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# Judicial Boilerplate Language as Torts Decisional Litany: Four Problem Areas in North Carolina

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# **JUDICIAL BOILERPLATE LANGUAGE AS TORTS DECISIONAL LITANY: FOUR PROBLEM AREAS IN NORTH CAROLINA**

CHARLES E. DAYE\*

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## I. INTRODUCTION

A judicial opinion performs many functions. It announces the decision, explains the reasons for the decision, provides a basis for analysis of the development of legal rules, guides judges of lower courts and trial courts as to controlling precedent, serves as a source that lawyers consult to analyze obligations and rights of clients, informs counsel's judgments about potential litigation, and provides grist for formal legal study.<sup>1</sup> Judicial opinions also "teach people in society what actions conform to the law."<sup>2</sup> Thus, not only do judicial opinions inform the litigants and lawyers, but they also inform other citizens and public officials.<sup>3</sup>

A judicial opinion is most effective when it adequately addresses the issues in the case under consideration and when it explains how rules from precedent apply or can be adapted to the facts and issues in the case at hand. Conversely, an opinion is least helpful when it announces rules that are not supported in precedents cited or when it makes unelaborated repetition of language from prior cases without adequate explanation or analysis of how that language applies or is being adapted to resolve issues in the case at hand.

When the court fails to fully analyze a case, or announces rules that lack precedential support, the use of judicial opinions becomes difficult. Perhaps all judges, attorneys, legal analysts including law professors and students, and other readers of judicial opinions at some time have confronted troubling deficiencies in judicial opinions when trying to determine the precedential value of a case or its application to the facts of a case at hand, particularly when the case might be close to the margin of developed rules or at the borderline between two or more rules.

Similarly, treatises writers and casebook editors at some time have probably found it difficult to completely synthesize a line of cases in a topic area when there are deficiencies in the judicial opinions which they must consult.

In the discussion of this article, the term "boilerplate" is used to denote language in judicial opinions which is plucked from prior cases in whole and inserted into an opinion without adequate

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1. See generally, Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REF. 119 (1994).

2. Martineau, *supra* note 1, at 123.

3. *Id.* (citing Committee on Use of Appellate Court Energies, Advisory Council for Appellate Justice, *Standards for Publication of Judicial Opinions* 1 (1973)).

analysis of the applicability of that language to the issues or facts of the case at hand. The phrase "decisional litany" is used to characterize the practically verbatim repetition of language from prior cases in subsequent judicial opinions without sufficient inquiry into the adequacy and appropriateness of the language as applied to the case at hand.

This article discusses four selected examples from the tort law of North Carolina.<sup>4</sup> These examples isolate instances in which the result of a case might not have warranted the language used or when the language of the cases was picked up and carried forward in subsequent cases without adequate analysis. Perhaps attorneys can point out these problems to the courts, and perhaps the courts might choose to make helpful clarifications.

## II. FOUR SELECTED EXAMPLES OF PROBLEM AREAS

Four topics have been selected to illustrate the instances when judicial opinions do not serve as the most helpful to perform a basis for analysis of legal rules. The topics concern landowners' obligations to a class of entrants onto the property; the types of and bases for libel actions; the requirements for determining when intentional private nuisances may be found and related considerations that govern remedial alternatives; and the imposition of strict liability for harms caused by "vicious" domestic animals.<sup>5</sup> These examples are offered for the constructive purpose of highlighting the problems that the lack of clarity creates for lower courts, trial court judges, lawyers who are advising or representing clients, analysts of judicial opinions (such as treatise writers), and citizens at large.

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4. Problems in these four torts areas were first noticed by this writer while engaged in preparation of the treatise *NORTH CAROLINA LAW OF TORTS*. 1991. The Michie Company. Permission is granted to the *CAMPBELL LAW REVIEW* to reprint selected portions from *NORTH CAROLINA LAW OF TORTS* by CHARLES E. DAYE and MARK W. MORRIS. The Michie Company, Charlottesville, VA, (800) 446-3410. All rights reserved.

Because of the limited objective of that treatise to set forth the law as it appeared to be rather than to fully explicate and propose modifications of the law to conform to what the authors believed it should be, this article has been developed to explore more fully several proposals for remedying the deficiencies in the four areas discussed in this article.

5. Whether other torts are non-torts areas might evidence any of the problems identified is beyond the scope of the analysis undertaken here.

A. *Landowners' Duty to Licensees: Is There Really No Duty to Warn of Passive Hazards?*

A social guest is visiting the landowner. The landowner sees the guest about to walk onto the covering of a concealed hole, knows that the covering will not support the weight of a person, and knows that the guest does not know of the hole and cannot see it. Should the landowner be required to warn the social guest?

1. *Classification of Persons on the Land*

In North Carolina the duty owed to persons on the landowner's property depends, in general, on the status of the visitor.<sup>6</sup> An entrant may be classified as a trespasser, licensee, or invitee.<sup>7</sup> A licensee is a person who enters onto the property with permission of the owner, but otherwise for his own purposes.<sup>8</sup> The landowner or occupier does not owe the licensee the duty to keep the premises in a safe condition,<sup>9</sup> but owes only the duty to refrain from injuring her either willfully or wantonly, or injuring her by increasing the hazard to her through "active or affirmative" negligence.<sup>10</sup>

2. *The Problem of Licensees and Passive Conditions*

The boilerplate language problem arises with respect to passive conditions, such as obstructions and pitfalls on property, and the duty owed to licensees regarding those conditions. Some North Carolina Supreme Court cases state not only that the landowner owes no duty to make the premises safe by removing such obstructions, but also that the landowner does not have any duty

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6. *Hood v. Queen City Coach Co.*, 249 N.C. 534, 540, 107 S.E.2d 154, 158 (1959) (actionable negligence on defendant's part when invitee fell into an uncovered pit beside defendant's walkway).

7. *Clarke v. Kerchner*, 11 N.C. App. 454, 459, 181 S.E.2d 787, 790, cert. denied, 279 N.C. 393, 183 S.E.2d 241 (1971) (lessor not liable to lessee's social guest injured when porch railing gave way since lessor had no duty to keep the premises in repair).

8. *Hood*, 249 N.C. at 540.

9. *Pafford v. Constr. Co.*, 217 N.C. 730, 736, 9 S.E.2d 408, 412 (1940) (where plaintiff entered premises for his own purposes in order to inspect building materials and he was not invited to do so, he was held to be a licensee in that mere permission involves license but it gives no right).

10. *Clarke v. Kerchner*, 11 N.C. App. 454, 461, 181 S.E.2d 787, 792, cert. denied, 279 N.C. 393, 183 S.E.2d 241 (1971) (defendant land occupier (lessee) not liable to plaintiff, a social guest, injured when back porch railing gave way, without a showing of willful or wanton negligence).

even to warn a licensee of hidden perils, such as pitfalls, of which the landowner knows and the licensee does not know.<sup>11</sup>

A cursory reading of these cases suggests that the rule stated above is black letter law in North Carolina, and that licensees injured by hidden perils on a landowner's property cannot recover for their injuries simply by arguing that the landowner failed to warn them of the peril. Analysis of the cases, however, casts substantial doubt on the proposition that a landowner, in the ordinary case, is not under a duty to warn a licensee of hidden perils on the property of which the landowner knows and of which the licensee does not know, at least when the landowner knows the licensee is about to encounter the condition or pitfall. This is as it ought to be; for it is difficult to believe that the law would countenance a landowner's failure to warn, for example, a social guest on the premises whom the landowner saw about to walk onto the covering of a concealed well, when the landowner knew the covering was rotten and would not support the weight of a person.

One reason liability might arise in the above situation could well be that in such circumstances the landowner's failure to warn would be considered "wanton" or "willful" behavior. Wanton and willful behavior may be found to exist where a defendant's "conduct is 'needless,' manifests no rightful purpose, and shows reckless indifference to the interests or rights of others; or is done purposely and deliberately in violation of law; or is knowing and 'of deliberate purpose' not to discharge some duty necessary for the protection of the person or property of another."<sup>12</sup> At the very least such inaction by the landowner in a circumstance such as that hypothesized would seem to create a jury question as to whether the landowner's conduct was wanton or willful. Moreover, to characterize the conduct as wanton or willful may, in

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11. See, e.g. *Dunn v. Bomberger*, 213 N.C. 172, 177, 195 S.E. 364, 367 (1938) (defendant not liable for death of licensee, an employee of contractor or agent of the state Highway Commission coming onto his property, who fell into excavation which caved in); *Pafford v. Constr. Co.*, 217 N.C. 730, 736, 9 S.E. 2d 408, 412 (1940) (where plaintiff entered the premises for his own purposes in order to inspect building materials and he was not invited to do so, he was held to be a licensee in that mere permission involves a license but gives no right); *Brigman v. Fiske Carter Const. Co.*, 192 N.C. 791, 795-96, 136 S.E. 125, 127 (1926) (active negligence in backing truck into vehicle in which plaintiff licensee was sitting).

12. CHARLES E. DAYE & MARK W. MORRIS, *NORTH CAROLINA LAW OF TORTS*, § 17.32 (Michie, 1991) (citing *Wagoner v. North Carolina R.R.*, 238 N.C. 162, 77 S.E.2d 701 (1953)).

many cases, result in too strong a remedy, opening the landowner to a claim of punitive damages, even under recently restricted standards.<sup>13</sup> And a characterization of the conduct as wanton or willful would preclude the defense of contributory negligence,<sup>14</sup> which is still applied in North Carolina.<sup>15</sup>

The second, and frankly, the better reason that a warning would be necessary is that, notwithstanding the broader statements in the cases, no Supreme Court case has been found that would exonerate a landowner's failure to warn a licensee, whom the landowner both knew was on the premises and knew was about to encounter a dangerous concealed hazard known to the landowner, but not known to the licensee. In all of the cases on this subject found and analyzed, the broader language purporting to adhere to a "no duty to warn" rule was not required to decide the case on the facts presented, or the case was or should have been decided on different or narrower grounds.

The case which comes closest to sustaining the no duty to warn a licensee rule is *Monroe v. Atlantic Coast Line Railroad Co.*<sup>16</sup> In *Monroe*, the plaintiff, treated as a licensee, fell into a concealed pit on the landowner's premises across which the plaintiff was taking a short cut.<sup>17</sup> The plaintiff, who had used the short cut apparently for over a year did not know of the pit, as it had been concealed by a growth of weeds and shrubs.<sup>18</sup> Judgment for the plaintiff pursuant to jury verdict was reversed, the Court concluding that the landowner's motion for non-suit should have been granted.<sup>19</sup> The Supreme Court reasoned that the plaintiff was using the short cut at her own peril and that the landowner had not been shown to have breached any duty owed to the plaintiff.<sup>20</sup>

*Monroe* does not mention whether the landowner knew that persons were using the property as a short cut. But because the evidence showed the path was clearly defined, it can be reasonably

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13. N.C. Gen. Stat. § 1D-15 (1995) (restricting punitive damages to "clear and convincing evidence" that "fraud, malice, or willful or wanton conduct" existed; added by ratified House Bill 729, 1995 Session, Chap. 514).

14. *Young v. Warren*, 95 N.C. App. 585, 383 S.E.2d 381 (1989) (defense of contributory negligence not available if jury finds defendant's negligence amounted to willful or wanton injury).

15. DAYE & MORRIS, *supra* note 12, § 19.21.1.

16. 151 N.C. 373, 66 S.E. 315 (1909).

17. *Monroe*, 151 N.C. at 374, 66 S.E. at 316.

18. *Id.*

19. *Id.* at 377, 66 S.E. at 318.

20. *Id.*

inferred that the landowner had at least constructive notice of the use of the property as a short cut. However, the pit had been created some two years before the plaintiff's injury.<sup>21</sup> Importantly, the facts do not show and the court does not discuss whether the landowner knew the pit had become concealed by weeds and shrubs. If the evidence did not show that the landowner was aware not merely that the pit existed, but that it constituted a concealed danger, the case cannot fully stand for the proposition that the landowner had a duty to warn, because the duty exists only with respect to conditions that the landowner knows about and which he knows are both concealed from and unknown to the licensee.

Finally, in modern terminology, the plaintiff seems not really to have been a licensee at any rate; she was a person trespassing on a limited area subject to constant trespass. THE RESTATEMENT (SECOND) OF TORTS suggests this classification, and provides for liability only when the condition is one which the landowner has reason to believe that trespassers will not discover.<sup>22</sup> Thus, if the landowner does not know that persons who enter will not discover the condition, it might well be that the landowner is not under a duty to warn of it.

Notwithstanding its arguably broader language *Dunn v. Bomberger*<sup>23</sup> does not actually support a rule that there exists no duty to warn licensees of passive conditions. First, the case involved an employee of the state, and, although called a licensee, the employee was privileged to enter the property without regard to the landowner's consent. Such persons have generally created classification problems.<sup>24</sup> Second, the Court pointed out that the landowner had not created the concealed condition, but rather that the state itself had made excavations which made the property dangerous.<sup>25</sup> Third, the Court actually held that the landowner could not foresee or be charged with a duty to foresee that agents of state (of which plaintiff was one) would create the condition and thus the landowner was not negligent.<sup>26</sup> Fourth, the Court opined that the deceased was negligent for failure to dis-

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21. *Monroe*, 151 N.C. at 374, 66 S.E. at 316.

22. RESTATEMENT (SECOND) OF TORTS § 335 (1965).

23. 213 N.C. 172, 177, 195 S.E. 364, 367 (1938).

24. See W.PAGE KEETON ET AL., PROSSER AND KEETON, ON THE LAW OF TORTS § 61, at 428-29 (5<sup>th</sup> ed. 1984).

25. *Dunn*, 213 N.C. at 177, 195 S.E. at 368.

26. *Id.*



cover the condition or discovered it and negligently continued to work in face of a recognized danger.<sup>27</sup> Finally, the Court thought it would be so "oppressive" that, under the circumstances, it could not conceive of requiring the landowner to give the state Highway Commission notice (since the Commission's employees had created whatever danger existed) or to require the landowner to exercise "a higher degree of omniscience" with respect to probable dangers than the employees of the Highway Commission were required to exercise.<sup>28</sup>

*Pafford v. J.A. Jones Construction Co.*<sup>29</sup> similarly does not support a rule of no duty to warn. First, there were warning signs posted to "Keep Out" of the building under construction which the plaintiff licensee ignored.<sup>30</sup> Thus, it is difficult to see the case on its facts as involving an instance in which no warning was given. Therefore, any statement made in the case that a warning was not required is classic dictum. Second, the plaintiff, as an experienced person in the plastering business, according to the Court, was fully aware that the building was not in a state of repair.<sup>31</sup> Thus, it is difficult to classify the case as one in which the condition either was concealed or was a condition of which the landowner was aware and of which the licensee was not. Third, the opinion does not make clear whether the landowner actually knew the plaintiff was on the premises at the time of his injury. Fourth, the Court made the statement regarding the lack of a duty to warn while speaking of the landowner's capacity to have discovered the defect by the exercise of reasonable care.<sup>32</sup> But the rules have generally not required landowners to make inspections to discover defects in the case of licensees. Fifth and finally, the Court also treats the plaintiff as having been contributorily negligent or as having assumed the risk: "He took his chances and lost."<sup>33</sup>

*Brigman v. Fiske-Carter Const. Co.*<sup>34</sup> announces the proposition that as to passive conditions the landowner owes only a duty to avoid wanton and willful injury to a licensee. The passive condition rule has no influence on the holding of the case, however.

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27. *Id.*

28. *Id.* at 176-78, 195 S.E. at 368.

29. 217 N.C. 730, 736, 9 S.E. 2d 408, 412 (1940).

30. *Id.*

31. *Id.* at 737, 9 S.E. 2d at 412.

32. *Id.* at 736, 9 S.E. 2d at 412.

33. *Id.* at 737, 9 S.E. 2d at 412.

34. 192 N.C. 791, 795-96, 136 S.E. 125, 127-28 (1926).

The holding of the case concerns the landowner's active negligence in backing a truck into the vehicle in which plaintiff was sitting.<sup>35</sup> At best, therefore, the statement regarding passive conditions is pure dictum. Moreover, *Brigman* does not address the issue of warning as to passive conditions, either as a separate duty or as possibly constituting wanton negligence in the circumstances posited in the case.

Both *Gibbs v. Southern Ry. Co.*<sup>36</sup> and *Clark v. Cleveland Drug Co.*<sup>37</sup> cite the "no duty to warn rule," but are decided on contributory negligence grounds. In *Gibbs*, the plaintiff was barred from recovering for injuries sustained after she was struck by a gang-plank that was on the defendant's passing train.<sup>38</sup> The Court held that because the plaintiff was not exercising any care for her own safety, the defendant was not liable for her damages.<sup>39</sup> In *Clark*, the defendant was not held liable for injuries suffered by the plaintiff after she fell into a trap door in defendant's store.<sup>40</sup> The Court held that the injuries resulted from the plaintiff's lack of due care.<sup>41</sup> In both cases, the boilerplate "no duty to warn" rule was announced in the broader language of the case, but the case was decided in favor of the defendant on different grounds. The Court in *Gibbs* and *Clark* did no more than repeat a rule which had no effect on the holding of either case.

In later cases, the Supreme Court has shown apparent reluctance to apply the "no duty to warn" rule in cases that are susceptible to alternative analyses and dispositions. For example, *Freeze v. Congleton*,<sup>42</sup> decided more than half a century after the Court adopted the "no duty to warn licensees" rule, does not mention such a rule. The plaintiff in *Freeze*, a five year-old licensee, sued his aunt to recover damages for injuries sustained when he walked through a sliding glass door.<sup>43</sup> The plaintiff's aunt had closed the glass door soon after the plaintiff entered through it once, and failed to warn him of the changed condition.<sup>44</sup> The rule applied by the *Freeze* Court is essentially that a landowner's duty

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35. *Id.* at 797, 136 S.E. at 128.

36. 200 N.C. 49, 156 S.E. 138 (1930).

37. 204 N.C. 628, 169 S.E. 217 (1933).

38. *Gibbs*, 200 N.C. at 50, 156 S.E. at 139.

39. *Id.*

40. *Clark*, 204 N.C. at 630, 169 S.E. at 218.

41. *Id.*

42. 276 N.C. 178, 171 S.E.2d 424 (1970).

43. *Id.* at 179, 171 S.E. 2d at 424.

44. *Id.*, 171 S.E. 2d at 425.

of care to an infant licensee is suspended when the parent of the infant is present, in which case the duty to warn of defective conditions falls on the parent.<sup>45</sup> The Court ruled in favor of the defendant because the duty to warn the plaintiff of the closed door fell upon the plaintiff's mother.<sup>46</sup> Although the Court's holding is based on a rule concerning the duty owed to *child* licensees, this case seems to be one in which the Court might have at least mentioned that an exception to that general "no duty" rule exists with respect to a child encountering even a passive condition. That exception imposes a greater duty on landowners to children than would be required to adult licensees.

But this approach would have been problematic, because it can cut both ways. Even under the general "no duty to warn" rule, the landowner's closing the glass door shortly after the plaintiff had entered through it could be interpreted as increasing the hazard to the plaintiff through affirmative negligence, or even as wanton or willful conduct if one considers the experiences and understandings of a child five years old. Liability in such an instance could be imposed regardless of the presence of the child's parents, unless the Court had imported the parental presence consideration into its consideration of the no duty rule. But the Court does not mention the "no duty to warn" rule.

The court's reluctance to apply the "no duty to warn" rule is also apparent in *Cupita v. Carmel Country Club*.<sup>47</sup> In *Cupita*, the plaintiff was injured when he fell into a hole on the defendant's lawn while walking along a pathway that was not intended for use by the defendant's invitees.<sup>48</sup> Because the plaintiff had exceeded the scope of his invitation at the time of his injury, he was classified by the Court as a licensee and, as such, the Court held that the defendant was not charged with any duty to warn him of the hole in the lawn.<sup>49</sup> Although the holding of *Cupita* can be rationalized as not inconsistent with the "no duty to warn" rule, the Court included in its opinion a substantial discussion of the effect the plaintiff's contributory negligence would have had on his ability to recover.<sup>50</sup> After confidently stating that the defendant did not breach any duty owed to the plaintiff under the no duty to

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45. *Id.* at 182, 171 S.E. 2d at 426.

46. *Id.*, 171 S.E. 2d at 427.

47. 252 N.C. 346, 113 S.E.2d 712 (1960).

48. *Id.* at 348, 113 S.E. 2d at 714.

49. *Id.* at 350, 113 S.E. 2d at 715.

50. *Id.* at 351, 113 S.E. 2d at 716.

warn rule, the *Cupita* Court, nevertheless, stated alternatively that the defendant could prevail because of the plaintiff's contributory negligence.<sup>51</sup>

There also exists an additional consideration in determining whether *Cupita* can stand for the proposition that there is "no duty to warn licensees of concealed conditions of which the landowner knows." The plaintiff did not prove that the defendant was aware of the hole in the lawn, and there is no inference that the defendant knew plaintiff was on the property or was about to encounter the hole. Absent proof that the defendant knew of hole and of plaintiff's presence, the "no duty to warn" rule could not be accurately said to have been the basis for the court's decision.

Like *Cupita*, *Clarke v. Kerchner*<sup>52</sup> cannot support the notion that there is "no duty to warn licensees of concealed conditions of which the landowner knows." The plaintiff in *Clarke* was injured when the defendant's porch railing gave way, causing her to fall to the ground.<sup>53</sup> In her witness statement, the defendant stated that "she had never noticed that the porch railings were loose prior to the time of the accident."<sup>54</sup> The owner or occupier only has the duty to warn of conditions of which he knows. Because of an absence of evidence that the defendant knew about the loose railings, she did not have an obligation under the "no duty" rule to warn the plaintiff of the danger.

The Court's discomfort with the "no duty to warn" language becomes more apparent when the Court fails to cite the rule in cases in which the facts presented apparently make application of the "no duty to warn" rule appropriate. The Court does not cite the "no duty to warn" rule in *Murrell v. Handley*.<sup>55</sup> In *Murrell*, the plaintiff was injured when she slipped and fell on a rug on the defendant's floor.<sup>56</sup> The floor had been waxed the previous night, but the plaintiff was not made aware of the changed condition.<sup>57</sup> The Court ruled in favor of the defendant after a lengthy discussion about whether a person's slipping on a waxed floor is evidence of negligence on the defendant's part.<sup>58</sup> The Court pointed out

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51. *Id.*

52. 11 N.C. App. 454, 181 S.E.2d 787, *cert. denied*, 279 N.C. 393, 183 S.E. 2d 241 (1971).

53. *Id.* at 455, 181 S.E. 2d at 789.

54. *Id.* at 458, 181 S.E. 2d at 790.

55. 245 N.C. 559, 96 S.E.2d 717 (1957).

56. *Id.* at 561, 96 S.E. 2d at 719.

57. *Id.* at 560, 96 S.E. 2d at 718-19.

58. *Id.* at 562, 96 S.E. 2d at 720-21.

that the plaintiff was a licensee, but never mentioned the duty owed to licensees.<sup>59</sup> Instead, the Court focused on the absence of negligence in the defendant's conduct.<sup>60</sup> This case appears to be one in which the "no duty to warn" rule would have been appropriate. It cannot be known whether the Court avoided the rule, because of a belief the rule is unfair and, consequently, avoided applying it when the case could be decided on another basis.

Several other cases are sometimes cited for the proposition that a landowner has no duty to warn a licensee, that the landowner knows is present, of hidden conditions that the landowner knows about if he is aware that the licensee does not know of the danger. But the holdings of the cases do not support the proposition.<sup>61</sup>

The lower courts seem to have carried forward the no duty to warn language verbatim without significant analysis or any substantial attempt to determine whether the actual holding of the Supreme Court cases supported the statement of no duty to warn.<sup>62</sup>

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59. *Id.* at 561, 96 S.E. 2d at 719.

60. *Id.* at 562, 96 S.E. 2d at 720-21.

61. These cases include *Quantz v. Railroad*, 137 N.C. 136, 49 S.E. 79 (1904) (where the public was licensed to walk through a railroad station, the railroad company was not liable for injuries to a licensee who fell through a door located 12 feet from the walkway because he was outside the public area); *Peterson v. South & Western R.R.*, 143 N.C. 260, 55 S.E. 618, (1906) (active operation, not passive condition; railroad had no reason to expect persons purchasing fruits and who were not passengers to be on the train, and when licensee was thrown from the train as it lurched forward in starting up, he could not recover because the railroad breached no duty towards him, but note that the court said that "[I]f the conductor, or anyone having control of the train, had seen the plaintiff on the car he should have warned him that it was about to move." *Id.* at 267, 55 S.E. at 621); *Brisco v. Henderson Lighting & Power Co.*, 148 N.C. 396, 62 S.E. 600 (1908) (landowner who had no reason to anticipate presence of 13 year old trespassing boy not liable under attractive nuisance doctrine); *Money v. Travelers Hotel Co.*, 174 N.C. 508, 93 S.E. 964 (1917) (decendent in hotel went down three corridors, including one narrower than others, traversing over 120 feet, opened an insecure door to a passenger elevator shaft and fell into the shaft was treated as, at best, a licensee who was not injured by a hidden or concealed condition which the hotel operator would have any reason to foresee as posing a danger since the danger was not along or near the usual and customary route for entering and leaving the hotel).

62. *See, e.g. Kelly v. Briles*, 35 N.C. App. 714, 242 S.E.2d 883 (1978) (allegations that defendant landowner maintained abandoned mines which were in danger of collapse, that to landowner's knowledge persons who were not aware of the danger entered the mines frequently, and that landowner neither boarded

With respect to the issue of licensees and passive conditions the North Carolina Supreme Court could go a long way toward warding off possible confusion over the duty owed by adopting the clearer rule established in a number of jurisdictions and promulgated in the stated in the Restatement 2d of *Torts*, which requires the landowner to warn a licensee of concealed perils of which the landowner is aware and the licensee is not.<sup>63</sup> Alternatively, the Court could abolish the categories of invitee, licensee, and trespasser altogether and establish a duty of reasonable care, under the circumstances, owed to everyone on the property.<sup>64</sup> While this approach would have a more sweeping portent, it would allow for a flexible answer to the issue of when liability should be imposed. It also would allow focus on the relevant considerations that determine whether liability should be imposed, including such concerns as the foreseeability of injury, the burden of precautions, and alternative ways to avoid injury or reduce the chances of

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up the mines nor warned of danger held insufficient to state a claim for relief). In *Kelly* the court treats the entrants as licensees by suggesting that open use by the public "implied an invitation." *Id.* at 717-18, 242 S.E. 2d at 886. The better analysis is that the entrants were, at best, constant trespassers on a limited area. As noted previously, the RESTATEMENT (SECOND) OF TORTS § 335 (1965) would provide for liability only when the condition is one as to which the landowner has reason to believe that trespassers will not discover the danger.

It is not altogether clear that the bare allegation that the plaintiff, who was joined in the suit by his father, could not know or discover the dangerous condition of the mine in question, at least not without some allegation of either his age or mental state.

It should be noted for the sake of accuracy that the *Kelly* court apparently misread the RESTATEMENT (SECOND) OF TORTS § 342 (1965) (referring to the provision as 1964) as requiring landowners to inspect premises for potential dangers to licensees. 35 N.C. App. At 719, 242 S.E. 2d at 886. The Restatement provision cited provides in Comment d., *inter alia*, that "A possessor of land owes to a licensee no duty to prepare a safe place for the licensee's reception or to inspect the land to discover possible or even probable dangers." RESTATEMENT (SECOND) OF TORTS § 342 cmt. D (1965). Also *Haddock v. Lassiter*, 8 N.C. App. 243, 174 S.E.2d 50 (1970), falls into the same pattern of carrying forward language without substantial analysis.

63. See RESTATEMENT (SECOND) OF TORTS § 342 (1977).

Michigan, Washington, Ohio, Oregon, New York, Missouri, Kentucky, Connecticut, Texas, Alaska, Arizona, Maryland, Virginia and Arkansas are among the states that require a landowner to warn a licensee of hidden perils of which the licensee is not aware and the landowner is aware.

64. Massachusetts, Wisconsin, Minnesota, and Illinois are among the states that have abolished the categories.

injury thereby permitting a focus on reducing the societal costs injuries impose.<sup>65</sup>

Whatever steps the Court might choose to take to clarify the rule, rather than leaving it as it currently stands, the effort would undoubtedly be welcomed as helping to eliminate the confusion facing landowners and occupiers, lower court and trial judges, attorneys advising and representing clients (whether landowners or claimants), scholars writing treatises, citizens, and others. Further, a clarified rule would be more consistent with notions of justice, at least to the extent that the broader unclarified boilerplate language could be positively misleading, in the sense that one has a hard time believing that a landowner may with impunity watch a social guest face possibly grievous injury or death while the landowner sat by without so much as yelling "watch out!" when he saw the guest walking onto the rotted covering of a concealed well. One cannot believe that our law would countenance such callous indifference or itself be so indifferent.

*B. Basis for Libel Action: Is there Really a Separate Category of "Dual Meaning" Libel?*

A well-known entertainer is interviewed by a local newspaper reporter. When the article is published, it contains statements that the entertainer and a small number of readers interpret as defamatory. Other readers do not interpret the statements in a defamatory manner. Under what category of libel, if any, may the entertainer base her cause of action?

*1. General Principles of Defamation*

The general distinction between libel and slander is that libel is based on the publication of a written communication, a communication which embodies words in a physical form, or some other means of communication having the likely harmful qualities of defamatory printed words. Slander is based on the publication of defamatory matter by spoken words, transitory gestures or any form of communication which is not sufficient for libel.<sup>66</sup> North Carolina generally follows these distinctions.<sup>67</sup>

The Supreme Court in a series of cases has purported to distinguish between the three classes of libel: (1) libel *per se*, which

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65. See generally, DAYE AND MORRIS, *supra* note 12, § 16.10.

66. See RESTATEMENT (SECOND) OF TORTS § 568 (1977).

67. See generally, DAYE AND MORRIS, *supra* note 12, § 28.31.

is defamatory upon its face; (2) publications susceptible of two interpretations, one of which is defamatory and the other not; and (3) libel *per quod*, which is defamatory only when considered with explanatory circumstances, innuendo or colloquium.<sup>68</sup>

## 2. The Problem of "Dual Meaning Libel"

The three-tiered categorization of libel, with the second tier consisting of statements capable of having both a defamatory and a non-defamatory meaning, apparently originated with the Court in *Flake v. Greensboro News Co.*<sup>69</sup> Earlier courts had distinguished between defamation actionable *per se* and that not actionable *per se*.<sup>70</sup> Such cases, however, cannot fairly be read as creating a substantive and distinct category of libel involving two meanings - one defamatory and one not (hereinafter called "dual meaning" libel). The *Flake* court cited five cases as authority for the dual meaning libel of which it spoke. However, it is doubtful that a fair reading of any of the cases can support the substantively distinct category of dual meaning libel. One case cited is *Wright v. Commercial Credit Co. Inc.*<sup>71</sup> The *Wright* court held that words susceptible to more than one meaning or having no meaning to persons not familiar with the language used to describe a particular transaction are considered to be ambiguous, and require an allegation and proof that the alleged defamation was published to a third party who understood the words to have a defamatory meaning.

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68. *Arnold v. Sharpe*, 296 N.C. 533, 251 S.E.2d 452 (1979) (directed verdict for defendant was proper.)

69. 212 N.C. 780, 195 S.E. 55 (1938) (libel *per se* claim not sustained; dual meaning libel was not alleged).

70. *See, e.g. Oates v. Wachovia Bank and Trust Co.*, 205 N.C. 14, 169 S.E. 869 (1933). In *Oates* the court was dealing with slander, and the issue was whether the alleged defamation was actionable *per se* as charging the commission of a crime involving moral turpitude or only actionable *per quod* upon allegation and proof of falsity, malice and special damages. The court said that if the words had only one reasonable interpretation it was for the court to say whether the words were defamatory, but that if the words were capable of two meanings one defamatory and one not it was for the jury to determine which of the meanings was intended and which was understood by the persons who heard the words.

This matter, of course, deals only with the role of the court and jury when factual predicates must be determined. The holding really has nothing to do with a second or middle substantive tier of slander, not to mention of libel.

71. 212 N.C. 87, 192 S.E. 844 (1937) (non-suit against plaintiff, no allegation or proof that the alleged libelous words were published to anyone who understood them to convey a defamatory meaning).



A second case cited for the dual meaning category, *Lewis v. Carr*,<sup>72</sup> does not mention any category of dual meaning libel. *Lewis* merely held that although the defendant's statement in fact charged embezzlement or breach of official duty, misconduct, and conversion of public funds, whether a charge of embezzlement was intended by the defendants was a question for the jury.

The three other cases involve slander. The first of these cases, *Vincent v. Pace*,<sup>73</sup> held that the alleged statement of the defendant to third persons who knew plaintiff, that the plaintiff had stolen the defendant's chickens, was a jury question as to whether the words were slanderous. The second case, *McCall v. Sustair*,<sup>74</sup> held that when the defendant allegedly told three people that the plaintiff stole cotton from him, the defendant's language was slanderous *per se*; however, the Court noted that if the words had been ambiguous, the jury would have had to decide what meaning was intended of the words.<sup>75</sup> The final case, *Lucas v. Nichols*,<sup>76</sup> required the jury to decide whether the defendant slandered the plaintiff by allegedly saying to a third person that the plaintiff was sexually promiscuous with slaves and that the defendant would pay someone \$25 to sleep with the plaintiff.

All of these cases, when accurately analyzed, will be seen to stand only for the proposition that when words cannot be determined to be slanderous as a matter of law because they are capable of a non-slanderous meaning, what meaning was intended by the defendant or understood by those who heard them is a jury question. None supports dual meaning libel as a distinct category of defamation.

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72. 178 N.C. 578, 101 S.E. 97 (1919) (non-suit reversed; whether alleged libel intended to charge the crime of embezzlement was for the jury).

73. 178 N.C. 421, 100 S.E. 581 (1919) (trial court erred in sustaining defendant's demurrer because the allegedly slanderous words were ambiguous but capable of a defamatory meaning thus the question of what meaning was intended and understood was for the jury to determine).

74. 157 N.C. 178, 72 S.E. 974 (1911) (allegedly slanderous words used were susceptible of more than one construction thus the trial court properly left the question of intent and meaning to the jury as to whether the defendant intended to charge the plaintiff with a crime and whether anyone so interpreted the words).

75. *Id.* at 181, 72 S.E. at 975.

76. 52 N.C. 32 (1859) (because the allegedly slanderous words were ambiguous and capable of a double interpretation it was proper for the judge to leave it to the jury whether the slanderous meaning was intended).

After the *Flake* decision, several cases have cited the *Flake* language regarding a special middle-tier category of dual meaning libel. No appellate case has been found which has sustained a claim of libel when it was in the special dual meaning category only; indeed, no appellate case has been found in which the plaintiff successfully has alleged dual meaning libel action. Of the appellate cases found that do specifically identify and sustain a particular form of libel allegation, only libel *per se* and libel *per quod* allegations have been found sustained.

One case which repeats the dual meaning libel language of *Flake* is *Arnold v. Sharpe*.<sup>77</sup> In *Arnold*, the plaintiff's employer allegedly left a memo on his desk describing someone as a gossip, a troublemaker, and one who could not get along well with others.<sup>78</sup> There was not a name on the memo; however, the plaintiff believed that the memo was written about her.<sup>79</sup> Other employees observed the memo on the defendant's desk, and the plaintiff claimed to have suffered embarrassment.<sup>80</sup> Although the *Arnold* Court discussed the three distinct classes of libel in its opinion, the discussion had no bearing on the holding of the case. The case was decided according to the rule that defamatory words are actionable only if they refer to some ascertained or ascertainable person.<sup>81</sup> Because the plaintiff was not identified in the memo, she could not prevail in an action for libel.<sup>82</sup>

*Renwick v. News and Observer Publishing Co. and Renwick v. Greensboro Daily News Co.*<sup>83</sup> also cites the *Flake* language but does not support the dual meaning libel category. In *Renwick*, the plaintiff sued two newspaper companies after they published an article criticizing minority admissions at UNC-Chapel Hill, of which the plaintiff was in charge.<sup>84</sup> The Court concluded that, at worst, the articles were susceptible of two interpretations, one defamatory and the other not.<sup>85</sup> The plaintiff's action was dismissed because plaintiff had alleged and admitted that his action

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77. 296 N.C. 533, 251 S.E.2d 452 (1979).

78. *Id.* at 536, 281 S.E. 2d at 454.

79. *Id.*

80. *Id.*

81. *Id.* at 539, 281 S.E. 2d at 456.

82. *Id.*

83. 310 N.C. 312, 312 S.E.2d 405 (1984)

84. *Id.* at 314, 312 S.E. 2d at 405.

85. *Id.* at 315, 312 S.E. 2d at 408.

was based only on a claim of libel *per se* which claim the court found plaintiff had not met.<sup>86</sup>

In *Ellis and Ellis Brokerage Co. v. Northern Star Co.*,<sup>87</sup> the plaintiff alleged that letters sent to the plaintiff's buyers by the defendant indicating that the plaintiff's prices were incorrect were libelous *per se*.<sup>88</sup> The *Ellis* Court dutifully quotes the dual meaning libel language of *Flake*<sup>89</sup>, but the complaint and the holding in the case speak to libel *per se* only.<sup>90</sup> Similarly, the Court in *R.H. Bouligny, Inc. v. United Steelworkers of Am.*,<sup>91</sup> cites the dual meaning libel language of *Flake* although the plaintiff alleged only libel *per se*.

In *Robinson v. Nationwide Ins. Co.*,<sup>92</sup> the Court suggests that the plaintiff's case could fall into a distinct category of libel that includes publications which are capable of two meanings—one defamatory and one not.<sup>93</sup> The plaintiff in *Robinson* charged the defendant with libeling him by publishing statements concerning the cancellation of the plaintiff's insurance policy.<sup>94</sup> The Court held that stating that one's insurance policy has been canceled is not libelous *per se* and that, because the plaintiff did not charge the defendant with any other form of libel, his complaint did not state a cause of action upon which relief could be granted.<sup>95</sup> Although the Court cites the *Flake* language and suggests that the plaintiff may have a cause of action under another type of libel, the court does not identify the defendant's words as those which fit into the dual meaning category.<sup>96</sup> The plaintiff did not bring an action for dual meaning libel, and the Court never states that the defendant's behavior constituted or may have constituted dual meaning libel.

It appears that the second tier of dual meaning libel as a distinct category of libel has no vitality in North Carolina<sup>97</sup> and, for

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86. *Id.* at 320, 312 S.E. 2d at 410.

87. 326 N.C. 219, 388 S.E.2d 127 (1990).

88. *Id.*

89. *Id.* at 222, 338 S.E. 2d at 129.

90. *Id.* at 224, 338 S.E. 2d at 130.

91. 270 N.C. 160, 154 S.E.2d 344 (1967).

92. 273 N.C. 391, 159 S.E.2d 896 (1968).

93. *Id.* at 393, 159 S.E. 2d at 898.

94. *Id.* at 391, 159 S.E. 2d at 897.

95. *Id.* at 395, 159 S.E. 2d at 899.

96. *Id.* at 394, 159 S.E. 2d at 899.

97. No other jurisdiction has been discovered that purports to have a form of defamation for dual meaning libel as a distinct substantive category.

all that can be determined, exists only in the boilerplate language that subsequent courts picked up and carried forward from *Flake*. At its first opportunity the Supreme Court should reconsider the *Flake* language. Upon doing so it is hard to see what the court could do but disavow it.

Disavowal would be appropriate, because the elements, the pleading requirements, whether special damages must be alleged, and other issues cannot be determined on the present state of the law. If not disavowed, it is incumbent upon the court to spell out the resolution of at least the basic dimensions of the action.

C. *Intentional Private Nuisance: Should One Focus on the Unreasonableness of the Interference or of the Conduct?*

An operator of an oil refinery purposely causes noxious gases to escape into the air. His neighbor brings a nuisance action against him asserting that the dangerous gases interfere with his use and enjoyment of the property. In deciding whether the operator is liable for nuisance, should the court focus on the unfair impact the release of the gases has on the neighbor or on whether the operator employed reasonable measures to prevent the release of the fumes?

1. *The Kinds of Private Nuisance*

North Carolina recognizes two kinds of private nuisances: nuisance *per se* (or in law) and nuisance *per accidens* (or in fact).<sup>98</sup> Private nuisance *per accidens* or in fact is an act, conduct, or a structure which is a nuisance by reason of its location or the manner in which it is constructed, maintained, or operated;<sup>99</sup> whereas a nuisance *per se* or in law is an act, occupation, or structure which is a nuisance at all times regardless of location or surroundings.<sup>100</sup> An action for private nuisance may be based on the

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98. *Andrews v. Andrews*, 242 N.C. 382, 88 S.E.2d 88 (1955) (reversing demurrer for defendant; allegation that defendant maintained a pond on his land next to plaintiff's property for the purpose of attracting wild geese and the geese were destroying plaintiff's crops stated facts sufficient to sustain a cause of action based on a private nuisance *per accidens*).

99. *Id.*

100. *Morgan v. High Penn Oil Co.*, 238 N.C. 185, 191, 77 S.E.2d 682, 687 (1953) (evidence tending to show that defendant, in operating an oil refinery, purposely and unreasonably caused noxious gases to escape into the air to such an extent as to substantially interfere with plaintiff's use and enjoyment of land held sufficient to withstand defendant's motion for non-suit).

intentional or unintentional creation of an unreasonable interference.<sup>101</sup>

## 2. Problems in Intentional Private Nuisance

A nuisance is intentional if the person acts for the purpose of causing the interference or invasion of plaintiff's use and enjoyment of his land, knows that the interference or invasion is resulting from his conduct, or knows that it is substantially certain that the interference or invasion will result from his conduct.<sup>102</sup> If a person intentionally creates or maintains a private nuisance, he is liable to others regardless of the degree of care used to try to avoid the harm.<sup>103</sup> Not every intentional interference with another's use and enjoyment of his land is a nuisance.<sup>104</sup> The key question becomes what intentional interferences are nuisances. The general formulation defines nuisance as an unreasonable interference that results from the defendant's conduct.<sup>105</sup>

The North Carolina Supreme Court has used language which beclouded the issue of whether the focus should be on the unreasonableness of *the conduct* of the defendant or should be upon the unreasonableness of *the invasion* of the plaintiff's interest. Speaking of intentional private nuisance, the Court has stated that "It is the *unreasonable* operation and maintenance that produces the nuisance."<sup>106</sup> At other times the Court has clearly focused on *the*

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101. *Watts v. Pama Mfg. Co.*, 256 N.C. 611, 616, 124 S.E.2d 809, 813 (1962) (new trial for error in instructions in an action for nuisance per accidens; but plaintiff's evidence of noise and vibrations from defendant's textile plant held sufficient to withstand defendant's motion for non-suit); *Morgan v. High Penn Oil Co.*, 238 N.C. 185, 193, 77 S.E.2d 682, 689 (1953) (evidence tending to show that defendant, in operating an oil refinery, purposely and unreasonably caused noxious gases to escape into the air to such an extent as to substantially interfere with plaintiff's use and enjoyment of land held sufficient to withstand defendant's motion for non-suit).

102. *Morgan v. High Penn Oil Co.*, 238 N.C. 185, 193, 77 S.E. 2d 682, 689 (1953). See RESTATEMENT (SECOND) OF TORTS § 825 (1965).

103. *Watts v. Pama Mfg. Co.*, 256 N.C. 611, 616, 124 S.E.2d 809, 813 (1962) (new trial for error in instructions in an action for intentional nuisance per accidens; but plaintiff's evidence of noise and vibrations from defendant's textile plant held sufficient to withstand defendant's motion for non-suit).

104. See RESTATEMENT (SECOND) OF TORTS § 822 Cmt. g. (1965).

105. RESTATEMENT (SECOND) OF TORTS § 822(a) (1965).

106. *Watts v. Pama Mfg. Co.*, 256 N.C. 611, 616, 124 S.E.2d 809, 813 (1962) (emphasis by the court) (new trial for error in instructions in an action for intentional nuisance per accidens; but plaintiff's evidence of noise and vibrations

*nature and quality of the invasion, or interference.*<sup>107</sup> In other cases the courts have apparently focused on both concerns; that is, they have looked at the defendant's conduct and looked at the nature and quality of the interference.<sup>108</sup>

The focus on the invasion or interference appears to be the correct focus when dealing with intentional private nuisance *per accidens*.<sup>109</sup> The focus should not be on the reasonableness of the defendant's *conduct* when dealing with intentional nuisance since that question concerns nuisance based on negligence, and because even *reasonable conduct* may *unreasonably interfere* with the

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from defendant's textile plant held sufficient to withstand defendant's motion for non-suit).

107. *Id.* (unreasonableness of intentional invasion; whether reasonable persons would regard the invasion as unreasonable); *Morgan v. High Penn Oil Co.*, 238 N.C. 185, 194, 77 S.E.2d 682, 690 (1953) (intentional and unreasonable invasion).

108. *Pendergrast v. Aiken*, 293 N.C. 201, 217, 236 S.E.2d 787, 797 (1977) (error to instruct jury that it could find nuisance and then should consider damages to plaintiff because jury could not find that a nuisance existed at all without finding "substantial damage" to plaintiffs).

The *Pendergrast* court, however, made its statements in the context of a nuisance action arising out of damage caused by the flow of surface waters as to which the court was adopting a "reasonable use" standard to determine liability for damages caused by flooding after defendant altered the flow of surface water. While the court spoke of intentional private nuisance as the basis for the action, it is clear that the substantive standard of "reasonable use" in actions involving surface water must necessarily govern whether any action - nuisance or other - would lie. Thus, *Pendergrast* must be understood in its context, rather than as stating general nuisance doctrine.

Moreover, when it turned to the question of liability for nuisance, it is quite plain that the court focused on the "reasonableness" of the interference by weighing gravity of harm against the utility of the defendant's conduct. The court even noted that when defendant's conduct is "reasonable" in the balance sense, liability may still be imposed for private nuisance if the interference is greater than the plaintiff should be required to bear without compensation, citing various sections of the RESTATEMENT OF TORTS in drafts for the second edition. *Id.* 293 N.C. 201, 217-18, 236 S.E.2d 787, 797

The Court of Appeals has similarly spoken of unreasonable conduct while analyzing the unreasonable interference issue. *Mayes v. Tabor*, 77 N.C. App. 197, 334 S.E.2d 489 (1985) (trial court erred in denying injunctive relief in a nuisance action by concluding that defendant's hog farm was operated without negligence and failed to balance the utility of defendant's conduct against the gravity of the harm to plaintiff). However, since the issue was whether an injunction should be granted, the court was in fact applying the requirement generally necessary before an injunction will lie.

109. See generally, KEETON, *supra* note 24, § 86; RESTATEMENT (SECOND) OF TORTS §§ 826, 829, 830 and 831 (1965).

plaintiff use and enjoyment of property.<sup>110</sup> The court has recognized that the reasonableness of the defendant's conduct — in the sense of exercising skill and care in an attempt to avoid the injury — does not preclude liability for an intentional nuisance.<sup>111</sup>

When determining liability in cases of intentional nuisance, it is given that the defendant intentionally caused the invasion, and the question is whether the invasion was or is an *unreasonable interference* with plaintiff's use and enjoyment of his property. The question of what invasions and interferences are unreasonable is determined by the circumstances in each case.<sup>112</sup>

If the jury determines that the invasion was unreasonable, it must next determine whether the unreasonable interference with the plaintiff's use and enjoyment was "substantial".<sup>113</sup> The requirement of substantial interference will be met if the plaintiff shows an effect on the health, comfort or property of those who live nearby which results in significant annoyance, material physical discomfort, or injury to the plaintiff's health or property.<sup>114</sup> A

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110. KEETON ET AL., *supra* note 24, § 87, p. 623 ("The two concepts - unreasonable interference and unreasonable conduct - are not at all identical."); *Id.* § 88, p. 629 ("Confusion has resulted from the fact that the intentional interference with the plaintiff's use of his property can be unreasonable even when the defendant's conduct is reasonable.")

111. *Morgan v. High Penn Oil Co.*, 238 N.C. 185, 194, 77 S.E.2d 682, 689 (1953) (evidence tending to show that defendant, in operating an oil refinery, purposely and unreasonably caused noxious gases to escape into the air to such an extent as to substantially interfere with plaintiff's use and enjoyment of land held sufficient to withstand defendant's motion for non-suit).

112. *Watts v. Pama Mfg. Co.*, 256 N.C. 611, 616, 124 S.E.2d 809, 814 (1962) (new trial for error in instructions in an action for intentional nuisance per accidens; but plaintiff's evidence of noise and vibrations from defendant's textile plant held sufficient to withstand defendant's motion for non-suit); *Hooks v. International Speedways, Inc.*, 263 N.C. 686, 140 S.E.2d 387 (1965) (temporary restraining order until time of final hearing on the merits affirmed; allegations that the location of defendant's racetrack 2500 feet from plaintiff's church and its operation on Sunday were sufficient to allege nuisance per accidens).

113. *Morgan v. High Penn Oil Co.*, 238 N.C. 185, 194, 77 S.E.2d 682, 689 (1953) (evidence tending to show that defendant, in operating an oil refinery, purposely and unreasonably caused noxious gases to escape into the air to such an extent as to substantially interfere with plaintiff's use and enjoyment of land held sufficient to withstand defendant's motion for non-suit). *See also* *Pendergrast v. Aiken*, 293 N.C. 201, 221, 236 S.E.2d 787, 799 (1977) (error to instruct jury that it could find nuisance and then should consider damages to plaintiff because jury could not find that a nuisance existed at all without finding "substantial damage" to plaintiffs).

114. *Pake v. Morris*, 230 N.C. 424, 42553 S.E. 2d 300,301 (1949) (affirming jury verdict for defendants against claim that the fish factory was nuisance pursuant

“slight inconvenience or petty annoyance”, of course, will not support a claim.<sup>115</sup>

Finally, reasonable persons, objectively looking at the entire situation, taking into account plaintiff's, defendant's and the community's interests, must consider the interference unreasonable. The question is not whether a reasonable person in plaintiff's or defendant's shoes would consider the invasion unreasonable.<sup>116</sup>

To determine whether defendant's interference is unreasonable, several factors must be taken into account: the surroundings and conditions under which defendant's conduct is maintained; the character of the location; the nature, utility and social value of defendant's operation; the nature, utility and social value of plaintiff's use and enjoyment which have been invaded; the suitability of the locality for defendant's operation; the suitability of the locality for the use the plaintiff makes of the property; the extent, nature and frequency of the harm to plaintiff's interest; priority of occupation between the parties; and other considerations arising from the evidence.<sup>117</sup>

It would be helpful to lawyers advising and representing clients, to trial judges, to analysts, and citizens generally if the Court's holdings were consistent and clear that the rule provides that a nuisance is created when the defendant intentionally causes *unreasonable interference* with the plaintiff's use and enjoyment of her or his land. The focus on the unreasonableness of the defendant's *conduct* is erroneous. To the extent that the cases do not make this matter clear the law is left with an undesirable lack of clarity.

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to instructions which stated the rule of law set forth in text that accompanies this note).

115. *Watts v. Pama Mfg. Co.*, 256 N.C. 611, 619, 124 S.E.2d 809, 815 (1962) (new trial for error in instructions in an action for intentional nuisance per accidens; but plaintiff's evidence of noise and vibrations from defendant's textile plant held sufficient to withstand defendant's motion for non-suit).

116. *Watts v. Pama Mfg. Co.*, 256 N.C. 611, 618, 124 S.E.2d 809, 814 (1962) (citing RESTATEMENT (SECOND) OF TORTS § 826 (1965)). (new trial for error in instructions in an action for intentional nuisance per accidens; but plaintiff's evidence of noise and vibrations from defendant's textile plant held sufficient to withstand defendant's motion for non-suit).

117. *Id.* These factors are very similar to those set forth in the RESTATEMENT § 826-31 (1965) and since the court has cited the Restatement with approval it would appear that the Restatement would be strongly persuasive authority.



### 3. Problems With Remedial Considerations

Considerable difficulty has been encountered in determining what relief should be granted in cases of private nuisances. Unlike public nuisances, many of which are crimes and thus are indictable, private nuisances are actionable only for damages, abatement by injunction, or both.<sup>118</sup> Relief granted in private nuisance cases may be temporary or final.<sup>119</sup>

First, monetary damages for *past* harm might be granted. However, in cases of conduct continuing into the future wasteful successive and repeated lawsuits would be necessary. Thus, second, *permanent* damages might be granted covering past and future harm. Third, a *conditional* injunction might be granted which, in essence gives the defendant a choice: take measures to avoid the interference or pay damages. Fourth, an *injunction* might be granted prohibiting the defendant from carrying on the activity at the location in question.

To award damages for harms caused by nuisance, the defendant's *conduct*, in and of itself, need not be unreasonable.<sup>120</sup> Of course, the interference with the plaintiff's use and enjoyment of his property must be unreasonable and must cause substantial harm or there is no nuisance.<sup>121</sup> This distinction requires clarity

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118. *State v. Everhardt*, 203 N.C. 610, 617, 166 S.E. 738, 742 (1932) (dictum) (defendant indicted, convicted and fined for the maintenance of a public nuisance for permitting a large number of people to gather, drink, holler, and use profanity at a dwelling under her control).

119. Various kinds of temporary relief are possible, and these forms of relief might require additional showings. See, e.g. *Hooks v. International Speedways, Inc.*, 263 N.C. 686, 140 S.E.2d 387, 393 (1965) (temporary restraining order until time of final hearing on the merits affirmed; allegations that the location of defendant's racetrack 2500 feet from plaintiff's church and its operation on Sunday were sufficient to allege nuisance *per accidens*).

120. *Mayes v. Tabor*, 77 N.C. App. 197, 199, 334 S.E.2d 489, 490 (1985) (citing *KEETON ET AL.*, *supra* note 24, § 87, p. 622-23 (trial court erred in denying injunctive relief in a nuisance action by concluding that defendant's hog farm was operated without negligence and failed to balance the utility of defendant's conduct against the gravity of the harm to plaintiff).

See also RESTATEMENT (SECOND) OF TORTS § 826(b) (1965) (an invasion is unreasonable if the harm caused by the conduct is serious and the burden of compensating this and similar harm to others would not make continuation of defendant's activity infeasible). See also *id.* cmt. f. (it may be reasonable to operate a harm causing activity which is important if payment is made for harm caused but unreasonable to do so without payment).

121. *Pendergrast v. Aiken*, 293 N.C. 201, 217, 236 S.E.2d 787, 797 (1977) (error to instruct jury that it could find nuisance and then should consider

in the focus on whether the conduct or the interference is unreasonable. A judgment that the defendant's activity has created a nuisance but that his conduct is not unreasonable means, in effect, that the activity is sufficiently valuable that it should not be abated or altered but that the defendant should bear the burden of costs for the harms inflicted.<sup>122</sup> Therefore, an injunction will not lie in this situation.

It follows, therefore, that the granting of injunctive relief requires proof that the defendant's conduct itself is unreasonable, i.e. the gravity of the harm exceeds the utility of the defendant's conduct.<sup>123</sup> In determining the gravity of the harm, factors to consider are the extent of the harm and the type of harm, the social value which the law recognizes regarding the type of use which is invaded, the appropriateness of the locale for that use, and the burden on the plaintiff to minimize the harm.<sup>124</sup> To determine the utility of defendant's conduct, factors to consider include the purpose of defendant's conduct, the social value which the law attaches to that use,<sup>125</sup> and the impracticability of preventing or avoiding the harm caused.<sup>126</sup> These factors must be considered and a judgment made on the balance of the harm against utility before a decision can be made as to whether injunctive relief is proper. Failure to do so will be reversible error.<sup>127</sup> The gravity of the harm will outweigh the utility of the defendant's activity in a number of specific circumstances, listed by persuasive authority, including when the defendant's activity is undertaken for the sole purpose of harming the plaintiff,<sup>128</sup> is contrary to standards of

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damages to plaintiff because jury could not find that a nuisance existed at all without finding "substantial damage" to plaintiffs).

122. KEETON ET AL., *supra* note 24, § 88A, p. 631.

123. *Mayes v. Tabor*, 77 N.C. App. 197, 201, 334 S.E.2d 489, 491 (1985) (trial court erred in denying injunctive relief in a nuisance action by concluding that defendant's hog farm was operated without negligence and failed to balance the utility of defendant's conduct against the gravity of the harm to plaintiff).

124. *Id.* (quoting *Pendergrast v. Aiken*, 293 N.C. 201, 236 S.E.2d 787 (1977)).

125. *Id.*

126. RESTATEMENT (SECOND) OF TORTS § 828 (1965).

127. *Mayes v. Tabor*, 77 N.C. App. 197, 201, 334 S.E.2d 489, 491 (1985) (trial court erred in denying injunctive relief in a nuisance action by concluding that defendant's hog farm was operated without negligence and failed to balance the utility of defendant's conduct against the gravity of the harm to plaintiff).

128. RESTATEMENT (SECOND) OF TORTS § 829(a) (1979).

decency,<sup>129</sup> is causing significant harm which could be avoided without undue hardship,<sup>130</sup> or is unsuited to the location.<sup>131</sup>

If these distinctions are not clear it can become awfully difficult to determine not merely whether the defendant's conduct has created a nuisance, but also importantly what remedy can and should be granted if the plaintiff prevails. Society may need valuable activities that cause unreasonable interference. If this is so that may mean that the plaintiff may not be granted an injunction abating the nuisance, but it does not necessarily follow that because injunction is not appropriate, the plaintiff should be left without any remedy, such as damages, or permanent damages, in appropriate circumstances.

Conversely, activities which are intentional, injurious, and unreasonable may be good candidates for injunctive relief at least against prospective injuries. These considerations can become very difficult to keep in perspective if there exists confusion as to whether the conduct or the interference is the focus of the action.

#### *D. Strict Liability For "Vicious" Domestic Animals: Should One Focus on the Defendant's Conduct or Her Knowledge of an Animal's Dangerous Propensity?*

A jogger, on a daily run, is attacked by a dog owned by a neighbor. If the jogger asserts that the owner should be held strictly liable, should the court focus on whether the owner knew (or as a reasonable person should have known) of the vicious propensity of the dog or should it focus on whether the owner acted unreasonably in allowing the dog to roam freely where it might be able to attack a pedestrian?

##### *1. General Principles of Strict Liability*

When a plaintiff brings an action under the doctrine of strict liability, she is not required to show that the defendant negligently or intentionally interfered with a protected interest.<sup>132</sup> Generally, neither care nor negligence, good nor bad faith, knowledge nor ignorance will save the defendant in strict liability cases.<sup>133</sup> There are instances of strict liability contexts, however, in which proof is required that the defendant had prior knowledge

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129. RESTATEMENT (SECOND) OF TORTS § 829(b) (1979).

130. RESTATEMENT (SECOND) OF TORTS § 830 (1979).

131. RESTATEMENT (SECOND) OF TORTS § 831 (1979).

132. KEETON ET AL., *supra* note 24, § 75 at 534.

133. BLACK'S LAW DICTIONARY 1591 (4th ed. 1968).

of the *danger* that caused the injury before he may be held strictly liable.<sup>134</sup>

The keeper of a domestic animal with a vicious propensity to cause a particular type of harm is strictly liable for that harm if the keeper knew, or was chargeable with knowledge, of that propensity.<sup>135</sup>

This strict liability rule first emerged in North Carolina in 1850, in a case of a bull that attacked and killed plaintiff's horse.<sup>136</sup> The Court stated that once the owner knew of the bull's viciousness, the owner was on notice sufficient to put him in the wrong and make him liable for the consequences of his "neglect" to keep the animal confined.<sup>137</sup> But the court's use of the word "neglect" does not mean that the court was employing a negligence analysis. The disposition of the case makes the court's approach clearer:

When the owner knows or has reason to believe that an animal is dangerous, on account of a vicious propensity in him, from nature or habit (a term used to denote an acquired as distinguished from a natural vice), it becomes his duty to take care that no injury is done; and he is liable for any injury which is likely to be the result of this known vicious propensity.<sup>138</sup>

In determining what knowledge the defendant possessed, or is to be constructively charged with, the question is what the defendant knew (actual knowledge) or what a reasonable person in defendant's circumstances would have known (constructive knowledge).<sup>139</sup> Thus, it is sufficient to get to the jury for the plaintiff to prove that the animal engaged in acts tending to indicate that unless restrained, for example, it would be likely to inflict

134. *Griner v. Smith*, 43 N.C. App. 400, 405, 259 S.E.2d 383, 387 (1979) (dangerous domestic animal; jury verdict for plaintiff based on negligence affirmed when horse breeder allowed another horse to injure plaintiff's horse).

135. *Swain v. Tillett*, 269 N.C. 46, 51, 152 S.E.2d 297, 301 (1967) ("tame" deer attacked plaintiff four times; owner found to have knowledge of the propensity at the time of the fourth attack); *Hill v. Mosley*, 220 N.C. 485, 487, 17 S.E.2d 676, 677 (1941) (vicious bull butted plaintiff).

136. *Cockerham v. Nixon*, 33 N.C. 269 (1850) (vicious bull killed plaintiff's horse; reversed for error in instructions regarding knowledge that the bull would be likely to attack a horse).

137. *Id.* at 270.

138. *Id.* at 271.

139. *Sanders v. Davis*, 25 N.C. App. 186, 188-89, 212 S.E. 2d 544, 556 (1975) (summary judgment for defendant improper in a case which apparently was based on negligence; but the court noted that the gravamen of the action was the "wrongful keeping of the animal with knowledge of its dangerous propensities).

injuries. From this evidence a jury might infer that the defendants "had reason" to know that the animal had dangerous propensities.<sup>140</sup> Another formulation of the test, which means the same thing, is that the owner or keeper, as a reasonable person, "should know" from past conduct that the animal would be likely to inflict injury.<sup>141</sup>

## 2. *The Problem of Liability Basis*

Unfortunately, the courts have often mixed the language of fault-based liability when considering cases that appear to be based on strict liability. Negligence concepts have often appeared in cases that were based on strict liability. As one North Carolina judge has stated the problem, "the gravamen of the action is not negligence, yet [the courts] nevertheless apply the standard of a reasonable person."<sup>142</sup> Applying the reasonable person test to determine the standard of conduct with which the defendant must comply is fundamentally unsound and incorrect, if the liability is based in strict liability. However, as noted, using the reasonable person standard to determine whether the defendant had sufficient knowledge (establishing the scienter requirement) to be liable for harm caused by a vicious domestic animal is appropriate and correct.

Many of the cases involving damages caused by domestic animals were premised alternatively on negligence or strict liability. Plaintiffs often state alternative causes of action to increase their chances of recovery. This fact has led to some confusing language in the cases, and even to one opinion in the Court of Appeals asserting that the Supreme Court has not authoritatively adopted strict liability for injuries caused by vicious domestic animals.<sup>143</sup> The statement is not supportable, however.

Part of the confusion can be explained by some of the courts' statements which suggest that the defendant's conduct is "wrongful" in keeping a dangerous animal with knowledge of its propen-

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140. *Miller v. Snipes*, 12 N.C. App. 342, 345, 183 S.E.2d 270, 272 *cert. denied*, 279 N.C. 619, 184 S.E.2d 883 (1971) (summary judgment for defendant reversed)

141. *Sanders*, N.C. App. At 189, 212 S.E.2d at 556 (1975) (quoting from a case in which the court discusses negligence).

142. *Griner*, 43 N.C. App. at 405-06, 259 S.E.2d at 387 (citations omitted) (jury verdict for plaintiff based on negligence affirmed when horse breeder allowed another horse to injure plaintiff's horse).

143. *Id.* at 407, 259 S.E.2d at 388 (jury verdict for plaintiff based on negligence affirmed when horse breeder allowed another horse to injure plaintiff's horse).

sities.<sup>144</sup> In strict liability cases, liability is imposed without inquiry into the reasonableness of the defendant's conduct in keeping the animal. A negligence standard, however, necessitates inquiry into factors such as the kind of animal that caused the harm, its usefulness to defendant's activities, the value of defendant's activity to the community, the alternatives, if any, the defendant had for accomplishing the purpose without the animal, and the care defendant exercised in attempting to prevent harm; in other words, necessitates inquiry into the reasonableness of the defendant's conduct. When liability is imposed without considering such factors, strict liability is being imposed in the sense that the defendant is not charged with unreasonable conduct in the manner of keeping, restraining or tending the animal.

One can describe the *keeping* of the animal as "wrongful" if the keeper knows of a dangerous propensity, but knowledge of a dangerous propensity would not necessarily make it negligent in all circumstances to do so.<sup>145</sup>

The Supreme Court has frequently stated:

"To *recover* for injuries inflicted by a domesticated animal. . . plaintiff must allege and prove: (1) that the animal was dangerous, vicious, mischievous, or ferocious, or one termed in law as possessing a vicious propensity; and (2) that the *Owner or Keeper* knew or should have known of the animal's vicious propensity, character, and habits. . . The gravamen of the cause of action in this event is not negligence, but rather the wrongful keeping of the animal with knowledge of its viciousness; and thus both viciousness and scienter are indispensable elements to be averred and proved."<sup>146</sup>

Since 1850 a succession of courts have announced the rule of strict liability in substantially these same terms.<sup>147</sup>

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144. *See, e.g. Sanders*, 25 N.C. App. at 188, 212 S.E. 2d at 556 (summary judgment for defendant improper in a case which apparently was based on negligence, but the court noted that the gravamen of the action was the "wrongful" keeping of the animal with knowledge of its dangerous propensities).

145. *See, e.g. Cockerham*, 33 N.C. at 269 (vicious bull killed plaintiff's horse; reversed for error in instructions regarding knowledge that the bull would be likely to attack a horse).

146. *Swain*, 269 N.C. at 51, 152 S.E.2d at 301 (emphasis added) ("tame" deer attacked plaintiff four times; owner found to have knowledge of the propensity at the time of the fourth attack): The court accepted, as law of the case, that the deer was tame and thus came within the rule governing domestic animals.

147. *See, e.g. Sellers v. Morris*, 233 N.C. 560, 64 S.E.2d 662 (1951) (mule kicked plaintiff; demurrer on the grounds of failure to allege viciousness or knowledge but rule of liability was said to be settled since the days of Moses,

The second reason for the confusion is that a case of damage or injury caused by a domestic animal may indeed be filed on the basis that the keeper or owner was negligent in the manner of keeping the animal or in other respects which led to the plaintiff's damage.<sup>148</sup> In a negligence case, knowledge of a specific vicious propensity is not required, but the keeper or owner of a domestic animal is chargeable with knowledge of the general propensities of certain animals and must exercise due care to prevent injury from reasonably anticipated conduct.<sup>149</sup> Thus, it has been properly held that negligence may be found, when the facts will otherwise support a finding of a lack of reasonable care, without proof that the animal had a vicious propensity and without proof that the defendant had knowledge of a specific propensity.<sup>150</sup> This, of course, is standard negligence law. The point is that when the basis of the action is negligence, standard negligence principles apply.<sup>151</sup> To avoid creating confusion, the courts must be certain that they are not relying on cases decided on standard negligence principles as precedent when they are deciding strict liability cases.

A third reason for the confusion is attributable to the application of the reasonable person standard to assess the appropriateness of charging the owner with knowledge even when strict liability is the basis for the action.<sup>152</sup> The defendant's actual or

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citing *Exodus* 21:28,29); *Plumidies v. Smith*, 222 N.C. 326, 22 S.E.2d 713 (1942) (principles governing recovery for being bitten by vicious dog said to be well settled); *Swain v. Tillet*, 269 N.C. 46, 152 S.E.2d 297 (1967) (tame deer attacked plaintiff four times; owner found to have knowledge of the propensity at the time of the fourth attack); *Griner v. Smith*, 43 N.C. App. 400, 259 S.E.2d 383 (1979) (jury verdict for plaintiff based on negligence affirmed when horse breeder allowed another horse to injure plaintiff's horse);

148. *Griner*, 43 N.C. App. at 400, 259 S.E.2d at 383 (based on negligence and citing negligence cases).

149. *Id.* (jury verdict for plaintiff based on negligence affirmed when horse breeder allowed another horse to injure plaintiff's horse).

150. *Id.*

151. *Lloyd v. Bowen*, 170 N.C. 216, 221, 86 S.E. 797, 799 (1915) (negligence may be found apart from knowledge of viciousness if defendant otherwise fails to exercise reasonable care).

152. *Griner*, 43 N.C. App. at 400, 259 S.E.2d at 383 (jury verdict for plaintiff based on negligence affirmed when horse breeder allowed another horse to injure plaintiff's horse); *Sanders*, 25 N.C. App. at 186, 212 S.E.2d at 554 (summary judgment for defendant improper in a case which apparently was based on negligence; but the court noted that the gravamen of the action was the "wrongful" keeping of the animal with knowledge of its dangerous propensities).

constructive knowledge of the propensity which led to the plaintiff's damage is essential to the strict liability theory of recovery for injuries by domestic animals.<sup>153</sup> Unfortunately, when the court applies the reasonable person standard to determine whether actual or constructive knowledge exists on the part of the owner of a vicious domestic animal, negligence concepts inappropriately tend to sneak into the opinion.<sup>154</sup>

Accordingly the courts must be keen to distinguish the basis for the action. If negligence is the basis reasonable conduct in keeping an animal is required. If the *conduct is unreasonable* in light of whatever danger the animal posed, liability will be imposed even when the animal may not have had a dangerous propensity to injure. If strict liability is being imposed based on the owner's keeping of a domestic animal that the owner knows or should know has a vicious disposition, then liability is imposed without proof that the owner was unreasonable. Determining what the owner knew or should have known is judged by the reasonable person standard, even though the liability is strict. Thus, the courts must be care to avoid boilerplate language of prior opinions and in the opinion at hand.

### III. CONCLUSION

North Carolina tort law is quite dynamic. Moreover, given the volume of opinions produced one can only imagine the pressures that exist to move cases and write opinions quickly. In analyzing judicial opinions one can be quite impressed with the extent to which courts and judges clearly and adequately state the rationale of the case being decided. That has been true of most of the opinions on tort law that have been analyzed by this writer.

Because the four areas set forth in this opinion do not consistently evidence the judicial crafting that one sees in other tort opinions, cases dealing with licensees, libel, intentional private nuisance, and strict liability for domestic animals stand out as particularly observable. It would be a major advance if these

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153. *Lloyd*, 170 N.C. at 221, 86 S.E. at 799 (negligence case contrasting strict liability as basis of recovery when defendant tied a high-spirited horse to a dead tree limb, and left it unfed and unattended on a winter day, enabling the horse to break loose and injure plaintiff).

154. *See, e.g. Williams v. Tysinger*, 328 N.C. 55, 399 S.E.2d 108 (1991) (stating that an owner of a domestic animal is chargeable with knowledge of the general propensities of certain animals and must exercise *due care* to prevent injury).



**observations served to influence advocates and judges to engage the clarifying efforts needed in these areas.**