



Center for Justice & Democracy's
Public Policy Clinic at
New York Law School

Student Contributor: Bryan Assael

FAQ: TRESPASSER LIABILITY

In 2012, the American Law Institute, in the Restatement (Third) of Torts,¹ recommended a change in the common law duty owed by landowners to people on their property. The common law is generally more beneficial to corporate landowners while the Restatement favors individuals. In response to the Restatement, the American Legislative Exchange Council (ALEC) created model state legislation to codify the common law, ensuring the Restatement would have no influence.²

This FAQ discusses the common law in this area, what the Restatement changed and why and the consequences for victims.

What is trespasser liability?

This area of law relates to landowners and exactly what type of duty they owe to individuals who are present on their property, and specifically, if they are injured on their property. Trespasser liability is important because it dictates what sort of allowances landowners are afforded and what protections landowners must put in place for the safety of others on their property. The standard landowners must follow to escape possible liability for injuries to others on their property may differ depending on the state in which they are located.

What duties do landowners have to protect people on their land?

This answer depends entirely upon what standard of duty an individual state follows. The main distinction is the difference between the standard set out in the common law

¹ The American Law Institute publishes various Restatements which are “addressed to courts and others applying existing law.” American Law Institute, “Projects,” <http://www.ali.org/index.cfm?fuseaction=projects.main>. The Restatements themselves are written by a “diverse group of practitioners, judges, and scholars.” *Ibid*. The aim of the Restatements is to provide “clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might plausibly be stated by a court.” *Ibid*. It is important to note, however, that the Restatements, while relied on by many courts and highly influential, are not binding in any fashion. Judges, attorneys and lawmakers use the Restatements in order to determine the legal standards throughout the nation. However, unless a Restatement is adapted by state legislation, Restatements only remain influential but not binding.

² See, <http://www.alec.org/model-legislation/trespasser-responsibility-act/>.

versus the more recently promulgated Restatement (Third) of Torts: Liability for Physical and Emotional Harm.

What is the common law duty of care owed to those who venture onto private property?

Historically, common law determines liability based on how an entrant to another person's property is classified (as opposed to the specific actions of a landowner). There are three separate and distinct entrant categories:³ invitees, licensees or trespassers. Generally, a person's classification is the key component in determining the duties owed to an individual.

"*Invitees* are individuals who have been invited onto the land by the landowner, and as such, landowners owe invitees a duty of reasonable care, which includes warning them of conditions on the land which may cause harm."⁴ *Licensees* are "entrants who are 'privileged to enter or remain on land only by virtue of the possessor's consent,' and as such, landowners must inform licensees of any dangers of which they are aware and which they would 'expect the licensee not to discover or realize.'"⁵ After any warning concerning the property is given to a licensee, landowners are generally no longer liable for injuries sustained by entrants on the landowner's land.

Finally, traditional common law provides little or no duty to trespassers on a landowner's land. "*Trespassers* are defined as those who 'enter or remain on land in the possession of another without the possessor's consent or other legal justification.'"⁶ For the most part, the only duty landowner's must observe is to avoid "harming trespassers through the landowner's willful or wanton misconduct."⁷ Willful or wanton misconduct is defined as falling on the scale of wrongdoing somewhere between the intentional infliction of harm and gross negligence.⁸

What changed under the Restatement (Third) of Torts?

The updated Restatement [Restatement (Third) of Torts: Phys. & Emot. Harm § 51 (2012)] published by the American Law Institute (ALI), removes the three strict "entrant" categories and says landowners should have an integrated and general duty of reasonable care. This duty of care applies to all visitors on a property owner's land, other than "flagrant" trespassers.⁹

³ Ann Fievet, "Breaking the Law and Getting Paid for It: How the Third Restatement of Torts Synthesizes Two Distinct Standards of Care Owed to Trespassers," 44 *Wake Forest L. Rev.* 239, 241 (2009).

⁴ *Ibid* (emphasis added).

⁵ *Ibid*.

⁶ *Ibid* (emphasis added).

⁷ *Ibid*.

⁸ Glen Weissenberger et al., *The Law of Premises Liability* § 2.3 (3d ed. 2001).

⁹ RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 51 (2012).

This general, unitary duty of care imposes a duty of reasonable care regarding risks created by the landowners, as well as an affirmative duty to warn of natural conditions.¹⁰ It is also important to note that the term “flagrant trespasser” was purposely left undefined, so that a legislature adopting the Restatement (Third) may implement its own definition based on its own values and historical practices.¹¹

Why was this Restatement change needed?

The need for this change was well summarized in a recent dissenting opinion by Mississippi Supreme Court Justice Kitchens:

Hypothetically, two young men drown in an apartment pool lacking standard, nationally recognized safety equipment and practices. Their drowning reasonably could have been foreseen by a pool owner lacking such equipment and not adhering to such practices. One of the young men lived in the apartment complex in which the pool was located. The other was visiting a relative who was a resident of the complex, but who did not accompany him to the pool. Both suffer the same foreseeable injury, and both suffer such injury due to the same lack of reasonable care on the part of the owner. However, due to a strict legal classification of entrants onto a landowner’s property, the estate and wrongful death beneficiaries of the youth who lived in the complex are permitted to sue the owner of the property, while those of the visiting youth are not, regardless of whether the pool was negligently maintained. This is the nonsensical effect of a strict devotion to a system of tort liability based on the classifications of invitees, licensees, and trespassers.¹²

More specifically, according to ALI, there were several reasons for the change:

- Uncertain land boundaries cause differing and often uncertain results.¹³ Rather than allow confusing and often differing interpretations of an individual’s classification, the ALI felt that a bright-line standard was more beneficial and productive. This way, the outcomes of legal actions may be more predictable and uniform. It is also important for individuals to understand what sort of laws are in place in order to protect themselves from injury if there is no hope of recovery.
- The authors believed that “the subcategories and exceptions that the courts had developed to the general duty rules for trespassers and for licensees produced an overall result closer to the reasonable-care duty imposed” in the updated restatements, including for flagrant trespassers.¹⁴ The common law already provides many exceptions including: intentional harms to trespassers on behalf of landowners; harms to trespassing children caused by highly dangerous artificial

¹⁰ *Ibid.*

¹¹ RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 52 (2012).

¹² *Handy v. Nejam*, 111 So.3d 610 (Miss. 2013) (Kitchens, J., dissenting).

¹³ RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 51 (2012).

¹⁴ *Ibid.*

conditions, or attractive nuisances; and harms to constant trespassers in a limited area caused by highly dangerous activities or highly dangerous artificial conditions. Looking into the intricate details of common law, the authors felt the law was already something closer to an implementation of a general duty rather than no general duty to entrants.

- ALI authors believed that “trespassers impose no great burden of precaution.”¹⁵ As landowners and possessors were already required to take reasonable care on behalf of invitees, the ALI authors reasoned that “exercising reasonable care on behalf of trespassers imposed no additional burden of precaution on land possessors.”¹⁶

How have the states responded to the Restatement (Third) of Torts: Liability for Physical and Emotional Harm?

First, it should be noted that many states had already,

... established a unitary duty of reasonable care by landowners and had totally abolished the distinction between invitees, licensees, and trespassers. ... Today these include Alaska, California, the District of Columbia, Hawaii, Louisiana, Montana, Nevada, New Hampshire, and New York. Several jurisdictions similarly have abolished the distinction between invitees and licensees, including Florida, Illinois, Iowa, Kansas, Maine, Massachusetts, Minnesota, Nebraska, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, Tennessee, West Virginia, Wisconsin, and Wyoming.¹⁷

However, some states have now affirmatively rejected the Restatement change and enacted legislation codifying the common law. States which have codified the common law have generally enacted model legislation written by the American Legislative Exchange Council (ALEC) that primarily benefits influential industries owning a great deal of land.¹⁸

What are some examples of cases where victims have been unable to recover under the common law standard?

¹⁵ RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 51 (2012).

¹⁶ *Ibid.*

¹⁷ *Handy v. Nejam*, 111 So.3d 610 (Miss. 2013)(Kitchens, J., dissenting).

¹⁸ See, Center for Media and Democracy, “Justice Denied: 71 ALEC Bills in 2013 Make It Harder to Hold Corporations Accountable for Causing Injury or Death, July 10, 2013, <http://www.prwatch.org/news/2013/07/12172/justice-denied-71-alec-bills-2013-make-it-harder-hold-corporations-accountable-ca> (“Ten states introduced the ‘Trespasser Responsibility Act,’ which would largely absolve landowners from a responsibility to maintain safe premises, and tends to benefit large landowners like railroads, utility companies, and big agriculture. These large corporations would be absolved from their duty to act responsibly, and would be immune if a person accidentally wanders onto their property and are injured by poorly-maintained electrical boxes, dangerous chemicals or farm implements.”)

Justin Reeves. On July 26, 2006, Justin Reeves was driving an ATV near Arrowhead R.V. Resort in Wellton, Arizona. Reeves was traveling home from a nearby farm and decided to take a shortcut.¹⁹ He had never been on the particular road he was traveling but believed the road was public since it was paved and double-striped. Later information would reveal that this road had been used by other members of the public as well. There was no signage to indicate that the road was anything but open and available for public use. Reeves was an experienced ATV driver and would often utilize other routes around or near the same area when traveling home from work.

Further up the roadway, an unforeseen barrier had been erected. The barricade consisted of two chains connected by four metal posts, with the chains lying across the roadway. Reeves did not see any chains, nor were there any signs communicating that the property belonged to Arrowhead. There were also no signs stating that the roadway was blocked. By the time Reeves finally saw the barricade, it was too late to react. He was knocked off his ATV, fell to the ground, suffered severe bodily injuries and was unable to see or breathe. At the hospital, Reeves was diagnosed with a fracture to his third lumbar, internal organ damage, internal bleeding and a ruptured stomach wall.

Reeves brought an action against Arrowhead R.V. Resort, seeking damages for his injuries. The trial court characterized Reeves as a trespasser and threw out the case on summary judgment.²⁰ If Reeves had been in a state that had adopted the Restatement (Third), his case would likely have gone to trial.

Kelly Smith. On July 22, 2000, Kelly Smith visited a friend's apartment in a four-story building in Minot, North Dakota. Smith left for a few hours to see a relative and was later invited to return to his friend's apartment. He never arrived; his body was discovered lying in an alley beneath the fire escape on the east side of the friend's apartment building.

Smith's widow brought a wrongful death action against the building's owner.²¹ During trial, a medical expert testified that the cause of Smith's death was "a fall from a balcony of a fire escape." Furthermore, a Minot Police Department investigator testified that attachment bolts were missing from the fire escape, which allowed it to swing away from the wall, causing Smith to fall to his death.

Although Smith was an invited guest of a legal tenant on the property, the North Dakota Supreme Court deemed Smith a trespasser due to a prohibition from using fire escapes to access apartments. Were Smith not found to be a trespasser, it's very likely that his widow would have recovered damages.

¹⁹ The factual information was found in Appellant's Opening Brief to the Arizona Court of Appeals in *Reeves v. Arrowhead R.V. Resort*, 2011 WL 4379193 (Ariz.App. Div. 1).

²⁰ On appeal, the trial court's decision was affirmed. *Reeves v. Arrowhead R.V. Resort*, 2012 WL 3020074 (Ariz Ct. App. July 24, 2012).

²¹ *Smith ex rel. Smith v. Kulig*, 696 N.W.2d 521 (N.D. 2005).