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evidence, analogous to prior threats, tends to show the victim's violent propensities toward the defendant.⁴⁰

Undoubtedly future cases will raise questions concerning the admissibility of evidence of the victim's character and background which remain unanswered. It is urged that the court continue its functional interpretation of the statute and require examination of the probative value of the evidence in light of the purpose for which it is offered.

Diane L. Crochet

LAND OCCUPIERS' LIABILITY—THE DUTY OF REASONABLE CARE TO ALL

Louisiana, along with all other jurisdictions, long determined the duty of a land occupier towards those injured on his property by examining the status of the entrant—either invitee, licensee or trespasser—and found a separate and distinct duty owed to each class. Recently, the Louisiana Supreme Court, in two separate decisions, indicated its desire to abandon these classifications and impose upon the land occupier a single duty of reasonable care towards all entrants.¹ In attempting to appraise the impact of these decisions, two questions must be considered. Does the duty of "reasonable care" dictate that identical precautions be taken for the safety of all entrants? If not, how will the facts surrounding the entry affect the determination of what is "the reasonable care" to which the particular entrant is entitled? Analyzing the development of the classification system in Louisiana may help formulate answers.

Long before the development of general negligence principles, English courts established the three classes of entrants,² justifying the system

40. This rationale could be extended to admit evidence of the victim's violent acts against persons closely associated with the defendant—for example, the defendant's family.

1. *Shelton v. Aetna Cas. & Sur. Co.*, 334 So. 2d 406 (La. 1976); *Cates v. Beauregard Elec. Coop.*, 328 So. 2d 367 (La. 1976). In both cases, the court affirmed the decisions of the lower courts although finding it unnecessary to use the classification system. Two recent circuit court cases have accepted the abandonment of the classification system as the new Louisiana position. *Vidrine v. Missouri Farm Ass'n.*, 339 So. 2d 877 (La. App. 3d Cir. 1976); *Molaison v. West Bros.*, 338 So. 2d 726 (La. App. 1st Cir. 1976).

2. Marsh, *The History and Comparative Law of Invitees, Licensees, and*

upon a social policy allowing land holders maximum freedom in using their property.³ Intending to limit liability, the courts determined the land occupier's duty by the status of the entrant at the time of his injury.⁴ The duty owed a *trespasser*—one who entered or remained without permission—was to refrain from “wilfully or wantonly” injuring him.⁵ The *licensee*, whose presence, though without invitation or business purpose, was consented to or tolerated, was protected from active negligence of the land holder and had to be warned of any known but hidden hazards.⁶ Finally, land holders owed the greatest duty to an *invitee*—one who entered because of invitation or inducement, generally to bestow some “economic benefit” upon the land holder.⁷ He was owed the enhanced duty of reasonable care, which included the positive obligation of inspecting the property and taking reasonable precautions to protect him from foreseeable dangers.⁸

Trespassers, 69 L.Q.REV. 182 (1953); Comment, *Torts—Abrogation of Common-Law Entrant Classes of Trespasser, Licensee, and Invitee*, 25 VAND. L. REV. 623 (1972).

3. 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 27.1 at 1430-32 (1956) [hereinafter cited as HARPER & JAMES]; James, *Tort Liability of Occupiers of Land: Duties Owed to Trespassers*, 63 YALE L.J. 144, 146 (1953). It has been suggested that a more basic reason for the classification system was the reluctance of judges to allow a jury of the unpropertied class a free reign in reaching verdicts against the land-owning defendant. See Green, *The Duty Problem in Negligence Cases: II*, 29 COLUM. L. REV. 255, 271-72 & n.56 (1929); Malone, *Contributory Negligence and the Landowner Cases*, 29 MINN. L. REV. 61, 62-66 (1945).

4. The definitions given here are simplified and do not reflect all developments which have occurred in the classification system.

5. W. PROSSER, *THE LAW OF TORTS* § 58 at 362 (4th ed. 1971) [hereinafter cited as PROSSER]; Comment, *Land Occupier's Liability to Trespassers*, 18 LA. L. REV. 716 (1958).

6. E.g., *Cothorn v. LaRocca*, 255 La. 673, 232 So. 2d 473 (1970); *Taylor v. Baton Rouge Sash & Door Works, Inc.*, 68 So. 2d 159 (La. App. 1st Cir. 1953); Comment, *Invitee Status in Louisiana*, 27 LA. L. REV. 796 (1967).

7. At its inception, the invitee class was solely composed of “business visitors.” RESTATEMENT OF TORTS § 332 (1934). A “business visitor” was defined as “a person who is invited or permitted to enter or remain on land in the possession of another for a purpose directly or indirectly connected with business dealings between them.” *Id.* Later, Professor Prosser asserted that this “economic benefit” test was not accurate. He placed greater importance on the “invitation” as expressing an assurance that the property was prepared for the entrant's visit. This is the view accepted by the majority of jurisdictions today. PROSSER, *supra* note 5, § 61 at 389; Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573 (1942). See RESTATEMENT (SECOND) OF TORTS § 332 (1965).

8. E.g., *Alexander v. General Accident Fire & Liab. Assurance Corp.*, 98 So. 2d 730 (La. App. 1st Cir. 1957); PROSSER, *supra* note 5, § 61 at 392; Comment, *Invitee Status in Louisiana*, 27 LA. L. REV. 796 (1967).

Application of the rigid common law classification system⁹ often produced harsh results;¹⁰ moreover, hastened by the Industrial Revolution, the social policy supporting limited liability changed, as courts in all American jurisdictions became more willing to protect personal safety at the expense of property rights.¹¹ In Louisiana, as elsewhere, this change was manifested by the expansion of certain classes and the creation of sub-categories within others. Thus, entrants who were known to trespass frequently on a limited area,¹² or trespassing children who should have been anticipated in certain situations,¹³ became entitled to an enhanced duty. Also, once trespassers were discovered, they were all protected from active negligence.¹⁴ The licensee, as well, was protected from active negligence,¹⁵ but more importantly, he was entitled to be warned of any known hidden hazards.¹⁶ Although the duty towards the invitee

9. One often quoted passage expresses this rigidity: "What I particularly wish to emphasize is that there are the three different classes—invitees, licensees, trespassers . . . Now the line that separates each of these three classes is an absolutely rigid line. There is no half-way house, no no-man's land between adjacent territories." Lord Dunedin, in *Robert Addie & Sons v. Dumbreck*, [1929] A.C. 358, 371 (Scot.), cited in PROSSER, *supra* note 5, § 8 at 357 n.63.

10. *E.g.*, *Dunbar v. Olivieri*, 97 Col. 381, 50 P.2d 64 (1935), where a trespassing nine year old child, permanently crippled by burns resulting from an unattended bonfire in violation of a statute, was denied recovery.

11. PROSSER, *supra* note 5, § 58 at 360.

12. *E.g.*, *Wood v. State Dep't. of Highways*, 295 So. 2d 78 (La. App. 2d Cir. 1974); *Taylor v. Baton Rouge Sash & Door Works, Inc.*, 68 So. 2d 159 (La. App. 1st Cir. 1953).

13. Recovery in these cases was allowed under the "attractive nuisance" doctrine. Louisiana courts long recognized this doctrine, and a large body of case law dealt with interpreting its factors. Comment, *The Attractive Nuisance Doctrine in Louisiana*, 10 LA. L. REV. 469 (1950). See also the comments of Professor Malone in *The Work of the Louisiana Appellate Courts for the 1965-1966 Term—Torts*, 26 LA. L. REV. 510, 524 (1966), where he urged the abandonment of the "attractive nuisance" terminology. PROSSER, *supra* note 5, § 59 at 364-76.

14. Almost all these cases involved railway operations. Many times Louisiana courts have stated that the duty is only to refrain from wilful and wanton misconduct, but found that the railroad's failure to use reasonable care amounted to wilful and wanton negligence. *Roberts v. Louisiana Ry. & Navigation Co.*, 132 La. 446, 61 So. 522 (1913); Comment, *Land Occupier's Liability to Trespassers*, 18 LA. L. REV. 716 (1958).

15. *E.g.*, *Cothorn v. LaRocca*, 255 La. 673, 232 So. 2d 473 (1970); PROSSER, *supra* note 5, § 60 at 379.

16. Compare *Taylor v. Baton Rouge Sash & Door Works, Inc.*, 68 So. 2d 159 (La. App. 1st Cir. 1953) with *Melancon v. Zoar Missionary Baptist Church*, 222 So. 2d 308 (La. App. 1st Cir. 1969). *E.g.*, *Cothorn v. LaRocca*, 255 La. 673, 232 So. 2d 473 (1970); *Savell v. Foster*, 149 So. 2d 210 (La. App. 2d Cir.), *cert. denied*, 244 La. 148, 150 So. 2d 769 (1963).

(reasonable care) did not change,¹⁷ the group entitled to this enhanced duty was enlarged. No doubt the greatest impact in this area of Louisiana law occurred in 1957 when the "social guest" was elevated to invitee status in *Alexander v. General Accident Fire & Liability Assurance Corp.*¹⁸

In practically all jurisdictions, the social guest, even one expressly invited and graciously welcomed, is not an "invitee"—"a distinction which has puzzled generations of law students and even some lawyers."¹⁹ In *Alexander*, the court, surveying the history of this anomaly and noting the frequent criticism of the classification system,²⁰ concluded: "We see no reason why the duty of ordinary reasonable care should not be owed to social guests who are expressly invited to the premises as well as to other invitees."²¹ The entrant who came with only an invitation thus became entitled to the enhanced duty of reasonable care; the "business purpose" was no longer required.²² Only those who entered or remained on the

17. Over the years, the *extent* of the duty of reasonable care has enlarged. A review of recent Louisiana Supreme Court decisions in the "slip and fall" area will illustrate how broad that duty has become. See *Natal v. Phoenix Assurance Co.*, 305 So. 2d 438 (La. 1974); Note, 37 LA. L. REV. 634 (1977).

18. 98 So. 2d 730 (La. App. 1st Cir. 1957), noted in 19 LA. L. REV. 906 (1959). Justice (then Judge) Tate's opinion was later approved by the Louisiana Supreme Court in *Foggin v. General Guar. Ins. Co.*, 250 La. 347, 195 So. 2d 636 (1967). Connecticut, through statute, made the social guest an invitee in 1963. CONN. GEN. STAT. § 52-557a (1968). Ohio created a separate class for the social guest. *Scheibel v. Lipton*, 156 Ohio St. 308, 102 N.E.2d 453 (1951). Michigan elevated the social guest to invitee status for a short time but later repositioned adult social guests to licensees. *Compare* *Genessee Merchants Bank & Trust Co. v. Payne*, 6 Mich. App. 204, 148 N.W.2d 503 (1967), *aff'd*, 381 Mich. 234, 161 N.W.2d 17 (1968) with *Preston v. Slezlak*, 383 Mich. 442, 175 N.W.2d 759 (1970).

19. PROSSER, *supra* note 5, § 60 at 378. "The reason usually given is that the guest understands when he comes that he is to be placed on the same footing as one of the family, and must take the premises as the occupier himself uses them, without any inspection or preparation for his safety . . ." *Id.*

20. "The utility in tort law of such highly refined and rigid distinctions, harking back to Nineteenth Century English concepts of the peculiar sanctity of land, is questioned, for tort liability is usually apportioned upon a duty to take reasonable precautions against undue risk of reasonably foreseeable harm under all the circumstances of each individual case." 98 So. 2d at 733 (La. App. 1st Cir. 1957).

21. *Id.* at 734. Although the holding specified "express" invitation, the courts have had little difficulty in satisfying this requisite. See *Daire v. Southern Farm Bureau Cas. Ins. Co.*, 143 So. 2d 389 (La. App. 3d Cir. 1962).

22. Early in the *Alexander* opinion, as the court was reviewing the history of the classification system, it defined "invitee" by traditional reference to economic benefit. It is unfortunate that later courts have seized this language when attempting to define "invitee," for it obscures the clear fact that the *Alexander* court felt the "invitation" test was more accurate. As the court said: "[While] in some instances the greater standard of care owed to an invitee may properly be based upon the 'economic benefit' theory, the more general rule is that an express invitation to be

property through the land occupier's sufferance were left in the licensee class. This significant increase in the number of entrants entitled to reasonable care resulted in more cases being decided on the factual question of breach of duty, rather than on the legal question of the plaintiff's status.

The *Alexander* court was not alone in its skepticism towards the usefulness of the tripartite classifications; at the same time, commentators and courts in many jurisdictions also called for reform.²³ The classification system had become a patchwork of exceptions and distinctions developed to mitigate its harshness. The law in all states had become one of "exceptions" to the rule; and the real question—whether under the facts of the case, the land occupier had been negligent in causing the entrant's injury—was being overshadowed by attempts to fit the entrant into one of the classes or one of the many exceptions. Therefore, few were surprised when in 1968, California became the first state²⁴ to abolish completely the common law classifications and impose a single duty of ordinary care towards all entrants.

In *Rowland v. Christian*,²⁵ the California Supreme Court noted that the common law tripartite system was a departure from the fundamental concept embodied in its Civil Code—a person is liable for injuries caused

on the premises, as distinguished from a merely permissive use thereof, carries with it an implied assurance to the invitee that the premises are reasonably safe for his use and that the host has exercised ordinary care for his safety." 98 So. 2d at 734. *But see* *Foggin v. General Guar. Ins. Co.*, 250 La. 347, 195 So. 2d 636 (1967); *Currington v. Great Am. Ins. Co.*, 281 So. 2d 150 (La. App. 3d Cir.), *cert. denied*, 283 So. 2d 498 (La. 1973).

23. *E.g.*, *Wolfson v. Chelist*, 284 S.W. 2d 477 (Mo. 1955); *Taylor v. New Jersey Highway Auth.*, 22 N.J. 454, 126 A.2d 313 (1956); *Potts v. Amis*, 62 Wash. 2d 777, 384 P.2d 825 (1963); *Hughes, Duties to Trespassers: A Comparative Survey and Reevaluation*, 68 *YALE L.J.* 633 (1959); Comment, *Landowners' Liability in New Jersey: The Limitation of Traditional Immunities*, 12 *RUT. L. REV.* 599 (1958).

24. England, which originated the classification system, abolished the distinction between invitees and licensees by statute in 1957. OCCUPIERS' LIABILITY ACT, 5 & 6 Eliz. II, c. 31 § 2, 303 (1957) *discussed in* *Payne, The Occupiers' Liability Act*, 21 *MOD. L. REV.* 359 (1958). The United States Supreme Court abolished the invitee-licensee distinction in admiralty law in 1959. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959).

25. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). The plaintiff, a social guest, injured his hand when the cracked knob of a cold water faucet broke. There was evidence that the defendant was aware of the defect but had failed to warn the plaintiff.

by his carelessness.²⁶ In rejecting the historical considerations²⁷ which led to this departure, the court stated:

We decline to follow and perpetuate such rigid classifications. The proper test to be applied to the liability of the possessor of land . . . is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others, and although the plaintiff's status as a trespasser, licensee, or invitee may . . . have some bearing on the question of liability, the status is not determinative.²⁸

The *Rowland* test was quoted and adopted by the Louisiana Supreme Court in *Cates v. Beauregard Electric Cooperative, Inc.*²⁹ where the court found the common law classification system "to be of little help in applying C.C. 2315."³⁰

In all jurisdictions that have considered abolishing some or all of the common law distinctions, the major concern has been that abandoning these judicially imposed guidelines would cause a substantial increase in jury findings for plaintiffs.³¹ Despite some evidence to the con-

26. The provisions of the California Civil Code relating to negligence are similar to LA. CIV. CODE art. 2316. CAL. CIV. CODE § 1714 (West 1954) provides that: "Everyone is responsible, not only for the results of his wilful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person" LA. CIV. CODE art. 2316 states that: "Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill."

27. HARPER & JAMES, *supra* note 3, § 27.1 at 1432; see the text at note 3, *supra*.

28. 69 Cal. 2d at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104. *Rowland* has served as a touchstone for other jurisdictions wishing to abolish some or all of the traditional distinctions. *Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97 (D.C. Cir. 1972); *Mile High Fence Co. v. Radovich*, 175 Colo. 537, 489 P.2d 308 (1971); *Wood v. Camp*, 284 So. 2d 691 (Fla. 1973); *Pickard v. City & County of Honolulu*, 51 Haw. 134, 452 P.2d 445 (1969); *Mounsey v. Ellard*, 363 Mass. 693, 297 N.E.2d 43 (1973); *Peterson v. Balach*, 294 Minn. 161, 199 N.W.2d 639 (1972); *Mariorenzi v. Joseph DiPonte, Inc.*, 333 A.2d 127 (R.I. 1975).

29. 328 So. 2d 367 (La. 1976). The court affirmed this approach in *Shelton v. Aetna Cas. & Sur. Co.*, 334 So. 2d 406 (La. 1976). In *Cates*, no landowner duty was fixed since it was found that the plaintiff's injury was caused by his own voluntary exposure to a dangerous electric wire. In *Shelton*, the court concluded that the condition which caused the injury (paint remover residue washed to the ground) was not unreasonably dangerous. Therefore, there was no duty to correct the situation or provide a warning. Since there was no breach of duty, plaintiff was denied recovery.

30. 328 So. 2d at 370.

31. *E.g.*, *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968) (Burke, J., dissenting); *Wood v. Camp*, 284 So. 2d 691, 694 (Fla. 1973);

trary,³² most courts and commentators feel that juries are "plaintiff oriented," and will, more likely than not, decide in the plaintiff's favor if given the opportunity. Accordingly, the plaintiff must "get his case to the jury"; and the classification system can be a substantial roadblock in this effort. If the judge finds as a matter of law that, because of the plaintiff's class, no duty is owed, the case will never get to the jury. Post-*Rowland* experience has shown that the results are much as they were before, with the only group of plaintiffs benefitting substantially by the abandonment of the classification system being social guests.³³ Louisiana should not experience any change in this area because a civil jury trial in Louisiana is a rare event and because the social guest in Louisiana is already entitled to a duty of reasonable care.³⁴ Since the Louisiana Supreme Court adopted the duty-risk approach in determining negligence,³⁵ lower courts have had ample opportunity to address the question of risk exclusion or inclusion in analyzing "reasonable care"; accordingly, there is a large body of case law in which the question of duty rather than status was the issue the court resolved.³⁶

The class of trespassers has also generated a great deal of discussion in jurisdictions which have considered modifying the classification system, with the majority of these jurisdictions deciding to exclude them from coverage under a standard of reasonable care.³⁷ In these jurisdictions, the courts have generally found it "unreasonable to subject an owner to a 'reasonable care' test against someone who isn't supposed to be there and about whom he does not know."³⁸ The problem associated with

Comment, *Torts—Abrogation of Common-Law Entrant Classes of Trespasser, Licensee, and Invitee*, 25 VAND. L. REV. 623, 635 (1972).

32. Kalven, *A Report on the Jury Project of the University of Chicago Law School*, 24 INS. COUNSEL J. 368 (1957).

33. See Note, 25 ALA. L. REV. 401, 413 (1973) for an extensive treatment of post-*Rowland* decisions.

34. See the text at note 21, *supra*.

35. *Dixie Drive It Yourself System v. American Beverage Co.*, 242 La. 471, 137 So. 2d 298 (1962); see Robertson, *Reason Versus Rule in Louisiana Tort Law: Dialogues on Hill v. Lundin & Associates, Inc.*, 34 LA. L. REV. 1 (1973).

36. E.g., *Scott v. I.L. Lyons & Co., Ltd.*, 329 So. 2d 795 (La. App. 4th Cir.), *cert. denied*, 333 So. 2d 239 (1976); *Millet v. Allstate Ins. Co.*, 319 So. 2d 803 (La. App. 1st Cir. 1975); *Natal v. Phoenix Assurance Co.*, 286 So. 2d 738 (La. App. 4th Cir. 1973), *rev'd*, 305 So. 2d 438 (1974). It is highly probable that the expansion of the invitee class to include social guests is the major reason the court felt it was not necessary to abandon the whole system, and accordingly waited until eight years after *Rowland* to do so.

37. E.g., *Wood v. Camp*, 284 So. 2d 691 (Fla. 1973). Hawaii, Minnesota, and Massachusetts are in accord. See the cases cited in note 28, *supra*.

38. *Id.* at 693.

the trespasser should be considered in light of the second question posed earlier: How will the facts surrounding the plaintiff's entry affect the duty determination?

Louisiana courts have stated many times that the landowner is not an insurer of those entering his property.³⁹ The standard of reasonable care is just that—*reasonable* care; it does have its limits. Reasonable care surely dictates that a store owner provide well lighted aisles for his patrons to use during nighttime shopping, but it does not demand that he keep them lit all night to protect a possible trespasser. Reasonable care only demands that the possessor of land act where the presence of entrants can be anticipated as to place and/or time. If they are invited or induced to visit, the storeowner or homeowner knows of their presence and can anticipate their arrival by taking the necessary precautions. Even the presence of one who is only tolerated can usually be anticipated; and it is not hard to imagine situations where even the trespasser could be anticipated.⁴⁰ The issue should not be focused on the *status* of the entrant, for the real question is this: Was *this* land occupier's conduct towards *this* entrant reasonable, considering the degree to which his presence could be anticipated? Viewed in this light, the trespasser problem does not appear nearly so formidable. When unknown and unable to be anticipated, the trespasser is entitled to little if any protection, not because it is *unreasonable* to allow him the protection of "reasonable care," but because *reasonable* care dictates that little protection be afforded to *this* entrant. If he is a known trespasser of a limited area, or a discovered trespasser, his presence can and should be anticipated; therefore, reasonable care dictates greater precautions.

Unanticipated entry is the only element which can explain the limited duty towards firemen and policemen; the "status" system could never logically explain classifying them as licensees when they came upon the premises at unusual times in response to an emergency. They are certainly providing an "economic benefit"; and their presence in those cases is always desired, often specifically requested. The only real answer is that their arrival cannot be anticipated; and having the premises prepared for their entry at all times is too great a burden for the land occupier—thus "unreasonable."⁴¹

39. *E.g.*, Shelton v. Aetna Cas. & Sur. Co., 334 So. 2d 406 (La. 1976); Landry v. Hazelwood & Santillo, Inc., 330 So. 2d 683 (La. App. 3d Cir. 1976).

40. See note 12, *supra*.

41. Some would argue that a test of anticipated entry is the same thing as "foreseeability." Many risks are foreseeable even though their occurrence cannot be anticipated. It is "foreseeable" that a policeman will respond to an alarm, but

It is important to remember that what has been discussed above is only one aspect in the duty-risk analysis of negligence—determination of the land occupier's duty. The plaintiff must still prove that the duty was breached, that the breach was the cause-in-fact of his injury, and that the risk and injury caused were within the scope of protection afforded by the duty—only then is there liability.⁴² In analyzing this last element of risk exclusion or inclusion, policy questions are considered; of special importance in these cases is the ability of the occupier to "spread his risk" through insurance. Court decisions increasing the possibility of land holder liability may lead to added insurance costs that, in the case of the storeowner, are eventually absorbed by the customer. But the homeowner ordinarily has no medium through which the added cost of insurance can be passed, and therefore, he must absorb it himself. Abandoning the classification system will allow Louisiana courts to increase the storeowner's liability in the proper case without producing additional cost to the homeowner since the courts will not have to apply their conclusions to all entrants in a particular former class. It cannot be said that the supreme court has opened the door to wholesale recovery by plaintiffs.⁴³

In the *Cates* decision, the Louisiana Supreme Court completed the work started by the *Alexander* court in 1957. In eliminating the procedural step of "status" determination, the court once again affirmed its belief that a duty-risk analysis should be used to determine negligence under Civil Code article 2315. Finally, the court eliminated an obsolete roadblock to reaching the ultimate question in tort suits against land possessors—what would a reasonable man do in light of this entrant's anticipated presence?

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the time and place of such entry cannot be anticipated. A court's conclusion that a risk was "not foreseeable" often means no more than there would be too great an economic burden placed on the storeowner or landowner to protect the entrant from the risk since his presence could not have been anticipated. See *Malone*, *supra* note 3; *Prosser*, *supra* note 7.

42. See note 35, *supra*.

43. It is not insignificant that in both *Cates* and *Shelton* the defendants were homeowners and the plaintiffs were denied recovery. *Shelton* is particularly interesting in that the injury occurred in the home to a visiting member of the homeowner's family.