

# Land Possessor Liability in the Restatement Third of Torts: Too Much and Too Little

Stephen D. Sugarman

## I. Introduction

When Gary Schwartz agreed to become the American Law Institute's (ALI) Reporter for what has now been re-named the project on Tort Liability for Physical and Emotional Harm, he excluded coverage of the liability of land possessors, or what is sometimes called premises liability (although some think the latter is a broader topic). After Professor Schwartz' untimely death, his project was taken over by Professors Michael Green and William Powers, who had earlier successfully collaborated together for the ALI on a different portion of what is to be part of the eventual Restatement Third of Torts — the apportionment of liability. As Green and Powers (the "Reporters") brought nearly to a close the scope of work initially undertaken by Schwartz, they were pressured by ALI leaders, Advisers to the project, and the Members Consultative Group to address the topic of land possessor liability (as well as other matters). They graciously accepted this additional responsibility. This is a valuable addition to the project in as much as physical injuries to persons (and property) for which land possessors are held liable are certainly an important part of the general topic addressed by this endeavor.

The Reporters have drafted a set of specific sections on land possessor liability that are gathered together as Chapter 9. This separate treatment is not altogether surprising given both that is what the Restatement Second of Torts does with land possessor liability and that this work was an "add on" effort of the Reporters. Moreover, in a recent Reporters' Memorandum they argue that not only have the duties of land

possessors historically been treated as a “discrete subject,” but also users of the new Restatement “would expect to find consolidated and separate treatment of land possessors’ duties.”

I have little objection to the substantive conclusions the Reporters reach about what the law is (or should be) on the liability of land possessors. But I have concerns about their packaging job. I think 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 part of the law into earlier sections of the Restatement Third of Torts that the Reporters already have had approved. In this article, I will explain why and how this could be done.<sup>1</sup>

Perhaps most importantly, integrating the topic of land possessors into earlier sections would help reveal, and allow us to make progress on, two important substantive matters that, I believe, are not very helpfully addressed by the Reporters’ work either on land possessors or on physical harm torts in general. These are: 1) what are the more general reasons that might justify any “no duty” rule in tort; and 2) when the issue is whether there has been a “breach” of duty, how should it be decided whether a fair warning is sufficient or whether it is necessary to eliminate (or at least reduce) the danger at issue by taking precautions beyond merely giving a warning.

## II. The Shift to a General Duty of Due Care of Land Possessors

### A. Section 51: Already Covered in Section 7(a)

Assuming that the Reporters’ work is adopted by the ALI, the Restatement Third of Torts will make clear in Section 51 that, in the end, for nearly all of the types of

accidents that occur on the land possessor's property, liability is basically determined by deciding on a case-by-case basis whether there was negligence under the circumstances. I strongly support this position. But what I want to emphasize is that we do not need Section 51 to reach this result. Instead, as I will explain, cases involving land possessor liability can be handled by Section 7(a), the new Restatement's basic principle about fault-based liability.

People can be injured while on the property of others in many ways. Just to give some examples: (a) they can be harmed from the land possessor carrying on activities on the premises (e.g., the possessor may be clearing snow and strike the victim with the shovel); (b) they can be harmed from 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 from 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 from 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 non-criminal ways (e.g., the victim may be attacked in the land 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.

By and large, in all of these settings it is the position of the Reporters that the basic common law rule today is (and/or should be) that the defendant land possessor may be held liable if the possessor was negligent in failing to take reasonable precautions to

prevent the harm that occurred. 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>2</sup>

By contrast, the traditional common law approach (as reflected in the original Restatement of Torts) had been to adopt various rules of law that were tailored to the “status” of the victim – invitee, licensee, or trespasser. Land possessors were usually said to owe different duties to these different classes of victims. Early on, the common law position appeared to be that licensees and trespassers could be harmed in ways that would otherwise be judged negligent, and still the land possessor would never be liable for the harm. That is, while invitees were owed the ordinary duty of due care generally demanded by the fault principle, licensees and trespassers were not. Over the centuries, however, it became clear to the common law courts that this restriction on the duty of care owed to non-invitees was often unfairly harsh to victims, and over time, in an ad hoc way, both licensees and trespassers were allowed to recover in tort for at least certain acts of negligence towards them. Speaking generally, courts tended to adopt special rules governing specific non-invitees on the land such as child entrants, social guests, and known or discovered trespassers. 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.

All of this brought us to 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.”

What the new Section 51 of the Restatement Third of Torts now makes clear is that, for nearly all of the types of accidents that occur on the possessor’s land, it is basically a matter of deciding on a case-by-case basis whether there was negligence under the circumstances. This is the position taken several decades ago (but after the adoption of the Restatement Second of Torts) by the California Supreme Court in *Rowland v. Christian*, since adopted explicitly by about half of the states, and now appropriately embraced by the Reporters. In short, the Reporters argue that not only should the old categories of entrants be largely abandoned, but also that the old rules within the categories, which had served as strict guidelines, should also be abandoned. I generally applaud this change (although I will introduce some complications below).

My point here, however, is that we do not need Section 51 to reach this result. Cases involving land possessor liability instead can be handled by Section 7(a), the basic statement about fault-based liability. Indeed, I think they are already so covered, in as much as Section 7(a) provides that: “An actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm.”

#### B. A Limited Duty to Flagrant Trespassers in Section 52: An Application of Section 7(b)

In the Reporters’ provisions regarding land possessor liability, only one set of claimants is now specially excluded from the normal operation of the fault principle. These are what Section 52 calls “flagrant trespassers.” I believe, however, that there is

no need for a separate Section 52 to deal with flagrant trespassers. Instead, the treatment of flagrant trespassers could be covered in Section 7(b), which makes the basic point that sometimes no duty of ordinary care is owed to one the defendant might reasonably have prevented from being injured.

The approach in Section 52 is broadly based on the California statute adopted 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. That statute rather precisely limits the duties of land possessors with respect to those who enter the land to commit certain serious crimes. Section 52 leaves the meaning of flagrant trespasser somewhat vague, thereby allowing room for states to adopt both wider and narrower definitions. Yet, the illustrations in Section 52 make clear that serious criminal trespassers are the core actors to be included within the definition of flagrant trespassers.

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. Their fault might or might not be the sort of fault that would qualify to reduce their recovery under the apportionment rules. But regardless of that, the notion is that in these sorts of circumstances it is simply outrageous to open up our courts to these “bad guys” who deliberately acted against the interests of a land possessor and now want to press for financial recovery against that land possessor who was arguably negligent.

Notice (as the Reporters have) that flagrant trespassers who are injured on the premises of others 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. That is, these victims are often either unforeseen or the precautions required to protect them from harm too burdensome to ask the land possessor to have taken. But the key point is that 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*: here, the land possessor's ordinary right to control access to the land is too offended if a victim who entered without consent and with intent on egregious wrongdoing is allowed to recover in tort from the land possessor. And trumping values are, as I see it, one of the important categories of reasons for concluding that a duty of ordinary care is not owed.

I have no complaints about this result. But, as noted above, I see no need for a separate Section 52 to deal with flagrant trespassers. Instead, the treatment of flagrant trespassers could be covered in Section 7(b) which provides: "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." As I see it, the flagrant trespasser could be offered up under Section 7(b) as a good example.

Notice next that the Reporters provide under Section 52, that in some special situations, flagrant trespassers are owed a duty of ordinary care after all: this is when they are imperiled and helpless or unable to protect themselves.<sup>3</sup> I applaud the Reporters for drafting Section 52 in this way. Their conclusion here about helpless trespassers (regardless of their reason for being on another's land) is consistent with other previously adopted positions in the Restatement Third of Torts that impose affirmative rescue

obligations on people in certain relationships. See Section 37, stating the general rule that there is “no duty” to take affirmative steps to help another, along with subsequent Sections 38-44 that impose such duties when certain relationships exist.

But, returning to the theme of my critique, this protection for even flagrant trespassers called for by the Reporters does not require the use of Section 52. It could be incorporated, for example, 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.” Section 52, in effect, adds to this the relationship between a land possessor and someone not lawfully on the premises, but who is imperiled and helpless.

Indeed, I offer a stronger claim. In my view, even Sections 37-44 are not really needed. I would prefer to collapse them into Section 7 as well. The default principle (as per Section 7(a)) would be that there is liability when anyone fails to take reasonable affirmative steps to help others. But there would be a “no duty” exception (as per Section 7(b)) in cases where the person in need was essentially a “stranger” to the potential rescuer (with the courts left to develop over time the meaning of “stranger.”)

Once placed in Section 7(b), the general “no duty” to affirmatively help “strangers” principle could perhaps 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 don’t know who 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 who you discover on your own land would not be – 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).

Note further that Section 52 also provides that, even as to stereotypical flagrant trespassers, one has a duty not to inflict willful or wanton injury. I agree that doing so is too much like taking the criminal law into your own hands and handing out vigilante justice, and hence land possessors should be liable for harm caused in this way. But once more, instead of so limiting Section 52, I would cover this limited obligation to the flagrant trespasser (who is not imperiled and helpless) 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). (Or, if Sections 37-44 were kept, then this proposition with respect to flagrant trespassers could be put in Section 40.)

### III. Redrafting Proposal

#### A. Simplifying Chapter 9

As a narrow matter, then, I would in any case do away with Section 50 that defines trespassers in general, because it is only flagrant trespassers to which special rules apply, and they are covered in Section 52. Anything important remaining in the comments to Section 50 could be 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 (Section 51, already discussed above), but also to land possessors with respect to those *off* the land (Section 54), and to a certain type of land possessor—a lessor (Section 53). This would leave Chapter 9 with but three sections:

the Section 49 on boundaries (which says this Chapter is about land possessors), the now more robust Section 51 on the general application of fault-based liability to land possessors, and the Section 52 on the narrow “no duty” exception for flagrant trespassers.

#### B. Eliminating Chapter 9

But, as emphasized already, I would prefer not to continue with the separate Sections 51 and 52 at all. As stated above, I would collapse Section 52 on flagrant trespassers into Section 7(b) on “no duty” in general. As the Reporters acknowledge, land possessors who are social hosts and serve alcohol to their guests may well be exempted from liability even if that activity (serving alcohol in the specific circumstances) would be found to be negligent by a jury. 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>4</sup> To me, it is not helpful to split up these different “no duty” situations involving land possessors. 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 Section 51 on the general duty of land possessors (plus Section 54 on their duty to those off the land, and Section 53 on the duty of lessors) into Section 7 on the general obligation to exercise due care, because that is the principle, as recognized by the Reporters, that applies in these three sections. Having done that, there would then be no need for Section 49 defining land possessors, and with that, the entire Chapter 9 on Duty of Land Possessors could disappear.<sup>5</sup>

Moving the coverage of land possessor liabilities to Section 7(a) would have the further benefit of locating there matters that are sometimes taught and analyzed under

what I believe to be the discredited doctrine of “assumption of risk.” For example, if X, who is sitting in the right field stands, is hit by a foul ball during the course of a baseball game held at a stadium owned/run by Y, this is what I consider to be a land possessor liability issue. To me, this example properly goes under Section 7(a) as a case in which, although the possessor would be liable for negligence, in these circumstances there is “no breach.” That is, there are no additional reasonable precautions that Y should have taken to prevent this injury and so Y is not at fault and hence not liable.<sup>6</sup> This, of course, could be given as an example under Section 51 of an instance in which the defendant land possessor is not at fault, but, as I have already said, that is duplicative of the core principle of Section 7(a).

### C. A Loss of Subtleties?

Are there subtleties in the Reporters’ analysis that are lost by my proposal? In the new Chapter 9 the Reporters skillfully show how the topics covered by a large number of sections in the Restatement Second of Torts are now embedded in the new Chapter 9 sections. But, in my view, that analysis could as easily be put elsewhere. 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. They admit that the due care duty imposed by Section 51 with respect to conditions created by the land possessor are simply an application of Section 7(a), but they argue that the parallel duty 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 acquired risks is analogous to the duty to take affirmative steps under circumstances set out in the sections following Section 37.

To me, however, this is just further evidence that Section 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) that includes the requirement of taking affirmative steps, and then there should be “no duty” exceptions to that duty (the Section 7(b) exemption) that includes circumstances in which one has an insufficient relationship with the risk or the victim.

#### IV. Warnings

##### A. When are Warnings Enough?

Now I want to turn to a different matter, a matter to which, I believe, insufficient attention has been given throughout the ALI project on Tort Liability for Physical and Emotional Harm. This concerns the question 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 is 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 of Torts.

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.” 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 obliquely addresses this matter by dividing precautions into the categories of “transient” and “durable.” Oral warnings are given as an example of “transient” precautions. It seems to me that some other measures to reduce the risk are also only transient, e.g., temporary fixes like taping something together knowing that the tape will last but a short time versus, say, welding or bolting something together. So, too, some warnings (e.g., written signs made of strong material) can be durable. In any event, what the Reporters emphasize here is the general principle that durable precautions are required when the extra burden of providing them is outweighed by the extra risk created if only temporary precautions are taken. While this is no doubt a sensible rephrasing of the general due care principle, it does not help us better understand when a warning is enough and when a warning is insufficient.

Comment h to Section 51 later 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). This is a well-put way of explaining how the Restatement Third of Torts may be read as accommodating the old saw that your social guests are not entitled to safer conditions than you have chosen to live with, so long as they are reasonably warned of dangers you know 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 discharge of

their duty of due care to their customers. We know the Reporters think that at least certain commercial actors must do more than warn because in Illustration 7 in Comment j to Section 52, 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. 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 h also 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 to so inspect and therefore not held in breach for failing to take precautions with respect to dangers they would have discovered through a reasonable inspection. Again, while this distinction between commercial and non-commercial actors may reflect traditional common law distinctions between duties owed (usually by commercial actors) to invitees and those owed to social guests (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 warnings, then additional warnings are generally superfluous as the conditions themselves generally warn as effectively as a written or oral warning would. But they also 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. Yet, again they do not even attempt to make clear 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 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 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 thought in our society to have different social roles than non-commercial actors. As commercial actors, they are thought 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 them to shift the risk to their customers (and others) merely by warning of dangers. Rather, we want them to repair the problem or otherwise change things to reduce or eliminate the danger. Think about supermarket, hotel, or apartment complex owners. We don't 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 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 don't want slightly cheaper markets, hotels and apartment buildings that contain these dangers. We are content to pay slightly more for this sort of greater safety.

Ordinary folks, by contrast, do not function in the same way and don't 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 as commercial actors are. 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 that same danger.

Maybe I am just saying that, 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 non-commercial actors. After all, when the former fix a dangerous condition it is likely to prevent more harms than when a non-commercial actor does so. But I think there is more to it than that. This 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 my argument is 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 don't want to return the regime of land possessor 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.<sup>7</sup>

As a different example, in my view physicians (and other professionals) are understood 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 the risks of not having treatment at all. By contrast, we generally don't 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 bodies like Consumer Reports) to bring out those

differences. By contrast, when you go to your doctor you are looking to that person to provide independent advice about options that you 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 of Torts, 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. But I leave this procedural detail for another occasion.

#### V. 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 throughout the Restatement Third of Torts, we might be better able to appreciate the common threads and justifications for them.

I have already set out one type of reason for relaxing the normal duty to exercise due care in certain circumstances: there are *trumping values* that would be put seriously at risk were juries allowed to decide the breach issue on a case-by-case basis. I pointed out that both the liberty interest of 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 that ground that there were simple precautions that the defendants might have taken to prevent harm to these victims.

A second type of reason for a “no duty” rule is what I call *perverse behavioral response concerns*. 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 escape liability than it would be to impose tort sanctions on them. Indeed, this sort of reason might, for some, justify the “no duty” to come to the aid of strangers rule. That is, some might believe that imposing such a duty with respect to strangers would in practice not promote additional careful rescue efforts but instead generate clumsy efforts by officious intermeddlers. This same sort of reason has been given 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 so many people shrink from engaging in such activities to the substantial detriment of society as a whole. Whether or not one should believe this empirical prediction is another matter. But accepting it for these purposes, it might be seen to justify a “no duty” rule on “perverse behavioral response” grounds.

Yet a third type of reason for a “no duty” rule is what I call *administrative concerns*. Indeed, this reason might also be advanced in support of the rule about “no duty” to come to the aid of strangers. The argument would be that it is too often too difficult to decide just who should have aided the stranger. Other sorts of “administrative concerns” might justify other “no duty” rules. For example, in some settings we might conclude that the jury is likely to make too many mistakes and thus not “do justice” but instead embarrass the legal system. (GIVE AND EXAMPLE) Yet another example is

that sometimes we fear that by allowing people to sue for this harm small value claims would flood the system, thereby creating costly delays in the handling of more serious cases (which reason may justify limiting duties regarding emotional distress damages, for example).

A fourth type of reason for a “no duty” rule is that the matter is better, or at least adequately, handled through 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 now 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, the “no duty” positions with respect to what the Reporters call affirmative actions are put in Section 37, the “no duty” provisions with respect to “emotional harm” are put in the separate sections dealing with that sort of loss, 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 threads among them – that is, the four types of reasons just noted (at least as I now see it).

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 on the land and the fire then burns a firefighter who tries to put it out. 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/her status as something other than an invitee since the status distinctions are now abandoned. 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.

I think that Section 7(b) is indeed the right place to deal with the question of whether there should be “no duty” to firefighters. There, we would then naturally focus, say, on whether this is properly a matter of, say, perverse behavioral responses. Although I find it quite unconvincing as an empirical matter, Dean Prosser once sought to explain the “firefighters 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. Some courts have justified the 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/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. To see this possible analogy, once more it would help for all these examples to be gathered together in Section 7(b) and not have the firefighter's rule separately set out in a comment to a separate 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 out on an opportunity to identify both common themes that run through 1) the whole range of “no duty” rules and 2) the function that social roles play in determining what sort of warnings are expected and whether warnings are enough.

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

<sup>1</sup> As an aside, even were there to be a separate chapter on land possessors, I think they could have dealt with the topic in a more parsimonious way, as I will also briefly explain.

<sup>2</sup> 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, then the possessor may be strictly liable for the ensuing harm. This narrow set of circumstances is already covered by Section 20 originally drafted by Professor Schwartz. The classic example is engaging in dynamiting in urban areas. To be sure, most of the case law on abnormally dangerous activities involves injuries to

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property or persons off the possessor's land. But that is not an essential element of Section 20. (Anyway, the Reporters' Chapter 9 includes within its reach Section 54 covering land possessor duties to those off the land for activities carried out on the land, and in the comments to Section 54 they acknowledge that the circumstances covered by Section 20 are an exception to the fault-based principle they lay out there). Second, so too, it is 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 product liability. The Reporters realize this as well and note that if a land possessor is using a defective chain saw and injures someone on the land with the saw, product liability law will apply. I put these matters aside.

<sup>3</sup> Notice how this brings back an idea contained in the now abandoned doctrine of "last clear chance." I thank Bob Rabin for bringing this to my attention.

<sup>4</sup> See Comment c to Section 7.

<sup>5</sup> I note that the Reporters acknowledge that Section 54 on harm to those off the land is merely a specific application of Section 7(a) to this circumstance.

<sup>6</sup> I reject the argument that the baseball foul ball case reflects a "no duty" rule. I say that because I think that no reasonable jury could find it was negligent to fail to screen in the seats in right field, for example. Hence, in my terms there was no breach. Put differently, in my way of thinking about it, "no duty" cases reflect circumstances in which individual juries might indeed find this specific defendant negligent but for overriding reasons (including trumping values) courts preclude this result.

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<sup>7</sup> Notice, however, that this point does not apply to all ways in which ordinary folks are expected to behave as operators of motor vehicles. For example, it generally will not suffice merely to honk one's horn to warn that you are coming along at a high rate of speed or going to pass through an intersection without stopping.