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Peterson v. Balach, Obvious Dangers, and the Duty of Possessors of Land in Minnesota

Michael K. Steenson

Mitchell Hamline School of Law, mike.steenson@mitchellhamline.edu

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Peterson v. Balach, Obvious Dangers, and the Duty of Possessors of Land in Minnesota

Abstract
The purpose of this article is to analyze Minnesota landowners law, with particular emphasis on the impact of Peterson v. Balach. Following a short history of Minnesota law governing possessors' duties, including a discussion of pre-Peterson v. Balach and Adee v. Evanson cases, the article considers the question of why the courts, post-Peterson v. Balach/Adee v. Evanson, regularly return to pre-Peterson forms to resolve possessor liability issues, particularly in cases involving obvious dangers, and whether the phenomenon is a result of a wrong turn or is a reflection of a conscious policy choice intended to effectively repudiate the progressive position the court took in Peterson. After a comparison of the cases with products liability law concerning open and obvious dangers, the article considers more broadly the appropriate place of duty in tort law and how no-duty rulings affect the judge-jury relationship. The broader issue concerns the appropriate place of duty in tort law and how and when duty, and its sometimes alter ego, primary assumption of risk, should be used as a limitation on liability. The next section considers a format for avoiding the impact of the obvious danger rule. The focus there is on a set of cases in which the evidence established alternative approaches the defendants in those cases could have taken to avoid injury to the plaintiff, notwithstanding the obviousness of the danger. The final section raises questions concerning jury instructions and, whether in light of the court's apparent return to pre-Peterson v. Balach standards, it is either appropriate or necessary to instruct juries according to the standards the appellate courts are actually applying in cases involving the duties of possessors of land.

Keywords
Minnesota law, torts, premises liability, notice, obvious dangers, hazards, products liability, open and obvious dangers

Disciplines
Consumer Protection Law | Property Law and Real Estate | Torts
PETE RSON V. BALACH, OBVIOUS DANGERS, AND THE
DUTY OF POSSESSORS OF LAND IN MINNESOTA

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I. INTRODUCTION

Entrant went to Owner’s pharmacy to fill a prescription late on a January afternoon. There had been a heavy snowfall earlier in the day. Owner cleared the sidewalk outside the pharmacy as soon as it stopped snowing, but as the weather turned colder, a thin

† Margaret H. and James E. Kelley Professor of Tort Law, William Mitchell College of Law.

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coating of ice glazed over the sidewalk. Owner was busy inside the store and did not go outside to salt or otherwise clear the sidewalk.

Entrant parked her car and walked along the sidewalk toward the pharmacy entrance. She was wearing high-heeled leather-soled boots. She thought the sidewalk might be slippery, but continued toward the pharmacy entrance because there was no alternative way to get there. She slipped and fell on the sidewalk and sustained serious injuries.

Entrant sues Owner in negligence. Owner moves for summary judgment on the basis that because the danger was open and obvious, Owner owed no duty to Entrant, or, if a duty was owed to Entrant, Owner did not breach that duty as a matter of law or, if the duty was breached, that Entrant assumed the risk in the primary sense. Any of those propositions might receive support under current Minnesota law. This article addresses the approach of the courts in Minnesota to cases involving the liability of possessors of land.

Prior to its 1972 decision in Peterson v. Balach,1 the Minnesota Supreme Court adhered to the standard common law classification scheme in which the duty owed by an owner or possessor of land depended on the status of the entrant as a trespasser, licensee, or invitee. The supreme court had previously acknowledged the confusion created by the classification scheme, and in Peterson it reformed landowner law by abolishing the distinctions between licensees and invitees in favor of a general duty of reasonable care for landowners and entrants, while retaining the trespasser category.

The supreme court seemed to cement Peterson in its 1979 decision Adee v. Evanson,2 but other decisions have cast doubt on Peterson’s continued vitality. The reason is that there are numerous decisions that continue to rely on pre-Peterson cases in resolving cases involving landowner liability, very often disposing of cases on summary judgment, or, post-verdict, based on the obviousness of the danger presented by premises hazards, results that the court’s decisions in Peterson v. Balach and Adee v. Evanson seemed to avoid. One of the touchstones for this seemingly atavistic treatment was the court’s decision in Peterson v. W.T. Rawleigh Co.3 The 1966 opinion seemed, at the time, to liberalize Minnesota law by

1. 294 Minn. 161, 199 N.W.2d 639 (1972).
2. 281 N.W.2d 177 (Minn. 1979).
3. 274 Minn. 495, 144 N.W.2d 555 (1966).
adopting section 343A of the Restatement (Second) of Torts, a key section of the Restatement stating that a possessor of land is not liable for activities or conditions presenting dangers that are obvious or known to the invitee, unless the possessor should anticipate injury notwithstanding that knowledge or obviousness. In *Adee*, the supreme court clearly stated that it would be inappropriate to instruct a jury according to section 343A. Nonetheless, courts have continued to police landowner cases just as they did prior to *Peterson v. Balach* by using pre-*Peterson* forms, including section 343A, along with primary assumption of risk, to bar recovery as a matter of law in injury cases. *Adee v. Evanson* is cited only to reinforce the use of section 343A, and not as a repudiation of the limitations of that section. The emphasis on those cases is frequently on obviousness of a danger, which is utilized to bar recovery, sometimes even in the face of a jury verdict finding liability under the *Peterson* standard. Obviousness of a danger becomes the basis for almost automatic assertions that there is no duty on the part of the landowner running to the injured person or that the injured person has assumed the risk in the primary sense, or that the landowner is not negligent as a matter of law. Those assertions frequently bear fruit.

The purpose of this article is to analyze Minnesota landowners law, with particular emphasis on the impact of *Peterson v. Balach*. Following a short history of Minnesota law governing possessors’ duties, including a discussion of pre-*Peterson v. Balach* and *Adee v. Evanson* cases, the article considers the question of why the courts, post-*Peterson v. Balach/Adee v. Evanson*, regularly return to pre-*Peterson* forms to resolve possessor liability issues, particularly in cases involving obvious dangers, and whether the phenomenon is a result of a wrong turn or is a reflection of a conscious policy choice intended to effectively repudiate the progressive position the court took in *Peterson*. After a comparison of the cases with products liability law concerning open and obvious dangers, the article considers more broadly the appropriate place of duty in tort law and how no-duty rulings affect the judge-jury relationship. The

5. 281 N.W.2d at 180.
6. See infra Part II.
7. See infra Part III.
8. See infra Part IV.
9. See infra Part V.
broader issue concerns the appropriate place of duty in tort law and how and when duty, and its sometimes alter ego, primary assumption of risk, should be used as a limitation on liability.

The next section considers a format for avoiding the impact of the obvious danger rule. The focus there is on a set of cases in which the evidence established alternative approaches the defendants in those cases could have taken to avoid injury to the plaintiff, notwithstanding the obviousness of the danger. The final section raises questions concerning jury instructions and, whether in light of the court's apparent return to pre-Peterson v. Balach standards, it is either appropriate or necessary to instruct juries according to the standards the appellate courts are actually applying in cases involving the duties of possessors of land.

II. A SHORT HISTORY—PRE-PETERSON V. BALACH

Before Peterson v. Balach, the Minnesota Supreme Court followed the standard common law classification scheme in which the duty owed by a possessor of land to an entrant depended on the entrant's status as a trespasser, licensee, or invitee. The supreme court has typically followed the principles set out in the First and Second Restatements of Torts in rounding out premises liability law, although as early as in Roadman v. C.E. Johnson Motor Sales in 1941 the court noted that there is "much conflict and confusion" in the classification scheme. Notwithstanding that confusion, the court in Roadman thought that the cases reflected a general principle that the greater the harm, the greater the precautions that would have to be taken to avoid it.

In general, a possessor of land does not owe a duty to a trespasser, but there are exceptions. If the possessor knows or should know that the trespasser is on his property, the supreme court has stated that the possessor owes a narrowly defined duty to use reasonable care for the protection of the trespasser. If there is

10. See infra Part VI.
12. 210 Minn. 59, 64, 297 N.W. 166, 169 (1941), overruled in part by Sandstrom, 267 Minn. at 407, 127 N.W.2d at 173.
13. Id. at 64, 297 N.W. at 169.
14. See, e.g., Doe v. Brainerd Int'l Raceway, Inc., 533 N.W.2d 617, 621 (Minn. 1995); Sirek ex rel. Beaumaster v. State, Dep't of Natural Res., 496 N.W.2d 807, 809 (Minn. 1993); Hanson v. Bailey, 249 Minn. 495, 500, 83 N.W.2d 292, 257 (1957).
15. Doe, 533 N.W.2d at 621. The court cited both Hanson, 249 Minn. at 500,
frequent trespass on a limited area of his property, the possessor has a duty to warn the trespassers of dangers created by artificial conditions on the land. The court has also held that the "landowner's duty of reasonable care does not extend to warn or protect against risks which the trespasser knew or, from the facts, should have known." The supreme court has adopted section 339 of the Restatement (Second) of Torts as the standard for determining the duty owed to child trespassers. The court has strictly construed the requirement that the possessor must know or have reason to know that children are likely to trespass on his property,

83 N.W.2d at 257 and Restatement (Second) of Torts section 336 (1965) for that proposition. There are differences between the court's statement of the rule and the rule as stated in section 336, however. Section 336 requires proof that the possessor "knows or has reason to know of the presence of another who is trespassing on the land," not "knows or should know." Id. The "should know" standard implies a duty to investigate. The "has reason to know" standard turns on the facts that the possessor already possesses. This difference is critical. A second difference is that the court in Doe said that the duty was "narrowly defined." Doe, 533 N.W.2d at 621. Section 336 appears to contain no such limitation.

16. Hanson, 249 Minn. at 500, 83 N.W.2d at 257; RESTATEMENT (SECOND) OF TORTS § 335 (1965).
17. Doe, 533 N.W.2d at 621.
18. RESTATEMENT (SECOND) OF TORTS § 339 (1965). Section 339 reads as follows:
A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if
(a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
(b) the condition is one which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
(c) the children because of their youth do not discover the condition or realize the risk involved in meddling with it or in coming within the area made dangerous by it, and
(d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
(e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.
19. Croaker ex rel. Croaker v. Mackenhausen, 592 N.W.2d 857, 860 (Minn. 1999). The court has held that all five elements must be established to impose liability on the possessor. Id.
including the requirement that the possessor must know or have reason to know that the trespass is occurring where the dangerous condition exists.\textsuperscript{20}

The supreme court has also followed the Restatement standards for determining whether an entrant is a licensee or invitee. A gratuitous licensee, defined as "any licensee other than a business visitor," includes "[a] licensee whose presence upon the land is solely for the licensee's own purposes, in which the possessor has no interest, either business or social, and to whom the privilege of entering is extended as a mere favor by express consent or by general or local custom."\textsuperscript{21} At one point, the court took the position that a person entering another's property for his own purpose, but with the possessor's consent, took the property as he found it.\textsuperscript{22} The possessor was not required to conduct his activities with the entrant's safety in mind. The exception was that the possessor could not inflict willful, wanton, or intentional injury on the entrant.\textsuperscript{23}

In \textit{Roadman v. C.E. Johnson Motor Sales},\textsuperscript{24} the court adopted section 341 of the Restatement (First) of Torts, covering the liability of a possessor of land for injuries caused by his activities on his land:

A possessor of land is subject to liability to licensees, whether business visitors or gratuitous licensees, for bodily harm caused to them by his failure to carry on his activities with reasonable care for their safety, unless the licensees know or from facts known to them, should know of the possessor's activities and of the risk involved therein.

In \textit{Sandstrom v. AAD Temple Building Association},\textsuperscript{26} the court noted that section 342 of the Restatement tempered that rule in providing that a possessor is subject to liability to a gratuitous licensee for bodily harm caused by a natural or artificial condition on the possessor's land if the possessor:

\begin{itemize}
  \item[20.] \textit{Id.} at 860–61.
  \item[21.] \textit{Sandstrom v. AAD Temple Bldg. Ass'n, 267 Minn. 407, 408, 127 N.W.2d 173, 175 (1964) (quoting \textit{RESTATEMENT (FIRST) OF TORTS}§ 331, cmt. a1 (1937)).}
  \item[22.] \textit{See Sandstrom, 267 Minn. at 409, 127 N.W.2d at 175.}
  \item[23.] \textit{Id.}
  \item[24.] 210 Minn. 59, 297 N.W.166 (1941), \textit{overruled in part by Sandstrom v. AAD Temple Bldg. Ass'n, 267 Minn. 407, 127 N.W.2d 173 (1964).}
  \item[25.] \textit{RESTATEMENT (FIRST) OF TORTS}§ 341 (1937).
  \item[26.] \textit{Sandstrom, 267 Minn. at 409, 127 N.W.2d at 175.}
\end{itemize}
(a) knows of the condition and realizes that it involves an unreasonable risk to them and has reason to believe that they will not discover the condition or realize the risk, and

(b) invites or permits them to enter or remain upon the land, without exercising reasonable care

(i) to make the condition reasonably safe, or

(ii) to warn them of the condition and the risk involved therein.  

The court in Sandstrom noted that it had broadened the possessor's liability by adopting the principles in section 342 of the Restatement, but nonetheless cautioned that "[i]t is still the recognized and prevailing view of American judicial opinion that the licensee assumes the risk of defective conditions on property unknown to the possessor and at most is entitled to only a warning of known hidden defects."  

Section 342 of the Restatement (Second) of Torts, also approved by the supreme court, varies only slightly:

A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,

(a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and

(b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and

(c) the licensees do not know or have reason to know of the condition and the risk involved.  

Sandstrom was a 1964 decision. Presaging Peterson v. Balach by eight years, the plaintiff argued that because some of the court's decisions involving the liability of possessors of land turned on the contributory negligence of the plaintiff, all distinctions between the

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27. Restatement (First) of Torts § 342 (1937).
28. Sandstrom, 267 Minn. at 411, 127 N.W.2d at 176.
30. Restatement (Second) of Torts § 342 (1965).
possessor's liability to a business invitee and to a gratuitous licensee had disappeared. The court rejected the argument.\textsuperscript{31} Firefighters have been treated as \textit{sui generis} by the supreme court,\textsuperscript{32} and, accordingly, the duties owed to them were unique. The landowner, not normally expecting the firefighter, was not charged with an obligation to maintain his or her premises in a reasonably safe condition. As a matter of public policy, firefighters take the premises as they find them.\textsuperscript{33} The rule was intended to protect landowners from undue liability and the general public from the increased risk that could otherwise result because of reluctance to call a firefighter for fear of liability.\textsuperscript{34}

The highest duty was owed to invitees. The supreme court adopted section 332 of the Restatement (First) of Torts as the appropriate definition of a business invitee: "A business visitor is a person who is invited or permitted to enter or remain on land in the possession of another for a purpose directly or indirectly connected with business dealings between them."\textsuperscript{35} In \textit{Zuercher v. Northern Jobbing Co.},\textsuperscript{36} the supreme court explained the duty of reasonable care owed by a possessor to an invitee:

The owner or occupant of premises, although not an insurer of their safe condition, is bound to exercise ordinary or reasonable care to keep them in a safe condition for those who come upon them by his express or implied invitation, and such duty of reasonable care encompasses the duty of making the premises safe as to dangerous conditions or activities upon the premises of

\textsuperscript{31} Sandstrom, 267 Minn. at 411, 127 N.W.2d at 176.


\textsuperscript{33} Id. at 397, 45 N.W.2d at 551.

\textsuperscript{34} Id. at 397–98, 45 N.W.2d at 551. In 1982, the legislature abrogated the rule. With amendments, the statute reads as follows:

The common law doctrine known as the fireman's rule shall not operate to deny any peace officer, as defined in section 626.84, subdivision 1, clause (c), or public safety officer, as defined in section 299A.41, subdivision 4, a recovery in any action at law or authorized by statute.

\textsuperscript{35} RESTATEMENT (FIRST) OF TORTS § 332 (1934). The court has noted that there has been criticism of the narrowness of the \textit{Restatement} definition, but that it is the law in Minnesota. See Dishington v. A.W. Kuettel & Sons, Inc., 255 Minn. 325, 329, 96 N.W.2d 684, 688 (1959); Meyer v. Mitchell, 248 Minn. 397, 399–400, 80 N.W.2d 450, 452–53 (1957).

\textsuperscript{36} 243 Minn. 166, 66 N.W.2d 892 (1954).
which he knows, or of which he ought to have knowledge in the exercise of reasonable care. Although the authorities generally agree that an owner or occupant of land who invites another on his premises owes that person an affirmative duty to protect him against dangers of which the landowner knows and those which with reasonable care the landowner ought to discover, there is no duty to warn a business visitor or an invitee against dangers which are known to the latter or which ought to be known and obvious to any person in the exercise of reasonable care.\footnote{37}

The supreme court in \textit{Zuercher} said that an “owner or occupant who holds his land open to others for his own business purposes must possess and exercise a knowledge of the dangerous qualities of the place itself and the appliances provided thereon which is not required of his patrons,” and that “[w]hether defendant has exercised ordinary care is to be ascertained by assuming that he knows those things which a reasonable man at that time and place ought to know even though he is in fact ignorant of them.”\footnote{38} The landowner’s standard of care is the same, whether the business is conducted inside or outside.\footnote{39}

A business visitor, or invitee, the court said in \textit{Behrendt v. Ahlstrand},

is entitled to assume that proper care has been exercised to make the premises safe and is not required to be on the alert for unusual conditions[,] . . . had a right to expect reasonable safety and convenience in the area made available to him[,] . . . [and] was not required to use extraordinary caution, but only such care as persons of reasonable prudence ordinarily exercise under such circumstances.\footnote{40}

In \textit{Sanders v. Boulevard Del., Inc.},\footnote{41} the plaintiff argued that it was error for the trial court to refuse to instruct according to the

\footnotesize{\begin{itemize}
\item \textit{Id.} at 171, 66 N.W.2d at 896–97 (footnotes omitted). \textit{See also} Dempsey v. Jaroszak, 290 Minn. 405, 408, 188 N.W.2d 779, 782 (1971); Sarsfield v. St. Mary’s Hosp., 268 Minn. 366, 364, 129 N.W.2d 306, 308 (1964); Behrendt v. Ahlstrand, 264 Minn. 10, 14, 118 N.W.2d 27, 30 (1962); Hutchison v. Hillside Cemetery Ass’n, 212 Minn. 242, 243, 4 N.W.2d 81, 81 (1942) (holding that there was no duty to warn of dangers of which the invitee knew or which should be known and obvious, however, there was a duty to warn of latent or concealed defects).
\item \textit{Zuercher}, 243 Minn. at 172, 66 N.W.2d at 897.
\item Wolveit v. Gustafson, 275 Minn. 239, 241, 146 N.W.2d 172, 173 (1966).
\item \textit{Behrendt}, 264 Minn. at 15, 118 N.W.2d at 31.
\item 277 Minn. 199, 152 N.W.2d 132 (1967).
\end{itemize}}
standards set out in Behrendt. While the court acknowledged that it might have been preferable for the trial court to have given the requested instruction, it held that there was no prejudicial error in refusing to give it, given the fact that the general charge fairly established the defendant’s duty of care.\textsuperscript{42}

The supreme court addressed the impact of obvious dangers on a landowner’s liability in Peterson v. W.T. Rawleigh Co.,\textsuperscript{43} a 1966 case in which the 69-year-old plaintiff, a distributor for the defendant’s products and therefore a business invitee, was injured while crossing a parking lot maintained by W.T. Rawleigh Company adjacent to its place of business in order to pick up products at the defendant’s loading dock.\textsuperscript{44} A heavy snow had occurred three days earlier and the lot had not been sanded or plowed.\textsuperscript{45} The plaintiff, a business invitee, slipped and fell on the lot, suffering substantial injuries.\textsuperscript{46} The plaintiff obtained a verdict at trial and the defendant appealed from an order denying its motion for judgment n.o.v. or a new trial.\textsuperscript{47}

The issues on appeal were whether the defendant was free from negligence as a matter of law and whether the issue of the plaintiff’s contributory negligence and assumption of risk were matters for jury determination.\textsuperscript{48} The defendant argued that it owed no duty to the plaintiff as a matter of law; arguing that it had a duty only to make its premises reasonably safe for invitees or to give adequate warning to prevent harm from occurring because of conditions on its premises.\textsuperscript{49} It also argued that it could not be liable for injuries caused by obvious defects that the plaintiff comprehended.\textsuperscript{50} The supreme court said that instead the better rule was section 343A(1) of the Restatement (Second) of Torts: “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.”\textsuperscript{51}

\textsuperscript{42} Id. at 202–03, 152 N.W.2d at 135.
\textsuperscript{43} 274 Minn. 495, 144 N.W.2d 555 (1966).
\textsuperscript{44} Id. at 495–96, 144 N.W.2d at 557.
\textsuperscript{45} Id. at 496, 144 N.W.2d at 557.
\textsuperscript{46} Id.
\textsuperscript{47} Id. at 495, 144 N.W.2d at 557.
\textsuperscript{48} Id. at 496, 144 N.W.2d at 557.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} RESTATEMENT (SECOND) OF TORTS § 343A(1) (1965).
The court also said that comment f to section 343A summarized its views on the matter:

There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. This duty may require him to warn the invitee, or to take other reasonable steps to protect him, against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm. . . . Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk. In such cases the fact that the danger is known, or is obvious, is important in determining whether the invitee is to be charged with contributory negligence, or assumption of risk. . . . It is not, however, conclusive in determining the duty of the possessor, or whether he has acted reasonably under the circumstances. 52

The court noted that while there are situations so obviously dangerous that the owner would have no duty to warn an invitee, that rule was inapplicable to the instant case, because the defendant should have foreseen that its elderly distributors would come to the loading dock to pick up products and would have to cross the area between the dock and entryway notwithstanding the slippery conditions. 53 The court concurred in the trial court’s conclusion that “it was the defendant’s duty either to make the area safe for pedestrian travel or take appropriate measures to prevent the lot from being accessible,” and that it was therefore appropriate to submit the case to the jury to determine the defendant’s negligence. 54

The court also considered the issue of whether the plaintiff was barred from recovery because he was contributorily negligent or assumed the risk of injury. 55 The court noted that the defendant argued for a rule that would bar recovery by an “invitee who,

52. 274 Minn. at 497, 144 N.W.2d at 557–58 (quoting RESTATEMENT (SECOND) OF TORTS § 343A(1) cmt. f (1965)).
53. Id. at 497–98, 144 N.W.2d at 558.
54. Id. at 498, 144 N.W.2d at 558.
55. Id. at 498–500, 144 N.W.2d at 558–60.
knowing of the danger and appreciating the nature and extent of the risk, acquiesces in assuming it, without regard to whether or not there were compelling circumstances which prompted plaintiff's decisions." The court rejected the approach because it was too rigid of a definition of assumption of risk and "would often lead to an unconscionably harsh result where an invitee's injury occurred while he was acting under compulsion within the scope of the owner's invitation."

III. THE "NEW" LAW

A. Peterson v. Balach (Minn. 1972)

The supreme court decided Peterson v. Balach\(^{58}\) in 1972. The opinion was written by the Honorable Ronald Hachey, who was sitting by designation on the court. The case was a wrongful death action arising out of the death from carbon monoxide poisoning of a minor child who had been invited to spend the night at a friend's cabin.\(^{59}\) The trial court directed a verdict for the defendant because of the lack of evidence of negligence on the part of the cabin owner, given the status of the child as a social guest and therefore a licensee.\(^{60}\) The supreme court concluded that the trial court was correct on the basis of existing law, which imposed no duty on the owner to inspect the premises or any duty of care to make the premises safe for the licensee's visit.\(^{61}\) The court decided to "squarely face the issue of why the law relating to the duties of owners and occupiers of land to invitees and licensees should not be merged with general negligence law."\(^{62}\)

Four years before Peterson, the California Supreme Court abolished the common law classification scheme, in Rowland v. Christian,\(^{63}\) in favor of imposing a general duty on landowners to exercise reasonable care for the protection of entrants on their property, irrespective of what the entrants' status might have been.

\(^{56}\) Id. at 498, 144 N.W.2d at 558.
\(^{57}\) Id.
\(^{58}\) 294 Minn. 161, 199 N.W.2d 639 (1972).
\(^{59}\) Id. at 162, 199 N.W.2d at 641.
\(^{60}\) Id. at 163, 199 N.W.2d at 641.
\(^{61}\) Id. at 174, 199 N.W.2d at 647.
\(^{62}\) Id. at 167, 199 N.W.2d at 644.
\(^{63}\) 443 P.2d 561 (Cal. 1968).
previously. The rationale was based on the lack of a continuing justification for the departure from the general rule civil code and common law rule imposing responsibility on others for injury caused by lack of ordinary care in the management of their property:

A departure from this fundamental principle involves the balancing of a number of considerations; the major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

The court viewed the common law classification scheme as an unjustified departure from this basic principle, in part because of the confusion engendered by the scheme and in part because of its lack of relationship to the considerations that the court said should control the issue of the immunity of a possessor of land:

Without attempting to labor all of the rules relating to the possessor’s liability, it is apparent that the classifications of trespasser, licensee, and invitee, the immunities from liability predicated upon those classifications, and the exceptions to those immunities, often do not reflect the major factors which should determine whether immunity should be conferred upon the possessor of land. Some of those factors, including the closeness of the connection between the injury and the defendant’s conduct, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, and the prevalence and availability of insurance, bear little, if any, relationship to the classifications of trespasser, licensee and invitee and the existing rules conferring immunity.

The court also considered the scheme to be bad public policy:

64. Id. at 567.
65. Id. at 564.
66. Id. at 567.
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. The common law rules obscure rather than illuminate the proper considerations which should govern determination of the question of duty.\footnote{Id. at 568.}

Rowland initiated a trend toward modification of the common law classification scheme.\footnote{DAN B. DOBBS, THE LAW OF TORTS § 237, at 616 (2000) (noting that some jurisdictions retain the trespasser category).} The Minnesota Supreme Court in Peterson noted the criticisms of the scheme, including Rowland's, although much of the criticism of the scheme in Peterson focused on the inequities that arose from treating licensees, including social guests, differently from invitees.

Following the trend, the Minnesota Supreme Court held that "[a]n entrant's status as a 'licensee,' or 'invitee' is no longer controlling, but is one element, among many, to be considered in determining the landowner's liability under ordinary standards of negligence."\footnote{Peterson, 294 Minn. at 173, 199 N.W.2d at 647.} Under the new rule, said the court, "the extent of the duty of the owner (or the person responsible) to inspect, repair, or warn those who come upon the land as licensees or invitees will be decided by the test of reasonable care," and that an entrant entering on the land of another will also be held to the reasonable care standard.\footnote{Peterson, 294 Minn. at 174, 199 N.W.2d at 647.} Reasonable care depends on the circumstances. In a footnote, the court suggested a non-exclusive list of factors the fact finder might consider in determining negligence.

\footnote{Peterson, 294 Minn. at 173, 199 N.W.2d at 647. See Gow v. Turnquist, 474 N.W.2d 182, 184 (Minn. Ct. App. 1991). That issue may be a question of fact for the jury. Id.}
Among the factors to be considered might be the circumstances under which the entrant enters the land (licensee or invitee); foreseeability or possibility of harm; duty to inspect, repair, or warn; reasonableness of inspection or repair; and opportunity and ease of repair or correction.\textsuperscript{71} In concluding its discussion of the new rule, the court cautioned, "[a]bsolute liability in any case is not intended by use of the new rule."\textsuperscript{72}

The duty of reasonable care is the standard rule in negligence cases.\textsuperscript{73} The supreme court embraced that rule in \textit{Peterson}.

\textbf{B. Post-Peterson v. Balach}

\textit{Peterson v. Balach} was the new platform for possessors' liability in Minnesota. The supreme court has decided a limited number of cases in the thirty-five years since \textit{Peterson}. Some of those decisions raise questions about \textit{Peterson}'s continuing vitality, in particular because of sporadic but continuing reliance on \textit{W.T. Raleigh} and section 343A of the Restatement, along with other pre-\textit{Peterson} decisions, as the controlling decisional principles in cases involving possessors' liability. The key is how the court has handled cases involving claims of obvious dangers, and the implications that has for the judge-jury relationship in cases involving the liability of possessors of land.

\textbf{C. Gaston v. Fazendin Construction, Inc. (Minn. 1978)}

In \textit{Gaston v. Fazendin Construction, Inc.},\textsuperscript{74} a 1978 per curiam decision, the supreme court affirmed a judgment for the plaintiff in a case that arose at a home construction site when the plaintiff, a telephone company employee who was installing telephone wiring in the home, was injured when he stepped in an uncovered hole.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{71} \textit{Id.} at 174 n.7, 199 N.W.2d at 648 n.7.
\item \textsuperscript{72} \textit{Id.} at 648, 199 N.W.2d at 175.
\item \textsuperscript{73} \textit{E.g.}, \textit{Flom v. Flom}, 291 N.W.2d 914, 916 (Minn. 1980) ("Negligence is the failure to exercise such care as persons of ordinary prudence usually exercise under such circumstances."); \textit{Jacobs v. Draper}, 274 Minn. 110, 116, 142 N.W.2d 628, 632–33 (1966) ("It is well established that negligence is always a question of what reasonably prudent men under the same circumstances would or should, in the exercise of reasonable care, have anticipated, that foresight, not retrospect, is the standard of diligence, and that negligence is not a matter to be judged after occurrence."); \textit{Hartman v. Nat'l Heater Co.}, 240 Minn. 264, 272, 60 N.W.2d 804, 810 (1953) ("Reasonable care is that degree of care that a reasonably prudent person would exercise under the same or similar circumstances.").
\item \textsuperscript{74} 262 N.W.2d 434 (Minn. 1978) (per curiam).
\end{itemize}
\end{footnotesize}
The jury assigned 92.5% of the negligence to the defendant. The defendant argued on appeal that it was entitled to a jury instruction “that there is no duty to warn an entrant of known dangers” and “that a possessor of land is under no duty to correct obviously dangerous conditions for the benefit of lawful entrants.”

The trial judge used the pattern instruction from the Minnesota Jury Instruction Guide on negligence, on the duty of an occupier of land “to inspect and repair hazards, or warn entrants,” and on the duty of an entrant to exercise care for his own safety. The court rejected the defendant’s argument regarding the proposed jury instructions and held that the instructions given by the trial court were appropriate, in light of Peterson v. W.T. Rawleigh’s statement that a possessor of land may be held liable for injury to a lawful entrant from a known or obvious danger, if the possessor should anticipate injury to the entrant, notwithstanding the obviousness of the danger or the entrant’s knowledge of it, and in light of the defendant’s “continuing duty to keep its premises in safe condition for business visitors.” The pattern instruction at the time provided in part that “[a] possessor of land has a duty to use reasonable care to inspect and repair his premises or warn an entrant who comes upon his premises to protect the entrant from an unreasonable risk of harm caused by the condition of the premises while he is on the premises.” The negligence instruction would have defined negligence as the failure to use reasonable care, further defined as failure to do something a reasonable person would not do or the failure to do something a reasonable person would do.

The court’s opinion is interesting because in rejecting the defendant’s argument that the jury should have been instructed that a possessor of land owes no duty, either to warn of or correct obviously dangerous conditions, the supreme court noted W.T. Rawleigh’s statement that there is liability if the possessor should anticipate injury notwithstanding the obviousness of a danger, but

75. Id. at 435. The defendant also requested a jury instruction on primary assumption of risk, which the supreme court held that the trial court appropriately denied. Id.
76. Id.
77. W.T. Rawleigh, 274 Minn. at 497, 144 N.W.2d at 557.
the court thought that the pattern instructions covered the possessor's obligation to use reasonable care. Gaston answers the important question of the relationship between Peterson v. Balach's general duty of care that is embodied in the general instruction on a possessor's duty, and the more specific statement in W.T. Raleigh of a possessor to guard against obvious dangers if the possessor should nonetheless anticipate injury to an entrant. The general duty encompasses its more specific statement. Questions concerning obviousness of a danger are encompassed in the general duty to use reasonable care and are subject to jury resolution of the breach issue.

D. Adee v. Evanson (Minn. 1979)

The supreme court seemed to cement Peterson in 1979 in Adee v. Evanson, a case in which the plaintiff was injured when she slipped and fell on the icy sidewalk outside a fast food restaurant where she was a frequent customer. The accident occurred in December, on an inclined and uneven sidewalk that was packed with snow. Relying on the front end of section 343A (1) of the Restatement, the trial judge instructed the jury "there is no duty to warn a customer who comes upon the store owner's premises of risks of which the customer himself or herself had present knowledge and present realization." By special verdict, the jury found neither party negligent.

The supreme court acknowledged that it had expressly approved section 343A(1) in Peterson v. W.T. Rawleigh Co., in 1966, and noted that omission of the "unless" qualification "permitted the improper inference that the store owner owed plaintiff no duty whatever if plaintiff merely knew of the icy condition of the sidewalk."

More importantly, the court qualified its statement that it had previously adopted section 343A(1) with a reference to Peterson v. Balach, and its conclusion there that "the test to be applied in determining the extent of a landowner's duty is that of reasonable care under the existing circumstances." In a following footnote, the court said that it was inappropriate to instruct a jury based

80. Id.
81. Id. at 179.
82. 274 Minn. 495, 497, 144 N.W.2d 555, 557 (1966).
83. Adee, 281 N.W.2d at 180.
84. Id. at 179.
upon section 343A(1) of the Restatement, referring to the pattern jury instruction that incorporated Peterson. That instruction read as follows:

A possessor of land has a duty to use reasonable care to (inspect and repair his premises) or (warn an entrant who comes upon his premises) to protect the entrant from an unreasonable risk of harm caused by the condition of the premises while he is on the premises.

In determining reasonable care of the landowner, the following factors may be considered:

1. The purpose for which the entrant entered the premises;
2. The circumstances under which the entrant entered the premises;
3. The use to which the premises is put or expected to be put;
4. The foreseeability or possibility of harm;
5. The reasonableness of the inspection, repair or warning;
6. The opportunity and ease of repair or correction or the giving of the warning.\(^{85}\)

The important point is that the court in Adde noted that the general duty of reasonable care adopted in Peterson v. Balach makes an instruction based on section 343A inappropriate and that the pattern instruction appropriately incorporates the general negligence standard adopted in Peterson.\(^{86}\) The court's conclusion that section 343A(1) is not an appropriate basis for a jury instruction is based on an understanding that post-Peterson, the possessor of land has a duty to use reasonable care in protecting entrants from unreasonable risk of harm, and that it is the jury's

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85. Minn. Dist. Judges Ass'n, supra note 79. The footnote also referred to JIG II, 332 G-S, which is the flip side of JIG II 330 G-S:
An entrant who enters upon the premises of another has a duty to exercise reasonable care for his own safety while on the premises.
In determining reasonable care, you may consider the following factors:
1. The purpose for which the entrant entered the premises;
2. The circumstances under which the entrant entered the premises;
3. The use to which the premises is put or expected to be put;
4. The foreseeability or possibility of harm.

Id.

86. Peterson, 294 Minn. at 174, 199 N.W.2d at 647.
function to decide the breach issue. Adee reaffirms the sense of the court’s decision a year earlier in Gaston.

Adee v. Evanson is a pivotal decision in Minnesota landowners’ duty law because, along with Peterson, it establishes the ascendency of the reasonable care standard without the potential encumbrance of section 343A of the Restatement as a limitation on the possessor’s duty. One of the most interesting aspects of the Minnesota landowner’s duties cases is what seems to have happened to Adee in subsequent cases, however. The case is often cited in other appellate decisions, but not for the proposition that the general duty of reasonable care applies in possessor liability cases.

One exception is the Minnesota Court of Appeals 1984 decision in Kantorowicz v. VFW Post No. 230. The plaintiff in the case, a VFW member, parked in the VFW parking lot and was injured while walking down one of three paths on a snow-covered embankment to get to the VFW post, which was separated from the parking lot by a private residence. The case was submitted to a jury, which assigned 81.5% of the fault to the VFW Post, and 18.5% to the plaintiff. Based on section 343A(1), the defendant argued on appeal that it owed no duty to the defendant because the plaintiff was aware of the slippery and potentially dangerous condition of the paths and chose to use one anyway. The court of appeals disagreed, noting instead that “[t]he test in determining whether a landowner owes a duty to entrants on land is ‘that of reasonable care under the circumstances,’” citing Adee v. Evanson (which itself cites Peterson v. Balach) in support. The obviousness of the danger becomes a factor to consider in determining whether the landowner has breached his duty to the entrant.

89. Id. at 599.
90. Id. at 598.
91. Id. at 599.
92. Id. (citing Adee, 281 N.W.2d 177).
93. Dodge v. Jose’s Am. Grill, No. C4-94-1338, 1995 WL 25209, at *1 (Minn. Ct. App. Jan. 24, 1995) takes the same position. The court considered section 343A(1) and noted that the standard is one of reasonable care for both possessors and entrants, and that “[w]hether a danger is known or obvious is a factor to consider when determining whether the entrant used reasonable care, and when
E. Bisher v. Homart Development Co. (Minn. 1983)

In Bisher v. Homart Development Co., the plaintiff tripped over a visible planter in a common walkway in a shopping center. The jury in the case found the defendant 57% causally negligent, the plaintiff 43% causally negligent, and awarded the plaintiff $10,000 in damages. The trial court granted the defendant’s motion for judgment notwithstanding the verdict, and, if not upheld on appeal, a new trial limited to the liability issue. The plaintiff appealed and the Minnesota Supreme Court affirmed in a four-three decision. Citing Peterson v. Balach, the court said that:

[i]n assessing the landowner’s duty to use reasonable care for the safety of persons invited on the premises, the following factors are to be considered: (1) the circumstances under which the person enters the premises (for what purpose); (2) foreseeability or possibility of harm; (3) duty to inspect, repair or warn; (4) the reasonableness of inspection or repair; and (5) opportunity and ease of repair or correction.

Immediately following the list the court quoted Johnson v. Evanski, a 1946 decision:

Breach of duty such as to constitute negligence in the keeping of the premises reasonably safe is not proved by the mere occurrence of an accident. Negligence must be predicated on what should have been reasonably anticipated, not merely on what happened. The duty is to guard, not against all possible consequences, but only against those which are reasonably to be anticipated in the normal course of events.

Then, applying the reasonable foreseeability standard, the court sifted the evidence and concluded that there was simply no evidence of negligence on the part of the defendant. The court

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94. 328 N.W.2d 731 (Minn. 1983).
95. Id. at 732.
96. Id. at 732.
97. Id.
98. 294 Minn. 161, 174, n.7, 199 N.W.2d 639, 648, n.7 (1972).
99. Bisher, 328 N.W.2d at 733 (citing Balach, 294 Minn. at 174 n.7, 199 N.W.2d at 648 n.7).
100. 221 Minn. 323, 326, 22 N.W.2d 213, 215 (1946).
101. Bisher, 328 N.W.2d at 733 (citation omitted).
102. Id. at 733.
did not cite section 343A of the Restatement (Second) of Torts in arriving at its conclusion.

The court pointed out that the planter the plaintiff tripped over was in plain view, obvious, and had previously not presented any problems given the heavy customer traffic area over the prior two years.\textsuperscript{103} The court thought it would be ridiculous to require a warning, and that adding another level of bricks to the border would have made no difference in providing notice of the planter to the plaintiff.\textsuperscript{104} Justice Yetka, joined by two other justices, dissented, arguing that the trial court usurped the jury’s role in the case.\textsuperscript{105}

It is important to note that in \textit{Bisher} the court held that the plaintiff was not entitled to recover as a matter of law, not on the basis that the defendant owed no duty to the plaintiff, but rather that the defendant was not negligent.\textsuperscript{106} The court, in surveying the relevant factors from \textit{Peterson v. Balach}, did say that the factors were relevant in “assessing the landowner’s duty to use reasonable care for the safety of persons invited on the premises,” but the application is actually to the breach issue.\textsuperscript{107}

\textit{Bisher} has not been interpreted consistently by the Minnesota Court of Appeals. It is sometimes cited for the proposition that there is no duty where the danger is obvious,\textsuperscript{108} sometimes for the proposition that there is no breach of duty where the danger is obvious,\textsuperscript{109} and sometimes for the proposition that there is no liability where the danger is obvious, without a clear reference to the duty or breach issues.\textsuperscript{110}

Another premises liability case, \textit{Wagner v. Thomas J. Obert Enterprises},\textsuperscript{111} is important for the position it takes on primary assumption of risk. The plaintiff was injured in a fall on the defendant’s roller-skating rink.\textsuperscript{112} The jury found that the

\begin{quote}
\textsuperscript{103} \textit{Id.} at 794.
\textsuperscript{104} \textit{Id.}
\textsuperscript{105} \textit{Id.} (Yetka, J., dissenting).
\textsuperscript{106} \textit{Id.}
\textsuperscript{107} \textit{Id.} at 733 (majority opinion).
\textsuperscript{111} 396 N.W.2d 223 (Minn. 1986).
\textsuperscript{112} \textit{Id.} at 225.
\end{quote}
defendant was not negligent and assigned 100% of the fault to the plaintiff. On appeal, the plaintiff argued that the trial court erred in submitting primary assumption of risk to the jury. The Minnesota Supreme Court began its analysis with the limiting statement that "[o]ne of the few instances where primary assumption of risk applies is in cases involving patrons of inherently dangerous sporting events." Those risks would include falling and colliding with other skaters, the court said, but not the risks created by negligent supervision of skating activities or to maintain the premises in a safe condition.

The supreme court held that the trial court’s instruction on primary assumption of risk was appropriate, although the court suggested an alternative. The special verdict form asked whether the defendant was negligent, but the trial court also instructed the jury that the answer had to be no if the plaintiff’s injury arose from a risk inherent in the activity of staking and well-known to the plaintiff. The supreme court suggested that it would be more appropriate to first ask whether the plaintiff assumed an inherent risk of roller-skating in her accident. If the jury answered “yes” to that question, it would have to go no further. If it answered “no,” it would have to answer the question of whether the defendant was negligent.

Wagner does two things. First, it notes that primary assumption of risk has limited application, and, second, it indicates how the primary assumption of risk issue might be submitted to the jury.

F. Pietila v. Congdon (Minn. 1985)

Two years later the court decided Pietila v. Congdon, a wrongful death action that arose out of the murder of Elizabeth Congdon and her nurse. The case revolved around the issue of whether the trustees of the property owed a duty to guard against

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113. Id.
114. Id.
115. Id. at 226.
116. Id.
117. Id. at 226–27.
118. Id. at 227.
119. Id.
120. Id.
121. Id.
122. 362 N.W.2d 328 (Minn. 1985).
the murders. The trial court entered judgment for the plaintiff following a jury verdict in the plaintiff’s favor. The court reversed. The court acknowledged the general duty of reasonable care it adopted in Peterson, but noted that in Peterson it did not intend to create any new duties. The court concluded that as a matter of public policy there was no duty on the part of a residential homeowner to guard against the criminal misconduct of third parties. Justice Yetka, joined in dissent by Justice Wahl, thought that the duty of the trustee in charge of the land was clearly spelled out in Peterson v. Balach, and that it was for the jury to determine how much care had to be exercised.

In two consecutive cases, plaintiffs prevailed in situations involving the liability of a possessor of land, and in each case the supreme court reversed. In one case, the supreme court reversed because there was no evidence of a breach of duty. In the other case, the court reversed because there was no duty, although the no duty determination in Pietila was based on the more categorical proposition that there is no duty to guard against the criminal misconduct of third persons. In each case the court adhered to the reasonable care standard established in Peterson.

123. Id. at 330.
124. Id.
125. Id.
126. Id.
127. Id. at 332.
128. Id. at 333. The court has consistently taken the position that there is generally no duty to act for the protection of third persons. See also Gilbertson v. Leininger, 599 N.W.2d 127, 132 (Minn. 1999) (holding that there was no duty to act for protection of dinner guest). The existence of a legal duty to act depends on the relationship of the parties and the foreseeable risk involved. Erickson v. Curtis Inv. Co., 447 N.W.2d 165, 168-69 (Minn. 1989) (discussing the duty of parking ramp operator to its customer to guard foreseeable criminal misconduct). But see Louis v. Louis, 636 N.W.2d 314, 320 (Minn. 2001), where the court did not include any discussion of whether there was a duty based on a premises liability theory.
131. Pietila, 362 N.W.2d at 333.
G. Baber v. Dill (Minn. 1995)

In Baber v. Dill, a 1995 supreme court decision, the plaintiff, an employee of a contractor hired to construct a retaining wall on the defendant's property, was injured when he slipped and fell on a steel reinforcing rod that was used in the construction of the wall. The plaintiff was the brother of the contractor who was hired to erect the retaining wall. The reinforcing rods in the wall had been left exposed overnight while the defendant decided whether to add an additional layer to the wall. The plaintiff and his brother were doing work on the wall the following morning when the accident occurred. The plaintiff was as familiar with the risk as the defendant property owner was. The trial court in the case directed a verdict for the defendant at the close of the plaintiff's case, based primarily on the conclusion that the plaintiff assumed the risk in the primary sense. The trial court also held that the defendant did not owe a duty to the plaintiff. The court of appeals reversed the trial court, holding that there was a genuine issue of material fact as to whether the plaintiff assumed the risk in the primary sense. The supreme court reversed, but without reaching the primary assumption of risk issue.

Rather than analyzing the landowner's duty in the general negligence terms prescribed by Peterson, the court said, "[a]nalysis of a cause of action against a landowner for negligence begins with an inquiry into whether the landowner, Dill, owed the invitee, William Baber, a duty." The court drew the duty standard from section 343A(1) of the Restatement (Second) of Torts.

Drawing on an Eighth Circuit products liability case, the court also established as a controlling principle the rule that "[a] possessor of land . . . has no duty to an invitee where the

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132. 531 N.W.2d 495 (Minn. 1995). The court's rationale in deciding this case is repeated in Louis, 636 N.W.2d at 319.
133. Baber, 531 N.W.2d at 494.
134. Id.
135. Id. at 494–95.
136. Id. at 495.
137. Id. at 494–95.
138. Id. at 494.
139. Id.
140. Id.
141. Id.
142. Id. at 495.
143. Id. (citing RESTATEMENT (SECOND) OF TORTS § 343A (1965)).
anticipated harm involves dangers so obvious that no warning is necessary." The stated rationale for the rule is that "no one needs notice of what he knows or reasonably may be expected to know." While the rule seems to be stated broadly, in application, the court's holding narrows the principle to a warning issue.

The court said that there is a "fine" distinction between open and obvious dangerous conditions and activities that the possessor should anticipate will result in harm, and those that are so open and obvious that the possessor need not anticipate harm, but that nonetheless was a distinction it chose to make. The court concluded that "a landowner has no duty to an invitee to warn or make safe known and obvious conditions when that invitee has assisted in creating those conditions[.]" and held that the defendant owed no duty to the plaintiff, stating, simply, that "[t]o hold a landowner has a duty to warn an invitee of danger created, in part, by that individual is untenable." The court framed the duty in terms of the obligation of a landowner to an "invitee" rather than simply an "entrant," and relied on that categorization in its duty analysis.

_Baber_ represents something of a turning point in Minnesota law. While _Peterson v. Balach_ and _Adee v. Evanson_ would be logical starting points in analyzing possessors' liability, the court cited neither case. It also used pre-_Peterson_ terminology and relied on section 343A as a determinant of duty, rather than breach. _Baber_ has become a standard reference point in subsequent decisions. Next to _Peterson v. Balach_, which is frequently cited for the proposition that a landowner owes a duty of reasonable care to entrants, _Baber_ is the most-cited case involving possessors' liability. In contrast to _Peterson_, _Baber_ is often used as a limiting

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144. _Id._ at 496 (citing _Peterson v. W.T. Rawleigh Co._, 274 Minn. 495, 497, 144 N.W.2d 555, 558 (1995)).
145. _Id._ (citing _Sowles v. Urschel Lab., Inc._, 595 F.2d 1361, 1365 (8th Cir. 1979), a products liability case involving obvious danger). The Minnesota Supreme Court has consistently stated this as the rationale for the rule. See, e.g., _Louis v. Louis_, 636 N.W.2d 314, 321–22 (Minn. 2001); _Doe v. Brainerd Int'l Raceway, Inc._, 533 N.W.2d 617, 622 (Minn. 1995).
146. _Baber_, 531 N.W.2d at 496.
147. _Id._
148. _Id._
149. _Id._
150. _Id._ at 495–96.
151. See, e.g., _Pietila v. Congdon_, 362 N.W.2d 328, 331–32 (Minn. 1985).
152. See, e.g., _Louis v. Louis_, 636 N.W.2d 314, 318–22 (Minn. 2001).
decision, bolstering a conclusion that the possessor owes no duty to the plaintiff in a case where the injury-causing hazard is obvious or known to the entrant.\textsuperscript{155}

It is important to note that \textit{Baber} involved a unique set of facts, and that the court's holding was quite narrow. The plaintiff in the case was complicit in the creation of the hazard that resulted in his injury and the court confined its holding on the duty issue to the question of whether the defendant had a duty to warn. While \textit{Baber} could be read narrowly as a decision holding that a landowner has no duty to warn an entrant who is partially responsible for creating the dangerous condition that caused injury, it has consistently been read much more broadly as a limitation on liability in cases where there is an open and obvious danger.

\textit{H. Sutherland v. Barton (Minn. 1997)}

\textit{Sutherland v. Barton},\textsuperscript{154} a 1997 decision, arose out of the death, in an electrical accident, of an employee of an independent contractor who was doing work in a manufacturing plant.\textsuperscript{155} The court cited both \textit{Baber v. Dill} and \textit{Peterson v. W.T. Rawleigh Co.} for the proposition that under section 343A of the Restatement (Second) of Torts, "landowners are not liable to their invitees for harm caused by dangers that are 'known or obvious' to those invitees."\textsuperscript{156} The court also noted the important qualifier to that rule in cases where the landowner has reason to anticipate harm notwithstanding that obviousness.\textsuperscript{157} The court cited \textit{Adee} for the latter proposition:

This court has adopted § 343A of the Restatement (Second) of Torts (1965) which states that landowners are not liable to their invitees for harm caused by dangers that are "known or obvious" to those invitees. \textit{Baber v. Dill}, 531 N.W.2d 493, 496 (Minn. 1995); \textit{Peterson v. W.T. Rawleigh Co.}, 274 Minn. 495, 496–97, 144 N.W.2d 555, 557 (1966). Sutherland knew of the danger involved in working near exposed live bus bars. He was a licensed electrician with 30 years of experience. He had worked

\begin{itemize}
  \item[153.] \textit{See}, e.g., \textit{id.} at 319.
  \item[154.] 570 N.W.2d 1 (Minn. 1997).
  \item[155.] \textit{Id.} at 2.
  \item[156.] \textit{Id.} at 7.
  \item[157.] \textit{Id.} (citing \textit{RESTATEMENT (SECOND) OF TORTS} § 343A (1965)). The court indicated that the proposition was a "crucial qualifier to the general rule." \textit{Id.} (citing \textit{Adee v. Evanson}, 281 N.W.2d 177, 179 (Minn. 1979)).
\end{itemize}
near live buss bars before and in fact had warned others of the danger inherent in such a task. On the day of the accident, his supervisor specifically pointed out the live buss bars to Sutherland. There is no dispute that the danger was known and obvious to Sutherland. Indeed, the trustee’s attorney specifically pointed out at oral argument that this is not a duty to warn case because the danger was known and obvious.

However, even if a danger is known and obvious, landowners may still be liable to their invitees if they “should anticipate the harm despite such knowledge or obviousness.” Restatement (Second) of Torts § 343A (1965). This language is a crucial qualifier to the general rule. Adee v. Evanson, 281 N.W.2d 177, 179 (Minn. 1979); W.T. Rawleigh Co., 274 Minn. at 497, 144 N.W.2d at 557–58. A reason to anticipate the harm may arise when the landowner “has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk.” Restatement (Second) of Torts § 343A cmt. f (1965).

The trustee argues that Sutherland’s only alternative to avoiding the risk of the live buss bars was to forgo his employment; therefore, the advantages of encountering the danger outweighed the apparent risk. But Sutherland did have alternatives other than completely avoiding the risk or forgoing his employment: namely, to refrain from using a metal tape measure near live buss bars. The DLI specifically determined that it was unsafe for Muska to allow Sutherland to have the metal tape near the live buss bars. More importantly, Sutherland had expertise as an electrician. This expertise was the exact reason Waldorf hired Muska to perform the box board mill project. Sutherland was trained to work near energized electrical wires. It was entirely reasonable for Waldorf to expect that Muska, as a company specializing in electrical work, would take the necessary safety precautions and would require its employees to follow proper safety guidelines. Accordingly, Waldorf had no reason to anticipate that Muska, its independent contractor, and Sutherland, its contractor’s employee, would proceed to encounter the danger of the live buss bars without taking the necessary safety precautions. Waldorf did not owe Sutherland a
duty to protect him from harm by this known and obvious danger.\footnote{158} The crucial difference is illustrated in a comparison of the outcomes in the district court, court of appeals, and supreme court. The district court held that the defendant owed no duty to the plaintiff.\footnote{159} The court of appeals reversed, holding that the breach issue was for the jury,\footnote{160} and the supreme court reversed the court of appeals, holding that Waldorf owed no duty to Sutherland to protect him from harm by the known and obvious danger he confronted.\footnote{161} The circumstances in the case are unique, given the knowledge of the decedent of the specific dangers involved in the job. In that respect, the case is similar to Baber, where the plaintiff had specific knowledge of, and in fact participated in the creation of, the hazard that led to his injury.\footnote{162}

I. Louis v. Louis (Minn. 2001)

In \textit{Louis v. Louis},\footnote{163} the court considered the liability of a landowner for injuries sustained by his brother when he slid down a water slide head first into a swimming pool.\footnote{164} The defendant moved for summary judgment on the basis that he owed no duty to the plaintiff absent a special relationship and because the plaintiff had assumed the risk in the primary sense.\footnote{165} The district court granted the motion for summary judgment on the basis that the defendant owed no duty to his brother because the defendant did not have either actual or constructive knowledge of the dangers involved in making headfirst belly slides into the pool.\footnote{166}

The court of appeals reversed the district court’s holding on the duty issue.\footnote{167} The duty issue was the sole issue before the

\footnote{158} \textit{Id.} at 7–8.
\footnote{159} \textit{Id.} at 2.
\footnote{161} \textit{Sutherland}, 570 N.W.2d at 7–8.
\footnote{162} See Baber v. Dill, 531 N.W.2d 493, 494–95 (Minn. 1995).
\footnote{163} 696 N.W.2d 314 (Minn. 2001).
\footnote{164} \textit{Id.} at 316–17.
\footnote{165} \textit{Id.} at 317.
\footnote{166} \textit{Id.}
\footnote{167} Louis v. Louis, No. C3-00-1325, 2001 WL 15739, at *1 (Minn. Ct. App. Jan. 9, 2001). The court’s opinion on the duty issue is as follows: In order to sustain an action in negligence, the plaintiff must first prove that the defendant owed a duty to plaintiff. Johnson v. State, 553 N.W.2d 40, 49 (Minn. 1996). A duty to warn arises only where the risk of harm is reasonably foreseeable. See Larson v. Larson, 373 N.W.2d 287,
supreme court, which affirmed the court of appeals. The supreme court began its analysis with the familiar principle that a landowner has a duty "to use reasonable care for the safety of all . . . persons invited upon the premises." The duty is the same whether the person is an invitee or licensee. While status is a factor to consider in determining "the scope of duty," it is only one element "among many to be considered in assessing the landowner's duty to use reasonable care for the safety of persons invited on the premises." The court noted, "[o]ther factors to

289 (Minn. 1985) (concluding risk was too speculative to impose duty to warn). Generally, a determination of the existence of legal duty is to be decided by the court as a matter of law. Yunker v. Honeywell, Inc., 496 N.W.2d 419, 421 (Minn. Ct. App. 1993), rev. denied (Minn. Apr. 20, 1993). It is longstanding legal tradition in Minnesota that close questions of foreseeability be referred to the factfinder for resolution. Lundgren v. Fultz, 354 N.W.2d 25, 28 (Minn. 1984).

The central issue in this action is whether Robert Louis was obliged to warn his brother of the dangers inherent in sliding head-first into the shallow end of the pool. In similar cases, courts have placed the onus on the injured party who should have known better than to dive into water of unknown depth, despite any knowledge the defendant may have had regarding the danger of diving. See, e.g., Harper v. Herman, 499 N.W.2d 472, 475 (Minn. 1993) (holding that a boat owner had no duty to warn a social guest of the depth of water); Snilsberg v. Lake Washington Club, 614 N.W.2d 738, 744 (Minn. Ct. App. 2000) (holding that a club and its members had no duty to protect an invitee of the club's caretaker from the risk of diving from a dock into a lake at night), rev. denied (Minn. Oct. 17, 2000). But the facts of the present case are more complicated. Because of the "belly-slide" instructions atop the slide, Steven Louis was faced with at best contradictory information about the safety of sliding head-first into the pool. A jury should be allowed to determine whether the instructions on the slide about "belly-sliding" required Robert Louis to place the slide in a position that would have channeled the slider into the pool at a safe depth. In short, the jury should also be allowed to decide whether Robert Louis may have created the danger by erecting the water slide in a too shallow place in the pool. These facts are certainly not so clear that a rational trier of fact could not find for the nonmoving party. To the contrary, this is the sort of factual determination that is most appropriate for a jury. Therefore the district court's grant of summary judgment on this issue was inappropriate and we reverse and remand.

Id. at *2.

168. Louis, 636 N.W.2d at 316, 318.
169. Id. at 318–19 (quoting Sutherland v. Barton, 570 N.W.2d 1, 7 (Minn. 1997)).
170. Id. (citing Conover v. N. States Power Co., 313 N.W.2d 397, 402 (Minn. 1981)).
171. Id. at 319 (citing Bisher v. Homart Dev., 328 N.W.2d 731, 733 (Minn. 1983)).
consider in assessing the duty owed include (1) the foreseeability or possibility of harm; (2) the duty to inspect, repair, or warn; (3) the reasonableness of inspection or repair; and (4) the opportunity and ease of repair or correction.\textsuperscript{172}

There is an interesting, and significant, inversion in \textit{Louis}. Rather than assuming that the landowner or possessor owes a duty of reasonable care to entrants, as the court appeared to conclude in \textit{Peterson v. Balach},\textsuperscript{173} with the breach of duty issue dependent on the listed factors, the court appears to make those factors relevant to the initial determination of whether there is a duty in the first place.\textsuperscript{174}

The defendant in \textit{Louis} argued that, because there was no special relationship between the plaintiff and defendant, the defendant did not owe any duty to the plaintiff.\textsuperscript{175} The supreme court rejected the argument, bringing needed clarification to this area of the law:

We have consistently recognized that a duty based on a special relationship theory is separate and distinct from a duty based on a premises liability theory. Accordingly, we hold that, where the negligence claim at issue is based on a theory of premises liability, whether there is a duty owed by the landowner does not depend on the existence or a special relationship.\textsuperscript{176}

The next issue was whether the defendant was entitled to summary judgment on the basis that he owed no duty to the plaintiff.\textsuperscript{177} The court separated the duty issue from primary assumption of risk, concluding that absent a duty there would be no need to determine whether the plaintiff/respondent assumed the risk.\textsuperscript{178}

Resolution of the duty issue involved the following steps in the court's opinion:

In this case, there is no factual dispute as to appellant's knowledge of the condition of the premises at issue. Appellant, as possessor of the premises, installed and maintained the pool, deck, and slide and knew that one

\textsuperscript{172} \textit{Id.} at 319, n.4 (citing \textit{Bisher}, 328 N.W.2d at 733).
\textsuperscript{174} \textit{See Louis}, 636 N.W.2d at 319.
\textsuperscript{175} \textit{Louis}, 636 N.W.2d at 320.
\textsuperscript{176} \textit{Id.} at 320–21 (citations omitted).
\textsuperscript{177} \textit{Id.} at 321.
\textsuperscript{178} \textit{Id.}
going down the slide would land in about 3 1/2 feet of water. Therefore, as to conditions on appellant's land, including the swimming pool and slide, appellant had a continuing duty to use reasonable care for the safety of respondent, as an entrant on his premises. Appellant would not have owed a duty, and hence not have been liable for any physical harm caused to respondent, if the danger associated with doing a headfirst belly slide was either known or obvious unless appellant should have anticipated the harm despite its known or obvious nature. Accordingly, the district court must determine if the activity or condition involved known or obvious dangers.

According to the Restatement, "the word 'known' denotes not only knowledge of the existence of the condition or activity itself, but also appreciation of the danger it involves. Thus, the condition or activity must not only be known to exist, but it must also be recognized that it is dangerous, and the probability and gravity of the threatened harm must be appreciated." The district court did not consider this issue in this case. Accordingly, we remand to the district court to determine if the respondent knew that the slide was dangerous and appreciated the probability and gravity of the threatened harm. If the court determines that the danger associated with doing a headfirst belly slide was not a "known" danger, then the court must also consider whether there was an obvious danger.179

The court continued its analysis with an examination of the obvious danger issue:

Under both our case law and the Restatement, the test for what constitutes an "obvious" danger is an objective test: the question is not whether the injured party actually saw the danger, but whether it was in fact visible. According to the Restatement, a condition is not

179. Id. (citations omitted). In footnote 8 to the second quoted paragraph, the court said:

While the district court held that there was a genuine issue of material fact as to whether respondent knew and appreciated the risk associated with doing a headfirst belly slide, it made this determination when considering primary assumption of the risk. The question of whether a condition or activity was known for purposes of determining whether a duty was owed is generally a question for the court to determine as a matter of law.

Id. at n.8 (citation omitted).
“obvious” unless both the condition and the risk are apparent to and would be recognized by a reasonable man “in the position of the visitor, exercising ordinary perception, intelligence and judgment.”

We are mindful of the fact that certain conditions have been held to involve dangers so obvious that no warning was necessary, including walking into a low hanging branch, walking down a steep hill, walking into a large planter, walking across a 20-foot square pool of water, and skydiving over a lake. However, we also recognize that the rationale underlying the rule eliminating a duty where the dangers are known or obvious is that “no one need notice of what he knows or reasonably may be expected to know.” In this case, the district court failed to consider whether the danger associated with the condition and the risk at issue involved such an “obvious” danger. Accordingly, we choose not to answer this question. Instead, we remand to the district court to determine whether the anticipated harm to respondent from using the slide to execute a headfirst belly slide was a harm that was either known to him or one that he reasonably should have been expected to know.

If the district court concludes that the danger was neither known nor obvious as a matter of law, it must hold that appellant was not relieved of his duty to use reasonable care for the safety of respondent. If the court concludes that the danger was either known or obvious as a matter of law, it must then decide whether appellant should nevertheless have anticipated the harm despite its known or obvious danger. Lastly, if the court finds that appellant owed respondent a duty, the jury should then be allowed to decide the primary assumption of risk question since the court has already held that a genuine issue of material fact exists as to this issue.\(^{180}\)

In the court's opinion, the duty of the property owner turned on whether the danger was either known or obvious to the injured brother and whether the owner should nonetheless have anticipated injury to him.\(^{181}\) All determinations apparently would have to be made by the trial court to make the duty determination. Of course, it is possible that implicit in the court's opinion is the

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180.  Id. at 321–22 (citations & footnote omitted).
181.  Id. at 322.
conclusion that disputed fact issues would have to be resolved by
the jury before the court could make the duty determination. If so,
there would have to be special verdict questions on the issue of
whether the danger was known or obvious and, if so, whether the
defendant should nonetheless have anticipated harm to his
brother. A finding that the danger was either known or obvious
would necessitate an answer to the question of whether the
defendant should nonetheless have anticipated the danger. A
positive answer to that question would then permit the jury to
determine whether the defendant acted negligently. A finding that
the danger was neither known nor obvious would directly lead to
the breach of duty consideration.

The court said that the primary assumption of risk analysis
would follow, if the trial court determined on remand that the
defendant owed a duty to the plaintiff, but primary assumption of
risk would be a question for the jury, given the fact that the trial
court had previously ruled that there were material questions of
fact that precluded summary judgment on the issue. The
supreme court did not consider primary assumption of risk beyond
that point because the issue was not raised on appeal.

J. Olmanson v. LeSueur County

In Olmanson v. LeSueur County, decided in 2005, the supreme
court considered the liability of the county for its maintenance of a
golf cart culvert that permitted golfers access to a golf course that
had holes on both sides of a county road. The plaintiff, who was
snowmobiling, crossed the road from one ditch to the ditch on the
other side, went off the edge of the golf cart culvert, and hit the
sidewall of the culvert. The court considered the landowner’s
duty in the context of an issue concerning the interpretation of the
statute of repose for improvements to real property, which was the
primary issue in the case.

Section 541.051 limits liability for injuries that arise out of the
improvement of real property. The defendants argued that the

182. Id.
183. Id. at 318 n.2.
184. 695 N.W.2d 876 (Minn. 2005).
185. Id. at 879.
186. Id. at 880. "Section 541.051 specifies a limitation period barring suit
more than [ten] years after substantial completion of a real property
statute barred recovery because the injury occurred more than ten
years after the placement of the culvert. An exception to the
statute of repose provides that “[n]othing in this section shall apply
to actions for damages resulting from negligence in the
maintenance, operation or inspection of the real property
improvement against the owner or other person in possession.”
The issue was whether the use of negligence terminology in the
subsection preserved the common law duty of reasonable care
owned by landowners to entrants. The court held that it did.

The court noted that “a landowner has a duty to use
reasonable care for the safety of all entrants upon the premises,”
but it also said that the “landowner’s duty of reasonable care is
modified according to the expected use of the land, and [that] the
entrant also has a duty of reasonable care, which varies according
to the circumstances under which he enters the land.” The court
then described the more specific obligations of the landowner:

[T]he landowner’s duty of reasonable care includes an
ongoing duty to inspect and maintain property to ensure
entrants on the landowner’s land are not exposed to
unreasonable risks of harm. If dangerous conditions are
discoverable through reasonable efforts, the landowner
must either repair the conditions or provide invited
entrants with adequate warnings. If a reasonable
inspection does not reveal a dangerous condition, such
that the landowner has neither actual nor constructive
knowledge of it, under the theory of negligence the
landowner is not liable for any physical injury caused to
invited entrants by the dangerous condition.

Citing section 343A(1) of the Restatement (Second) of Torts,
the court noted that the landowner’s duty to inspect, repair, and
warn is not absolute and read section 343A(1) as a limiting
principle. In apparent contradiction to Louis, the court then

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187. Olmanson, 693 N.W.2d at 880.
188. Minn. Stat. § 541.051, subdiv. 1(d) (Supp. 2007). The Olmanson
court cited to the statute’s codification then in force, Minn. Stat. § 541.051, subdiv. 1(c)
(2004).
189. Olmanson, 693 N.W.2d at 880.
190. Id.
191. Id. at 880–81.
192. Id. at 881 (citations omitted).
193. Id.
said, "[g]enerally, whether a condition presents a known or obvious danger is a question of fact." If it is, however, then those specific issues would have to be submitted to the jury, following the procedure noted in the discussion of Louis. Nothing in the court's opinion would preclude the trial court from deciding that a danger is known and obvious where the determination can be made as a matter of law.

The court relied on a mélange of pre- and post-Peterson cases in detailing the duties of landowners. The court reverted to pre-Peterson law, with the exception that the duty to invitees also applies to licensees. The upshot of the reversion is that the open and obvious danger rule, subject to the section 343A(1) qualification, has restored the central role of the courts as gatekeepers in cases involving obvious dangers or, given the centrality of section 343A(1), in resolution of a possessor's duty to the plaintiff.

K. Synthesis

Synthesized, the rules and approach to landowner liability drawn from Peterson v. Balach to Adee v. Evanson look like this:

1. A landowner has a duty to use reasonable care to protect entrants from injuries.

2. The duty is the same whether the entrant is a licensee or invitee.

3. That duty is not absolute.

4. Minnesota has adopted section 343A(1) of the Restatement (Second) of Torts, but it is inappropriate to instruct a jury based on section 343A(1).

The first four principles flow from the court's initial reform decisions. The duty of the possessor is to use reasonable care for the protection of entrants, and entrants have an obligation to exercise reasonable care for their own safety. Section 343A(1) is not appropriate for defining the possessor's standard of care. Duty

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194. *Id.* The court held that under the facts of the case the district court inappropriately granted summary judgment to the defendants. *Id.* at 882.

195. *See* *id.* at 880–81.
is not truncated because a danger is known to the entrant or obvious. The standard of care is the same that an automobile driver would owe a passenger—the duty of reasonable care. *Bisher* establishes that there may be cases where a court will conclude that a possessor is not liable as a matter of law, not on the basis that the possessor owes no duty to the plaintiff, but rather because there is insufficient evidence of breach.\(^{196}\) *Pietila* did hold that the possessor owed no duty, but the decision was made on the basis of the policy of refusing to impose on the possessor a duty to guard against the criminal conduct of a third person.\(^{197}\)

From *Baber v. Dill* on, different, but potentially conflicting, principles emerge from the court's decisions:

1. A special relationship between landowner and entrant is unnecessary for the landowner to owe a duty to the entrant.

2. Resolution of the duty issue involves several steps:
   a. A trial court must determine whether there is a continuing duty to use reasonable care for an entrant, based upon a consideration of several factors, as noted in *Peterson v. Balach*.
   
   b. There is no duty if the danger is either known or obvious, unless the possessor should have anticipated harm to the entrant, despite its known or obvious danger:
   
      i. The word "known" denotes not only knowledge of the existence of the condition or activity itself, but also appreciation of the danger it involves.

      ii. "[A] condition is not 'obvious' unless both the condition and the risk are apparent to and would be recognized by a reasonable person 'in the position of

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196. *See supra* Part III.
197. *See supra* Part III.
the visitor, exercising ordinary perception, intelligence and judgment."

iii. The issue of whether a condition presents a known or obvious danger is a question of fact.

c. Even if the danger is known or obvious, the possessor may be liable if he should have anticipated the harm despite its known or obvious danger.

3. If there is a duty, there must be a determination as to whether the plaintiff assumed the risk in the primary sense and relieved the defendant of that duty.

4. The primary assumption of risk issue is usually a question for the jury.

5. If the plaintiff did not assume the risk in the primary sense, the trier of fact would then determine whether the possessor was negligent and whether that negligence was a proximate cause of the injury.

6. The trier of fact would also have to determine whether the plaintiff was contributorily negligent (assumed the risk in the secondary sense).

Each of these propositions flows from more recent Minnesota Supreme Court decisions governing the liability of possessors of land. Peterson v. Balach and Adee are the background, but the simplified approach to the liability of possessors those cases signaled seems to have been obscured, even to the point that the supreme court refers to entrants as invitees or by plugging the word "entrant" into the Restatement rule governing invitees. Obviousness of a danger becomes a pivotal factor after Baber. In Louis v. Louis, the factors that might be used to determine breach of duty are guidelines for the court in determining whether a duty

exists at the outset. The issue of whether a danger is known or obvious is also decided by the court, although *Olmanson* says that those are fact issues for the jury. Section 343A is prominent in any analysis of possessor liability, given the standard defense that any hazard is one that was either obvious to a reasonable person or known to the plaintiff.

*Gaines-Lambert v. Francisco,* an unpublished court of appeals opinion from 2006, indicates how these principles can play out. The plaintiff was severely injured when a shotgun being handled by a visitor at Francisco’s cabin discharged. Whitmore, who accidentally shot the plaintiff, was a guest of McNeal, whose mother was in a relationship with Francisco and who had previously owned the cabin before transferring it to Francisco. Francisco asserted a cross-claim against McNeal. The cross-claim turned on whether McNeal was liable to the plaintiff. The issue before the court of appeals was whether the trial court erred in instructing the jury on the issue of whether the danger presented by the shotgun was open and obvious.

The district court’s instruction on whether the danger was open and obvious was as follows:

Whether a danger is open and obvious depends on an objective determination of whether the person would have reasonably seen the danger, not on a subjective consideration of whether the person actually perceived or appreciated the danger. If a brief inspection would have revealed the condition, it is not concealed.

The accompanying special verdict question read as follows: “Did the involved firearm within the cabin constitute an open and obvious hazard to a reasonable person?”

Francisco objected to the inclusion of a definition of open and obvious danger and to the special verdict interrogatory asking whether the firearm was an open and obvious hazard. He requested that the jury answer the question on such hazards from

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200. *Id.* at *1.
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.* at *2.*
205. *Id.*
206. *Id.* at *1.*
each defendant's subjective point of view. The trial court denied those requests. The issue, of course, is whether the hazard is open and obvious to the plaintiff.

The jury found that Whitmore was 70% at fault and that McNeal and Francisco were each 15% at fault, but that because the danger was open and obvious, neither owed a duty to the plaintiff. The court of appeals held that the jury instruction was appropriate in light of Louis v. Louis, which set out the standards for determining whether a danger is open and obvious, and Olmanson v. LeSueur County, which said that the issue of whether a danger is open and obvious is a question of fact.

Francisco argued that the section 343A exception could apply, and that there would have been a duty to warn of the danger presented by the shotgun notwithstanding its obviousness. The district court did not instruct the jury on the exception and the special verdict form did not ask the jury to determine whether McNeal should have anticipated the injury notwithstanding its obviousness. The defendant, however, did not ask for that instruction, effectively waiving his right to raise the issue on appeal, and therefore the court of appeals expressed no opinion on whether the argument would have been meritorious.

The case makes obviousness of the danger pivotal. Not only was the jury asked to determine whether the danger was open and obvious according to a specific special verdict question, but it was also asked to determine whether the defendants were negligent. It did find the defendants negligent, but the obvious danger determination overrode the jury's determination of negligence. It might be argued that the jury's finding of negligence was an implicit finding that the defendants were negligent even though the jury found the danger was open and obvious. After all, the shotgun was not a fixed hazard. The defendant's alternatives were either to remove the shotgun or take out the shells. The simplicity

207. Id.
208. Id.
209. Id.
211. Olmanson v. LeSueur County, 693 N.W.2d 876, 881 (Minn. 2005).
213. Id.
214. Id.
215. Id. at *4 n.1.
216. Id. at *4.
217. Id.
of the alternatives available to the defendants to avoid the danger could have provided the basis for the jury’s finding of negligence.

The key is that the obviousness of the hazard has assumed central importance. Had Adee v. Evanson applied, any instruction based on section 343A would be inappropriate, and only the general negligence instruction would have been given. Baber has been controlling; Kantorowicz,\textsuperscript{218} the court of appeals opinion recognizing Adee’s rejection of section 343A as the prevailing standard, is not cited for that proposition after Baber was decided.

Gaines is not an isolated case. The court of appeals’ decisions indicate a continuing reliance on no-duty determinations in justifying holding that, as a matter of law, a land possessor owes no duty to an entrant, sometimes because the danger is obvious and sometimes because the land possessor could not as a matter of law foresee injury to the entrant under the specific circumstances of the case.\textsuperscript{219}

L. Obvious Dangers and Duty—Other Jurisdictions

Other jurisdictions have taken various approaches to the issue of open and obvious danger in possessors’ liability cases. While there has been a trend toward the adoption of section 343A, courts have dealt with the open and obvious danger issue in various ways.

Retention of the open and obvious danger rule without modification is one possibility. A second approach is to adopt section 343A of the Restatement (Second) of Torts. Section 343A(1) creates the potential for liability on the part of a landowner for obvious conditions if the landowner should anticipate harm to the entrant, notwithstanding the entrant’s knowledge of the danger or the obviousness of the danger. A third approach is to make obviousness of a danger a factor in determining whether the possessor breached his duty to the entrant. That approach is sometimes based on the assumption that implied assumption of risk is equivalent to the no-duty rule, and that legislative adoption of comparative negligence, which spells the demise of implied assumption of risk as a separate defense, also necessarily terminates its functional equivalent, the no-duty rule.

\textsuperscript{218} Kantorowicz v. VFW Post No. 230, 349 N.W.2d 597, 599 (Minn. Ct. App. 1984).

\textsuperscript{219} See infra authorities cited in note 313.
Following are examples from Massachusetts, Illinois, Idaho, and Mississippi.

The Massachusetts Supreme Judicial Court strongly defended the open and obvious danger rule in *O'Sullivan v. Shaw*, a swimming pool accident case. The issue was whether the defendant landowner was negligent in permitting visitors to dive into the shallow end of the pool and in failing to warn of the dangers involved in such diving. The trial court granted the defendants' motion for summary judgment. The issue in the case concerned the status of the open and obvious danger rule in Massachusetts.

The court noted that a possessor or owner of land has a duty to use reasonable care with respect to all persons who are lawfully on the premises, and that the duty includes the obligation to maintain the property "in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk, and to warn visitors of any reasonable dangers of which the landowner is aware or reasonably should be aware."

The plaintiff argued that the Massachusetts comparative negligence statute, which abolished the defense of assumption of risk, implicitly eradicated the open and obvious danger rule. The court rejected the argument, stating:

Landowners are relieved of the duty to warn of open and obvious dangers on their premises because it is not reasonably foreseeable that a visitor exercising (as the law presumes) reasonable care for his own safety would suffer injury from such blatant hazards. Stated otherwise, where a danger would be obvious to a person of ordinary perception and judgment, a landowner may reasonably assume that a visitor has knowledge of it and, therefore, "any further warning would be an empty form" that would not reduce the likelihood of resulting harm.

By contrast, the open and obvious danger doctrine arises in connection with the separate issue of a

221. Id.
222. Id.
223. Id. at 954.
224. Id. (citing Davis v. Westwood Group, 652 N.E.2d 567 (Mass. 1995) and Mounsey v. Ellard, 297 N.E.2d 43 (Mass. 1973)).
defendant's duty to protect others from dangerous conditions about which the defendant knows or should know. Rather than evaluating a particular plaintiff's subjective reasonableness or unreasonableness in encountering a known hazard, the inquiry is an objective one that focuses, instead, on the reasonableness of the defendant's conduct: it presumes a plaintiff's exercising reasonable care for his own safety and asks whether the dangerous condition was, objectively speaking, so obvious that the defendant would be reasonable in concluding that an ordinarily intelligent plaintiff would perceive and avoid it and, therefore, that any further warning would be superfluous.226

The court acknowledged that the issue could be for the jury, but where only one conclusion could be drawn on the issue, it could be decided as a matter of law.227 Citing numerous other decisions where the same conclusion was reached, the court concluded that the trial court was correct in granting the defendant's motion for summary judgment based on the obviousness of the danger.228

In Ward v. K Mart Corp.,229 the Illinois Supreme Court also rejected the argument that comparative negligence affected the duty of a landowner or occupier to entrants on land. The court also rejected a per se rule that an open and obvious danger would preclude liability in all cases.230 The court noted the trend toward adoption of section 343A(1) of the Restatement (Second) of Torts: We recognize that the Restatement speaks to the more general question of liability, and not specifically to the existence of a duty. But we think the principles expressed there are consistent with the general duty of reasonable care owed to invitees and licensees, and they are relevant to the resolution of whether an injury was reasonably foreseeable. We emphasize, however, that since the existence of a duty turns in large part on public policy considerations, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden upon the defendant, as well as the likelihood of

226. Id. at 954–55 (citations omitted).
227. Id. at 959.
228. Id. at 956.
229. 554 N.E.2d 223, 228 (Ill. 1990).
230. Id. at 229.
injury and the possible serious nature of such an injury must also be taken into account.\textsuperscript{231}

The court engaged in a detailed analysis of the facts in order to make the determination that the defendant’s duty in the case extended to the hazardous condition. Because the injury to the plaintiff was foreseeable, the court held that the defendant’s duty encompassed the hazard, the case was appropriately submitted to the jury for resolution, and the evidence of breach was sufficient to justify the jury’s verdict.\textsuperscript{232}

Based on \textit{Ward}, however, a “distraction” exception has developed in Illinois law,\textsuperscript{233} which gives courts the latitude to engage in a detailed analysis of the facts. This analysis, which would seem to be more appropriate to the breach issue, determines whether a defendant could foresee that an entrant might be distracted from the risk and suffer injury, notwithstanding the obviousness of the risk.\textsuperscript{234}

In \textit{Harrison v. Taylor},\textsuperscript{235} an Idaho Supreme Court case, the plaintiff, while leaving a flower shop, slipped and fell on a sidewalk that had a section of concrete missing. \textsuperscript{236} The trial judge granted the defendants’ motion for summary judgment on the basis that the danger presented was open and obvious.\textsuperscript{237} One of the issues on appeal was whether the open and obvious danger doctrine barred recovery.\textsuperscript{238} The court noted that it had previously adopted section 343A of the Restatement,\textsuperscript{239} and that it was incorporated in Idaho’s pattern instruction, which read as follows:

The owner or operator of premises may be liable for physical injuries to an invitee proximately caused by the unsafe or dangerous condition of his premises even though the danger is obvious and known to such invitee if the owner or operator of the premises had reason to expect that the invitee would proceed to encounter the obvious danger because to a reasonable man in his

\begin{itemize}
\item \textsuperscript{231} \textit{Id.} at 292.
\item \textsuperscript{232} \textit{Id.} at 294.
\item \textsuperscript{233} \textit{E.g.}, Bonavia v. Rockford Flotilla 6-1, Inc., 808 N.E.2d 1131, 1136 (Ill. Ct. App. 2004).
\item \textsuperscript{234} \textit{See id.}
\item \textsuperscript{235} 768 P.2d 1321 (Idaho 1989).
\item \textsuperscript{236} \textit{Id.} at 1322.
\item \textsuperscript{237} \textit{Id.} at 1323.
\item \textsuperscript{238} \textit{Id.}
\item \textsuperscript{239} \textit{Id.} at 1323–24.
\end{itemize}
position the advantages of doing so (or the disadvantage of not doing so) would outweigh the apparent risk.\(^2\)

The court noted that applying the exception in section 343A(1) in situations where the landowner has reason to believe that the invitee would encounter the dangerous condition notwithstanding its obviousness, and the fact that it broadened a landowner’s duty, but based its decision on a broader reading of its cases and of the legislative intent it derived from Idaho’s comparative negligence statute.\(^2\) The court viewed implied assumption of risk, which the comparative negligence act abrogated as a complete defense, as a corollary to the open and obvious danger doctrine.\(^2\) Abrogating implied assumption of risk as a complete defense also mandated abrogation of the open and obvious danger doctrine as a complete bar to recovery. Other courts have taken the same position.\(^2\)

Interestingly, the Idaho Supreme Court, based on its reading of *Adee v. Evanson*, noted that “Minnesota has gone further than most courts, having abolished the distinctions between invitees and licensees, in favor of a standard of reasonableness under the circumstances.”\(^2\)

Most significantly, the Idaho Supreme Court’s decision also turned in significant part on its perception of the role of the jury system:

We must either trust the jury or get rid of it. One cannot afford to sympathize for long with the view that a legal system must carry the burden of fictitious and obscurantist doctrine in order to keep vital issues away from that tribunal which was constituted to decide them.\(^2\)

In *Tharp v. Bunge Corp.*,\(^2\) the Mississippi Supreme Court took the same position in abolishing the open and obvious danger doctrine and applying comparative negligence but with a different rationale:

\(^2\) Id. at 1323.
\(^2\) Id. at 1324.
\(^2\) Id. at 1325.
\(^2\) Id. at 1329.
\(^2\) 641 So. 2d 20 (Miss. 1994).
This Court should discourage unreasonably dangerous conditions rather than fostering them in their obvious forms. It is anomalous to find that a defendant has a duty to provide reasonably safe premises and at the same time deny a plaintiff recovery from a breach of that same duty. The party in the best position to eliminate a dangerous condition should be burdened with that responsibility. If a dangerous condition is obvious to the plaintiff, then surely it is obvious to the defendant as well. The defendant, accordingly, should alleviate the danger. 247

The Mississippi Supreme Court reaffirmed its holding in *Tharp* in *Vaughn v. Ambrosino* 248 but clarified its application:

It would be useful to pause here and distinguish a dangerous condition, from a claim that the defendant failed to warn of a dangerous condition. *Tharp* applies to the former. With respect to the latter, however, it would be strange logic that found it reasonable to allow a plaintiff to pursue a claim against a defendant for failure to warn of an open and obvious danger. One would struggle, indeed, to justify the need to warn a plaintiff of that which was open and obvious. Stated differently, a warning of an open and obvious danger would provide no new information to the plaintiff. Stated still another way, a thing warned of is either already known to the plaintiff, or it's not. If it's already known to the plaintiff, then the warning serves no purpose. If it is not already known to the plaintiff, then the thing warned of was not open and obvious in the first instance. Thus, an invitee may not recover for failure to warn of an open and obvious danger. 249

In combination, *Tharp* and *Vaughn* make it clear that landowners may not be liable for failure to warn of an open and obvious danger but that the failure to warn claim is independent from a claim that the landowner failed to correct a dangerous condition.

The differences in approach may seem minor, but they are significant in defining the role of the jury and court in landowners' liability cases. The greater the degree of control exercised by the court, the more the role of the jury is diminished.

247. *Id.* at 25.
248. 883 So. 2d 1167 (Miss. 2004).
249. *Id.* at 1170–71.
IV. PRODUCTS LIABILITY LAW AND OPEN OBVIOUS DANGERS

The cases suggest a comparison to the treatment of obvious dangers in products liability cases. In *Baber v. Dill*, the Minnesota Supreme Court relied on the rationale of an Eighth Circuit products liability case, *Sowles v. Urschel Lab, Inc.*, for the proposition that "no one needs notice of what he knows or reasonably may be expected to know." The Minnesota Supreme Court adopted the latent-patent danger rule in 1976 in *Halvorson v. American Hoist and Derrick Co.*, a products liability case, but rejected it six years later in *Holm v. Sponco Manufacturing, Inc.* The court in *Holm* noted the trend toward abolishing the doctrine and concluded that it was simply bad policy to continue to adhere to it:

[The rule] protects manufacturers who sell products with dangerous, but obvious, design defect. It "encourages manufacturers to eliminate safety devices, and to make hazards obvious." . . . Moreover, the rule shifts the entire economic loss to the injured party, notwithstanding the fact that the manufacturer was, to some degree, at fault.

The court also thought the latent-patent danger rule to be inconsistent with the comparative fault act because the rule "swallows up the assumption of the risk defense" and "is contrary to the public policy of apportioning loss between blameworthy plaintiffs and defendants."

The parallel to landowners’ duty cases is obvious. The rationale that the supreme court used to jettison the latent-patent danger rule has been applied by courts rejecting the equivalent rule, the open and obvious danger rule, in the landowners’ duty cases. The court in *Holm* viewed the latent-patent danger rule as effectively making assumption of risk a complete bar to recovery, a

250. 531 N.W.2d 493 (Minn. 1995).
251. 595 F.2d 1361, 1365 (8th Cir. 1979).
252. *Baber*, 531 N.W.2d at 496 (quoting *Sowles*, 595 F.2d at 1365 (products liability case involving obvious danger)). The Minnesota Supreme Court has consistently stated that to be the rationale for the rule. *E.g.*, Louis v. Louis, 636 N.W.2d 314, 321–22 (Minn. 2001); Doe v. Brainerd Int'l Raceway, Inc., 533 N.W.2d 617, 622 (Minn. 1995).
253. 307 Minn. 48, 57, 240 N.W.2d 303, 308 (1976).
254. 324 N.W.2d 207 (Minn. 1982).
255. *Id.* at 213 (citations omitted).
256. *Id.*
result inconsistent with the comparative fault act. That rationale has been accepted by some courts in landowners' duty cases, although it also has been rejected by other courts.

Of course, there is an argument that the two cases are conceptually different, and that the policies underlying strict products liability law are not the policies involved in landowners' duty cases. It depends on how the policies are argued, however.

The rationale offered by the Mississippi Supreme Court in *Tharp v. Bunge Corp.*\(^{258}\) for elimination of the open and obvious danger rule connects directly with the reasons for abolishing the latent-patent danger rule in products liability cases:

This Court should discourage unreasonably dangerous conditions rather than fostering them in their obvious forms. It is anomalous to find that a defendant has a duty to provide reasonably safe premises and at the same time deny a plaintiff recovery from a breach of that same duty. The party in the best position to eliminate a dangerous condition should be burdened with that responsibility. If a dangerous condition is obvious to the plaintiff, then surely it is obvious to the defendant as well. The defendant, accordingly, should alleviate the danger.\(^{259}\)

If the dots are connected, and the *Tharp* rationale that the law should not favor the free use of property at the expense of entrants who may sustain injury is accepted, the conclusion that must be reached is that the open and obvious danger doctrine, the functional equivalent of the latent-patent danger rule, should be rejected as a complete bar to recovery. Although the policy justifications advanced by the supreme court for the adoption of strict products liability theory in *McCormack v. Hanksraft Co.*\(^{260}\) could serve to differentiate products liability cases from cases involving the liability of possessors of land, the Minnesota Supreme Court's anchoring of products liability design defect and failure to warn cases in negligence law is a further reason to justify a parallel treatment of obvious dangers in possessor liability cases.\(^{261}\)

\(^{258}\) 641 So. 2d 20 (Miss. 1994).

\(^{259}\) Id. at 25.

\(^{260}\) 278 Minn. 322, 338, 154 N.W.2d 488, 500 (1967).

Two Minnesota court of appeals cases involving swimming pool accidents provide a good example of how obviousness plays out in the products liability context. Both cases involved swimmers who were rendered quadriplegic when they dove into swimming pools. The trial courts granted summary judgment for the defendants in both cases. In the first case, McCormick v. Custom Pools, Inc., the court of appeals upheld the trial court’s grant of summary judgment for the defendants, relying on Magnuson v. Rupp Manufacturing, Inc., a decision in which the supreme court said that “a plaintiff must not be aware of the defect in order to recover.” In the second case, Jonathan v. Kvaal, decided less than two years later, the court of appeals distinguished McCormick, because the court in that case ignored the supreme court’s decision in Holm v. Sponco Manufacturing, Inc., in which it rejected the latent-patent danger rule. The court in Jonathan recognized the impact of the supreme court’s decision in Holm, and that “in adopting a reasonable care standard the supreme court minimizes the significance of obviousness of danger to but a factor in determining liability.”

Of course, rejecting the rule as a per se bar to recovery does not mean that recovery by an injured person is automatic. There are important qualifications on the right to recover. There may be categorical reasons of policy that would limit a landowner’s responsibility to an entrant, as in Pietila v. Congdon, or there may be cases where a court will conclude that the landowner owes no duty, as in Wagner v. Thomas J. Obert Enterprises, applying the limited notion of primary assumption of risk.

Abolishing the open and obvious danger rule does not mean that recovery is automatic. An injured entrant seeking to recover based on a failure to warn theory may face the same problems as a plaintiff would in a products liability case, where obviousness of a danger may preclude recovery for failure to warn, but not under a design defect theory. A second reason is that a trier of fact will have the opportunity to resolve the issue if the plaintiff makes out a

263. 285 Minn. 32, 171 N.W.2d 201 (1969).
264. Id. at 40, 171 N.W.2d at 207.
266. 324 N.W.2d 207 (Minn.1982).
267. Jonathan, 403 N.W.2d at 261.
268. 362 N.W.2d 328 (Minn. 1985).
269. 396 N.W.2d 223 (Minn. 1986).
prima facie case of negligence. That may well mean that the injured entrant will have to establish an alternative course of action that the landowner could have taken to avoid the injury. The evidence may be relatively simple, as in a case where the landowner could have simply salted or sanded a slippery walkway, or it may be more complex, involving store design and the selection of floor materials, for example.

V. DUTY, BREACH, AND THE JUDGE-JURY RELATIONSHIP (THE RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARMs)

Duty is a question of law for the court.\textsuperscript{270} No-duty determinations are relatively common in cases involving landowner liability, as the preceding discussion indicates, typically based on the conclusion that the obviousness of a danger justifies a finding of no duty. The Minnesota cases involving the liability of possessors of land directly raise questions concerning the relationship between no-duty determinations and determinations that, in particular cases, land possessors are not negligent as a matter of law. More specifically, the issue is whether those decisions are consistent in respecting the boundaries between judge and jury.

Proposed Final Draft Number 1 of the Restatement (Third) of Torts: Liability for Physical Harms\textsuperscript{271} establishes the general rule that a person must exercise reasonable care if the person’s conduct creates an unreasonable risk of physical harm and that no-duty determinations should be reserved for exceptional cases dictated by countervailing principles or policies:

\textsuperscript{270} E.g., Bjerke v. Johnson, 742 N.W.2d 660, 664 (Minn. 2007) (duty to control conduct of third person); Becker v. Mayo Found., 737 N.W.2d 200, 212 (Minn. 2007) (duty to control conduct of third person); Stringer v. Minn. Vikings Football Club, LLC, 705 N.W.2d 746, 756 (Minn. 2005) (personal duty to protect co-employee); Anderson v. State, 693 N.W.2d 181, 186 (Minn. 2005) (landowner’s duty to use property so as not to injure others); Sandborg v. Blue Earth County, 615 N.W.2d 61, 62 n.2 (Minn. 2000) (duty to prevent suicide of detainee); Whiteford v. Yamaha Motor Corp., U.S.A., 582 N.W.2d 916, 918 (Minn. 1998) (manufacturer’s duty to protect product users from foreseeable risk decided by court as a matter of law where foreseeability issue is clear); Canada v. McCarthy, 567 N.W.2d 496, 504 (Minn. 1997) (duty of property owner to abate lead hazard).

\textsuperscript{271} RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARMS § 7 (Proposed Final Draft No. 1, 2005).
(a) An actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm.

(b) In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.272

The general rule is that a person ordinarily has a duty to exercise reasonable care so that “in cases involving physical harm, courts ordinarily need not concern themselves with the existence or content of this ordinary duty,”273 but instead should “proceed directly to the elements of liability . . . .”274

Duty is subject to limitation, as provided in section 7, which states that courts may take categorical positions that duty should be limited.275 An example of the sort of countervailing principle that justifies a no-duty determination is the Minnesota Supreme Court’s decisions limiting the right to recover for emotional distress to those who are in the zone of physical danger and who fear for their own safety.276 The Restatement takes the position that “[n]o-duty rules are appropriate only when a court can promulgate relatively

272. Id. § 7. A note to the Restatement states that “[w]ith the exception of Comment d to § 27 and Comment a to § 28, the substance of Proposed Final Draft No. 1 (issued on April 6, 2005), has been finally approved by both the Institute’s Council and its membership,” and that “the draft has not yet been published in final form only because the project has been expanded to include chapters on emotional harm and landowner liability.” Id.
273. Id. § 6 cmt. f.
274. Id.
275. Id. § 6 cmt. a. The Restatement also recognizes the frequent use of foreseeability in duty determinations but “disapproves that practice and limits no-duty rulings to articulated policy or principle in order to facilitate more transparent explanations of the reasons for a no-duty ruling and to protect the traditional function of the jury as factfinder.”
276. E.g., Engler v. Ill. Farmers Ins. Co., 706 N.W.2d 764 (Minn. 2005) (permitting recovery for fear for son’s safety by mother in zone of danger who satisfied other elements of negligent infliction of emotional distress); K.A.C. v. Benson, 527 N.W.2d 553, 559 (Minn. 1995) (recognizing zone of danger limitation); Stadler v. Cross, 295 N.W.2d 552, 554 (Minn. 1980) (adhering to zone of danger limitation).
clear, categorical, bright-line rules of law applicable to a general class of cases." 277

Section 8 of the Restatement states that if reasonable minds can differ either as to the facts that relate to the actor's conduct or whether the conduct lacked reasonable care, it is the jury's function to make those determinations, 278 and the comments note the importance of distinguishing between no-duty determinations and determinations that one is not negligent as a matter of law which "are based on the specific facts of the case, are applicable only to that case, and are appropriately cognizant of the role of the jury in factual determinations." 279

Section 7 of the Restatement also disapproves of the use of foreseeability as a factor in making no-duty determinations. 280 Because the extent of the foreseeable risk turns on the specific facts of a case, the foreseeability factor does not lend itself to no-duty determinations. The Restatement takes the position that "courts should leave such determinations to juries unless no reasonable person could differ on the matter":

Courts do appropriately rule that the defendant has not breached a duty of reasonable care when reasonable minds cannot differ on that question. See Comment i. These determinations are based on the specific facts of the case, are applicable only to that case, and are appropriately cognizant of the role of the jury in factual determinations. A lack of foreseeable risk in a specific case may be a basis for a no-breach determination, but such a ruling is not a no-duty determination. Rather, it is a determination that no reasonable person could find that the defendant has breached the duty of reasonable care. 281

A recent Minnesota Court of Appeals decision stands in direct contrast to the Restatement on the duty and foreseeability issues. In Foss v. Kincade, the court of appeals directly addressed the impact of the foreseeability issue in a case in which a three-year-old child visiting the home of a neighbor with his mother was injured

278. Id. § 8.
279. Id. § 7 cmt. j.
280. Id.
281. Id.
when a bookcase he was climbing apparently tipped over on him.\textsuperscript{282} The issue on appeal was whether the trial court erred in concluding that the defendants "owed no duty as a matter of law to protect a three-year-old child visitor under his mother's supervision."\textsuperscript{283}

The court of appeals affirmed. The court began its analysis by noting that the duty issue is a question of law for the court. The issue was whether the duty was owed not to the child's mother, but directly to the child himself. The plaintiff argued that the child trespasser standard of care\textsuperscript{284} applied, apparently under the assumption that the standard would require a greater degree of care than the ordinary duty of reasonable care under \textit{Peterson v. Balach},\textsuperscript{285} or perhaps that there would be a greater chance of establishing a jury issue concerning the specific elements of liability under that standard. The court of appeals rejected the argument, concluding that the standard is inapplicable in cases where children are in the company of their parents in areas where one would not expect to find unaccompanied children.\textsuperscript{286}

In considering the general duty owed under the \textit{Peterson} standard, the court of appeals focused on the foreseeability of the injury.\textsuperscript{287} The plaintiff argued that it was foreseeable that a three-year-old child would attempt to climb a bookcase, while the defendants argued that while it was conceivable that a three-year-old would do so, it was not legally foreseeable.\textsuperscript{288} The court recognized the complexity involved in assessing the impact of the foreseeability factor, noting that "in jurisprudence, the concept of foreseeability is not strictly literal, but rather encompasses policy considerations as well."\textsuperscript{289}

\begin{enumerate}
\item \textsuperscript{283} \textit{Id.} at *1.
\item \textsuperscript{284} \textit{Restatement (Second) of Torts} § 339 (1965).
\item \textsuperscript{285} 294 Minn. 161, 173, 199 N.W.2d 639, 647 (1972).
\item \textsuperscript{286} Foss, 2008 WL 942835, at *2 (citing Sirek v. State, Dep't of Natural Res., 496 N.W.2d 807, 811 (Minn. 1983) (standard inapplicable to child injured while using state trails with parents because unaccompanied children do not visit isolated state trails)).
\item \textsuperscript{287} \textit{Id.} at *1.
\item \textsuperscript{288} \textit{Id.}
\item \textsuperscript{289} \textit{Id.} at *3 (citing \textit{Black's Law Dictionary} 676 (8th ed. 2004), which defines foreseeability as "the quality of being \textit{reasonably} anticipatable").
\end{enumerate}
The court of appeals acknowledged the position of the Restatement (Third) of Torts\footnote{290} that no-duty determinations should be “articulated directly without obscuring references to foreseeability.”\footnote{291} The court dismissed the Restatement in a footnote because that section “has neither been published by the American Law Institute nor adopted by our supreme court.”\footnote{292}

The court noted that if the foreseeability issue is clear it should be decided by the courts, but that in closer cases it is an issue for the jury.\footnote{293} The court concluded that “in consideration of all of the circumstances . . . David’s injury was not foreseeable and thus that the Kincades did not owe a duty to him as a matter of law.”\footnote{294}

The court’s decision turned on several factors. The presence of the child’s mother was “central” to the court’s decision, given past judicial recognition of the paramount duty parents owe to their children:

It would be contrary to our societal norms to expect a homeowner to take charge of another’s child, particularly in the presence of the child’s parent. Thus . . . we conclude that the paramount duty to provide for a child’s safety rests with that child’s parents and cannot be delegated merely by entering the home of another.\footnote{295}

Two additional factors were critical to the court’s decision. One was that the injury occurred while the child was visiting a private residence.\footnote{296} The second was that a common household object caused the injury.\footnote{297} The court held that “[c]onsidering the circumstances as a whole,” the risk of harm to the child was “too remote to impose liability as a matter of public policy.”\footnote{298} The court explained that its decision was “based on the totality of the circumstances” before it, and that it was not holding that landowners would never have a duty to protect children on their

\footnote{290. \textit{Restatement (Third) of Torts: Liability For Physical Harms} § 7 cmt. j (Proposed Final Draft No. 1, 2005).}
\footnote{292. \textit{Id}, at n.3.}
\footnote{293. \textit{Id}, at *3.}
\footnote{294. \textit{Id.}}
\footnote{295. \textit{Id}, at *4.}
\footnote{296. \textit{Id}, at *2.}
\footnote{297. \textit{Id}, at *5.}
\footnote{298. \textit{Id}, (citing Germain v. F.L. Smith Mach. Co., 395 N.W.2d 922, 924 (Minn. 1986) (a products liability case in which a detachable bar on a hydraulic press was removed and in which the court concluded that injury to the operator was foreseeable)).}
premises. As an example, the court said that there would be a duty "to warn or protect both parents and child visitors from latent dangers in their homes."300

Foreseeability is of central importance to the court's duty analysis. Of course, there are other decisions involving the duties of land possessors that hold the foreseeability issue is a question of fact for the jury to resolve.301 Yet the court's determination that parents owe a paramount duty of care to their children, a duty that cannot be delegated simply by entering another's private home, particularly when the child is injured by a common household object, is not exactly the sort of categorical determination that leads to no-duty determinations. The decision will of course be cited for one or more of those propositions, requiring additional determinations concerning the nature of a possessor's duties to child entrants. Those broader categorical propositions would likely not be repeated had the conclusion been that the possessor owed a general duty of reasonable care to entrants, including child entrants, but that under the circumstances of the case there was no breach of duty as a matter of law.

The American Law Institute has not yet taken a definite position on the duties of possessors of land, although Preliminary Draft No. 6 adopts a general standard of reasonable care.302 The Restatement rules would point toward Peterson v. Balach and Adee v. Evanson as the appropriate rules of decision in cases involving landowner liability. No-duty determinations would be unusual, and the breach issue would typically be for the jury. In Minnesota, that approach was signaled by the supreme court in a combination of cases prior to Baber v. Dill. Baber resulted in a shift in the law, making the obviousness of danger the pivotal factor in the resolution of landowner liability cases.303

There is no specific explanation for the shift. Three recent studies of California tort law have concluded that changes in the

299. Id.
300. Id.
302. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 52 (Preliminary Draft No. 6, Sept. 12, 2007).
law, including cases involving the liability of possessors of land, reflect a conscious decision by the California courts to retreat from the broader rule established in Rowland v. Christian,°34 primarily through a series of no-duty decisions that give courts greater power and reduce the power of juries.°35 Two of the articles suggest that the shift there is a specific reaction to progressive decisions such as Rowland by Republican appointed judges who have consciously rolled back tort law in reaction to the decisions of the Rowland era.°36

That position would be difficult to sustain in any analysis of Minnesota tort law in general,°37 or in any analysis of decisions involving the liability of possessors of land in particular. The Minnesota decisions involving the liability of possessors of land may be inconsistent, and many cases indicate a retreat from the principles established in Peterson v. Balach, but the reasons might more appropriately be attributed to either a misinterpretation of or lack of clarity in the supreme court’s decisions in the area.°38

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°34. 443 P.2d 561 (Cal. 1968), superseded by CAL. CIV. CODE § 1714.7 (West 1971).
°36. Steiner, supra note 305, at 39; Sugarman, supra note 305, at 472.
°38. Davis v. Walter, No. 50-CI-04-001407, 2007 WL 3577, at *1 (Minn. Ct. App. Jan. 2, 2007), rev. denied, (Minn. Mar. 20, 2007), a recent unpublished court of appeals decision, candidly acknowledges the lack of clarity in the area of the duties of land possessors. Id. at *4. The decision is interesting for a number of reasons. It discussed the law in terms of duties owed not to entrants, but to invitees. It placed primary reliance on Baber v. Dill, 521 N.W.2d 493 (Minn. 1995), as establishing the basic proposition that a landowner does not owe a duty to an invitee for conditions on the land that are open and obvious, unless the possessor should nonetheless anticipate harm, but that the possessor owes no duty if the danger is “so obvious that no warning is necessary.” Id. at *3. It also noted the problems with assumption of risk, and that the existence of a duty has to analytically precede an assumption of the risk analysis, although the analysis at times has been conflated and circular. Id. The court’s tongue-in-cheek summary is worth repeating:

A cynic might suggest that our cases imply that where the danger is really obvious, there is no landowner duty, but where the danger is really, really obvious, there is a duty, yet, where the danger is really, really, really obvious, there is again no duty. Compare Lawrence v. Hollerich, 394 N.W.2d 853, 855–56 (Minn. Ct. App. 1986), (holding that open dangers generally avoid the duty but that when the danger is so clear that harm is
Peterson and Adee v. Evanson, seem to be clear in their approach to cases involving the liability of possessors of land, but Baber v. Dill, a key decision, indicates a potential retreat. Although, if the specific facts are understood, Baber stands for a narrower proposition than the broader "no duty where dangers are obvious" rule that some decisions have extracted from it. Appropriately limited, the broadest proposition Baber would stand for is that there is no duty where the person seeking recovery participated in creating the injury-causing hazard.\(^{309}\)

Baber has been of pivotal importance in cases involving the liability of possessors of land. It seems to have become the default rule for the evaluation of liability in those cases. If a case gets to a jury, it may be that the reasonable care standard from Peterson v. Balach\(^{310}\) will be the standard the jury is provided for determining liability. However, in determining whether the case actually gets there, or whether a verdict for the injured entrant will be sustained on appeal, the standards in Baber v. Dill and Restatement (Second) of Torts section 343A will typically be applied. Considering the way Baber has been construed, those standards become a filter, or a virtual prerequisite for liability to be imposed.\(^{311}\)

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likely there is a duty), rev. denied (Minn. Dec. 17, 1986) with Baber, 531 N.W.2d at 495–96 (holding that some dangers are "so obvious that no warning is necessary"). Our appellate decisions have not clearly explained the difference between a danger that is so obvious that the landowner must warn against the likely injury despite the obvious danger and a danger that is a bit more obvious such that the entrant now needs no warning.

Id. at *4.

309. Baber, 531 N.W.2d at 496 ("a landowner has no duty to an invitee to warn or make safe known and obvious conditions when that invitee has assisted in creating those conditions"). See also Allison v. Olson, No. C0-00-942, 2000 WL 1809156, at *2 (Minn. Ct. App. Dec. 12, 2000) (citing Baber for the narrower proposition that there is no duty to warn if an entrant is partly responsible for creating the dangerous condition).

310. 294 Minn. 161, 174 n.7, 199 N.W.2d 639, 648 n.7 (1972).

for plaintiff in premises liability case and finding that the entrant and the land possessor have a duty of reasonable care, but that a land possessor does not owe a duty to an entrant when the danger of an activity or condition is known and obvious to the entrant, although the issue of obviousness is a fact question for the jury; Williams v. James Gang of Minnetonka, No. A06-1679, 2007 WL 2245794, at *2–3 (Minn. Ct. App. Aug. 7, 2007) (citing Baber for the proposition that there is no duty if the danger is open and obvious, unless the owner could anticipate danger, and remanding the case because of factual disputes on that issue); Davis v. Walter, No. A06-457, 2007 WL 3577, at *3–4 (Minn. Ct. App. Jan. 2, 2007) (affirming jury verdict for plaintiff and noting that a possessor does not owe a duty to an entrant when the danger of an activity or condition is known and obvious to the entrant but that there is a broad exception in cases where the landowner should anticipate the harm despite the entrant’s knowledge or the obviousness of the danger); White v. City of N. St. Paul, No. A03-191, 2003 WL 22952103, at *4 (Minn. Ct. App. Dec. 16, 2003) (holding that there is no liability for known or obvious dangers unless the possessor should anticipate the harm despite the plaintiff’s knowledge of the condition or its obviousness, citing Baber and section 343A); Holland v. City of Renville, No. C6-03-328, 2003 WL 21962020, at *2 (Minn. Ct. App. Aug. 19, 2003) (citing Baber and section 343A as a basis for affirming summary judgment for defendant, stating the defendant had no duty to warn the plaintiff of obvious danger on defendant’s premises); Barry v. Berggren’s Mkt. Enters., Inc., No. C9-02-2175, 2003 WL 21500272, at *2 (Minn. Ct. App. July 1, 2003) (affirming jury verdict for plaintiff in grocery store slip and fall accident and citing Baber for the proposition that there is a duty of care to an invitee if harm to an invitee could be anticipated notwithstanding obviousness of danger); Cameron v. Manners, No. C2-01-1908, 2002 WL 1163605 (Minn. Ct. App. June 4, 2002) (holding that span of steel fencing upon which plaintiff slipped was an obvious condition, but that there was a jury issue as to whether defendant should have anticipated injury notwithstanding the obviousness of the condition); Warman v. Gaber, No. C5-01-1755, 2002 WL 459282, at *2 (Minn. Ct. App. Mar. 26, 2002) (stating that in the case of an injury on a trampoline, there is no duty of care to either warn or guard against an obvious danger unless the landowner should anticipate harm despite that obviousness); Dowling v. Edina Pet Hosp., P.A., No. C1-01-541, 2001 WL 910377, at *2 (Minn. Ct. App. Aug. 14, 2001) (affirming summary judgment for defendant where plaintiff was injured when she slipped on a stoop and ramp in front of the vet clinic based upon section 343A and Baber’s proposition that a landowner’s duty of reasonable care is not absolute); Schneider v. Lanesboro Golf & Country Club, No. C8-00-1868, 2001 WL 537053, at *2 (Minn. Ct. App. May 22, 2001) (affirming summary judgment in favor of defendant in case where plaintiff slipped and fell on a golf-cart path, citing Baber for the proposition that there is no obligation to warn of obvious dangers); Clardy v. PCL Const. Serv., Inc., No. CX-00-1242, 2001 WL 214227, at *3 (Minn. Ct. App. Mar. 6, 2001) (rejecting defendant’s claim that there was no duty to warn where a masonry worker fell through a previously boarded-up hole in Science Museum, citing Baber for the proposition that there is a duty to warn if harm should be anticipated, notwithstanding obviousness of a danger); Allison v. Olson, No. C0-00-942, 2000 WL 1809136, at *1 (Minn. Ct. App. Dec. 12, 2000) (reversing summary judgment in favor of lessee of property for injuries sustained by plaintiff who was trimming a tree when a dead tree branch his ladder was leaning on collapsed, imposing a duty of reasonable care on possessors including a duty to warn if harm could be anticipated despite obviousness of a danger; however, Baber is cited for the narrower proposition that there is no duty to warn if
It may be that the broader proposition for which Baber is read, coupled with Restatement (Second) of Torts section 343A, is really the law the Minnesota Supreme Court intends to have applied in cases involving land possessors' liability. If so, it needs to be reconciled with the general standard of reasonable care that Peterson v. Balach and subsequent cases established as the basic law in Minnesota. Of course, if Peterson is in fact the baseline, it would be easy enough to conclude that the broader no-duty rule in Baber applies, and that the key question in most cases involving the liability of possessors of land is whether the danger is obvious. However, in some cases, the exception that possessors of land may be liable if they should anticipate injury to an entrant notwithstanding the obviousness of the danger will apply. This gives courts a great role in defining the parameters of the liability of possessors of land. That may have been the intention in Baber, although it seems unlikely given the unique facts of that case.

VI. AVOIDING THE OBVIOUS DANGER RULE

Even with the open and obvious danger rule as a baseline, there are examples of cases in which the plaintiff has succeeded in establishing liability in the face of dangers that were seemingly obvious. This section discusses three examples, all Minnesota Court of Appeals opinions, one published and two unpublished, that establish a basic format for establishing a possessor's liability in the face of an obvious danger.

In Block v. Target Stores, Inc.,312 the plaintiff was injured while testing a skateboard at a Target store. He intended to purchase one for his son and was trying skateboards out; when he tested the third skateboard, the board slid out from underneath him when he stood on it. He was attempting to steady himself with his hand on a shelving unit.313 At first glance, it would seem hard to fault Target under circumstances where an adult is injured while trying out a skateboard on a tile floor. Skateboards have wheels. Wheels roll. The boards are narrow. Tile can be slippery.

The trial court excluded the plaintiff's expert's testimony concerning the appropriateness of the flooring materials used in
the aisle, the lighting, and display practices of Target, as well as the causal connection between the plaintiff's injuries and the flooring materials. The plaintiff's motion for a new trial was denied and the trial court assessed significant costs, disbursement, and attorney fees against the plaintiff. The court of appeals reversed.

The plaintiff's expert, an architect, was prepared to testify that other, safer flooring would have been less slip resistant, that it should have been used by Target, that the lighting in the display area was inadequate to alert customers to the slipperiness of the floor, and that he would also have recommended posting a sign warning that the flooring in the skateboard area was hazardous for skateboard testing. The court held that the plaintiff's expert was clearly qualified as an expert and that he should have been permitted to testify.

The court of appeals noted the legal basics, that the storeowner has an obligation to exercise reasonable care for the safety of its customers, and that the storeowner is not relieved of that duty simply because the customer knows of a hazard. The plaintiff's proof covered the basics. The court of appeals concluded that the excluded testimony established that if Target insisted on installing category one flooring, which the plaintiff's expert testified was more slip resistant than other available flooring, it should have either posted warning signs or kept the skateboards in a secure display so the skateboards could not have been removed from their boxes, and that "[a] jury could reasonably conclude that had a warning sign or a sign prohibiting testing skateboards been posted near the display area, Block would have obeyed the sign." If the skateboards had been secured, Block would not have been able to test the skateboards without first

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314. Id.
315. Id.
316. Id. at 708–09.
317. Id. at 712.
318. Id. at 709–11.
319. Id. at 711.
320. Id. (holding that the evidentiary factors were "weigh[ing] in Block’s favor").
321. Id. at 712.
contacting a salesperson, creating a jury issue on the breach of duty question. Inadequate lighting was also a jury issue.

The court of appeals discussed the plaintiff's burden of proof in a case in terms of general negligence principles, noting that "[t]he law imposes a duty on a storeowner to exercise reasonable care for the safety of its customers," that "a storeowner is not relieved of that duty simply because a hazard is known to the customer," and that "[a] storeowner must guard against consequences which may be reasonably anticipated in the normal course of events."

Citing Peterson v. Balach, the court noted that several factors, including the reason for which Block was at Target, the foreseeability of the accident, and the case with which it might have been prevented had to be considered in the evaluation of Target's conduct. The court concluded that those factors weighed in Block's favor, and that the issue of Target's negligence was a jury issue.

In Reinerton v. Cub Foods, Inc., the plaintiffs were injured when they drove into a signpost in the middle of the defendant's parking lot when it was dark outside and snowing lightly. The trial court granted summary judgment in favor of Cub Foods and another defendant, based on its conclusion that the hazard presented by a signpost in plain view in the middle of a parking lot was patently obvious.

The court of appeals noted Peterson v. Balach and the landowner's duty to exercise reasonable care for the protection of entrants from unreasonable risks of harm, but, citing section 343A

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322. *Id.* ("Similarly, had the skateboards been placed in a locked cabinet or some type of secure display, Block could not have tested the skateboards for sturdiness without contacting a salesperson.").

323. *Id.*


325. *Block*, 458 N.W.2d at 711 (citing Jepson v. Country Club Mkt., Inc., 279 Minn. 28, 29, 155 N.W.2d 279, 280 (1967)).

326. *Id.* (citing Adee v. Evanson, 281 N.W.2d 177, 179–80 (Minn. 1979)).

327. *Id.* (citing Bisher v. Homart Dev. Co., 328 N.W.2d 731, 733 (Minn. 1985)).

328. *Id.* (citing Peterson v. Balach, 294 Minn. 161, 174 n.7, 199 N.W.2d 639, 648 n.7 (1972)).

329. *Id.* at 712.


331. *Id.*
of the Restatement (Second) of Torts, also noted that the duty "does not extend to cases where the risk of harm is 'known or obvious' to the entrant 'unless the [landowner] should anticipate the harm despite such knowledge or obviousness.'"\textsuperscript{332}

The court of appeals disagreed with the trial court's conclusion that the danger was patently obvious.\textsuperscript{333} The plaintiffs said that they approached the signpost from an east-west direction and that the accident occurred when it was dark and snowing lightly, rather than under the optimal conditions considered by the trial court.\textsuperscript{334}

In opposition to the defendants' motion for summary judgment the plaintiffs submitted an affidavit from a traffic engineer whose opinion was "that the sign post would be 'only marginally visible, if at all,' to a person approaching from the east-west 'at night and/or in inclement weather.'"\textsuperscript{335} The affidavit "support[ed] the conclusion that the sign post was not visible to a reasonable person driving under circumstances similar to" those the plaintiffs were driving in and that the trial court therefore erred in concluding that the signpost was obvious as a matter of law.\textsuperscript{336}

The court of appeals also took the position that even if the danger was obvious, the defendant had a duty to exercise reasonable care if it could anticipate injury notwithstanding the obviousness of the danger.\textsuperscript{337} The court noted that the signpost was in the middle of the parking lot, there was heavy traffic in the lot, there was evidence that the markings around the signpost and the fire lane were dusted with snow, and there were five other incidents involving signs in the parking lot, making the foreseeability of injury a question for the jury.\textsuperscript{338}

After applying the Restatement's obvious danger standard the court listed the standard factors from \textit{Peterson v. Balach} and

\begin{footnotes}
332. \textit{Id.} (citing \textit{Peterson}, 294 Minn. at 174, 199 N.W.2d at 647; \textit{RESTATEMENT (SECOND) OF TORTS} § 343A (1965)).
334. \textit{Id.}
335. \textit{Id.}
336. \textit{Id.}
337. \textit{Id.} (citing \textit{Bisher v. Homart Dev. Co.}, 328 N.W.2d 731, 733 (Minn. 1983); \textit{RESTATEMENT (SECOND) OF TORTS} § 343A (1965)).
\end{footnotes}
concluded that the affidavit from the traffic engineer was sufficient to allege a prima facie case of negligence by the defendant.\footnote{339} In \textit{Nagel v. Minntertainment}, the plaintiff, who was at Camp Snoopy in the Mall of America with her three children, was waiting for her children to finish a ride when she stepped back to permit a woman with a stroller to get past her. As she did so, she fell over the side of an exit walkway and broke her arm.\footnote{341} A jury in the case found Minntertainment 100\% percent responsible for the accident.\footnote{342} Minntertainment appealed from the trial court’s denial of its alternative motions for judgment notwithstanding the verdict or a new trial.\footnote{343} On appeal, the court of appeals affirmed.\footnote{344}

The court of appeals concluded that the record was sufficient to establish negligence. It included testimony from an industrial engineer that a hazardous condition existed on the walkway, the potential for injury was foreseeable, and the defendant should have anticipated it; testimony from the plaintiff that the bricks and decorative fence caused her fall; photographs that showed higher safety fencing in the other areas surrounding the ride; and testimony from an orthopedic surgeon that the plaintiff’s injury was caused by the fall.\footnote{345} The defendant made the standard argument that the danger was obvious, but the court noted that the plaintiff’s expert testified that the defendant should have anticipated the harm because the walkway was unsafe was sufficient to establish liability.\footnote{346}

Taken together, the cases demonstrate that the principal way to create a jury issue in the face of an obvious danger is to focus on the alternatives available to the landowner that would have avoided the injury. Of course, there is no stated requirement that the plaintiffs prove the alternative in order to establish a prima facie case against the landowner,\footnote{347} but if there is, proof of alternatives

\footnote{339} \textit{Id.} (citing \textit{Bisher}, 328 N.W.2d at 733).
\footnote{340} \textit{No. C0-00-200, 2000 WL 782013, at *1 (Minn. Ct. App. June 20, 2000).}
\footnote{341} \textit{Id.} at *1.
\footnote{342} \textit{Id.}
\footnote{343} \textit{Id.}
\footnote{344} \textit{Id.} at *4.
\footnote{345} \textit{Id.} at *1.
\footnote{346} \textit{Id.} at *2.
\footnote{347} \textit{Cf. Kallio v. Ford Motor Co.}, 407 N.W.2d 92, 97 (Minn. 1987), in which the supreme court held that proof of a feasible alternative is not part of a plaintiff’s prima facie case in a design defect claim, while noting that in most cases the plaintiff will need to establish a feasible alternative in order to be entitled to recover.
makes it much more difficult to deny recovery as a matter of law at any stage of the litigation.

VII. JURY INSTRUCTIONS AND SPECIAL VERDICT FORMS

Given the prevalence of section 343A and the open and obvious danger rule in Minnesota appellate opinions, there is a question as to how jury instructions should be approached in possessor liability cases, as Gaines-Lambert indicates. 348 Whether

348. See supra Part III. Jury instructions in other jurisdictions illustrate the range of treatment of obvious dangers. New Mexico’s pattern instruction states simply: “An [owner] [occupant] owes a visitor the duty to use ordinary care to keep the premises safe for use by the visitor[, whether or not a dangerous condition is obvious].” N.M. STAT. ANN. § 13-309 (LexisNexis 2003). The New Mexico jury instruction covering slip and fall cases reads as follows:

An [owner] [occupant] owes a visitor the duty to exercise ordinary care to keep the premises safe for the visitor’s use. [This duty applies whether or not a dangerous condition is obvious.] [In performing this duty, the [owner] [occupant] is charged with knowledge of any condition on the premises [of which the [owner] [occupant] would have had knowledge had [he] [she] [it] made a reasonable inspection of the premises] [or [which was caused by the [owner] [occupant] or [his] [her] [its] employees].

Id. § 13-1318.

The “Directions for Use” following the instruction note that the bracketed language covering obvious conditions should be given where a condition is open and obvious. Id. The Directions for Use note that the duty of a landowner to exercise reasonable care applies even if a dangerous condition is known to the visitor or is open and obvious, “because in the exercise of ordinary care a landowner must generally anticipate some degree of negligence on the part of others encountering even a known or obvious danger.” Id. (citing Klopp v. Wackenhut Corp., 824 P.2d 293, 297 (N.M. 1992)). The Directions for Use also state that “[i]f the court concludes that the plaintiff’s negligence in encountering a known or obviously dangerous condition was unforeseeable as a matter of law, however, an instruction imposing a duty of care on the owner/occupier of the premises should not be given.” Id. In contrast, the Restatement (Third) of Torts: Liability for Physical Harms section 7 comment j (Proposed Final Draft No. 1, 2005), states that “[d]espite frequent use of foreseeability in no-duty determinations, this Restatement disapproves that practice and limits no-duty rulings to articulated policy or principle in order to facilitate more transparent explanations of the reasons for a no-duty ruling and to protect the traditional function of the jury as factfinder.”

The pattern instruction in Kansas is based on the abolition of the common law distinctions between licensees and invitees, although it retains the terminology. The duty is one of reasonable care, similar to Peterson v. Balach:

The duty owed by an occupier of land to (public invitees) (licensees) (business visitors) is one of reasonable care under all the circumstances. In order to determine whether the occupier of land exercised reasonable care in maintaining the land you shall consider the following factors:
section 343A is viewed either as an override of or corollary to the general negligence standard adopted by the court Peterson v. Balach, it has become central to most cases involving possessors, and it influences how lawyers approach cases involving the liability of possessors of land.\textsuperscript{549} Given the importance of section 343A, and

1. The foreseeability of harm to the plaintiff;

2. The magnitude of the risks of injury to others by maintaining the land in such a condition;

3. The individual and social benefit of maintaining the land in such a condition;

4. The cost and inconvenience of providing adequate protection whether incurred by the occupier of the land and/or the community.

5. [Other factors appropriate to the case.]

Pattern Instructions Kansas 3d Civil, Kansas Judicial Council PIK—Civil Advisory Committee, ch. 126.02 (2005).

Oklahoma’s pattern instruction covers open and obvious dangers, stating simply that “[t]he [owner/occupant] has no duty to protect invitees [licensees] from or warn them of any dangerous condition that is open and obvious, as such a danger is ordinarily readily observable by invitees [licensees].” Vernon’s Oklahoma Forms 2d, Oklahoma Uniform Jury Instructions, Civil No. 11.12 (2002).

The Pennsylvania pattern instruction combines sections 343 and 343A of the Restatement (Second) of Torts (1965):

An [owner] [occupier] of land is required to use reasonable care in the maintenance and use of the land, and to protect invitees from foreseeable harm. An [owner] [occupier] of land is also required to inspect the premises and to discover dangerous conditions. An [owner] [occupier] of land is liable for harm caused to invitees by a condition on the land if:

1. the [owner] [occupier] knows or by using reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm, and

2. the [owner] [occupier] should expect that the invitees will not discover or realize the danger, or will fail to protect themselves against it, and

3. the [owner] [occupier] fails to use reasonable care to protect the invitees against the danger. An [owner] [occupier] of land is liable to invitees for any harm that the [owner] [occupier] should have anticipated, regardless of whether the danger is known or obvious.


349. Requested instructions typically emphasize the limited duty in cases involving open and obvious dangers. In Carlson v. Eden Prairie Mall, LLC,

A possessor of property has no duty to protect an entrant from an open and obvious condition. Whether a condition is open and obvious depends on whether it could have been seen and not whether a person actually saw or appreciated the condition. A condition is open and obvious if a brief inspection would have revealed it.

Id.


The supporting authority was Sutherland v. Barton, 570 N.W.2d 1, 7 (Minn. 1997). In Horton v. Lawler, Plaintiff's Requested Jury Instructions, No. C7-05-0994, 2006 WL 4712623 (Minn. Dist. Ct. July 25, 2006), the plaintiff requested a jury instruction modeled on section 343A:

In general, landowners are not liable for harm caused by dangers that are “known or obvious” to entrants. However, even though a danger may be known and obvious, landowners may still owe a duty to entrants if they “should anticipate the harm despite such knowledge or obviousness.” Reason to anticipate harm may occur if the landowner “has reason to expect that the entrant will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk.”

(citing Sutherland, 570 N.W.2d at 7; Baber v. Dill, 551 N.W.2d 493, 496 (Minn. 1995); RESTATEMENT (SECOND) OF TORTS § 343, cmt. f. (1965); Minn. District Judges Ass'n, Minn. Jury Instruction Guides: Civil JIG II, Use Note to CIVJIG 85.28 (Minn. Practice Series v.4) (2d ed. 1974)).

In Spelios v. Loading Dock Specialists, Inc., Defendant Crenlo's Requested Supplemental Jury Instructions, No. 55-C8-03-001261, 2004 WL 2659007 (Minn. Dist. Ct. June 7, 2004), one of the defendants requested the following instructions:

2. The test for what constitutes an “obvious” danger is an objective test: the question is not whether the injured party actually saw the danger, but whether it was in fact visible. Munoz v. Applebaum's Food Market, Inc., 293 Minn. 433, 434, 196 N.W.2d 921, 922 (1972). According to the Restatement, a condition is not "obvious" unless both the condition and the risk are apparent to and would be recognized by a reasonable man "in the position of the visitor, exercising ordinary perception, intelligence and judgment." RESTATEMENT (SECOND) OF TORTS § 343A, cmt. b (1965).

3. Landowners have a duty “to use reasonable care for the safety of all such persons invited upon the premises.” Peterson v. Balach, 294 Minn. 161, 174, 199 N.W.2d 659, 647 (1972). As a landowner, a company may be directly liable, “as a possessor of land, to persons coming on the premises, including the employees of an independent contractor.” Conover, 313 N.W.2d at 401. Landowners
the *Olmanson* court's statement that questions concerning whether a danger is known and/or obvious are fact questions, those questions presumably have to be presented to juries with appropriate jury instructions and special verdict forms. At a minimum, satisfying those guidelines would require instructions on the definitions of "known" and "obvious." The accompanying special verdict questions would have to ask whether the danger was known to the plaintiff or obvious to the plaintiff. Assuming affirmative answers to either of those questions, an additional question of whether the possessor should nonetheless have anticipated injury to the entrant would have to be posed to the jury. An appropriately framed special verdict question would take care of the issue and would perhaps need no supporting jury instruction.

Assuming an affirmative answer to that question, the jury would still have to determine whether the possessor was negligent. The pattern instruction defining the possessor's duty of reasonable care would presumably be sufficient for that purpose.

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are not, however, liable for harm caused by known or obvious dangers unless the landowner should anticipate the harm despite its obvious nature.

The trial court gave the pattern instruction governing the duty of possessors of land to entrants, without modification. *See* Spelios v. Loading Dock Specialists, Inc., Jury Instructions, No. C8051261, 2004 WL 2659006 (Minn. Dist. Ct. June 25, 2004) ("A possessor of property has a duty to an entrant to use reasonable care to protect him from unreasonable risk of harm caused by the condition of the premises or caused by activities on the premises."). In *Carlson*, the plaintiff requested jury instructions based on the section 343A standard:

SPECIAL INSTRUCTION 4: "[E]ven for obvious dangers, [a possessor of land] has a duty to warn if harm to an invitee should be anticipated despite the obviousness of the danger." Baber v. Bill, 531 N.W.2d 495, 495–96 (Minn. 1995).

SPECIAL INSTRUCTION 5: "A reason to anticipate the harm may arise when the landowner 'has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man or [woman] in her position advantages of doing so would outweigh the apparent risk.'" Sutherland v. Barton, 570 N.W.2d 1, 7 (Minn. 1997).

SPECIAL INSTRUCTION 6: "[D]isturbing circumstances or factors which the jury might consider in excusing a person who did not look where she was stepping . . . . [W]here there is some distraction or other reason which will excuse the failure to see that which is in plain sight, it can be said that a person has exercised that degree of care required of an ordinarily prudent person. Krengel v. Midwest Automatic Photo, Inc., 205 N.W.2d 841, 845 (1973).

If primary assumption of risk is added in, additional problems may arise. *Louis v. Louis* says that primary assumption of risk can be resolved only after the duty issue is decided.\(^{350}\) *Louis* provides no guidance on how the primary assumption of risk issue would be framed for a jury, however. There are various alternatives.\(^{351}\) An instruction on primary assumption of risk might detail the standard elements, telling the jury that an entrant assumes the risk when the entrant knows and appreciates a risk and voluntarily encounters that risk. The accompanying special verdict questions could track the elements of primary assumption of risk or there could be a single question asking whether the entrant assumed the risk of injury. Either way, it seems clear that the jury would be treading on ground already covered in earlier jury instructions designed to accommodate the section 343A issue in answering the issue of whether the entrant had knowledge of the danger.

There is also an issue concerning placement. If primary assumption of risk "relieves" the defendant of any duty, the primary assumption of risk question(s) would have to be answered before there could be any consideration of the breach issue. The primary assumption of risk special verdict question(s) would have to follow the questions covering section 343A. Perhaps the answer to the question of whether the entrant knew of the danger would also serve to answer the first element of primary assumption of risk. That would still leave the issue of whether the entrant appreciated the risk dangling, but that question could fit in after the section 343A questions, followed by the question of whether the entrant voluntarily encountered the risk.

The potential net effect lies in the jury finding that, although the danger was known to the entrant and the possessor should nonetheless have anticipated injury to the entrant, the entrant appreciated the risk and voluntarily encountered it. As a result, the jury would not have to reach the breach issue because the entrant would have assumed the risk in the primary sense.

It might be argued that assumption of risk is absorbed by section 343A, but the Restatement is not clear on that point.\(^{352}\) If

\(^{350}\) 636 N.W.2d 314, 321 (Minn. 2001) (citing Baber v. Dill, 531 N.W.2d 493, 495 (Minn. 1995)).


\(^{352}\) John H. Marks, *The Limit to Premises Liability for Harms Caused by "Known or
section 343A does not include primary assumption of risk, jury instructions and special verdict questions relating to the issues presented by possessors' liability cases present some significant difficulties.

Things are simplified considerably, of course, if Peterson and Adee are followed. No instruction on section 343A would be appropriate, according to Adee. A jury would no more need to be instructed on whether a danger was known to or obvious to the plaintiff than in a secondary assumption of risk case involving the risk of injury to a passenger in an automobile accident. The issue would be whether the possessor breached the duty of reasonable care owed to the entrant.

If primary assumption of risk were merged with the duty issue, a remaining issue would be what latitude the courts would have to police cases involving obvious dangers in possessor liability cases. The answer is that their latitude would be significantly reduced.

VIII. CONCLUSION

Minnesota law governing the liability of possessors of land has lacked clarity, as the courts have themselves noted. That, of course, does not distinguish Minnesota law from that of other jurisdictions, but it is important to establish a clear and consistent set of rules that judges and lawyers can follow, rules that appropriately balance the role of judge and jury in possessors' liability cases, and that protect the rights of both entrants on and possessors of land.

There seems to be no disagreement that Peterson v. Balach establishes the basic duty possessors of land owe to entrants. It is the same standard of care applicable in other negligence cases—a duty of reasonable care under the circumstances. It is true, as numerous decisions have indicated, that Minnesota adopted Restatement (Second) of Torts section 343A, which states that "[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." The court did that in Peterson v. W.T. Raleigh Co., decided six years

before *Peterson v. Balach*. The supreme court seemed to set that standard aside in *Adee v. Evanson*, but subsequent cases continue to utilize section 343A as the applicable standard of care in possessors liability cases. When the supreme court decided *Baber v. Dill* in 1995, obviousness of a danger became a pivotal consideration. *Baber*, coupled with section 343A, cut into *Peterson* and *Adee; Baber* more broadly than the Restatement, depending on how broadly *Baber* is read.

Depending on how the law is viewed, an entrant seeking to recover for injuries must run a gauntlet. In the opening hypothetical, the starting point would be to determine if the Owner owes a duty of reasonable care to Entrant. Owner would undoubtedly raise the issue that the hazard Entrant encountered was open and obvious, and that under those circumstances there was no duty, either to warn of or correct the hazard. A court might or might not grant summary judgment on that issue. If it did, the decision would be based on *Baber v. Dill* and section 343A of the Restatement. A court might consider the exception applicable to cases where a possessor of land should anticipate harm to an entrant notwithstanding the obviousness, but, again, a court might conclude as a matter of law that the injury to the entrant could not be anticipated under the circumstances. Entrant would argue that there is a jury issue on the question, particularly given the minimal steps Owner would have to take to make the sidewalk safe, including simply salting the sidewalk. If the court did decide that Owner owed a duty to Entrant, primary assumption of the risk might have to be raised and disposed of before the breach issue is considered. The trial court could conclude that there is no breach as a matter of law, but that determination would be a difficult one to justify under the circumstances of the hypothetical.

The simplified version per *Peterson v. Balach* would recognize the general duty of reasonable care under the circumstances. The breach issue would be for the jury, pursuant to the pattern instructions on the duty of possessors of land. The issue would be whether Owner exercised reasonable care for the protection of Entrant under the circumstances and whether Entrant exercised reasonable care for her own safety. Again, a trial court might determine that there is simply insufficient evidence of breach on the issue and conclude as a matter of law that Owner is not liable. Even if that were a sustainable conclusion, it would not stand for
the categorical proposition that possessors of land have reduced responsibility for obvious dangers on their premises.

While it seems clear that Minnesota law changed with *Baber v. Dill* and the increasing emphasis on the obviousness of danger, and that subsequent decisions of both the court of appeals and supreme court have continued that reliance, it is not clear why. The shift can be demonstrated, although perhaps not the reasons. Courts appear to be comfortable in fact sifting to make duty determinations, although likely not from any particular ideological perspective. Absent a reassessment of *Peterson v. Balach* and its impact, the existing set of rules, which differentiate between a jury standard of reasonable care, should a case get that far, and the gate-keeping standards turning on obviousness of danger, courts will continue to apply law that seems regressive in comparison to *Peterson*, even if not intentionally so.