Louisiana Premises Liability in the Post-Cates v. Beauregard Electric Cooperative Era

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I. INTRODUCTION

The common-law jurisprudence created a strict series of categories classifying persons entering land belonging to another. This comprehensive classification system was uniformly used in the United States in defining a landowner’s duty to entrants subsequently injured on the premises by artificial and unreasonably dangerous conditions. The scope of the duty owed by the landowner to the entrant varied depending on the status accorded the entrant. The three main classes which have developed are “trespasser,” “licensee,” and “invitee.” Within the main classes are other distinct subclasses including children and others with child-like judgment, often covered by the jurisprudential exception of “attractive nuisance.” Other subclasses include public officers, legal incompetents, and the elderly, all of whom are also protected by similar exceptions judicially created to soften the effects of the rigid classification system. The distinctions in the three main classifications are drawn according to whether the entrant’s presence was consensual and/or with proper purpose. It follows that an invitee is owed the highest duty of care by landowners. The trespasser is owed the least duty of care because his presence on the premises is not of right. The licensee holds an intermediate level of protection in the scheme. Notwithstanding exceptions created, the duty of reasonable care is not owed to any trespasser or licensee under the common-law classification system. Generally, landowners owed only an invitee a duty of reasonable care.

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5. See, e.g., Fields v. Senior Citizens Ctr., Inc., 528 So. 2d 573, 582 (La. App. 2d Cir. 1988).


able care owed to invitees by finding the accident or injury occurred in an area beyond the invitation extended to the entrant.  

For many years Louisiana courts applied the classification system in premises actions. It is believed that Louisiana courts resorted to the common-law system developing in the United States for guidance in handling such tort suits. In *Cates v. Beauregard Electric Cooperative, Inc.* the Louisiana Supreme Court abolished the common-law classification system as the method to be used in defining the landowner's duty to entrants. No longer would the entrant's status be the determinative factor in defining the scope and extent of the landowner's duty. The *Cates* decision followed a short-lived national trend in adopting the "reasonable care to all entrants" standard to replace the classification system. This author believes that the *Cates* decision was responsible judicial activism, in absence of legislative action, designed to align Louisiana's premises liability law with the Civil Code scheme governing tort law in the state.

Despite this alignment, the transition from the classification system to the "reasonable care" approach has not been without problems. For instance, Louisiana courts still employ equitable common-law exceptions and doctrines arising under the classification system. Now, instead of briefly arguing classification, litigants diffusely argue at length the scope and extent of "reasonable care." The shift also resulted in the loss of rules of social order formerly supplied by the classification system. Recent decisions under the "reasonable care" approach permitted trespasser recovery. Finally, the "reasonable care" approach has caused Louisiana courts to exercise extreme jury control.

To alleviate these problems, Louisiana courts should consider adopting the "modified" classification system in premises actions. The "modified" system differs from the common-law classification system only in that the licensee status would no longer exist and would be subsumed in the invitee class. This dichotomized system would retain the rules governing the trespasser and invitee classes along with the special jurisprudential exceptions applied under the common-law classification system. The claimant's status would be determined by focusing on whether his presence was "rightful" or "wrongful," considering the foreseeability of presence. All invitees are owed a duty of reasonable care. Trespassers are owed no duty of care and are deemed to assume the risks presented by the premises.

This comment provides an overview of the classification system, the duty owed to members of each class, and the development of the case law involving each

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10. See Keeton et al., *supra* note 8, § 62, at 432-34. See also *infra* note 144.
NOTES

This discussion is a necessary preface for further examination of the development of premises liability law in Louisiana in the post-Cates era.

II. OVERVIEW OF THE CLASSES OF ENTRANTS

A. Trespassers

A trespasser is defined as one "who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise." Trespassers must take the premises as they find them. Trespassers assume the risks of danger on the premises, and landowners are not liable for any failure to exercise reasonable care that results in physical harm to trespassers.

For many years, "the landowner's established position of importance and his interest in the free and unrestricted use of his property overrode the value placed upon the trespasser's interest in physical safety." The special privileges afforded the landowner may be traced to ideals of dominance and prestige originating in the landowning classes in England during the common-law formation periods. Although the general rule prevailed that no duty of care was owed a trespasser, some exceptions evolved.

First, when the landowner has reason to know of constant or frequent trespasses on a particular part of his property and tolerates such acts, courts have tended to treat the trespasser as a licensee and have required the landowner to exercise reasonable care to make the premises safe, to warn of hidden and potential dangers, and to refrain from unreasonably dangerous activities in the entrant's proximity. The burden of preventing harm becomes less as the foreseeability of danger to a potential trespasser increases. Following this analysis, courts began to

12. Unusual circumstances and exigencies may give rise to privileges. See Restatement (Second) of Torts §§ 191-211, 329 cmt. a (1965).
18. Farrier, supra note 3, at 718.
impose a limited "duty of reasonable care to discover [such dangers] and protect [trespassers] . . . ."20 Some early cases calling for judicial attention involved the well-traveled pathways across or along railroad tracks.21 Rather than creating an exception to the trespasser laws, some courts chose to use an "implied permission" theory to label the entrant a "licensee."22

The second exception includes cases where the landowner has knowledge that a particular person has trespassed, even once, on his property. In such a case he may owe that person a duty of reasonable care.23 The exception imposing a duty on the landowner applies when the landowner, of his own volition, creates a controllable hazard24 as well as when the hazardous condition occurs naturally, at least in theory.25 Even under the classification system, a landowner cannot intentionally or willfully injure a trespasser, licensee, or invitee.26 Some courts have required at least a "willful or wanton" level of disregard to hold the landowner liable27 for injuries to a trespasser. A landowner may be able to satisfy his limited burden of due care by warning the trespasser of the danger.28 If it is possible that the trespasser will disregard the warning, then the landowner must take other steps to avoid harm to the trespasser.

20. Keeton et al., supra note 8, § 58, at 396.
22. Alexander v. General Accident Fire & Life Assurance Corp., 98 So. 2d 730, 732 (La. App. 1st Cir. 1957); Payton v. St. John, 188 So. 2d 647, 650 (La. App. 2d Cir. 1966). The first Louisiana case to acknowledge "implied permission" as a basis for "licensee" status was Ingram v. Kansas City, S. & G. Ry. Co., 134 La. 377, 381, 64 So. 146, 147 (1914). "Permission may be implied when the owner has actual knowledge of the entrant's presence and fails to object." Page, supra note 1, § 3.3, at 36.
24. Restatement (Second) of Torts § 338 (1965).
25. Restatement (Second) of Torts § 337 (1965); Loney v. McPhillips, 521 P.2d 340, 344 (Or. 1974). However, the Loney decision holds that the "attractive nuisance" exception does not apply when natural conditions are the alluring land feature.
27. See Keeton et al., supra note 8, § 58, at 397 n.49; Cates, 328 So. 2d at 370; Alexander v. General Accident Fire & Life Assurance Corp., 98 So. 2d 730 (La. App. 1st Cir. 1957).
28. Objective conditions must prove that the landowner reasonably believes the trespasser will see and heed the well-placed warning.
Another exception dubbed the "turntable" doctrine or the "attractive nuisance" doctrine was jurisprudentially created with regard to trespassing children. The court in *Hunter v. Evergreen Presbyterian Vocational School* defined the "attractive nuisance" doctrine as "nothing more than nomenclature given to a determination that a defendant has breached its duty of reasonable care for the safety of others by maintaining on its premises an unreasonable and foreseeable hazard to children or others with childlike judgment." The "attractive nuisance" doctrine is not confined to cases where the entrant is a trespasser. It applies equally to cases involving licensees.

Courts often found it necessary to soften the effects of the classification system when a child was injured. A child of tender years is unable, or less able, to appreciate the risks created on another's land. Further, children trespass more frequently than adults due to mere curiosity. For these reasons danger to children is more easily foreseeable.

Not every instrument possibly dangerous to a child of tender years, or which such a child might convert into a means of amusement, constitutes an attractive nuisance. On the contrary, for the attractive nuisance rule to apply, the instrumentality or [land] condition must be of a nature likely to incite the curiosity of a child and [be] fraught with such danger as to reasonably require precaution to prevent children from making improper use thereof.

The "attractive nuisance" doctrine has imposed liability on landowners maintaining conditions on their land which are alluring and harmful to children. Requirements for application of the "attractive nuisance" doctrine are: (1) the

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29. United Zinc, 258 U.S. at 275-76, 42 S. Ct. at 299-300 (First time United States Supreme Court adopted "attractive nuisance" doctrine); Saxton v. Plum Orchards, 215 La. 378, 387-88, 40 So. 2d 791, 795 (1949). Restatement (Second) of Torts § 339 (1965); Page, *supra* note 1, §§ 2.8, 2.9, 2.10, 2.11, 2.12, 2.13, at 16-32. This author notes that Louisiana courts continue to use the "attractive nuisance" exception to afford children a "super-plaintiff" position insuring full recovery. Comparative fault principles have not been discussed in these decisions. This author believes that comparative causation might be applied with success. See, e.g., Simmons v. Whittington, 444 So. 2d 1357, 1360 (La. App. 2d Cir.), *writ denied*, 447 So. 2d 1071 (1984); Batiste v. Bob Bros. Constr. Co., 404 So. 2d 1348, 1350 (La. App. 4th Cir. 1981); Carter v. Salter, 351 So. 2d 312, 314-15 (La. App. 3d Cir. 1977), *overruled by Lewis v. Till*, 395 So. 2d 737 (La. 1981). See also *infra* note 40.

30. 338 So. 2d 164, 166 (La. App. 2d Cir. 1976).

31. Patterson v. Recreation and Park Comm’n, 226 So. 2d 211, 215-16 (La. App. 1st Cir.), *writ refused*, 254 La. 925, 228 So. 2d 483 (1969). It need not be applied to an invitee-child as he already attains greater rights based on his classification as an invitee.


34. *Patterson*, 226 So. 2d at 216.
landowner knew the hazard was located on his property in an area where children were likely to trespass; (2) the landowner knew the risk and should have known or realized that it posed an unreasonable risk of harm to children; (3) the benefit of maintaining the hazard and the burden of eliminating the danger must be significantly outweighed by the risk of harm to children; and (4) the landowner must fail to use reasonable care to eliminate the foreseeable danger or protect the children.35

Cases in this area have involved countless different land conditions, objects and activities.36 Many of the cases involved land conditions and objects which a child mentally associated with a "plaything."37 Animals have always been alluring to children though few courts have been willing to stretch the "artificial condition" requirement to allow recovery under the doctrine.38

Courts have allowed the "assumption of the risk" and "contributory negligence" defenses when the injured child discovered and realized the danger and then decided to encounter it.39 Nonetheless, when a court applies the "attractive

35. Restatement (Second) of Torts § 339 (1965). See also Ibieta v. Phoenix of Hartford Ins. Co., 267 So. 2d 748, 749 (La. App. 4th Cir. 1972); Saxton, 215 La. at 388, 40 So. 2d at 795; Peters v. Town of Ruston, 167 So. 491, 492 (La. App. 2d Cir. 1936). Another requirement of the "attractive nuisance" doctrine which is often used as a defense is that the "attraction itself must contain the danger" which the victim encountered. Johnson v. NOPSI, 291 So. 2d 813, 816 (La. App. 4th Cir.), writ denied, 293 So. 2d 493 (1974); Patterson, 226 So. 2d at 216; Compagno v. Monson, 580 So. 2d 962, 966 (La. App. 5th Cir. 1991).

36. See Restatement (Second) of Torts, § 339 (Appendix) (1986); Keeton et al., supra note 8, § 59, at 399-411.


38. Hofer v. Meyer, 295 N.W.2d 333, 336-37 (S.D. 1980) (horse as an artificial condition). Some courts, as in Hofer, have labeled animals as "artificial" conditions to allow recovery. However, other courts have refused to hold that an animal could be an artificial condition. Hall v. Edlefson, 498 S.W.2d 514, 516 (Tex. Civ. App. 1973); Gonzales v. Wilkinson, 227 N.W.2d 907, 909-10 (Wis. 1975). Louisiana courts have yet to answer this issue; however, in Rolen v. Maryland Casualty Co., 240 So. 2d 42, 46 (La. App. 2d Cir.), writ refused, 256 La. 1149, 241 So. 2d 252 (1970), the court found the "attractive nuisance" doctrine did not apply to a child lured to the neighbor's yard by their dog, and subsequently bitten, because everyone believed the dog was gentle and playful. Thus, the animal was not a dangerous condition. The court in Betbeze v. Cherokee Nat'l Ins. Co., 345 So. 2d 577, 579 (La. App. 4th Cir.), writ denied, 349 So. 2d 329 (1977), discussed the unique attraction a child has to a dog. In Compagno v. Monson, 580 So. 2d 962, 966-67 (La. App. 5th Cir. 1991), the court held that a doghouse was not an attractive nuisance.

39. Richards, 347 So. 2d at 283-84; Juhas v. American Casualty Co., 140 So. 2d 676, 679 (La.
nuisance” doctrine, it appears that the plaintiff recovers all damages without any assessment of contributory or comparative fault.\(^4\)

The “attractive nuisance” doctrine must “be accorded limited application and employed only with caution.”\(^5\) A “tremendous burden [is] placed on the property owner when the principle of attractive nuisance is held applicable.”\(^6\)

Louisiana jurisprudence prior to the *Cates* decision is replete with cases applying the trespasser status.\(^4\) Courts have strictly scrutinized claims presented by persons injured while traversing a place they had no right to be. Public policy seeks to insure that business proprietors and landowners will not become insurers of the safety of transient or criminal individuals who happen upon their land.

### B. Licensees

A licensee is one who goes on the land of another with the consent\(^4\) of the landowner, by authority of law,\(^5\) or as necessary.\(^6\) Some courts divide licensees

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40. Between 1980 and 1992, there appear to have been only five appellate court decisions upholding the trial court’s application of the “attractive nuisance” doctrine. In each decision the plaintiff recovered in full. *See Melerine v. State*, 505 So. 2d 79 (La. App. 4th Cir.), *writ denied*, 507 So. 2d 226 (1987); *Fusilier v. Northbrook Excess & Surplus Ins. Co.*, 471 So. 2d 761 (La. App. 3d Cir.), *writ denied*, 472 So. 2d 918 (1985); *Simmons*, 444 So. 2d at 1357; *Ryals v. Home Ins. Co.*, 410 So. 2d 827 (La. App. 3d Cir.), *writ denied*, 414 So. 2d 375, *writ denied*, 414 So. 2d 376 (1982); *Batiste v. Boh Bros. Constr. Co.*, 404 So. 2d 1348 (La. App. 4th Cir. 1981). Each of these courts failed to address the issue of whether comparative fault can be applied once the “attractive nuisance” doctrine is used. Since comparative fault principles apply to strict liability actions, per the decision in *Landry v. State*, 495 So. 2d 1284, 1290 (La. 1986), the relevant inquiry may be whether the “attractive nuisance” doctrine is in the nature of strict liability or absolute liability.


42. *Patterson*, 226 So. 2d at 216. *See also* *Martin v. Sessum Serv. Corp.*, 174 So. 2d 180, 182 (La. App. 4th Cir. 1965).


44. A “license” may be given by words, either written or spoken, or by other acts which manifest consent. *Mills v. Heldingsfield*, 192 So. 786, 789 (La. App. 2d Cir. 1939) (“license” distinguished from “invitation”); *Mercer v. Tremont & G. Ry. Co.*, 19 So. 2d 270, 275 (La. App. 2d Cir. 1944) (consent may arise from custom, usages in the community, or prior dealings).


46. *See* Restatement (Second) of Torts § 345 (1965); *Alexander v. General Accident Fire &
into two types: (1) a "bare" licensee and (2) a licensee by invitation or social
guest.\textsuperscript{47} The licensee's presence is consensual, but he does not have a business
purpose for being on the land nor any other right apart from the landowner's admit-
tance.\textsuperscript{48} Incidental business motives behind an invitation, or incidental services
performed by a social guest, do not transform a licensee into an invitee.\textsuperscript{49} Obviously the landowner owes a higher duty of care to a licensee than to a
trespasser.\textsuperscript{50} Social guests are deemed "licensees" although they are "invited" by
the landowner.\textsuperscript{51} With limited additional protection, a licensee must take the
premises as he finds them.\textsuperscript{52} The only real obligation of the landowner is to
refrain from injuring the licensee willfully, wantonly, or through "active negli-
gence."\textsuperscript{53} Nonetheless, the landowner must warn the licensee of latent dangers
within the landowner's actual knowledge.\textsuperscript{54} Some courts have afforded social
guests the status of invitee and have refused to allow the landowner any greater
protection from liability with regard to them.\textsuperscript{55}

Although social guests do not become invitees by gratuitously performing
services,\textsuperscript{56} this result may differ if the sole reason for the guest's presence is to

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\textsuperscript{47} Cothern v. LaRocca, 221 So. 2d 836, 840 (La. App. 4th Cir. 1969), rev'd on other
grounds, 255 La. 673, 232 So. 2d 473 (1970); Payton v. St. John, 188 So. 2d 647, 650 (La. App. 2d
Cir. 1966). Louisiana courts, prior to \textit{Cates}, did not favor use of the "licensee" status. Few decisions
involve this intermediate status.

\textsuperscript{48} Potter v. Board of Comm'rs, 148 So. 2d 439, 440 (La. App. 4th Cir. 1963); Payton v. St.
John, 188 So. 2d 647, 650 (La. App. 2d Cir. 1966). \textit{See also} Restatement (Second) of Torts § 330
(1965).

\textsuperscript{49} Gudwin v. Gudwin, 14 Conn. Supp. 147 (1946) (transporting host); Pinson v. Barlow, 209
So. 2d 722, 724 (Fla. Dist. Ct. App. 1968); \textit{overruled} by Hix v. Billen, 284 So. 2d 209 (Fla. 1973)
(cooking with host); McHenry v. Howells, 272 P.2d 210, 213 (Or. 1954) (ironing clothes for host); Page,
supra note 1, § 3.21, at 62.

\textsuperscript{50} Cothern, 221 So. 2d at 840 (licensee is owed same duties as a trespasser and, also, a duty
of warning of latent premises dangers if land occupier actually knows of the danger); Doyle v.
Thompson, 50 So. 2d 505, 508 (La. App. 1st Cir. 1951).

\textsuperscript{51} Natal v. Phoenix Assurance Co., 305 So. 2d 438, 440 (La. 1974); Millet v. Allstate Ins. Co.,
319 So. 2d 803, 805 (La. App. 1st Cir. 1975).

\textsuperscript{52} Potter v. Board of Comm'rs, 148 So. 2d 439, 440 (La. App. 4th Cir. 1963).

\textsuperscript{53} Johnson v. Ruben, 222 So. 2d 617, 619 (La. App. 2d Cir.), \textit{application denied}, 254 La.
758, 226 So. 2d 522 (1969); Wannage v. Marcantel, 176 So. 2d 5, 7 (La. App. 3d Cir. 1965). Earlier
1944); Mills v. Heidingsfield, 192 So. 786, 789 (La. App. 2d Cir. 1939).

\textsuperscript{54} Melancon v. Zoa Missionary Baptist Church, 222 So. 2d 308, 310-11 (La. App. 1st Cir.
1969); Savell v. Foster, 149 So. 2d 210, 212 (La. App. 2d Cir. 1963).

\textsuperscript{55} One such decision is found in Daire v. Southern Farm Bureau Casualty Ins. Co., 143 So.
2d 389, 392 (La. App. 3d Cir. 1962). The Court stated "a social guest is . . . an invitee." Many
Louisiana courts chose to stretch their factual findings to afford "social guests" the status of invitee
rather than making the wholesale shift in the group's status, as in \textit{Daire}.

\textsuperscript{56} Drews v. Mason, 172 N.E.2d 383, 387-88 (Ill. App. Ct. 1961); Downey v. Lackey, 466
perform services. When the landowner receives economic benefit, some courts have applied the invitee status to the "guest." Since many scenarios may arise, borderline cases as to an entrant's status must be resolved by the trier of fact.

C. Invitees

The invitee is afforded the most protection by the common-law classification system. Broadly, an invitee is defined as a person entering the property of another with the landowner's consent for some purpose connected with the use of the premises. Louisiana law developed two types of invitees: "social guests," and "business visitors." A landowner owes the invitee a duty of reasonable care to inspect the premises, find hidden dangers, and warn of or remedy them. The jurisprudence has been inconsistent in determining which claimants


57. LaBranche v. Johnson, 193 S.E.2d 228, 229-30 (Ga. Ct. App. 1972). Even in more conservative courts, the court may find plaintiff to be an invitee, as a matter of law, if the benefit conferred upon the land occupier is substantial. Sills v. Forbes, 91 P.2d 246, 250 (Cal. Dist. Ct. App. 1939).

58. Mercer v. Tremont & G. Ry. Co., 19 So. 2d 270, 275 (La. App. 2d Cir. 1944). The Court in Champagne v. Northern Assurance Co., 210 So. 2d 68, 69 (La. App. 1st Cir.), writ refused, 252 La. 831, 214 So. 2d 159 (1968), labeled the claimant an invitee even though there was no economic benefit to the landowner. See also supra note 1, § 3.21, at 62.


62. Other states developed a third type of invitee, the "public invitee." See, e.g., Sears, Roebuck & Co. v. Johnson, 91 F.2d 332, 339 (10th Cir. 1937); Wiley v. National Garages, Inc., 488 N.E.2d 915, 919 (Ohio Ct. App. 1984). "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." Restatement (Second) of Torts § 332(2) (1965).


64. "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." Restatement (Second) of Torts § 332(3) (1965). See also Lee v. Vidrine, 316 So. 2d 402, 403-04 (La. App. 3d Cir. 1975); Savell v. Foster, 149 So. 2d 210, 212 (La. App. 2d Cir. 1963). This includes persons on the premises for the purpose of potential or future dealings. Also included are present persons necessary for the convenience of others on the land for a business purpose.

met the burden of proving a "purpose" sufficient to be deemed an invitee. Nevertheless, liability is proper because invitees have reasonable expectations that the landowner's premises were made safe for them. 

In limiting the "business visitor" branch of the invitee class, courts tend to rule that if the visitor reasonably believes that the premises have been held open to him for the particular purpose for which he entered, then he is a "business visitor." Courts do not require the claimant to be engaged in "business activity" when injured, as long as he has a general business relationship with the landowner.

If the invitee travels into areas of the premises beyond his invitation, then his status may be reduced to licensee or even trespasser. The extended invitation may be expressly or impliedly limited as to purpose, duration, or the portion of the premises accessible. The scope of the invitation must be properly determined in terms of time and space based on the reasonable expectations of the injured party. The landowner's hidden intentions do not affect the injured party's legal status.

Courts have set general guidelines for what constitutes "reasonable care" owed by landowners to invitees under different factual scenarios.Basically, the landowner cannot subject his invitee to "unreasonable risks of harm." The

66. Home Ins. Co. v. Spears, 590 S.W.2d 71, 73 (Ark. Ct. App. 1979). The reasonableness of such an "expectation" varies with the scope of the invitation and/or purpose for the entrant's presence.

67. The "reasonable man" standard is applied in deciding whether the entrant's expectation of implied invitation was sufficient to deem him an invitee or licensee. Terpstra v. Soiltest, Inc., 218 N.W.2d 129, 131 (Wis. 1974).

68. Restatement (Second) of Torts § 332, cmt. b (1965).


71. Id.


73. A landowner is not the insurer of his invitee's safety and is not obliged to protect him from every potential hazard; however, he owes the invitee a "duty of exercising ordinary and reasonable care for his safety commensurate with the nature of the premises, the use envisioned by the invitation to enter and the particular circumstances [surrounding the entrant's existence on the premises]." Leger v. Employers Liab. Ins. Corp., 276 So. 2d 759, 762 (La. App. 3d Cir. 1973) (quoting Kennedy v. Columbia Casualty Co., 174 So. 2d 869, 874 (La. App. 1st Cir. 1965)); Melton v. Mire, 268 So. 2d 123, 125-26 (La. App. 1st Cir. 1972) (quoting Kennedy, 174 So. 2d at 874).
landowner has an affirmative duty to use reasonable care to inspect the premises and to remedy latent defects.\textsuperscript{75}

The duty of "reasonable care" varies according to the established use of the premises.\textsuperscript{76} Circumstances permitting, the landowner may fulfill his obligation by merely warning the entrant. The warning must raise the invitee's awareness to a level enabling him to protect himself. But there are situations when a warning, no matter how fitting, will not suffice to protect the invitee.\textsuperscript{77} In such cases, the landowner must act to remedy the defect.

Although a particular danger is "open and obvious" to the invitee, if no warning is given by the landowner, reasonable steps must be taken to protect the entrant if it should be reasonably anticipated that harm will occur despite the obviousness of the danger.\textsuperscript{78} This is the modern view overshadowing the historic notion of non-liability if the danger is "open and obvious." The modern view treats "obviousness of the danger" as one factor bearing on whether the landowner is negligent or whether the invitee was comparatively at fault. Thus, it is no longer a "per se" duty limitation. The landowner does have a duty to correct the danger regardless of the invitee's potential awareness.\textsuperscript{79}

The landowner's duty of care also extends to risks posed by third persons who enter his premises while an invitee is present.\textsuperscript{80} Often, third party entrants of various types,\textsuperscript{81} including criminals,\textsuperscript{82} cause injury to invitees. The landowner's liability arises when he knows or reasonably should anticipate that danger may confront his invitee.\textsuperscript{83} A majority of courts have held that the landowner is not required to act unreasonably or risk his life to protect the invitee.\textsuperscript{84} The landowner must only "act reasonably to prevent such attacks and protect patrons from harm."

\begin{itemize}
  \item \textsuperscript{75} Day, supra note 70, at 797 n.6; Restatement (Second) of Torts § 343 (1965).
  \item \textsuperscript{76} Restatement (Second) of Torts § 343 cmt. e (1965).
  \item \textsuperscript{77} Restatement (Second) of Torts § 343A cmts., ill. 2 (1965).
  \item \textsuperscript{78} Day, supra note 70; Restatement (Second) of Torts § 343A(1) (1965).
  \item \textsuperscript{79} Day, supra note 70; Restatement (Second) of Torts § 343A, ills. 6, 8 (1965).
  \item \textsuperscript{80} Restatement (Second) of Torts § 344 (1965).
  \item \textsuperscript{81} Silvio v. Pharaoh's Palace, 517 So. 2d 185 (La. App. 1st Cir. 1987) (bar fight); Broussard v. Peltier, 499 So. 2d 1026 (La. App. 3d Cir. 1986) (one guest strikes another); Ozols v. Irving, 491 So. 2d 719 (La. App. 4th Cir.), writ denied, 496 So. 2d 348 (1986) (homeowner's nephew shoots neighbor).
  \item \textsuperscript{83} Stewart v. Gibson Prod. Co., 300 So. 2d 870, 877 (La. App. 3d Cir. 1974); Restatement (Second) of Torts § 344 (1965).
\end{itemize}
The duty is to foresee the general risk of criminal activity and to take sufficient steps to prevent harm to patrons.\textsuperscript{85} Certain public employees, legally required to enter a landowner's premises to make deliveries, collections, or inspections necessary to the landowner's activities, have been accorded invitee status.\textsuperscript{86} This classification is proper since their presence is economically tied to the landowner's activities.\textsuperscript{87} Some states have enacted "recreational use" statutes denying invitee or licensee status to persons invited upon a landowner's premises for "recreational purposes." In states rejecting the classification system, these "recreational use" statutes provide that "no duty" is owed the recreational entrant. In Louisiana, the legislature enacted Louisiana Revised Statutes 9:2791 and 9:2795 which provide statutory immunity for landowners who allow their land to be used by persons for "recreational purposes." Louisiana appellate courts have uniformly stated that neither of these "recreational use" statutes limits the liability of "commercial recreational facilities which are run for profit."\textsuperscript{88} The primary difference between the duty owed to a licensee as opposed to an invitee, is that with the latter, there is a duty to inspect for unknown dangers.\textsuperscript{89} The landowner must exercise reasonable care for the licensee's safety if he should expect that the licensee will not discover or realize the danger and lacks knowledge of the landowner's dangerous activities.\textsuperscript{90} Further, if the landowner knows of a

\textsuperscript{85} See Page, supra note 1, § 11.3, at 294; Restatement (Second) of Torts § 344 (1965); Tarantino & Dombroff, supra note 60, § 6.3, at 123 (1990).


\textsuperscript{87} Restatement (Second) of Torts § 345 cmt. c (1965); Page, supra note 1, § 511, at 114.

\textsuperscript{88} LaCroix v. State, 477 So. 2d 1246, 1249 (La. App. 3d Cir. 1985) (quoting Keele v. State, 463 So. 2d 1287 (La. 1985)); Pratt v. State, 408 So. 2d 336 (La. App. 3d Cir. 1981), writ denied, 412 So. 2d 1098 (1982). The Cates v. Beauregard Elec. Coop., Inc., 328 So. 2d 367 (La.), cert. denied, 429 U.S. 833, 97 S. Ct. 97 (1976), decision and its progeny do not logically mesh with the "recreational use" statutes. For example, consider that a person entering landowner's property, with consent, for recreational purposes is owed "no duty" while, according to the Cates jurisprudence, a trespasser or poacher entering a landowner's premises to partake in recreation is owed a duty of reasonable care. It appears that the "recreational use" statutes were designed in accord with the common-law classification system due to their reference to "invitees" and "licensees." In any event, is it sound policy for the law to protect uninvited persons and not invited guests?


\textsuperscript{90} Natal v. Phoenix Assurance Co., 286 So. 2d 738, 741-42 (La. App. 4th Cir. 1973), rev'd on other grounds, 305 So. 2d 438, 440 (La. 1974); Foggie v. General Guar. Ins. Co., 250 La. 347, 361, 195 So. 2d 636, 641 (1967). The "active negligence exception" has been universally employed by courts using the classification system. The exception is codified in the Restatement (Second) of Torts § 341 (1965).
latent premises hazard, reasonably hidden from the licensee’s discovery, then the landowner must exercise reasonable care in protecting the licensee from it. This includes a duty to warn of artificial hazards and latent natural dangers within the landowner’s knowledge. The landowner does not owe the licensee a duty to inspect the premises for possible hazards of which he is unaware.

It has been argued that a licensee is treated as a “second-class guest” solely because he lacks a “business purpose” related to the landowner’s property. While initial logic may have supported this inferior treatment, in today’s society there is no justification for the rule. It is believed that this distinction caused the great controversy resulting in the Rowland v. Christian decision and the aforementioned departure from the common-law classification system. Later sections of this comment will show that some states have adopted a modified classification system providing the licensee the same protection as an invitee. These states continue to enforce the rights, privileges, and policies established by the common-law rules while discarding the archaic distinction between licensees and invitees.

In any event, an invitee holds the preferred status under the classification system and has a greater probability of recovery than claimants of subordinate status. If current premises law trends continue, the scope of the landowner’s duty to invitees will continue to expand even in states strictly adhering to the common-law doctrine. Present day society demands that greater protection and potential for recovery be afforded persons who rightfully enter landowner’s property, whether for business or pleasure.

91. Payton v. St. John, 188 So. 2d 647, 650 (La. App. 2d Cir. 1966); Restatement (Second) of Torts § 342 (1965).
94. Courts have held that a landowner has no duty to remove or warn an entrant of natural hazards. Most of these decisions involved “open and obvious” dangers. Dowen v. Hall, 548 N.E.2d 346, 348 (Ill. App. Ct. 1989) (entrant dove into shallow, muddy water); Corbin Motor Lodge v. Combs, 740 S.W.2d 944, 945-46 (Ky. 1987) (no duty owed against obvious “natural outdoor hazards,” quoting Standard Oil Co. v. Manis, 433 S.W.2d 856, 858-59 (Ky. 1968)). Presumably this rule would not apply where the landowner knows of a latent, natural premises defect. For example, see Brasseaux v. Stand-By Corp., 402 So. 2d 140 (La. App. 1st Cir.), writ denied, 409 So. 2d 617 (1981) (bee attack in motel shower); Savoy v. DeLaup, 442 So. 2d 1209 (La. App. 5th Cir. 1983) (yard caved in “swallowing up” tenant).
95. See Restatement (Second) of Torts § 342 cmt. d (1965).
96. 443 P.2d 561 (Cal. 1968). See infra note 121.
97. Keeton et al., supra note 8.
III. THE MODERN TREND OF DEVIATION FROM THE COMMON-LAW CLASSIFICATION SYSTEM

American courts favor the creation of legal doctrine based on the doctrine of stare decisis.98 Precedent provides the necessary continuity, reliability, and stability in the law.99 A line of judicial decisions based on the same principles provide time-tested authority capable of application in different settings. Such principles afford society a reliable guideline in structuring their activities and affairs. However, life does not occur in a vacuum, the law must forever change and adapt. It is often necessary to alter or abolish a line of jurisprudence which has strayed from its intended mark. The Utah Supreme Court in Snyder v. Clune,100 in a non-premises action, stressed the propriety of rejecting established jurisprudential precedent by citing Justice Holmes:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.101

Since the principles of the common-law classification system began in England,102 it seems fitting that the first deviation from the strict classification system occurred when the British Parliament legislatively equated licensees and invitees.103 In response to inequities104 evolving in the jurisprudence, the British Parliament adopted the Occupier’s Liability Act in 1957.105 In the United States, Connecticut was the first state to abolish the classification system by legisla-

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99. The Louisiana Supreme Court in Johnson, 256 La. at 296, 236 So. 2d at 218, stated that “[f]undamental and elementary principles recognize that certainty and constancy of the law are indispensable to orderly social intercourse, a sound economic climate and a stable government. Certainty is a supreme value in the civil law system to which we are heirs.”
100. 390 P.2d 915, 916 (Utah 1964).
103. The statute “abolished the distinction between licensees and invitees and imposed upon the land occupier a ‘common duty of care’ toward all persons who lawfully enter the premises.” Keeton et al., supra note 8, § 62, at 432-33 n.2.
104. For example, social guests were being classified as licensees solely because they lacked a business “purpose.”
Illinois followed Connecticut’s innovative “Premises Liability Act” or “Guest Statute” and abolished the invitee-licensee distinction by statute. 107

The initial jurisprudential rejection of the classification system occurred in Kermarec v. Compagnie Generale Transatlantique. 108 In Kermarec, a crewman on the S.S. Oregon, berthed in New York City, invited a guest aboard. Upon exiting the vessel, the guest fell down a stairwell. The guest sued the vessel owner for damages in federal court, under diversity subject-matter jurisdiction, claiming the vessel was unseaworthy. At issue was whether or not the court must apply the classification system in defining the vessel owner’s duty. The United States Supreme Court held that the common-law status distinctions used to determine the duty of care imposed upon the owner of premises upon which injury occurs are not applicable in maritime law. 109 The Court concluded that:

For the admiralty law at this late date to import such conceptual distinctions would be foreign to its traditions of simplicity and practicality. . . . We hold that the owner of a ship in navigable waters owes to all who are on board . . . the duty of exercising reasonable care under the circumstances of each case. 110

While some commentators 111 have vaguely suggested that the Kermarec decision rejected the classification system in maritime cases completely, subsequent admiralty jurisprudence 112 interpreted the decision to have abolished the invitee-licensee distinction only. 113

Foreshadowing the trend in abandoning the common-law classification system, the Louisiana Supreme Court in Foggin v. General Guar. Ins. Co., 114 deviated

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106. Conn. Gen. Stat. § 52-557(a) (West 1991). The law equated social guests to invitees. Also, a landowner has a duty to take reasonable precautions to prevent foreseeable injuries when he should anticipate a hazard. See Corcoran v. Jacovino, 290 A.2d 225, 228-29 (Conn. 1971).


111. See, e.g., Keeton et al., supra note 8, § 62, at 433; and Maraist, supra note 109, at 140-41.

112. See, e.g., Buchanan v. Stanships, Inc., 744 F.2d 1070, 1074 (5th Cir. 1984); see also Martin J. Norris, The Law of Seamen § 667 n.15.

113. Therefore, when considering the issue of vessel owner liability, American courts are bound to apply a “modified” classification system under which the vessel owner would owe a duty of reasonable care only if the victim came aboard the vessel “for purposes not inimical to” the legitimate interests of the vessel owner. The courts must determine whether the victim’s presence was “rightful” or “wrongful.” Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630-32, 79 S. Ct. 406, 410 (1959). See infra notes 144-153 for state court applications of the “modified” classification system.

114. 250 La. 347, 195 So. 2d 636, 640 (La. 1967). Also, consider the decisions in Daire v.
from the strict common-law rules by classifying social guests as "invitees." This
decision was the precursor to Cates and Shelton and gave clear indication
that Louisiana courts favored a change. Even before the Foggin decision, some
jurisdictions expressed discontent with the common-law rules. The common-
law classification system had always troubled Louisiana courts because it did not
seem to mesh with our codal scheme "Of Offenses and Quasi Offenses" under
article 2315 and the concept of "fault."

The classification system had been uniformly applied for many years, but
courts became disappointed with the "injustice," "confusion," and "resulting
complexity" created by its usage. Nonetheless, it was not until 1968 that the
system was first completely rejected by the California Supreme Court in Rowland
v. Christian. The Rowland opinion was one in a series of decisions by
California courts which "progressively abolish[ed] common-law immunities and
distinctions drawn with regard to [the] duty owed based upon the status of the
plaintiff relative to the defendant."

In Rowland, the landowner-landlord was aware of a cracked faucet handle in
the apartment bathroom he leased to Ms. Christian. Plaintiff, Ms. Christian's guest,
was injured while using the faucet. No one warned plaintiff of the unreasonable
risk of harm presented by the faucet. The landowner had been informed of the
problem by Ms. Christian one month prior, but he failed to remedy the hazard. The
California Supreme Court reversed the lower courts, finding the trial court used the wrong legal standard in establishing the landowner's duty. After reviewing the development of the classification system, the court stated:

A man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land without permission [i.e., trespasser] or with permission but without a business purpose [i.e., licensee]. Reasonable people do not ordinarily vary their conduct depending upon such matters, and to focus upon the status of the injured party as a trespasser, licensee, or invitee in order to determine the question whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values. The common law rules obscure rather than illuminate the proper considerations which should govern determination of the question of duty.\(^{123}\)

The court applied California Civil Code article 1714\(^{124}\) which stated "that everyone is responsible for an injury caused to another by his want of ordinary care or skill in the management of his property."\(^{125}\) Employing this basic codal authority, the court stated:

The proper test . . . is whether in the management of his property he [landowner] has acted as a reasonable man in view of the probability of injury to others, and, although the plaintiff's status as a trespasser, licensee, or invitee may in light of the facts giving rise to such status have some bearing on the question of liability, the status is not determinative.\(^{126}\)

A dissenting justice argued that the majority's decision would allow a case-by-case determination of landowner liability. He argued that this approach would not be "workable" and the resulting jurisprudence would lack stability and predictability formerly found in the law. Further, such case-by-case decisions lack the benefits of the "guiding principles and precedent" of tort law.\(^{127}\)

In any event, Rowland provided the impetus for change in legal thought in some American courts. The California Supreme Court was well respected for the creative legal models set forth in their jurisprudence, however, each model could not be tested prior to its establishment. Further, some of the legal principles which

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123. Rowland, 443 P.2d at 568.
124. Cal. Civ. Code § 1714 (West 1985) is similar to La. Civ. Code art. 2316. Article 2316 fails to specifically address "management of . . . property," but Louisiana courts have repeatedly applied articles 2315 and 2316 in premises actions based upon a negligence theory.
125. Rowland, 443 P.2d at 568.
126. Id.
127. Id. at 569.
work in one environment are impractical and burdensome in other jurisdic-
tions.  
Nevertheless, the Rowland decision was accepted in varying degrees by other states’ courts. "A number of American jurisdictions have squarely approved the total rejection of the common-law status classifications as determinative of liability and have accordingly adopted the rule that an owner or occupier of [the] land is held to a duty of reasonable care under all the circumstances." Some courts still use the status as a relevant, but not determinative, factor.

Jurisdictions ruling that an injured party’s status is not determinative and applying a uniform standard of reasonable care toward all entrants, regardless of their status, include Alaska, California, Colorado, Hawaii, Louisiana, Montana, New Hampshire, New York, Rhode Island, Tennessee, and the District of Columbia. Most jurisdictions rejecting the classification system have ruled that the rejection is prospective and not retroactive. However, some states have applied the abolishment retroactively.

128. Considering the legal, socio-economic, political, and cultural aspects, among other factors too numerous to be listed here.

129. See supra note 121.


131. Initial rejection occurred in Webb v. City & Borough of Sitka, 561 P.2d 731, 732 (Alaska 1977). The Webb court found that "the subtleties and refinements of the rigid common law classifications... adds [sic] confusion to the law and is no longer desirable in modern times."


140. Hutchison v. Teeter, 687 S.W.2d 286, 288 (Tenn. 1985); Hudson v. Gaitan, 675 S.W.2d 699, 703-04 (Tenn. 1984). In Hudson, the Tennessee Supreme Court abolished the classification system and established a landowner duty to exercise "reasonable care under all attendant circumstances." Id. at 703.


142. 62 Am. Jur. 2d Premises Liability § 82 (1990); Peterson v. Balach, 199 N.W.2d 639, 647 (Minn. 1972); Antoniewicz v. Reszcynski, 236 N.W.2d 1, 12 (Wis. 1975).

Some states partially rejected the classification system and opted for the intermediate position.\textsuperscript{144} These states' courts abolished the distinctions between the duties owed to licensees and invitees but maintained the traditional rules regarding trespassers. Foreseeability of injury remains the fountainhead of landowner liability; however, a claimant's status as a trespasser is of primary importance.\textsuperscript{145} States adopting this intermediate view include Connecticut,\textsuperscript{146} Florida,\textsuperscript{147} Illinois,\textsuperscript{148} Maine,\textsuperscript{149} Massachusetts,\textsuperscript{150} Minnesota,\textsuperscript{151} North Dakota,\textsuperscript{152} and Wisconsin.\textsuperscript{153}

Most American courts refuse to reject the strict common-law classification system. Among the courts retaining the traditional categories, there is a trend to enlarge the scope of the invitee class.\textsuperscript{154} States fully retaining the common-law categories include Alabama,\textsuperscript{155} Arizona,\textsuperscript{156} Arkansas,\textsuperscript{157} Delaware,\textsuperscript{158} Geor-

\begin{footnotesize}
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\item[144.] "Since 1982, no courts have followed [the] Rowland v. Christian decision outright." See supra note 121. See also Keeton et al., supra note 8, § 62, at 433 (Supp. 1988).
\item[145.] 62 Am. Jur. 2d Premises Liability § 81 (1990); Keeton et al., supra note 8, § 62, at 433.
\item[147.] Wood v. Camp, 284 So. 2d 691, 695 (Fla. 1973); Post v. Lunney, 261 So. 2d 146, 148 (Fla. 1972). Some Florida courts may be retreating toward usage of a more structured classification system where licensees are divided into "uninvited" and "invited" class distinctions. Zipkin v. Rubin Constr. Co., 418 So. 2d 1040, 1043 (Fla. App. 1982); Dougherty v. Hernando County, 419 So. 2d 679, 681 (Fla. App. 1982).
\item[149.] Poulin v. Colby College, 402 A.2d 846, 851 (Me. 1979).
\item[151.] Pietila v. Congdon, 362 N.W.2d 328, 332-33 (Minn. 1985); Peterson v. Balach, 199 N.W.2d 639, 642, 647 (Minn. 1972).
\item[152.] O'Leary v. Coenen, 251 N.W.2d 746, 751-52 (N.D. 1977).
\item[153.] Clark v. Corby, 249 N.W.2d 567, 570 (Wis. 1977); Antoniewicz v. Resczynski, 236 N.W.2d 1, 11 (Wis. 1975). Wisconsin courts have criticized but partially retained the classification system. See Mark A. Peterson, Comment, Liability of Owners and Occupiers of Land, 58 Marq. L. Rev. 609, 618 (1974-1975).
\item[154.] Reasons cited include "the interest in judicial certainty advanced by the maintenance of well-established and predictable allocations of liability under the common law." Gulbis, supra note 130, at 300.
\item[155.] Whaley v. Lawing, 352 So. 2d 1090, 1091 (Ala. 1977); McMullan v. Butler, 346 So. 2d 950, 951 (Ala. 1977).
\item[157.] Baldwin by Baldwin v. Mosley, 748 S.W.2d 146, 148 (Ark. 1988); Knight v. Farmers' & Merchants' Gin Co., 252 S.W. 30, 32 (Ark. 1923).
\end{enumerate}
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168. Adams v. Fred's Dollar Store, 497 So. 2d 1097, 1102 (Miss. 1986); Astleford v. Milner Enters., 233 So. 2d 524, 525 (Miss. 1970).


171. Nevada courts have not expressly stated their acceptance of the classification system, but continual usage of it implies that Nevada has accepted it though landowner immunities have been limited. Turpel v. Sayles, 692 P.2d 1290, 1293 (Nev. 1985); Nevada Transfer & Warehouse Co. v. Peterson, 99 P.2d 633, 636 (Nev. 1940).


173. There is no express statement by New Mexico's appellate courts on this issue; however, by implication, the classification system is still employed. See Mozert v. Noeding, 415 P.2d 364, 366-67 (N.M. 1966) (duties to invitees and licensees); Latimer v. City of Clovis, 495 P.2d 788, 794-95 (N.M. App. 1972) (duties to trespassers).

Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming.

IV. A CLOSER LOOK AT THE TREND AWAY FROM THE COMMON-LAW CLASSIFICATION SYSTEM IN LOUISIANA

A. Cates: Louisiana's Abolishment of the Entrant Status as Determinative of Landowner's Duty

The Louisiana Supreme Court in Cates rewrote the state's premises liability law by adopting a new standard for defining a landowner's duty to entrants


177. Taylor v. Baker, 566 P.2d 884, 888-89 (Or. 1977); Loney v. McPhillips, 521 P.2d 340 (Or. 1974) (refusing to adopt the "straight negligence rule" of Rowland v. Christian, 443 P.2d 561 (1968), because it would not affect the case's outcome. The court stated "we now apply general negligence principles of law in determining the landowner's duty of care to children." Loney, 521 P.2d at 344-45.).


179. Parker v. Stevenson Oil Co., 140 S.E.2d 177, 179 (S.C. 1965) (Invitee status). Apparently, Parker was the first case in South Carolina to use the classification system. All post-Parker cases have used the classification system. See, e.g., Senn v. Sun Printing Co., 367 S.E.2d 456, 457 (S.C. App. 1988).


183. It is unclear whether Vermont courts use the classification system; however, the Vermont Supreme Court in Garafano v. Neshobe Beach Club, Inc., 238 A.2d 70, 74 (Vt. 1967), applied an invitee status to plaintiff. Implicitly, Vermont courts use the classification system. See also Stearns v. Sugarbush Valley Corp., 296 A.2d 220, 222 (Vt. 1972).


upon his land. Prior to Cates, a landowner did not always owe a duty of care to
third-party entrants which may have encouraged landowners to use less than
reasonable care. Before fully analyzing the Cates opinion and its effect, it is
necessary to examine the facts of the case.

In the evening of September 30, 1972, sixteen-year-old Larry Cates and two
friends went horseback riding on nearby property. The property provided a
frequent source of recreation to neighbors. In this rural setting the lack of fencing,
the absence of “no trespassing” signs, and the landowner’s acquiescence served as
an implicit invitation to neighbors to enjoy the property. The property contained
an electric utility pole and power lines formerly used to supply a farmhouse.
Several cut power lines dangled from the pole, but current continued to flow from
the main power line to the transformer atop the pole.

On the day of the accident, the young men rode their horses onto the property
to search for a cut copper wire power line which they had previously seen. After
an unsuccessful search for the cut power line, they noticed the dangling power lines
on the utility pole and decided to remove them. This made it necessary for one of
the boys to climb the pole and disconnect the end of the line from its heightened
position. Cates rode his horse next to the pole and, by standing on the horse’s back,
was able to reach the pole support steps. He shimmied up the pole to the
transformer, held onto the pole with his right arm, and reached with his left hand
to grab the cable. The resulting electrical shock knocked him from the pole. As a
result, Cates is a quadriplegic having lost his hands and feet.

Cates’ father sued Beauregard Electric Cooperative and the landowner for
damages under a theory of negligence. The trial court granted summary judgment
for the landowner and Beauregard Electric Cooperative. The court found Cates’
status upon entering the property was that of “licensee,” at best, to whom the
landowner owed no duty other than to refrain from willfully or wantonly injuring
him. Further, when Cates climbed the pole to steal the power lines, his status
was reduced to that of a “trespasser,” and due to the obvious dangers inherent in an
electric power pole, he was contributorily negligent as a matter of law. The trial
court declined to apply the “attractive nuisance” doctrine due to Cates’ age. On
appeal, the third circuit affirmed the decision. On further appeal, the Louisiana
Supreme Court upheld the judgments for defendants, but found the common-law
classification system “of little help in applying La. C.C. 2315.”

For some time prior to Cates, Louisiana courts expressed dissatisfaction with
the common-law classification system as a means of defining the landowner’s

189. Hawkins, supra note 7, at 15 n.3.
190. Emphasis in the law was placed on landowner’s freedom to use his property without fear
of liability to entrants.
191. As a licensee, Cates would be owed a warning of any latent dangers within landowner’s
actual knowledge. See supra notes 53-54.
192. Cates, 316 So. 2d at 907.
193. Cates, 328 So. 2d at 370.
NOTES

The courts found the common-law classification system made it very difficult to apply Louisiana's codal scheme of "fault" in premises cases. No doubt, the Louisiana Supreme Court became impressed with the growing number of state courts adopting the "reasonable care" standard set forth in Rowland. The Cates decision was a prime opportunity for the Louisiana Supreme Court, in dicta, to expand plaintiff rights while upholding a judgment for defendants. Despite having sympathy for Cates, the court found that gross negligence on his part barred recovery.

B. Cates Adopted the Uniform Test of Determining Landowner Liability in Negligence Actions Created in Rowland

The Cates court set forth a test to be applied in determining the scope and extent of a landowner's duty:

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

The court cited with approval much of the language from the Rowland decision.

Louisiana courts must now determine landowner liability to entrants on a case-by-case basis. This new test has been incorporated into the "duty-risk" analysis. Before analyzing the jurisprudence using the new test, it is necessary to

194. See supra notes 114-119.
195. See supra notes 131-141.
197. Today, under comparative fault standards, the case might be ripe for a jury trial. This is assuming the trial court would not deem Cates to be 100% at fault as a matter of law.
199. Id. at 371 (quoting Rowland v. Christian, 443 P.2d 561, 568 (Cal. 1968)).
200. Id.

1. Was any duty of care owed to plaintiff (was it a foreseeable risk)?
2. Was it breached (was there negligence)?
3. Was the negligence the cause-in-fact of the harm?
4. Was the negligence the legal cause of the harm (foreseeable risk)?"

revisit the basic duty-risk analysis. Many duty-risk variations exist and are employed by different courts and commentators. The idiomatic expression this author favors is set forth in the following paragraphs.

The threshold issue is whether landowner breached a duty to protect an entrant from the particular risk encountered. The individual "duty-risk" issues include:

1. **What, If Any, Duty Was Owed By Landowner to Entrant?**

Louisiana courts are now charged with defining a landowner’s duty to third party entrants in terms of the “straight negligence” rule. Employment of this rule created controversy because premises actions were treated as “sui generis” for many years. In essence, premises actions were governed by the special rules set forth by the classification system.

Under present Louisiana law, the landowner owes all persons entering his land the duty to act reasonably in managing his property. In defining the landowner’s duty, few Louisiana courts refer to the plaintiff’s status as persuasive, and none consider status determinative. In adopting the reasonable care standard, Louisiana courts effected a wholesale shift in focus from the “plaintiff’s status” to the “foreseeability of injury.” This shift in legal thought will be discussed later in this comment.

2. **Did Defendant Breach This Duty?**

Once the landowner’s duty has been established, the next issue—a factual one—is whether the duty has been breached by the landowner’s conduct. Louisiana courts appear to be using a balancing formula similar to that enunciated by Judge Learned Hand in determining the scope of the landowner’s duty.

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205. *Harris*, 455 So. 2d at 1371-72.
207. The formula is:
   a) Liability exists if: B < L * P where:
      - “B” is the burden/cost of preventing the harm by warning of or remedying the defect. This is a “consideration of the relative ease or difficulty which would have been encountered by the defendant in taking steps to prevent the harm from occurring.”
      - “P” is the likelihood or chance of harm. This is a “consideration of the chances that any given harm might occur.”
Prior to *Cates*, if the landowner’s conduct fell below the standard of care set forth by the classification system, under the facts presented, then he was negligent. Under the present law, if the landowner’s conduct falls below the care which would be exercised by a reasonable man under similar circumstances, then liability may attach for the resulting harm. 208 “Fault” in Louisiana is a broadly based concept which embraces all conduct falling below an established standard of care. 209 In any event, “breach” is an issue properly presented to the trier of fact.

3. Was the Risk Encountered By Entrant and Resulting Damage or Injury Incurred Within the Scope of Protection Afforded By the Duty Breached?

Historically, Louisiana courts have resorted to the following considerations in determining the scope and extent of duty in tort suits: (1) Administrative; (2) Ease of association; (3) Economic; (4) Moral; (5) Type of activity; and (6) Precedent or historical. 210 The “administrative” factor calls for an examination of whether the “imposition of a duty in a given situation [will] open the floodgates to unmanageable litigation.” 211 As it enlarges or restricts the scope and extent of a landowner’s duty, the court is wary not to cut off valid claims or create opportunities for frivolous claims. Litigation is costly and time-consuming, and thus courts are fairly conservative in defining the scope of a defendant’s duty.

The “ease of association” factor calls for inquiry into the relative ease of association between the plaintiff’s complaint of harm and the defendant’s conduct. 212 This factor is concerned with foreseeability and the relationship

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- “L” is the gravity of harm incurred by the plaintiff. It is an “inquiry dealing with a determination of how serious the harm would be should it occur.”


b) Liability exists if: \( U * B < L * P \) where: all the factors are the same as above,
however, the added factor “U” represents the social utility of the act(s), condition(s) or thing(s) giving rise to liability. It “is a consideration of the value of the defendant’s overall enterprise or activity to society or the community in which it takes place.”

*Id.* This test is “no more susceptible of mathematical application than are the factors of duty.”  *Id.* It is a balancing of interests.

208. Fontenot v. Bolfa, 549 So. 2d 924, 926 (La. App. 3d Cir. 1989); *Harris*, 455 So. 2d at 1372.
212. Crowe, *supra* note 207, at 907; Dillon v. Louisiana Power & Light, 557 So. 2d 293, 295
between plaintiff’s damage and defendant’s conduct.\textsuperscript{213} Recall, there is more than one type of foreseeability.\textsuperscript{214} Here, the court must answer the legal question of proximity between the type of conduct engaged in by the landowner and the resulting harm.

The “economic” factor requires an evaluation of the financial impacts upon plaintiff, defendant, and others similarly situated, and upon the local, national, and international economies, if such a duty were imposed upon defendant.\textsuperscript{215} Courts often examine the possibilities of cost allocation. In essence, they try to shift the cost of the loss to a deep-pocketed at-fault party who is best able to bear the burden.\textsuperscript{216}

The “moral” factor involves an instinctive or intuitive reaction according “to what seems right or wrong.”\textsuperscript{217} Here, courts may look at the gravity of the harm incurred, circumstances surrounding the accident, and personal characteristics of the parties in fashioning a fair outcome.\textsuperscript{218}

The “type of activity” factor requires “an inquiry into the nature of the defendant’s enterprise.”\textsuperscript{219} The foreseeability of injury to others is a relevant consideration. If the defendant’s conduct or practice involves a dangerous element, courts may hold him to a higher standard of care because it is more foreseeable that this type of activity will result in harm to others. For example, absolute liability may be imposed solely because the defendant’s ultrahazardous activities result in

\textsuperscript{213} See, e.g., Ronstadt v. Begnaud Motors, Inc., 427 So. 2d 911 (La. App. 3d Cir.), \textit{writ denied}, 430 So. 2d 82 (1983) (Plaintiff was raped while stranded in her employer’s car which she had just picked up from a dealership who did repair work on the auto. The Court held that the risk was not within the duty.). \textit{Cf.} Jones v. Robbins, 289 So. 2d 104 (La. 1974), \textit{infra} note 218; Wilson v. Department of Pub. Safety and Corrections, 576 So. 2d 490 (La. 1991) (Prisoners escaped and, thirteen (13) days later and eight (8) or fifteen (15) miles from the prison, robbed plaintiffs. The First Circuit Court of Appeal reversed, in favor of plaintiffs, finding the risk of harm to be within the duty. In essence, the risk was within the scope of defendant’s negligence.).

\textsuperscript{214} Roberts v. Benoit, 605 So. 2d 1032 (La. 1991); Hill v. Lundin & Assocs., 256 So. 2d 620 (La. 1972).


\textsuperscript{216} Crowe, supra note 207, at 908; Harris v. Pizza Hut of Louisiana, Inc., 455 So. 2d 1364, 1372 n.16 (La. 1984).

\textsuperscript{217} Crowe, supra note 207, at 908; Sistler, 558 So. 2d at 1113.

\textsuperscript{218} Guilloute v. Houston Gen. Ins. Co., 368 So. 2d 1026, 1028-29 (La. 1979); Jones, 289 So. 2d at 107-08. In \textit{Guilloute}, an elderly woman tripped over Christmas lights strung across a walkway. The lights were clearly visible but she attempted to step over them. The Louisiana Supreme Court reinstated the trial court’s judgment for plaintiff, finding no contributory negligence. The court wanted to afford recovery for the elderly claimant. In \textit{Jones}, a retailer sold gasoline to a child using an improper container. The child was severely burned. Can you guess the outcome? Judgment for plaintiff. \textit{Cf.} Kent v. Gulf States Utils. Co., 418 So. 2d 493 (La. 1982). In \textit{Kent}, plaintiff was electrocuted when his cement paving tool contacted an overhead power line. The court found plaintiff in a pitiable state but refused to impose liability finding that Gulf States acted reasonably in light of the circumstances and plaintiff’s contributory negligence.

\textsuperscript{219} Crowe, supra note 207, at 908.
harm to another.\textsuperscript{220} Absolute liability is "imposed as a matter of policy [due to the high degree of risk of harm] when harm results from the risks inherent in the nature of the activity."\textsuperscript{221}

Finally, the "historical or precedent" factor may be applied depending on the circumstances. Courts often consider customary conduct between the parties or a particular sector of industry.\textsuperscript{222} The owner of a particular type of land may have historically been required to take greater care with regard to third-party entrants.\textsuperscript{223} In such a case, the historical factor may play an important role in defining the scope of the duty owed.

This set of factors should be considered and balanced by the court. Since duty is a legal issue, the court must strike a balance between the competing interests and define the scope of the breached duty or duties so as to fairly reflect acceptable social policies.\textsuperscript{224}

4. Was Defendant's Conduct a Cause-in-Fact of Plaintiff's Damage?

Cause-in-fact and damages are traditional requirements in any tort suit. The threshold causation issue under the "duty-risk" analysis is whether the defendant's negligence was a "cause-in-fact" of the claimant's loss.\textsuperscript{225} "Cause-in-fact" is a term of art describing the factual examination of "whether the defendant's affirmative conduct in any way contributed to the plaintiff's harm [or] . . . whether the defendant [was] a cause of the plaintiff's harm?"\textsuperscript{226} Louisiana courts tend to find that negligent conduct is a "cause-in-fact" of the harm if it was a "substantial factor" in bringing about the harm.\textsuperscript{227} Affirmative conduct by defendant includes

\textsuperscript{220} See Perkins v. F.I.E. Corp., 762 F.2d 1250 (5th Cir. 1985) (applying Louisiana law); Rosenblath v. Louisiana Bank & Trust Co., 432 So. 2d 285 (La. App. 2d Cir. 1983). The court in Kent v. Gulf States Utils. Co., 418 So. 2d 493 (La. 1982), contrasted "strict liability" with "absolute liability" arising from ultrahazardous activities. "The classification as strict or absolute liability carries significant practical consequences. One consequence is that there are limited defenses to strict liability, whereas there are no defenses under absolute liability." (footnotes omitted). Carla A. Clark, Howard v. Allstate Insurance Co.—Louisiana's Attempt at Comparative Causation, 49 La. L. Rev. 1163, 1166 (1989).

\textsuperscript{221} Kent, 418 So. 2d at 498. Once claimant proves defendant's activity gave rise to an absolute liability claim then he "recovers simply by proving damage and causation." Id.

\textsuperscript{222} Welcker v. Welcker, 342 So. 2d 251, 253 (La. App. 4th Cir.), writ denied, 343 So. 2d 1077 (1977); Craton v. Miller, 47 So. 2d 342, 343 (La. App. 2d Cir. 1950); Crowe, supra note 207, at 909 n.16.

\textsuperscript{223} See, e.g., Franklin v. Paul Dupuis & Assocs., 543 So. 2d 970 (La. App. 3d Cir.), writ denied, 545 So. 2d 1042 (1989); Thrasher v. Legget, 373 So. 2d 494 (La. 1979).

\textsuperscript{224} Harris v. Pizza Hut of Louisiana, Inc., 455 So. 2d 1364, 1371 (La. 1984).

\textsuperscript{225} See supra note 201.

\textsuperscript{226} Crowe, supra note 207, at 904; Wes S. Malone, Essays on Torts, "Ruminations on Cause in Fact," 161-96 (1986); Harris, 455 So. 2d at 1370; Lejeune v. Allstate Ins. Co., 365 So. 2d 471, 475 (La. 1976); Dixie Drive It Yourself Sys. v. American Beverage Co., 242 La. 471, 482, 137 So. 2d 298, 302 (La. 1962).

\textsuperscript{227} Breithaupt v. Sellers, 390 So. 2d 870, 873 (La. 1980); Laird v. Travelers Ins. Co., 263 La. 199, 209-10, 267 So. 2d 714, 717-18 (La. 1972); Dixie Drive It Yourself Sys., 242 La. at 482, 137
the "acts of omission as well as commission."\textsuperscript{228} Another test for cause-in-fact is the "but for" or "sine qua non" test.\textsuperscript{229} To be a "cause-in-fact" the conduct need not be the sole cause as "[n]o event results from a single cause."\textsuperscript{220} Finally, [in determining cause-in-fact in a negligence case, causation should be considered by the trier of fact without reference to policy overtones that are involved in the case, and if plaintiff can show that he probably would not have suffered the harm complained of but for the defendant's conduct, he has carried the burden of proof on this question.\textsuperscript{231}

The court must also consider whether any intervening causes exist. Rarely is there a scenario lacking at least one intervening cause.\textsuperscript{232} Intervening causes may either have no effect on the original negligence, may concur in and contribute to the original "cause" of the resulting damage. A non-superseding, concurring act of negligence by a second tortfeasor requires him to share in the responsibility and liability for the resulting damage to the victim(s).\textsuperscript{233} An intervening, superseding act of negligence by a second tortfeasor, on the other hand, imposes on him full responsibility and liability, "thereby relieving the initially scrutinized defendant of any liability."\textsuperscript{234} Nonetheless, a claimant bears the burden of proving the true mechanism(s) of damage.\textsuperscript{235}

The final requirement for a prima facie tort suit is "damage."\textsuperscript{236} Whether claimant incurred injury or losses is a factual determination produced by "a mechanical inventory and assessment of the plaintiff's harm or harms—an enumeration and evaluation."\textsuperscript{237} The proper goal of an award in a lawsuit based

\textsuperscript{228} Crowe, supra note 207, at 904. Such acts are deemed "actionable negligence."

\textsuperscript{229} Crowe, supra note 207, at 905; Landry v. State Farm Ins. Co., 529 So. 2d 417, 421 (La. App. 1st Cir. 1988).

\textsuperscript{230} Crowe, supra note 207, at 904.


\textsuperscript{232} Crowe, supra note 207, at 909.


\textsuperscript{234} Crowe, supra note 207, at 909.

\textsuperscript{235} See, e.g., Naquin v. Marquette Casualty Co., 244 La. 569, 574-76, 153 So. 2d 395, 397 (La. 1963).


on defendant's tortious conduct is to compensate and restore plaintiff, as close as possible, to the position he occupied prior to the accident.\textsuperscript{238}

C. Reasonableness and Foreseeability Have Replaced Plaintiff's Status as the Focus in Determining Landowner's Duty

The Louisiana Supreme Court in \textit{Cates}\textsuperscript{239} adopted the standard set forth in the \textit{Rowland} decision.\textsuperscript{240} No longer would an entrant's status be determinative of the landowner's duty; however, the status might be considered in defining the scope and extent of the landowner's duty. The test is now one of "reasonableness"\textsuperscript{241} of the landowner's conduct based on the "foreseeability" of injury to an entrant.\textsuperscript{242} Probability of harm and potential gravity of harm are two factors to be considered together.\textsuperscript{243} The burden which would be imposed upon the landowner to remedy the potential danger is balanced against these factors.\textsuperscript{244} An added factor which some courts consider along with the burden on the landowner is the utility of the condition or activity upon land.\textsuperscript{245} The shift in focus from "plaintiff's status" to the "reasonableness" of defendant's conduct was designed to allow courts to define the landowner's duty so as to make it easier for a plaintiff to establish a prima facie case.\textsuperscript{246}

\textsuperscript{238} Fogle \textit{v.} Feazel, 201 La. 899, 910, 10 So. 2d 695, 698 (La. 1943).
\textsuperscript{240} Rowland \textit{v.} Christian, 443 P.2d 561 (1968).
\textsuperscript{242} See supra note 207. The "foreseeability" of the entrant's presence is a proper consideration because the landowner should not be expected to anticipate the presence of a trespasser on the premises or the presence of an invited guest in areas of the premises beyond the express or implicit invitation. Arguably, allowing the trespasser or "unexpected" guest to recover is tantamount to making the landowner the "insurer" of the safety of all entrants. The classification system makes "foreseeability of the entrant's presence" the sole focus, notwithstanding jurisprudential exceptions created, in determining landowner's liability. It is suggested that the landowner's non-intentional conduct should not be a relevant inquiry until the entrant's presence is deemed "foreseeable." Of course, this suggestion is subject to exceptions; for example, if the landowner's activity is "ultrahazardous" or justifies the imposition of "strict liability."

\textsuperscript{243} Sistler, 558 So. 2d at 1106.
\textsuperscript{244} Id.
\textsuperscript{245} See supra note 207.
\textsuperscript{246} The "reasonable care" approach makes foreseeability of harm, due to a given premises condition, the central focus. Basso \textit{v.} Miller, 352 N.E.2d 868 (N.Y. 1976). The traditional common-law classification system focuses on the foreseeability of the presence of the plaintiff on the premises as the key consideration. Should the landowner be subject to suit if an unforeseen entrant is injured on the premises or a foreseeable entrant ventures into areas of the property not intended for unwary, unexpected persons?
V. LANDOWNER'S STRICT LIABILITY IN LOUISIANA

An analysis of the aftermath of *Cates* would not be complete without reviewing the infusion of strict liability into Louisiana tort law. Early jurisprudence interpreting Louisiana Civil Code article 2315 held that liability could not be imposed absent "fault." While "fault" defies statutory definition, it is clear that strict liability is based upon the relationship between an owner or custodian and the thing in his custody, and is not based upon "fault" arising from negligence.

The Louisiana Supreme Court in *Langlois* foreshadowed the advent of strict liability by rejecting the historic equation of "fault" and "negligence." The court explained that "fault" encompasses both negligent and non-negligent conduct. Under the Louisiana Civil Code scheme governing liability for tortious conduct, there can be no liability absent "fault." By broadening the concept of "fault," the court laid a necessary "stepping stone" for the subsequent invocation of strict liability. Shortly after *Langlois*, the court decided three cases by establishing strict liability actions under Civil Code articles 2317, 2318, and 2321. The *Loescher* decision was the first strict liability case relating directly to premises liability law and raised many legal questions. The strict liability theory allows recovery where it was formerly precluded by the common-law classification system.

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248. *Sisler*, 558 So. 2d at 1112. "[T]he common-law recognized fault as negligence or intended, wrongful conduct. The civil law has also defined 'fault' in terms of wilful, unlawful conduct, as well as imprudence or want of skill." Poole, supra note 247, at 209. Ferdinand F. Stone, *Tort Doctrine in Louisiana: The Concept of Fault*, 27 Tul. L. Rev. 1, 9 (1952). Of course, it could be argued that strict liability is based upon negligence. Consider that strict liability arises due to defects in a thing under the care or custody (or ownership) of a person who bears such a legal relationship to the thing that the policies of strict liability are justifiably imposed. In most cases, the "defect" giving rise to the unreasonable risk of harm, and the claim of strict liability, existed due to the "neglect" of the defendant in failing to discover it and/or remedy it. For example, the court in *Sisler*, 558 So. 2d at 1112, stated that the "fault [under strict liability] of the owner is based upon his failure to prevent the building . . . from causing such an unreasonable risk of injury to others."
250. *Id.* at 137. "'Fault' is a broader and more comprehensive term than 'negligence'. Therefore the codal scheme imposes responsibility on a person not only when his negligence causes damage, but also when the person has a legal relationship with a person, a thing, or an activity which causes damage." *Kent* v. Gulf States Utils. Co., 418 So. 2d 493, 496 (La. 1982) (quoting *Langlois* v. Allied Chem. Corp., 258 La. 1067, 249 So. 2d 133 (1971)).
252. Poole, supra note 247, at 210.
254. *See, e.g.*, *Loescher*, 324 So. 2d 441.
A. Loescher Set the Standard for Strict Liability Actions Under Louisiana Civil Code Article 2317

With the emergence of Loescher, Louisiana premises liability took a new direction.255 The Loescher decision opened the door to widespread use of strict liability in premises actions.256

The Louisiana Supreme Court in Loescher interpreted Article 2317257 in defining plaintiff's burden of proof. To establish a strict liability claim, plaintiff must prove:

1. The thing was in defendant's "custody";258
2. The thing had a "defect";259 and
3. The injury or damage was caused by the "defect."260

Once a prima facie claim of strict liability is made, the defendant is liable unless he proves the loss was caused by victim fault,261 third-party fault,262 or irresistible

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256. Since Loescher, strict liability has continually spread through a steady broadening of the interpretations given the basic elements of the strict liability actions under the various Code articles. This trend will continue as different courts find the social policy existing in a new situation so as to justify the imposition of strict liability. See, e.g., Hopkins v. Travasos, 569 So. 2d 1056 (La. App. 3d Cir. 1990); Vicknair v. T.L. James Co., 375 So. 2d 960 (La. App. 4th Cir. 1979), writ denied, 379 So. 2d 10 (1980).

257. La. Civ. Code art. 2317 provides: "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody . . . ." See Malone, supra note 226, at 372-73.

258. The Court in Loescher interpreted "custody" to mean:

[T]he things in one's care are those things to which one bears such a relationship as to have the right of direction and control over them, and to draw some kind of benefit from them. This relationship will ordinarily be associated with ownership, but the guardianship will also belong to the . . . [depository], the lessee, the usufructuary, the borrower for use . . . among others . . . . The owner may transfer the guardianship by transferring the thing to another who will bear such a relationship to the thing as to himself have the care of it.


259. "Defect" has been given broad construction to encompass any unreasonable risk of harm to others. Loescher, 324 So. 2d at 447. See also Sistler, 558 So. 2d at 1112; Koppie v. Commercial Union Ins. Co., 478 So. 2d 179, 181 (La. App. 3d Cir.), writ denied, 479 So. 2d 922 (1985).

260. Loescher, 324 So. 2d at 1113.

261. See, e.g., Gibson v. Faubion Truck Lines, 427 So. 2d 68, 71 (La. App. 4th Cir. 1983); Duplechain v. Thibodeaux, 359 So. 2d 1058, 1060 (La. App. 3d Cir. 1978); Loescher, 324 So. 2d at 445, 447, 449. Prior to the enactment of comparative fault many strict liability claims were terminated due to claimant's contributory negligence. Dorry v. LaFleur, 399 So. 2d 559 (1981); Robert V. Vitanza, Comment, Victim Fault and Comparative Fault in Strict Liability, 48 La. L. Rev. 1249 (1988).

262. See, e.g., Motion Indus., Inc. v. LeBlanc, 532 So. 2d 498, 500 (La. App. 1st Cir. 1988);
force. If a defense is proven, defendant is entitled to have his percentage of fault eliminated or reduced accordingly.

Article 2317 provides for the liability of a person who is the owner or custodian of a "thing" which creates an "unreasonable risk of harm." The article also states that a "person" is liable for the acts of another person for whom he is answerable. The final sentence of Article 2317 makes the liability set forth in the provision subject to "the following modifications."

Most litigation involving Article 2317 and its strict liability "test" involves the interpretation of the term "thing," the concept of "garde," and the requisite "defect" giving rise to liability. In order to be deemed a "defect" the thing must create an "unreasonable risk of harm" to others. Whether a risk is reasonable or unreasonable is determined by the same formula used in negligence actions. However, in a strict liability action, the court must decide if the factual scenario justifies the imposition of such liability by examining the existing jurisprudence and prevailing public policy. The main difference between negligence and strict liability actions is that a strict liability action relieves the plaintiff of the burden of proving defendant's scienter, in essence, that defendant knew or should have

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Dufour v. Trosclair, 374 So. 2d 186, 187-88 (La. App. 4th Cir. 1979); Olsen v. Shell Oil Co., 365 So. 2d 1285, 1293 (La. 1978); Loescher, 324 So. 2d at 447, 449.
265. Much of the strict liability litigation concerning responsibility for another person's actions has arisen under other Louisiana Civil Code articles. See, e.g., La. Civ. Code arts. 2318 (minors, children, etc.), 2319 (incompetents), and 2320 (students, employees, apprentices, etc.).
266. The "modifications" referred to are the articles following Article 2317. La. Civ. Code arts. 2318-2324.1. The court in Sistler v. Liberty Mut. Ins. Co., 558 So. 2d 1106, 1112 (La. 1990), discussed Article 2322, a "modification" following Article 2317.
267. Sistler, 558 So. 2d at 1112-13; Ross v. LaCoste de Monterville, 502 So. 2d 1026, 1028 (La. 1987).
269. The court in Sistler, 558 So. 2d at 1112-13, stated that "[t]he unreasonable risk criterion cannot be applied mechanically. This criterion is a concept employed to symbolize the judicial process of deciding which risks are encompassed by the codal obligations from the standpoint of justice and social utility." (citations omitted).
270. The court in Kent v. Gulf States Utils. Co., 418 So. 2d 493, 497 (La. 1982), noted that "[t]he distinction between negligence cases and strict liability cases (such as Loescher) has largely been either misunderstood or completely disregarded."
known of the "defect" which created the "unreasonable risk of harm." The defendant is charged with knowledge of the defect.

B. Olsen Outlined the Burden of Proof for Strict Liability Actions Under Louisiana Civil Code Article 2322

As strict liability began to spread in premises liability law, claimants and courts repeatedly turned to Article 2322. Article 2322 provided liability for injuries incurred in dwellings and business premises alike. Article 2322 has been interpreted to allow strict liability actions to be brought against building owners when someone is injured due to "ruin" of the building. Here, as in Article 2317, the court must decide if the "defect" or, under Article 2322, the "ruin," of the building is an "risk of harm" to others. Also, as in strict liability under Article 2317, the owner is not relieved of liability merely because he did not know of the defect. The Louisiana Supreme Court in Olsen set forth plaintiff's prima facie requirements in an Article 2322 strict liability action:

1. There must be a "building";

271. Id. at 497. "Under strict liability concepts, the mere fact of the owner's relationship with and responsibility for the damage-causing thing gives rise to an absolute duty to discover the risks presented by the thing in custody." Id. "Under traditional negligence concepts, the knowledge (actual or constructive) gives rise to the duty to take reasonable steps to protect against injurious consequences resulting from the risk . . . ." Id.

272. Article 2322 provides: "The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction." Injury caused by external decay or "fall" of the building is governed by La. Civ. Code arts. 660, 661.


275. The court in Olsen, 365 So. 2d at 1291-92 n.13, noted that "there are two competing notions of the theoretical basis of the strict liability" under Article 2322. "[T]he 'fault' theory is that even though we hold the owner of the building strictly liable, this liability is based on his 'fault' in failing to attend to his building." Id. Next, "[t]he 'risk' theory is based on the notion that, even though the owner may have a right of indemnification against some third person, he must bear the primary responsibility for damage caused by the buildings as the quid pro quo for the advantages and powers of ownership of the building." Id.

276. Id. at 1292.

277. Id. at 1289.


279. Few Louisiana Supreme Court decisions have given definition to the term "building." The first decision to do so was Cothern, 255 La. at 683-84, 232 So. 2d at 477. The Court stated that a "building" is a permanent structure, but need not be intended for habitation. The court in Olsen, 365
2. Defendant must be the "building owner";\textsuperscript{280} and
3. There must be "ruin" in the building caused by a vice in the original construction or a neglect to repair, which caused injury to claimant.\textsuperscript{281}

Once a prima facie case is made, the defendant may escape liability by proving the same defenses as provided under Louisiana Civil Code article 2317. Thus, by proving plaintiff's injury occurred due to victim fault, third party fault, or an "act of God,"\textsuperscript{282} defendant may rebut plaintiff's prima facie showing and eliminate or reduce his percentage of fault.\textsuperscript{283}

C. The Interrelationship Between Actions Under Louisiana Civil Code Articles 2315, 2316, 2317, and 2322

The fountainhead of Louisiana tort law is Louisiana Civil Code article 2315 which provides the basis of liability for "fault."\textsuperscript{284} The remaining tort law articles\textsuperscript{285} following Article 2315 "constitute amplifications as to what constitutes 'fault' and under what circumstances a defendant may be held liable for his act or that of a person or thing for which he is responsible."\textsuperscript{286} While Articles 2315 and 2316 govern with regard to "fault" arising from negligence,\textsuperscript{287} the remaining articles are necessary to define delictual responsibility because "negligence is not

\textsuperscript{280} Though "ownership" is defined in La. Civ. Code art. 477, Louisiana courts have been creative in defining "owner" under La. Civ. Code art. 2322. The court in Olsen, 365 So. 2d at 1290-92, found defendant was the "owner" of defective attachments to an oil drilling platform despite contractual provisions shifting responsibility. The court found the living unit attachment was sufficiently incorporated into the platform so as to become part of the "building." \textit{Id.}

\textsuperscript{281} Many Louisiana decisions discuss "ruin" as found in La. Civ. Code art. 2322. Nonetheless, no clear definition exists.


\textsuperscript{286} Loescher v. Parr, 324 So. 2d 441, 445 (La. 1975). In dissenting, Justice Marcus argues that Article 2317, by its language, is subject to the modifications set forth in Articles 2318 through 2322, and therefore, Article 2317 is meant to be a "transitional article, rather than an autonomous rule of civil liability." \textit{Id.} at 451. He adds that the modifying articles "enumerate the specific classes of persons or things for whose damage one is responsible regardless of his lack of fault." \textit{Id.} The court in Langlois v. Allied Chem. Corp., 258 La. 1067, 249 So. 2d 133 (La. 1971), "expanded the concept of fault in article 2315 to include responsibility for ultrahazardous activities without negligence, namely, responsibility based on the notion of risk." Perkins v. F.I.E. Corp., 762 F.2d 1250, 1259 (5th Cir. 1985) (citing A.N. Yiannopoulos, \textit{Civil Responsibility in the Framework of Vicinage: Articles 667.69 and 2315 of the Civil Code}, 48 Tul. L. Rev. 195, 222-23 (1974)).

\textsuperscript{287} Actionable negligence constitutes "negligent acts and omissions." \textit{Loescher}, 324 So. 2d at 445.
necessarily a basis for the obligation to respond in damages for harm caused by persons or things for which we are responsible as provided by the subsequent Articles 2317 through 2322.”

Prior to the Loescher decision, Article 2317 was interpreted as providing for additional delictual responsibility, regardless of actionable negligence on defendant’s part, solely because he is answerable for the person or thing in his custody. Further, Articles 2318 through 2322 were designed to “delineate the rules of civil responsibility for the damages caused by the minor children and wards, insane persons, employees, students, animals, and buildings in one’s custody.” It was suggested that Article 2317 was simply meant to set forth “an autonomous rule: One is responsible for the act of things that are in one’s custody [care]; therefore, the victim was excused from proving the fault of the party responsible.”

Prior to Loescher, a strict interpretation was applied to claims under Article 2317 which failed to show actionable negligence on defendant’s part.

In the beginning of Louisiana tort law, almost all premises liability actions were controlled by Articles 2315 and 2316. A claimant brought his suit alleging landowner’s “fault” due to substandard conduct in maintaining the activities on or conditions of the premises. Such substandard conduct by landowner was codally provided for in Louisiana Civil Code article 2316. However, the Louisiana Civil Code provided very little guidance for Louisiana courts handling premises liability actions. As a consequence, premises liability law developed through the common-law jurisprudence, as did most of Louisiana’s tort law. This trend may explain why many code articles governing tort actions in Louisiana have changed so little since their inception. The Louisiana Legislature apparently.

288. Id. at 445 n.3.
289. Id. at 450 (Marcus, J., dissenting).
290. Id.
292. Loescher, 324 So. 2d at 450 (Marcus, J., dissenting).
293. These articles are read together to “announce the general rule of delictual liability, that is, one is obliged to repair the damage he occasions to another through his own act or failure to act.” Id. This appears to be the concept of “actionable negligence.” The court in Perkins v. F.I.E. Corp., 762 F.2d 1250, 1259 (5th Cir. 1985) (citing Langlois v. Allied Chem. Corp., 258 La. 1067, 1077, 249 So. 2d 133, 137 (1971)), described the combination of articles 2315 and 2316 as the “fountainhead of responsibility” in Louisiana tort law.
294. In essence, “actionable negligence.”
295. Recovery under Articles 2315 and 2316 was allowed “only when the author of the damage is proved to be at fault.” Loescher, 324 So. 2d at 450 (Marcus, J., dissenting).
296. There were few articles specifically addressing landowner liability.
decided many years ago to leave the control of tort law to the courts. Subsequently, few and insignificant amendments have been made to the original text of code articles providing the foundation of Louisiana tort law. Only in recent years, since the liability and insurance crisis, has the Legislature enacted statutory immunity provisions and other tort reform "packages."

In a series of decisions, the Louisiana Supreme Court created strict liability in Louisiana law. Each of the different actions raised the standard of care owed others even though strict liability is based on the defendant's legal relationship with the person or thing which caused the harm and not on any particular substandard act by the defendant. For example, in Loescher, the defendant owned a piece of land which contained a rotten magnolia tree. The tree fell and crushed plaintiff's car on the adjacent property. While defendant was not guilty of negligence, it was his legal relationship to the property and the tree which created the basis for his liability. Under early premises liability notions, the plaintiff would have lost this action by failing to prove defendant's "fault" or negligence.

The court's imposition of strict liability in Loescher is an example of the court's decision to place a prima facie showing within the reach of a plaintiff who is deserving of compensation. It seems that the court's widespread imposition of strict liability in premises actions is a natural extension of the Langlois, Cates, and Loescher decisions. The main policies underlying strict

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298. Id.
300. The 1987 legislative session alone resulted in at least 25 new provisions affording tort immunity to certain persons or groups. See Ferdinand F. Stone, Tort Doctrine § 102, in 12 Louisiana Civil Law Treatise (1977) (Supp. 1993, W. Crawford, § 102, at 49-50 n.33.5).
303. Of course, early Louisiana tort law imposed absolute liability in some cases where the risk created by defendant was so great as to justify liability, absent negligence. See, e.g., Craig v. Montelepre Realty Co., 252 La. 502, 211 So. 2d 627 (La. 1968) (pile driving); Gotreaux v. Gary, 232 La. 373, 94 So. 2d 293 (La. 1957) (spraying herbicides); Fontenot v. Magnolia Petroleum Corp., 227 La. 866, 80 So. 2d 845 (La. 1955) (blasting).
304. The Langlois Court "expanded the concept of fault in article 2315 to include responsibility for ultrahazardous activities without negligence, namely, responsibility based on the notion of risk." A.N. Yiannopoulos, Civil Responsibility in the Framework of Vicinage: Articles 667-69 and 2315 of the Civil Code, 48 Tul. L. Rev. 195, 222 (1974).
306. The Loescher decision could be described as a forewarning of the Louisiana Supreme Court's intent to reconstruct the tort laws to afford increased recovery to claimants.
307. Edward Ursin, Strict Liability for Defective Business Premises-One Step Beyond Rowland
tort liability are accident reduction through responsible land management and risk-spreading through cost allocation.\textsuperscript{308} No doubt, the imposition of strict liability has spread the expense of losses incurred by unfortunate victims, however, it is questionable whether accident numbers have reduced. The rationale may be flawed because the theory assumes that landowners have a natural tendency to be carefree in the maintenance of their property absent potential liability. It may be that strict liability has provided an incentive for frivolous claims rather than an actual reduction of the number of accidents. Recently, the Louisiana Supreme Court in \textit{Sistler v. Liberty Mutual Insurance Co.}\textsuperscript{309} explained the rationale underlying strict liability as follows:

Rather than the loss falling upon some innocent third person, the loss resulting from the creation of the risk falls upon the person to whom society allots its care, custody or control (\textit{guarde}) [sic]. The rationale is the owner is in a better position than the innocent victim to detect, evaluate and take steps to eliminate an unreasonable risk of harm which arises from the thing.\textsuperscript{310}

Again, this rationale may lack validity in light of the application of comparative fault principles in strict liability actions.\textsuperscript{311}

\textit{I. Strict Liability Has Eaten Away at Negligence Actions}

Although the redactors of the Louisiana Civil Code may have envisioned "absolute liability" in some cases\textsuperscript{312} and mere negligence in others, it is doubtful, by negative implication, that they ever envisioned the intermediate action of "strict liability" or the like.\textsuperscript{313}

As previously mentioned, strict liability in Louisiana developed as courts applied common-law strict liability principles to the various code articles\textsuperscript{314} following Article 2315. Strict liability claims multiplied as claimants created ways
to fit their claims under the statutory language of the "strict liability articles." The court in Kent cited the problem stemming from the Loescher\textsuperscript{315} court’s application of strict liability principles to Article 2317 by stating:

Because the term “thing” [in La. Civ. Code art. 2317] encompasses a virtually unlimited range of subject matter, the Loescher decision has since been cited by innumerable litigants seeking to avoid the necessity of proving personal negligence in tort cases.\textsuperscript{316}

The scope of strict liability under Article 2317, as under the other “strict liability articles”\textsuperscript{317} is ever expanding. Courts have justified the increased imposition of strict liability by finding that the “fault” of the liable party is based “upon his failure to prevent the person or thing for whom he is responsible from causing such unreasonable risk of injury to others.”\textsuperscript{318} So, as between an innocent victim and the “person to whom society allots the supervision, care, or guardianship (custody) of the risk-creating person or thing [animal, building, etc.],” liability is better placed upon the latter.\textsuperscript{319} The custodian is in a superior position to prevent the “condition or activity” giving rise to the unreasonable risk of harm.\textsuperscript{320}

VI. SHOULD LOUISIANA RETAIN THE REASONABLE CARE APPROACH AND REJECT THE COMMON-LAW CLASSIFICATION ENTIRELY?

Critics of the reasonable care approach have questioned why any court would move away from a structured set of laws thereby reducing the body of time-tested principles to a single, perhaps overly simplistic and vague, standard of reasonable care. Nonetheless, in states repudiating the common-law classification system, the jurisprudence has proven that regardless of which system is used,\textsuperscript{321} the result is the same in almost every decision.\textsuperscript{322} With regard to invitee and licensee cases, this is not surprising as, in many cases under the classification system, courts have found the landowner owed a duty of reasonable care to these preferred entrants. Therefore, the real measure of difference between the two systems lies in the treatment of trespasser cases and the cost-benefit ratio.

Under the classification system, the trespasser was owed “no duty” of care whatsoever unless the court resorted to the application of an equitable excep-

\begin{itemize}
\item \textsuperscript{315}. Loescher v. Parr, 324 So. 2d 441 (La. 1975).
\item \textsuperscript{316}. Kent v. Gulf States Utils. Co., 418 So. 2d 493, 497 (La. 1982).
\item \textsuperscript{317}. La. Civ. Code arts. 2318-2322.
\item \textsuperscript{318}. Loescher, 324 So. 2d at 446.
\item \textsuperscript{319}. Id.
\item \textsuperscript{320}. Id.
\item \textsuperscript{321}. Application of the common-law classification system and the “reasonable care” system under general negligence principles has rendered like results.
\item \textsuperscript{322}. Hawkins, supra note 7, at 32 n.141; William E. Crawford, Comment on Torts, 38 La. L. Rev. 352, 353 (1978).
\end{itemize}
Courts rarely employed such exceptions. A thorough search of post-

Cates jurisprudence shows that some trespassers are able to recover under the 

"reasonable care" system in Louisiana. Nonetheless, there are many cases 

denying recovery to trespassers.

Prior to Cates, the "no duty" to trespasser principle firmly established a rule 
of social order subordinating to the lawful interests of landowners a trespasser's 
right to roam. The classification rules, as a whole, served many important 
functions, including: (1) providing rules of social order which defined the scope 
of a landowner's duty to entrants; and (2) definitively and necessarily allocating 
decision making responsibilities.

A. Rules of Social Order

The classification rules constituted a "sliding scale" system reflecting the 
foreseeability of injury to entrants, the obligation of injured entrants to heed 
warnings and other precautions employed by landowner, and the varying economic 
considerations that might justify placing a burden on landowners to protect a 
particular entrant. The jurisprudence arising under the rules reflected an attempt 
to balance the need to compensate the victim against the landowner's lawful 
interest in the efficient, free use of his property.

The classification rules promoted economic efficiency in Louisiana land 
development. Landowners did not fear liability or the cost of litigation because of 
injuries sustained on the premises by all entrants. When faced with clear rules 
governing their potential liability, landowners are more likely to use their property 
in the most economically efficient manner. The absence of clear bounds of 
potential landowner liability increases the cost of property insurance. By rejecting 
the classification rules, Louisiana courts have moved toward making premises 
liability laws solely a tool of compensation.

323. Supra notes 12-49.
324. Cates v. Beauregard Elec. Coop., Inc., 328 So. 2d 367 (La.), cert. denied, 429 U.S. 833, 
97 S. Ct. 97 (1976).
325. See, e.g., Entrevia v. Hood, 413 So. 2d 954 (La. App. 1st Cir. 1982), rev'd, 427 So. 2d 
1146 (1983) (Louisiana Supreme Court reversed appellate court's judgment for trespasser); Bourg 
v. Redden, 351 So. 2d 1300 (La. App. 1st Cir. 1977) (trespassers recovered because landowner set 
a "trap"); Jones v. Gateway Realty, Inc., 550 So. 2d 388 (La. App. 3d Cir. 1989) (trespasser 
recovered less her 50% comparative fault), writ denied, 556 So. 2d 27, and writ denied, 556 So. 2d 
30 (1990); Lewis v. State, DOTD, 436 So. 2d 1305 (La. App. 4th Cir. 1983) (trespasser recovered); 
judgment for trespasser).
326. See, e.g., Humphries v. T.L. James & Co., 468 So. 2d 819 (La. App. 1st Cir.), writ denied, 
470 So. 2d 123 (1983); Bizette v. State Farm Ins. Co., 454 So. 2d 197 (La. App. 1st Cir.), writ 
3d Cir. 1986); Thompson v. Ewin, 457 So. 2d 303 (La. App. 3d Cir. 1984); Kaplan v. Missouri-Pac. 
4th Cir. 1982); McGee v. McClure, 442 So. 2d 625 (La. App. 1st Cir. 1983), writ denied, 444 So. 
Landowners should be able to develop their property in the most profitable way and should not be forced to alter the land or curtail certain activities solely to protect trespassers or other entrants with interests not inimical to those of the landowner. It is an unreasonable burden to make law-abiding landowners constantly monitor all parts of their property in order to avoid liability to trespassers. It is also unreasonable to force landowners and their insurers to incur the costs of litigating frivolous claims brought by unlawful entrants injured on the premises. Of course, public policy dictates that landowners should not become the insurers of the safety of all entrants coming onto their property.  

The classification rules also set out legal guidelines by which landowners could structure their affairs and avoid liability. The rules sought to instruct landowners on how and when they must act to avoid liability. By taking certain precautionary measures, a landowner could be assured that his activities on or the conditions of the property would not result in liability. The magnitude of precaution required varied depending upon the foreseeability of the entrant’s presence, in essence, the entrant’s status. Since Louisiana courts abolished usage of the classification rules, much uncertainty has been injected into the scope of a landowner’s duty to entrants. Particularly, a landowner must now take extraordinary precautions in order to avoid liability. The cost of such extra precautions are an unreasonable burden. The presence of a certain entrant, like a trespasser, is unforeseeable. Therefore, the cost of preventing potential harm to the trespasser is extremely high because the landowner must employ safety, corrective, and other precautionary devices and procedures on all parts of his property. Though a certain circumstance may not give rise to liability, landowners often overreact, incurring great costs, to avoid potential liability. Aside from employing the above described devices, landowners often tend to overinsure the premises to protect their interests.  

The need for rules of social order, which the classification system provided, is evident in the nature of premises liability. Many instances of landowner liability result not from the landowner’s affirmative conduct but from an omission or failure to act. The landowner is likely to be liable for damages that result from failing to either correct a premises defect or warn an entrant of the existence of the defect. Thus, the landowner’s duty to anticipate the entrant and accordingly prepare his property potentially gives rise to tort liability. The classification rules employed the entrant’s status as the determinative factor in defining landowner’s duty because the entrant’s status reflected the landowner’s ability or inability to foresee the presence of the entrant. If the entrant’s presence was foreseeable, it is proper to impose a duty upon landowners to take affirmative action to make the premises safe for the entrant. Of course, this duty is limited to the scope of the expected


presence. Absent foreseeability of the entrant's presence, there would be no duty to prepare the property for the entrant's safe use, passage, or otherwise. The time, place, manner, and other surrounding circumstances of the entrant's presence are determinative factors of the foreseeability of the entrant's presence and govern the scope of any duty owed by landowners.

The rules provided an express warning to trespassers that their unlawful presence on the land of another would not be protected over the lawful interests of the landowner. The denial of trespasser recovery, absent intentional infliction of harm by landowner, promoted popular social policy. There was little reason to impose greater burdens on a landowner to restrict the use of his property solely to protect unlawful or unexpected entrants. Rules of social order, like any set of rules, are only useful if they are sufficiently flexible to promote fairness. Flexibility is introduced through the creation of exceptions. Since the classification rules were never intended to be given rigid application in all circumstances, certain exceptions were created to promote fairness and public policy.

The classification rules and their exceptions grew over centuries into a fully developed, time-tested set of legal principles capable of application in every setting, and sufficiently flexible to meet the needs of modern society. An overwhelming majority of American jurisdictions continue to employ the classification rules. The classification system, like a constitution or code, must be interpreted and amended to preserve its timely usefulness.

B. The Common-Law Classification System Provides a Structure for the Relationship Between Judge and Jury

Commentators agree that the common-law classification system “served an administrative function by providing a structure for the relationship between judge and jury.” Under the common-law classification rules, Louisiana courts were able to dispose of many trespasser and licensee cases at the outset by restricting the scope of the landowner’s duty. Trial courts often set plaintiff’s status and correlative duty as a matter of law. The greater “front-end” control of juries was inexpensive and judicially efficient. As in other classification jurisdictions, Louisiana courts were able to restrict cases given to the jury to those which “turned upon specific and narrowly defined issues.” Restrictions on the issues tendered to juries are proper

329. Criminal law statutes prohibiting trespass are rarely effective as a deterrent and carry small penalties for violation.
331. Hawkins, supra note 7, at 18 n.38.
332. Id. at 18 n.39; Note, Torts—Occupier of Land Held to Owe Duty of Ordinary Care to All Entrants—“Invitee,” “Licensee,” and “Trespasser” Distinctions Abolished, 44 N.Y.U. L. Rev. 426, 430 (1969); Green, supra note 330.
because juries are inexperienced in the breadth of legal problems and are ill-suited to dictate substantive law or social policy.\textsuperscript{333} Further, as noted by other commentators,\textsuperscript{334} juries experience problems in applying the negligence formula in cases formerly governed by trespasser status rules. Juries lack sufficient instruction under the negligence formula to consider, in the proper degree, the "special values associated with the use and occupancy of land."\textsuperscript{335}

The negligence formula works well when each party has "reciprocal rights and obligations" because there are "no special values or priorities" inherent in either party's status.\textsuperscript{336} However, the general formula is inappropriate "where evaluation of defendant's conduct requires defining the contours of special relationships."\textsuperscript{337} The classification rules provided clear, definitive instructions requiring the trier of fact to consider the special relationships involved and reflect upon the social policies sought to be enforced. Some jury control is justified because juries are often swayed by sympathy and personal bias. Louisiana courts have always utilized evidentiary and procedural devices to avoid unfettered jury discretion.\textsuperscript{338}

In 1981, Dean Hawkins\textsuperscript{339} released the results of a study examining whether a loss of jury control occurred in jurisdictions employing the negligence formula in all premises actions.\textsuperscript{340} The survey included an analysis of Louisiana premises liability cases. Dean Hawkins noted that "of the states that have rejected the common law status rules, Louisiana has demonstrated the strongest disposition to limit the cases given to the jury under the general negligence formula."\textsuperscript{341} The Hawkins survey suggested that early "reasonable care" decisions\textsuperscript{342} were handled by Louisiana courts by using a combination of risk-exclusion devices and other "rulings of insufficient evidence of landowner's negligence."\textsuperscript{343} The "risk exclusion approach" mentioned by Hawkins describes the different devices employed by Louisiana trial courts to dispose of premises actions. These devices included: (1) finding plaintiff to be contributorily negligent as a matter of law; (2)

\begin{itemize}
\item \textsuperscript{333} Basso v. Miller, 352 N.E.2d 868, 874, 877 (N.Y. 1976) (Breitel, C.J., concurring).
\item \textsuperscript{334} Hawkins, supra note 7, at 18; Henderson, supra note 330, at 501, 510-14, 522.
\item \textsuperscript{335} Id.
\item \textsuperscript{336} Id.
\item \textsuperscript{337} Id.
\item \textsuperscript{338} Commentators and courts have recognized the problem of unfettered jury discretion. See, e.g., Hawkins, supra note 7, at 19. See also Rowland v. Christian, 443 P.2d 561, 569 (Cal. 1968) (Burke, J., dissenting); Basso v. Miller, 352 N.E.2d 868, 873-74 (N.Y. 1976) (Breitel, C.J., concurring); Wood v. Camp, 284 So. 2d 691, 695 (Fla. 1973); Gerchberg v. Loney, 576 P.2d 593 (Kan. 1978).
\item \textsuperscript{339} Professor and Dean of Utah Law School.
\item \textsuperscript{340} Hawkins, supra note 7, at 15, 21-35.
\item \textsuperscript{341} Id. at 31.
\item \textsuperscript{343} Hawkins, supra note 7, at 32.
\end{itemize}
finding the risk of harm to be outside the scope of landowner’s duty;\footnote{344} and (3) finding the landowner owed a restrictive duty excluding normal hazards and bizarre, unforeseeable events. Perhaps the most interesting finding by Dean Hawkins is that utilization of the general negligence formula has made no real difference in the outcome of premises actions. In surveying many recent Louisiana premises actions, this author has found Dean Hawkins’ conclusion correct, except with regard to “trespasser” actions. Without further retreading the findings of Dean Hawkins, this author will offer insight into cases subsequent to the Hawkins survey.

Before discussing the “front-end” jury control devices, it is necessary to mention an avenue left unconsidered by other premises liability commentators. Louisiana courts have procedural devices capable of controlling the decisions of juries. Two “back-end” jury control devices include: (1) the judgment notwithstanding the verdict (JNOV),\footnote{345} and (2) appellate review of fact.\footnote{346} The judgment notwithstanding the verdict allows a trial judge to alter the jury’s decision based on his own findings. The Louisiana Constitution authorizes appellate courts to independently review the findings of the jury. Appellate review is subject to the judicial restraint of the “manifest error” or “clearly wrong” standard.\footnote{347} Nonetheless, as interpreted, the Louisiana Constitution authorizes an appellate court to reverse findings of fact by the jury and render a decision based on its own review of the appellate record thereby precluding further consideration of factual issues at the trial level.\footnote{348}

1. “Front-End” Jury Control Devices

a. Contributory Negligence

For many years the primary death-knell for many tort lawsuits in Louisiana was the doctrine of contributory negligence.\footnote{349} If the trial judge concluded from the pleadings that plaintiff, in any degree, contributed to his own injury, the plaintiff was contributorily negligent as a matter of law, and the action was summarily dismissed. This device was often used to terminate premises actions

\footnote{344} This step in the duty-risk analysis has been treated differently in Louisiana jurisprudence. Some courts treat the issue as a legal one while other courts treat it as a mixed issue of fact and law. Still some courts treat the issue as purely factual. This dispositive device will be discussed further infra text at notes 357-361.

\footnote{345} La. Code Civ. P. art. 1811.

\footnote{346} La. Const. art. V, § 5(c).


\footnote{348} These “back-end” jury control devices are discussed infra V.B.1.3.

\footnote{349} \textit{See}, e.g., Dulaney v. Travelers Ins. Co., 434 So. 2d 578 (La. App. 1st Cir. 1983); Crowe v. Hoover, 434 So. 2d 1231 (La. App. 1st Cir. 1983); Sumner v. Foremost Ins. Co., 417 So. 2d 1327 (La. App. 3d Cir. 1982); Barcia v. Estate of Keil, 413 So. 2d 241 (La. App. 4th Cir. 1982); Flair v. Board of Comm’rs, 411 So. 2d 614 (La. App. 4th Cir. 1982); Smith v. Louisiana Cement Co., Inc., 405 So. 2d 687 (La. App. 4th Cir. 1981), \textit{writ denied}, 413 So. 2d 496 (1982).
before they reached the trier of fact. In 1979, Louisiana adopted pure comparative fault principles designed to ameliorate the harsh results of the contributory negligence doctrine. Now, a claimant’s negligence will only diminish, not bar, his recovery as long as his negligence is less than 100%.

The abolishment of contributory negligence impacted subsequent premises actions in several respects. First, trial courts have been reluctant to terminate premises actions by finding the claimant to be 100% comparatively at fault. The actions which have been summarily dismissed due to claimant’s fault have involved extreme faultworthy conduct on the claimant’s part. Some of these courts have described plaintiff’s conduct as the “cause-in-fact” of his own injuries. Second, as a result of comparative fault, more premises cases, which would have been precluded by the doctrine of contributory negligence, are reaching the jury for fault assessment. Finally, while many of the premises actions which involve a faultworthy claimant are now reaching the jury, there appears to be a movement in the trial courts to find new ways to summarily dismiss such actions by invoking the other risk exclusion devices. Thus, trial courts have begun to broaden the


352. This judicial reluctance is not surprising because, as previously mentioned, it is difficult to compare the fault of a landowner and the comparative fault, based in negligence, of a claimant in a premises action. A landowner’s liability is usually based on his negligent omission, failure to act, or a legal relation to the offending object. A claimant’s comparative fault is usually caused by some affirmative act or failure to exercise care for his own safety.

353. Now, victim fault must rise to the level of a substantial cause of the accident before it will bar recovery. Rozell v. Louisiana Animal Breeders Co-op., Inc., 496 So. 2d 275, 279 (La. 1986). However, note that the Third Circuit Court of Appeal’s apparent expansion of the scope of cause-in-fact to include conduct which “in any way contributed to the harm.” Pastor v. Lafayette Bldg. Ass’n, 567 So. 2d 793, 795 (La. App. 3d Cir. 1990).


356. The large number of cases surveyed by this author reflect this movement. Proof may only be illustrated by reference to the following paragraphs which discuss the other “front-end” jury control devices.
scope of the other "front-end" jury control devices to compensate for the loss of control created by the abolishment of contributory negligence.

b. "Risk Within the Duty"

Another risk exclusion device employed by Louisiana courts is the duty-risk analysis used to analyze most tort claims. The analysis in its purest form contains five parts. As previously mentioned, it is the duty of the trial judge to formulate the duty owed by defendant landowner. This formulation involves two basic steps: (1) determination, in general terms, of the duty owed by the landowner; and (2) determination of whether the risk of harm encountered by the victim was within the ambit of the duty owed by the landowner. The latter element is used to restrict and shape the contour of landowner's duty. Under the negligence formula, Louisiana courts have used this device to summarily dismiss many premises actions. There is evidence that trial courts have used this device with greater frequency since the abolishment of contributory negligence.

The real problem with the "risk within the duty" method of defining the scope of a landowner's duty is the inconsistent treatment courts have given this duty-risk step. Some courts have treated the "risk within the duty" factor as a purely legal issue, while some have treated it as a mixed question of law and fact. Still, some courts have been content with issuing the jury very broad instructions and allowing the jury to decide whether the risk falls within the scope of the duty.

357. Duty-risk analysis was discussed at length. See supra text accompanying notes 202-238.
359. Id.
360. In these cases, courts exercise greater judicial control over the duty issue and limit the number of issues presented to the jury. See, e.g., St. Hill v. Tabor, 542 So. 2d 499 (La. 1989); Gresham v. Davenport, 537 So. 2d 1144 (La. 1989); Edwards v. State, 556 So. 2d 644 (La. App. 2d Cir. 1990); Sanford v. Reeves, 554 So. 2d 1328 (La. App. 1st Cir. 1989); Mang v. Palmer, 557 So. 2d 973 (La. App. 4th Cir. 1989), writ denied, 561 So. 2d 117 (1990).
361. In these cases, it appears that the courts treat the "duty-risk" analysis like the common-law "proximate cause" analysis, and greater discretion is afforded the trier of fact. Thus, the duty imposed is drawn in broader terms, and duty limitations are determined by the trier of fact in setting the scope of the proximate cause. See, e.g., Pitre v. Opelousas Gen. Hosp., 530 So. 2d 1151 (La. 1988); Murray v. Ramada Inns, Inc., 521 So. 2d 1123 (La.), certified question adhered to, 843 F.2d 831 (5th Cir. 1988); Fowler v. Roberts, 556 So. 2d 1 (La. 1989). Use of a modified "duty-risk" formula resembling the "proximate cause" analysis is in conformity with the Louisiana Legislature's refusal to adopt the "duty-risk" approach. See La. Code Civ. P. arts. 1812, 1917; Louisiana Products Liability Act of 1988, La. R.S. 9:2800.51, et. seq. The Legislature disfavors the "duty-risk" analysis because it promotes judicial activism.
Of course, this latter method tends to make the “risk within the duty” determination a purely factual one.

c. Normal Hazards and Bizarre Occurrences

Throughout the history of Louisiana premises liability, landowners have not been held liable for injuries incurred by entrants who encounter normal hazards on the premises. Louisiana courts often summarily dismiss such cases upon finding that the claimant failed to prove an “unreasonable risk of harm.” Nonetheless, there is proof that Louisiana courts have enlarged the scope of the term “normal hazard” and “reasonable risk” in an attempt, perhaps, to compensate for the diminution of other control devices.

On the other end of the spectrum, landowners have traditionally been immune from liability for bizarre, unforeseeable, or suspicious accidents occurring on the premises. Landowner immunity in such cases is in accord with the accepted social policy that a landowner should not become the insurer of the safety of all entrants on his property.

The cases involving “normal hazards” and “bizarre, unforeseeable or suspicious accidents” are the best examples of Louisiana courts giving definition to a landowner’s duty by finding such risks to be outside the scope of the duty owed.


363. See supra notes 339-344, 362.


367. See supra note 327.
d. Insufficient Proof of Landowner’s Negligence

Since the Cates\(^{368}\) court set forth the landowner’s duty, many trial courts have summarily decided cases by finding the landowner did not breach any duty giving rise to liability. Some courts have been particularly sensitive to premises actions and require real proof that the landowner was negligent in some manner. After all, landowners are not insurers of the premises and mere proof of an accident does not necessarily imply that the landowner was negligent, or that a defect existed on the premises.\(^{369}\) Since the adoption of comparative fault principles, Louisiana courts have utilized this summary device more often.\(^{370}\)

e. Judgment Notwithstanding the Verdict (JNOV)

Trial courts in Louisiana are able to reverse or alter the findings of fact of the jury by entering a judgment, notwithstanding the verdict.\(^{371}\) The courts have followed the federal standard set forth in the Boeing Co. v. Shipman\(^{372}\) decision. A court is required to consider all of the evidence in the light most favorable to the non-moving party. Only if the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied.\(^{373}\)

The Boeing court rejected the more traditional view that “it is only when there is a complete absence of probative facts to support the conclusion reached that the jury’s judgment may be ignored.”\(^{374}\)

The JNOV is a powerful device used by trial courts which refuse to accept the final word of the jury in premises actions. A review of the jurisprudence under the

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\(^{369}\) See, e.g., Richard v. Sonnier, 363 So. 2d 961 (La. App. 3d Cir. 1978); Barcia v. Estate of Keil, 413 So. 2d 241 (La. App. 4th Cir. 1982).

\(^{370}\) See, e.g., Cappo v. Alliance Ins. Co., 499 So. 2d 233 (La. App. 2d Cir. 1986); McCormick v. Insured Lloyds Ins. Co., 488 So. 2d 491 (La. App. 3d Cir. 1986); Bell v. State, 553 So. 2d 902 (La. App. 4th Cir. 1989); Inglest v. Louisiana Power and Light Co., 464 So. 2d 790 (La. App. 5th Cir. 1985); Savoy v. Delaup, 442 So. 2d 1209 (La. App. 5th Cir. 1983).

\(^{371}\) For brevity purposes, a JNOV. See La. Code Civ. P. art. 1811.

\(^{372}\) 411 F.2d 365, 374 (5th Cir. 1969).

\(^{373}\) Id. at 374; Campbell v. Mouton, 373 So. 2d 237, 239 (La. App. 3d Cir. 1979); Scott v. Hospital Serv. Dist. No. 1, 496 So. 2d 270, 273 (La. 1986).

\(^{374}\) Boeing Co., 411 F.2d at 370 (emphasis in original); Planters Mfg. Co. v. Protection Mut. Ins. Co., 380 F.2d 869, 874 (5th Cir. 1967). The Planters decision set forth the traditional view.
common-law classification system and the “reasonable care” system proves that
Louisiana trial courts have an increased tendency to utilize the JNOV to correct jury
verdicts. In many of these actions, the trial judge simply disagrees with the
jury’s assessment of fault. Some JNOV’s result from the trial judge’s lack of
deferece to the jury’s credibility assessment of witnesses. Of course, some
courts properly adhere to the rule that “[i]n applying [the JNOV] standard, the court
does not weigh the evidence, pass on the credibility of the witnesses, or substitute
its factual judgment for the jury’s.” Finally, some JNOV’s result from a
difference in opinion between the trial judge and the jury as to what constitutes an
“unreasonable risk of harm” and/or negligence.

The JNOV is a “back-end” jury control device which deserves due attention
and discretion. Currently this device is used by Louisiana trial courts to alter the
findings of fact of the jury, but without the proper application, the device
further erodes the foundation of and trust placed in the civil jury system in
Louisiana.

f. Appellate Review of Fact

Over time, the Louisiana Legislature amended the Code of Civil Procedure to
limit a claimant’s ability to request a trial by jury. Today, a large majority of
all civil jury trials are based on a theory of tort law. A majority of the civil jury
trials based in tort involve some, if not many, issues of landowner liability.

A thorough review of appellate opinions involving civil juries shows that many
decisions are being altered by the reviewing courts. Louisiana appellate courts
have frequently disagreed with civil juries assessing fault in premises actions. Several possible reasons for the courts' lack of deference to civil juries come to mind. First, it could be that Louisiana courts, with the unique and awesome power of appellate review of facts, have developed a distrust of jury findings of fact. It has frequently been asserted that juries are swayed by emotional and moral pleas of experienced advocates. Civil juries have been accused of abandoning their entrusted role of fact finding and actively seeking to serve non-civil functions of retribution and deterrence. It could be argued that increased appellate supervision is necessary because juries have trouble assessing comparative fault and/or negligence. Reviewing courts have also noted jury difficulties in balancing factors, in the proper degree, in the determination of whether the offending object or condition gives rise to an "unreasonable risk of harm." Finally, on some occasions, juries simply are unable to determine whether the landowner breached a duty of care at all. A concluding proposition to explain the increased exercise of appellate review of facts lies in the applicable standard of care. In order to disturb the findings of a jury, the reviewing court must find "manifest error" or "clearly wrong" findings of fact. These terms obviously connote that an


extremely erroneous decision is required in order to justify the reversal of a civil jury in Louisiana.

In any event, the unique power of Louisiana courts to exercise appellate review more broadly than other states' courts constitutes an additional jury control device. Courts use this "back-end" control device to supervise juries in their resolution of difficult issues in premises actions.

C. The Cost Versus Benefit Analysis

Several reasons have been cited supporting Louisiana's abandonment of the classification rules. First, it has been argued that the classification rules were inequitable because "licensees" were virtually equated to "trespassers." This problem alone does not justify abandonment of the rules as the "modified" classification system is capable of curing the perceived inequity. Some jurisdictions have adopted this view in order to preserve the usefulness of the common-law classification rules.

Second, it was believed that the "reasonable care" system would result in a greater number of premises actions reaching the jury. Due to the unique jury control devices frequently employed by Louisiana courts, this result has not prevailed. In fact, most jurisdictions adopting the "reasonable care" system have experienced a loss of jury control in premises actions. While Louisiana courts have not experienced a loss of jury control in premises actions, this author suggests that the extreme jury control being exercised has created greater problems in all civil jury trials.

Also, as previously mentioned, most decisions under the "reasonable care" approach could have been reached under the more judicially efficient classification rules. One difference noted between the systems is that trespassers now have an enhanced ability to recover. Another difference involves the focus of argument in premises liability actions. Under the classification system, the parties argued over the proper "status" of the claimant and whether one of the well-defined equitable exceptions should be employed. Now, parties spend hours arguing every minute factual detail seeking to define "reasonable care" suitable to their position. The final difference between the systems is that, under the "reasonable care" system, the body of law properly termed "premises actions" fails to provide substantive rules of social order. There is no clear definition of "reasonable care." The "reasonable care" system does not lend itself to clear interpretation and instruction for landowners. The only certain outcome is that landowners must

605 (1962).
390. Both "front-end" and "back-end" jury control devices. See supra notes 349-389.
392. See also Britt v. Allen County Community Junior College, 638 P.2d 914, 918 (Kan. 1982).
393. Many of the problems involve cost considerations.
394. Supra notes 330-389.
395. Supra note 325.
overreact to avoid liability. Of course, in recent years, many immunity statutes have been enacted to counteract potential liability under the “reasonable care” system.\textsuperscript{396}

VII. CONCLUSION

Tort reform is needed in the area of premises liability in Louisiana. The transition from the common-law classification system to the “reasonable care to all entrants” system has created some problems. Courts continue to employ classification system equitable exceptions but generally ignore the substantive guidelines that developed under the rules. Extreme jury control is being exercised by Louisiana courts in an attempt to counteract potential difficulties juries experience with the general negligence formula. Immunity statutes are being adopted to carve holes in the broad legal duties proposed by the “reasonable care to all entrants” system. These statutes are designed to place Louisiana premises liability laws in the same position as they were under the common-law classification system. This apparent full circle retreat needs closer examination.

This author suggests that Louisiana adopt a “modified” classification system approach. Further, the extreme jury control currently being exercised by Louisiana courts will fade if Louisiana tort law, including premises liability law, adopts reforms which add substance to the law.

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\textsuperscript{396} This trend can be seen in all areas of tort law. Louisiana tort reform appears to be closing on a full circle return to the substantive rules of common-law torts. Many of the reforms can be found in Title 9 of the Louisiana Revised Statutes.