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Lucinda S. Ingram

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MISSOURI RETREATS FROM THE KNOWN OR OBVIOUS DANGER RULE IN PREMISES LIABILITY

*Cox v. J.C. Penney Co., Inc.*¹
*Patton v. The May Department Stores Co.*²

Two recent Missouri Supreme Court decisions may prove to be a powerful weapon for plaintiffs injured by dangerous conditions on land. Landowners and occupiers traditionally have enjoyed a privileged status in the law of negligence. The view that the owner or occupier was sovereign over his land was deeply rooted in common law feudalism.³ The traditional rule that there was no liability for obvious or known dangers reflected one facet of this sovereignty.⁴ The favored status which landowners and occupiers enjoyed in Missouri with regard to obvious or known dangers appears threatened, however, by the recent Missouri Supreme Court decisions in *Cox v. J.C. Penney Co., Inc.*⁵ and *Patton v. The May Department Stores Co.*⁶ This Note will analyze the historical foundations and policy justifi-

1. 741 S.W.2d 28 (Mo. 1987) (en banc).

2. 762 S.W.2d 38 (Mo. 1988) (en banc).

3. Referring to the common law view toward entrants onto the land, the Supreme Court said it was "inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism." *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630 (1959). One commentator notes that:

[V]arious justifications have been advanced for different aspects of the rules [the division of entrants into classes with graduated degrees of duty owed each class]. But the modern concensus is that the special privilege these rules accord to the occupation of land sprang from the high place that land has traditionally held in English and American thought and the still continuing dominance and prestige of the landowning class in England during the formative period of this development. This sanctity of land ownership included notions of its economic importance and the social desirability of the free use and exploitation of land. Probably it also included, especially in England, more intangible overtones bound up with the values of a social system that traced much of its heritage to memories of feudalism.

5 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 27.1, at 131-32 (1986). The common law view was based, in part, on the proposition that English manor lords would have difficulty regulating entries onto the lands of their vast estates.

4. See *infra* notes 52-62 and accompanying text.

5. 741 S.W.2d 28 (Mo. 1987) (en banc).

6. 762 S.W.2d 38 (Mo. 1988) (en banc).

cations of the traditional rule and its subsequent erosion by *Cox* and *Patton*.

The facts in *Cox* and *Patton* are similar. In both, the plaintiff was a business invitee in the defendant's retail store. In both, the plaintiff was injured when she tripped over an object in the aisle of the store.⁷ The Missouri Supreme Court granted transfer in both cases.⁸ Therefore, the Missouri Supreme Court heard the cases as if on original appeal from the trial court.⁹

In *Patton*, the defendant contended that the plaintiff failed to make a submissible case because she failed to establish that she did not know or could not have known of the dangerous condition and that the defendant did know or could have known of the dangerous condition.¹⁰ In *Cox*, the defendant contended that "the basis for any liability must be [the land owner's] superior knowledge of an unreasonable risk of harm which cannot be discovered by an invitee exercising ordinary care"¹¹ The *Cox* defendant also asserted that "open and obvious dangers present no duty to warn"¹²

If the evidence supported the defendants' assertions of the obviousness of the danger, then there is abundant support for the traditional view that the defendants had no duty to warn the plaintiffs of the danger.¹³ Traditionally, the land occupier's duty to warn arose only when he had superior knowledge of the dangerous condition.¹⁴ The *Cox* and *Patton* courts, however, dismissed these contentions, as well as centuries of premises liability law, with little discussion. The court simply declared that the comparative fault principles adopted in *Gustafson v. Benda*¹⁵ "modif[y] the common law relationship between business inviters and their invitees."¹⁶

7. *Cox*, 741 S.W.2d at 28; *Patton*, 762 S.W.2d at 39.

8. *Id.*

9. Mo. R. Crv. P. 83.09 provides that "Any case coming to this Court [Missouri Supreme Court] from a district of the Court of Appeals, whether by certification, transfer or certiorari, may be finally determined the same as on original appeal." For purposes of this Note, the *Patton* decisions at both the appellate and Missouri Supreme Court level will be discussed. The Eastern District Court of Appeals decision, however, is unpublished since transfer to the Supreme Court was granted.

10. *Patton*, 762 S.W.2d at 39.

11. *Cox*, 741 S.W.2d at 29.

12. *Id.*

13. See *infra* note 79.

14. "The basis of a proprietor's liability in a case of this nature is his superior knowledge of the defective condition of his premises which results in injury to his business invitee." *Kelly v. Dairy Queen Enter., Inc.*, 581 S.W.2d 903, 905 (Mo. Ct. App. 1979).

15. 661 S.W.2d 11 (Mo. 1983) (en banc). See *infra* text accompanying note 78.

16. *Cox*, 741 S.W.2d at 30.

To fully appreciate the magnitude of the court's position, one must understand the historical support for the common law view. Traditionally, the law viewed a landowner as sovereign over his land with the right to use it as he chose.¹⁷ English landlords were a powerful class and enjoyed a favored status in the law.¹⁸ This view was especially suited to an earlier time period in Anglo-American history:

This Nineteenth Century idea was that freedom of contract, enterprise, and unrestricted uses of property were uppermost over human welfare. This philosophy was well adapted and a natural outgrowth to serve the economy of that time, an age of extreme economic individualism, industrial expansion and unrestrained exploitation of human and natural resources.¹⁹

The evolution of classifications of entrants onto the land slightly eroded the traditional immunity bestowed on land occupiers.²⁰ Land occupiers were no longer completely absolved from all liability for injuries to entrants from dangerous conditions on the land. The landowner's duty to the entrant depended upon the class of the entrant: trespasser, licensee, or invitee.²¹ A trespasser is one who is on the premises without the consent of the owner or occupier.²² As to trespassers, the occupier owes no duty of reasonable care, only the duty to refrain from active injury.²³

Licensees are those who "enter land with the occupier's permission but only for their own purposes that are not connected with the occupier's interests."²⁴ Generally, the owner or occupier owes a duty of reasonable

17. See 5 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 27.1 (1986).

18. Edwards & Jerome, *The Foreseeable Emergence of the Community Standard*, 51 DENVER L.J. 145, 147 (1974); Sheldahl, *The Slip-and-Fall Case in Oregon*, 48 OR. L. REV. 123, 124 (1968).

19. Comment, *The Outmoded Distinction Between Licensees and Invitees*, 22 MO. L. REV. 186, 187 (1957).

20. See *infra* notes 21-28 and accompanying text for a discussion of the duties owed to each class of entrant. Prosser describes the classification scheme as a "rough sliding scale." W. KEETON, D. DOBBS, R. KEETON, D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 58, at 393 (W. Keeton 5th ed. 1984) [hereinafter PROSSER & KEETON]; see also 62 AM. JUR. 2D *Premises Liability* § 37 (1972) for a discussion of the distinctions between the three categories.

21. See PROSSER & KEETON, *supra* note 20, § 58, at 393.

22. RESTATEMENT (SECOND) OF TORTS § 329 (1965); 5 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 27.1, at 129 (1986).

23. RESTATEMENT (SECOND) OF TORTS § 333 (1965) provides the general rule: Except as stated in §§ 334-339, a possessor of land is not liable to trespassers for physical harm caused by his failure to exercise reasonable care
(a) to put the land in a condition reasonably safe for their reception, or
(b) to carry on his activities so as not to endanger them.

There are exceptions to this general rule. These are embodied in §§ 334-39 which impose a duty in situations such as where the trespassing is constant, known, the danger arises from an artificial condition on the land, or the trespasser is a child.

24. 5 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 27.1, at 130 (1986); see also RESTATEMENT (SECOND) OF TORTS § 330 (1965).

care to the licensee only to the extent that he expects that the licensee will not realize the dangers encountered in an entry upon the land.²⁵

The third class of entrant is the invitee, defined as "one who enters the premises with the express or implied consent of the possessor, and for some purpose of real benefit or interest to the possessor or for the mutual benefit of both."²⁶ The duty owed to the invitee requires the occupier to use care not to injure him by negligent activities, to warn him of hidden dangers, and to inspect the premises for possible dangerous conditions.²⁷ Since the entrant's classification determines the owner or occupier's duty, distinctions between the classes are critical. The distinction between trespasser and licensee turns on the existence of permission, and the distinction between licensee and invitee turns on which party was intended to benefit from the entry onto the land.²⁸

Many courts and commentators have expressed dissatisfaction with this rigid classification scheme.²⁹ The response to this dissatisfaction has been

25. RESTATEMENT (SECOND) OF TORTS § 341 (1965) provides:

A possessor of land is subject to liability to his licensees for physical harm caused to them by his failure to carry on his activities with reasonable care for their safety if, but only if,

(a) he should expect that they will not discover or realize the danger, and
(b) they do not know or have reason to know of the possessor's activities and of the risk involved.

26. *Twine v. Norris Grain Co.*, 241 Mo. App. 7, 15, 226 S.W.2d 415, 420 (1950).

27. PROSSER & KEETON, *supra* note 20, § 61, at 425-26. Though the invitee is entitled to the highest duty of care among the three classes of entrants, the occupier does not owe a full duty of reasonable care in all the circumstances to any class of entrant. "Even to the favored invitee the occupier would fully discharge his duty if he pointed out a dangerous defect, instead of using care to remedy the conditions." 5 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 27.1, at 131 (1986).

28. *McVicar v. W.R. Arthur & Co.*, 312 S.W.2d 805, 812 (Mo. 1958); see James, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 *YALE L.J.* 605 (1954).

29. "This system has long made many legal writers, and some of the courts, quite unhappy because of its arbitrary and sometimes unreasonable character. . . ." PROSSER & KEETON, *supra* note 20, § 58, at 393. One commentator notes that problems have resulted from a change in attitudes over time:

Rigid application of the common-law trespasser, licensee, and invitee categories . . . produced harsh results in some cases, and judicial reluctance to deny a person recovery because of these categorizations developed along with the attitude that human life and its protections is more valuable than a person's right to unrestricted freedom in the use of his land.

Note, *Liability of Owners and Occupiers of Land*, 58 *MARQ. L. REV.* 609, 609-10 (1975). This commentator classifies the problems with the common law scheme into three areas:

(1) the classifications fail to promote a basic policy of the law and a basic social value - that human life is more important than property and that a person should be held responsible for injuries to others resulting from

to create exceptions to the classification system and its corresponding degrees of care.³⁰ Recognition of these exceptions frequently worked a more equitable result for the injured land entrant. Even so, the overall classification system has continued to be heavily criticized.³¹ One commentator described the evolution of the law in this area skeptically:

Occasionally, this beating of the law of negligence at the gates of the occupier's immunities has been by Cyclopean blows; more often, in the fashion of the common law, it has been by a process of erosion - a quiet nibbling away at the immunities. Stemming originally from feudalism and a sanctification of the rights and privileges rooted in land ownership, the common law classified all entrants into more or less exact categories, such as trespasser, licensees, invitees, etc. and fixed variant obligations owing by the occupier to the entrant, depending upon his place in the hierarchy of entrants. The common law thus achieved what at first blush might seem to have been a triumph of classification and organization. But the triumph depended upon swallowing up into a formal scheme of classification many of the living issues of the law of torts, such as: in the light of the general security, what obligation of care should be owed by occupiers to entrants injured either by activities or conditions on the land? The solution of such questions should depend on judgments about objectives of tort law in this area, rather than upon mechanical rules assigning entrants to categories.³²

Dissatisfied with these mechanical rules and fearful that the exceptions would eventually swallow up the general rules,³³ a minority of courts have

his own negligence; (2) the traditional distinctions are confusing and subject to inconsistent application; and (3) the use of classifications usurps the function of the jury.

Id. at 615.

30. The RESTATEMENT (SECOND) OF TORTS §§ 334-39 (1965) contain exceptions for children, discovered trespassers, artificial conditions on the land and other protected entrants.

31. One commentator noted that:

[T]he existing exceptions and judicial extensions which pervade the common-law rules manifest a basic confusion surrounding the application of those rules and are symptomatic of an attempt to attain justice in the individual case while working within a system of law which frustrates the attainment of that end. This confusion and inequity in the area of occupier's liability stems from an attempt to apply old common-law principles in a society which no longer holds the landowner sacrosanct.

Stites, *Liability of a Land Occupier to Persons Injured on His Premises: A Survey and Criticism of Kansas Law*, 18 KAN. L. REV. 161, 162 (1969).

32. Comment, *The Outmoded Distinction Between Licensees and Invitees*, 22 Mo. L. REV. 186, 198 (1957) (quoting Lambert, *Recent Important Tort Cases*, 16 N.A.C.C.A. L.J. 317, 319 (1955)).

33. As one commentator noted, "The exceptions carved out from these categories as a response to changing times are usually so numerous that the classifications no longer function as rules of law that can be applied consistently, uniformly, and predictably." Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?*, 36 MD. L. REV. 816, 823 (1977);

see, e.g., *Ouellette v. Blanchard*, 116 N.H. 552, 554, 364 A.2d 631, 632 (1976).

abandoned the classification of entrants altogether.³⁴ Most notably, California, in *Rowlands v. Christian*,³⁵ abolished the classification scheme in favor of imposing upon the occupier a duty of reasonable care in all the circumstances.³⁶ Other jurisdictions have since followed suit.³⁷ Some jurisdictions have hesitated to make such a significant departure from stare decisis and have preferred to retain the classification system but to trim it down from three classes to two classes.³⁸ They have combined the licensee and invitee classifications into one so that the entrant is either a trespasser or invitee.³⁹ Still other jurisdictions have taken the approach of broadening the invitee classification to include social invitees rather than to classify them as licensees.⁴⁰ Reflection upon this modification or abandonment of the traditional classification scheme has speculated that the movement reflects the idea that tort law should be a "device for social engineering, primarily concerned with allocation of liability in such a manner as to most satisfactorily protect the social fabric from the impact of such injuries as are a necessary or probable consequence of the complicated organization of society."⁴¹

34. *Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973); *Webb v. City of Sitka*, 561 P.2d 731 (Alaska 1977); *Mile High Fence Co. v. Radovich*, 175 Col. 537, 489 P.2d 308 (1971); *Pickard v. City of Honolulu*, 51 Haw. 134, 452 P.2d 445 (1969); *Cates v. Beauregard Elec. Coop.*, 328 So. 2d 367 (La. 1976), *cert. denied*, 429 U.S. 833 (1976); *Ouellette v. Blanchard*, 116 N.H. 552, 364 A.2d 631 (1976); *Basso v. Miller*, 40 N.Y.2d 233, 352 N.E.2d 868, 386 N.Y.S.2d 564 (1976); *Mariorenz v. Joseph DiPonte, Inc.*, 114 R.I. 294, 333 A.2d 127 (1975).

35. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). In abandoning the common law classifications, the California Supreme Court said:

A man's life or limb does not become less worthy of protection by law nor a loss less worthy or 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. The common law rules obscure rather than illuminate the proper considerations which should govern determination of the question of duty.

Id. at 115, 443 P.2d at 568, 70 Cal. Rptr. at 103.

36. *Id.*

37. See PROSSER & KEETON, *supra* note 20, § 62, at 432-34.

38. PROSSER & KEETON, *supra* note 20, § 62, at 433; see also, e.g., *Poulin v. Colby College*, 402 A.2d 846 (Me. 1979); *Mounsey v. Ellard*, 363 Mass. 693, 297 N.E.2d 43 (1973); *Peterson v. Balach*, 294 Minn. 161, 199 N.W.2d 639 (1972); *O'Leary v. Coenen*, 251 N.W.2d 746 (N.D. 1977); *Antoniewicz v. Reszcyński*, 70 Wis. 2d 836, 236 N.W.2d 1 (1975).

39. See Comment, *The Outmoded Distinction Between Licensees and Invitees*, 22 Mo. L. REV. 186 (1957) for a discussion of why Missouri should abandon the distinction.

40. See 62 AM. JUR. 2D *Premises Liability* § 64 (1972).

41. Annotation, *Modern Status of the Rule Absolving a Possessor of Land*

Missouri courts have expressed little interest in departing from the traditional classification approach of premises liability.⁴² As this Note will later discuss, however, perhaps the *Cox* and *Patton* decisions signal a willingness to expand the occupier's duty in the area of known and obvious dangers.

Both *Cox* and *Patton* involved an injured invitee, a woman shopping in the defendant's store.⁴³ While patrons in retail stores are almost universally recognized as business invitees, courts have sometimes had difficulty distinguishing between invitees and licensees in other situations.⁴⁴ One school of thought advances the proposition that the focus of the inquiry is on the benefit to the owner or occupier.⁴⁵ The other school focuses on the invitation aspect of the entrant's presence on the land.⁴⁶ The first Restatement adopted the benefit test and explained that its approach was based on the idea that the owner or occupier's duty was the price he must pay

of Liability to Those Coming Thereon for Harm Caused by Dangerous Physical Conditions of Which the Injured Party Knew and Realized the Risk, 35 A.L.R.3D 230, 235 n.3 (1971); see also 62 AM. JUR. 2D *Premises Liability* § 60, at 305 (1972).

42. For a general discussion of the Missouri law, see McCleary, *The Liability of a Possessor of Land in Missouri to Persons Injured While on the Land*, 1 Mo. L. REV. 45 (1936). Missouri is in the majority in rejecting the single standard of care. Prosser says that the majority position:

may reflect a more fundamental dissatisfaction with certain developments in accident law that accelerated during the 1960s - the reduction of whole systems of legal principles to a single, perhaps simplistic, standard of reasonable care, the sometimes blind subordination of other legitimate social objectives to the goals of accident prevention and compensation, and the commensurate shifting of the decisional balance of power to the jury from the judge. At least it appears that the courts are gaining a renewed appreciation for the considerations behind the traditional duty limitations toward trespassing adults, and that they are acquiring more generally a healthy skepticism toward invitations to jettison years of developed jurisprudence in favor of a beguiling legal panacea.

PROSSER & KEETON, *supra* note 20, § 62, at 433-34; see also Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467, 510-14 (1976), for a discussion of why few courts have followed California's lead.

43. *Cox*, 741 S.W.2d at 28; *Patton*, 762 S.W.2d at 39.

44. 5 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 27.12, at 218-34 (1986). For a discussion of the various views on the distinction, see PROSSER & KEETON, *supra* note 20, § 61, at 420-24; James, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 YALE L.J. 605, 612 (1954); Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573, 585 (1942); Comment, *The Outmoded Distinction Between Licensees and Invitees*, 22 Mo. L. REV. 186, 195-98 (1957), for a discussion of the various views on the distinction.

45. For a discussion of the benefit test, see Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573 (1942).

46. For a discussion of the invitation test, see 62 AM. JUR. 2D *Premises Liability* § 42, at 279-81 (1972); James, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 YALE L.J. 605, 613 (1954).

for the economic benefit derived from the entrant's presence on the premises.⁴⁷

The benefit test has encountered problems in application, however, because of the difficulty of determining when an entry onto the land bestows a benefit on the occupier.⁴⁸ Some courts have strained the concept of economic benefit beyond any real meaning.⁴⁹ The benefit test has also been criticized for its lack of historical support.⁵⁰ Despite problems with this approach, Missouri courts still subscribe to the benefit test.⁵¹

The "obvious or known danger" rule is also firmly entrenched in the common law.⁵² A typical statement of this rule posits that "when the condition contended to constitute an unreasonable risk is obvious to one in the exercise of ordinary care, or is actually known to the invitee, there

47. Referring to the benefit test of the first Restatement, Prosser said, "The Restatement of the Law of Torts is wrong." Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573, 612 (1942). See also James, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 YALE L.J. 605, 612 (1954).

48. Harper and James discuss cases "in which the economic benefit theory must be strained - sometimes to the breaking point." 5 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 27.12, at 224 (1986).

49. See, e.g., *Guilford v. Yale Univ.*, 128 Conn. 449, 23 A.2d 917 (1942) (returning graduate who urinated on campus grounds held to be an invitee); *Davis v. Central Congregational Society*, 129 Mass. 357, 37 Am. Rep. 368 (1880) (person attending free lecture held to be an invitee); *American Nat'l Bank v. Wolfe*, 22 Tenn. App. 642, 125 S.W.2d 193 (1938) (person going into bank to change a five dollar bill held to be an invitee); *Wingrove v. Home Land Co.*, 120 W. Va. 100, 196 S.E. 563 (1938) (person going with car owner to pick up car at parking garage held to be an invitee); see also 5 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 27.12, at 224-29 (1986); Comment, *The Outmoded Distinction Between Licensees and Invitees*, 22 Mo. L. REV. 186, 192 (1957).

50. Prosser states that "in none of these earlier decisions does 'benefit' to the occupier play any important part, and . . . in most of them it is entirely absent." Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573, 583 (1942). James also promoted the invitation test over the benefit test. He states that the invitation test:

seems to be coming back into its own in all circles of legal thought. This is as it should be, for the test has merit and deserves acceptance because it accounts more satisfactorily than the economic benefit test for many of the actual decisions holding the plaintiff to be an invitee.

James, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 YALE L.J. 605, 614 (1954).

51. The leading case on the issue is *Glaser v. Rothschild*, 221 Mo. 180, 120 S.W.1 (1909), where the court distinguished between an entrant who goes on the land for a reason not connected with the business and the entrant who goes on the land for the mutual benefit of the owner and entrant. *Id.* at 3. See McCleary, *The Liability of a Possessor of Land in Missouri to Persons Injured While on the Land*, 1 Mo. L. REV. 45 (1936), for a discussion of the development of Missouri law and the benefit test.

52. See *infra* note 79.

is no duty on the owner or occupier to warn him."⁵³ This rule is known alternatively as the traditional or orthodox rule.⁵⁴ Under the rule, a landowner "is not liable for injuries due to dangers which are obvious, or as well known to plaintiff as to defendant."⁵⁵ It has also been stated in terms of the "superior knowledge" requirement:

[T]he traditional common-law rule is that the liability of an owner or occupant to an invitee for negligence in failing to render the premises reasonably safe for the invitee, or in failing to warn him of danger thereon, must be predicated upon the possessor's superior knowledge concerning the dangers of the premises to persons going thereon.⁵⁶

Courts and commentators have suggested various rationales for the traditional rule. Some courts have stated that actual knowledge of a danger is obviously equivalent to, or perhaps even better than, a warning so that a warning would serve no real purpose.⁵⁷ Other courts have reasoned that it would be unfair to impose a duty on the landowner to guard against a risk which he cannot reasonably foresee because he reasonably expects the entrant himself to guard against known dangers.⁵⁸ The Restatement (Second) of Torts frames the justification for the known or obvious danger rule in terms of the entrant's choice. The entrant who is aware of the condition on the land and the attendant risks "is free to make an intelligent choice as to whether the advantage to be gained is sufficient to justify him in incurring the risk by entering or remaining on the land."⁵⁹

Whatever its rationale, Missouri courts traditionally have embraced the rule.⁶⁰ *Harbourn v. Katz Drug Co.*⁶¹ provides a statement of the Missouri law on the subject:

The invitee assumes all normal, obvious, or ordinary risks attendant on the use of the premises, and the owner or occupant is under no duty to reconstruct or alter the premises so as to obviate known and obvious dangers. . . . The owner or occupier is not an insurer of the business invitee's safety, . . . and the basis of his liability is his superior knowledge

53. *Harbourn v. Katz Drug Co.*, 318 S.W.2d 226, 229 (Mo. 1958). The rule is often stated in terms of invitees. *A fortiori*, it also applies to licensees and trespassers since the owner or occupier owes them a lesser degree of care than owed to the invitee. See *supra* notes 20-28.

54. Some commentators use the phrases interchangeably. See James, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 YALE L.J. 605, 628 (1954); Note, *The Proprietor-Invitee Relationship and the Superior-Knowledge Requirement*, 1960 DUKE L.J. 469, 472.

55. *Weber v. Hinds*, 440 S.W.2d 129, 132 (Mo. Ct. App. 1969).

56. 62 AM. JUR. 2D *Premises Liability* § 69, at 317-18 (1972).

57. See, e.g., *Atherton v. Hoening's Grocery*, 249 Iowa 50, 86 N.W.2d 252 (1957); *Wagner v. Lone Star Gas Co.*, 346 S.W.2d 645 (Tex. Civ. App. 1961).

58. See 62 AM JUR. 2D *Premises Liability* § 71 (1972).

59. RESTATEMENT (SECOND) OF TORTS § 343 A, comment e (1965).

60. See *infra* note 79.

61. 318 S.W.2d 226 (Mo. 1958).

of an unreasonable risk of harm of which the invitee, in the exercise of ordinary care, does not or should not know. . . . It follows that when the condition contended to constitute an unreasonable risk is obvious to one in the exercise of ordinary care, or is actually known to the invitee, there is no duty on the owner or occupier to warn him Therefore, an owner or occupier is not liable for injuries resulting from open and obvious conditions which are or should be as well known to the invitee as to the owner or occupier.⁶²

Some courts have used means other than the duty analysis of the traditional rule to reach the same result of immunizing the landowner from liability for known or obvious dangers.⁶³ The doctrine of contributory negligence is one such means. A court might hold that the danger was "so apparent to the invitee that if he had been using reasonable care for his own safety he would have observed it, and having failed to do so, he was guilty of contributory negligence."⁶⁴ Similarly, a court might also reach the same result by holding that the doctrine of assumption of the risk barred the entrant from recovering for his injuries.⁶⁵ Commentators have expressed frustration over the confusion of courts in application of these related theories.⁶⁶ Harper and James state that contributory negligence "is

62. *Id.* at 229 (citations omitted). Missouri courts have also described the traditional rule in terms of the "superior knowledge" requirement. "The liability of an owner or possessor of land to an invitee is based primarily upon his superior knowledge of a danger which he knows or should know of under such circumstances that he should expect the invitee would not discover or realize the danger." *Cunningham v. Bellerive Hotel, Inc.*, 490 S.W.2d 104, 107 (Mo. 1973).

63. See Annotation, *The Modern Status of the Rule Absolving a Possessor of Land of Liability to Those Coming Thereon for Harm Caused by Dangerous Physical Conditions of Which the Injured Party Knew and Realized the Risk*, 35 A.L.R.3d 230, 240 (1971); 62 AM. JUR. 2d *Premises Liability* § 71 (1972).

64. Annotation, *supra* note 63, at 240.

65. See Keeton, *Assumption of Risk and the Landowner*, 20 TEX. L. REV. 562 (1942) for a discussion of this defense in premises liability actions. Keeton disparages the use of the defense in premises liability actions, saying that "the best usage for a defensive theory is the one 'that most sharply focuses the defensive facts. Assumed risk is usually too blunt and too comprehensive to serve such a function in a highly developed adversary process.'" Keeton, *Assumption of Risk and the Landowner*, 22 LA. L. REV. 108, 120-21 (1961) (quoting Green, *Assumed Risk as a Defense*, 22 LA. L. REV. 77, 89 (1961)).

66. The court in *McKee v. Patterson*, 153 Tex. 517, 271 S.W.2d 391 (1954), recognized the similarity in the three theories and said:

There are two legal theories, wholly aside from the plaintiff's own negligence, for denying liability in a suit against an owner or occupier of land brought by an invitee for injuries growing out of open and obvious dangers thereon. One rests on the judicial concept that there is no breach of any duty the landowner owes to his invitees. The other arises out of the doctrine of *volenti non fit injuria* - voluntary encountering of risk - which is regarded as a defense to all negligence actions. . . . Actually, in their application to a given fact situation the two theories so completely overlap as to be almost indistinguishable. Actually, also, the defense of

sometimes hopelessly confused with the duty issue"⁶⁷ and that assumption of the risk "contributes nothing except ambiguity and confusion to a discussion of the occupier's liability."⁶⁸ Others suggest that the doctrine of contributory negligence is really the common foundation of all three theories.⁶⁹

While there is abundant case support for the validity of the traditional rule,⁷⁰ it has also been extensively criticized for its harshness and inflexibility. Some courts have avoided the harshness of the rule by refusing to find that the plaintiff had equal knowledge of the dangerous condition.⁷¹ Other courts have allowed the plaintiff to recover despite his equal knowledge of the danger when the risk posed by the condition was substantial and easily could have been eliminated or decreased.⁷²

The Restatement of Torts illustrates the development of the law leading to the narrowing of the landowner's immunity. The first Restatement of Torts granted an unqualified immunity to the owner or occupier from liability to entrants for injuries caused by dangerous conditions on the land if the entrants "know of the condition and realize the risk involved therein."⁷³ The Restatement (Second) of Torts, however, qualifies this immunity for known or obvious dangers. It does not completely abandon the traditional rule of immunity for obvious or known dangers but drastically cuts back

voluntary exposure to risk and contributory negligence are frequently treated as one and the same.

McKee, 153 Tex. at 519-20, 271 S.W.2d at 393.

67. 5 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 27.13, at 253 (1986).

68. *Id.* at 255. Keeton declares that "assumption of risk is . . . but the negative of duty." Keeton, *Assumption of Risk and the Landowner*, 22 LA. L. REV. 108, 109 (1961).

69. 62 AM. JUR. 2D *Premises Liability* § 71, at 323 (1972) states:

[W]hile it is often difficult to determine from the language used by the court in a particular case whether recovery was denied under the no duty rule, or on the theory of assumption of risk, or of contributory negligence, regardless of the terms employed, the underlying principle on which the court relied was contributory negligence.

70. See *infra* note 79.

71. See, e.g., *Rose v. Melody Lane*, 39 Cal. 2d 481, 247 P.2d 335 (1952); *Gobrecht v. Beckwith*, 82 N.H. 415, 135 A. 20 (1926); *Haefeli v. Woodrich Engr. Co.*, 255 N.Y. 442, 175 N.E. 123 (1931); *Brown v. Montgomery Ward & Co.*, 217 N.C. 368, 8 S.E.2d 199 (1940); see also Note, *The Proprietor-Invitee Relationship and the Superior Knowledge Requirement*, 1960 DUKE L.J. 469, 473-76.

72. Some cases have "broke[n] with tradition and held defendant liable to an invitee in spite of his knowledge of the danger, when the danger was great enough and could have been feasibly remedied." 5 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 27.13, at 251 (1986); see, e.g., *Taylor v. Tolbert Enter., Inc.*, 439 So. 2d 991 (Fla. Dist. Ct. App. 1983); *Pittman v. Volusia County*, 380 So. 2d 1192 (Fla. Dist. Ct. App. 1980); *Dean v. Safeway Stores*, 300 S.W.2d 431 (Mo. 1957); *Petera v. Railway Exch. Bldg.*, 42 S.W.2d 947 (Mo. Ct. App. 1931).

73. RESTATEMENT OF TORTS § 340 (1934).

on the reach of the immunity by adding the qualifying phrase, "unless the possessor should anticipate the harm despite such knowledge or obviousness."⁷⁴ Commentators generally agree that the Restatement (Second) of Torts position more accurately reflects the fundamental principles of modern negligence law.⁷⁵ Harper and James criticize the first Restatement view as "a highly doubtful one both on principle and authority." James also declares that:

The *Restatement* view is wrong in policy. The law has never freed land-ownership or possession from all restrictions or obligations imposed in the societal interest. . . . The gist of the matter is unreasonable probability of harm in fact. And when that is great enough in spite of full disclosure, it is carrying the quasi-sovereignty of the landowner pretty far to let him ignore it to the risk of life and limb⁷⁶.

With this background in mind, how should the holdings of *Cox* and *Patton* be characterized? Did the Missouri Supreme Court completely abandon the view of unqualified immunity in favor of a qualified immunity for landowners? If so, how is this immunity now qualified? It is well settled that Missouri had strongly adhered to the unqualified traditional rule prior to 1984⁷⁷ when the Missouri Supreme Court adopted the doctrine of comparative fault in *Gustafson v. Benda*.⁷⁸ There is abundant support for the proposition that a landowner or occupier had no liability for injuries incurred by an entrant encountering a known or obvious danger on the land.⁷⁹

74. RESTATEMENT (SECOND) OF TORTS § 343A (1965) provides:

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

75. Keeton says that "the plaintiff's knowledge of a particular danger should simply be an important factor in passing upon several of the commonly accepted ultimate issues in a negligence case, and . . . this circumstance alone should not as a matter of law settle any one of them for all situations and relationships." Keeton, *Assumption of Risk and the Landowner*, 20 TEX. L. REV. 562, 563 (1942).

76. James, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 YALE L.J. 605, 628 (1954).

77. See *infra* note 79.

78. 661 S.W.2d 11 (Mo. 1983) (en banc).

79. See, e.g., *Bohler v. National Food Stores, Inc.*, 425 S.W.2d 956 (Mo. 1968); *Sellens v. Christman*, 418 S.W.2d 6 (Mo. 1967); *Brown v. Kroger Co.*, 344 S.W.2d 80 (Mo. 1961); *Harbourn v. Katz Drug Co.*, 318 S.W.2d 226 (Mo. 1958); *Howard v. Johnoff Restaurant Co.*, 312 S.W.2d 55 (Mo. 1958); *Stafford v. Fred Wolferman, Inc.*, 307 S.W.2d 468 (Mo. 1957).

The jury instruction for an injured invitee, Missouri Approved Instruction [hereinafter MAI] 22.03,⁸⁰ reflected this traditional view and perhaps even went a step further with it. MAI 22.03 instructed the jury that they must find that "plaintiff did not know and by using ordinary care, could not have known of this [dangerous] condition"⁸¹ in order for the plaintiff to prevail. This instruction could be construed as going even a step beyond the conservative first Restatement view which granted immunity if the danger was known or obvious.⁸² MAI 22.03 states that either the plaintiff did not know or "by using ordinary care *could* not have known."⁸³ This appears to impose an affirmative duty on the invitee to inspect the land for dangerous conditions. If so, then MAI 22.03 does indeed go a step beyond the traditional view and further expand the occupier's liability.

With the adoption of comparative fault principles and the rejection of antiquated contributory negligence principles in *Gustafson*, it was inevitable that the issue of revising MAI 22.03 would arise eventually. *Cox v. J.C. Penney Co., Inc.*⁸⁴ is the case confronting this issue. The Missouri Supreme Court granted transfer to "consider the effect of *Gustafson v. Benda* on MAI 22.03."⁸⁵ The plaintiff appealed a jury verdict for the defendant on the ground that MAI 22.03 did not accurately reflect the principles of comparative fault adopted in *Gustafson*.⁸⁶ At trial, the plaintiff had offered a revised version of MAI 22.03 which eliminated the requirement that "plaintiff did not know and by using ordinary care could not have known of this condition."⁸⁷ The trial court rejected the revised instruction.⁸⁸ The

80. The jury instruction provides:

[1965 New] Verdict Directing - Invitee Injured

Your verdict must be for plaintiff if you believe:

First, there was (here describe substance on floor which caused the fall) on the floor of defendant's store and as a result the floor was not reasonably safe for customers, and

Second, plaintiff did not know and by using ordinary care could not have known of this condition, and

Third, defendant knew or by using ordinary care could have known of this condition, and

Fourth, defendant failed to use ordinary care to [remove it] [barricade it] [warn of it], and

Fifth, as a direct result of such failure, plaintiff was injured.

See notes 82-86 and accompanying text for a discussion of the modification of MAI 22.03 by *Cox v. J.C. Penney Co., Inc.*, 741 S.W.2d 28 (Mo. 1987) (en banc).

81. *Id.*

82. *See supra* note 73 and accompanying text.

83. *See supra* note 80 (emphasis added).

84. 741 S.W.2d 28 (Mo. 1987) (en banc).

85. *Id.*

86. *Id.* at 29.

87. *Id.* at 28.

88. *Id.* at 30. Judge Donnelley dissented and expressed the opinion that the revision of MAI 22.03 in response to comparative fault was not the real issue in

Cox court stated that “[t]he requirement of MAI 22.03, paragraph second, that a plaintiff ‘not know and by using ordinary care could not have known’ of an unsafe condition is a vestige of the contributory fault system *Gustafson* sought to end in the name of ‘fairness and justice.’”⁸⁹ The court explained its holding and subsequent modification of MAI 22.03 by stating:

Under comparative fault, we leave to juries the responsibility to assess the relative fault of the parties in tort actions. Respondent’s duty argument fails in this context because it pretermits jury assessment of respondent’s fault for failure to maintain the premises in a reasonably safe condition. In this regard, *Gustafson* modifies the common law relationship between business inviters and their invitees. Paragraph Second of [MAI 22.03] is inimical to the concept of comparative fault adopted in *Gustafson*.⁹⁰

Patton followed quickly on the heels of the *Cox* decision, being decided seven weeks later.⁹¹ The defendant contended that “the substantive law controlling business invitee cases requires the plaintiff to prove she was without knowledge of the condition.”⁹² This assertion was premised upon the second paragraph in MAI 22.03, which requires that the jury find that the plaintiff did not and could not have known of the dangerous condition in order to prevail.⁹³ The court rejected the defendant’s contention.⁹⁴ This is not surprising in light of the recent *Cox* decision.

Perhaps the *Cox* court’s modification of MAI 22.03 went a step beyond simply incorporating principles of comparative fault into the common law relationship between business inviters and their invitees. The court declared that a plaintiff’s “failure to exercise ordinary care in discovering an obvious danger is contributory negligence.”⁹⁵ Since *Gustafson* abolished contributory negligence as a bar to plaintiffs’ recovery and supplanted it with comparative fault principles, the court reasoned that this part of the jury instruction must be eliminated.⁹⁶ *Patton* reaffirmed this result in stating that “the plaintiff no longer bears the burden to prove she was without knowledge

the case. He identified the real issue as being the “idea that the occupier is liable only where his knowledge of the danger was superior to that of the customer” *Id.* at 31 (quoting Keeton, *Personal Injuries Resulting from Open and Obvious Conditions*, 100 U. PA. L. REV. 629, 634 (1952)). This was an issue independent of the adoption of comparative fault principles.

89. *Id.* at 30.

90. *Id.*

91. *Cox* was decided on December 15, 1987, and *Patton* was decided on February 2, 1988. The Missouri Supreme Court decided *Patton* on December 13, 1988.

92. *Patton*, 762 S.W.2d at 39.

93. *See supra* note 80.

94. *Patton*, 762 S.W.2d at 40.

95. *Cox*, 741 S.W.2d at 29-30.

96. *Id.* at 30.

of the dangerous condition.”⁹⁷ The shift of this burden, however, also has implications for the duty analysis in negligence cases such as these. It is a fundamental principle of negligence law that the plaintiff must establish the existence of a duty before she can prevail in a cause of action for negligence.⁹⁸ Prior to *Cox*, it was also undoubtedly a fundamental principle of negligence law that a landowner had no duty to warn of open and obvious dangers.⁹⁹ Modification of the jury instruction here, however, means that a plaintiff no longer must show the existence of a duty before issues of comparative fault are raised. The jury instruction shifts the burden to the landowner defendant to show that the danger was so open and obvious that the defendant had no duty to warn. The plaintiff no longer bears the initial burden of establishing a duty to warn.¹⁰⁰

Besides the burden shift, a further implication of the modification of the jury instruction is that it is now possible for a plaintiff to recover from the landowner despite the obviousness of the dangerous condition. Prior to *Cox*, the plaintiff would face the initial threshold question of “Was the dangerous condition open and obvious?” If answered in the affirmative, the inquiry ended there. The plaintiff was unable to prevail on his claim. But now, an affirmative response to such an inquiry no longer presents a complete bar to the plaintiff’s recovery. Rather, the obviousness of the danger may merely reduce the amount of the plaintiff’s recovery by allocating a percentage of fault to the plaintiff and not bar his recovery altogether. This result is consistent with the abrogation of contributory negligence principles by the adoption of comparative fault principles. Barring the plaintiff’s recovery altogether, regardless of the extent of the plaintiff’s negligence, is inconsistent with the underlying principles of tort law, compensation and deterrence.

Perhaps the combined effect of *Cox* and *Patton* indicates a gradual erosion of the land owner’s sovereignty. Prior to *Cox*, MAI 22.03 appeared to place an affirmative duty on the invitee to inspect the premises for dangers. This was a step beyond the traditional rule which required the entrant to be aware of obvious dangers but not search for hidden dangers. The *Cox* court eliminated this provision of the jury instruction and stated that the obviousness of the danger was merely one factor to be considered when the analyzing the invitee’s comparative fault.¹⁰¹ Now, the entrant onto

97. *Patton*, 762 S.W.2d at 40.

98. “[W]hen negligence began to take form as a separate basis of tort liability, the courts developed the idea of duty, as a matter of some specific relationship between the plaintiff and the defendant, without which there could be no liability.” PROSSER & KEETON, *supra* note 20, § 53, at 357.

99. *See supra* note 79.

100. *Patton*, 762 S.W.2d at 40.

101. *Cox*, 741 S.W.2d at 30. Indeed, the Eastern District Court of Appeals in *Patton* appeared to make an even more dramatic departure from the common law view by stating that “warning of the danger or the fact that the danger is

the land is relieved of the duty to inspect for dangerous conditions. The entrant injured by such a condition no longer bears the burden of establishing that the danger was not obvious and therefore required the landowner to warn.

The *Cox* and *Patton* decisions reflect two current trends in tort law, in Missouri and elsewhere. First, the increasing tendency is to create more jury issues and have fewer issues decided by the court as a matter of law.¹⁰² Second, while Missouri has indicated no intention of abandoning the traditional classification scheme in favor of a duty of reasonable care in all the circumstances,¹⁰³ the state has shown a receptiveness to expanding

equally within the knowledge of the invitee no longer relieves the occupier of liability." *Patton v. May Dep't Stores Co.*, No. 52943, slip op. at 2 (Mo. Ct. App., Feb. 2, 1988). This appears to impose an affirmative duty on the landowner to remedy all dangerous conditions on his land since warning of them will no longer suffice. This suggests that the landowner bears the dual duties of determining the existence of all dangerous conditions on his land then remedying all such conditions.

102. See Keeton, *Personal Injuries Resulting from Open and Obvious Conditions*, 100 U. PA. L. REV. 629, 641-42 (1952), for a discussion of the impracticability of leaving the issues to the jury:

There may be justification for a limitation of the defendant's duty or obligation because of the impracticability of passing upon the very close questions of negligence and contributory negligence that are involved when accidents result from obvious dangers. There is hardly any condition from which an accident occurs that could not have been made safer by a different method of construction. It is easy, therefore, for the plaintiff to argue that negligence was involved in the method of construction or the manner in which the property is used. Perhaps in most instances where the plaintiff encounters a known danger the fact that the danger is obvious makes it clear the defendant is not negligent; and in many other instances the rightness of his conduct is extremely doubtful. There is basis for concluding that, because of the known propensities of the jury, the issue of the defendant's negligence should not be tried and the plaintiff in all cases should be denied relief.

Id. This reluctance to send the issue to the jury may account for a court's decision to characterize the issue as one of duty or assumed risk rather than contributory negligence. This approach has been criticized:

This is incompatible with good theory if in fact there was a duty to make the premises reasonably safe for the customer and the shopkeeper negligently failed to do so. In such a case the victim's conduct was simply contributing. It seems a contradiction in terms to say the shopkeeper owed the plaintiff no duty. Nevertheless some courts prefer to express their decision in terms of no duty and assumption of risk. It is believed they do so in order to escape criticism for taking the contributory negligence issue away from the jury and thus invading the jury's function. Doctrinal semanticism serves their psychological reaction.

Green, *Assumed Risk as a Defense*, 22 LA. L. REV. 77, 85 (1961).

103. And the "traditional entrant classification scheme is well entrenched in the great majority of jurisdictions. . . ." PROSSER, PROSSER AND KEETON ON TORTS § 58, at 393 (1984). *But see* *Cunningham v. Hayes*, 463 S.W.2d 555, 559 (Mo.

the landowner or occupier's liability for injuries to entrants on the premises.¹⁰⁴

Courts have been willing to depart from the traditional rules of premises liability when such rules proved unable to promote the objectives of modern tort theory. The *Patton* and *Cox* courts made such a departure in holding that the obviousness of the danger is merely one factor in the determination of whether a landowner or occupier is negligent. This approach allows the outcome to depend on fundamental principles of negligence rather than rigid rules of decision. Further interpretation of these decisions will reveal whether this holding proves too much by placing the owner or occupier in the position of insurer.

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Ct. App. 1971) (the court indicated that it will freely transcend the common law categories when justice requires it).

104. For example, Missouri courts have shown a willingness to expand the landowner's or occupier's liability for criminal acts of third parties. See *Faheen v. City Parking Corp.*, 734 S.W.2d 270 (Mo. Ct. App. 1987).

