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Premises Liability in Texas - Time for a Reasonable Change.

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COMMENT

Premises Liability in Texas — Time for a "Reasonable" Change

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I. INTRODUCTION

In recent years, the common law classifications of invitee,[1] licensee,[2] and

1. *See, e.g.*, Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 100 (D.C. Cir. 1972) (landowner owes highest duty of care to invitee to keep premises reasonably safe), *cert. denied*, 412

trespasser[3] utilized in premises liability cases for determination of the landowner's duty of care[4] have been under direct attack by both courts[5] and

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U.S. 939 (1973); Rowland v. Christian, 443 P.2d 561, 565, 70 Cal. Rptr. 97, 100 (1968) (invitee considered business visitor and is owed duty of ordinary care from landowner); Mariorenzi v. Joseph DiPonte, Inc., 333 A.2d 127, 129 (R.I. 1975) (invitee enters another's land at express or implied invitation of occupier to transact mutually beneficial business); *see also* RESTATEMENT (SECOND) OF TORTS § 332 (1965) (invitees enter occupier's premises upon express invitation for business purpose of possessor). Examples of invitees are store patrons, patients in waiting rooms of hospitals or doctor's offices, and deliverymen. *See generally* James, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees,* 63 YALE L.J. 605, 614-18 (1954) (recitation of all possible fact situations where entrant classified as invitee).

2. *See, e.g.,* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 100 (D.C. Cir. 1972) (landowner must not actively harm licensee), *cert. denied,* 412 U.S. 939 (1973); Rowland v. Christian, 443 P.2d 561, 565, 70 Cal. Rptr. 97, 100 (1968) (licensee privileged to enter premises of owner by virtue of owner's permission but must take premises as he finds them); Mariorenzi v. Joseph DiPonte, Inc. 333 A.2d 127, 129 (R.I. 1975) (duty toward licensee not to knowingly allow him to come in contact with hidden peril or wilfully cause injury); *see also* RESTATEMENT (SECOND) OF TORTS §330 (1965) (licensee's presence tolerated or permitted by occupier without resulting benefit). Examples of licensees are social guests, unsolicited salesmen, and loiterers at a place of business. *See generally* Prosser, *Business Visitors and Invitees,* 26 MINN. L. REV. 573, 589 (1942) (other important factors in determining licensees include occupier's type of business, character of building and its use, community customs and parties' past conduct).

3. *See, e.g.,* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 99-100 (D.C. Cir. 1972) (landowner owes duty to not wilfully or wantonly injure trespasser), *cert. denied,* 412 U.S. 939 (1973); Rowland v. Christian, 443 P.2d 561, 565, 70 Cal. Rptr. 97, 101 (1968) (trespasser enters another's land without privilege or consent of landowner); Mariorenzi v. Joseph DiPonte, 333 A.2d 127, 129 (R.I. 1975) (trespasser entitled to recover for personal injuries because landowner wilfully or wantonly harmed trespasser); *see also* RESTATEMENT (SEOND) OF TORTS §329 (1965) (persons entering another's land without license or permission).

4. *See* Smith v. Arbaugh's Restaurant Inc., 469 F.2d 97, 99 n.5 (D.C.Cir. 1972) (party in possession of premises subject to common law rules of status distinctions), *cert. denied,* 412 U.S. 939 (1973). Although the various terms of "landowner," "occupier," and "possessor" have different legal meanings, for the purposes of this comment the terms will be used interchangeably to refer to that person who may be liable to an entrant injured on his premises. *See generally Recent Development,* 25 VAND. L. REV. 623, 623 n.1 (1972) (even though terms landowner, possessor, etc., have distinctive legal meanings, terms become synomous in premises liability cases).

5. *See* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 99 (D.C. Cir. 1972) (eighteenth century rules of liability do not provide adequate tools to allocate risk of injury in modern society), *cert. denied,* 412 U.S. 939 (1973); Webb v. City and Borough of Sitka, 561 P.2d 731, 732 (Alaska 1977) (rigid common law categories too subtle and confusing to use in today's society); Rowland v. Christian, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968) (status distinctions obscure instead of clarify proper factors that should be considered in determination of liability); Mile High Fence Co. v. Radovich, 489 P.2d 308, 312-13 (Colo. 1971) (status classifications cause judicial waste, harsh results and take issue of defendant's liability away from jury); Pickard v. City and County of Honolulu, 452 P.2d 445, 446 (Hawaii 1969) (common law categories not logically related to exercise of reasonable care by landowner/occupier to others entering his property); Cates v. Beauregard Elec. Coop., 328 So. 2d 367, 370 (La. 1976) (analysis of plaintiff's status unnecesary in determining landowner's liability for plaintiff's injury);

commentators.[6] While a growing minority of states have moved to abolish the categories in favor of a general duty of reasonable care,[7] a significant portion of the courts that have considered the question have either directly refused to abrogate the classifications,[8] or have taken an intermediary posi-

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Ouellette v. Blanchard, 364 A.2d 631, 634 (N.H. 1976) (owners and occupiers of land must act reasonably in maintenance of their land, taking into account surrounding circumstances of intrusion); Basso v. Miller, 352 N.E.2d 868, 872, 386 N.Y.S.2d 564, 573 (1976) (rigid common law categories abolished, but court function and proof standards remain unchanged); Mariorenzi v. Joseph DiPonte, Inc., 333 A.2d 127, 132 (R.I. 1975) (abolished status categories in favor of basic reasonableness test of torts). Thus, a total of nine states have imposed a general duty of reasonable care on landowners and occupiers while maintaining the common law classifications as *one* factor in the determination of the landowner's liability. *See generally* Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions,* 1981 UTAH L. REV. 15, 17 (noting states that have abolished common law status categories).

6. *See, e.g.,* Green, *The Duty Problem in Negligence Cases: II,* 29 COLUM L. REV. 255, 275 (1929) (negligence standard of reasonable care best when applied to cases with most variety of facts, especially premises liability cases because uniformity almost impossible); Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions,* 1981 UTAH L. REV. 15, 22 (common law categories do not address modern concerns); *Recent Development,* 25 VAND. L. REV. 623, 639 (1972) (modern society concerned with redressing personal injuries more than landower's immunity under common law.). *But see* Henderson, *Expanding the Negligence Concept: Retreat From the Rule of Law,* 51 IND. L.J. 467, 513 (1976) (adoption of reasonable care standard retains substance of common law classifications, while repudiating its form, leaving juries to determine relationships between entrant and possessor solely by common sense).

7. *See, e.g.,* McMullen v. Butler, 346 So. 2d 950, 951 (Ala. 1977) (minority of states abolished common law scheme in favor of reasonable care standard); Mariorenzi v. Joseph DiPonte, Inc., 333 A.2d 127, 132 (R.I. 1975) (*Rowland* decision repudiating status categories started trend in other jurisdictions to reassess categories' place in modern tort law); Olson v. Washington Country Club, 489 A.2d 895, 897-98 n.3 (Pa. Super. Ct. 1985) (group of states abolishing common law categories enlightened and should be followed in appropriate case). *But see* Yalowizer v. Husky Oil Co., 629 P.2d 465, 468 (Wyo. 1981) (majority of states have refused to abrogate traditional categories, thus disproving contention that trend is occurring).

8. *See, e.g.,* McMullan v. Butler 346 So. 2d 950, 951 (Ala. 1977) (refusal to abrogate status classifications because still followed by majority of states); Gerchberg v. Loney, 576 P.2d 593, 597-98 (Kan. 1978) (traditional status categories evolved over many years and should not be discarded for vague negligence standard giving free reign to lay jury); Yalowizer v. Husky Oil Co., 629 P.2d 465, 468 (Wyo. 1981) (court refused to abandon common law status categories because still viable and followed by majority of jurisdictions). To date, either the highest court or the appellate court in 24 different states have specifically refused to abandon the common law classifications in favor of a general negligence standard. *See* McMullan v. Butler, 346 So. 2d 950, 951 (Ala. 1977) (so-called trend toward repudiating common law classifications still minority position); Nicoletti v. Westcor, Inc., 639 P.2d 330, 332 (Ariz. 1982) (landowners must maintain premises in reasonable safe manner for invitees, continuing to follow traditional categories with designated duties); Bailey v. Pennington, 406 A.2d 44, 47-48 (Del. 1979) (common-law categories not abandoned because to do so would be impermissible judicial legislation), *app. dism'd,* 444 U.S. 1061 (1980); Meyberg v. Dodson, 221 S.E.2d 200, 201 (Ga. Ct. App. 1975) (court lacks jurisdiction to abolish common law categories); Huyck v.

tion of retaining the trespasser distinction while abolishing the invitee-licensee categories.[9] The Texas Supreme Court in *Nixon v. Mr. Property*

Hecla Mining Co., 612 P.2d 142, 144 (Idaho 1980) (declined to abolish distinctions between invitees, licensees, and trespassers because legislature has not passed statute dealing with standard of care owed by land occupant to entrant); Mentesana v. La Franco, 391 N.E.2d 416, 421 (Ill. App. Ct. 1979) (since Illinois Supreme Court has yet to abolish distinctions, cannot be done in present case); Barbre v. Indianapolis Water Co., 400 N.E.2d 1142, 1145-46 (Ind. Ct. App. 1980) (status of entrant determines what duty landowner owes, thus trespasser denied recovery because no duty breached); Rosenau v. City of Estherville, 199 N.W.2d 125, 136 (Iowa 1972) (court discussed developing trend towards abolishing categories, but applied attractive nuisance doctrine to allow trespassing child to recover for injuries sustained on city's land); Gerchberg v. Loney, 576 P.2d 593, 597 (Kan. 1978) (lay jury cannot be expected to weigh all factors necessary to apply reasonable care standard without legal principles inherent in traditional categories); Murphy v. Baltimore Gas & Elect. Co., 428 A.2d 459, 463 (Md. 1981) (court declined to abolish common law categories, especially that of trespasser); Hughes v. Star Homes, Inc., 379 So. 2d 301, 304 (Miss. 1980) (majority continued to apply traditional classifications; thus landowner did not breach duty to trespasser who was killed when concrete cover on septic tank fell on him); Davis v. Jackson, 604 S.W.2d 610, 612 (Mo. Ct. App. 1980) (possessor of land owes licensee duty as determined under circumstances - whether licensee's presence is known, or if dangerous condition exists); Steen v. Grenz, 538 P.2d 16, 18 (Mont. 1975) (person entering another's premises for his own purposes mere licensee, which landowner owes duty not to wilfully or wantonly cause injury); Buchanan v. Prickett & Son, 279 N.W.2d 855, 859 (Neb. 1979) (court applied "fireman's rule" to deny plaintiff recovery based on rationale that landowner must be wilful or wantonly negligent for recovery to be granted); Caroff v. Liberty Lumber Co., 369 A.2d 983, 985-86 (N.J. Super. Ct. App. Div. 1977) (appellate court without power to abolish common law categories as long as supreme court follows them, no need to abolish in instant case because plaintiff invitee and owed highest standard of care); Andrews v. Taylor, 239 S.E.2d 630, 632 (N.C. Ct. App. 1977) (common law categories applied to deny recovery to plaintiff); Moore v. Denune & Pipic Inc., 269 N.E.2d 599, 601 (Ohio 1971) (court declined to abolish traditional categories); Sutherland v. St. Francis Hosp., Inc., 595 P.2d 780, 782 (Okla. 1979) (commmon law categories traditionally followed by this court; no public policy reasons formed to support abolition); Taylor v. Baker, 566 P.2d 884, 888 (Or. 1977) (application of *Restatement* rules precludes abolition of common law distinctions); Crotty v. Reading Indus., Inc., 345 A.2d 259, 262 (Pa. Super. Ct. 1975) (common law duty toward business invitee highest standard under traditional scheme); Buchholz v. Steitz, 463 S.W.2d 451, 454 (Tex. Civ. App.—Dallas 1971, writ ref'd n.r.e.) (court refused to dispose of common law distinctions because drastic step); Tjas v. Proctor, 591 P.2d 438, 441 (Utah 1979) (court continued to follow majority view holding persons' status determines liability of landowner); Egede-Nissen v. Crystal Mountain, Inc., 606 P.2d 1214, 1218 (Wash. 1980) (court declined to abandon traditional categories because parties failed to urge it at trial); Yalowizer v. Husky Oil Co., 629 P.2d 465, 468 (Wyo. 1981) (other courts following common law scheme continue to be majority position in this country).

9. *See* Poulin v. Colby College, 402 A.2d 846, 851 (Me. 1979) (distinction abolished between invitees and licensees); O'Leary v. Coenen, 251 N.W.2d 746, 752 (N.D. 1977) (landowners still protected from unlimited liability by retaining trespasser category as limitation); Antoniewicz v. Reszcynski, 236 N.W.2d 1, 4-5 (Wis. 1975) (status of trespasser completely different than other categories, justifying abolishing distinction between invitees and licensees); Wood v. Camp, 284 So. 2d 691, 696 (Fla. 1973) (retaining trespasser distinction as still valid); Mounsey v. Ellard, 297 N.E.2d 43, 51 (Mass. 1973) (trespasser category retained because still consistent with property use values); Peterson v. Balach, 199 N.W.2d 639, 647 (Minn. 1972)

Management Co.,[10] recently faced this very issue,[11] but the majority of the court refused to question the validity of the common law classifications,[12] basing their decision on an existing city ordinance,[13] rather than on the status of the plaintiff.[14]

The potential consequences of this Texas Supreme Court decision are many and far-reaching.[15] In order to clarify these implications, a historical review of the policies supporting the common law system is necessary, as well as a thorough analysis of the various attacks and criticisms that have been made on the common law categories. Additionally, an analysis of the abolition of common law categories in favor of a general duty of reasonable care by other jurisdictions will provide a valuable indication of the implications of retaining or abolishing the categories in Texas. Finally, an appeal will be made to repudiate the status categories in favor of imposing a general duty of reasonable care on landowners for those entering their premises.

II. HISTORICAL DEVELOPMENT OF PREMISES LIABILITY CATEGORIES

A. *Development at Common Law and in Texas*

The landowner's privileged status to do as he pleased on his own land was a unanimous position taken by the common law courts well into the nineteenth century.[16] When the theory of negligence[17] began to evolve in direct

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(landowner owes some duty of care to all persons invited on premises). *But see* Mounsey v. Ellard, 297 N.E.2d 43, 57 (Mass. 1977) (Kaplan, J., concurring) (trespassers hard to distinguish from other two categories, thus retention of that category only continues inherent difficulties of common law system). Connecticut is the only state to abolish the invitee/licensee distinction by statute instead of a judicial decision. *See* CONN. GEN. STAT. ANN. § 52-557a (West Supp. 1985) (standard of care to licensee same as owed to invitee); *see also* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?*, 36 MD. L. REV. 816, 842 (1977) (rationale for abolishing distinction between invitees and licensee same as repudiation of entire common law system).

10. 690 S.W.2d 546 (Tex. 1985).

11. *See id.* at 554 (Kilgarlin, J., concurring) (instant case good fact situation to repudiate one of last remainders of common law feudalism, because plaintiff's status category of trespasser does not justify desired result).

12. *See id.* at 551 (Kilgarlin, J., concurring) (majority failed to decide pivotal issue in case by relying on city ordinance instead of evaluating premises liability categories).

13. *See id.* at 548 (city ordinance designed to protect general public, larger class than invitees or licensees, making these distinctions irrelevant to analysis of liability).

14. *See id.* at 554 (Kilgarlin, J., concurring) (facts in instant case present perfect opportunity to abolish last remnant of feudal era).

15. *See id.* at 554 (Spears, J., concurring) (by deciding case on existence of city ordinance, majority has not prevented future exceptions to categories or their complete abolition); *see also* Note, *Torts - Landowner's Liability - Traditional Distinctions Between Trespassers, Licensees and Invitees Abolished as Determinative of the Standard of Care Owed a Visitor*, 25 ALA. L. REV. 401, 414 (1973) (failure of jurisdictions in abolishing categories perpetuates legal chaos).

16. *See, e.g.*, Chapman v. Rothwell, 120 Eng. Rep. 471, 473 (Q.B. 1858) (landowner's

response to the increasing number of industrial accidents,[18] the common law courts had to resolve the conflict between the apparent immunity of the landowner and the growing fault doctrine of negligence.[19] The end result of this conflict was the well-known premises liability categories,[20] which allowed judges to maintain control over jury discretion[21] while still accommo-

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duty to entrant rigidly defined by how entrant classified); Toomey v. London B. & S.C. Ry., 140 Eng. Rep. 694, 696 (C.P. 1857) (categories favor landowners over entrant because determination of liability made by judge, not plaintiff-oriented jury); Southcote v. Stanley, 156 Eng. Rep. 1195, 1196 (Ex. 1856) (hotel not liable to invited visitor harmed on premises, because visitor must take premises as he found them); *see also* BOHLEN, STUDIES IN THE LAW OF TORTS 163 (1926) (landowner sovereign and could do with his land whatever he desired). *See generally Recent Development,* 25 VAND. L. REV. 623, 623 (1972) (common law categories derived from feudal concept that landowner's liability more important than entrant's injury).

17. *See* BOHLEN, STUDIES IN THE LAW OF TORTS 181 (1926) (basic premise of negligence to make one liable for any injuries caused by one's actions, which one should realize creates unreasonable risk of injury to another); *see also* Green, *The Duty Problem in Negligence Cases: II,* 29 COLUM. L. REV. 255, 271 (1929) (negligence standard of reasonable care slow to develop).

18. *See* Comment, *Loss of the Land Occupier's Preferred Position - Abrogation of the Common Law Classifications of Trespasser, Invitee, Licensee,* 13 ST. LOUIS U. L. J. 449, 451 (1969) (development of negligence encouraged by Industrial Revolution because of increasing number of accidents courts felt should be compensated).

19. *See* Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630-32 (1959) (in response to industrialized society, modern common law courts have created fine distinctions to status categories to accommodate desired results); *see also* Comment, *The Outmoded Distinction Between Licensees & Invitees,* 22 MO. L. REV. 186, 188 (1957) (nineteenth-century English courts made inevitable mistake of combining fault doctrine of negligence with real property theory and concepts).

20. *See* Comment, *Loss of the Land Occupier's Preferred Position - Abrogation of the Common-Law Classifications of Trespasser, Invitee, Licensee,* 13 ST. LOUIS U.L.J. 449, 451 (1969) (rigid status categories compromise between negligence concepts and feudal concept of land occupier's immunity). One commentator, as early as 1929, noted that "the courts took over the trespass idea, a moral notion employed since the earliest developments of the common law, and made it serve the purpose of a stem on which to graft this whole new scheme of categories." *See* Green, *The Duty Problem in Negligence Cases: II,* 29 COLUM. L. REV. 255, 271 n.56 (1929).

21. *See* Mile High Fence Co. v. Radovich, 489 P. 2d 308, 311-12 (Colo. 1971) (common law categories kept plaintiff from jury determination on issue of defendant's negligence). Most commentators agree with this analysis of the development of the common law status categories. *See, e.g.,* Green, *The Duty Problem in Negligence Cases: II,* 29 COLUM. L. REV. 255, 271-72 n.56 (1929) (status categories prevented unbridled jury discretion, because fewer cases sent to jury under very definition of duty each category mechanically imposed); Marsh, *The History and Comparative Law of Invitees, Licensees, and Trespassers,* 69 LAW Q. REV. 182, 185 (1953) (common law judges kept extension of premises liability law within their control, not trusting jury verdicts because juries mainly comprised of possible entrants rather than landowners); *Recent Development,* 25 VAND. L. REV. 623, 624 (1972) (nineteenth-century judge did not want to leave determination of landowner's liability to juries consisting primarily of potential land entrants).

dating the negligence concept of "duty of care."[22] Because the determination of the plaintiff's status in the common law scheme defined the defendant's duty of care, any possible jury misconduct was automatically restrained.[23]

The three major status categories with their attendant duties were first adopted in the United States in 1865,[24] and have since been adopted by a majority of states,[25] as well as by the *Restatement (Second) of Torts.*[26] As the twentieth century began, however, the harsh results[27] and difficulty in

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22. *See* W. PROSSER & W. P. KEETON, THE LAW OF TORTS § 28, at 161 (5th ed. 1984) (liability for negligent acts of landowner first appeared in the form of action on case); *see also* Comment, *Loss of the Land Occupier's Preferred Position - Abrogation of the Common-Law Classifications of Trespasser Invitee, Licensee,* 13 ST. LOUIS U.L.J. 449, 451 n.16 (1969) (rigid formula of status categories either fails to work under legal system following *stare decisis* or gets swallowed up in judicially-created exceptions).

23. *See* Thacker v. J. C. Penny Co., 254 F.2d 672, 678 (5th Cir. 1958) (liability for plaintiff's injuries depend on existence and extent of defendant's duty of care to plaintiff, as determined by status liability categories), *cert. denied,* 358 U.S. 820 (1959); *see also* Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions,* 1981 UTAH L. REV. 15, 18 (premises categories serve administrative function by structuring relationship between judge and jury).

24. *See* Sweeney v. Old Colony & Newport R.R., 92 Mass. (10 Allen) 368, 372-73 (1865) (announcing definitions and application of invitee, licensee, and trespasser categories to determination of land occupier's liability for someone injured on his premises); *see also* Comment, *Torts - Abolition of Distinction Between Licensees and Invitees Entitles All Lawful Visitors to a Standard of Reasonable Care,* 8 SUFFOLK U.L. REV. 795, 796-97 (1974) (fixed categories only allowed entrant to recover from landowner if invitee, thus forcing court and jury to focus on relationship between parties and not on negligence involved).

25. *See, e.g.,* McMullen v. Butler, 346 So. 2d 950, 951 (Ala. 1977) (so-called trend towards abolition of common law categories still minority viewpoint); Sutherland v. St. Francis Hosp., Inc., 595 P.2d 780, 782 (Okla. 1979) (common law distinctions still followed in Oklahoma; only abolished in two states); Antonace v. Ferri Contracting Co., 467 A.2d 833, 838 (Pa. Super. Ct. 1983) (majority of jurisdictions still adhere to traditional scheme promoting landowner immunity); *see also Recent Development,* 25 VAND. L. REV. 623, 625 (1972) (American courts quickly adopted categories in late nineteenth and early twentieth centuries).

26. *See* RESTATEMENT (SECOND) OF TORTS § 329, 330, 332 (1965) (adopting common law categories of trespasser, licensee, invitee with their prescribed duties of care); *see also* Note, *Torts - Landowner's Liability - Traditional Distinctions Between Trespassers, Licensees and Invitees Abolished as Determinative of the Standard of Care Owed a Visitor,* 25 ALA. L. REV. 401, 402-03 n.10-12 (1973) (review of *Restatement* position of common law categories of trespasser, licensee and invitee).

27. *See, e.g.,* Jefferson v. Birmingham Ry. & Elec. Co., 22 So. 546, 549 (Ala 1897) (five year old boy receiving crippling injuries due to hitching ride on defendant's train, then falling off, not compensable); Savannah, F. & W. Ry. v. Beavers, 39 S.E. 82, 84 (Ga. 1901) (recovery refused for drowning of five year old trespasser in defendant's open excavation); Reardon v. Thompson, 21 N.E. 369, 370 (Mass. 1889) (licensee fell into open hole while on defendant's land at night, court held no duty breached because licensee entered at own risk); *see also* Comment, *Loss of the Land Occupier's Preferred Position - Abrogation of the Common-Law Classifications of Trespasser, Invitee, Licensee,* 13 ST. LOUIS U.L.J. 449, 454 (1969) (courts

fitting every conceivable plaintiff into one of the three rigid categories,[28] as well as a growing trend towards the importance of human safety over the traditional landowner immunity,[29] resulted in a multitude of judicially-created exceptions to the basic common law system.[30] These exceptions, most pronounced in the trespasser category, include attractive nuisance[31] and known[32] or frequent trespassers[33] on a limited area. The crucial issue facing

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create exceptions to status categories when facts so shocking as to mandate deviation from rigidly defined classes).

28. *See* Basso v. Miller, 352 N.E.2d 868, 871-72, 386 N.Y.S.2d 564, 567-68 (1976) (difficulty in determining plaintiff's status under facts presented one reason why status categories should be eliminated); *see also* Comment, *The Common Law Tort Liability of Owner's and Occupiers of Land: A Trap for the Unwary?,* 36 MD. L. REV. 816, 817-18 (1977) (plaintiff in *Basso* has permission to be on landowner's property, but facts made applicability of common law scheme inequitable due to plaintiff's shifting status while on property). Professor Green made an insightful comment when he stated that "[f]requently [courts] wrestle so hard in getting [the plaintiff] into the desired classification that not only are their own judgments clouded, but others who would rely on such judgments for guidance come also to take them seriously." *See* Green, *The Duty Problem in Negligence Cases: II,* 29 COLUM. L. REV. 255, 272 n.56 (1929) (common law classifications focus on one factor alone, resulting in misleading judgments).

29. *See, e.g.,* Wolfson v. Chelist, 284 S.W.2d 447, 451 (Mo. 1955) (common law categories not rigidly applied when humanitarian concerns dictate additional precautionary measures); O'Leary v. Coenen, 251 N.W.2d 746, 749 (N.D. 1977) (safety of entrant more important than unrestricted freedom of landowner); Potts v. Amis, 384 P.2d 825, 831 (Wash. 1963) (court noted modern humanitarian values should be addressed in determination of defendant's liability); *see also* W. PROSSER & W. KEETON, THE LAW OF TORTS § 62, at 432 (5th ed. 1984) (human safety transcends landowner's desire to be free from burdensome precautions and expense).

30. *See* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 103 (D.C. Cir. 1972) (erosion of once distinct categories by multitude of judicially-created exceptions supports abolition of categories), *cert. denied,* 412 U.S. 939 (1973). Commentators have utilized the existence of multiple exceptions to the once sharply defined categories to support abolition of the distinctions. *See, e.g.,* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?,* 36 MD. L. REV. 816, 823 (1977) (exceptions to status categories so numerous that common law distinctions cease to function as viable rules of law); *Recent Development,* 25 VAND. L. REV. 623, 627 n.31 (1972) (courts relied on fictional distinctions to reduce harsh results from mechanical application of categories indicating traditional scheme no longer working); Note, *Torts - Landowner's Liability - Traditional Distinctions between Trespassers, Licensees and Invitees Abolished as Determinative of the Standard of Care Owed a Visitor,* 25 ALA. L. REV. 401, 403-04 n.14 (1973) (noting various exceptions carved out of rigid categories to avoid unjust results).

31. *See* Lyshak v. City of Detroit, 88 N.W.2d 596, 605 (Mich. 1958) (child's right to life unmaimed more important than landowner's right to maintain property as he chooses). Attractive nuisance has been defined as the creation of an unreasonsable risk to young children by the maintenance of some type of artificial condition on the property that is attractive to children. *See generally* Comment, *Torts - Negligence - Premises Liability: The Foreseeable Emergence of the Community Standard,* 51 DEN. L.J. 145, 153 (1974) (duty under attractive nuisance doctrine owed to trespassing children similar to duty owed to invitees).

32. *See* Herrick v. Wixom, 80 N.W. 117, 118 (Mich. 1899) (if occupier knows of and

American courts today is whether to retain the common law scheme with its strict categories and confusing exceptions,[34] or replace it with a more flexible standard of reasonable care under all circumstances.[35] Before analyzing the viability of the premises categories, a brief review of each category's requirements is necessary.

1. Trespassers

Trespassers enter onto the land of another without the express or implied consent of the occupant.[36] Because of the extreme lack of regard the common law courts had for trespassers or their safety,[37] the landowner owed no

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allows trespasser's presence on his land, trespasser owed duty of licensee); St. Louis S.W.R.R. v Douthit, 208 S.W. 201, 205 (Tex. Civ. App. — Dallas 1918, writ ref'd) (trespassers known to landowner and not ejected, landowner owed higher duty to warn of any latent defects). *See generally* Note, *Torts - Landowner's Liability - Traditional Distinctions Between Trespassers, Licensees, and Invitees Abolished as Determinative of the Standard of Care Owed a Visitor,* 25 ALA. L. REV. 401, 403-04 n.14 (1973) (noting exception of known trespassers). *But see* Peaslee, *Duty to See Trespassers,* 27 HARV. L. REV. 403, 403 (1914) (Massachusetts does not recognize known trespasser exception to traditional trespasser status).

33. *See* Southern R.R. v. Campbell, 309 F.2d 569, 571-72 (5th Cir. 1962) (known, frequent trespassers on small portion of property may be subjected to greater risk, thereby increasing duty of landowner to anticipate their presence and use ordinary care to avoid injury); Mariorenzi v. Joseph DiPonte, Inc., 333 A.2d 127, 131 n.2 (R.I. 1975) (landowner liable to frequent trespassers injured on small area of property with high risk of harm; called "beaten path" exception); *see also Recent Development,* 25 VAND. L. REV. 623, 627 n.31 (1972) (courts rely on fiction of frequent trespassers to mitigate otherwise harsh consequences of mechanical application of status categories).

34. *See* Olson v. Washington Country Club, 489 A.2d 895, 898 n.3 (Pa. Super. Ct. 1984) (common law distinctions diluted to point where lost validity, but should wait for proper case to abolish classification). *See generally Recent Development,* 25 VAND. L. REV. 623, 623 (1972) (proponents of traditional system claim workable approach to landowner liability maintained).

35. *See* Rowland v. Christian, 443 P.2d 561, 568, 70 Cal. Rprt. 97, 104 (1968) (continued adherence to traditional common law categories only causes unjust results, or additional exceptions to be created adding to overall confusion). *See generally* Note, *Tort Liability of Owners and Possessors of Land - A Single Standard of Reasonable Care Under the Circumstances Toward Invitees and Licensees,* 33 ARK. L. REV. 194, 201 (1979) (landownership today only qualified privilege, because landowner in best position to prevent harm to others, and thus must bear burden of precautionary measures).

36. *See* Texas-Louisiana Power Co. v. Webster, 127 Tex. 126, 128, 91 S.W.2d 302, 306 (1936) (trespasser enters land without lawful right or authority but merely for his own purposes); Rowland v. City of Corpus Christi, 620 S.W.2d 930, 933 (Tex. Civ. App. — Corpus Christi 1981, writ ref'd n.r.e.) (trespasser enters another's land without any lawful right or permission for own convenience or purposes, not for that of landowner); *see also* RESTATEMENT (SECOND) OF TORTS § 329 (1965) (trespassers least protected class because enter land without invitation or permission); 2 F. HARPER & F. JAMES, LAW OF TORTS § 27.3, at 1435 (1956) (trespasser is wrongdoer in eyes of common law).

37. *See* Scurti v. City of New York, 354 N.E.2d 794, 796, 387 N.Y.S.2d 55, 57 (1976) (common law valued rights of landownership over trespassers' injuries, thus placing trespass-

affirmative duty to trespassers,[38] except to refrain from wilfully or wantonly causing the trespasser injury.[39] It has been observed that under the traditional common law scheme, a landowner is allowed to be negligent towards a trespasser, as long as he refrains from intentionally harming the intruder.[40]

Texas has generally followed the traditional common law definition of trespassers and its attendant duty of care.[41] Texas courts have not been insensitive, however, when harsh results occur under the common law scheme.[42] This concern for justice has resulted in several judicially-created

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ers at lowest place on sliding scale of duties); *see also* 2 F. HARPER & F. JAMES, LAW OF TORTS § 27.3, at 1438 (1956) (landowner dominant class in feudal England, thus trespassers not protected under traditional scheme).

38. *See* Peterson v. Balach, 199 N.W.2d 639, 642 (Minn. 1972) (trespassers on property illegally, therefore, should still continue to distinguish between trespasser category and licensee/invitee because duty of care different); *see also* Hughes, *Duties to Trespassers: A Comparative Survey and Reevaluation,* 68 YALE L.J. 632, 637 (1959) (occupier owes no affirmative duty to trespasser to keep premises safe, only duty not to wilfully or wantonly injure entrant); James, *Tort Liability of Occupiers of Land: Duties Owed to Trespassers,* 63 YALE L.J. 144, 144-45 (1953) (occupier may pursue any activity on land except intentionally injuring trespasser).

39. *See* Burton Constr. & Shipbldg. Co. v. Broussard, 273 S.W.2d 598, 602 (Tex. 1954) (plaintiff mere trespasser, thus defendant only owed duty not to wilfully, wantonly, or through gross negligence injure plaintiff). Several possible rationales supporting the minimal duty of occupiers to trespassers include the unexpectedness of the trespasser's presence on the premises and the inequitable burden on the landowner as a result. *See generally Recent Development,* 25 VAND. L. REV. 623, 625 n.8 (1972) (trespassers usually unexpected, would not be equitable to place unreasonable burdens on landowner).

40. *See, e.g.,* Delhi-Taylor Oil Corp. v. Henry, 416 S.W.2d 390, 394 (Tex.) (landowner under no duty to warn employees of independent contractor of dangerous conditions, as it is contractor's duty), *cert. denied,* 389 U.S. 1021 (1967); Carlisle v. J. Weingarten, Inc., 137 Tex. 220, 223, 152 S.W.2d 1073, 1075 (1941) (if premises used for private purposes, occupier under no obligation to keep safe those who enter, except if they enter on express invitation); Burton-Lingo Co. v. Morton, 126 S.W.2d 727, 730-31 (Tex. Civ. App. — Eastland 1939) (duty owed by occupier to injured party nonexistent unless injured party had right to be there), *aff'd,* 136 Tex. 263, 150 S.W.2d 239 (1941); *see also* Keeton, *Personal Injuries Resulting From Open and Obvious Conditions,* 100 U. PA. L. REV. 629, 632 (1952) (common law restricted landowner's liability to trespassers solely for policy reasons, even if defendant was negligent).

41. *See, e.g.,* Texas-Louisiana Power Co. v. Webster, 127 Tex. 126, 128, 91 S.W.2d 302, 306 (1936) (trespasser one who enters another's property without lawful right, for his own purposes); Galveston Oil Co. v. Morton, 70 Tex. 400, 404, 7 S.W. 756, 758 (1888) (trespasser injured on land of another barred from recovery unless injury result of wilful or wanton conduct or through occupier's gross negligence); Streety v. Chambers, 368 S.W.2d 148, 150 (Tex. Civ. App. — Eastland 1963, writ ref'd n.r.e.) (landowner not liable for causing adult trespasser's death when not result of wilful or wanton acts or through gross negligence). *See generally* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?,* 36 MD. L. REV. 816, 832 n.91 (1977) (landowner may be negligent toward trespasser without breaching traditional duty of care).

42. *See, e.g.,* Burnett v. Fort Worth Light & Power Co., 102 Tex. 31, 36, 112 S.W. 1040, 1041 (1908) (twelve-year-old trespasser electrocuted on roof of defendant's building, denied recovery because no breach of care); Streety v. Chambers, 368 S.W.2d 148, 150 (Tex. Civ.

exceptions to the status categories that alleviate otherwise harsh results.[43] One such exception is the so-called attractive nuisance doctrine,[44] imposing a higher standard of care on the landowner for trespassing children[45] thereby allowing the child a greater chance of recovery.[46] A second limited exception to the traditional common law scheme requires easement holders

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App. — Eastland 1963, writ ref'd n.r.e.) (widow could not recover because defendant's actions as user of explosives were not wilfully, wantonly, or grossly negligent toward decedent); Ledbetter v. Ashland Oil & Ref. Co., 363 S.W.2d 492, 496 (Tex. Civ. App. — El Paso 1962, writ ref'd n.r.e.) (eleven-year-old trespasser riding machinery crushed leg, denied recovery because defendant did not breach applicable duty of care).

43. *See* Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 552 (Tex. 1985) (Kilgarlin, J., concurring) (recognizing several judicially-created exceptions to common law system). *See generally* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?,* 36 MD. L. REV. 816, 831-32 (1977) (noting other possible exceptions to trespasser category).

44. *See* Banker v. McLaughlin, 146 Tex. 434, 442, 208 S.W.2d 843, 847 (1948) (attractive nuisance doctrine implies children on premises by invitation of owner when strongly attracted to such premises); Mayes v. West Texas Utils. Co., 148 S.W.2d 950, 952 (Tex. Civ. App. — Eastland 1941, no writ) (owner liable for trespassing children's injuries caused by unusually attractive instrumentality on premises). *But see* Holt v. Fuller Cotton Oil Co., 175 S.W.2d 272, 275 (Tex. Civ. App. — Amarillo 1943, no writ) (eight-year-old's injury on landowner's premises not caused by attractive nuisance but by unfortunate chain of events). The policy reasons supporting the attractive nuisance exception to the traditional trespasser category include society's stronger interest in protecting children from serious injury than placing incidental burdens on the landowner. *See* Hughes, *Duties to Trespassers: A Comparative Survey and Reevaluation,* 68 YALE L.J. 632, 691 (1959) (social interest in protecting children of greater importance than landowner's burden to prevent injury).

45. *See, e.g.,* Banker v. McLaughlin, 146 Tex. 434, 437, 208 S.W.2d 843, 847 (1948) (small boy's drowning in pool of water on defendant's property foreseeable, landowner liable when preventative measures slight when compared to risk of injury); Gotcher v. City of Farmersville, 137 Tex. 12, 13, 151 S.W.2d 565, 566 (1941) (attractive nuisance liability justified by raising presumption of higher standard of care if landowner can reasonably foresee children would be attracted to his land); Carlisle v. J. Weingarten, 137 Tex. 220, 224, 152 S.W.2d 1073, 1076 (1941) (merchant owes duty of reasonable care to public invitees and their children, whether or not they purchase anything). *See generally Recent Development,* 25 VAND. L. REV. 623, 628 n.33 (1972) (attractive nuisance doctrine based on foreseeability of harm to trespassing child).

46. *See, e.g.,* United Zinc & Chem. Co. v. Britt, 258 U.S. 268, 275 (1922) (dangerous objects "attractive to children like baited hook to fish"); Eastburn v. Levin, 113 F.2d 176, 178 (D.C. Cir. 1940) (society benefits from encouraging landowners to protect small children); Burk Royalty Co. v. Pace, 620 S.W.2d 882, 885 (Tex. Civ. App. — Tyler 1981, no writ) (when possessor has reason to know small children would play on his oil wells, duty of care owed much higher, allowing child to recover). The elements that a child trespasser generally must prove to recover under the attractive nuisance doctrine are: 1) that he was injured by a foreseeably dangerous object or condition on defendant's land; 2) he failed to realize the risk of the harm; and 3) children usually played on the object or would be attracted to the condition if they happen to come upon defendant's land. *See* Comment, *The Common Law Tort Liability of Owners & Occupants of Land: A Trap for the Unwary?,* 36 MD. L. REV. 816, 832-33 (1977) (child trespasser treated as constructive invitee).

to meet a higher standard of care to maintain their interest to those entering the property.[47] This duty of maintenance extends even to would-be trespassers on the owner's land.[48] A third exception developed by Texas courts pertains to limited areas attracting frequent trespassers, holding the landowner liable if he makes the area unsafe without due warning.[49]

2. Licensees

While a licensee is not expressly or impliedly invited, he enters another's property with the landowner's express or implied permission, for reasons personal to the licensee.[50] Because the landowner has given some indication of his willingness to allow the licensee's presence on his property,[51] the

47. *See* Texas-Louisiana Power Co. v. Webster, 127 Tex. 126, 136, 91 S.W.2d 302, 305 (1936) (power company as easement holder owed duty of ordinary of care to maintain power lines within statutory guidelines); *see also* Comment, *Recent Trends in the Law Governing the Liability of the Occupant of Land for Personal Injuries,* 22 TEXAS L. REV. 489, 493 (1944) (*Webster* establishes general duty of care owed by easement holder to person crossing easement). *But see* Rehwalt v. American Falls Reservoir Dist. No. 2, 550 P.2d 137, 139 (Idaho 1976) (court rejected expansion of common law categories and their relevant duties to easement owner because would cause overzealous protection of property rights).

48. *See* Allen v. Texas and Pacific Ry. Co., 430 F.2d 982, 985-86 (5th Cir. 1970) (while easement holder has right to use property pursuant to his easement, rights are restricted by nature and terms of easement, and may not be extended to use that violates law); Texas-Louisiana Power Co. v. Webster, 127 Tex. 126, 136, 91 S.W.2d 302, 307 (1936) (power company negligent in allowing power lines to sag just above ground and liable for killing three trespassers, even though company did not own land but was merely easement holder); *see also,* F. HARPER & F. JAMES, THE LAW OF TORTS § 27.2, at 1433 (1956) (expansion of common law classifications to determine easement holder's duty to entrant acceptable, as unforeseeable presence of entrant taken into consideration in determination of duty).

49. *See* Gulf Ref. Co. v. Beane, 133 Tex. 157, 161-62, 127 S.W.2d 169, 171-72 (1939) (frequent trespassers to limited area of landowner's property owed higher standard of care if area made unsafe without notice); *see also* Comment, *Recent Trends in the Law Governing the Liability of the Occupant of Land for Personal Injuries,* 22 TEXAS L. REV. 489, 495 n.17 (1944) (liability for injuries to frequent trespassers to limited area imposed by deeming trespasser "licensee by acquiescence").

50. *See* Texas-Louisiana Power Co. v. Webster, 127 Texas. 126, 134, 91 S.W.2d 302, 306 (1936) (licensee on another's property through permission or mere sufferance, but not by invitation); Galveston Oil Co., v. Morton, 70 Tex. 400, 401, 7 S.W. 756, 758 (1888) (plaintiff injured by dangerous machinery on defendant's land mere trespasser, not licensee, because wrongfully entered property); *see also* Comment, *Recent Trends in the Law Governing the Liability of the Occupant of Land for Personal Injuries,* 22 TEXAS L. REV. 489, 490 (1944) (*Galveston Oil* regarded as starting point for injured licensees recovering against landowners).

51. *See* Hamilton v. Brown, 207 S.E.2d 923, 925 (W. Va. 1974) (licensee category created when owner grants permissive use of premises through express or implied consent). *See generally* James, *Tort Liability of Occupiers of Land: Duties Owed to Trespassers,* 63 YALE L.J. 144, 145 (1953) (occupier may do with land as he pleases in regard to trespasser, but owes duty to warn licensees of latent dangers on property).

courts view licensees slightly more favorably than trespassers.[52] The landowner's duty of care to licensees can be expressed in one of two different ways: the *Restatement* position relieving the landowner of any duty to inspect the property for dangers or warn the licensee of open and obvious conditions,[53] or the stricter view holding that the occupant has to refrain from wilfully or wantonly injuring the licensee.[54] Texas courts seem to adhere to the latter view, which requires a rigid interpretation of the licensee category.[55] Recent Texas decisions, however, indicate a willingness to apply the more reasonable *Restatement* position.[56]

3. Invitees

An invitee is a person entering the property of another by an express or implied invitation related to the occupant's activities.[57] The general test

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52. *See* Stewart v. Texas Co., 67 So. 2d 653, 465 (Fla. 1953) (licensees least favored in common law scheme that are not actually wrongdoers); Yolowizer v. Husky Oil Co., 629 P.2d 465, 469 (Wyo. 1981) (licensees more favored than trespassers because have not committed any wrong).

53. *See* RESTATEMENT (SECOND) OF TORT §§ 341, 342 (1965). Examples of licensees permitted by the landowner to remain on his land are social guests, salesmen unsolicited by the owner, and loiterers at a bus or train station. *See* Prosser, *Business Visitors and Invitees,* 26 MINN. L. REV. 573, 589 (1942).

54. *See* Rowland v. City of Corpus Christi, 620 S.W.2d 930, 933 (Tex. Civ. App. — Corpus Christi 1981, writ ref'd n.r.e.) (landowner owes duty not to wilfully, wantonly, or through gross negligence injure licensee). *See generally* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?,* 36 MD. L. REV. 816, 826 (1977) (noting *Restatement* position and stricter view with resultant duties of care).

55. *See* Texas-Louisiana Power Co. v. Webster, 127 Tex. 126, 134, 91 S.W.2d 302, 306 (1936) (under general rule, owner under no obligation to make premises safe for licensees entering without express or implied invitation); Holt v. Fuller Cotton Oil Co., 175 S.W.2d 272, 274 (Tex. Civ. App. — Amarillo 1943, no writ) (without knowledge of licensee's presence, owner's duty merely to refrain from intentionally injuring licensee).

56. *See, e.g.,* State v. Tennison, 509 S.W.2d 560, 562 (Tex. 1974) (exception to proprietor's duty of care to licensees arises when landowner knows of condition likely to cause injury, has duty to warn licensee); Buchholz v. Steitz, 463 S.W.2d 451, 454 (Tex. Civ. App. — Dallas 1971, writ ref'd n.r.e.) (noting *Restatement* position but declining to apply it to present fact situation); Gonzalez v. Broussard, 274 S.W.2d 737, 738-39 (Tex. Civ. App. — San Antonio 1954, writ ref'd n.r.e.) (exception to general rule of owner's duty to licensees when occupier knows of dangerous condition on land, must warn known licensees or make property reasonably safe). *See generally* Keeton, *Torts — Occupiers of Land,* 25 SW. L.J. 1, 5 (1971) (if Texas courts would adopt dangerous condition rule, distinction between licensees and invitees would be abolished).

57. *See* Adam Dante Corp. v. Sharpe, 483 S.W.2d 452, 455 n.1 (Tex. 1972) (court identifies basic issues involved in typical invitee-landowner cases); Rowland v. City of Corpus Christi, 620 S.W.2d 930, 933 (Tex. Civ. App. — Corpus Christi 1981, writ ref'd n.r.e.) (landowner owes invitee duty to maintain premises in reasonably safe condition and discover latent defects through inspection). Among the various entrants that are recognized as invitees are store customers, doctor's patients in the waiting room or hospital, deliverymen, and postmen.

used to determine if the plaintiff was an invitee at the time of the injury is whether his presence also benefits the landowner.[58] Under the common law scheme, the occupier owes invitees the highest standard of care—reasonable care under all circumstances.[59] Thus, invitees occupy the most protected position of the common law categories,[60] because the landowner benefits

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See James, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees,* 63 YALE L.J. 605, 612-27 (1954) (recitation of possible fact situations where person entering land classified as invitee). *But see* Keeton, *Torts, Annual Survey of Texas Law,* 23 SW. L.J. 1, 14 (1969) (better description of invitee as business guest with actual or apparent consent of occupier given for business reasons, avoiding subtle distinction between invitation and consent).

58. *See* Cowart v. Meeks, 131 Tex. 36, 40, 111 S.W.2d 1105, 1107 (Tex. 1938) (difficult to distinguish between licensee and invitee but test stated helps clarify distinction); Crum v. Stasney, 404 S.W.2d 72, 74 (Tex. Civ. App. — Eastland 1966, no writ) (test used to distinguish invitee from licensee whether entrant on premises by invitation to transact mutually beneficial business). Besides the invitation test, another theory states that because the occupant receives some actual or possible financial benefit, he is under the highest duty to keep the premises safe for the invitee. *See generally* 2 F. HARPER & F. JAMES, LAW OF TORTS § 27.12, at 1478 (1956) (economic benefit theory also explains why landowner must bear burden of liability to injured invitee). Texas, along with a majority of other states, follows the invitation theory to determine when the plaintiff is an invitee. *See, e.g.,* Trowell v. United States, 526 F. Supp. 1009, 1012-13 (M.D. Fla. 1081) (plaintiff-camper impliedly invited to enter recreational area as member of general public, thus United States as landowner owed her duty of reasonable care to keep premises safe, applying invitation test); Arambula v. J. M. Dellinger, Inc., 415 S.W.2d 456, 459 (Tex. Civ. App. — San Antonio 1967, error ref'd n.r.e.) (facts and circumstances surrounding entry determine plaintiff's status, such as whether there was implied invitation because of mutual benefit); Colonial Natural Gas Co. v. Sayers, 284 S.E.2d 599, 601-02 (Va. 1981) (Virginia follows invitation theory to determine when entrant becomes invitee). *See generally* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?,* 36 MD. L. REV. 816, 825 (1977) (invitation theory used in more jurisdictions than economic benefit test).

59. *See, e.g.,* Carlisle v. Weingarten, 137 Tex. 220, 221, 152 S.W.2d 1073, 1075 (1941) (defendant owes duty of ordinary care to keep premises reasonably safe to avoid injuring invitees); Texas-Louisiana Power Co. v. Webster, 127 Tex. 126, 134, 91 S.W.2d 302, 306 (1936) (if owner invites public to enter his land, owner owes duty of reasonable care to invitees, warning them of concealed or latent dangers); Furrs, Inc. v. Patterson, 618 S.W.2d 417, 419 (Tex. Civ. App. — Amarillo 1981, no writ) (owner's basic duty of care to invitees to keep premises in reasonably safe condition). *But see* Brownsville & Matamoros Bridge Co. v. Null, 578 S.W.2d 774, 781 (Tex. Civ. App. — Corpus Christi 1978, writ ref'd n.r.e.) (landowner not absolute insurer of all invitees' safety while on premises). *See generally* Comment, *Allegation of Negligent Operating Procedures in Slip & Fall Actions After Corbin v. Safeway Stores,* 15 ST. MARY'S L.J. 403, 404 (1984) (Texas business proprietors owe duty of reasonable care to invitee in maintenance of premises).

60. *See* Holt v. Fuller Cotton Oil Co., 175 S.W.2d 272, 274 (Tex. Civ. App. — Amarillo 1943, no writ) (occupiers' duty to warn and keep premises reasonably safe only applied to invitees, not licensees or trespassers); *see also* James, *Tort Liability of Occupiers of Land: Duties Owed to Trespassers,* 63 YALE L.J. 144, 145 (1953) (invitees only common law category occupier owes affirmative duty of care to discover and either remedy defect or warn invitee of its presence).

from the invitee's presence.[61]

Texas had developed a unique exception to the standard duty of care owed to invitees by a business proprietor.[62] Besides looking at the landowner's actions to determine if negligence occurred,[63] Texas courts also required examination of the plaintiff's conduct to determine if he voluntarily exposed himself to the risk.[64] If such was the case, the store owner had no duty[65] to warn of the dangerous condition, and the plaintiff failed to recover.[66] Recently, however, the Texas Supreme Court abolished[67] the "no-duty" doc-

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61. *See, e.g.,* Rosas v. Buddies Food Store, 518 S.W.2d 534, 536 (Tex. 1975) (occupier owes highest duty care to business invitee, because invitee's presence mutually beneficial); Rowland v. City of Corpus Christi, 620 S.W.2d 930, 933 (Tex. Civ. App. — Corpus Christi 1981, writ ref'd n.r.e.) (licensee and invitee differentiated by benefit landowner receives); St. Louis S.W. R.R. v. Rea, 202 S.W. 812, 813 (Tex. Civ. App. — Texarkana 1918, no writ) (business proprietor owes duty of reasonable care to public because he benefits from their presence on premises); *see also* Keeton, *Torts, Annual Survey of Texas Law,* 23 Sw. L.J. 1, 14 (1969) (occupier recognizes it is to his benefit to permit invitee's intrusion).

62. *See, e.g.,* Robert E. McKee, Gen. Contractor, Inc. v. Patterson, 153 Tex. 517, 520-21, 271 S.W.2d 391, 393 (1954) (under no-duty exception, invitee must prove defendant breached duty of care and that invitee lacked knowledge or appreciation of danger); Great Atl. & Pac. Tea Co. v. Giles, 354 S.W.2d 410, 414 (Tex. Civ. App. — Dallas 1962, writ ref'd n.r.e.) (no-duty rule requires occupiers' knowledge of hazard causing fall before held liable); H. E. Butt Grocery Co. v. Johnson, 226 S.W.2d 501, 502 (Tex. Civ. App. — San Antonio 1949, writ ref'd n.r.e.) (proof of defendant's knowledge of hazard established liability because has duty to warn or take reasonable precautions to protect invitees).

63. *See* Parker v. Highland Park, Inc., 565 S.W.2d 512, 516 (Tex. 1978) (proprietor must protect invitees from dangers known to him or conditions he should have known under reasonable care standard); Smith V. Henger, 148 Tex. 456, 457, 226 S.W.2d 425, 431 (1950) (occupier owes duty to inspect and discover dangerous conditions).

64. *See* Ellis v. Moore, 401 S.W.2d 789, 793 (Tex. 1966) (no-duty doctrine mixes plaintiff's own knowledge of dangerous condition with occupiers' duty to exercise reasonable care); Halepeska v. Callihan Interests, Inc., 371 S.W.2d 368, 371 (Tex. 1963) (when invitee has knowledge of open and obvious danger will lose under no-duty rule).

65. *See* Parker v. Highland Park Inc., 565 S.W.2d 512, 516 (Tex. 1978) (occupier owes no duty to warn invitee of danger invitee already has knowledge and full appreciation of).

66. *See id.* at 517 (no-duty rule defeats plaintiff's cause of action when plaintiff's own knowledge sufficient to meet requirements of rule, thus liability of defendant cut off); Rosas v. Buddies Food Store, 518 S.W.2d 534, 538 (Tex. 1975) (failure of plaintiff to recover under no-duty rule explained by intrusion of subjective intent of plaintiff into objective negligence standard); *see also* Keeton, *Assumption of Products Risk,* 19 Sw. L.J. 61, 67-69 (1965) (no-duty concept really new formulation of doctrine of assumption of risk).

67. *See* Parker v. Highland Park, Inc., 565 S.W.2d 512, 517-19 (Tex. 1978) (no-duty concept abolished because of resultant confusion, unpredictability and harsh results); Furr's Inc. v. Patterson, 618 S.W.2d 417, 419 (Tex. Civ. App. — Amarillo 1981, no writ) (with abolition of no-duty doctrine, premises cases tried on general negligence principles of duty, breach, causation and damage). *See generally* Comment, *Allegations of Negligent Operation Procedures in Slip & Fall Actions After Corbin v. Safeway Stores,* 15 ST. MARY'S L.J. 403, 403 (1984) (historical review and analysis of impact of abolition of no-duty rule to slip and fall cases).

trine,[68] returning this type of premises liability case to general negligence principles.[69] As a result, the issue of proximate cause, with its elements of cause in fact and foreseeability,[70] remain the key considerations in determining whether the landowner breached his duty of reasonable care to the invitee.[71]

An altogether different fact situation addressed by Texas courts involves criminal acts of third parties against invitees.[72] The pivotal issue in these

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68. *See* Robert E. McKee, Gen. Contractor, Inc. v. Patterson, 153 Tex. 517, 520-21, 271 S.W.2d 391, 394 (1954) (conduct of invitee must also be examined to determine if voluntarily exposed self to risk that owner had no duty to warn of). *But see* Parker v. Highland Park, Inc., 565 S.W.2d 512, 516 (Tex. 1978) (plaintiff's additional burden to negate owner's no-duty to warn clumsy concept). The *Parker* court explained that the no-duty concept usually defeated plaintiff's cause of action, because plaintiff's own knowledge of the open and obvious danger would terminate the action before the court reached the issue of defendant' negligence. *See id.* at 517.

69. *See* Parker v. Highland Park, Inc., 565 S.W.2d 512, 517 (Tex. 1978) (general negligence principles and comparative negligence will now determine reasonableness of actor's conduct under surrounding circumstances); *see also* Furr's Inc. v. Patterson, 618 S.W.2d 417, 419 (Tex. Civ. App. — Amarillo 1981, no writ) (premises cases now tried under negligence principles and reasonable duty of care under circumstances). *See generally* Comment, *Allegations of Negligent Operating Procedures in Slip & Fall Actions After Corbin v. Safeway Stores,* 15 ST. MARY'S L.J. 403, 404 (1984) (analysis of current slip and fall cases in Texas and requisite duty of care by store owners).

70. *See, e.g.,* Missouri Pac. R.R. v. American Statesman, 552 S.W.2d 99, 103 (Tex. 1977) (under ordinary negligence principles proximate cause consists of cause in fact and foreseeability); Carey v. Pure Distrib. Corp., 133 Tex. 31, 35, 124 S.W.2d 847, 849 (1930) (in negligence cases, mere showing of negligence insufficient to impose liability; plaintiff must show defendant's act proximate cause of injuries and was reasonably foreseeable); Northwest Mall, Inc. v. Lubri-Lon Int'l, 681 S.W.2d 797, 803 (Tex. App. — Houston [14th Dist.] 1984, no writ) (proximate cause composed of two elements - cause in fact and foreseeability).

71. *See* Smith v. Arbaugh's Restaurant, 469 F.2d 97, 100 (D.C. Cir. 1972) (landowner must maintain property in reasonably safe manner, considering likelihood and seriousness of possible injury to others versus burden of precautionary measures), *cert. denied,* 412 U.S. 939 (1973); Peterson v. Balach, 199 N.W.2d 639, 647 (Minn. 1972) (test of reasonable care determines landowner's duties, taking into consideration factors surrounding entrant's presence on premises, as well as expected use of property). *See generally* Comment, *Torts - Negligence - Premises Liability: The Foreseeable Emergence of the Community Standard,* 51 DENV. L.J. 145, 161 (1974) (common law exceptions to original categories implicit recognition that these particular plaintiffs were more foreseeable than under applicable category).

72. *See, e.g.,* Bicknell v. Lloyd, 635 S.W.2d 150, 152 (Tex. App. — Houston [1st Dist.] 1982, no writ) (property owner may be responsible for creating unreasonable risk of harm to invitee through third party's foreseeable acts); Walkovick v. Hilton Hotels Corp., 580 S.W.2d 623, 625 (Tex. Civ. App. — Houston [14th Dist.] 1979, writ ref'd n.r.e.) (business proprietor owes duty of reasonable care to protect invitees from foreseeable acts by third parties); Eastep v. Jack-In-The-Box, Inc., 546 S.W.2d 116, 118 (Tex. Civ. App. — Houston [14th Dist] 1977, writ ref'd n.r.e.) (invitees owed reasonable duty care to be protected from assaultive third parties while on defendant's premises); *see also* Keeton, *Torts — Liability of Occupier for Misconduct of Third Persons,* 25 SW. L.J. 1, 6 (1971) (proprietor liable for failure to take precautionary measures, thus increasing likelihood of injury).

cases is whether the landowner or the occupant of the property could have reasonably foreseen that injury would result to an invitee because of third party criminal actions,[73] even though the landowner had no control over the third parties.[74] If there have been past incidents or occurrences on the premises involving third party criminal activity, Texas courts have almost uniformly held the landowner liable,[75] even though the defense of superceding cause is raised.[76] As a result, plaintiff's invitee status and its attendant duty of reasonable care ensure recovery from the landowner for third party criminal actions that occur on defendant's land.[77]

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73. *See, e.g.,* Northwest Mall v. Lubri-Lon Int'l, 681 S.W.2d 797, 803 (Tex. App. — Houston [14th Dist.] 1984, no writ) (if third party's intervening action was foreseeable, negligence of property owner not excused); Bicknell v. Lloyd, 635 S.W.2d 150, 152 (Tex. App. — Houston [1st Dist.] 1982, no writ) (unsupervised electric cart continuing temptation to children who might play on it, thus injury to plaintiff foreseeable); Morris v. Barnette, 553 S.W.2d 648, 650 (Tex. Civ. App. — Texarkana 1977, writ ref'd n.r.e.) (washateria operator's duty to exercise reasonable care if criminal activity foreseeable, based on location and past occurrences). *See generally* Comment, *Negligence Liability for the Criminal Acts of Another,* 15 JOHN MARSHALL L. REV. 459, 461 (1982) (liability based on property owner's breach of duty to protect victim).

74. *See* Parker & Parker Constr. Co. v. Morris, 346 S.W.2d 922, 924 (Tex. Civ. App. — El Paso 1961, no writ) (even when car owner left keys in ignition and thieves stole car, owner not liable to third persons for resulting damages); *see also* Bicknell v. Lloyd, 635 S.W.2d 150, 152 (Tex. App. — Houston [1st Dist.] 1982, writ ref'd n.r.e.) (negligent omission by landowner creating opportunity for third party's foreseeable mischief makes landowner liable).

75. *See* Walkoviak v. Hilton Hotels Corp., 580 S.W.2d 623, 625-26 (Tex. Civ. App. — Houston [14th Dist.] 1979, writ ref'd n.r.e.) (previous incidents of criminal activity in hotel parking lot put duty on hotel to take precautionary measures to prevent further foreseeable attacks); Morris v. Barnette, 553 S.W.2d 648, 650 (Tex. Civ. App. — Texarkana, 1977, writ ref'd n.r.e.) (usually possessor not insurer of invitee's safety, but if has reason to know from past experience of possible criminal acts by third parties, under duty to take reasonable precautions); *see also* Keeton, *Torts — Liability of Occupier for Misconduct of Third Persons,* 25 Sw. L.J. 1, 6 (1971) (failure to take precautionary measures when reasonable person would have in same circumstances may impose liability on occupier).

76. *See* Northwest Mall v. Lubri-Lon Int'l, 681 S.W.2d 797, 803 (Tex. App. — Houston [14th Dist.] 1984, no writ) (invervening cause of third party not superceding cause relieving defendant of liability, when foreseeable injury to patron may occur); Walkovik v. Hilton Hotels Corp., 580 S.W.2d 623, 627-28 (Tex. Civ. App. — Houston [14th Dist.] 1979, writ ref'd n.r.e.) (defense of independent superceding cause not valid when evidence supports foreseeability of criminal activity on hotel premises).

77. *See, e.g.,* Northwest Mall v. Lubri-Lon Int'l, 681 S.W.2d 797, 803-04 (Tex. App. — Houston [14th Dist.] 1984, no writ) (plaintiff produced adequate evidence to support contention that vandalism and spillage of waste oil containers would cause slippery area and foreseeable injury); Bicknell v. Lloyd, 635 S.W.2d 150, 152 (Tex. App. — Houston [1st Dist.] 1982, no writ) (similar past incidents as one causing injury to plaintiff sufficient to support defendant's breach of duty to take precautionary measures); Walkoviak v. Hilton Hotels, Corp., 580 S.W.2d 623, 625-26 (Tex. Civ. App. — Houston [14th Dist.] 1979, writ ref'd n.r.e.) (reasonable to infer possible injury from criminal activities to plaintiff when had similar occurrences in past). At least one commentator has noted three factors that determine defendant's liability

As can be seen from this brief review of the common law status categories in Texas, uniformity in application has been the exception rather than the rule.[78] This dissatisfaction with the rigidity of the categories,[79] as evidenced by the numerous exceptions created to achieve equitable results,[80] is also

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for the criminal acts of others: 1) the amount of defendant's control and ability to take precautionary measures, 2) the foreseeability of the harm, and 3) the interest of the public in crime prevention. *See* Comment, *Negligence Liability for the Criminal Acts of Another,* 15 JOHN MARSHALL L. REV. 459, 473 (1982). It should be noted that liability has been denied in other jurisdictions if the injured party was a stranger to the premises and was attacked by another stranger. *See* City of Mobile v. Largay, 346 So. 2d 393, 395 (Ala. 1977) (injury to plaintiff result of independent, intervening cause not reasonably foreseeable; thus city's failure to lock cellar not proximate cause of plaintiff's rape); Totten v. More Oakland Residential Hous., Inc., 63 Cal. App. 3rd 538, 542, 134 Cal. Rptr. 29, 33 (Cal. Ct. App. 1976) (imposition of duty on landlord to protect strangers on premises from criminal acts of third parties unwarranted).

78. *See* Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 552 (Tex. 1985) (Kilgarlin, J., concurring) (noting multiple exceptions such as attractive nuisance and obvious dangerous condition, to traditional common law scheme in jurisdictions still following it, including Texas). *See generally* Note, *Tort Liability of Owners and Possessors of Land - A Single Standard of Reasonable Care Under the Circumstances Towards Invitees and Licensees,* 33 ARK. L. REV. 194, 197 (1979) (rigid application of status categories resulted in nonuniformity in all jurisdictions following traditional scheme).

79. *See* Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630-31 (1959) (multitude of exceptions to common law categories arose because of rigidity of application). The specific language in the *Kermarec* decision that is used by abolitionists to support their position is that "the classifications and subclassifications bred by the common law have produced confusion and conflict . . . through the semantic morass the common law has moved . . . towards imposing on owners and occupiers a single duty of reasonable care in all the circumstances." *Id.* at 631. The mechanical application of the common law categories has been criticized by numerous state courts as well. *See, e.g.,* Webb v. City and Borough of Sitka, 561 P.2d 731, 733 (Alaska 1977) (negligence test of reasonable man will now be used to determine landowner's liability to injured plaintiff); Rowland v. Christian, 443 P.2d 561, 567, 70 Cal. Rptr. 97, 103 (1968) (easy to mechanically apply rigid common law categories, but difficulty arises when unjust results occur); Scurti v. City of New York, 354 N.E.2d 794, 798, 387 N.Y.S.2d 55, 59 (1976) (rigidity of status categories apparent in wide variety of fact situations, but courts tend to rely on legal fictions to mitigate harsh results, instead of abolishing categories). It should be noted that England expressed its dissatisfaction with the subtle distinctions between invitees and licensees by statute in 1957. *See* Occupier's Liability Act, 5 & 6 Eliz. 2, c.31 (1957) (uniform duty of care imposed on occupier towards invitees and licensees, but trespasser category remains unchanged). *See generally* Payne, *The Occupiers' Liability Act,* 21 MOD. L. REV. 359, 359-60 (1958) (providing detailed explanation and analysis behind Act, as well as it's possible ramifications). Connecticut is the only American jurisdiction to follow England's lead in abolishing the distinction between licensees and invitees by statute. *See* CONN. GEN. STAT. ANN. § 52-557a (West Supp. 1985) (standard of care to licensee same as to invitee).

80. *See* Peterson v. Balach, 199 N.W.2d 639, 644 (Minn. 1972) (inequities and exceptions developed over many years in applying rigid categories to various fact situations); Ouellette v. Blanchard, 364 A.2d 631, 632 (N.H. 1976) (exceptions created to ameloriate harsh results of common law status categories render such categories useless as rules of law). Examples of such judicially-created exceptions include the attractive nuisance doctrine, known or frequent

quite common in other states that have followed the common law scheme.[81] In the last two decades, nine states[82] have taken the bold step of repudiating the common law categories in favor of imposing a reasonable care standard that is applicable under all circumstances.[83] These jurisdictions, however, still consider the status categories as one factor among many in the factual determination of the landowner's liability.[84] This growing minority has re-

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trespasses, and public officials entering the premises to perform their duties. *See, e.g.,* Palmer v. Gordon, 53 N.E. 909, 909-10 (Mass. 1899) (trespassers that are either known or frequently appear on landowner's property owed higher duty of care); Lyshake v. City of Detroit, 88 N.W.2d 596, 605 (Mich. 1958) (attractive nuisance doctrine applied to owner of golf course); Paubel v. Hitz, 96 S.W.2d 369, 371 (Mo. 1936) (mailman classified as invitee when entered premises in performance of official duties). *See generally* Note, *Tort Liability of Owners and Possessors of Land - A Single Standard of Reasonable Care Under the Circumstances Towards Invitees and Licensees,* 33 ARK. L. REV. 194, 201 (1979) (exceptions to common law categories part of erosion process that threatens to swallow up distinctions).

81. *See* Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 631 (1959) (uniformity in application of common law categories has not occurred since their adoption); *see also* Ouellette v. Blanchard, 364 A.2d 631, 632-33 (N.H. 1976) (noting many judicially-created exceptions in application of common law categories). *See generally* Note, *Tort Liability of Owners and Possessors of Land - A Single Standard of Reasonable Care Under the Circumstances Towards Invitees and Licensees,* 33 ARK. L. REV. 194, 197 (1979) (most jurisdictions following common law categories have created exceptions).

82. *See* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 99 (D.C. Cir. 1972) (eighteenth-century rules of liability do not provide adequate tools to allocate risk of injury in modern society), *cert. denied,* 412 U.S. 939 (1973); Webb v. City and Borough of Sitka, 561 P.2d 731, 732 (Alaska 1977) (rigid common law categories too subtle and confusing to use in today's society); Rowland v. Christian, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968) (status distinctions obscure instead of clarify proper factors that should be considered in determination of liability); Mile High Fence Co. v. Radovich, 489 P.2d 308, 312-13 (Colo. 1971) (status classifications cause judicial waste, harsh results and take issue of defendant's liability away from jury); Pickard v. City and County of Honolulu, 452 P.2d 445, 446 (Hawaii 1969) (common law categories not logically related to exercise of reasonable care of landowner/occupier to others entering his property); Cates v. Beauregard Elec. Coop., 328 So. 2d 367, 370 (La. 1976) (analysis of plantiff's status unnecessary in determining landowner's liability for plaintiff's injury); Ouellette v. Blanchard, 364 A.2d 631, 634 (N.H. 1976) (owners and occupiers of land must act reasonably in maintenance of their land, taking into account surrounding circumstances of intrusion); Basso v. Miller, 352 N.E.2d 868, 877, 386 N.Y.S.2d 564, 573 (1976) (rigid common law categories abolished, but court function and proof standard remain unchanged); Mariorenzi v. Joseph DiPonte, Inc., 333 A.2d 127, 132 (R.I. 1975) (abolished status categories in favor of basic reasonableness test of torts).

83. *See* Peterson v. Balach, 199 N.W.2d 639, 644 (Minn. 1972) (law regarding permises liability should be merged into general negligence law). *But see* Yalowizer v. Husky Oil Co., 629 P.2d 465, 468 (Wyo. 1981) (majority of states have resisted abolishing common law categories, thus proving status classifications still viable).

84. *See, e.g.,* Rowland v. Christian, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968) (plaintiff's status relegated to proper place in determining landowner's liability, as one factor among many); Gibo v. City and County of Honolulu, 459 P.2d 198, 200 (Hawaii 1969) (whether plaintiff invitee, licensee, or trespasser only one factor in determination of defendant's possible liability); Shelton v. Aetna Cas. & Sur. Co., 334 So. 2d 406, 410 (La. 1976) (status of

fused to be bound by the constraint of precedent that no longer is justifiable in modern society,[85] and have brought premises liability cases into the realm of modern tort principles.[86]

B. *Effect of* Stare Decisis

The present controversy of whether the common law status categories should be replaced with a general duty of reasonable care can be reduced to basic differences in judicial philosophy concerning the legal process.[87] Abolitionists of the common law categories urge a more liberal approach to the doctrine of *stare decisis,*[88] particularly when the reasons underlying the cate-

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plaintiff may affect defendant's liability but not determinative). Professor Henderson, however, contends that courts should completely abolish the categories, instead of retaining them as one factor among many in the determination of defendant's liability. *See* Henderson, *Expanding the Negligence Concept: Retreat From the Rule of Law,* 51 IND. L.J. 512-13 (1976) (courts abolishing distinctions really attacking formalities of common law categories, not underlying policy considerations); *see also* Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions,* 1981 UTAH L. REV. 15, 18 (general negligence formula will not work as well when facts involve defining contours of relationships, such as between landowner and entrant).

85. *See, e.g.,* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 105 (D.C. Cir. 1972) (*stare decisis* should not prevent new developments by responding to modern social mores), *cert. denied,* 412 U.S. 939 (1973); Webb. v. City and Bourough of Sitka, 561 P.2d 731, 732 (Alaska 1977) (refusal to follow rigid common law categories break with precedent); Ouellette v. Blanchard, 364 A.2d 631, 634 (N.H. 1976) (can no longer justify adherence to system that is complex, confusing, and inequitable). *See generally* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?,* 36 MD L. REV. 816, 846 (1977) (precedent should be overruled if no longer viable or justifiable in its results).

86. *See* Peterson v. Balach, 199 N.W.2d 644 (Minn. 1972) (courts should impose reasonable man standard on landowner, treating him just like any other alleged tortfeasor). *See generally* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?,* 36 MD. L. REV. 816, 846, 850 (1977) (common law rules no longer should be enforced as rules of law because too complex in application and fail to reflect current negligence policies). *But see* Payne, *Occupiers' Liability Act,* 21 MOD. L. REV. 359, 374 (1958) (abolitionists ignore continuing need for check in judicial discretion, as well as jury misconduct, which common law rules provide).

87. *Compare* Gerchberg v. Loney, 576 P.2d 593, 597 (Kan. 1978) (factors that jury must weigh under proposed reasonable man standard beyond their capability) *with* Quilan v. Cecchini, 363 N.E.2d 578, 581, 394 N.Y.S.2d 872, 875 (1977) (under reasonable care standard, court still has duty to examine facts to set parameters of possible negligence of landowner); *see also* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?,* 36 MD. L. REV. 816, 844-45 (1977) (repudiation of status categories reflects liberal view of *stare decisis).*

88. *See, e.g.,* Rowland v. Christian, 443 P.2d 566-67, 70 Cal. Rptr. 97, 103-04 (1968) (complexity and confusion tolerated if underlying rational governing liability based on relevant considerations); Ouellette v. Blanchard, 364 A.2d 631, 634 (N.H. 1976) (respect for precedent and stability must give way to growth and change as required by modern society); Basso v. Miller, 352 N.E.2d 868, 871-72, 387 N.Y.S.2d 564, 567-68 (1976) (rigid common law categories abandoned because no longer necessary in determination of landowner's liability); *see also*

gories no longer exist.[89] Abolitionists also argue that the premises categories have become so cumbersome in their application as to raise serious doubts concerning their reliability and fairness.[90] Opponents of abolition contend that a strict approach should be taken when considering the constraints of precedent,[91] to preserve legal stability, and to minimize any possibility of egregious errors because of comprehensive change.[92] While courts adhering to a strict interpretation of *stare decisis* advocate the position that legislatures are the proper institutions to make sweeping modifications in the law,[93]

Payne, *Occupiers' Liability Act,* 21 MOD. L. REV. 359, 373 (1958) (legal system's rigid categories operate arbitrarily in borderline cases, but small price to pay in return for predictability and elimination of bias).

89. *See* Rowland v. Christian, 443 P.2d 561, 567, 70 Cal. Rptr. 97, 103 (1968) (underlying rationale of status categories no longer relevant in light of modern society; thus need to follow precedent baseless); Sargent v. Ross, 308 A.2d 528, 534 (N.H. 1973) (rules that no longer reflect modern social and judicial philosophies should be abolished); *see also* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?,* 36 MD. L. REV. 816, 846 (1977) (liberal courts break with precedent by becoming more activist when change supported by compelling reasons and legislative refusal to act).

90. *See, e.g.,* Rowland v. Christian, 443 P.2d 561, 564-69, 70 Cal. Rptr. 97, 100-05 (1968) (conservative approach tried with unsatisfactory results, making broad overruling of precedent only reasonable alternative); Mile High Fence Co. v. Radovich, 489 P.2d 308, 312 (Colo. 1971) (citing *Smith v. Windsor Reservoir & Canal Co.* that came before Colorado Supreme Court four different times because of different interpretations of common law categories); Mariorenzi v. Joseph DiPonte, Inc., 333 A.2d 127, 133 (R.I. 1975) (abolishing semantical morass of common law categories, along with its attendant exceptions and extrapolations). Courts that have refused to overrule precedent are "virtually forced to acccomplish reform by devising a labyrinth of rules with dubious and unpredictable implications . . . rigorous judicial abstention from overruling precedents defeats the very stability that those who embrace it are trying to preserve." KEETON, VENTURING TO DO JUSTICE 15 (1969).

91. *See, e.g.,* Wood v. Camp, 284 So. 2d 691, 696 (Fla. 1973) (refused to break with precedent because reasons underlying common law distinctions still valid); Ouellette v. Blanchard, 364 A.2d 631, 637 (N.H. 1976) (Grimes, J., dissenting) (common law categories well-settled and should be followed instead of substituting vague standard of reasonable care); Yalowizer v. Husky Oil Co., 629 P.2d 465, 468 (Wyo. 1981) (trend toward abolishing categories still minority position, citing appellate court decisions in states refusing to abolish categories). *See generally* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?,* 36 MD. L. REV. 816, 844-45 (1977) (noting courts' concern for maintaining integrity of judicial decision-making by avoiding inequitable results on litigants as determinative of approach to *stare decisis). But see* KEETON, VENTURING TO DO JUSTICE 16 (1969) (mature legal systems require more breaks with precedent than system in earlier phase of development, because as precedents accumulate, judicial creativity constricted).

92. *See* Basso v. Miller, 352 N.E.2d 868, 875, 386 N.Y.S.2d 564, 572 (1976) (Breitel, C.J., concurring) (criticism of common law rules has merit, but majority's sweeping solution radically destructive of adaptability of common law to change); *see also* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?,* 36 MD. L. REV. 816, 846 (1977) (policy supporting status and negligence theories identical because both consider same factors, thus reducing potential for fundamental policy errors by rapid change).

93. *See, e.g.,* Rowland v. Christian, 443 P.2d 561, 569, 70 Cal. Rptr. 97, 105 (1968)

such reluctance to act can produce more harm than good.[94] The very stability sought through *stare decisis* defeats judicial integrity, by preventing the courts from reacting to new social pressures and changing policy rationales.[95] Strict adherence to precedent erodes the very stability trying to be preserved by the common law system, thereby prompting judicially-created exceptions designed to mitigate otherwise harsh or unjust results that predictably occur under the traditional scheme.[96] *Stare decisis* therefore becomes a doctrine which undermines the common law system of premises liability, leaving an often inequitable morass of uncertainty and inconsistency.[97]

(Burke, J., dissenting) (legislature proper forum to decide major changes in tort liability as all affected persons can be heard); Bramble v. Thompson, 287 A.2d 265, 268 (Md. 1972) (court will continue to adhere to precedent until Maryland legislature indicates by statute different direction); Mariorenzi v. Joseph DiPonte, Inc., 333 A.2d 127, 133 (R.I. 1975) (Joslin, J., dissenting) (case calls for deference to legislature by judicial restraint).

94. *See* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 102 (D.C. Cir. 1972) (empirical and moral judgments best left to community as whole, but without legislative action, next step to allow jury as representative of community to decide such issues), *cert. denied,* 412 U.S. 939 (1973); *see also* KEETON, VENTURING TO DO JUSTICE 17-18 (1969) (modern legislatures deal only with compelling needs, thus potential for law reform diminished greatly, placing more responsibility on courts to overrule precedent to initiate reform).

95. *See* Sargent v. Ross, 308 A.2d 528, 534 (N.H. 1973) (respect for precedent weighed against need to update rules that no longer accurately reflect modern thought); *see also* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1073 (D.C. Cir. 1970) (duty of courts to reappraise common law doctrines when no longer reflect current ethics and community values); Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?,* 36 MD. L. REV. 816, 846 (1977) (policy rationales of premises cases under traditional approach or general negligence position identical, thus adherence to precedent should not prevent new developments in tort law).

96. *See* Mile High Fence Co. v. Radovich, 489 P.2d 308, 311 (Colo. 1971) (court has departed from strict categories in past to reach just result, indicating difficulty in application of categories that should be met directly to avoid any more confusion); *see also* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?,* 36 MD. L. REV. 816, 846 (1977) (common law status categories can no longer be enforced). The article identifies three reasons for abolishing the categories: 1) it is difficult to determine the plaintiff's category, based on precedent, as similar fact situations have produced inconsistent results, thus undermining the conservative viewpoint's goal of predictability and stability, 2) the categories no longer reflect modern values, as human safety takes precedence over the interest of the landowner, and 3) the categories as mechanically applied are too restrictive of the judicial role to promote justice and fairness in resolution of litigious conflicts. *See id.* at 846-47; *see also* KEETON, VENTURING TO DO JUSTICE 15 (1969) (rigid abstention from overruling precedent destroys very stability trying to be preserved).

97. *See* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 103 (D.C. Cir. 1972) (modern trend of erosion of once sharp distinction between status categories indicates common law system not working), *cert. denied,* 412 U.S. 939 (1973). Numerous commentators have also described and criticized the erosion of the status distinctions, while promoting adoption of a more flexible reasonable care standard. *See, e.g.,* Henderson, *Expanding the Negligence Concept: Retreat From the Rule of Law,* 51 IND. L.J. 467, 510 (1976) (premises actions clearest

III. COMMON LAW CATEGORIES COMPARED TO NEGLIGENCE STANDARD

A. *Why Status Categories are Under Attack*

Three basic developments are responsible for the present controversy surrounding the status liability categories. First, there has been a basic philosophical shift in modern tort law away from landowner immunity towards a more humanitarian approach of compensating injuries.[98] Secondly, political, economic, and social changes have occurred since the common law categories were first created in feudal England, thus raising questions about the categories' continuing validity in today's society.[99] The third major development is the reassessment of the roles of judge and jury in our advocacy system.[100] Reflection on the implications of these changes will provide a greater understanding of where premises liability fits in the scheme of modern tort law.[101]

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example of abandonment of common law formalities in favor of reasonable standard of care); Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?,* 36 MD. L. REV. 816, 850 (1977) (real issue courts have to decide before abolishing common law standards is whether precedent should be abandoned, or followed with its many exceptions); *Recent Development,* 25 VAND. L. REV. 623, 635 (1972) (reasonable care standard will eliminate confusion and inconsistency surrounding common law categories).

98. *See, e.g.,* Wolfson v. Chelist, 284 S.W.2d 447, 451 (Mo. 1955) (traditional common law categories yield to humanitarian concerns as society changes); O'Leary v. Coenen, 251 N.W.2d 746, 749 (N.D. 1977) (safety of entrant more important than landowner's unrestricted freedom to use property); Mariorenzi v. Joseph DiPonte, Inc., 333 A.2d 127, 134 (R.I. 1976) (tort law shifting from fault determination to enterprise liability, so as to spread costs of injury over large parts of population, quoting Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 101 (D.C. Cir. 1972), *cert. denied,* 412 U.S. 939 (1973)); *see also Recent Development,* 25 VAND. L. REV. 623, 635 (1972) (implications of adopting reasonableness standard are elimination of confusion and unpredictability found under common law scheme).

99. *See, e.g.,* Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630 (1959) (society highly industrialized, resulting in complicated relationships for which simple common law categories not designed); Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 102-03 (D.C. Cir. 1972) (person on public sidewalk becomes trespasser when steps over boundary onto private land, but anticipated in today's crowded world), *cert. denied,* 412 U.S. 939 (1973); Basso v. Miller, 352 N.E.2d 868, 871-72, 386 N.Y.S.2d 564, 567-68 (1976) (modern society much more crowded and commercialized than when common law categories created). *But see* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?,* 36 MD. L. REV. 816, 837 (1977) (abolitionists never precisely identify factual distinctions that are persuasive).

100. *See* Mile High Fence Co. v. Radovich, 489 P.2d 308, 312 (Colo. 1971) (common law categories usurp jury function of determining landowner's liability, because judge decides liability as matter of law); *see also* Note, *Torts - Occupier of Land Held to Owe Duty of Ordinary Care to All Entrants - "Invitee," "Licensee," "Trespasser" Distinctions Abolished,* 44 N.Y.U. L. REV. 426, 430 (1969) (common law categories decide defendant's liability as matter of law).

101. *See* Scurti v. New York, 354 N.E.2d 794, 798-99, 387 N.Y.S.2d 55, 59 (1976) (evidence that would be dispositive under common law scheme now only relevant under reasona-

Many commentators[102] and judges[103] have identified the basic philosophical shift in our society away from the common law perception of landowner immunity towards a more humanitarian focus favoring compensation of injured persons.[104] As society becomes more complicated, the formal categories of trespasser, licensee, and invitee fail to resolve a myriad of fact situations, without relying upon judicially-created exceptions to alleviate inequitable consequences.[105] In order to accomplish the goals of equitable compensation and results in today's premises liability cases, the rigid com-

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bleness standard); *see also* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?,* 36 MD. L. REV. 816, 820 (1977) (under reasonableness standard, every case does not raise issue of negligence for jury).

102. *See, e.g.,* Henderson, *Expanding the Negligence Concept: Retreat From the Rule of Law,* 51 IND. L.J. 467, 511 (1976) (one major force threatening survival of status categories is preference towards injured victims' compensation rather than landowner's unrestricted use of property); Comment, *The Common Law Liability of Owners and Occupiers of Land: A Trap for the Unwary?,* 36 MD. L. REV. 816, 847 (1977) (common law rules fail to reflect societal view that landowners must accommodate factor of human safety in operation of his property); Note, *Tort Liability of Owners and Possessors of Land - A Single Standard of Reasonable Care Under the Circumstances Towards Invitees and Licensees,* 33 ARK. L. REV. 194, 200 (1979) (human safety more important than unrestricted freedom of landowner). *See generally* 2 F. HARPER & F. JAMES, LAW OF TORTS §§ 27-28, at 1430-1505 (1956) (criticizing formal common law rules limiting landowner's liability to entrants as outdated).

103. *See* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 101 (D.C. Cir. 1972) (no rational reason to continue immunizing landowners from liability, as occurs under common law scheme), *cert. denied,* 412 U.S. 939 (1973); Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 554 (Tex. 1985) (Kilgarlin, J., concurring) (purposes of common law categories to place great emphasis on landowner's rights, but basic philosophical shift in society towards human safety not reflected in traditional scheme); *see also* 2 F. HARPER & F. JAMES, LAW OF TORTS § 27.3, at 1440 (1957) (traditional rules allowing occupant to be negligent no longer justifiable than would be in other areas of tort law).

104. *See, .e.g.,* Rowland v. Christian, 443 P.2d 561, 567, 70 Cal. Rptr. 97, 103 (1968) (common law rules fail to reflect crucial factors of today's society, namely reasonable prevention of injuries); Ouellette v. Blanchard, 364 A.2d 631, 632 (N.H. 1976) (feudal belief that landowner's unrestricted freedom regarding use of his property must give way to human safety concerns not reflected in common law distinctions); Basso v. Miller, 352 N.E.2d 868, 871-72, 386 N.Y.S.2d 564, 567-68 (1976) (feudal concept of superiority of landowner no longer appropriate in light of urban society). *But see* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?,* 36 MD. L. REV. 816, 836-37 (1977) (historical perspective argument not persuasive attack on common law rules, as precise characteristics of modern society never identified that make common law rules outdated).

105. *See* Rowland v. Christian, 443 P.2d 561, 567, 70 Cal. Rptr. 97, 103 (1968) (common law rules too easy to apply; confusion stems from exceptions created to mitigate harsh results); *see also* KEETON, VENTURING TO DO JUSTICE 15 (1969) (abstention from overruling precedent causes more harm because only other way to deal with unjust results is to create confusing exceptions that erode very stability courts seeking to preserve); Note, *Tort Liability of Owners and Possessors of Land - A Single Standard of Reasonable Care Under the Circumstances Towards Invitees and Licensees,* 33 ARK. L. REV. 194, 201 (1979) (judicial exceptions to status categories part of erosion process and used as rationale to abandon categories).

mon law categories[106] must be replaced by a more flexible standard.

Abolitionists point to the traditional categories and note that many factual differences exist between modern day living and life in the nineteenth century when the common law rules were first propounded.[107] Both cultures exhibit radically different social mores and concerns.[108] Today's industrialized society is predominately urban in character,[109] as compared to the agrarian culture and large landholdings of feudal England.[110] Because of the increasing complexity of human relationships in modern times and the greater likelihood of people intruding on the land than in common law England,[111] the status categories no longer fulfill their stated purpose of determining the landowner's liability to persons entering his land.[112] At least one commentator has noted, however, that upon further inspection, the condi-

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106. *See* Basso v. Miller, 352 N.E.2d 868, 876, 386 N.Y.S.2d 564, 572 (1976) (Breitel, C.J., concurring) (criticism of formal status categories directed at mechanical application, not at underlying policies). *But see* KEETON, VENTURING TO DO JUSTICE 68-69 (1969) (generalized formulas most useful when very nature of case demands weighing of competing interests as defined by particular facts of case); Comment, *Torts - Negligence - Premises Liability: The Foreseeable Emergence of the Community Standard,* 51 DEN. L.J. 145, 161 (1974) (common law scheme does not work because applies same duty to entrants of same class who are differently foreseeable).

107. *See* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 105 (D.C. Cir. 1972) (traditional categories used in determination of landowner's liability to entrant for injuries fail to adopt modern economic, moral and social standards), *cert. denied,* 412 U.S. 939 (1973). *See generally* Note, *Liability of Owners and Occupiers of Land,* 58 MARQ. L. REV. 609, 617 (1975) (common law status system not directed at achieving justice; thus use of categories for purpose not created results in confusion and inequity).

108. *See* Rowland v. Christian, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968) (common law rules confuse rather than clarify proper considerations of social mores and humanitarian values that govern determination of duty). The *Rowland* court went on to note that people usually do not base their actions or conduct on the status they may have while on the landowner's premises but instead expect the landowner to act reasonably. *See id.* at 568, 70 Cal. Rptr. at 104.

109. *See* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 102 (D.C. Cir. 1972) (realities of modern life are closer living conditions, thus courts need to recognize common law categories no longer relevant in determination of defendant's liability), *cert. denied,* 412 U.S. 939 (1973). *But see* Basso v. Miller, 352 N.E.2d 868, 873-73, 386 N.Y.S.2d 564, 569 (1976) (Breitel, C.J., concurring) (courts have accommodated changing social conditions through common law process by creating exceptions to status categories).

110. *See* Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 551 (Tex. 1985) (Kilgarlin, J., concurring) (feudal England encouraged landowners to remain sovereign within boundaries and to do whatever wanted to without regard to possibility of injury to entrants); *see also* W. PROSSER & W. KEETON, THE LAW OF TORTS § 362, at 432 (5th ed. 1984) (today private ownership of land qualified privilege not sovereign right as in feudal times).

111. *See* Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630 (1959) (urban, industrial society includes increasingly complex relationships which must be accommodated by courts).

112. *See* Peterson v. Balach, 199 N.W.2d 639, 644 (Minn. 1972) (courts can no longer adhere to scheme that is confusing, complex and unpredictably nonuniform); Ouellette v.

tions of modern society may not be as drastically different from those in feudal times,[113] because modern rural and suburban areas closely resemble feudal landholdings.[114] Even though the general negligence standard applies to all environments (urban, suburban, rural), the historical perspective argument is only valid when directed to modern urban landholders.[115] This assertion is proved by comparing the various fact situations that have prompted courts to abolish the categories,[116] since every case arose in an urban setting.[117] Although the abolitionists' arguments pertaining to the factual differences between feudal and modern society may be questioned, the pragmatic result of this conflict has been for courts to reevaluate the status categories in light of modern considerations.[118]

Blanchard, 364 A.2d 631, 634 (N.H. 1976) (modern social and policy considerations no longer validate common law categories' continuing viability and should be abolished).

113. *See* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?,* 36 MD. L. REV. 816, 836-37 (1977) (abolitionists have misconstrued history of feudal landowners to better their argument for repudiation of status categories).

114. *See id.* at 837 (physical characteristics of modern society closely resemble manorial system, deflating abolitionists' historical perspective argument). For a persuasive analysis supporting this contention, see id. at 836-37 n.119, and cases collected therein.

115. *See id.* at 837 (historical argument used to justify abolition of categories really more narrow in application than its proponents state, as it is only applicable to modern urban property).

116. *Compare* Webb v. City and Borough of Sitka, 561 P.2d 731, 732 (Alaska 1977) (plaintiff sued city for injuries resulting from stubbing toe on sidewalk, court abolished common law categories because no longer applicable to modern life) *with* Mile High Fence Co. v. Radovich, 489 P.2d 308, 309 (Colo. 1971) (police officer sued fence company for injuries resulting from stepping into open hole at night, court held defendant negligent under general negligence standard in creating hazardous situation).

117. *See* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 98 (D.C. Cir. 1972) (building inspector injured from fall on greasy metal steps in defendant's restaurant), *cert. denied,* 412 U.S. 939 (1973); Webb v. City of Sitka and Borough, 561 P.2d 731, 732 (Alaska 1977) (pedestrian sued city for injuries resulting from stubbing toe on sidewalk); Rowland v. Christian, 443 P.2d 561, 562, 70 Cal. Rptr. 97, 103 (1968) (social guest injured when knob of cold water faucet in apartment broke); Mile High Fence Co. v. Radovich, 489 P.2d 308, 309 (Colo. 1971) (action by police officer for injuries sustained from stepping into open post hole abutting alley); Pickard v. City and County of Honolulu, 452 P.2d 445, 445 (Hawaii 1969) (action against city for plaintiff's personal injuries sustained from fall through hole in unlit courthouse restroom); Cates v. Beauregard Elec. Coop., 328 So. 2d 367, 368 (La. 1976) (plaintiff injured when touched energized electric wire); Ouellete v. Blanchard, 364 A.2d 631, 631 (N.H. 1976) (defendant burning rubbish on his property, resulting in plaintiff's injuries); Basso v. Miller, 352 N.E.2d 868, 869-70, 386 N.Y.S.2d 564, 565 (1976) (motorcycle rider sued for injuries sustained from condition of amusement park's road); Mariorenzi v. Joseph DiPonte, Inc., 333 A.2d 127, 127-28 (R.I. 1975) (wrongful death action for drowning of five year old boy in defendant developer's water-filled holes dug for septic tanks); *see also* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?,* 36 MD. L. REV. 816-37 (1977) (precise characteristics of modern society never identified by abolitionists, only vague descriptions).

118. *See, e.g.,* Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630

The third development in modern times provoking criticism of the traditional common law categories is the controversy surrounding the roles of judge and jury in our legal system.[119] Under the common law standards, a plaintiff was often denied recovery because the judge would rule as a matter of law that the defendant did not breach any duties owed to plaintiff, based on the relevant duty standard applicable to plaintiff's particular class.[120] Only invitee cases, which imposed the same basic standard of reasonable care as the proposed negligence standard, would reach the jury for their consideration of the relevant factors.[121] Abolitionists welcome the more flexible negligence standard because it allows juries to play a more important role in determining the defendant's negligence.[122] Conversely, proponents of the

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(1959) (common law adapts to today's industrialized society by gradually imposing a reasonable duty of care on occupiers of land); Sherman v. Suburban Trust Co., 384 A.2d 76, 84-85 (Md. 1978) (Levine, J., dissenting) (inequities of common law system shown when trial court rules on status of plaintiff as matter of law, depriving plaintiff opportunity for reasonableness determination by jury of landowner's actions); Scurti v. City of New York, 354 N.E.2d 794, 798-99, 387 N.Y.S.2d 55, 59 (1976) (trial court retains duty to determine if plaintiff presented sufficient evidence to submit case to jury under new reasonableness standard); *see also* Comment, *The Common Law Tort Liabiliy of Owners and Occupiers of Land: A Trap for the Unwary?*, 36 MD. L. REV. 816, 850 (1977) (although historical perspective argument unpersuasive, most courts have expressed dissatisfaction with categories and are thus moving in right direction).

119. *See* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 103-04 n.32 (D.C. Cir. 1972) (cases reaching jury under common law system revolve on plaintiff's status instead of basic issue of defendant's negligence), *cert. denied*, 412 U.S. 939 (1973); Mile High Fence Co. v. Radovich, 489 P.2d 308, 311-12 (Colo. 1971) (jury prevented from applying community standard by adherence to status categories, because occupier's liability determined as matter of law once plantiff placed in category). *But see* Basso v. Miller, 352 N.E.2d 868, 874, 386 N.Y.S.2d 564, 569 (1976) (Breitel, C.J., concurring) (majority delegated judicial responsibility of determining public policy to unguided jury). *See generally* Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions*, 1981 UTAH L. REV. 15, 21 (flexible provisions available to control jury under general negligence standard, such as judge's articulation of standard of care and jury instructions).

120. *See* Quinlan v. Cecchini, 363 N.E.2d 578, 581, 394 N.Y.S.2d 872, 875 (1977) (under new reasonable care standard, case should have gone to jury to determine defendant's liability instead of usurping jury function by granting of summary judgment); *see also* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 103 (D.C. Cir. 1972) (under common law scheme, jury prevented from applying community standard when plaintiff's category precludes recovery), *cert. denied*, 412 U.S. 939 (1973). For a sample listing of cases that were disposed of without a jury trial, but on appeal were remanded because a sufficient fact issue was present as to defendant's liability under the reasonable care standard, see Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions*, 1981 UTAH L. REV. 15, 58 n.304 (disposition of cases listed indicates adoption of reasonable care standard drastically effects role of judge and jury than under common law standard)

121. *See* Note, *Liability of Owners and Occupies of Land*, 58 MARQ. L. REV. 609, 617 (1975) (fundamental questions of negligence never reached jury under status rules because judge would decide issue as a matter of law).

122. *See* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 105 (D.C. Cir. 1972) (negli-

common law system fear complete loss of jury control under a general negligence standard.[123] The proponents' fear is probably unfounded since judges can still maintain control over jury verdicts by such traditional methods as directed verdicts, careful phrasing of jury instructions, use of special issues, and judgments *non obstante verdicto.*[124]

B. *Comparison Between Negligence Standard and Common Law Categories*

Whenever consideration is given to replacing an allegedly antiquated rule of law, the strengths and inequities of both systems must be compared and analyzed before a rational course of action can be advocated. The formal status rules have clearly delineated the roles of judge and jury, regardless of their alleged inequities.[125] As noted previously, the major concern of judges opposed to abandonment of the categories is loss of jury control,[126] because

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gence standard allows jury to allocate costs of prevention versus risk of injury based on infinite variety of facts in any one case), *cert. denied,* 412 U.S. 939 (1973); *see also* GREEN, JUDGE AND JURY 145 (1929) (system of judge and jury designed for adaptability not standarization).

123. *See* Gerchberg v. Loney, 576 P.2d 593, 597 (Kan. 1978) (questions raised as to jury's competence in deciding complex fact issues without guidance of common law standards); *see also* Note, *Torts - Negligence - Premises Liability: The Foreseeable Emergence of the Community Standard,* 51 DEN. L.J. 145, 165 (1974) (noting fear of jury bias toward compensating injured plaintiff).

124. *See* James, *Functions of Judge and Jury in Negligence Cases,* 58 YALE L.J. 667, 672-74 (1949) (under negligence standard, court decides if sufficient factual evidence of inference of defendant's negligence before submission of case to jury); Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?,* 36 MD. L. REV. 816, 848 (1977) (judge plays important function under general negligence standard to control jury mischief). *But see* Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions,* 1981 UTAH L. REV. 15, 18 (implicit faith of abolitionists that jury capable of determining liability of defendant under general negligence standard questionable).

125. *See, e.g.,* Green, *The Duty Problem in Negligence Cases: II,* 29 COLUM. L. REV. 255, 271-72 n.56 (1929) (status categories controlled power of jury as an administrative device); Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions,* 1981 UTAH L. REV. 15, 18 (judge and jury relationship structured by common law categories); Henderson, *Expanding the Negligence Concept: Retreat From the Rule of Law,* 51 IND. L.J. 467, 511 (1976) (common law categories screened cases from courts as a control device avoiding potential unlimited liability).

126. *See* Gerchberg v. Loney, 576 P.2d 593, 597 (Kan. 1978) (questions raised as to jury's competence in deciding complex fact issues without common law standards as guidelines); *see also* Note, *Torts - Negligence - Premises Liability: The Foreseeable Emergence of the Community Standard,* 51 DEN. L.J. 145, 165 (1974) (noting fear of jury bias toward compensating injured plaintiff). The fear of unfettered jury discretion under the proposed negligence standard has proven to be groundless in those states adopting the new approach. *See* Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions,* 1981 UTAH L. REV. 15, 53 (out of eighty cases surveyed, thirty did not proceed to jury because of directed verdicts).

the formal guidelines inherent in the categories will be replaced by a general negligence standard.[127] However, in addition to the judicial administrative procedures such as directed verdicts and judgments *non obstante verdicto,* the pivotal question that arises is why fears are being expressed concerning uncontrollable juries in landowner liability cases.[128] The basis for the fear of possible jury abuse can be traced back to the formulative period of the status categories, when the feudalistic notion of landowner supremacy dictated the need for control over more plaintiff-oriented juries.[129] Whether such fears of unfettered jury discretion are valid today is debated among judges and commentators alike.[130] The general negligence standard of reasonable care has been accepted in other areas of tort law and has been applied without caus-

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127. *See* Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 554 (Spears, J., concurring) (juries will not be able to reconcile various social policies inherent in reasonable care standard). *But see* Quinlan v. Cecchini, 363 N.E.2d 578, 581, 340 N.Y.S.2d 475, 479 (1977) (court's role to set parimeters of negligence continues under new standard of reasonable caree).

128. *See* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?,* 36 MD. L. REV. 816, 848-49 (1977) (potential problems under reasonable care standard for premises liability cases no greater than for other types of negligence suits).

129. *See* Green, *The Duty Problem in Negligence Cases: II,* 29 COLUM L. REV. 255, 271 n.56 (1929) (common law categories seem to place too much power in hands of jury, more than judges willing to share).

130. *See, e.g.,* Rowland v. Christian, 443 P.2d 561, 569, 70 Cal. Rptr. 97, 105 (1968) (Burke, J., dissenting) (deciding liability on case-by-case basis under vague standard of reasonable care fails to provide necessary guiding principles followed by status of parties); Ouellette v. Blanchard, 364 A.2d 631, 636-37 (N.H. 1976) (Grimes, J., dissenting) (negligence formula so vague that possibility burglars would prevail over innocent landowners significantly increased); Basso v. Miller, 352 N.E.2d 868, 873-74, 386 N.Y.S.2d 564, 569 (1976) (Breitel, C.J., concuring) (majority has delegated its function determining social policy to jury by test so broad offers little or no guidance to jury). This review of dissenting opinions in cases abolishing the categories can be summarized as a general apprehension that setting the jury adrift under the vague community standard without any guiding principles will cause more harm than good. *See* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?,* 36 MD. L. REV. 816, 847 n.183 (1977). Commentators, on the other hand, while recognizing the possibility of jury abuse, seem to concentrate on positive solutions and existing controls to resolve the problem, while continuing to promote the reasonable care standard's greater application to today's premises liability cases. *See, e.g.,* Green, *The Duty Problem in Negligence Cases: II,* 29 COLUM. L. REV. 255, 275 (1929) (judge and jury have same power as under categories, but more flexibility to exercise it rationally); Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions,* 1981 UTAH L. REV. 15, 21-22 (control devices such as determination of sufficient evidence to make negligence jury issue, jury instructions and formulating standard of care used effectively in states abolishing status categories); Note, *Tort Liability of Owners and Possessors of Land - A Single Standard of Reasonable Care Under the Circumstances Towards Invitees and Licensees,* 33 ARK. L. REV. 194, 203 n.67 (1979) (standard jury control devices may still be used under new rule of duty of care, as well as general principles of the reasonable person test itself). *But see* Payne, *The Occupier's Liability Act,* 21 MOD. L. REV. 359, 374 (1958) (abolition of common law system will cause more uncertainty than under status categories).

ing uncontrollable jury misconduct.[131] Premises liability cases should not be treated any differently than these other tort situations.[132] Additionally, even though fear may be expressed that plaintiff-oriented juries will impose unreasonable burdens on the defendant,[133] it must be remembered that many jurors in modern society are also landowners, which may make them more reluctant to impose unrealistic burdens on the defendant.[134]

Another debated implication of substituting the negligence standard for the common law categories is the possibility of placing burdensome precautionary requirements on the landowner, such as the expensive cost of insurance premiums.[135] The courts that have advocated abolition of the status categories are careful to avoid transforming the landowner into an absolute insurer against all injuries suffered by persons while on his property.[136]

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131. *See* Mile High Fence Co. v. Radovich, 489 P.2d 308, 312-14 (Colo. 1971) (common law categories usurped jury function which negligence standard will avoid); Parker v. Highland Park, Inc., 565 S.W.2d 512, 519 (Tex. 1978) (noting large number of tort cases tried more easily on negligence theory than under judicially-created exception). *See generally* O. HOLMES, THE COMMOM LAW 98 (1881) (juries best suited to determine liability under negligence standard, because of their reference to current community standards).

132. *See* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?,* 36 MD L. REV. 816, 849 (1977) (applying negligence standard to landowner liability situations creates no greater problems than in other uses of negligence standard).

133. *See, e.g.,* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 108 (D.C. Cir. 1972) (Leventhal, J., concurring) (adoption of reasonable man standard exposes less-affluent landowners and tenants to risks of litigation not present under traditional scheme), *cert. denied,* 412 U.S. 939 (1973); Rowland v. Christian, 443 P.2d 561, 569, 70 Cal. Rptr. 97, 105 (1968) (Burke, J., dissenting) (door now open to unlimited liability of landowners because negligence theory lacks guiding principles of common law categories); Ouellette v. Blanchard, 364 A.2d 631, 636 (N.H. 1976) (Grimes, J., dissenting) (by abolishing traditional status categories, unreasonable, unrealistic, and unjust burdens will be placed on every landowner, occupant, or lessee); *see also* Note, *Tort Liability of Owners and Possessors of Land - A Single Standard of Reasonable Care Under the Circumstances Towards Invitees and Licensees,* 33 ARK. L. REV. 194, 202 (1979) (noting possible disadvantage of increased burdens on landowner, but concluding modern social concern for human safety outweighs any ensuing restriction on landowner).

134. *See* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 106-107 (D.C. Cir. 1972) (reasonableness standard retains flexibility for jury to determine what is reasonable under circumstances; thus new standard not quantifiable but based on jury's determination of relevant facts), *cert. denied,* 412 U.S. 939 (1973). *See generally* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?,* 36 MD. L. REV. 816, 848 (1977) (jury abuse controllable in premises liability cases because of judicial controls and jury's own determination of what is reasonable under circumstances, as in other areas of tort law).

135. *See* Mariorenzi v. Joseph DiPonte, Inc., 333 A.2d 127, 134 (R.I. 1975) (Joslin, J., dissenting) (majority made value judgment that foreseeable risk of loss be placed on landowner rather than person entering his land, even if trespasser).

136. *See, e.g.,* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 101 (D.C. Cir. 1972) (trend toward allocation of losses over larger portion of society rather than using fault as determinative factor), *cert. denied,* 412 U.S. 939 (1973); Webb v. City and Borough of Sitka, 561 P.2d 731, 734 (Alaska 1977) (landowner will not become insurer or bear unreasonable

These courts justify any possible resulting increase in insurance premiums by the enterprise liability theory,[137] reasoning that the best way to compensate the victim is to spread the cost of recovery to as many people as possible.[138] While the validity of the enterprise liability theory may be questioned in terms of its effects on premises liability cases, it appears to be the most equitable solution.[139] All landowners will have to conform to the same reasonable care standard, making any additional burdens imposed as a result of the landowner's negligence absorbed by everyone, not just the individual landowner.[140] Thus, by adopting a reasonable care standard in premises liability cases, all landowners will be held to the same duty of care.

The application of a reasonable care standard will enable the jury to con-

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burden in maintenance of property); O'Leary v. Coenen, 251 N.W.2d 746, 752 (N.D. 1977) (decision does not transform landowner into absolute insurer to all who enter his property). A large number of commentators have discussed the trend away from fault determination towards enterprise liability. *E.g.* Note, *Tort Liability of Owners and Possessors of Land - A Single Standard of Reasonable Care Under the Circumstances Towards Invitees and Licensees,* 33 ARK L. REV. 194, 202-03 n.62 (1979) (listing commentators discussing issue).

137. *See* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 101 (D.C. Cir. 1972) (modern trend in tort law away from fault determination of liability towards enterprise liability, which distributes losses through insurance over larger portion of society), *cert. denied,* 412 U.S. 939 (1973); Sherman v. Suburban Trust Co., 384 A.2d 76, 85 (Md. 1978) (Levine, J., dissenting) (modern goal of tort law to distribute risks of injury over wide portion of population, thereby efficiently allocating social resources); *see also* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?,* 36 MD. L. REV. 816, 838 (1977) (recognizing shift away from fault liability toward enterprise liability to reduce economic impact of a finding of negligence).

138. *See* Rowland v. Christian, 443 P.2d 561, 567-68, 70 Cal Rptr. 97, 103-04 (1968) (insurance availability and cost not shown to be affected by adoption of negligence standard, thus preferable to spread costs of liability to as many as possible through insurance); *see also Recent Development,* 25 VAND. L. REV. 623, 637 (1972) (any increases in premiums as result of negligence standard will be absorbed by businesses that can then shift those increases onto public at large).

139. *See* Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 553 (Tex. 1985) (Kilgarlin, J., concurring) (resource allocation should be jury's function to determine how to best spread costs of injury). *But see* Mariorenzi v. Joseph DiPonte, Inc., 333 A.2d 127, 134 (R.I. 1975) (Joslin, J., dissenting) (majority's reliance on enterprise liability incorrect because opinion in effect places risk of foreseeable injury on landowner rather than on entrant). *See generally* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?,* 36 MD. L. REV. 816, 838 (1977) (tort law gradually shifting away from fault towards enterprise liability).

140. *See* Cooper v. Goodwin, 478 F.2d 653, 656 (D.C. Cir. 1973) (additional financial burdens that may be imposed on landowners because of adoption of reasonable care standard offer no excuse to not take reasonably foreseeable measures within landowners' capacity); *see also* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?,* 36 MD. L. REV. 816, 839 (1977) (landowners only responsible for taking reasonable precautions under general negligence standard, thus negating argument of undue burdens).

sider all the relevant circumstances surrounding the plaintiff's entry,[141] instead of only the plaintiff's status with its attendant standard of care.[142] Foreseeability[143] remains the key issue in determining whether the defendant should have reasonably anticipated the plaintiff's presence on his land, and the risk or condition which caused plaintiff's injury.[144]

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141. *See* Isaacs v. Huntington Memorial Hosp., ___ P.2d ___, ___, 211 Cal. Rptr. 356, 361 (1985) (foreseeability flexible concept, allowing jury to adjust necessary degree of care to each case); Bigbee v. Pacific Tel. & Tel. Co., 665 P.2d 947, 950-51, 192 Cal. Rptr. 857, 860-61 (1983) (foreseeability of injury key determination made by jury, taking into account all relevant facts and circumstances); *see also* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?*, 36 MD. L. REV. 816, 848 (1977) (juries determine landowner's duty of care under particular circumstances of case, instead of merely determining status of plaintiff under common law standards).

142. *See* Rowland v. Christian, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968). The court lists the following relevant factors:

> [t]he degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, costs, and prevalence of insurance for the risk involved.

Id. at 564, 70 Cal. Rptr. at 100. *Rowland* has been followed as the appropriate model by the eight other states adopting the general negligence standard for landowner liability cases. *See* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 102 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973); Webb v. City and Borough of Sitka, 561 P.2d 731, 733 (Alaska 1977); Mile High Fence Co. v. Radovich, 489 P.2d 308, 314 (Colo. 1971); Pickard v. City & County of Honolulu, 452 P.2d 445, 446 (Hawaii 1969); Cates v. Beauregard Elec. Coop., 328 So. 2d 367, 371 (La. 1976); Ouellette v. Blanchard, 364 A.2d 631, 633 (N.H. 1976); Basso v. Miller, 352 N.E.2d 868, 872, 386 N.Y.S.2d 564, 568 (1976); Mariorenzi v. Joseph DiPonte, Inc., 333 A.2d 127, 131 (R.I. 1975); *see also* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?*, 36 MD. L. REV. 816, 839 (1977) (foreseeability remains key determination of landowner's liability).

143. *See* Rowland v. Christian, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968) (general negligence standard will force consideration of relevant factors in determination of duty, not concentrate solely on plaintiff's status as required by common law categories). *But see* Basso v. Miller, 352 N.E.2d 868, 876, 386 N.Y.S.2d 567, 572 (1976) (Breitel, C.J., concurring) (policy rationale for status categories same as negligence theory because both consider reason for plaintiff's presence on property, prevention of future harm, and moral blame of landowner's conduct, albeit former through implicit reasoning, latter by explicit analysis).

144. *See, e.g.*, Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 105 (D.C. Cir. 1972) (entrant's presence on landowner's property will now be formulated in terms of foreseeability), *cert. denied*, 412 U.S. 939 (1973); Ouellette v. Blanchard, 364 A.2d 631, 634 (N.H. 1976) (general test of foreseeability now determines landowner's liability); Quinlan v. Cecchini, 363 N.E.2d 578, 581, 394 N.Y.S.2d 872, 875 (1977) (foreseeability determination must be made by court before case submitted to the jury). *See generally* Note, *Tort Liability of Owners and Possessors of Land - A Single Standard of Reasonable Care Under the Circumstances Towards Invitees and Licensees*, 33 ARK. L. REV. 194, 203-04 (1979) (jury to determine status of entrant under new standard and how much weight should be placed on that one factor in determination of landowner's liability).

Although the common law categories clearly define the role of judge and jury,[145] the numerous inequities and harsh results are at odds with today's compensatory approach to personal injury cases.[146] The fear of loss of jury control under the negligence standard fails to support the retention of the status categories — a system that often fails to adequately compensate injured parties.[147] Additionally, fears concerning the possible unreasonable burdens that may be placed on landowners are not justified in light of the public policy rationales supporting the enterprise liability theory.[148] By applying a duty of reasonable care to all landowners for persons entering their property, flexibility is maintained so that the myriad of factual situations may be properly resolved.[149] Thus, the major drawback of the common law system — mechanical application of the categories[150] — is replaced by an adaptable standard of care which is defined on a case-by-case basis.[151] But the most persuasive argument that can be made for supporting adoption of the reasonable care standard is to analyze the effect in premises liability cases

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145. *See* Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions,* 1981 UTAH L. REV. 15, 18 (traditional distinctions clearly defined relationship between judge and jury).

146. *See, e.g.,* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 101 (D.C. Cir. 1972) (common law categories immunizes landowner from liability but no longer acceptable in modern world), *cert. denied,* 412 U.S. 939 (1973); Gerchberg v. Loney, 576 P.2d 593, 601 (Kan. 1978) (Prager, J., dissenting) (cardinal tort rule requires all persons to use reasonable care to prevent injury to others, thus reflecting modern humanitarian values); Ouellette v. Blanchard, 364 A.2d 631, 632 (N.H. 1976) (harsh results of traditional categories subjected to modern negligence theory as shown by judicially-created exceptions).

147. *See* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 105 (D.C. Cir. 1972) (under general negligence standard, jury will be guided by same principles used in other area of tort law), *cert. denied,* 412 U.S. 939 (1973); *see also* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?,* 36 MD. L. REV. 816, 848 (1977) (judge still has traditional tools to control jury misconduct under single standard of care).

148. *See* Note, *Tort Liability of Owners and Possessors of Land - A Single Standard of Reasonable Care Under the Circumstances Towards Invitees and Licensees,* 33 ARK. L. REV. 194, 202 (1979) (possible restriction on landowner under general negligence theory justified by humanitarian concerns for human safety). *But see* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 102 (D.C. Cir. 1972) (human safety should not be advanced before other relevant values in allocation of risk formula), *cert. denied,* 412 U.S. 939 (1973).

149. *See* Quinlan v. Cecchini, 363 N.E.2d 578, 581, 394 N.Y.S.2d 873, 876 (1977) (conduct of defendant of primary concern in determination of reasonableness under pertinent facts of case). *See generally* Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions,* 1981 UTAH L. REV. 15, 21 (general negligence standard extremely flexible in determination of duty of care and subsequent breach).

150. *See* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 103 (D.C. Cir. 1972) (jury scrutiny of entrant's and landowner's conduct eliminated by judge's mechanical decision when applying status categories), *cert. denied,* 412 U.S. 939 (1973).

151. *See* Rowland v. Christian, 443 P.2d 561, 565, 70 Cal. Rptr. 97, 101 (1968) (to avoid mechanical application of common law categories, courts can either create further exceptions or abandon the scheme altogether).

in those states following such a standard, and compare the results to the traditional common law system.[152]

C. *Actual Effects of Change to Negligence Standard*

As commentators have predicted,[153] adoption of the general negligence standard has caused more cases to proceed to the jury on the issue of the defendant's negligence than under the common law classifications.[154] But submitting the case to the jury has not relieved the plaintiff of proving that a duty existed which the defendant allegedly breached, thus causing plaintiff's injury.[155] The cases following the reasonable care standard have not left the jury without adequate guidance, thereby putting to rest the anti-abolitionists' fears of uncontrollable jury verdicts.[156] Thus, courts have reaffirmed their

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152. *See* Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions,* 1981 UTAH L. REV. 15, 57-58 (after states repudiated categories, trial courts' summary disposition of cases reversed on appeal for trials on merit, thus indicating substantial differences in allocation of judicial functions).

153. *See, e.g.,* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?,* 36 MD. L. REV. 816, 847-48 (1977) (adoption of negligence standard favors plaintiffs as plaintiff-oriented juries will become more prominant in determination of liability); *Recent Development,* 25 VAND. L. REV. 623, 636 (1972) (under negligence standard, more cases will proceed beyond pleading stage resulting in favorable entrant verdicts); 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, 431 (1969) (under common law system, claims by injured plaintiffs not pursued because recovery usually denied as matter of law).

154. *See Recent Development,* 25 VAND. L. REV. 623, 636 (1972) (more cases will proceed to jury determination under proposed reasonable man standard because plaintiffs have better chance of recovering than under traditional scheme). Several cases are indicative of the procedural process modern premises liability cases are subjected to in those states that have abolished the common law categories, because the trial court's use of summary judgment, nonsuit, or directed verdict was improper. *See, e.g.,* Isaacs v. Huntington Memorial Hosp., ___ P.2d ____, ____, 211 Cal. Rptr. 356, 366 (1985) (evidence indicated duty created as matter of law, reversing trial court's judgment of nonsuit); Connelly v. Redman Dev. Corp., 533 P.2d 53, 54-5 (Colo. Ct. App. 1975) (trial court's motion for directed verdict reversed because facts disputed as to what constitued reasonable care; thus up to jury to determine defendant's duty); Bidar v. AMFAC, 669 P.2d 154, 159-60 (Hawaii 1983) (summary judgment of trial court cannot stand up to demanding test whether reasonable minds could draw different inferences from evidence presented, reversed and remanded).

155. *See* Note, *Torts - Landowner's Liability - Traditional Distinctions Between Trespassers, Licensees, and Invitees Abolished as Determinative of the Standard of Care Owed a Visitor,* 25 ALA. L. REV. 401, 411 (1973) (courts may still require strict proof of all elements of plaintiff's case under new standard).

156. *See, e.g.,* Carlson v. Ross, 76 Cal. Rptr. 209, 211 (Ct. App. 1969) (jury instructions simplified in cases where plaintiff would have been licensee under old common law system); Ekberg v. Greene, 588 P.2d 375, 377 (Colo. 1978) (trial court's submission of case to jury upheld when sufficient evidence existed relating to foreseeability, jury verdict for plaintiff reasonably based on evidence presented); Gibo v. City & County of Honolulu, 459 P.2d 198, 200

traditional role of setting the parameters of possible negligence before submitting the case to the jury, by looking at several factors, such as foreseeability of risk and probability of harm when compared to the landowner's burden of taking precautionary measures.[157]

The flexibility of the negligence standard has turned out to be both its greatest strength and weakness. While the reasonable care standard seems best suited to resolve varying fact situations that can arise under the premises liability categories,[158] it also fails to set precedent because the negligence standard is redetermined each time a new case with its unique facts is considered.[159] Repudiation of the common law categories in favor of a reasonable care standard, however, has not left courts without guidance, since they are able to refer to existing principles of general tort law.[160]

(Hawaii 1969) (trial court correctly stated defendant's duty of care owed to plaintiff, jury verdict for plaintiff supported by facts presented). *See generally* Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions,* 1981 UTAH L. REV. 15, 22 (California courts have not abandoned cases to jury without adequate instruction).

157. *See, e.g.,* Bartell v. Palos Verdes Peninsula School Dist., 147 Cal. Rptr. 898, 901-02 (Ct. App. 1978) (courts must still determine threshold issue whether landowner owes duty to injured plaintiff based on facts of case); Paquette v. Joyce, 379 A.2d 207, 210 (N.H. 1977) (abolition of traditional scheme did not repudiate court's duty to determine if duty exists based on foreseeable risk of injury and particular relationship of parties); Quinlan v. Cecchini, 363 N.E.2d 578, 581, 394 N.Y.S.2d 872, 875 (1977) (court's traditional role of setting boundaries of possible negligence not abolished after adoption of reasonable care standard). For an extensive list of courts utilizing this effective jury control technique, see Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions,* 1981 UTAH L. REV. 15, 54 n.283.

158. *See* Weirum v. RKO Gen., Inc., 539 P.2d 36, 39, 123 Cal. Rptr. 468, 471 (1975) (determination of duty made on case-by-case basis as question of law for judge, while foreseeability of risk question of fact for jury); Ekberg v. Greene, 588 P.2d 375, 377 (Colo. 1978) (courts should allow juries to determine reasonable conduct under unique facts of particular case). *See generally* Hughes, *Duties to Trespassers: A Comparative Survey and Reevaluation,* 68 YALE L. J. 632, 693 (1959) (all relevant facts considered under reasonable care standard, allowing both judges and juries to change their positions concerning social policies as new facts presented).

159. *See* Rowland v. Christian, 443 P.2d 561, 569, 70 Cal. Rptr. 97, 105 (1968) (Burke, J., dissenting) (liability of landowners under general negligence standard determined on case-by-case basis without benefits of precedent or guiding principles). *See generally,* Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions,* 1981 UTAH L. REV. 15, 45 (negligence standard with attendant judicial controls fail to set precedent when judge rules on insufficiency of evidence, thereby taking case from jury). *But see* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?,* 36 MD. L. REV. 816, 849 (1977) (negligence standard viable in different tort law areas; should also be acceptable in premises liability cases).

160. *See, e.g.,* Isaacs v. Huntington Memorial Hosp., ___ P.2d _____, ____, 211 Cal. Rptr. 356, 362 (1985) (foreseeability determined under general tort principles in light of all circumstances; same principle applicable to premises liability cases under reasonable care standard); Ekberg v. Greene, 588 P.2d 375, 377 (Colo. 1979) (third party's intentionally tortious

Additionally, the negligence standard has simplified jury instructions for licensees.[161] The standard has also continued to erode the obvious risk doctrine usually applied in invitee cases.[162] The two groups of categories that have benefited the most under the reasonable care standard are licensees,[163] and particularly, borderline trespassers.[164] Finally, the application of the negligence standard to premises liability fact situations raises the question of whether the same plaintiffs are winning under the new standard as under the

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act not superceding cause absolving defendant from liabity when foreseeable; same principle applicable in occupier-liability cases); DiSalvo V. ARMAE, Inc., 359 N.E.2d 391, 392-93, 390 N.Y.S.2d 882, 883-84 (1976) (even if existing tort principles applied to facts of present case instead of reasonable care standard, plaintiff proved duty owed by landowner breached). *See generally* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?,* 36 MD. L. REV. 816, 849 (1977) (reasonable care standard in premises liability cases analogous to other tort areas following same standard).

161. *See* Carlson v Ross, 76 Cal. Rptr. 209, 211 (Ct. App. 1969) (jury instructions concerning licensees simplier under new standard); Fitch v. LeBeau, 81 Cal. Rptr. 722, 726 (Ct. App. 1969) (trial court failed to give proper jury instruction concerning defendant's duty to licensee; judgment for landowner reversed). *See generally* Comment, *Torts - Negligence - Premises Liabiity: The Foreseeable Emergence of the Community Standard,* 51 DEN. L.J. 145, 161 (1974) (application of general negligence standard should increase chances of licensee recovering).

162. *See* Beauchamp v. Los Gatos Golf Course, 273 C.A.2d 20, 26, 77 Cal. Rptr. 914, 923 (Ct. App. 1968) (after adoption of reasonable care standard in premises liability cases, doctrine of landowner's no duty to warn invitee of open/obvious dangers part of contributory negligence issue); *see also* Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions,* 1981 UTAH L. REV. 15, 43 (no great loss that open and obvious danger doctrine abandoned under reasonable care standard, as doctrine caused confusion and obscured issues of contributory negligence). Texas has taken the opposite approach, by abolishing the open and obvious danger doctrine (referred to as the "no-duty" rule) without repudiating the status categories. *See* Parker v. Highland Park, Inc, 565 S.W.2d 512, 517 (Tex. 1978) (no-duty rule repudiated).

163. *See* Carlson v. Ross, 271 Cal. App. 2d 29, 31, 76 Cal. Rptr. 209, 211 (1969) (licensees able to reach jury under new standard on facts that would have prevented them under common law scheme). *See generally* Note, *Torts - Landowner's Liability - Traditional Distinctions Between Trespassers, Licensees, and Invitees Abolished as Determinations of the Standard of Care Owed a Visitor,* 25 ALA. L. REV. 401, 411 (1973) (most plaintiffs benefit under new reasonableness standard, especially licensees).

164. *See* Mark v. Pacific Gas & Elec. Co., 496 P.2d 1276, 1279, 101 Cal. Rptr. 908, 911 (1972) (trespasser owed duty of care while reaching out of apartment window to unscrew defective streetlight); Leone v. City of Utica, 414 N.Y.S.2d 412, 416-17 (N.Y. App. Div. 1979) (city held liable for injuries to child-trespasser who wandered from city property and fell beneath train), *aff'd,* 403 N.E.2d 964 (1980); Watson v. Niagara Mohawk Power Corp., 411 N.Y.S.2d 769, 770 (N.Y. App. Div. 1978) (sufficient evidence of factual issues existed whether defendant power company's alleged negligence in failing to take precautionary measures to prevent child-trespasser from playing on wall and falling to death in river below submitted). *But see* Hawkins, *Premises Liability After Repudiation of Status Categories: Allocation of Judge and Jury Functions,* 1981 UTAH L. REV. 15, 26 (*Leone* court imposing unreasonable burden on city by finding duty breached, because nothing short of personal supervision would have prevented accident).

traditional common law scheme.[165] Close analysis and comparison of cases decided after the categories were repudiated support the view that more and different plaintiffs are successful, or at least are taking their cases to juries.[166]

IV. RECENT CHANGES IN PREMISES LIABILITY IN TEXAS

A. *General Negligence Standard in Other Areas of Premises Liability*

1. Abolition of the No-Duty Rule and its Effects on Premises Liability

In *Parker v. Highland Park, Inc.*,[167] the Texas Supreme Court abandoned the "no duty" rule that had restricted the landowner's duty of care to business invitees.[168] The no-duty rule placed an added burden on the plaintiff to prove he had no knowledge of the hazard causing his injury.[169] In 1978, however, the Texas Supreme Court abolished this rule in favor of applying a general negligence standard,[170] which includes the elements of foreseeability and comparative negligence.[171] To justify abandoning the no-duty rule, several rationales were used, including the confusing precedent spawned by the

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165. *Compare* Note, *Torts - Landowner's Liability - Traditional Distinctions Between Trespassers, Licensees, and Invitees Abolished as Determinative of the Standard of Care Owed A Visitor,* 25 ALA. L. REV. 401, 412-413 n.59-60 (1973) (under reasonableness standard same type of plaintiffs winning and losing as under traditional system) *with* Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions,* 1981 UTAH L. REV. 15, 58 (cases decided after repudiation of categories show potential for different outcome on merits when compared to old scheme).

166. *E.g.* Ward v. Enevold, 504 P.2d 1108, 1110-11 (Colo. Ct. App. 1972) (plaintiff injured after leaving one bar and entering adjacent property; defendant landowner liable because risk of injury foreseeable under circumstances); *e.g. also* Comment, *Torts - Negligence - Premises Liability: The Foreseeable Emergence of the Community Standard,* 51 DEN. L.J. 145, 162 (1974) (*Ward* court achieved result which could not have been reached under traditional analysis).

167. 565 S.W.2d 512 (Tex. 1978).

168. *See id.* at 516 (if invitee knows of open and obvious danger, occupier under no duty to warn or protect); *see also* Robert E. McKee, Gen. Contractor, Inc. v. Patterson, 153 Tex. 517, 521, 271 S.W.2d 391, 394 (1954) (conduct of invitee important in determining owner's duty to warn); Graham v. F. W. Woolworth Co., 277 S.W. 223, 224 (Tex. Civ. App. — El Paso 1925, writ dism'd) (breach of duty requires notice be given of broken glass to proprietor before liabilty can be assessed). *See generally* Comment, *Allegations of Negligent Operating Procedures in Slip & Fall Actions After Corbin v. Safeway Stores,* 15 ST. MARY'S L.J. 403, 403-25 (1984) (in-depth analysis of negligence standard in premises liabilty cases).

169. *See* Parker v. Highland Park, Inc., 565 S.W.2d 512, 516 (Tex. 1978) (plaintiff has to negate no-duty rule to proceed with case on merits).

170. *See id.* at 517 (no-duty concept abolished and replaced with general negligence standard); Furr's Inc. v. Patterson, 618 S.W.2d 417, 419 (Tex. Civ. App. — Amarillo 1981, no writ) (negligence concepts again applied to premises liability cases involving business invitees).

171. *See* Parker v. Highland Park, Inc., 565 S.W.2d 512, 520 (Tex. 1978) (return to general negligence standard will include determination of foreseeability and plaintiff's contributory negligence). *See generally* Greenhill, *Assumption of Risk,* 16 BAYLOR L. REV. 111, 112 (1964) (predicting *Parker* court's abolition of no-duty rule).

no-duty rule and the unpredictability in application of the rule,[172] the unjust results that were being reached,[173] and previous cases that had already undermined the doctrine.[174] Consequently, the Texas Supreme Court refused to follow the doctrine of *stare decisis*[175] because the reasons underlying the no-duty rule no longer supported adherence to that precedent.[176]

2. Abolition of Common Law Categories

The highest courts in nine states have abolished the traditional premises categories in favor of a reasonable man standard because the policies underlying the categories no longer existed, and *stare decisis* did not demand adherence to outmoded rules which obstruct legitimate present-day interests.[177] The similarities between these rationales and the various rea-

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172. *See* Parker v. Highland Park, Inc., 565 S.W.2d 512, 518 (Tex. 1978) (plaintiff must prove defendant owed duty to warn or make reasonably safe, thereby negating no-duty concept, before court will reach issue of defendant's negligence).

173. *See id.* at 517-19 (no-duty doctrine produces harsh results and shows basic distrust of juries); *see also* Keeton, *Annual Survey of Texas Law,* 23 SW. L.J. 1, 11 (1969) (no-duty concept harsh). The *Parker* court noted that the concept seemed to be unique to Texas, as no other jurisdiction had developed such a restriction on the landowner's duty of care to invitees. *See* Parker v. Highland Park, Inc., 565 S.W.2d 512, 519 (Tex. 1978) (no helpful literature from other states because no other jurisdictions follow no-duty concept).

174. *See* Parker v. Highland Park, Inc., 565 S.W.2d 512, 517-18 (Tex. 1978) (no-duty concept undermined when voluntary assumption of risk abolished, because two concepts are synonomous).

175. *See id.* at 518 (court taking action now that it felt could not be taken in earlier cases). *See generally* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?,* 36 MD. L. REV. 816, 846 (1977) (courts break with precedent when such change supported by compelling reasons).

176. *See* Parker v. Highland Park, Inc., 565 S.W.2d 512, 517-19 (Tex. 1978) (no-duty doctrine abolished to eliminate confusion, unpredictability, and harsh results).

177. *See* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 99 (D.C. Cir. 1972) (eighteenth-century rules of liability do not provide adequate tools to allocate risk of injury in modern society), *cert. denied,* 412 U.S. 939 (1973); Webb v. City & Borough of Sitka, 561 P.2d 731, 732 (Alaska 1977) (rigid common law categories too subtle and confusing to use in today's society); Rowland v. Christian, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968) (status distinctions obscure instead of clarify proper factors that should be considered in determination of liability); Mile High Fence Co. v. Radovich, 489 P.2d 308, 313 (Colo. 1971) (status classifications cause judicial waste, harsh results, and take issue of defendant's liability away from jury); Pickard v. City & County of Honolulu, 452 P.2d 445, 446 (Hawaii 1969) (common law categories not logically related to exercise reasonable care of landowner/occupier to others entering his property); Cates v. Beauregard Elec. Coop., 328 So. 2d 367, 370 (La. 1976) (analysis of plaintiff's status necessary in determining landowner's liability for plaintiff's injury); Ouellette v. Blanchard, 364 A.2d 631, 634 (N.H. 1976) (owners and occupiers of land must act reasonably in maintenance of their land, taking into account surrounding circumstances of intrusion); Basso v. Miller, 352 N.E.2d 868, 873, 386 N.Y.S.2d 564, 568 (1976) (rigid common law categories abolished, but court's function to ensure adequate evidence introduced to take case to jury and proof standards remain unchanged); Mariorenzi v. Joseph DiPonte, Inc., 333 A.2d

sons stated by the Texas Supreme Court in abolishing the no-duty rule are identical.[178] The Texas Supreme Court stated that confused, unpredictable, and harsh results were all products of the no-duty rule.[179] The same logic has been stated as sound rationale supporting repudiation of the common law status categories.[180] Another basis justifying the abolition of the no-duty rule was that previous case law had already undermined it to the point of being meaningless as a rule of law.[181] The same rationale may be applied to the common law categories when used as the sole determining factor of the defendant's liability, due to the various judicial exceptions that have virtually swallowed the distinctions.[182] Finally, the Texas Supreme Court recognized the inequitable treatment the plaintiff received when he failed to prove, under the no-duty rule, that the defendant owed him a duty, and thus

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127, 133 (R.I. 1975) (abolished status categories in favor of basic reasonableness test of torts because no longer applicable to modern society).

178. *Compare* Parker v. Highland Park, Inc., 565 S.W.2d 512, 517-19 (Tex. 1978) (doctrine of no-duty to warn abolished because of confusion, unpredictable results, and usurpation of jury function) *with* Mile Fence Co. v. Radovich, 489 P.2d 308, 312-13 (Colo. 1971) (common law categories cause confusion, harsh results, and take issue of defendant's liability away from jury).

179. *See* Parker v. Highland Park, Inc., 565 S.W.2d 512, 517-19 (Tex. 1978) (no-duty doctrine produces harsh, unpredictable results and should not be tolerated).

180. *Compare id.* at 517-18 (no-duty doctrine confusing and elusive) *with* Rowland v. Christian, 443 P.2d 561, 567, 70 Cal. Rptr. 97, 103 (1968) (complexity and confusion tolerated if underlying rationale governing liability relevant). *See generally* KEETON, VENTURING TO DO JUSTICE 16 (1969) (mature legal systems require more breaks with precedent than younger system, which allows for more judicial creativity).

181. *See* Parker v. Highland Park, Inc., 565 S.W.2d 512, 517-18 (Tex. 1978) (no-duty doctrine logically undermined by previous case law). The basis of this contention by the supreme court is that when voluntary assumption of risk was abolished, the no-duty doctrine, as inseparable from that concept, was also abolished. *See id.* at 518.

182. *See, e.g.,* Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630 (1959) (once sharply defined categories now eroded by judicially-created subtle verbal niceties and subclassifications); Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 103 (D.C. Cir. 1972) (numerous exceptions to once distinct categories indication that courts have experienced difficulty in their application), *cert. denied,* 412 U.S. 939 (1973); Mariorenzi v. DiPonte, Inc., 333 A.2d 127, 133 (R.I. 1975) (judicially created categories of trespasser, licensee, and invitee now abolished, along with extensions, exceptions, and extrapolations). Texas had developed its own exceptions to the common law categories, such as attractive nuisance, limited areas of frequent trespasser, and up until 1978, the no-duty doctrine for business invitees. *See, e.g.,* Parker v. Highland Park, Inc., 565 S.W.2d 512, 517 (Tex. 1978) (abolition of traditional no-duty doctrine); Banker v. McLaughlin, 146 Tex. 434, 442, 208 S.W.2d 843, 847 (1948) (attractive nuisance exception for trespassing children); Gulf Co. v. Beane, 133 Tex. 157, 158, 127 S.W.2d 169, 171 (1939) (frequent trespassers to limited area of defendant's property imposes liability if area unsafe). *See generally* James, *Torts Liability of Occupiers of Land: Duties Owed to Trespassers,* 63 YALE L.J. 144, 180-82 (1953) (decisive factor in judicially-created exceptions is likelihood of plaintiff's presence, thus legal fictions used to mitigate harsh result of status categories based on foreseeability analysis).

would not be able to submit the case to the jury.[183] Many courts and commentators have criticized this identical inequity in premises liability cases,[184] and have either broadly interpreted the categories to allow the plaintiff to recover,[185] or have abolished them completely to allow the jury to decide the case on the merits.[186] Therefore, by analogy, the exact reasoning used by the Texas Supreme Court to abolish the no-duty rule may be adopted in support of repudiating the common law categories in favor of a reasonable care standard. It is time for Texas to join the growing number of states opting for the reasonable man standard in place of the traditional categories. Texas has already taken the first step by repudiating the no-duty rule and returning business invitee cases to a general negligence standard. Accordingly, Texas courts should not balk from continuing the journey to a general negligence standard for all premise liability situations.

B. Nixon v. Mr. Property Management Co. — *An Opportunity Lost*

In *Nixon v. Mr. Property Management Co.*,[187] a case recently decided by the Texas Supreme Court, the issue of the continuing viability of the common law categories was squarely before the court.[188] The majority decision,

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183. *Compare* Parker v. Highland Park, Inc., 565 S.W.2d 512, 517 (Tex. 1978) (no-duty doctrine defeated plaintiff's cause of action when plaintiff aware of danger, because issue of defendant's negligence never reached jury) *with* Mile High Fence Co. v. Radovich, 489 P.2d 308, 312 (Colo. 1971) (rigid application of status categories usually resolved landowner's liability as matter of law, thus usurping jury function). *See generally* Note, *Torts - Occupier of Land Held to Owe Duty of Ordinary Care to All Entrants - "Invitee," "Licensee," "Trespasser" Distinctions Abolished,* 44 N.Y.U. L. REV. 426, 430 (1969) (if premises case not decided as matter of law, case would go to jury to determine plaintiff's status, rather than primary issue of negligence).

184. *See, e.g.,* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 103-04 n.32 (D.C. Cir. 1972) (jury decides only plantiff's status under common law scheme, not defendant's negligence), *cert. denied,* 412 U.S. 939 (1973); Mile High Fence Co. v. Radovich, 489 P.2d 308, 311-12 (Colo. 1971) (jury prevented from applying community standard to issue of defendant's negligence by mechanical application of status categories); Scurti v. New York, 354 N.E.2d 794, 795, 387 N.Y.S.2d 55, 56 (1976) (if status category not issue in plaintiff's case, result predestined because court automatically applied the pertinent standard of care attaching to plaintiff's category); *see also* Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions,* 1981 UTAH L. REV. 15, 18 (cases kept from jury based on plaintiff's status).

185. *See* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 103 (D.C. Cir. 1972) (courts expand common law categories to reach desired result), *cert. denied,* 412 U.S. 939 (1973); Mile High Fence Co. v. Radovich, 489 P.2d 308, 311 (Colo. 1971) (court recognized that in past it had deviated from rigidly defined categories to achieve just result).

186. *See* Rowland v. Christian, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968) (status distinctions should be abolished instead of prolonging confusion and multiple exceptions).

187. 690 S.W.2d 546 (Tex. 1985).

188. *See id.* at 551 (Kilgarlin, J., concurring) (majority avoided considering status categories, thus creating another exception to doctrine); *see also* Petitioners Application for Writ of

however, avoided the issue of whether the traditional scheme should be followed, by basing their decision on a finding of negligence *per se,* in that the defendants violated a city ordinance in the maintenance of their property.[189] The court implicitly rejected a strong line of previous decisions which held that a trespasser fails to acquire any new right under the common law scheme merely because the defendant violated a statutory duty.[190] Thus, the *Nixon* majority's rationale for its decision to reverse and remand the case is questionable at best, and does not distinguish the very precedent it implicitly overruled.

In choosing to apply the statutory duty as defined by the city ordinance, the majority expressly interprets the proper conduct under the ordinance to be that of a reasonably prudent person.[191] The language of the ordinance itself, however, does not raise this interpretation, but merely identifies the proper action that should be taken to comply with the city code.[192] The

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Error at 6, Nixon v. Mr. Property Mangement Co., 690 S.W.2d 546 (Tex. 1985) (Texas should join growing number of states abolishing categories). The *Nixon* trial court granted defendant's motion for summary judgment, based on a determination that the plaintiff was merely a trespasser, and defendant did not breach any duty of care. *See* Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 548 (Tex. 1985) (defendant's duty of care to trespasser not to wilfully or wantonly injure her or cause injury through gross negligence). The appellate court affirmed the trial court's granting of summary judgment because no duty of care was breached, and the failure of the defendant to not have a locked door in the vacant apartment was not the proximate cause of the plaintiff's rape. *See* Nixon v. Mr. Property Management Co., 675 S.W.2d 585, 586-88 (Tex. App. — Dallas 1984), *rev'd,* 690 S.W.2d 546 (Tex. 1985). Thus, the facts of the case and the predictable granting of the defendant's motion for summary judgment presented a clear opportunity to analyze the status categories' viability in light of the preordained harsh result. *See* Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 554 (Tex. 1985) (Kilgarlin, J., concurring) (case presents perfect opportunity to repudiate feudalistic notion that does not relate to modern society). *But see* Answer to Application for Writ of Error at 15-16, Nixon v. Mr. Property Management Co., 690 S.W.2d 546 (Tex. 1985) (Texas traditionally followed common law categories and should continue to do so).

189. *See* Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 548-49 (Tex. 1985) (city ordinance requiring doors and windows of vacant building to be securely closed to prevent unauthorized entry meant to protect general public, thus making premises categories irrelevant to decision).

190. *See, e.g.,* Texas-Louisiana Power Co. v. Webster, 127 Tex. 126, 133, 91 S.W.2d 302, 305 (1936) (general rule regarding owner's liability holds that no distinction exists betweeen common law negligence and negligence *per se);* Burnett v. Fort Worth Light & Power Co., 102 Tex. 31, 34 (1908) (court fails to see how trespasser acquires any new rights because of defendant's violation of statute than does under common law distinctions); Mayes v. West Tex. Util. Co., 148 S.W.2d 950, 953 (Tex. Civ. App. — Eastland 1941, no writ) (electric company's violation of statutory duty created no cause of action for trespasser electrocuted while climbing on company's tower).

191. *See* Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 549 (Tex. 1985) (proper conduct under ordinance that of reasonably prudent man).

192. *See* DALLAS, TEX., REV. ORDINANCES § 27.11 (a)(6) (1984) (landowner must lock doors and windows of vacant building to prevent unauthorized entry); *see also* Nixon v. Mr.

Nixon majority implicitly adopted the general negligence standard of a reasonable man by interpreting the ordinance as requiring such a standard. Thus, the majority had no difficulty in finding a genuine issue of material fact under the reasonable care standard, reversing and remanding the case to be tried on its merits.[193]

The *Nixon* court could have followed a much simpler and clearer approach to reach the same result by repudiating the common law status categories and adopting the negligence standard of reasonable care in its stead.[194] Sound policy considerations, as well as a general trend towards imposing the negligence standard in all areas of premises liability cases support this assertion.[195] The majority of the Texas Supreme Court instead chose to create another exception to the common law categories, by imposing liability based on the breach of an ordinance.[196] This approach has been uniformly rejected by previous Texas Supreme Court decisions and perpetuates the exception-wrought common law categories.[197]

Persuasive arguments were made by Justice William Kilgarlin in his con-

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Property Management Co., 690 S.W.2d 546, 554 (Tex. 1985) (Spears, J., concurring) (court's reliance on statutorily-imposed conduct does not prevent future exceptions or abolition of common law categories).

193. *See* Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 549-51 (Tex. 1985) (case should not have been taken from jury because material fact issue existed whether landowner acted reasonably in light of surrounding circumstances). *But see id.* at 558 (McGee, J., dissenting) (majority result establishes unsupportable precedent and discourages use of summary judgment).

194. *See id.* at 554 (Kilgarlin, J., concurring) (present case excellent opportunity to simplify this area of law); *see also* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 102 (D.C. Cir. 1972) (negligence standard better suited to resolve various fact situations than rigid common law categories), *cert. denied,* 412 U.S. 939 (1973). *See generally* Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions,* 1981 UTAH L. REV. 15, 21 (general negligence formula flexible in determining if liability exists, whether sufficient evidence offered to take liability issue to jury, and framing jury instructions).

195. *See* Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 553-54 (Tex. 1985) (Kilgarlin, J., concurring) (importance of resource allocation, adoption of new legal standards and greater emphasis on safety confirm position that common law categories should be abolished). *See generally* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?,* 36 MD. L. REV. 816, 850 (1977) (negligence standard simplifies analysis of premises liability cases, as supported by sound social policy considerations).

196. *Compare* Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 551 (Tex. 1985) (Kilgarlin, J., concurring) (majority's reliance on statutory duty creates another exception to common law rules) *with id.* at 554 (Spears, J., concurring) (willing to create exception to resolve present facts equitable by relying on traditional scheme, not city ordinance).

197. *See* Texas-Louisiana Power Co. v. Webster, 127 Tex. 126, 133, 91 S.W.2d 302, 305 (1936) (under common law approach no distinction made between negligence and negligence *per se);* Burnett v. Fort Worth Light & Power Co., 102 Tex. 31, 35 (1908) (trespasser does not gain new rights merely because defendant breached statutory duty of care under traditional system).

curring opinion, supporting abolition of the common law categories in favor of a general duty of reasonable care.[198] After a brief review of the historical background behind the traditional scheme, Justice Kilgarlin noted the obvious difficulties the lower courts have had in fitting the injured plaintiff into one of the rigid categories [199] as a reason to abolish the categories.[200] Additionally, Texas, along with most jursdictions, has created numerous exceptions to the once distinct categories,[201] implicitly recognizing that the distinctions are inapplicable to the unique fact situations that arise in modern, urban settings.[202] Finally, after identifying the nine states that have abolished the categories, Justice Kilgarlin noted that our advocacy system presumes that the jury is in the most advantageous position to determine the proper allocation of resources to compensate injured parties.[203] Justice Kilgarlin identified and advocated abolition of the common law categories,

198. *See* Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 551-54 (Tex. 1985) (Kilgarlin, J., concurring) (modern trend should be followed in instant case, repudiating antiquated rules of status). *See generally* Hawkins, *Premises Liability After Repudiation of Status Categories: Allocation of Judge and Jury Functions,* 1981 UTAH L. REV. 15, 63 (reasonable care standard best suited to unusual fact situations, by equally protecting interests of landowner and entrant).

199. *See* Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 557-52 (Tex. 1985) (Kilgarlin, J., concurring) (if plaintiff was tenant of defendant and injured under same circumstances, would be invitee and owed duty of reasonable care, as majority found to be owed under city ordinance); *see also* Comment, *Torts - Landowner's Liability - Traditional Distinctions Between Trespassers, Licensees and Invitees Abolished as Determinative of the Standard of Care Owed a Visitor,* 25 ALA. L. REV. 401, 410 (1973) (too much judicial time wasted on determination of plaintiff's status).

200. *See* Nixon v. Mr. Property Managment Co., 690 S.W.2d 546, 551-52 (Tex. 1985) (Kilgarlin, J., concurring) (trespasser category applied by lower courts to minor plaintiff who was focibly dragged off property and raped in defendant's empty building harsh and absurd); *see also* Basso v. Miller, 352 N.E.2d 868, 871, 386 N.Y.S.2d 564, 567 (1976) (difficulty in determining plaintiff's status valid reason to expedite repudiation of status categories). *See generally Recent Development,* 25 VAND L. REV. 623, 635 (1972) (foreseeable consequences of abolishing traditional categories include more efficient adjudication, because courts relieved of making determination of plaintiff's status).

201. *See* Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 552 (Tex. 1985) (Kilgarlin, J., concurring) (Texas not alone in creating exceptions to rigid categories); *see also* Ouellette v. Blanchard, 364 A.2d 631, 632 (N.H. 1976) (exceptions to common law categories response to changing social mores and values). *See generally* Comment, *The Common Law Tort—Liabiliy of Owners and Occupiers of Land: A Trap for the Unwary?,* 36 MD. L. REV. 816, 823 (1977) (common law rules gave landowner virtual immunity from liability; exceptions to rules created to reflect changing social values).

202. *See* Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 553 (Tex. 1985) (Kilgarlin, J., concurring)(common law distinctions alien to modern tort goals and principles, quoting Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 101 (D.C. Cir. 1972), *cert. denied,* 412 U.S. 939 (1973)).

203. *See id.* at 553 (Kilgarlin, J., concurring) (if legislature failed to allocate resources jury next best alternative because represents community standard).

based on three major forces which have generated widespread criticism of the categories' continuing viability in modern tort law.[204] Comparison of the results reached under the rigid common law distinctions and the flexible negligence standard[205] in those states that have chosen to adopt the new standard support Justice Kilgarlin's contention that Texas should adopt the negligence standard for all premises liability cases.[206]

In a separate concurring opinion, Justice Franklin Spears advocated retention of the traditional categories until the various consequences of abolition could be analyzed in the states that have repudiated the categories.[207] Justice Spears also questioned the jury's ability to weigh the various competing social policies under a general negligence standard.[208] He concluded that if

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204. *See* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 101-03 (D.C. Cir. 1972) (various forces combine to make categories obsolete, including importance of human safety over landowner's freedom, factual changes between feudal England and modern society, and juries increased role in determining proper community standards). *See generally* Henderson, *Expanding the Negligence Concept: Retreat From the Rule of Law,* 51 IND. L.J. 467, 513 (1976) (attack on common law categories not criticism of underlying policies but refusal to be bound by inherent formalities).

205. *See* Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions,* 1981 UTAH L. REV. 15, 61 (in survey of eighty cases since traditional scheme repudiated, jury control devices and procedural techniques used effectively, supporting abolition).

206. *See* Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 551 (Tex. 1985) (Kilgarlin, J., concurring) (should abolish last remnant of feudalism in favor of general negligence standard); *see also Recent Development,* 25 VAND. L. REV 623, 635 (1972) (adoption of reasonable man standard eliminates confusion and unpredictability under common law scheme).

207. *See* Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 554 (Tex. 1985) (Spears, J., concurring) (court should expressly retain the categories until ramifications of abolition can be studied). *But see* Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Function,* 1981 UTAH L. REV. 15, 56-58 (comparative results of eighty cases surveyed in nine states abolishing common law categories). Professor Hawkins found that out of eighty cases surveyed, twenty-seven were reversed on appeal because the trial court summarily disposed of the case based on the status rules. *See id.* at 57-58 n.303-04. Professor Hawkins concluded from these results that repudiation of the categories produced a potentially different result than under the traditional scheme, in that the plaintiff's case was allowed to proceed to the jury. *See id.* at 58. Thus, there are quantifiable results and conclusions to support repudiation of the common law distinctions, because enough time has passed in most of the nine states abolishing the traditional system to determine any possible ramifications. *But see* Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 554 (Tex. 1985) (Spears, J., concurring) (Texas should wait to study consequences of abolition in states adopting negligence standard).

208. *See* Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 554 (Tex 1985) (Spears, J., concurring) (doubtful whether juries capable of reconciling different social goals when determining landowner's liability implicit under general negligence standard). *But see* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?,* 36 MD. L. REV. 816, 849 (1977) (negligence standard explicitly weighs factors such as foreseeability, cost of preventative measures, and efficient allocation of costs that were implicitly considered under traditional scheme).

the categories were still going to be used as a reference point under the new standard, little is gained by repudiating the predictable classifications.[209]

Two justices joined in a dissenting opinion written by Justice Sears McGee.[210] The basic premise of the dissenting justices was that the criminal assault by a third party was not foreseeable,[211] nor was the landowner's alleged negligence the cause of the plaintiff's injury.[212] The dissent implicitly agreed with the majority's assessment of the standard of care under the applicable city ordinance, but differed as to the result when that standard was applied to the facts of the case.[213] The majority concluded that the criminal activity involved in the present case was foreseeable, while the dissent found that the criminal activity was a superceding cause, thereby absolving the defendant-landowner from liability.[214] The diametrically opposed results reached by the *Nixon* majority and dissent illustrates the subtleties of applying the reasonable care standard to the unique facts presented.[215] *Nixon* also further confuses and obfuscates Texas premises liability law by postponing the inevitable repudiation of the common law categories.

V. CONCLUSION

The time has come for Texas courts to take a position on the continuing viability of the common law status categories. While many arguments may be presented for both abolition and retention of the categories, reason and common sense dictate that the abolitionists' viewpoint is the stronger argument. The common law status classifications have gone through multiple

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209. *See* Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 554 (Tex. 1985) (Spears, J., concurring) (if former categories still referred to in jury instructions under proposed standard, no reason to abolish categories).

210. *See id.* at 551 (McGee, J., and Wallace and Gonzalez, J.J., dissenting).

211. *See id.* at 556-58 (McGee, J., dissenting) (third party criminal activities not foreseeable under reasonableness standard because landowner had no notice of assaultive crimes occurring on premises since he bought property).

212. *See id.* at 554 (McGee, J., dissenting) (applicable "but for" test used to determine if defendant's negligence cause of plaintiff's injury failed on facts of instant case).

213. *Compare id.* at 549 (issue under reasonable care standard whether defendant proximately caused plaintiff's injury) *with id.* at 555 (McGee, J., dissenting) (issue was whether defendant's alleged negligence proximate cause of injury); *see also Recent Development,* 25 VAND. L. REV. 623, 635 (1972) (implementation of resonable man standard eliminates confusion found under traditional scheme).

214. *Compare id.* at 551 (material fact issue present on issue of foreseeability) *with id.* at 560 (McGee, J., dissenting) (criminal assault in present case unforeseeable as matter of law).

215. *See* Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions,* 1981 UTAH L. REV. 15, 44-45 (mixed results of courts using insufficiency of evidence as judicial administration tool under negligence standard shows subtlety of process); *see also* Comment, *Torts - Negligence - Premises Liability the Foreseeability Emergence of the Community Standard,* 51 DEN. L.J. 145, 163 (1974) (factual analysis crucial under reasonableness test).

variations and mutations since they were first created by feudal English courts. This adaptation of the status system indicates their lack of viability when applied to modern factual situations. Additionally, public policy dictates a stronger concern for human safety than the traditional categories will accommodate or allow. Since the categories are judicially-created rules of law, they may also be judicially-abrogated when necessity dictates, without waiting for state legislatures to act. Thus, the basic conflict centers on the constraints of *stare decisis* and precedent. Strict interpreters of *stare decisis* would not change the common law categories because of their alleged reliability and predictability. But abolitionists take a more liberal view of precedent and refuse to be bound when the reasons underlying the categories are no longer valid in light of modern considerations. Again, the abolitionists have the more persuasive argument, in that the categories are no longer stable guidelines and predictable indicators for future courts since the categories are so riddled with exceptions that they overcome the categories' rigid distinctions.

Adoption of a general negligence standard of reasonable care has many advantages, both procedurally and substantively. Such a standard provides flexibility for both the judge and jury, so that the myriad of fact situations that occur between landowners and persons entering their property may be resolved in the most equitable manner possible. Fears of unfettered jury discretion are unfounded when one considers that judges may still refer to traditional jury control techniques, as well as other areas of tort law, for guidance under the single standard of care when applied to premises cases. The possibility of undue burdens being placed indiscriminately on landowners under the general negligence standard is rebutted by the consideration that the burdens imposed by the jury will be reasonable in light of the relevant circumstances. Landowners have to conduct themselves as reasonable people in other areas of their lives, so it should not be too difficult to impose the same standard of care as to persons entering their property. Finally, analysis of cases arising in the nine states that have repudiated the common law categories provides the strongest argument that the reasonable man standard is the most equitable method to assign liability in today's society.

The Texas Supreme Court seems to be moving in the direction of applying the general negligence standard in all areas of tort law, by abolishing the no-duty rule in business invitee cases. The very rationales used by the supreme court to support repudiation of the no-duty rule are identical to the policy reasons espoused by the highest courts of nine states when abolishing the common law categories. It seems that Texas is only one step away from reaching the same result. However, in the recent case of *Nixon v. Mr. Property Management Co.,* the majority of the Texas Supreme Court blithely avoided the issue of the status categories' viability and based their decision on negligence *per se.* The decision fails to distinguish a strong line of previ-

ous decisions holding that trespassers do not acquire any additional rights than they have under the traditional scheme, just because the defendant violated a statutory duty. Thus, the very premise of *Nixon* is unsound, and will only produce further confusion and judicially-created exceptions to the once distinct status categories. The Texas Supreme Court had an excellent opportunity to clarify an unsettled area of tort law, but instead of taking this positive step, it chose the easier route of avoiding the pivotal issue. The common law status categories eventually will be repudiated, based on sound policy rationales and humanitarian values. The Texas Supreme Court could have saved much time and expense by abolishing the distinctions now, instead of delaying the inevitable.