickens, as artificial conditions when securely maintained upon a farm. See Restatement (Second) of Torts, §339. In Gonzales v. Wilkinson, 68 Wis. 2d 154, 227 N.W.2d 907 (1975), and Hartsock v. Bandhauer, App., 158 Ariz. 591, 764 P.2d 352 (1988), dogs were held not to be "an artificial condition." Traditional farm animals would seem to be even less subject to such a characterization. . . .

Our [prior decisions] are in harmony with the authorities heretofore cited with respect to domesticated animals. It is necessary to show that the condition causing injury was foreseeably dangerous and domesticated animals have not been so regarded. . . .

For its decision, the Court of Appeals relied on Hofer v. Meyer, S.D., 295 N.W.2d 333 (1980), which permitted imposition of liability upon a landowner whose horse injured a child. The horse was kept within the city limits in a residential yard enclosed by two strands of barbed wire and residences where children lived were on three sides of the place where the horse was kept. The court observed that elimination of the danger would have been slight when compared with the risk to children in the area:

> Here it was just a matter of some additional wiring that would have been adequate to keep little children out of the horse yard.

We believe the facts presented here differ substantially from those in *Hofer*. These horses were not kept in a residential yard, but on a 27-acre farm. The landowners had attempted, albeit unsuccessfully, to prevent trespassing by the children and the cost of rendering the farm inaccessible to children would have been prohibitive. We need not now determine whether on identical or similar facts this Court would follow the holding in *Hofer*. The factual differences are sufficient.

As the undisputed facts presented here demonstrate appellant's entitlement to judgment as a matter of law, we conclude that the trial court correctly granted summary judgment. As such, we reverse the Court of Appeals and remand to the trial court for reinstatement of its judgment.

LEIBSON, J., dissents by separate opinion in which COMBS, J., joins.

Respectfully, I dissent.

This is not a farm animal case, but an urban cowboy case. I agree with the Majority that ordinarily it is not an attractive nuisance to maintain on your property livestock, including horses and other domestic farm animals. But this case is different, and it is as important for the law to discriminate between differences as it is to apply neutral principles equally where no differences exist. This was recognized in the Court of Appeals' Opinion, which stated:

> [W]hen a herd of horses is introduced into an area heavily populated with children by the very company which developed the adjacent subdivision where they live, a different situation is presented.

Ordinarily keeping animals on your property is a natural condition which is not included within the parameters of the attractive nuisance doctrine. But no rule should be applied blindly regardless of circumstance. It may be that upon trial of this case, the claimant will be unable to prove the facts as stated in the Court of

Appeals' Opinion. Nevertheless, in the absence of facts or circumstances establishing that "as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant," a summary judgment is inappropriate. Steelvest, Inc. v. Scansteel Service Ctr., Ky., 807 S.W.2d 476, 483 (1991). "[S]uch a judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." Id. at 480. . . .

NOTES TO NORTH HARDIN DEVELOPERS, INC. v. CORKRAN

1. ***Unreasonable Risk to Children.*** The *Hardin* court analyzed whether the horses presented an unreasonable risk to children. In the Restatement's formulation, this factor is stated as the "utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved." The majority and dissent disagreed on whether, *as a matter of law*, maintaining a herd of horses was an attractive nuisance. The majority also suggested, in distinguishing *North Hardin Developers* from Hofer v. Meyer, that the landowner exercised reasonable care. What facts support the majority's views?

2. ***Water.*** Courts usually reject application of the attractive nuisance doctrine to swimming pools and ponds or other bodies of water. Comment j of the Restatement (Second) of Torts §339 states:

> there are many dangers, such [as] those of fire and water, . . . which under ordinary conditions may reasonably be expected to be fully understood and appreciated by any child of an age to be allowed at large. To such conditions the rule stated in this Section ordinarily has no application, in the absence of some other factor creating a special risk that the child will not avoid the danger, such as the fact that the condition is so hidden as not to be readily visible, or a distracting influence which makes it likely that the child will not discover or appreciate it.

Courts in some western states have taken conflicting views on whether irrigation ditches, which distribute water in arid areas, can be attractive nuisances. In Salladay v. Old Dominion Copper Mining & Smelting Co., 100 P. 441 (Ariz. 1909), the court held that because distribution of water for farming is so important, the attractive nuisance doctrine should not be extended to irrigation ditches and flumes. Another western state, Utah, also exempts irrigation ditches from coverage under the attractive nuisance doctrine. See Kessler v. Mortenson, 16 P.3d 1225 (Utah 2000). In contrast, the court in Carmona v. Hagerman Irrigation Company, 957 P.2d 44 (N.M. 1998), refused to find that such ditches, as a matter of law, are always outside the coverage of the doctrine.

Statute: LIABILITY OF OWNERS OR OCCUPIERS OF LAND FOR INJURY TO GUESTS OR TRESPASSERS

Del. Stat. tit. 25 §1501 (2001)

No person who enters onto private residential or farm premises owned or occupied by another person, either as a guest without payment or as a trespasser, shall have a cause of action against the owner or occupier of such premises for any injuries or damages sustained by such person while on the premises unless such accident was

intentional on the part of the owner or occupier or was caused by the willful or wanton disregard of the rights of others.

NOTE TO STATUTE

Statutes Related to Attractive Nuisance. The Kentucky court in *North Hardin Developers* described two statutes, one that limits responsibility of landowners to trespassers and another that preserves the application of the attractive nuisance doctrine. The Delaware statute does not refer to the attractive nuisance, and no companion statute preserves the attractive nuisance doctrine, as was the case in Kentucky. Could a court hold that child trespassers in Delaware are still entitled to special protections? In Porter v. Delmarva Power & Light Co., 547 A.2d 124 (Del. 1988), the Delaware Supreme Court held that the word "trespasser" in the statute should not be read to include child trespassers, since the legislature would have been explicit if it had intended to abrogate the attractive nuisance doctrine, which had been part of the state's jurisprudence for a long period prior to adoption of the statute.

Perspective: Deterrence and Corrective Justice Rationales for Limited Liability to Trespassers

Can limited liability to trespassers be understood in terms of general societal notions of fairness? See Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 Tex. L. Rev. 1801 (1997):

> Currently there are two major camps of tort scholars. One understands tort liability as an instrument aimed largely at the goal of deterrence, commonly explained within the framework of economics. The other looks at tort law as a way of achieving corrective justice between the parties. If these are alternative camps, they are also to a large measure unfriendly camps: much of the time each treats the other with neglect or even derision. . . .
>
> Consider . . . the liability of landowners to trespassers. While landowners owe a full duty of non-negligence to their invitees, under the traditional rules that most jurisdictions still accept landowners' liability to trespassers is sharply limited. Landes and Posner have explained the limited liability rules by suggesting that "the cost of avoiding" the injury-producing activity of trespassing "normally is very low," much lower than "the landowner's cost" of adopting precautions. This explanation, however, seems unsatisfactory, because in many cases the trespasser neither knows nor has reason to know of the particular hazard on the landowner's property. Much more satisfactory is the ethical perception that when the plaintiff's encounter with the defendant's danger has been a consequence of the plaintiff's flouting of the defendant's rights as landowner, the plaintiff cannot claim that the injury he ends up suffering is a result of any injustice imposed on him by the possibly negligent defendant.

Professor Schwartz considers the trespasser's ability to avoid the harm as limited by lack of awareness of the risk. Does the trespasser's ability to avoid trespassing altogether change Professor Schwartz's conclusion?

B. Licensees and Invitees

For entrants who are not trespassers, classification as either a licensee or an invitee can be outcome-determinative. In many cases, plaintiffs have difficulty in showing that the defendant failed to provide the level of care owed to a licensee. In contrast, landowners owe a level of care to invitees that is often described simply as "reasonable care" and is significantly higher than the care owed to a licensee. Knorpp v. Hale discusses the implications of characterizing an entrant as a licensee rather than an invitee. In Richardson v. The Commodore, Inc., the entrant was clearly an invitee, but the dispute involved whether the plaintiff's proof could support a finding that the defendant failed to provide the required level of care.

KNORPP v. HALE

981 S.W.2d 469 (Tex. App. 1998)

GRANT, J.

Bonita Knorpp appeals from a directed verdict in a premises liability case. Knorpp contends that the trial court erred by finding her son, Todd Erwin, to be a licensee rather than an invitee at the time of his death and by rendering a directed verdict against her claim for damages.

The decedent, Todd Erwin, was killed while cutting down a tree at the Hales' house. The evidence shows that he had moved to Texarkana to be near the Hales' daughter Autumn, who he had been dating for about a year, and that he spent a great deal of time at their house. The Hales were planning a New Year's Eve bonfire at a location in a pasture near their house around the base of a dead pine tree. They decided to cut down the tree. Erwin went to the house on December 6, 1994, took the Hales' chain saw, and began to cut down the tree. After about forty-five minutes, the tree fell in an unexpected direction and landed on Erwin, killing him. . . .

When Knorpp completed the presentation of her evidence, the trial court granted the landowner's motion for a directed verdict and ruled as a matter of law that Hale [sic Erwin] was a licensee and that there was no evidence that the landowners were negligent under applicable standards for a licensee.

Knorpp contends that the trial court erred in determining that there was no evidence that Erwin was an invitee and that the court therefore erred by rendering a directed verdict. Knorpp further contends that there was evidence that Erwin was an invitee on this particular day when he came onto the property. . . .

A landowner owes an invitee a duty to exercise ordinary care to protect him from risks of which the owner is actually aware and those risks of which the owner should be aware after reasonable inspection. To recover, a plaintiff must plead and prove that the landowner (1) had actual or constructive knowledge of some condition on the premises; (2) that the condition posed an unreasonable risk of harm; (3) that the landowner did not exercise reasonable care to reduce or eliminate the risk; and (4) that the landowner's failure to use such care proximately caused the plaintiff's injuries.

The duty that an owner owes to a licensee is to not injure him by "willful, wanton or grossly negligent conduct, and that the owner use ordinary care to either warn a licensee of, or to make reasonably safe, a dangerous condition of which the owner is aware and the licensee is not." In order to establish liability, a licensee must prove

(1) that a condition of the premises created an unreasonable risk of harm to him; (2) that the owner actually knew of the condition; (3) that the licensee did not actually know of the condition; (4) that the owner failed to exercise ordinary care to protect the licensee from danger; and (5) that the owner's failure was a proximate cause of injury to the licensee.

In the present case, it is admitted by all that Erwin was a regular visitor to the Hales' house, that he had his own key to the house and came and went unsupervised, and that he was looked on as a likely son-in-law. He was clearly invited onto the property. Thus, it would appear that he should be defined as an "invitee."[3] This is not, however, the case. In Texas, a "social guest" is classified as a licensee. As set out above, a host owes a social guest a duty not to injure him by willful, wanton or gross negligence.

All of the evidence in the present case shows that the decedent was invited onto the premises, but also shows that he falls into the category of a "social guest." In Texas, as a matter of law, he was a licensee. The trial court did not err by finding him to be a licensee.

Knorpp also contends that this conclusion is erroneous and that the trial court erred by rendering a directed verdict in the Hales' favor, because regardless of the decedent's usual status, a different one existed in this particular situation. She argues that because there was a discussion, at which the decedent was present, about cutting down the tree, because Reeda Hale had asked Erwin if he was going to help her husband cut down the tree, and because Erwin was going to be present at the bonfire, then the cutting of the tree was done for the mutual advantage (or benefit) of the decedent and the landowner. This, Knorpp argues, constitutes some evidence that the decedent was an invitee and that the trial court therefore erred by finding him to be a licensee as a matter of law.

In determining whether an individual is an invitee or a licensee, the cases typically use the language "mutual benefit" or "mutual advantage." Knorpp argues that this term stretches so far as to include an intangible benefit, such as having the opportunity to attend or conduct the New Year's Eve bonfire.

The concept behind this language was originally brought into Texas cases as a paraphrase of the predecessor of Restatement (Second) of Torts §332 (1965). Carlisle v. J. Weingarten, Inc., 137 Tex. 220, 152 S.W.2d 1073, 1076 (1941). In *Carlisle*, the Court discussed an invitee in terms of business-related ventures exclusively, as discussed in the Restatement. Later cases discussed the necessity of determining who qualified as an invitee and cited to the Restatement and cases applying the Restatement concepts.

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[3] The difficulty in applying this area of law to social guests is addressed by the Restatement as follows:

> Some confusion has resulted from the fact that, although a social guest normally is invited, and even urged to come, he is not an "invitee," within the legal meaning of that term, as stated in §332. He does not come as a member of the public upon premises held open to the public for that purpose, and he does not enter for a purpose directly or indirectly connected with business dealings with the possessor. The use of the premises is extended to him merely as a personal favor to him. The explanation usually given by the courts for the classification of social guests as licensees is that there is a common understanding that the guest is expected to take the premises as the possessor himself uses them, and does not expect and is not entitled to expect that they will be prepared for his reception, or that precautions will be taken for his safety in any manner in which the possessor does not prepare or take precautions for his own safety, or that of the members of his family.

However, instead of using the more explicit terminology contained in Section 332[6] to determine whether a person was an invitee, the courts instead looked to see whether an entry was one by a person invited and to the "mutual advantage" of both parties. . . .

It appears that the formula set out by the Restatement for analysis of invitee/licensee/trespasser status was adopted for use in Texas by *Carlisle* . . . and that it remains the proper analysis to apply.

The decedent was a social guest of the landowners. He was not expecting payment for cutting down the tree, and the evidence is that no one asked him personally to do so, but that he volunteered to do so. There was no business relationship or dealing in existence or contemplated between the decedent and the landowner, and it is unquestioned that the land was not open to the public. Accordingly, as a matter of law, the decedent was not an invitee, but was a licensee on this particular occasion, and the trial court did not err by so holding.

Knorpp also argues that, in the alternative, there was evidence that the dead tree presented an unreasonable risk of harm and that there is at least some evidence that the landowners were negligent in failing to warn of the danger involved in cutting down the tree. This contention is based upon Knorpp's contention that the landowners were aware of the risk of harm and failed to use reasonable care to reduce the risk. This analysis is applied when the claimant is in the status of an invitee. We have concluded that the decedent was a licensee; thus, the analysis does not apply to the present case. Even if we analyze this argument as an attempt to show liability for a licensee, the attempt fails on several grounds.

In the present case, the undisputed evidence is that the decedent had worked with his father trimming and felling trees and that he had at least a passing acquaintance with the dangers involved. The undisputed evidence also shows that the landowners were unaware of any special dangers involved in cutting down a dead tree. Thus, the evidence shows that the licensee was aware of the danger involved in the action that he intentionally undertook.

The evidence also shows that the tree itself was not a dangerous condition. The worry stated by the landowners was that if they burned it in the bonfire, it would fall on someone. Cutting the tree was the act that caused the danger. . . .

In summary, the condition did not exist until Erwin began cutting the tree, thus, it was not a "condition of the premises"; the owner did not know that the licensee was creating a dangerous condition; and the licensee was the one creating the condition. In light of those facts, there was nothing for the landowner to warn the licensee about, because no dangerous condition existed until it was created by the licensee and, therefore, no duty to warn was shown by the evidence.

The judgment is affirmed.

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[6] Restatement (Second) of Torts §332 (1965) defines invitee:

(1) An invitee is either a public invitee or a business visitor.

(2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.

(3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.

NOTES TO KNORPP v. HALE

1. ***Degree of Care.*** In *Knorpp*, the court describes the duty owed to a licensee by stating that a landowner must not injure the licensee by willful, wanton, or grossly negligent conduct and must use reasonable care to warn about or to make reasonably safe a dangerous condition that the owner knows and the licensee did not know. This formulation does not require a landowner to make reasonable inspections of the land for the licensee, and it protects a landowner from liability even in a situation where the landowner's ignorance of a danger was unreasonable.

2. ***Active Conduct on the Land.*** Some states modify the duty owed to licensees by holding that landowners owe licensees a duty of reasonable care when they conduct activities on their land. For example, in Hoffman v. Planters Gin Co., 358 So. 2d 1008 (Miss. 1978), the court held that the defendant was required to exercise reasonable care to protect non-employees who were allowed to come into the vicinity of machinery that loaded cotton seeds into trucks.

3. ***Problem: Cooperation and Characterization as an Invitee.*** In a region where farmers produced fruit and needed to pack the fruit in boxes, farmers customarily sold boxes to each other when one farmer had more fruit than anticipated and another farmer had more boxes than that farmer needed. Would a farmer who was injured while picking up boxes in this arrangement be a licensee or an invitee? Is one characterization so clearly correct that a jury would have to adopt it, or would these facts present a case close enough so that either conclusion, if reached by a jury, could be the basis for a judgment? See Holzheimer v. Johannesen, 871 P.2d 814 (Idaho 1994).

4. ***Public Invitees.*** In addition to the category of business invitees discussed in *Knorpp*, many courts recognize the category of public invitees. See Restatement (Second) §332, cited in footnote 6 of *Knorpp:* "A public invitee is a person who is invited to enter or remain on the land as a member of the public for a purpose for which the land is held open to the public." A person need not pay any benefit to the landowner to be a public invitee. The landowner owes the same standard of care to public and business invitees.

5. ***Problem: Status of People at Church Services.*** Would you treat a person who attends a church service as the church's licensee or invitee? Would it matter if the person was a member of the choir? See Hambright v. First Baptist Church, 638 So. 2d 865 (Ala. 1994). Should a person who tours a private home as a participant in a garden club tour of homes, and who pays $25 to the garden club but nothing to the homeowner, be characterized as an invitee or a licensee? See Post v. Lunney, 261 So. 2d 146 (Fla. 1972).

Statute: ACTIONS AGAINST LANDOWNERS

Colo. Rev. Stat. §13-21-115 (2002)

(2) In any civil action brought against a landowner by a person who alleges injury occurring while on the real property of another and by reason of the condition of such property, or activities conducted or circumstances existing on such property, the landowner shall be liable only as provided in subsection (3) of this section. . . .

(3) . . . (b) A licensee may recover only for damages caused:

(I) By the landowner's unreasonable failure to exercise reasonable care with respect to dangers created by the landowner of which the landowner actually knew; or

(II) By the landowner's unreasonable failure to warn of dangers not created by the landowner which are not ordinarily present on property of the type involved and of which the landowner actually knew. . . .

(5) As used in this section: . . .

(b) "Licensee" means a person who enters or remains on the land of another for the licensee's own convenience or to advance his own interests, pursuant to the landowner's permission or consent. "Licensee" includes a social guest. . . .

Statute: DUTY OF OWNER OF PREMISES TO LICENSEE

Ga. Code Ann. §51-3-2 (2002)

(a) A licensee is a person who:

(1) Is neither a customer, a servant, nor a trespasser;

(2) Does not stand in any contractual relation with the owner of the premises; and

(3) Is permitted, expressly or impliedly, to go on the premises merely for his own interests, convenience, or gratification.

(b) The owner of the premises is liable to a licensee only for willful or wanton injury.

Statute: STANDARD OF CARE OWED SOCIAL INVITEE

Conn. Stat. §52-557a (2002)

The standard of care owed to a social invitee shall be the same as the standard of care owed to a business invitee.

NOTES TO STATUTES

1. ***Alternative Definitions.*** The Colorado and Georgia statutes take different approaches to defining the term "licensee." Would the entrants specifically excluded in the Georgia statute fit within the Colorado statute's definition? How do these two definitions promote resolution of difficult cases, such as those concerning churchgoers or participants in social club meetings?

2. ***Classifying Social Guests.*** As indicated in footnote 3 of *Knorpp*, social guests usually meet the definition of "licensee." In a few states, however, modern decisions define social guests as invitees or classify them as licensees but hold that they are entitled to the same care as an invitee. See, e.g., Burrell v. Meads, 569 N.E.2d 637 (Ind. 1991) (treating social guests as invitees), and Wood v. Camp, 284 So. 2d 691 (Fla. 1973) (calling social guests "licensees by invitation" and applying a duty is to use reasonable care). The Connecticut statute is an example of this approach.

RICHARDSON v. THE COMMODORE, INC.

599 N.W.2d 693 (Iowa 1999)

TERNUS, J.

Appellant, Russell Richardson, was injured at a bar owned and operated by the defendants/appellees when a portion of the ceiling fell on him. His suit against the defendants was dismissed on their motion for summary judgment. The court of appeals affirmed. On further review, we find sufficient evidence to create a jury question on Richardson's premises liability claim. Therefore, we vacate the court of appeals decision and reverse the judgment of the district court, remanding for further proceedings. . . .

The accident giving rise to this action occurred on September 12, 1994. While shooting pool at the bar on that date, Richardson was suddenly struck by falling plaster. Richardson thereafter brought this action against the defendants to recover damages for his physical injuries. Richardson's claim was based on a theory of premises liability. He alleged that he was a business invitee and the collapse of the ceiling and his resulting injuries were caused by the defendants' negligence in failing to maintain the premises in a reasonably safe condition.

The record shows that the building that housed The Commodore Tap was built in 1913. Ralph and Betty Hauerwas acquired the building in 1982, and subsequently moved their tavern business into it. The tavern was on the first floor of this two-story building. Prior to opening for business, the Hauerwases contracted with Wayne Blumer to repair portions of the plaster ceiling of the first floor where the wood lath had been exposed by the removal of some partition walls. Blumer did not notice any signs of damage to or other problems with the plaster ceiling at the time of his repairs.

In 1985, the Hauerwases installed a drop ceiling on the first floor of the building to improve the efficiency of heating and cooling the premises. They did not notice any problems with the plaster ceiling at that time. Between 1985 and the date of the accident in 1994, the Hauerwases did not inspect the plaster ceiling, were unaware of any problems in that ceiling, and made no repairs to it.

It is undisputed that Richardson was struck by a portion of the original (1913) plaster ceiling when the plaster separated from the lath and fell through the drop ceiling. Blumer repaired the plaster ceiling after its collapse in 1994. He estimated that a piece of ceiling measuring two feet by five feet fell. This piece was not close to the areas he had repaired in 1982. Blumer testified that the ceiling collapsed due to its age and the effect, over time, of vibration from heavy traffic on the adjoining street. He thought this particular area of the ceiling may have fallen off because it was thicker than the rest of the plaster ceiling. While making the repairs in 1994, Blumer inspected the remainder of the plaster ceiling by looking through the drop ceiling where the tiles had been pushed off by falling plaster, and using a spotlight to view whether the plaster was sagging in any other areas.

As noted above, Richardson's suit is based on a theory of premises liability. The district court granted the defendants' motion for summary judgment, holding there was no evidence they knew or should have known of the dangerous condition of the plaster ceiling. Richardson's appeal was transferred to the court of appeals. That court affirmed, and we granted Richardson's application for further review. . . .

The general rule applicable to the liability of possessors of land [to invitees] for injuries caused by conditions on the land is found in the Restatement (Second) of Torts:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

Restatement (Second) of Torts §343, at 215-16 (1965). The parties do not dispute Richardson's status as an invitee nor the defendants' status as possessors of the land. The dispute in this case centers on the requirement that the defendants know of the dangerous condition or by the exercise of reasonable care should have known of the condition.

Although Richardson does not contend that the defendants had actual knowledge of the condition of the plaster ceiling, he argues that this knowledge should be imputed to them because the defendants created the dangerous condition by installing the drop ceiling. Alternatively, he claims that if the defendants had exercised reasonable care in inspecting the plaster ceiling, they would have discovered the condition of the ceiling. We discuss these issues separately.

Knowledge of a dangerous condition is imputed to a possessor of land who has created the condition that causes the plaintiff's injury. See Smith v. Cedar Rapids Country Club, 255 Iowa 1199, 1210, 124 N.W.2d 557, 564 (1963). For example, in *Smith*, the plaintiff was injured when she slipped and fell on a floor that had been waxed to an uneven and extremely slippery finish. There was no dispute that the defendant had applied the finish to the floor. We stated that when "the condition has been created by the owner[,] . . . he will not be heard to deny he had notice of it."

This rule does not, however, help the plaintiff here. There is no evidence that the defendants created the condition in the plaster ceiling *that caused it to fall.* The defendants merely installed a drop ceiling over the plaster ceiling, and there is nothing in the record to indicate that the drop ceiling contributed in any way to the collapse of the plaster ceiling. Therefore, knowledge of the dangerous condition in the plaster ceiling cannot be imputed to the defendants.

The defendants' duty of reasonable care as possessors of the premises extends to an inspection of the premises to discover any dangerous conditions or latent defects, "followed by such repair, safeguards, or warning as may be reasonably necessary for [the invitee's] protection under the circumstances." Wieseler v. Sisters of Mercy Health Corp., 540 N.W.2d 445, 450 (Iowa 1995) (quoting Restatement (Second) of Torts §343 cmt. b, at 216). The action necessary to satisfy this duty of reasonable care depends upon "the nature of the land and the purposes for which it is used." Restatement (Second) of Torts §343 cmt. e, at 217. "The duty of one who operates a place of entertainment or amusement is higher than that of the owner of private property generally." Grall v. Meyer, 173 N.W.2d 61, 63 (Iowa 1969). . . .

[T]he facts here could support a jury finding that reasonable care warranted an inspection. Although the plaster ceiling had not collapsed in the past, the defendants

were aware of the age of the ceiling (it was built in 1913), and they should have realized that a falling ceiling posed a serious danger to their patrons. Even more important, an inspection was not an onerous and impractical burden. . . . [W]ith a ladder and a flashlight, the defendants could have conducted periodic inspections by simply lifting a ceiling tile in the drop ceiling and viewing the original ceiling, as Blumer did after the accident in 1994. . . . We think these facts . . . provide an evidentiary basis for a jury finding that the defendants' duty of reasonable care included inspection for hidden defects in the plaster ceiling.

Of course, a failure to inspect is relevant only to the extent such an inspection would have revealed the defect in the ceiling. See Restatement (Second) of Torts §343, at 215 (imposing liability only if the possessor knew or *would have discovered* the defect in the exercise of reasonable care). The record in this case shows that the plaster ceiling fell because the plaster separated from the wood lath. In addition, the record reveals that the cause of this separation was vibration of the ceiling over many years caused by traffic outside the building. We think the jury could make a common-sense inference from this evidence that the separation would not occur instantly, but that the plaster would gradually separate over time and begin to sag, thereby resulting in an appearance observable to someone looking at the ceiling. In fact, the repairman, Blumer, testified that was exactly what he was looking for when he inspected the ceiling after Richardson's accident — signs of sagging that would indicate the need for additional repairs. Therefore, we conclude that the plaintiff generated a jury question on whether the defect in the ceiling would have been discoverable upon inspection.

We think material issues of disputed fact exist as to whether reasonable care warranted an inspection of the plaster ceiling and whether such an inspection would have alerted the defendants to the dangerous condition of the ceiling. Therefore, the district court erred in ruling that the defendants were entitled to judgment as a matter of law. Accordingly, we vacate the court of appeals decision affirming the district court, reverse the decision of the district court, and remand the case for further proceedings.

NOTES TO RICHARDSON v. THE COMMODORE, INC.

1. ***Duty to Invitee.*** The *Richardson* court adopts the Restatement's description of the duty owed by a landowner to an invitee. Unlike the duty owed to a licensee, the duty owed to an invitee covers a reasonable response to hazards that the landowner would discover by the exercise of reasonable care. Duty to licensees is usually limited to hazards that the landowner actually knows, regardless of whether reasonable actions would have given the landowner more knowledge. If Russell Richardson had been a licensee, would the district court have been justified in awarding the defendant a summary judgment?

2. ***Problem: Duty to Invitee.*** Emily Hopkins, her son, and her daughter-in-law went to see a house that was for sale. The party had been invited by a salesperson employed by a real estate broker. The broker left them free to inspect the house unaccompanied. The kitchen of the house led up to a family room that was slightly elevated from the front portion of the house. On the same level as the family room were a powder room and laundry room. Ms. Hopkins waited on the upper level in the family room while her family viewed the patio and grounds. When Ms. Hopkins heard her son and daughter-in-law reenter, she attempted to join them in the foyer, where the

staircase to the second floor was located. She proceeded down the hallway from the laundry room toward the foyer, unaware that a step led down from the hallway into the foyer. The floors on both levels and the step were covered with the same pattern of vinyl. According to Ms. Hopkins, the use of the same floor covering on both levels camouflaged the presence of a step. Not anticipating the step, she lost her footing and fell, fracturing her right ankle. What was Ms. Hopkins' status on the land, what standard of care applies, and did the homeowner breach the appropriate standard of care? See Hopkins v. Fox & Lazo Realtors, 625 A.2d 1110 (N.J. 1992).

1. Slip-and-Fall Cases

In "slip and fall" cases, a plaintiff seeks damages for injuries suffered in a fall at a defendant's premises. From the plaintiff's point of view, ideal proof would be evidence that the defendant had known about the hazard and failed to remove it. This kind of *actual knowledge* of a danger might be established, for example, with testimony showing that the defendant or an employee of the defendant dropped something slippery on the floor.

In most cases, plaintiffs are unable to produce testimony showing a defendant's actual knowledge of debris or objects on the defendant's floor. Tort law has responded by developing two doctrines. In one, a plaintiff may establish *constructive notice* of a hazard. A defendant will be treated as if he or she had actual knowledge of a hazardous condition if there is proof supporting the conclusion that the condition was present for a significant period of time prior to the plaintiff's injury. Another approach, focused on the *mode of operation,* treats a defendant as having actual knowledge of a hazardous condition if the defendant has chosen to operate an enterprise in a way that makes it likely that dangerous conditions will occur often. Nisivoccia v. Glass Gardens, Inc. describes one state's transition from the constructive notice to the mode of operation approach and considers how broadly to characterize a food store's "mode of operation."

NISIVOCCIA v. GLASS GARDENS, INC.

818 A.2d 314 (N.J. 2003)

LaVecchia, J.

. . . The facts are straightforward. Approximately three feet from the entry of a supermarket checkout aisle, plaintiff slipped when she stepped on a grape with the heel of her right shoe. After she had fallen, she observed at least five other grapes within a three-foot diameter around her. No other grape had been squashed. She and her husband reported the incident to the employee at the checkout register and to the store manager.

Plaintiff filed this complaint in negligence against defendant Glass Gardens, Inc., doing business as Shop-Rite of Rockaway (the store). At trial, plaintiff and her husband testified to the circumstances involved in the slip and fall. The defense presented two store employees who were working on the day of the accident, a customer service clerk and the assistant manager. The customer service clerk recounted that he completed an incident report that day. However, the report failed to include any description of the

accident area or what the post-accident inspection revealed. The store's assistant manager described the store's method of selling grapes and its floor maintenance program. The grapes arrive at the store from the wholesaler already packaged in clear plastic bags that are open at the top and have slits for air vents on the sides. Those bags are then placed in the produce area for display to customers. The manager acknowledged that grapes may fall onto the store floor during the process of being handled by either customers or store employees and that that tended to happen at the two locations where the grapes were handled most frequently, in the produce aisle and at the checkout area. . . .

At the close of testimony, plaintiff requested and was denied an inference of negligence. The trial court distinguished *Wollerman* [*v. Grand Union Stores, Inc.*, 47 N.J. 426 (1966)], reasoning that the accident here did not occur, as in *Wollerman*, in the supermarket's produce aisle, nor did it occur close enough to the checkout cashier to have constituted part of the self-service operation. The court concluded that a reasonable juror could not find that any specific mode of store operation created a significant risk of harm, and it refused to make the store a general insurer of customer safety.

Defendant was granted a directed no-cause verdict because plaintiff had not produced any evidence of the store's actual or constructive notice of a dangerous condition. The Appellate Division affirmed in an unpublished opinion, and we granted certification.

Business owners owe to invitees a duty of reasonable or due care to provide a safe environment for doing that which is within the scope of the invitation. . . . Ordinarily an injured plaintiff asserting a breach of that duty must prove, as an element of the cause of action, that the defendant had actual or constructive knowledge of the dangerous condition that caused the accident. Equitable considerations have, however, motivated this Court to relieve the plaintiff of proof of that element in circumstances in which, as a matter of probability, a dangerous condition is likely to occur as the result of the nature of the business, the property's condition, or a demonstrable pattern of conduct or incidents. In those circumstances, we have accorded the plaintiff an inference of negligence, imposing on the defendant the obligation to come forward with rebutting proof that it had taken prudent and reasonable steps to avoid the potential hazard.

We first articulated that modification of the cause of action in *Bozza v. Vornado, Inc.*, 42 N.J. 355, 359-60 (1964). . . . In *Bozza*, the plaintiff, when leaving the counter of a self-service cafeteria, claimed to have slipped on a sticky, slimy substance on the littered and dirty floor. We pointed out that spillage by customers was a hazard inherent in that type of business operation from which the owner is obliged to protect its patrons, and we held that when it is the nature of the business that creates the hazard, the inference of negligence thus raised shifts the burden to the defendant to "negate the inference by submitting evidence of due care." We further addressed the mode-of-operation rule in *Wollerman*, in which the plaintiff had slipped on a string bean in the produce aisle of a supermarket. We explained in *Wollerman* that the defendant's self-service method of operation required it to anticipate the hazard of produce falling to the ground from open bins because of the carelessness of either customers or employees, imposing upon the defendant the obligation to use reasonable measures promptly to detect and remove such hazards in order to avoid the inference that it was at fault.

Our courts have adhered to the mode-of-operation rule since *Wollerman* . . . and it has been incorporated as well into the *Model Jury Charges (Civil)*, §5.24B-11 Duty Owed as to Condition of Premises (1970). The Model Charge correctly states the rule that when a substantial risk of injury is inherent in a business operator's method of doing business, the plaintiff is relieved of showing actual or constructive notice of the dangerous condition. The plaintiff is entitled to an inference of negligence, shifting the burden of production to the defendant, who may avoid liability if it shows that it did "all that a reasonably prudent man would do in the light of the risk of injury [the] operation entailed." . . . The ultimate burden of persuasion remains, of course, with the plaintiff.

Applying the foregoing principles to the matter before us, we conclude that plaintiff was entitled to a mode-of-operation instruction to the jury.

A location within a store where a customer handles loose items during the process of selection and bagging from an open display obviously is a self-service area. A mode-of-operation charge is appropriate when loose items that are reasonably likely to fall to the ground during customer or employee handling would create a dangerous condition. In *Wollerman,* the location was the produce area. But the same considerations apply to the checkout area of a supermarket. Customers typically unload their carts onto the checkout counter. Droppage and spillage during that process are foreseeable. Indeed, because of the way the grapes were packaged, they could easily have fallen out when accidentally tipped or upended in a shopping cart anywhere in the store. The open and air-vented bags invited spillage. It was foreseeable then that loose grapes would fall to the ground near the checkout area, creating a dangerous condition for an unsuspecting customer walking in that area.

The trial court took a restrictive view of what constituted the "checkout area," concluding that the location of the wayward grapes was too far removed from the actual cashier counter to be attributable to a mode of operation involving the handling of goods by customers and employees during checkout. The grape on which plaintiff slipped was approximately three feet from the entry to the checkout lanes. The trial court's analysis, however, failed to take into account the fact that grapes can be expected to roll if they fall to the ground. Thus, the dangerous condition caused by stray grapes in the entry area of the checkout lanes was a foreseeable risk posed by the store's mode of operation. "Mode of operation" here includes the customer's necessary handling of goods when checking out, an employee's handling of goods during checkout, and the characteristics of the goods themselves and the way in which they are packaged.

Given the combination of factors, negligence shall be inferred requiring the store to come forward and produce evidence of its due care. The question of the adequacy of the store's efforts to exercise due care was one for the jury. It was error for the court to have entered a directed verdict for defendant. Plaintiff was entitled to have the jury decide the issue of negligence.

The judgment of the Appellate Division is reversed and the matter remanded for further proceedings.

NOTES TO NISIVOCCIA v. GLASS GARDENS, INC.

1. ***Comparing Constructive Notice and Mode of Operation Theories.*** The plaintiff in *Nisivoccia* sought to establish the defendant's obligation to act reasonably with

respect to the fallen grape by relying on the mode of operation rule. That effort required proof that the store operator had chosen a style of business that made the presence of debris on the floor reasonably likely. The prior New Jersey approach, the constructive notice doctrine, would have required proof that the particular grape on which the plaintiff slipped had been present on the floor for a significant period of time prior to the accident.

2. *Time Lapse for Constructive Notice.* In establishing constructive notice, plaintiffs typically introduce evidence describing the condition of the thing that caused the accident. For judicial treatment of bananas, the paradigm of slippery objects, see Anjou v. Boston Elevated Railway Co., 208 Mass. 273, 94 N.E. 386 (1911) (dry, gritty, black, flattened banana peel could have been found by jury to have been on ground long enough to establish constructive notice); Joye v. Great Atlantic & Pacific Tea Co., 405 F.2d 464 (4th Cir. 1968) (dark banana with dirt and sand on it could not support finding of constructive notice, because it could have been on the defendant's floor for "30 seconds or 3 days").

The following Florida cases indicate other types of proof plaintiffs typically use in the effort to establish constructive notice: Ramey v. Winn-Dixie Montgomery, Inc., 710 So. 2d 191, 192-193 (Fla. Dist. App. 1998) (partially melted butter with lumps in it); Woods v. Winn-Dixie Stores, Inc., 621 So. 2d 710, 711 (Fla. Dist. App. 1993) (unidentified substance described as "very dirty," "trampled," "containing skid marks, scuff marks," and "chewed up"); Ress v. X-tra Super Food Ctrs., Inc., 616 So. 2d 110, 110-111 (Fla. Dist. App. 1993) (substance that appeared to be sauerkraut was "gunky, dirty and wet and black"); Hodges v. Walsh, 553 So. 2d 221, 222 (Fla. Dist. App. 1989) (sticky substance in bowling alley had dried); Washington v. Pic-N-Pay Supermarket, Inc., 453 So. 2d 508, 509 (Fla. Dist. App. 1984) (collard green leaves were "old, nasty" and "looked like they had been there for quite a while"); Camina v. Parliament Ins. Co., 417 So. 2d 1093, 1094 (Fla. Dist. App. 1982) (ice cream was thawed, dirty, and splattered).

3. *Required Proof of Unreasonable Conduct?* Under the Restatement's formulation, to be entitled to damages from a land occupier in a slip-and-fall case, an invitee must establish that the defendant knew or should have known about a risk, that the defendant should have expected that an invitee would not protect himself or herself from it, and that the defendant failed to exercise reasonable care to protect the invitee from the danger. See Restatement (Second) of Torts §343. This last element might call for proof about the defendant's response to a hazard. In constructive notice cases, courts generally treat proof that a hazard was present long enough to have been noticed as equivalent to proof that the defendant's nonresponse to the hazard was unreasonable. In theory, a full description of the circumstances surrounding the non-response could support a jury finding in favor of a defendant. See J.C. Penney Co. v. Sumrall, 318 So. 2d 829 (Miss. 1975) (even when a defendant store operator had actual notice of a dangerous condition, an employee's choice to call for help rather than to attend to it personally was reasonable as a matter of law).

4. *Problem: Limits of the Mode of Operation Rule.* A leaky roof in a supermarket caused water to collect on the floor, and a plaintiff slipped on the water. In a jurisdiction that has adopted the mode of operation rule, could a plaintiff's negligence claim be based on that doctrine? What evidence would be required in a traditional constructive notice jurisdiction? See Wiltse v. Albertson's Inc., 805 P.2d 793 (Wash. 1991).

5. ***Problem: Proof Required for Constructive Notice or Mode of Operation Theories.*** In a case where you could prove the following facts, what additional information would you want to have? Would the plaintiff's chance of recovery be the same in a jurisdiction that requires proof of constructive notice as in a jurisdiction that has adopted the mode of operation rule?

> The plaintiff entered a K-Mart department store as a business invitee for the purpose of shopping for children's clothing. While walking down an aisle in the children's clothing department, she slipped and fell near a round clothing rack. In the middle of the tile floor near the rack, there was an accumulation of a green liquid substance that was apparently avocado juice. She did not see the spilled juice, did not know how it got there, and did not know how long it had been there. After her fall, an unidentified K-Mart employee found a partially full can of avocado juice near the spill and told the plaintiff that she apparently had slipped on the substance. Later, the plaintiff overheard an unidentified K-Mart customer say a woman had passed through the children's clothing department accompanied by a small child who was carrying a can of avocado juice. The customer surmised the child disposed of the can by placing it on the floor underneath the clothing rack. K-Mart operates an in-store cafeteria and allows cafeteria patrons to remove food and drink from the cafeteria area and consume it on the shopping floor. K-Mart sells small cans of avocado juice in the cafeteria.

See Jackson v. K-Mart Corporation, 251 Kan. 700, 840 P.2d 463 (1992).

6. ***Shifting the Burden of Proof in Slip-and-Fall Cases.*** Some jurisdictions have incorporated a shift in the burden of proof while adopting the mode of operation doctrine. For example, the Colorado Supreme Court has held that

> the plaintiff establishes a prima facie case of negligence when he presents evidence that the nature of the defendant's business gives rise to a substantial risk of injury to customers from slip-and-fall accident, and that the plaintiff's injury was proximately caused by such an accident within the zone of risk. It is then incumbent upon the defendant to produce evidence that it exercised reasonable care under the circumstances. The ultimate decision whether the defendant exercised such care is to be made by the finder of fact.

Safeway Stores, Inc. v. Smith, 658 P.2d 255, 258 (Colo. 1983).

7. ***Public Policy Basis for Pro-Plaintiff Slip-and-Fall Doctrines.*** The Florida Supreme Court has adopted a burden-shifting approach for slip-and-fall cases. It supported this with the following ideas:

> [M]odern-day supermarkets, self-service marts, cafeterias, fast-food restaurants and other business premises should be aware of the potentially hazardous conditions that arise from the way in which they conduct their business. Indeed, the very operation of many of these types of establishments requires that the customers select merchandise directly from the store's displays, which are arranged to invite customers to focus on the displays and not on the floors. In addition, the premises owners are in a superior position to establish that they did or did not regularly maintain the premises in a safe condition and they are generally in a superior position to ascertain what occurred by making an immediate investigation, interviewing witnesses and taking photographs. In each of these cases, the nature of the defendant's business gives rise to a substantial risk of injury to customers from slip-and-fall accidents and that the plaintiff's injury was caused by such an accident within the zone of risk.

Owens v. Publix Supermarkets, Inc., 802 So. 2d 3165 (Fla. 2001). Most of these ideas would support either adoption of the mode of operation rule or of the version of the mode of operation rule that additionally incorporates a shift in the burden of proof.

2. Open and Obvious Dangers; Natural Accumulations

Common law doctrines have moderated the obligations of landowners to licensees and invitees where a hazard is open and obvious or where it is the result of a natural accumulation (usually of water, snow, or ice). Valance v. VI-Doug, Inc., examines whether wind, which caused an injury because it blew open a restaurant's door, could be treated as an *open and obvious danger*. It also describes connections between a natural accumulation and open and obvious danger doctrines.

VALANCE v. VI-DOUG, INC.

50 P.3d 697 (Wyo. 2002)

KITE, J. . . .

On March 5, 1999, Mrs. Miles went to the Village Inn Restaurant in Douglas [VI-Doug] with her grandson. She recalled that it was a terribly windy day. Her grandson let her off in front of the entrance to the restaurant, and he parked the car. . . . Mrs. Miles claimed that, as she opened the door, a strong gust of wind caught it and caused her to fall to the ground. As a result of her fall, she suffered a broken hip that required surgery. The owner of VI-Doug testified that, three or four months prior to Mrs. Miles' accident, another woman was slightly injured under very similar circumstances. . . .

Mrs. Miles alleged VI-Doug was negligent in failing to provide a reasonably safe entry for its patrons and claimed damages for her resulting severe physical injuries. On October 16, 2000, the district court granted VI-Doug's motion for summary judgment concluding the same policy reasons that support the open-and-obvious-danger exception and the natural-accumulation-of-ice-and-snow rule, which immunize defendants from liability, applied equally to wind. . . . This appeal followed.

The elements a plaintiff must establish to maintain a negligence action are: (1) The defendant owed the plaintiff a duty to conform to a specified standard of care, (2) the defendant breached the duty of care, (3) the defendant's breach of the duty of care proximately caused injury to the plaintiff, and (4) the injury sustained by the plaintiff is compensable by money damages. In this case, we are required to address the first element: whether a duty exists. The application of the natural accumulation rule and the open-and-obvious-danger exception determines whether the defendant has a duty. This is a question of law that the courts normally determine. We have, however, recognized that in certain instances the question of the existence of a duty hinges upon the initial determination of certain basic facts and, in those circumstances, the initial determination of those basic facts is properly placed before the trier of fact.

"As a general rule, a possessor of land owes a duty to his business invitees to maintain his premises in a reasonably safe condition." Eiselein v. K-Mart, Inc., 868 P.2d 893, 895 (Wyo. 1994). VI-Doug, as the possessor of land in this case, relies on the recognized open-and-obvious-danger exception and posits that wind is like a natural accumulation of ice or snow in that it is a force of nature, an element of weather, and a naturally occurring phenomenon which a business invitee encounters off the business

premises as well as when entering the business premises. The issues in this appeal are whether the natural accumulation rule and the open-and-obvious-danger exception are applicable to injuries resulting from naturally occurring wind. . . .

It is important to note that one of the underlying principles of the natural accumulation rule is that the dangers of natural accumulations are obvious; thus, the open-and-obvious-danger exception is contained within, and is part and parcel of, the natural accumulation rule. . . .

In this case, the district court concluded the same policy reasons exist for the element of wind as exist for the elements of ice and snow.

> The justification for the natural-accumulation rule comports with the factors to be considered in determining the existence of a duty. The magnitude of the burden on defendant to prevent injuries from snow or ice is great. . . . Natural winter conditions make it impossible to prevent all accidents. The plaintiff is in a much better position to prevent injuries from ice or snow because the plaintiff can take precautions at the very moment the conditions are encountered. Even if the plaintiff is unaware of the ice or snow he happens to slip on, he may be charged with knowledge that ice or snow is a common hazard in winter, one which he must consistently guard against.

Eiselein, 868 P.2d at 897-98. Therefore, the rules should naturally be extended to include the natural effect of the wind:

> "[A] proprietor is not considered negligent for allowing the natural accumulation of ice due to weather conditions where he has not created the condition. The conditions created by the elements, such as the forming of ice and falling of snow, are universally known and there is no liability where the danger is obvious or is as well known to the plaintiff as the property owner." Bluejacket [v. Carney, 550 P.2d 494], at 497 [(Wyo. 1976)]. The rationale underlying this rule is that "in a climate where there are frequent snowstorms and sudden changes of temperature, these dangerous conditions appear with a frequency and suddenness which defy prevention and, usually, correction; consequently, the danger from ice and snow in such locations is an obvious one, and the occupier of the premises may expect that an invitee on his premises will discover and realize the danger and protect himself against it." 62A Am. Jur. 2d *Premises Liability* §699 (1990).

Paulson v. Andicoechea, 926 P.2d 955, 957 (Wyo. 1996).

We agree with the district court's statement:

> Anyone who has ever lived anywhere in Wyoming knows that the wind and its potential severity are just as natural as the accumulation of ice and snow. The wind is an open and obvious danger. Probably the most common manifestation of that danger is in the opening of doors. The same policy reasons for the existence of the obvious danger rule and the natural accumulation rule apply equally to wind[.]

We conclude the terms of naturally occurring forces such as ice, snow, and wind can be used interchangeably in this court's social policy analysis. In general, the possibility of a sudden gust of wind, particularly in Wyoming, is an obvious danger foreseeable to anyone. A plaintiff is in a superior position to protect against hazards caused by wind at the moment it is encountered. A proprietor does not owe a duty of care to invitees to prevent the natural consequences of wind on his premises where he has not created or aggravated the naturally existing condition. . . .

Affirmed in part [and reversed and remanded based on issues omitted].

NOTES TO VALANCE v. VI-DOUG, INC.

1. ***Variations on the "Open and Obvious Danger" Rule.*** In some jurisdictions, the open and obvious danger rule applies to all hazards that are open and obvious, whether natural or made by a person. A jurisdiction applying this version of the doctrine, for example, would reject liability to an invitee who slipped and fell over spilled milk in a grocery store if evidence showed that the milk was obvious to the victim. See Moore v. Albertson's Inc., 7 P.3d 506 (Okla. 2000). As described in *Valance*, Wyoming applies the doctrine only to conditions that arise from natural causes. A small number of states have rejected the doctrine completely. The New Mexico Supreme Court has taken that position, explaining:

> Simply by making hazards obvious to reasonably prudent persons, the occupier of premises cannot avoid liability to a business visitor for injuries caused by dangers that otherwise may be made safe through reasonable means. A risk is not made reasonable simply because it is made open and obvious to persons exercising normal care.

Klopp v. The Wackenhut Corp., 824 P.2d 293 (N.M. 1992).

2. ***Non-Natural Accumulations.*** As its name suggests, the "natural accumulations" rule protects landowners from responsibility for hazards such as ice, drifts of snow, and puddles of water. If a landowner's conduct intensifies risks related to these conditions, such as by directing a flow of water from one place to another, the landowner will ordinarily lose the benefit of the rule. See, e.g., Moore v. Standard Paint & Glass Co. of Pueblo, 358 P.2d 33 (Colo. 1960).

3. ***Problem: Invisible Natural Accumulation.*** Linda Brown was injured when she slipped and fell on an patch of ice outside the door of a real estate office. She filed suit against the premises' owners alleging that they were negligent in that they failed to clear the path of ingress and egress to their place of business and failed to protect the plaintiff from the slick condition of the path of ingress and egress. On summary judgment, the defendants asserted that the ice was the result of a natural accumulation; the defendants had done nothing to enhance the accumulation of the ice, and the plaintiff's injury was caused by her own negligence. The plaintiff responded with evidence tending to establish that the patch of ice was not visible upon due care. That evidence showed that on the day of the accident, the weather was cold and clear but there was no indication of any ice in the vicinity; the sidewalk appeared to be dry but there was a patch of clear and virtually invisible ice, which is known as "black ice"; and another person had slipped and fallen on the same patch of black ice earlier the same day and had informed an employee in the real estate office of the dangerous invisible patch of ice. Black ice is not an ordinarily perceptible hazard, nor is it within ordinary knowledge, such as an ordinary accumulation of ice and snow. Is the defendant entitled to summary judgment? See Brown v. Alliance Real Estate Group, 976 P.2d 1043 (Okla. 1999).

3. Criminal Conduct by Third Parties

The victim of a crime can rarely recover damages from the criminal, because the criminal's identity is sometimes unknown, and the criminal is unlikely to have resources adequate to pay a tort judgment. For this reason, crime victims sometimes seek to impose liability on others who are associated with the crime. Occupiers of land have increasingly become subject to liability to invitees for conduct that contributed to

an attack on an invitee. Seibert v. Vic Regnier Builders, Inc. is representative of modern cases treating this problem.

SEIBERT v. VIC REGNIER BUILDERS, INC.

253 Kan. 540, 856 P.2d 1332 (1993)

McFarland, J.

This is a premises liability action brought by a woman who was shot in the parking lot of a shopping center in an armed robbery by an unknown assailant. Liability is sought to be imposed upon the owner of the shopping center on the basis of negligence in not providing security for the area. The district court, utilizing the "prior similar incidents" rule of foreseeability, entered summary judgment in favor of the defendant. The plaintiff appeals therefrom. . . .

There are controverted facts relative to whether plaintiff Betsy Seibert had the legal status of a licensee or business invitee at the time she was injured. For purposes of ruling on the defendant's summary judgment motion, the district court, appropriately, held Ms. Seibert to be a business invitee. We shall do the same.

On April 2, 1989, Ms. Seibert was a passenger in an automobile owned and driven by her friend Michelle Brandes. At about 3:00 p.m., they drove to the Ranch Mart Shopping Center and parked in the subterranean parking garage. They got out of the automobile and reached into the back to retrieve their purses from the "cubby" area of the Corvette. Suddenly, each had an assailant. Where the two robbers had been prior to assaulting the women is unknown. Ms. Seibert had her handbag and a cola can in her hands. When confronted, Ms. Seibert screamed and either dropped or threw the can of cola at her assailant, who then shot her in the head. The robbers fled.

Ms. Seibert brought this action against Vic Regnier Builders, Inc., the owner of Ranch Mart, Inc., alleging it was negligent in not providing security for its patrons when the assault upon her was foreseeable. Specifically, she alleged that by virtue of past criminal activity in the shopping center's parking areas plus the nature of the underground parking area, including dim lighting by virtue of numerous burned-out fluorescent tubes, the defendant owed a duty to her as a business invitee to provide security. The shopping center had no security for its patrons — no warning signs, video surveillance, or security guards. The plaintiff offered expert testimony that the security, including the lighting, was inadequate and had appropriate security measures been in place, the attack upon her would probably not have occurred.

No evidence of prior crimes in the underground parking area was offered or suggested. There was sketchy evidence of crimes occurring in above-ground areas of the parking lot, as follows: (1) Prior to 1986, a car window was broken and personal property taken from the vehicle; (2) in 1986, an armed robbery occurred (details unknown); (3) in 1988, a strong-armed robbery attempt was interrupted when witnesses intervened, and a second armed robbery was thwarted when the victim resisted.

In granting summary judgment to the defendant premises owner, the district court stated:

> Maybe you can get the guys up in the appellate courts to tell me I'm wrong, but in this case, factually, there are a total of four crimes in the preceding two years upon which to base a conclusion that there would be a criminal act taking place in the future, . . .

> . . . [B]ut I just don't know where to draw the line here.
>
> So, I'm going to find in this case that the criminal act was not foreseeable. . . .
>
> The effect of my ruling is, basically, even if there was no lighting, the criminal act was still not foreseeable. . . .

The plaintiff contends that under the "prior similar incidents" rule utilized by the district court, the court erred in holding that such prior incidents were insufficient to establish a duty owed. Alternatively, plaintiff contends the court erred in not applying the broader "totality of the circumstances" rule. The two rules are different methods for determining the foreseeability requirement of whether or not there is a duty owed by the premises owner to the customer injured by the criminal conduct of a third party.

In 62A Am. Jur. 2d, Premises Liability §513, p.69, it is stated:

> In accordance with the general rule (subject to some major exceptions) that an owner of premises has no duty to protect another from criminal attack, a storekeeper or proprietor of other commercial premises will not generally be held responsible for the willful criminal act of a third person which could not be foreseen or anticipated.

The difference between the two methods of determining foreseeability is stated in 62A Am. Jur. 2d, Premises Liability §520, p.77, as follows:

> Where the courts apply the "prior similar incidents" test of foreseeability, the occurrence of prior offenses on the premises is a key element of proof, and the proffered offenses apparently must be not only of the same type and nature as the offense complained of, but also must have occurred with some frequency. . . . Some courts have abrogated the "prior similar incidents" test in favor of the "totality of circumstances" test on the ground that application of such test contravened the policy of preventing future harm by forestalling a duty to safeguard until someone was injured; invaded the province of the jury to determine foreseeability from all of the facts and circumstances, and erroneously equated foreseeability of a particular act with previous occurrences of similar acts. Under such a rule, . . . foreseeability of criminal conduct may be established by the place and character of the business.
>
> Comment: This is in accord with the comment to the Restatement that a possessor of land has a duty to take precautions against criminal conduct on the part of third persons if "the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons."

The above reference to the Restatement is to Restatement (Second) of Torts §344 (1965), which states:

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Comment f to §344 explains that although the owner of the property is not an insurer of the land, there are certain circumstances in which liability is warranted:

> Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third

> person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

The plaintiff acknowledges there are no Kansas cases precisely on point. She likens the situation herein to those in Gould v. Taco Bell, 239 Kan. 564, 722 P.2d 511 (1986), and the earlier Kimple v. Foster, 205 Kan. 415, 469 P.2d 281 (1970). There are some significant distinctions between the *Gould/Kimple* cases and the factual situation before us. In both *Gould* and *Kimple* the criminal assaults occurred among fellow patrons of a restaurant and tavern, respectively. Explosive confrontational situations developed inside the business premises. The proprietors neither intervened nor called the police. . . .

In the case before us, the attack upon the plaintiff did not occur inside the business premises under the noses, so to speak, of the proprietors. The attack occurred in a parking lot. Neither the premises owner nor any of its employees were aware of the presence of the plaintiff or her attackers or that an attack was occurring. Neither failure to intervene nor to summon police is the basis of liability asserted herein, as was true in the *Gould* and *Kimple* cases. Rather, the liability sought to be imposed herein is predicated upon the frequency and severity of prior attacks against different patrons by presumably different attackers at different times and in different areas of the parking lot, plus the totality of the circumstances making the attack upon the plaintiff or some other business invitee foreseeable to the defendant, who then had a duty to take appropriate security action to prevent or make less likely the same from occurring.

Negligence exists where there is a duty owed by one person to another and a breach of that duty occurs. Further, if recovery is to be had for such negligence, the injured party must show: (1) a causal connection between the duty breached and the injury received; and (2) he or she was damaged by the negligence. Whether a duty exists is a question of law. Whether the duty has been breached is a question of fact. . . .

In determining whether there is a duty owed, we start with two general rules. The owner of a business is not the insurer of the safety of its patrons or customers. The owner ordinarily has no liability for injuries inflicted upon patrons or customers by the criminal acts of third parties in the business' parking lot, as the owner has no duty to provide security. Such a duty may arise, however, where circumstances exist from which the owner could reasonably foresee that its customers have a risk of peril above and beyond the ordinary and that appropriate security measures should be taken. In determining foreseeability, should the rule be limited to prior similar acts or include the totality of the circumstances? . . .

Perhaps the most commonly cited case accepting the totality of circumstances rule of foreseeability is Isaacs v. Huntington Memorial Hospital, 38 Cal. 3d 112, 211 Cal. Rptr. 356, 695 P.2d 653 (1985). The scene of the crime was the physicians' parking lot at a major hospital located in what was stated to be a high crime area. At the nearby emergency room parking area, numerous crimes had occurred, and security guards were employed therein. The emergency department was open 24 hours a day and attracted large numbers of drunks, drug addicts, and assorted violent criminal

types. Dr. Isaacs was an anesthesiologist who was shot by an assailant near his car in the physicians' parking lot. There had been no prior criminal incidents in this parking lot. The California Supreme Court rejected the prior similar incidents rule and embraced the totality of the circumstances test for foreseeability. In essence, the California court held that this particular parking lot could not be isolated and foreseeability based just upon events therein. The lot was in a high crime area and adjacent to the emergency room parking lot where violent behavior was known to be a common occurrence requiring security. . . .

We believe that totality of the circumstances is the better reasoned basis for determining foreseeability. The circumstances to be considered must, however, have a direct relationship to the harm incurred in regard to foreseeability. Prior incidents remain perhaps the most significant factor, but the precise area of the parking lot is not the only area which must be considered. If the parking lot is located in a known high crime area, that factor should be considered. For instance, one should not be able to open an all-night, poorly lit parking lot in a dangerous high crime area of an inner city with no security and have no legal foreseeability until after a substantial number of one's own patrons have fallen victim to violent crimes. Criminal activity in such circumstances is not only foreseeable but virtually inevitable.

It is a sad commentary on our times that there is probably no shopping center parking lot that is likely to be crime free. Thefts of vehicles and from vehicles do occur, as well as purse snatches, etc. It is only where the frequency and severity of criminal conduct substantially exceed the norm or where the totality of the circumstances indicates the risk is foreseeably high that a duty should be placed upon the owner of the premises to provide security. The duty to provide security is determined under the reasonable person standard. Thus, the duty to provide security and the level of such security must be reasonable—that includes the economic feasibility of the level of security. In some instances, the installation of better lighting or a fence or cutting down shrubbery might be cost effective and yet greatly reduce the risk to customers. We note with concern the plaintiff's expert's references to the security not being adequate or being inadequate. This is a poor choice of terms. Presumably, the fact that the attack on the plaintiff occurred shows that the security was "inadequate." Had it been "adequate" the attack would not have occurred. The shopping center owner is not under a duty to provide such security as will prevent attacks on the patrons—such a duty would make the owner the insurer of his patrons' safety. Rather, if because of the totality of the circumstances the owner has a duty to take security precautions by virtue of the foreseeability of criminal conduct, such security measures must also be reasonable under the totality of the circumstances. Such an approach is consistent with the Restatement (Second) of Torts §344 (1965).

. . . We must reverse and remand the case for reconsideration under the totality of the circumstances test for foreseeability. The circumstances to be considered must relate specifically to the foreseeability of the attack on the plaintiff. We note that under the facts presented, it is unknown where plaintiff's and her friend's assailants were immediately prior to the attack. Thus, the district court will have to consider the claims of deficient lighting in the context of whether this factor played any role in increasing the risk of this attack upon the plaintiff.

The summary judgment is reversed, and the case is remanded for reconsideration under the totality of the circumstances test of foreseeability.

NOTES TO SEIBERT v. VIC REGNIER BUILDERS, INC.

1. ***Required Showing of Foreseeability.*** The court describes and chooses between the "prior similar incidents" rule and the "totality of circumstances" rule, which each deal with the foreseeability of crime. How do the rules differ?

2. ***Degree of Required Foreseeability.*** The court states that a duty to protect invitees from third-party criminal conduct arises where "the frequency and severity of criminal conduct" around the defendant's location "substantially exceed the norm," and when the risk of crime is "above and beyond the ordinary." Other courts have recognized a duty to act reasonably in response to possible third-party crime in instances when that crime is foreseeable. The test adopted in *Seibert* would make summary judgment available to defendants more often than a test based only on "foreseeability" because foreseeability or lack of foreseeability is rarely clear enough to preclude consideration by a jury.

3. ***Problem: Aberrant Conduct and Foreseeability of Crime.*** In Maysonet v. KFC, National Management Co., 906 F.2d 929 (2d Cir. 1990), the victim of an attack at a fast food restaurant sought damages from its operator:

> Late one May night appellant Jose Maysonet entered a Kentucky Fried Chicken restaurant in the South Bronx, New York. He had been there before and had often seen loiterers panhandling patrons. This night was no different. When Maysonet entered there were 20-25 customers present, including a panhandler who was bothering and harassing customers, asking them for money and attracting attention by "crazy laughing." After Maysonet had waited on line for 15 minutes, the panhandler approached him and asked for money. When Maysonet refused the man stabbed him in the abdomen. The police and ambulance came and took him to the hospital where he eventually recovered, but the assailant was never found.

The trial court granted summary judgment to the defendant, on the ground that the plaintiff's evidence could not support a finding of foreseeable violent crime. With respect to that issue, the appellate court majority wrote:

> The panhandler's conduct up to the time he stabbed appellant was of the sort regularly seen nowadays in the streets and spaces where the public congregates in New York City and elsewhere. It may have been bothersome and annoying, but bothersome or annoying actions unaccompanied by assaultive or abusive conduct are simply too common an occurrence to alert a property owner that such person may commit a violent act.

What arguments would have supported reversal of the summary judgment? Would these arguments depend on the state's choice between the prior similar incidents rule and the totality of circumstances rule?

Perspective: Allocating Crime Prevention Resources

The goal of protecting people from crime is served by decisions that lead businesses to devote resources to safety measures. It would also be served by greater allocations of public funds to public police work. One way to decide which allocation method is superior would be to consider why the security measures are needed. If crime is widespread throughout the area of the defendant's

business, perhaps that is best addressed by public resources rather than the business's security measures. On the other hand, if criminals are drawn to the specific location of the business or are in that general locale because of the business, perhaps the business should pay for security as part of its cost of doing business.

Another way to look at the problem is to consider how crime prevention resources are most effectively spent. If businesses are in a better position than the police to know what security measures are needed and when, perhaps they can most efficaciously reduce crime on a business-by-business basis. On the other hand, if increased public expenditures on police can reduce everyone's crime problem simultaneously, that might be the best way to allocate resources.

C. Liability to Tenants and Their Guests

A tenant is permitted to enter a landlord's land because of a commercial agreement between the tenant and the landlord for the mutual benefit of those two parties. Looked at this way, it might seem that tenants and their guests could be classified as invitees. The common law rejected that analysis. The common law's primary position has been that landlords ordinarily do not owe any duty of care to tenants with regard to the safety of leased premises. This general immunity has been limited somewhat with doctrines that identify specific circumstances in which a landlord might be liable to a tenant or tenant's guest for injuries related to the condition of leased premises. Borders v. Roseberry applies the common law doctrines in a case where a tenant's social guest was injured because gutters that would have kept rain from creating hazardous ice had been removed.

BORDERS v. ROSEBERRY

532 P.2d 1366 (Kan. 1975)

PRAGER, J.

This case involves the liability of a landlord for personal injuries suffered by the social guest of the tenant as the result of a slip and fall on the leased premises. The facts in this case are undisputed and are as follows: The defendant-appellee, Agnes Roseberry, is the owner of a single-family, one-story residence located at 827 Brown Avenue, Osawatomie, Kansas. Several months prior to January 9, 1971, the defendant leased the property on a month to month basis to a tenant, Rienecker. Just prior to the time the tenant took occupancy of the house the defendant landlord had work performed on the house. The remodeling of the house included a new roof. In repairing the house the repairmen removed the roof guttering from the front of the house but failed to reinstall it. The landlord knew the guttering had been removed by the workmen, intended to have it reinstalled, and knew that it had not been reinstalled. The roof line on the house was such that without the guttering the rain drained off the entire north side of the house onto the front porch steps. In freezing weather water from the roof would accumulate and freeze on the steps. The landlord as well as the tenant knew

that the guttering had not been reinstalled and knew that without the guttering, water from the roof would drain onto the front porch steps and in freezing weather would accumulate and freeze. The tenant had complained to the landlord about the absence of guttering and the resulting icy steps.

On January 9, 1971, there was ice and snow on the street and ice on the front steps. During the afternoon the tenant worked on the front steps, removing the ice accumulation with a hammer. The plaintiff-appellant, Gary D. Borders, arrived on the premises at approximately 4:00 p.m. in response to an invitation of the tenant for dinner. . . . At 9:00 p.m. as plaintiff Borders was leaving the house he slipped and fell on an accumulation of ice on the steps and received personal injuries. There is no contention that the plaintiff Borders was negligent in a way which contributed to cause his injuries. After a pretrial conference the case was tried to the court without a jury. Following submission of the case the trial court entered judgment for the defendant, making findings of fact which are essentially those set forth above. The trial court based its judgment upon a conclusion of law which stated that a landlord of a single-family house is under no obligation or duty to a social guest, a licensee of his tenant to repair or remedy a known condition whereby water dripped onto the front steps of a house fronting north froze and caused plaintiff to slip and fall. The plaintiff has appealed to this court.

The sole point raised on this appeal by the plaintiff, Gary D. Borders, is that the trial court committed reversible error in concluding as a matter of law that a landlord of a single-family house is under no obligation or duty to a social guest of his tenant to repair or remedy a known condition whereby water dripped from the roof onto the front steps of a house fronting north, froze and caused the social guest to slip and fall.

At the outset it should be emphasized that we do not have involved here an action brought by a social guest to recover damages for personal injuries from his host, a possessor of real property. The issue raised involves the liability of a lessor who has leased his property to a tenant for a period of time. Furthermore, it should be pointed out that the plaintiff, a social guest of the tenant, has based his claim of liability against the landlord upon the existence of a defective condition which existed on the leased property *at the time the tenant took possession.*

Traditionally the law in this country has placed upon the lessee as the person in possession of the land the burden of maintaining the premises in a reasonably safe condition to protect persons who come upon the land. It is the tenant as possessor who, at least initially, has the burden of maintaining the premises in good repair. The relationship of landlord and tenant is not in itself sufficient to make the landlord liable for the tortious acts of the tenant. When land is leased to a tenant, the law of property regards the lease as equivalent to a sale of the premises for the term. The lessee acquires an estate in the land, and becomes for the time being the owner and occupier, subject to all of the responsibilities of one in possession, both to those who enter onto the land and to those outside of its boundaries. Professor William L. Prosser in his Law of Torts, 4th ed. §63, points out that in the absence of agreement to the contrary, the lessor surrenders both possession and control of the land to the lessee, retaining only a reversionary interest; and he has no right even to enter without the permission of the lessee. There is therefore, as a general rule, no liability upon the landlord, either to the tenant or to others entering the land, for defective conditions existing at the time of the lease.

The general rule of non-liability has been modified, however, by a number of exceptions which have been created as a matter of social policy. Modern case law on the subject today usually limits the liability of a landlord for injuries arising from a defective condition existing at the time of the lease to six recognized exceptions. These exceptions are as follows:

1. Undisclosed Dangerous Conditions Known to Lessor and Unknown to the Lessee. . . .

. . . It should be pointed out that this exception applies only to latent conditions and not to conditions which are patent or reasonably discernible to the tenant.

2. Conditions Dangerous to Persons Outside of the Premises

The theory of liability under such circumstances is that where a nuisance dangerous to persons outside the leased premises (such as the traveling public or persons on adjoining property) exists on the premises at the time of the lease, the lessor should not be permitted to escape liability by leasing the premises to another. . . .

3. Premises Leased for Admission of the Public

The third exception arises where land is leased for a purpose involving the admission of the public. The cases usually agree that in that situation the lessor is under an affirmative duty to exercise reasonable care to inspect and repair the premises before possession is transferred, to prevent any unreasonable risk or harm to the public who may enter. . . .

4. Parts of Land Retained in Lessor's Control Which Lessee Is Entitled to Use

When different parts of a building, such as an office building or an apartment house, are leased to several tenants, the approaches and common passageways normally do not pass to the tenant, but remain in the possession and control of the landlord. Hence the lessor is under an affirmative obligation to exercise reasonable care to inspect and repair those parts of the premises for the protection of the lessee, members of his family, his employees, invitees, guests, and others on the land in the right of the tenant. . . .

5. Where Lessor Contracts to Repair

At one time the law in most jurisdictions and in Kansas was that if a landlord breached his contract to keep the premises in good repair, the only remedy of the tenant was an action in contract in which damages were limited to the cost of repair or loss of rental value of the property. Neither the tenant nor members of his family nor his guests were permitted to recover for personal injuries suffered as a result of the breach of the agreement. In most jurisdictions this rule has been modified and a cause of action given in tort to the injured person to enable him recovery for his personal injuries. . . .

6. Negligence by Lessor in Making Repairs

When the lessor does in fact attempt to make repairs, whether he is bound by a covenant to do so or not, and fails to exercise reasonable care, he is held liable for

injuries to the tenant or others on the premises in his right, if the tenant neither knows nor should know that the repairs have been negligently made. . . .

[Section] d of [Restatement (Second) of Torts] Section 362 declares that the lessor is subject to liability if, but only if, the lessee neither knows nor should know that the purported repairs have not been made or have been negligently made and so, relying upon the deceptive appearance of safety, subjects himself to the dangers or invites or permits his licensees to encounter them. Conversely it would follow that if the lessee knows or should know that the purported repairs have not been made or have been negligently made, then the lessor is not liable under this exception. . . .

With the general rule and its exceptions in mind we shall now examine the undisputed facts in this case to determine whether or not the landlord can be held liable to the plaintiff here. It is clear that the exceptions pertaining to undisclosed dangerous conditions known to the lessor (exception 1), conditions dangerous to persons outside of the premises (exception 2), premises leased for admission of the public (exception 3), and parts of land retained in the lessor's control (exception 4) have no application in this case. Nor do we believe that exception 5, which comes into play when the lessor has contracted to repair, has been established by the court's findings of fact. It does not appear that the plaintiff takes the position that the lessor contracted to keep the premises in repair; nor has any consideration for such an agreement been shown. As to exception 6, although it is obvious that the repairs to the roof were not completed by installation of the guttering and although the landlord expressed his intention to replace the guttering, we do not believe that the factual circumstances bring the plaintiff within the application of exception 6 where the lessor has been negligent in making repairs. As pointed out above, that exception comes into play only when the lessee lacks knowledge that the purported repairs have not been made or have been negligently made. Here it is undisputed that the tenant had full knowledge of the icy condition on the steps created by the absence of guttering. It seems to us that the landlord could reasonably assume that the tenant would inform his guest about the icy condition on the front steps. We have concluded that the factual circumstances do not establish liability on the landlord on the basis of negligent repairs made by him.

In his brief counsel for the plaintiff vigorously argues that the law should be changed to make the landlord liable for injuries resulting from a defective condition on the leased premises where the landlord has knowledge of that condition. He has not cited any authority in support of his position, nor does he state with particularity how the existing law pertaining to a landlord's liability should be modified. We do not believe that the facts and circumstances of this case justify a departure from the established rules of law discussed above.

The judgment of the district court is affirmed.

NOTES TO BORDERS v. ROSEBERRY

1. ***Landlord Immunity.*** The plaintiff in Borders was a social guest of a lessee. States that follow the doctrines described in the decision apply the immunity (with exceptions) to suits by tenants and members of tenants' families as well.

2. ***Access to Information.*** Some of the common law exceptions to landlord immunity may be based on the ability of landords and tenants to know about hazards.

The exception for dangerous conditions known to the landlord and unknown to the tenant fits this analysis. Similarly, the exceptions for conditions that cause injury outside the land or that harm a member of the public also involve a landlord whose opportunity to know about the risk is greater than the opportunity possessed by the injured individual.

3. ***Incentives to Inspect and Repair.*** The exception to immunity for common areas (or areas under control of the landlord) can be justified on two grounds. First, the landlord is able to inspect those places easily and therefore to discover dangerous conditions. Second, if the law did not provide an incentive to landlords to maintain those areas, it is unclear how multiple tenants might organize themselves to maintain or repair those places. If landlords were immune and individual tenants had no incentive to take action, dangerous conditions would likely remain unremedied.

4. ***Third-Party Crime.*** As is true for land occupier cases in general, landlord-tenant cases have seen an increase in recognition of landlords' liability for crimes committed on their premises by third parties. The court in Walls v. Oxford Management, Inc., 633 A.2d. 103 (N.H. 1993), provided a typical statement of current law:

> We hold that while landlords have no general duty to protect tenants from criminal attack, such a duty may arise when a landlord has created, or is responsible for, a known defective condition on a premises that foreseeably enhanced the risk of criminal attack. Moreover, a landlord who undertakes, either gratuitously or by contract, to provide security will thereafter have a duty to act with reasonable care. Where, however, a landlord has made no affirmative attempt to provide security, and is not responsible for a physical defect that enhances the risk of crime, we will not find such a duty.

5. ***Problem: Availability and Application of Traditional Rules in a Non-Lease Setting.*** Pauline Burch, a 67-year-old grandmother, was hurt in a fall in an unlighted stairwell located in a University of Kansas dormitory. The stairwell connected the main lobby with a lounge used by residents and visitors. When Ms. Burch fell, she was attempting to visit her granddaughter, who lived in the dormitory. Ms. Burch sought damages from the university. The agreement between the granddaughter and the University of Kansas was set out in a "Residence Hall Contract." Under the contract, the university guaranteed space, meals, and other services in a residence hall, but did not guarantee a specific room in a specific hall. Payments under the contract were denominated installments, not rent. Assuming that the jurisdiction's treatment of licensees would not provide recovery for Ms. Burch, could she base a claim under any aspects of the duties owed by landlords to their tenants and tenants' guests? See Burch v. University of Kansas, 756 P.2d 431 (Kan. 1988).

III. Modern Approaches

Dissatisfaction with the process of resolving land entrant cases according to the three-category system of trespasser, licensee, and invitee has led many states to modify that common law doctrine. Landlord-tenant law has evolved in some states in a similar fashion, moving away from the doctrinal framework of a general no-duty rule accompanied by specifically enumerated exceptions.

A. Rejection of the Three-Category System

In some states, landowners now owe all entrants a duty of reasonable care. Other states have combined the licensee and invitee category to develop a system with two categories: lawful entrants and trespassers. Nelson v. Freeland discusses the advantages and disadvantages of these positions.

NELSON v. FREELAND

507 S.E.2d 882 (N.C. 1998)

WYNN, J.

The sole issue arising out of the case sub judice is whether defendant Dean Freeland's ("Freeland") act of leaving a stick on his porch constituted negligence. Indeed, this case presents us with the simplest of factual scenarios—Freeland requested that plaintiff John Harvey Nelson ("Nelson") pick him up at his house for a business meeting the two were attending, and Nelson, while doing so, tripped over a stick that Freeland had inadvertently left lying on his porch. Nelson brought this action against Freeland and his wife seeking damages for the injuries he sustained in the fall. The trial court granted summary judgment for the defendants, and the Court of Appeals affirmed.

Although the most basic principles of tort law should provide an easy answer to this case, our current premises liability trichotomy—that is, the invitee, licensee, and trespasser classifications—provides no clear solution and has created dissension and confusion amongst the attorneys and judges involved. Thus, once again, this Court confronts the problem of clarifying our enigmatic premises-liability scheme—a problem that we have addressed over fourteen times.

. . . [W]e have repeatedly waded through the mire of North Carolina premises-liability law. Nonetheless, despite our numerous attempts to clarify this liability scheme and transform it into a system capable of guiding North Carolina landowners toward appropriate conduct, this case and its similarly situated predecessors convincingly demonstrate that our current premises-liability scheme has failed to establish a stable and predictable system of laws. Significantly, despite over one hundred years of utilizing the common-law trichotomy, we still are unable to determine unquestionably whether a man who trips over a stick at a friend/business partner's house is entitled to a jury trial—a question ostensibly answerable by the most basic tenet and duty under tort law: the reasonable-person standard of care. . . .

Although the common-law trichotomy has been entrenched in this country's tort-liability jurisprudence since our nation's inception, over the past fifty years, many states have questioned, modified, and even abolished it after analyzing its utility in modern times. At first, states believed that although the policies underlying the trichotomy—specifically those involving the supremacy of land ownership rights—were no longer viable, they nonetheless could find means to salvage it. In particular, states attempted to salvage the trichotomy by engrafting into it certain exceptions and subclassifications which would allow it to better congeal with our present-day policy of balancing land-ownership rights with the right of entrants to receive adequate protection from harm. . . .

Additionally, courts were often confronted with situations where none of the exceptions or subclassifications applied, yet if they utilized the basic trichotomy, unjust

and unfair results would emerge. Therefore, these courts were forced to define terms such as "invitee" and "active conduct" in a broad or strained manner to avoid leaving an injured plaintiff deserving of compensation without redress. Although these broad or strained definitions may have led to just and fair results, they often involved rationales teetering on the edge of absurdity. For example, in Hansen v. Richey, 237 Cal. App. 2d 475, 480-81, 46 Cal. Rptr. 909, 913 (1965), under the trichotomy the court would not have been able to compensate the plaintiffs for their licensee son's drowning because the defendant did not maintain his pool in a manner which wantonly or recklessly exposed the decedent to danger. Therefore, to reach a just result, the court in *Hansen* read the phrase "active conduct" broadly to include the general "active" act of having a party. Under this strained reading, however, "active conduct" could plausibly exist whenever a landowner "actively" invites someone to his home. . . .

The first significant move toward abolishing the common-law trichotomy occurred in 1957 when England — the jurisdiction giving rise to the trichotomy — passed the Occupier's Liability Act which abolished the distinction between invitees, licensees and so-called contractual visitors. . . .

[In 1968], the Supreme Court of California decided the seminal case of Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97, which abolished the common-law trichotomy in California in favor of modern negligence principles. Specifically, the court in *Rowland* held that the proper question to be asked in premises-liability actions is whether "in the management of his property [the landowner] has acted as a reasonable man in view of the probability of injury to others." Moreover, the court [noted] that "whatever may have been the historical justifications for the common law distinctions, it is clear that those distinctions are not justified in the light of our modern society." The court continued by stating that the trichotomy was "contrary to our modern social mores and humanitarian values . . . [, and it] obscures rather than illuminates the proper considerations which should govern determination of the question of duty."

The *Rowland* decision ultimately served as a catalyst for similar judicial decisions across the country. Indeed, since *Rowland*, twenty-five jurisdictions have either modified or abolished their common-law trichotomy scheme — seven within the last five years.

Specifically, eleven jurisdictions have completely eliminated the common-law distinctions between licensee, invitee, and trespasser.

Further, fourteen jurisdictions have repudiated the licensee-invitee distinction while maintaining the limited-duty rule for trespassers.

In summation, nearly half of all jurisdictions in this country have judicially abandoned or modified the common-law trichotomy in favor of the modern "reasonable-person" approach that is the norm in all areas of tort law.

To assess the advantages and disadvantages of abolishing the common-law trichotomy, we first consider the purposes and policies behind its creation and current use. The common-law trichotomy traces its roots to nineteenth-century England. Indeed, it emanated from an English culture deeply rooted to the land; tied with feudal heritage; and wrought with lords whose land ownership represented power, wealth, and dominance. Even though nineteenth-century courts were aware of the threat that unlimited landowner freedom and its accompanying immunity placed upon the

community, they nevertheless refused to provide juries with unbounded authority to determine premises-liability cases. Rather, these courts restricted the jury's power because juries were comprised mainly of potential land entrants who most likely would act to protect the community at large and thereby reign (sic) in the landowner's sovereign power over his land. Thus, the trichotomy was created to disgorge the jury of some of its power by either allowing the judge to take the case from the jury based on legal rulings or by forcing the jury to apply the mechanical rules of the trichotomy instead of considering the pertinent issue of whether the landowner acted reasonably in maintaining his land. . . .

Although the modern trend of premises-liability law in this country has been toward abolishing the trichotomy in favor of a reasonable-person standard, there are some jurisdictions that have refused to modify or abolish it. One of the primary reasons that some jurisdictions have retained the trichotomy is fear of jury abuse — a fear similar to the reason it was created in the first place. Specifically, jurisdictions retaining the trichotomy fear that plaintiff-oriented juries — like feudal juries composed mostly of land entrants — will impose unreasonable burdens upon defendant-landowners. This argument, however, fails to take into account that juries have properly applied negligence principles in all other areas of tort law, and there has been no indication that defendants in other areas have had unreasonable burdens placed upon them. Moreover, given that modern jurors are more likely than feudal jurors to be landowners themselves, it is unlikely that they would be willing to place a burden upon a defendant that they would be unwilling to accept upon themselves.

Another fear held by jurisdictions retaining the trichotomy is that by substituting the negligence standard of care for the common-law categories, landowners will be forced to bear the burden of taking precautions such as the expensive cost associated with maintaining adequate insurance policies. This argument, however, ignores the fact that every court which has abolished the trichotomy has explicitly stated that its holding was not intended to make the landowner an absolute insurer against all injuries suffered on his property. Rather, they require landowners only to exercise reasonable care in the maintenance of their premises. . . .

On a more practical level, the trichotomy has been criticized for creating a complex, confusing, and unpredictable state of law. . . .

The complexity and confusion associated with the trichotomy is twofold. First, the trichotomy itself often leads to irrational results not only because the entrant's status can change on a whim, but also because the nuances which alter an entrant's status are undefinable. Consider, for example, the following scenario: A real-estate agent trespasses onto another's land to determine the value of property adjoining that which he is trying to sell; the real-estate agent is discovered by the landowner, and the two men engage in a business conversation with respect to the landowner's willingness to sell his property; after completing the business conversation, the two men realize that they went to the same college and have a nostalgic conversation about school while the landowner walks with the man for one acre until they get to the edge of the property; lastly, the two men stand on the property's edge and speak for another ten minutes about school. If the real-estate agent was injured while they were walking off the property, what is his classification? Surely, he is no longer a trespasser, but did his

status change from invitee to licensee once the business conversation ended? What if he was hurt while the two men were talking at the property's edge? Does it matter how long they were talking? . . .

The preceding [illustration demonstrates] that the trichotomy often forces the trier of fact to focus upon irrelevant factual gradations instead of the pertinent question of whether the landowner acted reasonably toward the injured entrant. For instance, in the real-estate agent hypothetical . . . the trier of fact would be focused on determining the agent's purpose for being on the land at the time of injury instead of addressing the pertinent question of whether the landowner acted as a reasonable person would under the circumstances.

Corresponding to this argument is the fact that "in many instances, recovery by an entrant has become largely a matter of chance, dependent upon the pigeonhole in which the law has put him, e.g., 'trespasser,' 'licensee,' or 'invitee'—each of which has radically different consequences in law." . . .

Lastly, we note that the trichotomy has been criticized because its underlying landowner-immunity principles force many courts to reach unfair and unjust results disjunctive to the modern fault-based tenets of tort law. For example, . . . the California Supreme Court noted that using the trichotomy to determine whether a landowner owed the injured plaintiff a duty of care "is contrary to our modern social mores and humanitarian values." *Rowland*, 69 Cal. 2d at 118, 443 P.2d at 567, 70 Cal. Rptr. at 104. Indeed, modern thought dictates that "[a] man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation . . . because he has come upon the land of another without permission or with permission but without a business purpose." Id. . . .

Given the numerous advantages associated with abolishing the trichotomy, this Court concludes that we should eliminate the distinction between licensees and invitees by requiring a standard of reasonable care toward all lawful visitors. Adoption of a true negligence standard eliminates the complex, confusing, and unpredictable state of premises-liability law and replaces it with a rule which focuses the jury's attention upon the pertinent issue of whether the landowner acted as a reasonable person would under the circumstances.

In so holding, we note that we do not hold that owners and occupiers of land are now insurers of their premises. Moreover, we do not intend for owners and occupiers of land to undergo unwarranted burdens in maintaining their premises. Rather, we impose upon them only the duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors.

Further, we emphasize that we will retain a separate classification for trespassers. We believe that the status of trespasser still maintains viability in modern society, and more importantly, we believe that abandoning the status of trespasser may place an unfair burden on a landowner who has no reason to expect a trespasser's presence. Indeed, whereas both invitees and licensees enter another's land under color of right, a trespasser has no basis for claiming protection beyond refraining from willful injury. . . .

Accordingly, plaintiff Nelson is entitled to a trial at which the jury shall be instructed under the new rule adopted by this opinion. Specifically, the jury must determine whether defendant Freeland fulfilled his duty of reasonable care under the circumstances. This case is therefore remanded . . . for proceedings consistent with this opinion.

NOTES TO NELSON v. FREELAND

1. ***Complexity of the Three-Category System.*** The court describes the three-category system as having been difficult to apply, as leading to irrational results, and leading to unfair outcomes. Considering two examples, the facts of *Nelson* and the hypothetical about the real estate agent discussed in *Nelson*, would a two-category system (trespassers and legal entrants) resolve these difficulties in those cases?

2. ***Effect of Combining Licensee and Invitee Categories.*** The court states that landowners will not be insurers of the safety of entrants, even under its newly adopted rules. Being an "insurer" in this context means paying for all harms suffered by legal entrants. What must injured land entrants prove to win cases that keeps landowners from being "insurers"?

3. ***Recreational Uses.*** Almost all states have statutes that limit the liability of landowners to people they allow to enter their land for recreational purposes without charge. The impetus for these statutes has been a desire to insulate these landowners from the effect of pro-plaintiff changes in their states' underlying landowner–land entrant doctrines. Typically under these statutes, landowners are liable only for intentionally or wantonly caused injuries regardless of any changes a state might make in its general definition of duties owed to licensees. A statute of this type is quoted in Note 1 to Sandler v. Commonwealth in Chapter 3.

4. ***Moral Rationale for Rejecting the Three-Category System.*** The court noted that the two-category system would be better than the three-category system because the three-category system led to lots of confusion. It also quoted a California opinion's statement that "a man's life or limb does not become less worthy of protection . . . because he has come upon the land of another without permission. . . ." Each of these ideas logically supports the court's decision to treat licensees and invitees equally. Do they each support the court's decision to continue to use separate rules for trespassers?

5. ***Effect on Outcomes.*** The same facts that lead to classifying a plaintiff as a trespasser or licensee or invitee might affect a jury's evaluation of whether a landowner had been reasonable in jurisdictions adopting a rule applying a single standard to people who would formerly have had different status classifications. A clear example of this would be jury evaluation of what care is reasonable on the part of a landowner toward a trespasser. Where a trespasser was unforeseeable, the reasonable care standard would probably demand very little care from a landowner. And there is less that a landowner can reasonably do to protect a licensee who merely has permission of the landowner to be on the land (to hunt, for instance). The outcomes of cases under modern approaches may be similar to the outcomes that the traditional rules would have produced.

Statute: COMMON LAW DISTINCTION ABOLISHED, TRESPASSER

Ill. Comp. Stats. §740 130/2, 130/3 (2002)

Sec. 2. The distinction under the common law between invitees and licensees as to the duty owed by an owner or occupier of any premises to such entrants is abolished.

The duty owed to such entrants is that of reasonable care under the circumstances regarding the state of the premises or acts done or omitted on them. The duty of

reasonable care under the circumstances which an owner or occupier of land owes to such entrants does not include any of the following: a duty to warn of or otherwise take reasonable steps to protect such entrants from conditions on the premises that are known to the entrant, are open and obvious, or can reasonably be expected to be discovered by the entrant; a duty to warn of latent defects or dangers or defects or dangers unknown to the owner or occupier of the premises; a duty to warn such entrants of any dangers resulting from misuse by the entrants of the premises or anything affixed to or located on the premises; or a duty to protect such entrants from their own misuse of the premises or anything affixed to or located on the premises.

Sec. 3. Nothing herein affects the law as regards the trespassing child entrant. An owner or occupier of land owes no duty of care to an adult trespasser other than to refrain from willful and wanton conduct that would endanger the safety of a known trespasser on the property from a condition of the property or an activity conducted by the owner or occupier on the property.

NOTES TO STATUTE

1. ***Definition of "Reasonable Care."*** The statute defines "reasonable care" as not including measures that would protect an entrant from a hazard known to the entrant. In the absence of that limitation, could there be circumstances in which a reasonable landowner would seek to protect an entrant from a condition that the entrant knew about?

2. ***Comparing Statutory and Common Law.*** The *Nelson* opinion is an instance of judicial abrogation of the distinction between invitees and licensees. How does the result in that case compare with the result established in the Illinois statute?

Perspective: Efficiency of Common Law Rules

Courts that have abolished the three-category approach to landowner liability have usually believed that the traditional categorical distinctions were artificial and failed to reflect the genuine circumstances of real cases. In Jason Scott Johnston, *Uncertainty, Chaos, and the Torts Process: An Economic Analysis of Legal Form*, 76 Cornell L. Rev. 341 (1991), the author contends that the common law approach offers substantial efficiencies, arguing:

> My model suggests that a categorical rule will generate proper incentives when circumstances are either typical or extreme. In typical circumstances, the rule is correct. In extreme circumstances, actors will essentially ignore the rule and do what is socially optimal. Moreover, because it is easy for a judge to accurately determine whether circumstances were extreme, exceptions to the categorical rule for extreme circumstances may be self-enforcing. At the very least such an exception does not significantly worsen the incentives. . . .
>
> In some circumstances, such as when risk to a trespasser will be very likely and risk to an invitee will not, the rule's distinctions will not make sense. But the common-law approach makes several explicit exceptions to the no duty to trespasser rule in those cases. These exceptions are not only theoretically correct

but also probably self-enforcing. One such exception imposes a full duty to use reasonable care toward an adult trespasser once she is discovered on the land. Another such exception treats a child as an invitee under the attractive nuisance doctrine when the trespasser is a child drawn to trespass on the land by something attractive upon it. Neither of these exceptions is easy to fabricate. Only children can invoke the attractive nuisance doctrine. Only a known trespasser is owed a duty of reasonable care. There may be some blurring around the edges of these exceptions, as in determining an upper age limit for the attractive nuisance doctrine or defining when a trespasser is known. But generally the exceptions are narrowly drawn, cover circumstances distinctly different from the usual case, and likely send substantially correct signals.

The *Rowland* court was apparently concerned not only about the tendency of the no duty to trespasser rule to inadequately deter, but also about the rule's tendency to make landowners behave too cautiously towards invitees. . . . One may argue that landowners may be too careful toward invitees because invitees are owed a full duty of care. With a full duty of care, the landowner's liability to an invitee is determined under case-by-case balancing. It is the uncertainty inherent in balancing, rather than the status distinction, that is most likely to cause landowners to be too careful toward invitees. And in this lies the great irony of *Rowland*, for if balancing is likely to overdeter in the case of invitees, it is likely to do so also with respect to trespassers and licensees.

B. Changes in Landlord-Tenant Doctrines

Landlord-tenant tort law has been affected in some states by the same trends that have influenced the evolution of landowner-land entrant law in general. Just as some states have abrogated the three-category approach to landowner-land entrant cases, some have rejected the detailed structure of the common law's landlord immunity system. Newton v. Magill is representative of cases implementing this change.

NEWTON v. MAGILL

872 P.2d 1213 (Alaska 1994)

MATTHEWS, J.

This is a slip and fall case brought by a tenant against her landlord. The superior court granted summary judgment in favor of the landlord based on the traditional common law rule that a landlord is generally not liable for dangerous conditions in leased premises. We hold that this rule no longer applies in view of the legislature's enactment of the Uniform Residential Landlord and Tenant Act, and therefore reverse.

In the summer of 1988, Darline Newton moved from Idaho to Petersburg to join her husband, Stan, who had moved to Alaska a few months earlier. In Petersburg, Stan Newton had leased a house in a trailer park owned by Enid and Fred Magill.

The front door of the house opened onto a wooden walkway about six feet long and five feet wide. This walkway served the Newtons' house. It was partly covered by an overhanging roof, had no hand railing, and no "anti-slip" material on its surface.

On November 20, 1988, Darline Newton slipped and fell on the walkway, breaking her ankle. The Newtons filed suit against the Magills claiming that the walkway had been slippery and hazardous for a considerable period of time prior to the accident, that the Magills had a duty to remedy its condition, and that they negligently failed to do so.

The Magills moved for summary judgment on the ground that the tenants were responsible for "any slippery conditions resulting from rain" under both the common law and the Uniform Residential Landlord and Tenant Act (URLTA) as adopted in Alaska, AS 34.03.010-380. The Magills argued, further, that they could not be liable under a latent defect theory because the walkway was not defective; further, even assuming that it had a tendency to become dangerously slippery when wet, this hazard should have been obvious to the tenants. The superior court granted the motion. The court ruled:

> Plaintiff's . . . claim is barred by Alaska's interpretation of the Uniform Residential Landlord [and] Tenant Act; AS 34.03.010-380. In Coburn v. Burton, 790 P.2d 1355, 1357 (Alaska 1990), the Supreme Court held that the landlord had the duty to keep common areas in a safe and clean condition, while at the same time, the tenant had a correlative duty to keep areas occupied and used solely by the tenant in a clean and safe condition. Here, the injury did not occur in a common area. The plaintiff states that she slipped and fell on the entryway, which was for the sole use of the plaintiff to enter the single-family residence. Pursuant to *Coburn,* the plaintiff had the duty to keep the entryway in a clean and safe condition. The defendant could not have breached the plaintiff's duty.
>
> Additionally, there is no evidence that the entryway was latently defective. The plaintiff even admits that no complaints were made to the defendant about the entryway.

The Newtons moved to reconsider. The court denied the motion in a written order which stated, after noting that the accident occurred in an area which the Newtons had a duty to maintain:

> Nevertheless, the Newtons argue that other circumstances involved here should require the burden to remain with the Magills. They argue that the entryway had latent or design defects. The fact that the entryway did not have a handrail, a gutter on the roof, or anti-slip material on the boards are not latent defects. These conditions existed in plain view and the Newtons knew these conditions existed. This is not a case involving a guest unfamiliar with the house or entryway. Mrs. Newton lived in the house for nearly five months before the fall. The Newtons used the entryway daily and it rained on numerous days before [the accident].
>
> Even if the lack of a gutter and a handrail could be considered design defects, given the width of the entryway and its outside location, it is difficult to see, and the Newtons have offered no evidence to suggest, how these fixtures would have played any role in preventing the accident. Furthermore, the parties have not argued that the handrail or the rain gutters are required by any building code, ordinance or statute.
>
> The anti-slip material is not a design problem, but is a maintenance problem. As noted above, the duty to maintain the entryway rests with the Newtons.

(Footnote omitted.)

From this order the Newtons have appealed. . . .

This court will uphold a summary judgment only if the record presents no genuine issues of material fact and "the moving party was entitled to judgment on the law