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I. INTRODUCTION

To what extent should landowners[1] be liable for injuries suffered by those who enter upon their land? Historically, the Montana Supreme Court answered this question by focusing on three entrant categories—invitee, licensee, and trespasser. Landowner liability under these entrant categories represented an exception to the fundamental rule that a tortfeasor is liable for injuries caused by a failure to exercise reasonable care under the circumstances. While an invitee is owed a duty of reasonable care, the common law entrant categories allowed landowners to exercise a lesser standard of care toward those who entered their property as licensees or trespassers.

In 1981, the Montana Supreme Court appeared to abandon the entrant categories and apply a single standard of reasonable care under the circumstances. In *Corrigan v. Janney*,[2] the court held that a landowner owes a duty of ordinary care in the management of property to avoid exposing entrants to an unreasonable risk of harm.[3] Although *Corrigan* suggested a departure from the entrant categories, a subsequent 1981 decision disregarded *Corrigan* and continued to focus on entrant categories.[4] The conflicting decisions caused Montana attorneys and trial court judges to wrestle with the unsettled question of what standard of care is imposed upon landowners.

On September 26, 1985, the Montana Supreme Court clarified its position on the issue of landowner liability. In *Limberhand v. Big Ditch Co.*,[5] the court reaffirmed its commitment to the single standard of care propounded in *Corrigan*.[6] Writing for a unanimous court, Justice Sheehy noted that the court erred in a decision which contradicted *Corrigan*.[7] After four years of uncertainty, *Limberhand* is a welcome clarification of Montana's landowner lia-

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1. For purposes of brevity in this comment, the term landowner will refer to all possessors and owners of land subject to liability to those who enter the landowner's premises.
2. ___ Mont. ___, 626 P.2d 838 (1981).
3. *Id.* at ___, 626 P.2d at 841.
4. Cereck v. Albertson's, Inc., 195 Mont. 409, 637 P.2d 509 (1981) (held that "In Montana, the duty imposed upon the property owner depends on the status of the injured party."), *Id.* at 412, 637 P.2d at 511.
5. ___ Mont. ___, 706 P.2d 491 (1985).
6. *Id.* at ___, 706 P.2d at 496.
7. *Id.*

bility law.

This comment briefly examines the traditional rules governing landowner liability, and examines the Montana case law which created confusion in this area. Finally, this comment examines the single standard and its future application in Montana courts.

II. Judicial and Historical Background

A. *Rules and Rationale*

The common law rules governing landowner liability provide three classifications—invitee, licensee, and trespasser—which determine the duty of care owed by a landowner.[8] An invitee is defined as one who enters upon public land for its intended use, or one who enters the landowner's premises for the economic benefit of the landowner.[9] A landowner owes an invitee a duty of ordinary care. Traditionally, the rationale for the invitee rule argues that because the landowner derives economic benefit from the invitee's presence, the landowner should provide reasonably safe premises, or warn of hidden dangers.[10]

A licensee, typically a social guest, has the landowner's permission to use the premises, yet enters the premises for pleasure without yielding economic benefit to the landowner.[11]

> [The licensee] receives the use of the premises as a gift, and comes well within the old saying that one may not look a gift horse in the mouth. He has no right to demand that the land be made safe for his reception, and he must in general assume the risk of whatever he may encounter, and look out for himself. The rendering of permission to enter carries with it no obligation to inspect the premises to discover dangers which are unknown to the possessor, nor, *a fortiori*, to give warning or protection against conditions which are known or should be obvious to the licensee.[12]

Thus, under the common law rules, the landowner owes a licensee a duty merely to avoid willful, wanton or intentional conduct.[13] The same duty that is owed to a licensee is also owed to a tres-

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8. *See generally* 62 Am. Jur. 2d *Premises Liability* § 58 (1964); 65 C.J.S. *Negligence* § 63 (1955).

9. Restatement (Second) of Torts § 332 (1965).

10. W. Prosser and W. Keeton, Prosser and Keeton on Torts § 61, p. 420 (5th ed. 1984).

11. Restatement (Second) of Torts § 330 (1965).

12. Prosser and Keeton, *supra* note 10, at § 60, p. 412.

13. *See, e.g.*, 38 Am. Jur. 2d *Negligence* § 178 (1964);Harmon v. Billings Bench Water Users Ass'n, 765 F.2d 1464 (9th Cir. 1985); McLaughlin v. Bardsen, 50 Mont. 117, 145 P. 954 (1915).

passer.[14] The rationale provided as the basis for the trespasser rule is that one who enters upon the landowner's premises without the landowner's knowledge or permission cannot expect the landowner to provide him with safe premises.[15]

B. *History*

The legal standards governing landowner liability reveal two competing social values: "(1) the sanctity of landed property;[16] (2) the protection of members of the community from physical injury caused by another's negligence."[17] Historically, the sanctity of landed property has commanded far more significance than protection of the community, partly because the common law entrant categories that focus upon the status of the injured party trace their ancestry to the feudal system of medieval Europe. Landowners were a privileged class in the medieval era; the rules that governed their liability leaned heavily in their favor. Originally, a landowner enjoyed complete immunity from liability for injury to those entering upon his property. A landowner was "sovereign within his own boundaries and as such might do what he pleased on or with his own domain."[18] These feudal landowner rules served as a framework for the developing English common law.[19] English and early American ideals perpetuated "this sanctity of land ownership [which] included notions of its economic importance and the social desirability of the free use and exploitation of land."[20]

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14. This rule does not apply in all jurisdictions, however. Some jurisdictions have adopted § 342 of the RESTATEMENT (SECOND) OF TORTS which provides that a landowner has a duty to warn the licensee of conditions which present an unreasonable risk of harm. Also, for a definition of trespasser, see RESTATEMENT (SECOND) OF TORTS § 329 (1965).

15. PROSSER AND KEETON, *supra* note 10, at § 58, p. 393.

16. BLACK'S LAW DICTIONARY 790 (5th ed. 1979), defines landed property as: "a colloquial or popular phrase to denote real property. Landed estate ordinarily means an interest in and pertaining to lands. Real estate in general, or sometimes, by local usage, suburban or rural land, as distinguished from real estate situated in a city."

17. Marsh, *The History and Comparative Law of Invitees, Licensees, and Trespassers*, 69 L.Q. REV. 182, 198 (1953).

18. Comment, *Abrogation of Common Law Entrant Classes of Trespasser, Licensee, and Invitee*, 25 VAND. L. REV. 623 (1972) (quoting F. BOHLEN, STUDIES IN THE LAW OF TORTS 163 (1926)).

19. *See, e.g.*, Humphrey v. Twin State Gas & Elec. Co., 100 Vt. 414, 139 A. 440 (1927).

> [The rule] is found to have originated in an overzealous desire to safeguard the right of ownership as it was regarded under a system of landed estates long since abandoned, under which the law ascribed a peculiar sanctity to rights therein. Under the feudal system as it existed in western Europe during the Middle Ages, the act of breaking a man's close was an invasion of exaggerated importance and gravity.

Id. at 418, 139 A. at 442.

20. 2 F. HARPER & F. JAMES, TORTS § 27.1 at 1432 (1956).

Negligence principles emerged in common law after landowner liability rules had developed. As a result, a fusion occurred between negligence principles and common law landowner liability rules in which "the common law courts superimposed the new principles upon the existing framework of entrant categories."[21] This fusion resulted in the traditional common law system in which the status of the entrant determines the duty owed by a landowner.

In 1865, Massachusetts became the first jurisdiction to apply the common law entrant categories in a negligence action in *Sweeney v. Old Colony & Newport R.R.*[22] The Massachusetts Supreme Court fashioned a system which classified persons entering upon a landowner's property. The entrant's category determined the duty imposed upon the landowner. Other American states[23] followed the Massachusetts lead, and the system which imposes a duty based on entrant categories became the standard rule for landowner liability.

III. Criticism of the Common Law Entrant Categories

Continued application of the entrant categories has engendered increasing criticism. Legal commentators argue that the entrant categories should be abrogated in favor of a single standard.[24] The

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21. Comment, *supra* note 18, at 624.

22. 92 Mass. (10 Allen) 368 (1865). In *Sweeney*, the plaintiff sustained two broken legs when the defendant's railroad car collided with the plaintiff's wagon. The defendant railroad allowed the public to cross its property and employed a flagman to provide a signal when crossing the tracks was safe. On the day of the accident, the defendant's flagman, failing to notice that a train was approaching, signaled the plaintiff that he could cross. The defendant's train collided with the plaintiff as he started across the tracks, causing the injury to the plaintiff's legs. The trial court awarded the plaintiff $7500 in damages. The Massachusetts Supreme Court reversed, stating:

> No duty is imposed by law on the owner or occupant to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure, and who are not either expressly invited to enter or induced to come upon them by the purpose for which the premises are appropriated and occupied, or by some preparation or adaptation of the place for use of customers or passengers, which might naturally and reasonably lead them to suppose that they might properly and safely enter thereon.

Id. at 372-73.

23. For a listing of jurisdictions which currently apply the traditional entrant categories, see Annot., 22 A.L.R.4th 294 (1983).

24. *See, e.g.*, Comment, *supra* note 18; Comment, *Tort Liability of Owners and Possessors of Land—A Single Standard of Reasonable Care Under the Circumstances Towards Invitees and Licensees*, 33 Ark. L. Rev. 194 (1979) [hereinafter cited as *Tort Liability*]; Comment, *The Foreseeable Emergence of the Community Standard*, 51 Den. L.J. 145 (1974) [hereinafter cited as *Community Standard*]; Comment, *Common Law Distinctions Between Licensee, Invitee, and Trespasser are Abolished in California and Replaced by a Standard of Ordinary Care*, 14 Vill. L. Rev. 360 (1969) [hereinafter cited as *Common Law*

entrant categories are deficient in a number of ways. First, the entrant categories are criticized as archaic and oppressive. American jurisdictions embraced the entrant categories when America was a sparsely populated, agrarian country. Now, however, a greater regard for human safety and increasing urbanization have created different burdens in the law. A Colorado case, *Gotch v. K. & B. Packing & Provision Co.*,[25] illustrates the harshness of the common law rules when applied to a modern situation. In *Gotch*, a woman fell into an unguarded elevator shaft while delivering a lunchbox to her husband at his jobsite. The Colorado Supreme Court found the woman to be either a trespasser or a licensee; she therefore was required to take the premises as she found them. The court did not find the landowner negligent and the decedent's family did not receive compensation for her death.

Despite the harsh results of cases like *Gotch*, courts continue to apply the entrant categories. The notion of "hospitality" has served as one time-honored justification. Before the prevalence of homeowners insurance, it was considered the height of ingratitude to sue a host for an injury sustained upon his property, because a host would have to pay for the injury out of his own pocket.

Hospitality has also served as the justification for the guest passenger statute,[26] which provides that a gratuitous passenger in an automobile cannot sue the driver for injuries sustained as a result of the driver's negligence. Many jurisdictions, including Montana, have abolished their guest passenger statutes, largely because "hospitality" is an anachronistic justification for limiting a driver's liability. More progressive jurisdictions have held:

> [W]idespread liability insurance has largely eliminated any notion of "ingratitude" that may have once adhered to a guest's suit against his host, and second, because the deprivation of a guest's redress for negligence cannot rationally be justified by a desire to promote hospitality . . . there is simply no notion of ingratitude in suing your host's insurer.[27]

Distinctions].

25. 93 Colo. 276, 25 P.2d 719 (1933).

26. Montana's guest passenger statute was REV. CODE. MONT. § 32-1113 (1947), which provided:

> The owner or operator of a motor vehicle shall not be liable for any damages or injuries to any passenger or person riding in said motor vehicle as a guest or by invitation and not for hire, nor for any damages to such passenger's or person's parent or guardian, unless damages or injury is caused directly and proximately by the grossly negligent and reckless operation by him of such motor vehicle.

The statute is now repealed. 1975 Mont. Laws Vol. 1, ch. 236.

27. Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973). In *Brown*, the court further argued:

If there is no ingratitude in suing a host's auto insurance carrier, there is accordingly no notion of ingratitude involved in suing a host's property insurer for injuries sustained as a result of the host's negligently maintained premises.

A second criticism is that the "deceptive precision" of the entrant categories "produces arbitrary and inconsistent application in borderline cases."[28] For instance, a customer who purchased a drink in a bar was allowed to recover for a subsequent injury because, as a paying customer, he was considered an invitee.[29] Another customer whose drink was purchased by a friend was not allowed to recover for a subsequent injury because, having conferred no benefit upon the bar, he was considered a licensee and was therefore required to take the premises as he found them.[30] In England, an entrant was first considered a trespasser when he came upon the land without permission, then a licensee after the landowner had accepted his presence, then an invitee when he conducted business with the landowner.[31]

Another criticism stems from the difficulties courts have categorizing the circumstances of modern life into rigid entrant categories. To circumvent the harshness of the categories, courts have strained the definition of invitee to include injured licensees who have not conferred an economic benefit upon the landowner.[32] For example, in *Nary v. Parking Authority of Town of Dover*,[33] the court held a public parking lot liable for injuries sustained by the plaintiff, a passenger in a friend's automobile, when she tripped over a cement bumper block, even though neither she nor the driver had paid the parking fee prior to the injury.

Courts have also carved numerous exceptions to the general

> A second common explanation for the hospitality justification rests on the thesis that a guest's lawsuit against his host constitutes the epitome of "ingratitude," and as such ought to be condemned. As we explain below, however, this explanation is unpersuasive on two separate grounds: first, because widespread liability insurance has largely eliminated any notion of "ingratitude" that may have once adhered to a guest's suit against his host, and second, because the deprivation of a guest's redress for negligence cannot rationally be justified by a desire to promote hospitality.

Id. at 868, 506 P.2d at 221, 106 Cal. Rptr. at 397.

28. Comment, *supra* note 18, at 639.

29. Braun v. Vallade, 33 Cal. App. 279, 164 P. 904 (1917); *Common Law Distinctions, supra* note 24, at 362.

30. Kneuser v. Belasco-Blackwood Co., 22 Cal. App. 205, 133 P. 989 (1913); *Common Law Distinctions, supra* note 24, at 362.

31. Dunster v. Abott, [1953] 2 All E.R. 1572 (C.A.).

32. *See, e.g.*, Hickey v. Shoemaker, 132 Ind. App. 136, 167 N.E.2d 487 (1960); Pope v. Willow Garages, 274 Mass. 440, 174 N.E. 727 (1931).

33. Nary v. Parking Auth. of Town of Dover, 58 N.J. Super. 222, 156 A.2d 42 (1959).

categories, creating even more categories and subcategories which impose a higher standard of care upon the landowner. The Restatement (Second) of Torts contains a lengthy catalogue of these exceptions.[34] Courts have avoided the licensee rule by applying the "activities dangerous to licensees"[35] and "dangerous conditions known to possessor"[36] exceptions provided by the Restatement. The Restatement also contains six categories providing exceptions to the trespasser rule.[37] Although the exceptions provided by the Restatement represent a commendable effort to improve landowner liability law, "these changes further compounded the confusion and complexity surrounding questions of landowner duty."[38]

Despite progress in the form of judicially-created exceptions, in many jurisdictions the most egregious deficiency in the common law entrant categories still exists: a landowner owes a social guest a duty merely to avoid willful and wanton conduct. Almost all jurisdictions hold that municipalities must exercise reasonable care to avoid exposing members of the community to an unreasonable risk of harm.[39] A person injured by a defect in a sidewalk would expect compensation by the city. Yet, under the entrant categories, a social guest cannot expect his host to provide him with reasonably safe premises. Most Americans, when dining at a neighbor's dinner party, would be shocked to discover that their host had no obligation to warn them of unsafe surroundings.

IV. The Single Standard

A. *Development*

Under the single standard, the status of the entrant upon the land is not solely determinative. Rather, it is but one of the factors to be considered.[40]

The development of the single standard began in England, out of the same system which had originally established limited landowner liability. In 1957, England abolished its common law entrant categories with the passage of the Occupier's Liability Act.[41] The

34. Restatement (Second) of Torts §§ 334, 335, 336, 337, 338, 339, 341, 342, 343, 343(B), 344 (1965).

35. Restatement (Second) of Torts § 341 (1965).

36. Restatement (Second) of Torts § 342 (1965).

37. *See supra*, note 34.

38. *Community Standard*, *supra* note 24, at 159.

39. In Montana, see, e.g., Mont. Code. Ann. § 7-1-4125 (1985); Ledbetter v. City of Great Falls, 123 Mont. 270, 213 P.2d 246 (1949); Gilligan v. City of Butte, 118 Mont. 350, 166 P.2d 797 (1946).

40. *See* Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

41. 5 & 6 Eliz. 2, c. 31 (1957).

Occupier's Liability Act imposes a reasonable duty of care under the circumstances upon the occupier towards licensees and invitees, while retaining the common law trespasser exception. In a 1959 decision, the United States Supreme Court applied the single standard in the context of admiralty law in *Kermarec v. Compagnie Generalie*,[42] where the plaintiff sustained injuries from a fall down a stairway while aboard the defendant's ship. In declining to apply the common law entrant classifications, Justice Stewart stated:

> The distinctions which the common law draws between licensee and invitee were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism. In an effort to do justice in an industrialized urban society, with its complex economic and individual relationships, modern common-law courts have found it necessary to formulate increasingly subtle verbal refinements, to create subclassifications among traditional common-law categories, and to delineate fine gradations in the standards of care which the landowner owes to each. Yet even within a single jurisdiction, the classifications and subclassifications bred by the common law have produced confusion and conflict. As new distinctions have been spawned, older ones have become obscured. Through this semantic morass the common law has moved, unevenly and with hesitation, towards "imposing on owners and occupiers a single duty of reasonable care in all the circumstances."[43]

Although the *Kermarec* court expressed its approval of the single standard, it did so only in the context of admiralty law. Even so, Justice Stewart's criticism of the common law entrant categories later provided the point of departure for the trend among the states to abolish the entrant categories.

B. *Rowland v. Christian*

In 1968, California became the first state to adopt the single standard in the landmark decision of *Rowland v. Christian*.[44] In *Rowland*, the plaintiff sustained injuries when a cracked water faucet in the defendant's home broke injuring the plaintiff's hand. The trial court granted summary judgment for the defendants, holding that the plaintiff, a social guest, could not recover as a matter of law because a licensee must take the premises as he finds them. The California Supreme Court reversed, holding that the

42. 358 U.S. 625 (1959).
43. *Id.* at 630-31.
44. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97.

common law entrant categories would no longer determine the standard of care owed by a landowner, but rather a single standard of reasonable care under all the circumstances would apply.[45] The *Rowland* court supported its decision by relying on Justice Stewart's reasoning in *Kermarec* and the rationale that the entrant categories are contrary to modern humanitarian values. The court stated a compelling argument for abolition of the categories:

> A man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose. Reasonable people do not ordinarily vary their conduct depending upon such matters, and to focus upon the status of the injured party as a trespasser, licensee, or invitee in order to determine the question whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values.[46]

The *Rowland* court further based its decision on California statutory law, which provides that one is responsible for injuries caused by a failure to exercise ordinary care.[47] The California Supreme Court found that in the absence of public policy or statutory provision allowing for the common law entrant categories, landowner liability must be governed by the fundamental tort principles of ordinary care imposed by legislative mandate.[48]

Many states have followed the *Rowland* lead, applying a single standard of care.[49] Other states have abolished the distinction between invitee and licensee, while retaining the trespassor category.[50]

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45. *Id.* at 114, 443 P.2d at 568, 70 Cal. Rptr. at 104.

46. *Id.*

47. CAL. CIV. CODE § 1714 (West 1973), provides: "Every one is responsible, not only for the results of his willful 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 . . . ."

48. *Rowland*, 69 Cal. 2d at 114, 443 P.2d at 568, 70 Cal. Rptr. at 104.

49. The following states apply a single standard to all entrants. Alaska: Webb v. Sitka, 561 P.2d 731 (Alaska 1977); Colorado: Mile High Fence Co. v. Radovich, 175 Colo. 537, 489 P.2d 308 (1971); District of Columbia: Smith v. Arbaugh's Restaurant, Inc., 152 App. D.C. 86, 469 F.2d 97, *cert. denied* 412 U.S. 939 (1972); Hawaii: Pickard v. Honolulu, 51 Hawaii 134, 452 P.2d 445 (1969); Louisiana: Cates v. Beauregard Elec. Coop., Inc., 328 So. 2d 367 (La.), *cert. denied* 429 U.S. 833 (1976); Montana: Limberhand v. Big Ditch Co., ___ Mont. ___, 706 P.2d 491; New Hampshire: Oulette v. Blanchard, 116 N.H. 552, 364 A.2d 631 (1976); New York: Barker v. Parnossa, Inc., 39 N.Y.2d 926, 352 N.E.2d 880, 386 N.Y.S.2d 576 (1976); Rhode Island: Mariorenzi v. Joseph Di Ponte, Inc., 114 R.I. 294, 333 A.2d 127 (1975).

50. The following jurisdictions apply a single standard toward licensees and invitees, while retaining a lesser standard of care for the trespasser category. Florida: Arias v. State Farm Fire & Cas. Co., 426 So. 2d 1136 (Fla. Dist. Ct. App. 1983); Maine: Poulin v. Colby

V. STATUS OF THE SINGLE STANDARD IN MONTANA

Prior to 1981, there was no question that the Montana Supreme Court adhered to the traditional common law entrant categories.[51] In 1981, the Montana Supreme Court seemingly abandoned the common law entrant categories and adopted a single standard of reasonable care in *Corrigan v. Janney*.[52] In *Corrigan*, a tenant died as a result of an electrical shock he received from contact with the faucet of the bathtub in his apartment. The trial court granted defendant's motion for summary judgment on the ground that under Montana law, a tenant "has no redress in damages for injury to person or property consequent upon the landlord's failure to repair."[53] The Montana Supreme Court reversed, holding that pursuant to Montana statutory law, "the owner of premises is under a duty to exercise reasonable care in the management of the premises to avoid exposing persons thereon to an unreasonable risk of harm."[54] The court in *Corrigan* relied on Montana's ordinary negligence statute, which provides:

> Everyone is responsible not only for the results of his willful 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 except so far as the latter has willfully or by want of ordinary care brought the injury upon himself.[55]

The *Corrigan* court relied extensively on *Rowland* in its decision. Quoting *Rowland*, the court held that "[T]o focus upon the

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College, 402 A.2d 846 (Me. 1979); Massachusetts: Mounsey v. Ellard, 363 Mass. 693, 297 N.E.2d 43 (1973); Minnesota: Peterson v. Balach, 294 Minn. 161, 199 N.W.2d 639 (1972); North Dakota: O'Leary v. Coenen, 251 N.W.2d 746 (N.D. 1977); Wisconsin: Antoniewicz v. Reszcynski, 70 Wis. 2d 836, 236 N.W.2d 1 (1975).

51. *See, e.g.*, Steen v. Grenz, 167 Mont. 279, 538 P.2d 16 (1975); Fuchs v. Huether, 154 Mont. 11, 459 P.2d 689 (1969); Blackman v. Crowe, 149 Mont. 253, 425 P.2d 323 (1967); Lenz v. Mehrens, 149 Mont. 394, 427 P.2d 297 (1967); Maxwell v. Maxwell, 140 Mont. 59, 367 P.2d 308 (1961). *See also* Comment, *Liability for Personal Injuries Caused by Use and Occupation of Real Estate*, 30 MONT. L. REV. 153 (1969).

In 1980, Justice Sheehy suggested departure from the entrant categories in a specially concurring opinion in *Rennick v. Hoover*. There, he stated:

> I think in a proper case we should re-examine the fiction that different rules should apply on the duty owed to persons lawfully on another's premises, based on their economic relationship to the possessor of the premises. In other words, I see no reason for differentiating between invitees and licensees, because of the economic difference in their reasons for going upon another's property . . . .

Rennick v. Hoover, 186 Mont. 167, 172-73, 606 P.2d 1079, 1082 (1980).

52. ___ Mont. ___, 626 P.2d 838 (1981).

53. *Id.* at ___, 626 P.2d at 840 (citing Busch v. Baker, 51 Mont. 326, 152 P. 750 (1915)).

54 *Id.* at ___, 626 P.2d at 841.

55. MONT. CODE ANN. § 27-1-701 (1985).

status of the injured party, . . . in order to determine the question whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values."[56]

It appeared unquestionable that *Corrigan* had adopted the single standard of reasonable care and its rationale as set out by the California Supreme Court in *Rowland*. In *Corrigan*, the court not only adopted the holding in *Rowland*, but endorsed *Rowland*'s interpretation that the entrant categories are contrary to the legislative intent that reasonable care applies in all circumstances. The court made no explicit mention, however, of abolishing the entrant categories, nor did it expressly overrule its numerous prior decisions which applied the common law entrant categories. The absence of specific language overruling the categories left attorneys wondering exactly what impact *Corrigan* would have.

Seven months after *Corrigan*, Justice Haswell delivered the court's opinion in *Cereck v. Albertsons, Inc.*,[57] stating: "In Montana the duty imposed upon a property owner depends on the status of the injured party."[58] The plaintiff in *Cereck* recovered damages for an injured leg and hip due to her status as an invitee at the defendant's premises. Even so, Justice Haswell specifically relied upon the common law entrant categories in his decision without reference to the court's earlier holding in *Corrigan*. Justice Morrison filed a dissenting opinion in which he stated:

> I concur in the result, but not in all that is said therein.
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> Specifically this Court has begun to depart from "status" in determining the degree of care owed by a property owner. See *Corrigan v. Janney*. The plaintiff, Mrs. Cereck, need not enjoy the status of invitee in order to recover. A general duty of due care is owed.[59]

The majority decision in *Cereck* extinguished beliefs that Montana had permanently departed from the common law entrant categories in *Corrigan*.

Throughout Montana, plaintiffs' attorneys argued at the trial court level that *Corrigan* had changed Montana to a single standard jurisdiction, but not always with success. The *Corrigan* holding was too vague: it had not overruled the long line of authority which focused on the entrant categories. The *Cereck* holding, however, was quite clear when it specifically held that Montana continued to focus on the entrant categories. This caused trial court

56. *Corrigan*, at ____, 626 P.2d at 841.
57. 195 Mont. 404, 637 P.2d 509.
58. *Id.* at 412, 637 P.2d at 511.
59. *Id.* at 413-14, 637 P.2d at 512.

judges to apply *Cereck* rather than *Corrigan*. For example, in a 1985 federal case,[60] Judge Battin applied the entrant categories, despite the plaintiff's contention that a single standard applied in Montana. In that case, the plaintiff was a social guest at the home of relatives. After dark, the plaintiff walked out onto the defendant's second story deck. The deck had no railing around its perimeter and the plaintiff fell ten feet to the ground below, sustaining serious injuries.

Prior to trial, the plaintiff requested that the federal district court certify to the Montana Supreme Court the question of whether Montana law applied a single standard, or whether it continued to focus on the entrant categories. Judge Battin denied the motion to certify, citing *Cereck*'s holding that the duty imposed depends upon the status of the injured party.[61]

In July, 1985, the Ninth Circuit addressed the contention that *Corrigan* represented a change in Montana law in *Harmon v. Billings Bench Water Association*.[62] When faced with the conflicting opinions of *Corrigan* and *Cereck*, the Ninth Circuit chose to follow *Cereck* and apply the entrant categories.[63] *Harmon* reinforced *Cereck's* holding that Montana continued to focus on the status of the entrant. Consequently, Montana attorneys were left to speculate whether ideological differences among the Justices had caused the court to vacillate, or whether the dicta in *Cereck* was merely a mis-

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60. Davis v. Gershmel and Evans Prod., CV-84-203 (D. Mont. July 2, 1985) (order denying motion to certify issue to state supreme court) The order stated:

> The Montana Supreme Court continues to recognize that the duty imposed upon a property owner depends upon the status of the party who had been injured on the landowner's premises. *Cereck v. Albertsons, Inc.*, ___ Mont. ___, 637 P.2d 509, 511 (1981); *Rennick v. Hoover*, 186 Mont. 167, 170, 606 P.2d 1079, 1081 (1980). The Court chose not to abolish the distinctions, although the concurring opinion urged abolition in both *Cereck* and *Rennick*.
>
> The Montana Supreme Court has declined to adopt a general standard of care for landowners when presented with the opportunity. This Court, plaintiff's choice of forum, does not believe that certification of the question of the duty of care owed to a social guest is proper or necessary. The law of Montana recognizes that a property owner's duty is dependent upon the status of those who come upon the premises.

61. *Id.*

62. 765 F.2d 1464 (9th Cir. 1985).

63. In a footnote of Harmon, the Ninth Circuit Court stated:

> Harmon erroneously argues that the Supreme Court of Montana no longer focuses upon the status of an injured party in determining the duty owed by a property owner to the injured party. In a case decided after *Corrigan v. Janney*, 626 P.2d 838 (Mont. 1981), upon which Harmon relies, the court stated: "In Montana, the duty imposed upon a property owner depends upon the status of the injured party on the premises." *Cereck v. Albertson's, Inc.*, 637 P.2d 509, 511 (Mont. 1981).

Id. at 1467.

take. Attorneys attempting to follow the court's position on landowner liability were left without clear precedent.

On September 26, 1985, the Montana Supreme Court handed down its decision in *Limberhand v. Big Ditch Co.*[64] In *Limberhand*, the plaintiff brought a wrongful death action on behalf of her eighteen-month old son who drowned in an irrigation ditch in Billings. The trial court judge granted summary judgment for the defendants, and the plaintiff appealed. Although the *Limberhand* court primarily addressed the issue of attractive nuisance and remanded, the court took the opportunity to address the confusion in the area of landowner liability.

Limberhand corrected the confusion originally created by *Corrigan*, *Cerek*, and *Harmon*. The court expressly overruled *Cereck* and *Harmon* which applied the entrant categories. Montana now imposes a single standard of reasonable care upon landowners in all circumstances, pursuant to *Corrigan* and existing Montana statutory law.[65] *Limberhand* also expressly held that Montana's single standard of care also applies to trespassers.

VI. The Single Standard in Montana

Now that a single standard clearly applies in Montana, the question becomes one of application. The *Rowland* and *Corrigan* decisions provide guidance. The remaining text of this comment examines the single standard of care in the context of the advantages it provides, and suggests how it should be applied to a claim alleging landowner negligence.

Under the entrant categories, cases rarely go to the jury when they involve social guests who sustain injuries. For example, in

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64. ___ Mont. ___, 706 P.2d 491.

65. The *Limberhand* court stated:

> In *Harmon*, in footnote 3, the Circuit Court of Appeals felt that this Court had vacillated on the necessity of status of the injured party in determining the duty owned [sic] by a property owner to an injured party. 765 F.2d at 1467. In Corrigan v. Janney, (Mont. 1981), 626 P.2d 838, 841, 38 St.Rep.[sic] 545, 549, in construing section 27-1-701, MCA (formerly section 58-607 R.C.M. 1947), we held that the statute prevented us from distinguishing between social guests and invitees in determining the liability of the landowner for injuries received. We regard the same statute as declaring the applicable law as to the duty of landowners to persons though they may be trespassers. The test is always not the status of the injured party but the exercise of ordinary care in the circumstances by the landowner . . . .
>
> Although in a later case, Cereck v. Albertson's, Inc. (1981), 195 Mont. 409, 412, 637 P.2d 509, 511, we stated that the duty imposed on a property owner depends on the status of the injured party, that statement is not correct in light of section 27-1-701, MCA, above quoted.

Id. at ___, 704 P.2d at 496.

State ex rel. Northwest Airlines v. District Court,[66] a man fractured his ankle and twisted his back when he slipped (on an alleged oil slick) while walking from the airport terminal to a plane. Because the man was retrieving his keys from a passenger on board, he had conferred no benefit on the airport or the airline. As such, he was considered a licensee. The trial court granted summary judgment in favor of the defendants based upon the entrant category rule that a licensee is required to take the premises as he finds them.[67]

Northwest is characteristic of the effect of the entrant categories: landowner liability cases that are summarily dismissed focus on the issue of the entrant's status rather than whether the defendant acted carelessly. Summary dismissal of entrant cases precludes jury application of their own test of reasonableness—the touchstone of the torts process.

A. *Advantages*

The single standard eliminates judicial arrest of entrant cases, like *Northwest*. Rather than applying rigid categories, the reasonableness of the airline company's conduct would be decided by the jury's contemporary community standards.

Application of a single standard will provide a more flexible approach to the peculiar circumstances that may arise in each case. Thus, a single standard of reasonable care properly focuses the issue of landowner liability on the relationship between individuals which determines duty—a relationship characterized by Professor Prosser as one "of close proximity in time, space, direct causal sequence, between a negligent defendant and the person he injures."[68]

A single standard eliminates rigid categories, while imposing a single duty in a wide range of conceivable fact situations. Under the single standard, the basic goal of the entrant categories remains intact, but is applied under a more workable standard. A single standard of reasonable care eliminates the possibility of confusing the jury with the common law categories and their attendant subclassifications. It will allow jurors to determine a plaintiff's entrant status and what weight that status should be given under the circumstances. Lack of specific jury direction does not compromise the quality of the jury's decision because "the fact that there

66. 167 Mont. 464, 539 P.2d 714 (1975).

67. *Id.* at 469, 539 P.2d at 717.

68. *Community Standard, supra*, note 24, at 160 (quoting Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 15 (1953)).

are no definite guidelines for the jury is not unreasonable since by their very nature the tests of foreseeability and reasonableness of conduct defy an *a priori* definition."[69]

B. *Application*

1. *Foreseeability and Policy*

The entrant categories and the Restatement exceptions are no longer solely determinative of a landowner's liability. Rather, the threshold question is, was it reasonably foreseeable that the dangerous condition existing on the landowner's premises would cause injury to the entrant? If so, then the landowner had a duty to correct the dangerous condition or to warn the entrant of its existence. When the breach of that duty proximately causes the entrant's injury, the injury will be compensable regardless of whether the injured party was an invitee, licensee, or trespasser. An attorney handling this type of claim should focus on the specific factual circumstances that will serve to establish, in the eyes of the jury, a higher quantum of foreseeability. That quantum of foreseeability can best be established by illuminating facts that will show:

1. the likelihood that the landowner was aware or should have been aware of the unreasonably dangerous condition existing upon his land;
2. the likelihood that the plaintiff would enter upon the land;
3. the likelihood that the plaintiff would encounter the dangerous condition when he entered upon the land;
4. the likelihood that the plaintiff would be injured by the dangerous condition.

In addition to these guidelines for establishing foreseeability, the attorney may wish to utilize the following policy considerations which the *Rowland* court has suggested should determine landowner liability.

1. Foreseeability of harm to the plaintiff.
2. The degree of certainty that the plaintiff suffered injury.
3. The closeness of connection between the defendant's conduct and the injury suffered.
4. The moral blame attached to the defendant's conduct.
5. The policy of preventing future harm.
6. The extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach.

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69. *Tort Liability, supra* note 24, at 204.

7. The cost, availability, and prevalence of insurance for the risk involved.[70]

2. *Defenses*

A single standard of reasonable care, applied to social guests as well may seem inequitable to landowners. However, the single standard does not leave landowners utterly bereft of protection from liability, nor does it dictate that landowners will be "absolute liability carriers for all who come upon the land."[71] Under a single standard of care, there remains no duty to warn where it would be reasonable to expect that an ordinary person would observe the danger. Thus, the plaintiff's culpability remains accounted for under the comparative fault system.

Montana has stepped further than most jurisdictions in holding that the standard of reasonable care applies to trespassers. Many would suggest that this in effect creates unlimited liability upon a landowner. However, it will remain very difficult to convince a jury that one who entered upon the landowner's premises without permission should receive compensation for an injury. The plaintiff's attorney who handles a trespasser's claim will want to establish facts showing that even though the trespasser was upon the land without permission, it was nevertheless reasonably foreseeable that he would enter upon the land and sustain injuries from contact with the dangerous condition. Conversely, the defense attorney will want to establish facts that will show a jury that the entrant's presence was unforeseeable and that it would be unfair to impose a duty upon the landowner. This should remain an effective defense to claim's by trespassers.

VII. Conclusion

With faltering steps, the Montana Supreme Court has brought Montana's landowner liability law out of the past and constructed a framework more consistent with the realities of modern society. The single standard is also far more consistent with fundamental tort principles of reasonableness and foreseeability. Due to its vague language and absence of discussion overruling the entrant categories, few were positive that *Corrigan* had changed Montana to a single standard jurisdiction. After four years, the supreme court has finally corrected its mistake in *Cereck*. Montana has

70. Rowland, 69 Cal. 2d at ____, 443 P.2d at 564, 70 Cal. Rptr. at 100.
71. *Tort Liability, supra* note 24, at 201.

joined a number of other progressive states in becoming a single standard jurisdiction.