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Stephen D. Sugarman  
*Berkeley Law*

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# LAND-POSSESSOR LIABILITY IN THE *RESTATEMENT (THIRD) OF TORTS*: TOO MUCH AND TOO LITTLE

*Stephen D. Sugarman\**

## INTRODUCTION

In working towards a *Restatement (Third) of Torts*, Michael Green and William Powers, the Reporters for the American Law Institute's ("ALI") project on Liability for Physical and Emotional Harm, have drafted six sections specifically addressing land-possessor liability that are gathered together as chapter 9.<sup>1</sup> This separate treatment is not altogether surprising; the *Restatement (Second) of Torts* also addresses land-possessor liability separately, and these sections are an "add on" effort to the Reporters' initial work. Moreover, in a recent Reporters' Memorandum, they argue not only that the duties of land possessors have historically been treated as a "discrete subject" but also that users of the new *Restatement* "would expect to find consolidated and separate treatment of land possessors' duties."<sup>2</sup>

I do not object to the substantive conclusions that the Reporters reach about what the law is (or should be) on the liability of land possessors. My concerns go to their packaging job. I think that it is a mistake to have a separate chapter on land possessors. Rather, I believe that the ALI and the profession would both be better served by integrating this area of the law into earlier sections of the *Restatement (Third) of Torts* that the ALI has already approved.

Perhaps most importantly, integrating the topic of land possessors into earlier sections would help us to make progress on two important substantive themes that, I believe, are not very helpfully addressed by the Reporters: (1) What are the reasons that justify any no-duty rule in tort? (2) In deciding what due care requires, when is a fair warning sufficient and when must the defendant eliminate (or at least reduce) the danger by taking additional precautions?

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\* Roger J. Traynor Professor of Law, University of California, Berkeley. Thanks to Christine Fujita (UC Berkeley School of Law 2009) for research and editing assistance.

1. *RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM* §§ 49–54 (Tentative Draft No. 6, 2009).

2. *Id.* reporters' memorandum at xx.

## I. THE SHIFT TO A GENERAL DUTY OF DUE CARE OF LAND POSSESSORS

### A. *What Section 51 Provides Is Already Covered in Section 7(a)*

In section 51 the Reporters make clear that for nearly all of the types of accidents that occur on the land possessor's property, liability is determined by deciding on a case-by-case basis whether there was negligence under the circumstances.<sup>3</sup> I strongly support this position, which moves away from the "rules" that previously dominated this area of the law. But we do not need section 51 to reach this result. Cases involving land-possessor liability for misfeasance can be handled by section 7(a), the new *Restatement's* basic principle about fault-based liability.<sup>4</sup>

People can be injured while on the property of others in many ways. Just to give some examples: (a) they can be harmed by the land possessor's activities on the premises (e.g., the possessor may be clearing snow and strike the victim with the shovel), (b) they can be harmed by dangers that the possessor has created that lie in wait to injure those who encounter them (e.g., the victim may drown in the possessor's swimming pool), (c) they can be harmed by dangers that have developed with respect to artificial conditions on the premises that the possessor has not fixed (e.g., the victim may fall down a broken stairway), (d) they can be harmed by natural conditions of the premises that become dangerous (e.g., the victim may slip on paths made dangerous by snow and ice, or tree branches may fall on the victim), (e) they can be harmed by third parties on the premises in both criminal and noncriminal ways (e.g., the victim may be attacked in the possessor's parking lot by a third party), (f) they can be harmed by dangers created by prior possessors and left in place (e.g., dangerously piled rocks may fall on victims), and so on.<sup>5</sup>

For all of these settings the Reporters say that the basic common-law rule today is (and/or should be) that the defendant land possessor may be held liable if he was negligent in failing to take reasonable precautions to prevent the harm that occurred.<sup>6</sup> That is, the basic fault principle is to govern these cases, just as it dominates most of the rest of tort law with respect to physical injury.<sup>7</sup>

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3. *Id.* § 51 cmt. i ("Thus, the facts relating to the entrance onto the land, not status, bear on whether reasonable care was exercised.").

4. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7(a) (Proposed Final Draft No. 1, 2005).

5. See, e.g., RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 51 cmt. b, illus. 1, cmt. h, illus. 2-4, cmt. i, illus. 5, cmt. j, illus. 6-7, cmt. u, illus. 8-13 (Tentative Draft No. 6, 2009).

6. *Id.* § 51.

7. I can think of two important exceptions to this claim about the fault principle. First, as the Reporters well appreciate, if the land possessor engages in abnormally dangerous activities (e.g., dynamiting in urban areas), then the possessor may be strictly liable for the ensuing harm. This narrow set of

By contrast, the traditional common-law approach had been to adopt various rules of law that were tailored to the “status” of the victim—invitee, licensee, or trespasser.<sup>8</sup> Early on, the common-law position appeared to be that if licensees and trespassers were harmed in ways that would otherwise be judged negligent, the land possessor would not be liable. Only invitees were owed the ordinary duty of due care generally demanded by the fault principle.<sup>9</sup> Over the centuries, it became clear to common-law courts that this regime was often unfairly harsh to non-invitee victims, and over time, in an ad hoc way, both licensees and trespassers were allowed to recover for at least certain acts of negligence towards them. Courts tended to adopt special rules governing specific non-invitees on the land such as child entrants, social guests, and known or discovered trespassers.<sup>10</sup> Simultaneously, even as to invitees, various special rules were adopted by courts, such as those governing “open and obvious” dangers, third-party criminal attacks on people who were on the property of the land possessor, and so on.<sup>11</sup>

These legal rules based on the status of the victim yielded an unduly complicated state of affairs in which judges were deciding issues at the “wholesale” level—that is, as a matter of “law” and frequently labeled as “duty” questions—that negligence law normally reserves for juries to decide at the “retail” level—that is, whether or not the defendant was at fault in these particular circumstances, which is a question of “breach.”

The new section 51 makes clear that, for nearly all of the types of accidents that occur on the possessor’s land, both the rules and the categories are out. This was the position taken several decades ago (but after the adoption of the *Restatement (Second)*) by the California Supreme Court in *Rowland v. Christian*,<sup>12</sup> since adopted explicitly by about half of the states, and now appropriately embraced by the Reporters.

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circumstances is already covered by section 20. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 20 (Proposed Final Draft No. 1, 2005). Second, so too is it possible for a land possessor to cause harm with respect to the use of defective products on the possessor’s land in ways that would give rise to strict products liability. The Reporters realize this as well and note that if a land possessor is using a defective chainsaw and injures someone on the land with the saw, products liability law will apply. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM ch. 9 scope note at 5 (Tentative Draft No. 6, 2009). I put these matters aside.

8. KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 239 (3d ed. 2007).

9. *Id.*

10. See G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL STUDY 190 (2003); see also RESTATEMENT (SECOND) OF TORTS § 342 (1965) (setting out special liability of land possessors to licensees).

11. See, e.g., RESTATEMENT (SECOND) OF TORTS § 343 (1965) (setting out special liability of land possessors to invitees); *id.* § 343A (describing open and obvious dangers).

12. 443 P.2d 561 (Cal. 1968).

Although I applaud this embrace of the basic “due-care” standard, we do not need section 51 to reach this result. Cases involving land-possessor liability for misfeasance instead can be handled by—and indeed are already covered by—section 7(a), the basic statement about fault-based liability, which provides: “An actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm.”<sup>13</sup>

*B. The Limited Duty to Flagrant Trespassers Set Out in Section 52 Is an Application of Section 7(b)*

The Reporters specifically exclude only one set of claimants from the normal operation of the fault principle. These are what section 52 calls “flagrant trespassers.”<sup>14</sup> But there is no need for a separate section 52 to deal with flagrant trespassers. Instead, they could be covered in section 7(b), which makes the basic point that sometimes no duty of ordinary care is owed to someone the defendant might reasonably have prevented from being injured.<sup>15</sup>

The approach in section 52 is broadly based on the California statute<sup>16</sup> enacted in response to *Rowland v. Christian* and a subsequent celebrated case of a trespasser who fell through the roof of a public school while in the process of stealing lights and then sued the school district.<sup>17</sup> That statute rather precisely limits the duties of land possessors with respect to those who enter the land to commit and are convicted of certain serious crimes.<sup>18</sup> Section 52 leaves the meaning of flagrant trespasser somewhat vague, allowing room for states to adopt both wider and narrower definitions than did the California State Legislature. Yet the illustrations in section 52 make clear that serious criminal trespassers are the core actors to be included.<sup>19</sup>

However defined in detail, exempting land possessors from ordinary due-care obligations to flagrant trespassers is a no-duty conclusion that these claimants are simply undeserving. The notion is that, in these sorts of circumstances, it is simply outrageous to open up our courts to these “bad guys” who deliberately act against the interests of even a negligent land possessor.

Flagrant trespassers who are injured on the premises of others

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13. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7(a) (Proposed Final Draft No. 1, 2005).

14. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 52 (Tentative Draft No. 6, 2009).

15. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7(a) (Proposed Final Draft No. 1, 2005).

16. CAL. CIV. CODE § 847 (Deering 2005).

17. See generally Wendy Lilliedoll, An Unexpected Windfall for California’s Tort Reform Movement: *Bodine v. Enterprise High School* (2004) (unpublished comment), <http://www.law.berkeley.edu/faculty/sugarmans/#Torts>.

18. CAL. CIV. CODE § 847.

19. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 52 cmt. i, illus. 2–4, cmt. m, illus. 9 (Tentative Draft No. 6, 2009).

would very often lose anyway, even if there were an ordinary duty of care owed to them, on the ground that there was no breach of that duty. These victims are often unforeseen or the precautions required to protect them from harm are too burdensome to ask the land possessor to take them. But even if the straightforward application of the ordinary negligence principle would have found the land possessor at fault, these undeserving entrants are precluded from recovery. This is a policy determination based upon what I call a “trumping value”: the land possessor’s ordinary right to control access to the land is too offended if a victim who entered without consent and intent on egregious wrongdoing is allowed to recover in tort from the land possessor. And trumping values are one important reason for concluding that a duty of ordinary care is not owed.

I have no complaints about this result. But the treatment of flagrant trespassers could be offered up as a nice example of the principle provided by section 7(b): “In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.”<sup>20</sup>

Note that section 52 provides that, even as to flagrant trespassers, one has a duty not to inflict willful or wanton injury.<sup>21</sup> I agree that doing so is too much like taking the criminal law into one’s own hands and handing out vigilante justice, and hence land possessors should be liable for harm caused in this way. But once more I would cover this limited obligation to the flagrant trespasser in section 7(b), which already contemplates using no-duty rules only to wipe out the duty of ordinary care (and does not provide immunity for willful and wanton conduct).<sup>22</sup>

The Reporters further provide under section 52 that, in some special situations, flagrant trespassers are owed a duty of ordinary care after all—when they are imperiled and helpless or unable to protect themselves.<sup>23</sup> I support this conclusion as well; it is consistent with other previously adopted positions in the *Restatement (Third)* that impose affirmative rescue obligations on people in certain relationships.<sup>24</sup> Section 37 states the general rule

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20. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7(b) (Proposed Final Draft No. 1, 2005).

21. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 52(a) (Tentative Draft No. 6, 2009).

22. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 cmt. a (Proposed Final Draft No. 1, 2005).

23. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 52(b) (Tentative Draft No. 6, 2009).

24. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM §§ 38–44 (Proposed Final Draft No. 1, 2005).

that there is “no duty” to take affirmative steps to help another,<sup>25</sup> but subsequent sections 38 to 44 impose such duties when certain relationships exist.<sup>26</sup>

So the protection for some flagrant trespassers set out in section 52 could be incorporated into an expanded section 40, which currently imposes a duty to take affirmative actions to prevent (or reduce) harm when the parties involved have a relationship of “a business or other possessor of land that holds its premises open to the public with those who are lawfully on the premises.”<sup>27</sup> Section 52, in effect, expands section 40 to cover the relationship between a land possessor and someone not lawfully on the premises, but who is there and is imperiled and helpless.

Beyond that, in my view, even sections 37 to 44 are not needed. I would prefer to collapse them into section 7(a) as well, thereby making 7(a) cover both misfeasance and nonfeasance. The default principle then would be that there is liability when anyone fails to take reasonable steps to help others. There would then be a no-duty exception in section 7(b) to cover cases envisioned by section 37 in which the person in need was essentially a “stranger” to the potential rescuer.

Once placed in section 7(b), the general rule that there is no affirmative duty to help strangers could (like the rule for most flagrant trespassers) be explained by a trumping value: in this case, the liberty interest people have in not becoming involved with the lives of strangers. Notice, then, that a person you do not know whom you pass on the road and who is in obvious need of help would qualify as a “stranger” under this approach. But an imperiled and helpless trespasser whom you discover on your own land would not—on the ground that this is a responsibility that goes along with possessing land. Responsibilities towards such trespassers would then be covered by the basic section 7(a).

## II. REDRAFTING PROPOSAL

With respect to the six sections of chapter 9, then, I would first do away with section 50, which defines trespassers in general,<sup>28</sup> because it is only flagrant trespassers to whom special rules apply, and they are covered in section 52. Anything important remaining in the comments to section 50 could be temporarily moved to section 52.

I would also collapse sections 53 and 54 into section 51 because they together provide that the basic negligence principle applies not only to land possessors with respect to those *on* the land (which is

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25. *Id.* § 37.

26. *See id.* §§ 38–44.

27. *Id.* § 40.

28. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 50 (Tentative Draft No. 6, 2009).

covered in section 51, discussed above<sup>29</sup>), but also to land possessors with respect to those *off* the land (section 54),<sup>30</sup> and to a certain type of land possessor—a lessor (section 53).<sup>31</sup> This would leave chapter 9 with but three sections: section 49 on boundaries (which says that chapter 9 is about land possessors), the now more robust section 51 on the general application of fault-based liability to land possessors, and section 52 on the narrow no-duty exception for flagrant trespassers.

Then, as explained above, I would collapse section 52 on flagrant trespassers into section 7 on “no duty” in general. As the Reporters acknowledge in a comment to section 7, land possessors who are social hosts and who serve alcohol to their guests may well be exempted from liability even if serving alcohol in the specific circumstances would be found to be negligent by a jury.<sup>32</sup> This would be because a court would find that the no-duty principle of section 7(b) applies to such conduct by social hosts.<sup>33</sup> To me, it is not helpful to split up these different no-duty situations involving land possessors—flagrant trespassers in section 52 and victims of one’s alcohol-drinking social guests in section 7(b). Instead, both examples could be provided in section 7(b), along with other special circumstances in which the normal due-care principle is suspended.

As also stated above, I would collapse the now more robust section 51 on the general duty of land possessors to those on the land, plus section 54 on their duty to those off the land and section 53 on the duty of lessors, into section 7(a) on the general obligation to exercise due care. Having done that, there would then be no need for section 49 defining land possessors, and the entire chapter 9 on Duty of Land Possessors could disappear.

Are there subtleties in the Reporters’ analysis that are lost under my proposal? The Reporters skillfully show how the topics covered by a large number of sections in the *Restatement (Second)* are now embedded in the new chapter 9 sections. Consider the following example. The Reporters’ comments to section 51 distinguish artificial conditions created by a land possessor from those created by a prior owner.<sup>34</sup> They admit that the due-care duty imposed by section 51 with respect to conditions created by the land possessor is simply an application of section 7(a) on misfeasance, but they argue that the parallel duty that land possessors have under section 51, with respect to conditions that were acquired, is not. Instead, they argue that the duty to eliminate or ameliorate those

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29. *Id.* § 51.

30. *Id.* § 54.

31. *Id.* § 53.

32. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 cmt. c (Proposed Final Draft No. 1, 2005).

33. See *id.*

34. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 51 cmt. e (Tentative Draft No. 6, 2009).



acquired risks is analogous to the duty to take affirmative steps under circumstances set out in the sections following section 37 (on nonfeasance).<sup>35</sup>

To me, however, this is just further evidence that sections 37 and following are misplaced and perhaps misconceived. Instead, as already explained, there should be a general duty of due care (the section 7(a) obligation broadened to cover misfeasance and nonfeasance), and then there should be no-duty exceptions to that duty (the section 7(b) exemption) that include circumstances in which one has an insufficient relationship with the risk or the victim.

### III. WARNINGS

#### A. *When Are Warnings Enough?*

I do not believe that the ALI project on Tort Liability for Physical and Emotional Harm pays enough attention to the recurrent issue of when warnings are enough and when the actor must take further precautionary steps to repair or otherwise reduce the danger. In this Part, I suggest that what is involved here may be a matter of the different “social roles” of commercial actors and ordinary people. In my view, these social-role distinctions should be given a prominence that is now lacking in the *Restatement (Third)*.<sup>36</sup>

Notice that in the comments to section 51 on the general duty of land possessors to exercise due care with respect to those who come onto the land, the Reporters say, “The rule requires a land possessor to use reasonable care to investigate and discover dangerous conditions and to use reasonable care to attend to known or reasonably knowable conditions on the property.”<sup>37</sup> This is correct. What it does not make clear, however, is when the reasonable care obligation is satisfied by providing the entrant with notice of the danger and when the land possessor must take additional steps to reduce or eliminate the danger. After all, the actor could “attend to” the danger in either way.

Comment *h* to section 51 begins to get at this matter when it discusses the idea that it may well suffice to discharge the duty of due care to social guests by providing warnings as to non-obvious dangers (i.e., it would not be negligent to fail to fix the problems that give rise to those dangers).<sup>38</sup> This is a well-put way of explaining how the *Restatement (Third)* may be read as accommodating the old saw that one’s social guests are not entitled to safer conditions than

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35. *Id.*

36. For further discussion of the need to spell out due-care obligations in more detail, see Stephen D. Sugarman, *Rethinking Tort Doctrine: Visions of a Restatement (Fourth) of Torts*, 50 UCLA L. REV. 585, 597–601 (2002).

37. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 51 cmt. a (Tentative Draft No. 6, 2009).

38. *Id.* § 51 cmt. h.

one has chosen to live with, so long as they are reasonably warned of dangers one knows or should know about.

But comment *h* does not then go on to talk directly about whether commercial actors (say, hotels) should also be able to get away merely with warnings in discharging o their duty of due care to their customers. We know that the Reporters think that at least certain commercial actors must do more than warn because in illustration 7 in comment *j* to section 51, involving trespassers, they make clear, albeit in passing, that a landlord with notice of missing posts in an apartment-house railing will be liable for failing to repair the railing even if the victim (and even a formal, but not flagrant, trespasser) is well aware of the danger.<sup>39</sup> I agree with this position, but the Reporters do not offer a deeper and more thematic explanation for these different treatments of warnings.

Taking up an analogous matter, comment *i* notes that while commercial actors may well be thought to be at fault for failing to inspect their land for hidden dangers, ordinary people (i.e., homeowners) may not be expected so to inspect and therefore are not held in breach for failing to take precautions with respect to dangers they would have discovered through a reasonable inspection.<sup>40</sup> Again, while this distinction between commercial and noncommercial actors may reflect traditional common-law distinctions between duties owed (usually by commercial actors) to invitees and those owed to licensees, nothing more than a broad generalization is offered in its defense.

Turning next to the issue of “open and obvious” dangers in comment *k*, the Reporters make clear that if all that is required in such settings is a warning, then additional warnings are generally superfluous, as the conditions themselves generally warn as effectively as a written or oral warning would.<sup>41</sup> But they also rightly make clear that in some settings a warning may not suffice, and it will be a breach of the duty of due care to fail to take steps to repair or otherwise fix the dangerous condition.<sup>42</sup> Yet again they do not even attempt to explain why and when some actors should have to do more than warn, remembering that they earlier said in comment *h* that a warning from a host to a social guest may well suffice.

In sum, one comes away from reading the Reporters’ comments with the sense that, when it comes to taking due care, ordinary homeowners need neither inspect their property for dangers nor fix those they know about. Rather, they are to be held liable basically for failing to warn of known risks. But why? For the Reporters, in the end, whether the land possessor should have inspected or not, as

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39. *Id.* § 51 cmt. j, illus. 7.

40. *Id.* § 51 cmt. i.

41. *Id.* § 51 cmt. k.

42. *Id.*

well as whether the possessor should have done more than warn about a danger the land possessor knew (or should have known) about seems simply to be a jury question on the issue of breach.

### *B. Social Roles*

To me, something more seems to be involved here. I see it as a matter of what I call "social roles." Commercial actors are expected in our society to play different social roles than noncommercial actors; they are expected to be more attentive to risks, better able to plan actions to reduce risks, better able to train their employees to act in more careful ways, better able to spread the cost of repairs (through the pricing of their goods and services), and better able to spread the loss if held liable. For these reasons, it seems more appropriate for society to use the law to call on commercial actors to take risk-reducing precautions as part of their business practices.

Put differently, in many situations we do not want commercial actors to shift the risk to their customers (and others) merely by warning of dangers. Rather, we want them to repair the problem or otherwise make changes to reduce or eliminate the danger. Think about supermarket, hotel, or apartment-complex owners. We do not want them simply to point out dangers on their premises like broken stairs, missing handrails, slippery floors, unshoveled snow, and the like. We want them to take reasonable steps to get rid of these risks. That is their social role. It is a condition we, in effect, impose on them as part of the price of doing business and making profits. We seem to do this because we have confidence that commercial actors can sensibly respond to the law in ways that make life in our society safer in ways that we as a society want. We do not want slightly cheaper markets, hotels, and apartment buildings that contain these dangers. We are content to pay slightly more for greater safety.

Ordinary folks, by contrast, do not function in the same way and do not have commercial activities into which they can internalize either the costs of precautions or the burden of losses if held liable. Society does not expect ordinary folks to be experts in risk reduction in the same way it expects commercial actors to be. Hence, ordinary folks play a different social role and, as among themselves, it is often sufficient to provide an adequate warning. This, I think, better explains why the tort system would decide that ordinary homeowners have not committed a breach of their duty of ordinary care when they have warned guests of dangers that they as hosts know about, while commercial land possessors would be said to have breached their duty of ordinary care if they fail to take further precautions to fix those same dangers.

In other words, under the circumstances, a commercial actor would have breached its duty by merely warning because the benefit of the extra precaution is worth its cost, whereas this is not true for

a noncommercial actor. After all, when the former fixes a dangerous condition, it is likely to prevent more harms than when a noncommercial actor does so. But I think there is more to it than that. This argument is not meant to be a plea to recreate the invitee and licensee categories. If nothing else, my argument is that shopping malls can be held liable for merely warning and failing to fix dangers when the victims are only licensees and that homeowners can be freed from liability to business visitors to their homes (invitees) merely by warning of dangers and not fixing them. Moreover, I do not want to return the regime of land-possessor liability to one of "duty" rules, but I do want to argue that our understanding of what is and is not a breach is importantly influenced by what I am calling "social roles."

Furthermore, in my view, this difference in the obligations that go along with different social roles is not restricted to the land-possessor setting. It applies too, for example, with respect to transportation. We have different expectations of measures that airline companies, bus companies, railroads, and even taxi companies should take to protect passengers as compared with what precautions ordinary folks should take with respect to their passengers. The safety condition of the vehicle is one example in which a warning to passengers (say, about a lack of air bags) may suffice for ordinary folks but would not suffice for commercial vehicle operators.

As a different example, in my view, physicians (and other professionals) are expected to play a different social role than other business actors because we view the former more like trustees or fiduciaries. This helps explain why, when we apply the concept of the duty to warn to physicians, we expect certain doctors to tell us both about other treatment options and about the risks of not having treatment at all. By contrast, we generally do not look to regular businesses to tell us about differences between their products and those of their competitors. Rather, we rely on the market (and consumer shopping and independent rating sources like *Consumer Reports*) to bring out those differences. By contrast, when we go to the doctor, we are looking to him or her to provide independent advice about options that we cannot count on sensibly obtaining in other ways.

In sum, these social-role distinctions should be given a prominence that is now lacking in the *Restatement (Third)*, a prominence that would be much more readily and coherently provided were all of the duties to exercise due care collected under section 7(a). Operationally perhaps, giving prominence to social roles might be translated into jury instructions that call upon juries to take different social roles into account in deciding whether there was a breach. But I leave this procedural detail for another occasion.

## IV. GROUNDS FOR “NO DUTY”

In this last Part, I will suggest that, were the various categories of no-duty rules gathered together in section 7(b) instead of being distributed throughout the *Restatement (Third)*, we might be better able to appreciate the common justifications for them.<sup>43</sup>

I have already set out one reason for relaxing the normal duty to exercise due care in certain circumstances: the existence of *trumping values* that would be put seriously at risk were juries allowed to decide the breach issue on a case-by-case basis.<sup>44</sup> I pointed out that both the individual's liberty interest in not having to aid strangers and the land possessor's interest in being free from the intrusion of flagrant trespassers can be understood as trumping values that bar the imposition of liability, even if a jury might find that there was a breach on the ground that there were simple precautions that the defendants might have taken to prevent harm to these victims.<sup>45</sup>

A second reason for a no-duty rule is what I call the *perverse behavioral response* concern. Here the idea is that, even though this defendant might have been negligent, if we allow victims to sue and win such cases, people will change their behavior in ways that will have even worse social consequences—with the result that it is, regrettably, less bad to allow some careless defendants to escape liability than it would be to impose tort sanctions on them. Indeed, this sort of reason might, for some, justify the rule that there is no duty to come to the aid of strangers. That is, some might believe that imposing such a duty with respect to strangers would not in practice promote additional careful rescue efforts but instead would generate clumsy efforts by officious intermeddlers. This same sort of reasoning has been used by some courts that allow ordinary citizens engaged in recreational activities to escape liability for negligently harming fellow participants—i.e., to impose liability would have such a chilling effect as to cause many people to shrink from engaging in such activities to the substantial detriment of society as a whole. Whether one should believe these empirical predictions is another matter. But accepting them for these purposes, they might be seen to justify no-duty rules on perverse behavioral response grounds.

Yet a third reason for a no-duty rule is what I call the *administrative* concern. Indeed, this reason might also be advanced in support of the rule that there is no duty to come to the aid of strangers. The argument would be that it is very often too difficult

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43. For further discussion of “no duty” policy arguments, see Stephen D. Sugarman, *A New Approach to Tort Doctrine: Taking the Best from the Civil Law and Common Law of Canada*, 17 SUP. CT. L. REV. 375, 388–89 (2002); Sugarman, *supra* note 36, at 613–18.

44. See *supra* Part I.B.

45. See *supra* Part I.B.

to decide just who should have aided the stranger. Other sorts of administrative concerns might justify other no-duty rules. For example, sometimes we fear that if we allowed people to sue for certain harms, small-value claims would flood the system, thereby creating costly delays in the handling of more serious cases (a reason that may justify limiting duties regarding emotional distress damages, for example).

A fourth reason for a no-duty rule is that the matter is better, or at least adequately, handled though some *alternative mechanism(s)* to tort law. This is a reason that may, for example, justify exempting from the tort system most injuries incurred by professional athletes in the course of play. Leagues and other bodies already have elaborate penalty systems in place to serve the deterrence and punishment goals of tort law, and players, especially in unionized team sports, have ready access to generous disability-insurance arrangements to deal with the compensation goal.

The current discussion in section 7(b) does not richly explore these four sorts of no-duty justifications. One reason for that, in my view, is that the no-duty positions with respect to land possessors are put in chapter 9,<sup>46</sup> the no-duty positions with respect to what the Reporters call “affirmative actions” are put in section 37,<sup>47</sup> the no-duty provisions with respect to emotional harm are put in the separate sections dealing with that sort of loss,<sup>48</sup> and so on. Were all of the no-duty rules instead gathered together in section 7(b), we might be better able to appreciate the common themes among them.

Here is an illustration of my point. Comment *m* to section 51 takes up the so-called “firefighter’s rule” that, where embraced, exempts from liability a land possessor who, for example, carelessly starts a fire that then burns a firefighter who tries to put it out.<sup>49</sup> The Reporters make clear that under section 51 (as would be true under section 7(a)), the firefighter may no longer be denied recovery because of his or her status as something other than an invitee because the status distinctions are now abandoned.<sup>50</sup> Moreover, the firefighter is clearly not a flagrant trespasser. The Reporters rightly say that firefighter recovery could well be denied under a no-duty rule adopted pursuant to section 7(b), although they do not take a position on this matter.<sup>51</sup>

I think that section 7(b) is indeed the right place to deal with

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46. See, e.g., RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §§ 52(a), 54(c) (Tentative Draft No. 6, 2009).

47. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 37 (Proposed Final Draft No. 1, 2005).

48. See, e.g., RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §§ 46–47 (Tentative Draft No. 5, 2007).

49. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 51 cmt. m (Tentative Draft No. 6, 2009).

50. See *id.*

51. See *id.*

the question of whether there should be no duty to firefighters. There, we would naturally focus on whether this is properly a matter of, say, perverse behavioral responses. Although Dean Prosser finds it quite unconvincing as an empirical matter (and I agree), some have sought to explain the firefighter's rule on the ground that if land possessors owed firefighters a duty of ordinary care, then those who carelessly set fires might be too frightened to call the fire department for help, thereby risking harm not only to the land possessor's property but to neighbors as well.<sup>52</sup> Some courts have justified the firefighter's rule on the basis of "alternative mechanisms"—firefighters are already well compensated for this risk through special workers' compensation schemes, and land possessors are already adequately enticed to take reasonable care via the pricing of their fire insurance. Or maybe, in the end, the firefighter's rule is justified by "social role" considerations noted earlier—i.e., when it is your professional job (your "social role") to rescue people and their property even from their own folly, you are entitled from them only to a warning as to the danger (which the fire itself of course provides), and you should not be able to complain about the earlier carelessness that created the fire. In this respect the firefighter may be like a doctor who cannot complain that he or she caught a contagious disease or an infection from a presenting patient who carelessly caught the disease or incurred the infection in the first place.<sup>53</sup> To see this possible analogy, once more it would be helpful for all of these examples to be gathered together in section 7(b), rather than having the firefighter's rule separately set out in a comment to a section on land possessors.

### CONCLUSION

In sum, chapter 9 on land-possessor liability is both too much and too little—too much because everything it provides is already, in effect, covered by other sections, and too little because by spreading this and other topics around the new *Restatement*, the Reporters miss an opportunity to identify and analyze both the common themes that run through the whole range of no-duty rules and the function that social roles play in determining what sort of warnings are expected and whether warnings are enough.

52. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 431 (5th ed. 1984) (calling this argument "preposterous rubbish").

53. See, e.g., *Fritts v. McKinne*, 934 P.2d 371 (Okla. Civ. App. 1996) (noting that a doctor cannot assert a contributory negligence defense when being sued for a botched—and ultimately fatal—surgery on a drunk driver).