TORT DUTIES OF LANDOWNERS: A POSITIVE THEORY

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INTRODUCTION

One of the most controversial areas of modern tort law is that of the duty of landowners toward people who visit their land. The common law divided land visitors into three types: invitees, licensees, and trespassers.[1] The highest duty of care was owed to the invitee and the lowest to the trespasser. These distinctions led courts to hand down harsh decisions and to draw formal lines between the categories, which seemed to defy common sense at times.

That traditional common-law approach was famously rejected by the California Supreme Court in 1968, in *Rowland v. Christian*.[2] The 1960s were a period of intellectual upheaval across society, and so it makes sense in retrospect that a sturdy common-law tradition, such as the classification of landowner duties, would be overturned by California justices during that time. The court suggested that the landowner duties were due to "historical considerations stemming from the high place which land has traditionally held in English and American thought, the dominance and prestige of the landowning class in England during the formative period of the rules governing the possessor's liability, and the heritage of feudalism."[3]

In other words, there was nothing to those duties other than the dead hand of landed interests in pre-industrial England. Obviously, with so much being rethought in the 1960s, it was time to discard

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1. *See* RESTATEMENT (SECOND) OF TORTS §§ 333, 342–343 (1965). On the origin of the common-law distinctions, see, for example, Graham Hughes, *Duties to Trespassers: A Comparative Survey and Revaluation*, 68 YALE L.J. 633 (1959); Fleming James, Jr., *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 YALE L.J. 605 (1954); Norman S. Marsh, *The History and Comparative Law of Invitees, Licensees and Trespassers*, 69 LAW Q. REV. 182 (1953).

2. Rowland v. Christian, 443 P.2d 561 (Cal. 1968).

3. *Id.* at 564–65.

the common-law landowner rules.[4] In their place the court substituted a general duty of reasonable care,[5] which it regarded as a return to a fundamental principle that had been distorted by class-based influence.

Rowland touched off a wave of rejections of the landowner duties by other state courts. At this time, twenty-five jurisdictions have modified the traditional common-law duties, based in part on the reasoning of *Rowland*.[6] The current draft of the *Restatement (Third) of Torts* casts the same skeptical eye toward the common-law duties of landowners.[7]

I have no objections to skepticism as a stock approach to legal theories. However, there is a difference between skepticism and beneficial reform. It is often much easier to find potential flaws in any set of legal rules than to devise a superior system. Somewhere between skepticism and reform proposals should come an effort to understand precisely the function served by any set of legal rules that appears questionable at first glance.

This Article undertakes a task that should have preceded the *Rowland* decision: to understand the incentive-based function of the classical landowner duties. I will argue that the classical duties served useful regulatory functions.[8] The most important was regulating the overall scale of injuries by imposing the risk of latent defective conditions in property on the landowner when he was the party most likely to be informed of the defects or to inform himself of their existence.[9] Overall, the duties shifted the risk from defective

4. On the general connection between the 1960s and reform of the common law, see Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601 (1992).

5. *Id.* at 659–60. Other jurisdictions have followed. *See, e.g.*, Scurti v. City of N.Y., 354 N.E.2d 794, 798 (N.Y. 1976); Basso v. Miller, 352 N.E.2d 868, 872–73 (N.Y. 1976). In *Basso*, the New York Court of Appeals abolished the common-law distinctions regarding entrant status and replaced them with a unitary duty-of-care standard. *Basso*, 352 N.E.2d at 872–73. *Scurti* further specified that the common-law categorization would not be determinative of landowner liability and listed three factors from the traditional analysis that would continually be used in assessing the reasonableness issue: whether the injury occurred on the defendant's property, whether the plaintiff entered the land with the defendant's permission, and the plaintiff's age. *Scurti*, 354 N.E.2d at 798.

6. *See* Mallet v. Pickens, 522 S.E.2d 436, 444–45 (W. Va. 1999). Of the twenty-five that have modified the law, seventeen have abolished the distinction between invitees and licensees, and eight have extended the uniform-care rule to trespassers as well.

7. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 51 (Tentative Draft No. 6, 2009).

8. This Article builds on the arguments in Keith N. Hylton, *Duty in Tort Law: An Economic Approach*, 75 FORDHAM L. REV. 1501 (2006) [hereinafter Hylton, *Duty in Tort Law*], and Keith N. Hylton, *A Missing Markets Theory of Tort Law*, 90 NW. U. L. REV. 977 (1996).

9. This argument applies especially to the distinction between invitees and licensees, which is the most controversial of the distinctions.

conditions toward the cheapest cost avoider.[10]

I. TRADITIONAL LANDOWNER DUTIES

The common law divided the visitors to land into three categories: invitee, licensee, and trespasser. In a leading case, *Robert Addie & Sons (Collieries), Ltd. v. Dumbreck*,[11] the House of Lords described the duties allocated to these categories as follows:

> The highest duty exists towards those persons who fall into the first category, and who are present by the invitation of the occupier. Towards such persons the occupier has the duty of taking reasonable care that the premises are safe.
>
> In the case of persons who are not there by invitation, but who are there by leave and license, express or implied, the duty is much less stringent—the occupier has no duty to ensure that the premises are safe, but he is bound not to create a trap or to allow a concealed danger to exist upon the said premises, which is not apparent to the visitor, but which is known—or ought to be known—to the occupier.
>
> Towards the trespasser the occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger. The trespasser comes on to the premises at his own risk. An occupier is in such a case liable only where the injury is due to some willful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser.[12]

A. Duties

Consider the first two categories, invitee and licensee. With respect to both the landowner has a duty of care to avoid injuries due to defective conditions of which he is aware. If the landowner, therefore, is aware of a step on a staircase that might give way under pressure, he has a duty at least to inform an invitee or a licensee about the dangerous step. Of course, the duty of reasonable care is potentially broader than a duty to inform. The landowner may be able to meet his duty of care by informing the visitor. However, if merely informing the visitor is not enough to meet the duty of care, the landowner may have to fix the dangerous step so

10. I thank Ariel Porat for suggesting the cheapest-cost-avoider label as a concise, intuitive summary of my argument.

11. Robert Addie & Sons (Collieries), Ltd. v. Dumbreck, [1929] A.C. 358 (H.L.) (appeal taken from Scot.) (U.K.).

12. *Id.* at 364–65.

that it will not give way under the weight of the visitor.

The amount of care required is determined by the reasonableness test of tort law. Judge Learned Hand described the reasonableness test as based on a balance between the expected loss that could be avoided through care and the burden of taking care.[13] The expected loss is just the probability of loss multiplied by the severity or amount of the loss to the victim. Suppose, then, that if the landowner does nothing to warn or fix the defective step, the likelihood of injury to the visitor is 75%. Suppose also that the amount of the loss to the visitor is at most $100 (in terms of medical bills and lost wages) because the likelihood of a serious injury is extremely low. Suppose that if the landowner warns the visitor, the likelihood of injury falls to 50%. Suppose that if the landowner fixes the step, the likelihood of injury falls to 0%.

The reasonableness of the landowner's conduct, in this example, will be determined by comparing the expected losses avoided and the burden of the specific care action chosen. The expected loss avoided by a warning is $75 – $50 = $25. Since the cost of issuing a warning to the visitor is likely to be much less than $25, the landowner will have failed to exercise reasonable care if he does not warn the visitor (either invitee or licensee) of the defective condition of the staircase. Should the landowner fix the staircase (rather than warn)? The expected loss avoided by fixing the staircase is $75. Suppose the burden of fixing the stairwell is $5000. In this case, a court probably would hold that the landowner did not have a duty to fix the stairwell.[14]

Now consider a slightly different view of the same problem. Suppose, instead, that the cost of fixing the staircase is $5000 and that the injury that would be suffered as a result of the defective step is $100,000. Under these assumptions, the expected loss avoided by a warning would be $25,000. The expected loss avoided by fixing the staircase would be $75,000. At the least, the landowner would be expected to warn. But even after a warning, the expected loss to the visitor would remain at $50,000. Given that the cost of fixing the stairwell is $5000, a court might find that the landowner had a duty to fix the stairwell. In other words, the warning may be considered insufficient to meet the landowner's duty of care to the visitor.

So far I have considered defective conditions to which the

13. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

14. Admittedly, this gets us into the business of comparing physical injuries to financial burdens, which is a rich topic. On some of the general issues, see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1111–15 (1972); Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56 (1993). For now, I will simply assume that the cost of fixing the staircase is so large, relative to the expected injury avoided, that a court would deem it reasonable not to have fixed the staircase.

landowner owes an equivalent duty to both the invitee and the licensee—because of his awareness of the condition. Now I will consider the important difference between the two types of visitors. Suppose the defective-stairwell condition is in an area of the house that the landowner seldom visits (for example, the attic) and the landowner is unaware of its existence. In this case, the traditional common-law classifications imply that the landowner has a duty of reasonable care with respect to the invitee but not the licensee.

In terms of the stairwell example, this means that the landowner will not be held liable to the licensee visitor because he was not aware of the condition. The landowner will have a duty with respect to the invitee. The landowner has a duty of reasonable care, which means a duty to take reasonable care in inspecting for and reducing the likelihood of injury from the defective condition. If the cost of inspecting and informing the invitee is likely to be far less than the expected loss avoided, the landowner will be found negligent in failing to inform the invitee. If the cost of fixing the stairwell is high, the court may or may not find that a warning is sufficient to meet his duty of care, depending on the severity of the loss.

The key difference between the duty owed to the invitee and that owed to the licensee is that the landowner has a duty of both reasonable inspection and reasonable remedial conduct (warning the visitor or fixing the defective condition) in the case of the invitee. In the case of the licensee, the landowner has no duty to make a reasonable inspection for defective conditions of which he is not aware.

Consider the trespasser. According to *Addie & Sons*, the landowner owes no duty of care to the trespasser, just a duty not to intentionally harm him. Obviously this means that the landowner will be held liable to the trespasser if he shoots the trespasser for no reason other than to injure him. The landowner may also be liable if he sets a trap for the trespasser. Thus, a landowner who sets out a lion's pit into which a trespasser could fall will be held liable. Perhaps a landowner may be held liable for holding a vicious animal in a manner that a trespasser could not possibly observe until it is too late. But as we consider other possible dangers, the outcome of a trespasser lawsuit becomes less clear. The general norms are clear—no intentional harms, no traps—but their application remains a matter of discretion and dependent on the facts.

B. Categories

It is easier to specify the duties owed to visitors under the different visitor categories than to identify the boundaries of the categories. *Addie & Sons* tells us that the invitee is someone who

shares a joint interest with the landowner.[15] Other sources say that the landowner and invitee must have a mutual interest in their transaction.[16] The clear case is that of a business relationship that brings the visitor to the land. The typical invitee is someone who has a contract with the landowner, like a repairman who is visiting to repair something on the occupier's land.

The licensee has come to be understood as a social guest rather than someone in a business relationship with the landowner. A neighbor or friend who drops by for a social visit is a typical example. There is no contract between the parties. But the visit may be part of an ongoing exchange between the two. Indeed, even a neighbor who drops by for a social visit may be expecting a reciprocal act in the future. This is a form of exchange, without money changing hands.

Plenty of cases have arisen in which it is not clear whether the visitor should be called an invitee or licensee. Suppose the visitor is a friend who visits in order to help the landowner with a repair project at the home. There is no contract between the parties, but there is clearly a financial interest. The friend is performing a service that has an identifiable market value. Moreover, he may be doing the service in the expectation that the landowner will reciprocate some time in the future. This transaction is arguably no different in economic terms from the standard invitee relationship. Instead of a transaction for money, it is a transaction with an expectation of reciprocity in the future.

The cases do not tell us precisely whether to call such a visitor a licensee or invitee. The only way to get an answer is to delve deeper into the functional justification for the categories to see if there is a basis for distinguishing these cases.

II. THE ECONOMICS OF LAND-VISITOR CATEGORIES IN THE COMMON LAW

In this Part I will present economic explanations for the common-law classifications of landowner duties. I will not attempt to provide a single, simple theory that explains all of the doctrinal rules. The landowner duties probably serve several functions.

I will focus on the different treatment of invitees and licensees. That is the most controversial of the land-visitor distinctions. The less favorable treatment of trespassers has been far less

15. *Addie & Sons,* [1929] A.C. at 371.

16. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 332 (1965) ("An invitee is either a public invitee or a business visitor . . . . A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land."); Clem v. United States, 601 F. Supp. 835, 841–42 (N.D. Ind. 1985); Mazzacco v. Purcell, 303 N.C. 493, 497, 279 S.E.2d 583, 587 (1981), *abrogated by* Nelson v. Freeland, 349 N.C. 615, 507 S.E.2d 882 (1998).

controversial. Of the states that have reformed their landowner-duty rules, all of them have abolished the distinction between invitee and licensee. Only eight of them have abolished the distinction between trespasser and licensee.[17]

A. Assumption of Risk and Informational Asymmetry

One reason for the common-law distinction between the duties owed to invitees and to licensees can be found in traditional assumption-of-risk theory.[18] Invitees, as a class, are business visitors who have no knowledge of the condition of the landowner's property and no basis on which they might be able to predict the condition.

Consider the repairman who visits the landowner's property to fix an appliance. If the repairman assumes that the landowner's property will not be defective, he will not consider the cost of injury from defective conditions as part of his cost of service to the landowner. The supply of his services, the set of reservation prices that the repairman will set for visits, will be distorted from the full-information case because of his lack of knowledge.

The "repairman problem" can be described in the familiar supply-and-demand framework of economics. Let the supply schedule labeled *S* in Figure 1 (below) represent the relationship between the reservation prices of repairmen and the quantity of service provided. The schedule builds in the typical assumptions of economics: as the price offered to repairmen increases, more of them will offer their services and less repair service will be demanded. Let the demand schedule labeled *D* in Figure 1 represent the relationship between price and the quantity of landowner-site repair service demanded by landowners.

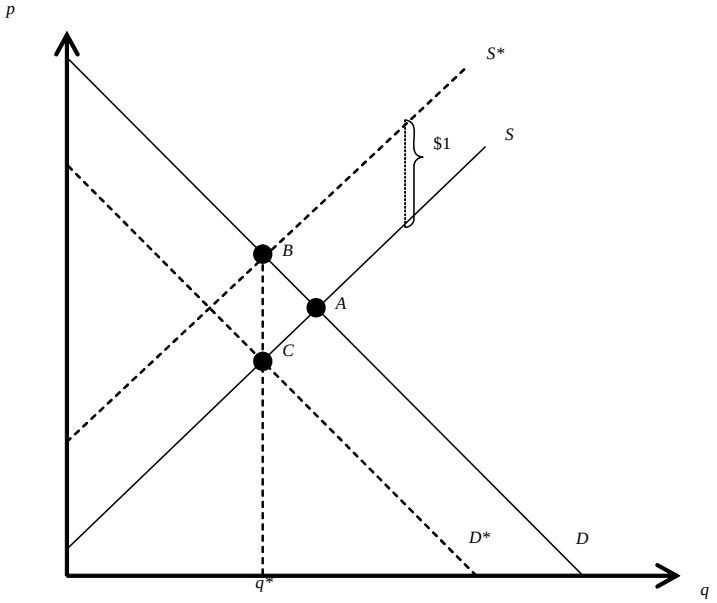
Assume the supply and demand schedules (*S* and *D*) in Figure 1 reflect the baseline scenario in which the property of landowners is free from latent defective conditions. If there is a latent defective condition, it will introduce a cost that is not contemplated by either the landowner or the repairman. Let the expected cost of injury to the repairman be $1. The cost can be introduced into the market framework by adding it to the supply schedule. The injury cost is part of the cost of supplying home repair service. For this reason, I will treat it as a cost of service that, in a full-information market, would induce the repairman to demand higher prices in order to

17. Mallet v. Pickens, 522 S.E.2d 436, 444–45 (W. Va. 1999).

18. One of the early and theoretically sophisticated presentations of the assumption-of-risk doctrine was provided by Chief Justice Shaw in *Farwell v. Boston & Worcester Railroad Corp.*, 45 Mass. (4 Met.) 49 (1842). On the literature on assumption of risk, see Francis H. Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14 (1906); Fleming James, Jr., *Assumption of Risk*, 61 YALE L.J. 141 (1952); Kenneth W. Simons, *Reflections on Assumption of Risk*, 50 UCLA L. REV. 481 (2002).

compensate for the risk of injury. In Figure 1 I have added an alternative supply schedule (S^*), which represents the full-information case in which the repairman knows the precise risk of injury from defective conditions on the property of landowners.

FIGURE 1: SUPPLY AND DEMAND FOR REPAIR SERVICES ON LANDOWNER'S PROPERTY



The economically optimal (or efficient) scale of consumption of the services of repairmen is the level that reflects all of the costs and benefits of the service. That is the level of service associated with point *B* in Figure 1. However, if the repairman is not aware of the risk of injury, and if the landowner is not held liable for the latent defective condition, the level of service that will be generated by the market is that associated with point *A*. This is a familiar result from the literature on products liability: in the absence of full information, the market tends to generate too much consumption of a risky product.[19] In this scenario, one observes that in the absence of full information, the market for home repair services generates

19. *See* A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 97–106 (2d ed. 1989) (discussing consumer and producer decisions concerning product liability); James M. Buchanan, *In Defense of Caveat Emptor*, 38 U. CHI. L. REV. 64 (1970) (challenging the shift towards strict products liability because of its economic effects); A. Mitchell Polinsky & William P. Rogerson, *Products Liability, Consumer Misperceptions, and Market Power*, 14 BELL J. ECON. 581 (1983) (analyzing market structure and its impact on the appropriate standard of tort liability).

too much service relative to the economically ideal level. The socially excessive service level leads to a socially excessive rate of injury. This is a classic example of market failure.

One way to correct this market failure is to force the landowner-consumer to pay for the injuries due to latent defective conditions. If forced to pay for the injuries due to latent property defects, the landowner-consumer would reduce his bids for repair service. If the landowner is aware of the possible defective conditions, he will reduce his bids for service by an amount that reflects the cost of compensating repairmen for their injuries. The efficient level of consumption of repair services will result.

The efficient consumption level for repair services is the quantity that provides the greatest net benefit to society from the service. That level will be observed where the incremental benefit from the last repair call is just equal to its incremental cost. The incremental cost of the last repair call is simply the sum of the repairman's reservation price and the cost of injury. Thus, the efficient level of service will be observed when the incremental benefit from service to the landowner is just equal to the sum of the reservation price and the compensation transfer. But if the repairman is not aware of the risk of injury, he will not know to ask to be compensated for it, and the service will appear to be cheaper than it really is. Unless the landowner is required to pay for it, the market level of repair service will be distorted away from (and above) the efficient level. In contrast, if the landowner is required to pay for the injury, then the service will not appear to be cheaper than it really is. In this case the market will generate additional service as long as the *net* benefit to the landowner, the value of service less the cost of compensation, is at least as great as the repairman's reservation price. The resulting market equilibrium is where the net benefit to the landowner (from the last service call) is equal to the repairman's reservation price, which is the efficient service level.

In terms of Figure 1, note that when a landowner is not liable to the repairman for injuries caused by defective conditions on his property (because there are no defects), his bid for repair service will reflect the value to him of the service (as shown in the demand schedule D). However, when the landowner is held liable to the repairman for injuries, he will deduct the cost of having to pay compensation from his bid for the service. That results in a lower bid, as reflected in the lower alternative demand schedule (D^*). When the landowner is required to pay compensation for injuries to the repairman caused by latent defective conditions, the market equilibrium will occur at the efficient level of consumption of repair services (C in Figure 1). Landowner liability corrects the market failure that would otherwise have resulted.

This analysis can be extended easily to the case in which the invitee knows that there is some chance that he will confront a

defective condition on the land. Suppose there are two types of landowner: high-risk and low-risk. If both types occur with equal frequency, the invitee will assume that the likelihood of an injury is simply the average of the low-risk and high-risk cases. Even in this case, the invitee will fail to adjust his service price to reflect the specific risk generated by each landowner. A misallocation of services similar to that described in the simpler case examined earlier will be observed.

On the assumption that the landowner knows more about the possible dangers on his property than does the invitee, which is plausible, an adverse-selection process would result.[20] Landowners with relatively safe property would find the cost of repair service expensive relative to the charge they would bear if they did their own repair. As a result, the market for landowner-site repair services would be disproportionately tilted toward landowners with relatively defective property. Again, the result would be excessive injuries until the repairmen adjusted their charges appropriately. In the longer term of the most severe adverse-selection process, the market for repair service would shrink substantially to the point of collapse. Viewed from this perspective, the traditional tort classifications may have helped to support a large set of market transactions.

B. Linking to Law

In the analysis of the "repairman problem" above, I considered the effect of holding the landowner liable for injuries to repairmen caused by latent defective conditions on his property. To simplify matters, I assumed that liability was strict. The analysis showed that if the landowner had greater information than the visitor on the possible defective conditions in the property, strict liability corrected a market failure that would have otherwise resulted. In the absence of strict liability, the cost of injuries to repairmen would never be taken into account by the market, and the result would be excessive injuries.

There are two immediate questions that arise in connecting this analysis to the law. The first arises because the law does not hold landowners strictly liable to invitees; they are liable on the basis of negligence. Does this fact alter the analysis above? The second

20. Some legal rules, such as the rule governing foreseeability of contract damages, can be understood as a mechanism for cutting short an adverse-selection process that undermines the market. Tort rules can serve the same function. *See* Mark F. Grady, *Efficient Negligence*, 87 GEO. L.J. 397, 404 (1998); Hylton, *Duty in Tort Law*, *supra* note 8, at 1527. On the contract-law applications of the adverse-selection theory, see generally Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989); Lucian Ayre Bebchuk & Steven Shavell, *Information and the Scope of Liability for Breach of Contract: The Rule of* Hadley v. Baxendale, 7 J.L. ECON. & ORG. 284 (1991).

issue connected to this analysis is suggested by the fact that the law imposes a lower care requirement for the landowner in his dealings with licensees. Is this consistent with the model?

The fact that the law imposes liability on the basis of negligence, rather than strict liability, in the case of an invitee (such as a repairman) does not alter the usefulness of the analysis above. The reason is that the broad duty imposed on the landowner with respect to invitees has the same effect and operates in a manner equivalent to strict liability.

Recall that the law imposes a general duty of care in the case of invitees. This means that in the context of latent defects, the landowner has a duty to inspect for such defects and either to cure them or to warn the invitee of their existence.

In many settings, a duty to inspect and cure (or warn), coupled with negligence liability, will operate in effect as strict liability. One key scenario was identified by Mark Grady in his analysis of res ipsa loquitur doctrine.[21] Grady distinguished durable- and nondurable-precaution settings. In durable-precaution settings, the actor adopts a particular precaution and it remains effective for the relevant period in which injuries might arise.[22] In *nondurable* precaution-settings, the actor must continually revisit the precaution stage.[23] Taking precaution once does not relieve the actor of a duty to take a similar precaution within the relevant time period in which an injury might occur.

The classic example of a nondurable-precaution setting is carefully watching the roads during a busy traffic period. If the driver looks to both sides of the street in order to avoid hitting another car or a pedestrian, that precautionary effort will be effective only for the moment in which it occurs. In the following second, the actor will have to renew the precautionary effort.

The problem with nondurable precaution is that it is bound to generate failures at some point. No one is perfect 100% of the time. Eventually, a moment of inadvertence will slip in, and if the actor is unlucky, an injury will occur to someone as a result of the actor's failure to take care.

There are not many obvious examples of nondurable precaution in relation to property. Most precautionary efforts concerning property are durable. But there may be cases in which the landowner fails to exercise some nondurable precaution. The landowner's children may occasionally leave their toys in places that might cause injury to a visitor to the land, for example. For the landowner to find and cure the defect, he would have to monitor the area in which children leave their toys continually. But the

21. Mark F. Grady, *Res Ipsa Loquitur and Compliance Error*, 142 U. PA. L. REV. 887 (1994).

22. *Id.* at 903.

23. *Id.* at 908–09.

landowner may forget to monitor one day. Indeed, this is bound to happen at some point as the result of inadvertence. And when it happens it will be difficult (probably impossible) for the landowner to convince a court that he should not be found negligent because he is careful 99.99% of the time. Holding the landowner liable on the basis of negligence will operate effectively as strict liability in these instances.

Another general case, especially important in this context, in which negligence liability may operate as strict liability is when the setting in which precaution is required is seldom experienced by the actor. We may refer to this generally as a *remote space within the actor's precautionary domain*. Over remote spaces of the precautionary domain the actor seldom experiences the need to take precaution. He may not realize the need to take precaution at first.

In the property setting, it is relatively easy to think of remote precautionary spaces. For example, there are areas of property that some landowners seldom visit. A landowner that owns a one-hundred-acre parcel may have portions of his real property through which he seldom walks. A homeowner may have parts of his home that he seldom visits. In such spaces, the landowner may not readily perceive a need to inspect for dangers that a visitor might encounter. Reasonable precaution is, after all, a matter of experience.[24] If an actor seldom confronts a setting in which precaution is desirable, he may not immediately perceive the potential costs to others (or to himself) of failing to take care.

The attic is a good example of a remote precautionary space for many homeowners. Most do not have a need to go up to the attic on a regular basis. If a defective condition exists or develops in some portion of the attic, most homeowners will probably not find out about it or perceive a need to inspect for it. When a repairman visits the attic, it may not dawn on the landowner, until it is too late, that it would be desirable to inspect the attic for defective conditions. And even if it dawns on the homeowner that such an inspection would be desirable, he may have no idea how to conduct it.

These considerations imply that a broad negligence rule covering remote precautionary spaces will operate in effect in the same manner as strict liability. Negligence works best at inducing efficient precaution when actors are trained by experience to consider the potential costs of failing to take precaution. This training from experience happens daily when actors take to the roads in their cars. But in areas of activity in which actors seldom engage, experience cannot train them to think immediately of the costs and benefits of precaution. The negligence rule, over these areas, is unlikely to induce efficient precaution. One could argue that in the absence of experiential training, the actor's burden of

24. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 117–23 (Boston, Little, Brown & Co. 1881).

care is too great for him to take efficient precaution. But courts are incapable of taking such considerations into account in the operation of the negligence standard. In view of this problem, which is analogous to Mark Grady's nondurable-precaution problem, the negligence rule operates in effect as a strict-liability rule.

Durable precaution can interact with a remote precautionary space. The landowner may have taken precaution to avoid injuries to land visitors at one time. But as time passes, the precaution may become ineffective. If the landowner seldom visits the area, the property may develop a dangerously defective condition over time. So the mere fact that the required precaution is durable does not imply that the negligence rule will not have the same impact as a strict-liability rule.

The landowner's duty with respect to latent defects that may injure invitees is quite capable of inducing efficient precaution when the type of precaution is durable and it occurs over a nonremote precautionary space. However, these are the instances in which the defective condition is unlikely to remain latent for long. If the landowner frequently visits an area of his property, he will eventually discover the defective condition. He will probably discover it long before a visitor gets to it. Thus, latent defective conditions in property are most likely to be associated with remote precautionary spaces and nondurable precautions. The duty to invitees is described as a negligence rule, but because of the special circumstances in which the duty will have a unique impact it is indistinguishable in operation from a strict-liability rule.

The law imposes on the landowner a narrower duty with respect to licensees. In this case, the landowner has to cure or warn of a defective condition of which he is aware. He does not have a duty to inspect for defective conditions.

This is understandable on the basis of traditional assumption-of-risk theory, applied in a categorical sense. There is a difference between the risk knowledge of invitees and licensees in general. Licensees, typically social guests, are likely to know more about the landowner than would the typical invitee (the repairman). A friend who visits the landowner's home is likely to know something of the landowner's personal environment and habits, for example, whether the landowner has children who leave their toys out in places that would pose a risk to visitors. The licensee is likely to be aware of dangers that might be posed by the landowner's hobbies or vocation, for example, the case of a scientist who has constructed a laboratory in his basement.

To be sure, there is no reason to believe that every licensee knows more about the landowner's personal environment than every potential invitee. Obviously, it is possible that a repairman might know more about the condition of a landowner's property than some licensees. But as a class, licensees are likely to know more than invitees. Because licensees as a class are likely to have more

information than do invitees on the condition of the landowner's property, assumption-of-risk arguments are more applicable to them.

To see the economic implications of assumption of risk, return to Figure 1. If the visitor assumes the risk, then he is aware of the potential injury cost that he faces on the landowner's property. If we treat the licensee-landowner relationship as an exchange of services in a market based on reciprocal altruism, the supply schedule in Figure 1 can be viewed as reflecting the supply of benefits offered by the licensee. The "price" charged by the licensee is simply the quantity of reciprocal benefits expected by the licensee for each benefit he confers on the landowner. If the licensee is aware of the risk of injury, his "supply schedule" will reflect full information (S^*), which means that the licensee will demand a higher price for every level of service that he offers to the landowner. There is no excessive-injury problem in this case.

It may seem unusual to treat the relationship between a landowner and a social guest as a market exchange, like that between the landowner and the invitee. Social guests do not demand to be paid for their services. But the simple notion reflected in this treatment is that people are rational even in their dealings with friends and social compatriots. They do not totally exclude people whom they find difficult; they simply demand a greater return from those relationships than from others.

There is another sense in which assumption-of-risk arguments apply to the licensee more readily than to the invitee. The invitee typically acts within a well-defined area of the land. Licensees, in contrast, often assume the freedom to explore the land, even without an explicit invitation to do so. An invitee (repairman) who is on the land to fix the refrigerator in the kitchen on the first floor obviously would exceed the scope of his invitation if he decided to explore the bedrooms on the second floor. Licensees, however, often assume that they are not confined to a particular part of the landowner's property. The scope of the invitation is typically broader for the licensee than the invitee.

A visitor to the land who strays beyond the immediate space of the invitation is choosing to confront some risks. He knows that the landowner has not invited him into the particular space in which he strays. Given this, he knows that the landowner had no reason to take precautions to safeguard him. Although he may not have enough information to predict the particular risk that he faces, he is aware that there is a range of risks that could materialize. Thus, even if the licensee does not have preliminary information on the risks that might materialize, which is more likely as he strays further beyond the boundary of the invitation, his voluntary decision to confront unknown risks is conduct that has traditionally been treated as assumption of risk in the law. The actor could easily avoid the risk by not straying outside of the boundary of the

invitation.

Most instances in which the landowner will not be responsible in damages to the licensee, because he was not aware of the defective condition and could not easily have informed himself of it, will involve remote precautionary spaces. There is no good reason in these settings to think that the landowner is aware of the risk. The licensee is unlikely to be aware either, but he has a choice over what to do with his lack of information. His decision to forge ahead in spite of his lack of information is a decision to act in the face of a risk, and given that it is cheaper to be timid and fearful, the law allocates the cost of that decision to the decision maker. This is consistent with the goal of encouraging efficient precaution. By allocating the cost of the injury to the licensee in these settings, the law encourages the licensee to take care.

For both invitees and licensees, the assumption-of-risk rule should apply when they stray beyond the scope of the invitation. There is a difference though. The invitee has a tightly confined space of invitation, and it is quite clear to everyone when he has strayed beyond it. Moreover, the landowner's duty to the invitee evaporates once he strays outside of the clear invitation boundary. The licensee's space of invitation is less well defined.[25] There is a core space of invitation for the licensee, and areas close to it are probably part of that space too. A social guest invited to a dinner party may reasonably consider himself invited to stray into the kitchen. But at some point, depending on the circumstances, it will be clear to everyone that the social guest has gone beyond the area of the invitation.

One might argue that the landowner should still have the same duty to licensees as to invitees because he is likely to know more than the licensee about possible defective conditions. But what is important in this analysis is the ability of the party to foresee possible dangers. In this respect, the licensee and landowner may not be far apart at all, especially given the information held by the licensee. And the additional range of choice available to the licensee, which is not available to the invitee, introduces a margin along which the licensee can control the risk.

C. Risk-Benefit Exchange

An alternative and closely related justification for the different treatment of invitees and licensees can be grounded in the exchange of benefit and risks among the parties. The legal distinction between the two types of visitor, invitee and licensee, works to provide a subsidy to (or, equivalently, to remove a tax from) the landowner in his relationship with licensees. There is an economic justification for this.

25. *See, e.g.*, James, *supra* note 1, at 607.

If the social guest is the stock example of a licensee, then it appears immediately that there are two types. One is a long-term repeat player, or *relational licensee*, and the other is a one-shot visitor, or *nonrelational licensee*. The relational licensees are those involved in long-term relationships with the landowner. The nonrelational licensee is the social guest who happens to show up on the landowner's property one day, perhaps to attend a party.

The foregoing discussion of assumption of risk applies to relational licensees. Their relationship with the landowner is in some respects similar to a market transaction; they earn the benefits they get from the landowner through a quasi-market in exchange conducted through a process of reciprocal altruism. The assumption-of-risk theory, I argued above, often applies to them.

In addition to the assumption-of-risk theory, there is an alternative rationale based on the exchange of risks between the landowner and the relational licensee that justifies the common-law rule governing the duty to licensees. If the relational licensee faces a risk on the landowner's property one day, the landowner may face a similar risk on the relational licensee's property the next day. In the context of reciprocal harms, there is no economic basis for adopting a strict-liability rule as between two interacting actors.[26] The reason is simple: the chief purpose served by a strict-liability rule is to control activity levels, that is, to reduce the overall frequency of potentially injurious transactions.[27] But in the case of reciprocal harms, the costs generated by the activities of two interacting actors will be the same whether liability is based on negligence or strict liability.[28] If I impose a risk of a dollar per week on you and you impose a risk of a dollar per week on me, then a strict-liability rule imposed on the two of us is equivalent to having us trade a dollar (you give me a dollar; I give you a dollar) every week.

Because the expected injuries from defective property conditions are roughly the same between the landowner and the relational licensee, the risks between them are reciprocal, and no purpose would be served by adopting a rule of strict liability. This provides an alternative justification to the assumption-of-risk theory, based on the exchange of risks, for the legal distinction between invitees and licensees. Of course, in some respects this justification is quite similar to the assumption-of-risk argument because it is based on an equivalence of risk impositions with which the parties are assumed to be familiar.

Now consider the other type of licensee, the nonrelational

26. Hylton, *Duty in Tort Law*, *supra* note 8, at 1507.

27. Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1 (1980).

28. Keith N. Hylton, *A Positive Theory of Strict Liability*, 4 REV. L. & ECON. 153 (2008).

licensee. The law governing the landowner's duties is defensible on economic grounds in the context of these one-shot visitors too.

There is a simple story that illustrates the intuition for the justification in the case of nonrelational licensees. Suppose you buy a newspaper, read it, and then leave it on a park bench. Another person comes along later, finds the newspaper and gains just as much information from it as you did. The benefits received by the second reader are free spillover benefits flowing from your decision to buy a newspaper. In economic terms, this occurs because information is a public good that, once supplied, can be consumed by many. Because information is a public good, it tends to be undersupplied to the market. The market generates too few newspapers, or too little information, relative to the economically efficient quantity. Ideally, some subsidy would be provided in the newspaper market to correct this market failure. Although the government does not provide a subsidy to newspapers, the market itself has provided one mechanism for addressing the informational market failure: advertising. Firms that purchase advertising do so with a view toward reaching all of the possible viewers of each newspaper, whether purchasers or not.

An analogous market failure happens in the setting of land visitors, especially licensees. The nonrelational licensees are like the second newspaper reader in the example above. They show up and get their free spillover benefits without ever having to invest in any relationship with the landowner.

Just like the case of newspapers and information, the supply of benefits offered by landowners will tend to be less than the socially efficient level, and for the same reason. A substantial number of licensees free ride off the relationship investments of others, like the second readers of the purchased newspapers. The misallocation would be exacerbated if the landowner were held strictly liable to all licensees for injuries caused by latent defects in his property. The law effectively avoids this outcome by applying a limited negligence rule to the landowner in his relationship with the licensee. Alternatively, one could say that the law provides an implicit subsidy for landowners for the production of a public good.

To take this argument seriously one has to assume that social events serve an important function in society. They clearly do. Social events serve as the sites for collective decisions, such as political meetings, or for social bonding. The landowner who facilitates these events provides a key input in the supply of important social services. The common law, in other settings, has shown a willingness to reduce liability in order to subsidize public goods, which is evident in the common-law treatment of charitable services,[29] rescue attempts,[30] and liability for hazardous activities

29. *See* McDonald v. Mass. Gen. Hosp., 120 Mass. 432 (1876) (relying on Holliday v. St. Leonard, Shoreditch Vestry (1861) 142 Eng. Rep. 769 (C.P.), in

that provide public benefits.[31] The law governing duties to licensees may reflect, at least in part, the same interest.

D. Duty to Trespassers

I have focused on the distinction between invitees and licensees because that is the area of most controversy in the law. Relatively few courts have abolished the distinction between trespassers and licensees.

The cheapest-cost-avoider rationale provided so far continues to apply to some extent in the case of trespassers. In many settings, it is cheaper for trespassers to refrain from trespassing than it is for the landowner to anticipate and eliminate risks to them.

However, the rule that the landowner owes no duty to trespassers has a more general and different theoretical basis than that for the distinction between invitees and licensees. The absence of a duty on the part of the landowner toward the trespasser, in the common law, can be understood as the complementary rule to trespass doctrine.[32] Trespass law permits the landowner to exclude all others for any reason. The best economic case is grounded in the property-rule framework of Calabresi and Melamed.[33] The right to exclude and to enjoin invasions forces would-be invaders to bargain for rights of access. The rules effectively protect the subjective valuations that landowners attach to property.[34]

The no-duty-to-trespassers rule is implied by trespass doctrine and its functional basis. A duty of care toward trespassers would result in expropriations of subjective valuation from landowners. One reason a landowner may be willing to invest in land for a particular purpose is the knowledge that he does not have to alter the use of his property to accommodate the needs of a potential

making Massachusetts the first state to adopt charitable immunity, holding a charity hospital immune from liability); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §133, at 1069 (5th ed. 1984); Note, *The Quality of Mercy: 'Charitable Torts' and Their Continuing Immunity*, 100 HARV. L. REV. 1382 (1987). Now virtually all states have rejected the complete charity-immunity doctrine. *See* RESTATEMENT (SECOND) OF TORTS § 895E (1979) ("One engaged in a charitable, educational, religious, or benevolent enterprise or activity is not for that reason immune from tort liability.").

30. For discussion of tort doctrine governing rescue attempts, see Hylton, *Duty in Tort Law*, *supra* note 8, at 1514–16, noting that the law subsidizes rescue by holding the rescuer responsible for contributory negligence only if he has acted rashly or recklessly.

31. One example of a hazardous activity that provides public benefits is operating a zoo. Instead of applying strict liability under the *Rylands* doctrine, many courts have applied the negligence rule to zoos. *See, e.g.*, Guzzi v. N.Y. Zoological Soc'y, 182 N.Y.S. 257 (App. Div. 1920), *aff'd*, 233 N.Y. 511 (1922); City of Denver v. Kennedy, 476 P.2d 762 (Colo. Ct. App. 1970).

32. Hylton, *Duty in Tort Law*, *supra* note 8, at 1510–12.

33. Calabresi & Melamed, *supra* note 14.

34. Keith N. Hylton, *Property Rules and Liability Rules, Once Again*, 2 REV. L. & ECON. 137 (2006).

invader. And since potential invaders can come in a wide variety of forms and from all sorts of directions, the investments that would be required by the landowner could be enormous.

III. APPLICATION OF THEORY

My argument provides an economic justification for the general categories created by the common law. In contrast to the view that the categories are simply a relic of feudalism's class hierarchies, as suggested in the landmark *Rowland v. Christian* opinion,[35] the categories appear to serve specific functions.

I set out to justify broad categories, not specific case outcomes. The cases that make their way to appellate courts are often difficult and call into question or suggest a conflict between more than one of the functions identified in this Article. The best way to examine those cases is on the basis of the specific functions and purposes of the landowner-duty rules.

A good example of one of the difficult cases is *Burrell v. Meads*.[36] The homeowner and a friend decided to install a ceiling in the homeowner's garage. The friend climbed up to the rafters and walked across a surface that appeared to be plywood but was not. The surface gave way and the friend fell to the garage floor, suffering severe injuries.[37] The court rejected the traditional category-based law, which would have classified the friend as a licensee, and decided to categorize the friend as an invitee.[38]

Burrell displays a conflict between the rigid-categorization approach and the functions identified for the common-law classifications. Social guests are classified as licensees because they often have some basis on which to predict the risks they might face on the landowner's property, because of the nature of the risk-benefit exchange, and because of the voluntary choice they make to confront a specific risk. But note that in *Burrell*, there is no reason to believe that the landowner's friend had any basis on which to predict the condition of a surface supported by beams near the roof of the garage. Unlike the social guest who might have some information on the landowner's habits or environment (for example, children leaving toys on the ground), the space near the garage ceiling is an area whose condition probably would not be related in any predictable way to the landowner's lifestyle. The assumption-of-risk justification for the law governing the licensee category is not applicable in *Burrell*. Moreover, the landowner's friend, unlike the typical licensee who encounters a danger in a remote area of the landowner's property, did not exercise a choice to confront that risk for his own utility, but confronted it, in the same manner as does the

35. *See supra* note 3 and accompanying text.
36. Burrel v. Meads, 569 N.E.2d 637 (Ind. 1991).
37. *Id.* at 638–39.
38. *Id.* at 643.

typical invitee, as part of an obligation to the landowner.

The risk-benefit-exchange theory suggests that landowners have a less demanding duty to licensees in part to compensate the landowner for the public goods that he provides to the class of licensees. But the friend in *Burrell* is not in any sense the potential recipient of any public good produced by the landowner. The friend in *Burrell* is there to do a job that is ordinarily done by a contracted handyman.

These arguments suggest that the reasons for distinguishing the licensee category from the invitee category do not apply to the friend in *Burrell*, even though he is a social guest. Following function rather than category, the friend should be treated as if he were an invitee. The mere fact that he is a social guest should not determine the outcome in *Burrell*. But this approach, which emphasizes function rather than category, does not imply that courts should necessarily abolish the distinction between invitee and licensee as general categories. The categories can be treated much more flexibly in response to underlying theoretical rationales.

My approach may seem to undermine the certainty created by having rigid classifications. But the certainty created by the categories is illusory when one approaches the boundaries and encounters cases that are difficult to reconcile with any sense of the purpose of the common-law classifications. The approach observed in some courts recently has been to abolish the classifications when encountering these cases. The preferable approach is to look more seriously into the possible incentive-based justifications for the categories and to use the functions implied by the classifications to resolve disputes at the boundary. For cases well within the boundaries of the categories, no additional uncertainty would be created by this approach.

CONCLUSION

I have offered a positive theory of the traditional land-visitor classifications in the common law of torts. Their most basic function is to allocate liability for injuries from defective conditions in property to the party who is most likely to be aware of the risk (or the possibility of risk) or to take action to avoid the potential risk. The traditional law provides reasonable regulations governing the scale of injury-causing activities and the level of precaution over injury-causing decisions.

As with any positive theory of legal doctrine, this one invites a more careful empirical examination. Perhaps the conditions that made the rules desirable from a regulatory perspective in the past no longer exist today. Whether the theory of this Article stands or falls in the long run, its key message is that it is important to attempt to understand the function or functions of common-law doctrines. At the least, courts and legal scholars should attempt to

understand these functions before engaging in reform projects.