

**LACK OF SPECIAL RELATIONSHIP NOT SPECIAL  
ENOUGH TO RELIEVE LANDOWNERS FROM DUTY IN  
PREMISES LIABILITY ACTIONS—*LOUIS V. LOUIS***

Shanda K. Pearson<sup>†</sup>

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I. INTRODUCTION

As a threshold matter, landowner liability in premises liability actions varies according to the evolutionary stage of a particular jurisdiction.<sup>1</sup> Historically, courts refused to recognize a landowner's duty to protect visitors from dangerous conditions on

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<sup>†</sup> Winona State University, B.A. 1998; William Mitchell College of Law, J.D. Candidate 2004.

1. See Edward A. Strenkowski, Case Note, *Tort Liability of Owners and Possessors of Land – A Single Standard of Reasonable Care Under the Circumstances Toward Invitees and Licensees*, 33 ARK. L. REV. 194, 198-200 (1979) (citing *O'Leary v. Coenen*, 251 N.W.2d 746, 749 (N.D. 1977) to illustrate that in premises liability cases, some courts moved from duty based on entrant status to a reasonable care standard for all entrants).

the premises.<sup>2</sup> Societal trends, however, gradually expanded landowners' duties to entrants, initially according to the entrant's status.<sup>3</sup> Through time, the lines defining "status" became blurred, and many jurisdictions abandoned the classification altogether.<sup>4</sup> Minnesota is currently among the increasing number of jurisdictions holding that landowners owe a duty of reasonable care to *all* lawful land entrants.<sup>5</sup>

Recently, in *Louis v. Louis*, the Minnesota Supreme Court further fortified its conception of a landowner's duty to visitors. In *Louis*, the court rejected a landowner's argument that absence of a special relationship<sup>6</sup> between the landowner and entrant should exculpate the landowner of any duty to exercise reasonable care toward the entrant.<sup>7</sup> Building on past decisions,<sup>8</sup> the *Louis* court rightfully held that all lawful entrants are owed the same duty of care, irrespective of whether a special relationship exists between the landowner and entrant.<sup>9</sup>

This case note explores the historical progression of legal authority concerning duty and special relationships in negligence cases—specifically premises liability negligence cases—on a national level.<sup>10</sup> This note then narrows the scope of the discussion concerning duty and special relationships, focusing on the manner in which Minnesota applies special relationships to duty in basic negligence cases, as well as premises liability cases grounded on negligence theories.<sup>11</sup> The third portion of this note explores the facts, procedural history, and holding in *Louis v. Louis*.<sup>12</sup> Finally,

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2. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 57, at 386 (5th ed. 1984).

3. Strenkowski, *supra* note 1, at 198-200.

4. *Id.*

5. See *Peterson v. Balach*, 294 Minn. 161, 174, 199 N.W.2d 639, 647 (1972) (abolishing common law rules based on invitee and licensee status).

6. See RESTATEMENT (SECOND) OF TORTS § 314A (1965) (stating that a special relationship giving rise to duty typically involves common carriers, innkeepers, possessors of land who hold it open to the public, and persons who have custody of another person that deprives that third person of the opportunity to protect himself); KEETON ET AL., *supra* note 2, § 56, at 376-77 (stating that courts have also recognized relationships between jailers and prisoners, schools and students, husbands and wives, and parents and children).

7. 636 N.W.2d 314, 320-21 (Minn. 2001).

8. See *Balach*, 294 Minn. at 174, 199 N.W.2d at 647 (stating that all invited entrants upon land are owed the same duty of reasonable care).

9. *Louis*, 636 N.W.2d at 321.

10. See *infra* Part II.A-B.

11. See *infra* Part II.C-D.

12. See *infra* Part III.A-B.

this note explores arguments that justify the *Louis* decision<sup>13</sup> and concludes that the holding in *Louis* was judicious and consistent with past decisions in premises liability cases.<sup>14</sup>

## II. HISTORICAL DEVELOPMENT

### A. *The Origin of Duty and Duty of Landowners*

Notions of liability emerged in England long before contemporary duty theories existed.<sup>15</sup> Early English courts imposed liability and rarely inquired into fault, the relationship between opposing parties, or any affirmative obligations the parties may have had to protect each other.<sup>16</sup>

By the mid- to late-nineteenth century, however, myriad English court decisions<sup>17</sup> and legal commentators<sup>18</sup> began developing modern notions of liability based on fault, relationship, and legal obligation. American jurisprudence adopted England's fault-based theories in the mid-nineteenth century,<sup>19</sup> and although

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13. See *infra* Part IV.A-B.

14. See *infra* Part V.

15. See 2 WILLIAM S. HOLDSWORTH, HISTORY OF ENGLISH LAW 50-54 (1936); *id.* at 375-82 (discussing the lack of a concept of duty in early England, and that an actor was liable for any damages resulting from a wrongful act); Percy H. Winfield, Comment, *Duty in Tortious Negligence*, 34 COLUM. L. REV. 41, 48-49 (1934) (stating that a defendant is liable even if the harm was inadvertent or unintentional).

16. See KEETON ET AL., *supra* note 2, § 53, at 357. Instead of owing an obligation to the other party or to an individual, “[t]he defendant’s obligation to behave properly apparently was owed to all the world, and he was liable to any person whom he might injure by his misconduct.” *Id.*

17. See *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Ex. D. 1842) (developing the rule that the defendant must be under a legal obligation to the plaintiff in order to be liable for any wrongdoing); *Vaughan v. Menlove*, 132 Eng. Rep. 490 (C.P.D. 1837); *Langridge v. Levy*, 150 Eng. Rep. 863 (Ex. D. 1837).

18. See *Le Lievre v. Gould*, 1 Q.B. 491, 497 (Eng. C.A. 1893). Lord Esher states, “[t]he question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence . . . .” *Id.* See also FREDERICK POLLOCK, LAW OF TORTS 468 (13th ed. 1920) (stating the famous quote concerning duty, “[n]egligence in the air, so to speak, will not do”).

19. See *Brown v. Kendall*, 60 Mass. 292, 298 (1850) (holding that to recover damages, a plaintiff must prove that the defendant is chargeable with “some fault, negligence, carelessness or want of prudence . . .”). Legal historians generally regard *Brown* as the case that abandoned strict liability and replaced it with a fault-based system in the United States. Kathleen E. Payne, *Linking Tort Reform to Fairness and Moral Values*, 1995 DET. C. L. MICH. ST. U. L. REV. 1207, 1211-12 (1995).

it is difficult to ascertain exact origin,<sup>20</sup> the United States adopted England's concept of duty in the late-nineteenth century.<sup>21</sup>

This newly adopted concept of duty soon became one of the cornerstones of American tort liability. Duty, as one of the elements comprising negligence,<sup>22</sup> was codified by the First Restatement of Torts in 1934.<sup>23</sup> The standards concerning duty set by these early scholars and courts remain immutable to this day: liability for breach of duty depends on whether the defendant owes a duty to the plaintiff.<sup>24</sup> Duty, in turn, arises when the plaintiff's interests are entitled to legal protection against the defendant's conduct.<sup>25</sup>

Though most plaintiffs injured on another person's land traditionally sought recovery under negligence theories,<sup>26</sup> the subjective nature of duty<sup>27</sup> embedded in negligence long provided a safe haven for landowners. In fact, courts have limited liability in premises liability actions more than in any other area of law.<sup>28</sup> The rationale is historical: premises liability laws trace back to feudalism and a culture "deeply rooted to the land."<sup>29</sup> At a time when land

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20. See Francis H. Bohlen, *The Basis of Affirmative Obligations on the Law of Torts*, 53 AM. L. REG. 209, 209 (1905) (stating "[i]t is surprising to find that every attempt to announce either judicially or in textbooks any inclusive affirmative principle of the origin of duty of care, the primary fundamental requisite, has been unsuccessful").

21. See, e.g., MELVILLE M. BIGELOW, *ELEMENTS OF THE LAW OF TORTS FOR THE USE OF STUDENTS* 313 (1896) (stating that a defendant can be liable for negligence if the defendant owed the plaintiff "the duty to exercise reasonable care, skill, or diligence, or all of these, according to the situation") (citing *Membury v. Great W. Ry. Co.*, 14 App. Cas. 179, 190 (1889)); *Rader v. Davis*, 134 N.W. 849, 850 (Iowa 1912) (holding that there was no liability absent breach of a legal duty).

22. See, e.g., Leon Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1022 (1928) (setting forth the four elements of negligence, including duty).

23. RESTATEMENT (FIRST) OF TORTS § 281 (1934).

24. See, e.g., *M.H. v. Caritas Family Servs.*, 488 N.W.2d 282, 287 (Minn. 1992). But see Jordan K. Kolar, *Is This Really the End of Duty? The Evolution of the Third Restatement of Torts*, 87 MINN. L. REV. 233, 245 (2002) (stating that the Discussion Drafts of the Restatement (Third) of Torts indicate that rather than portraying duty as a requisite of tort liability, an individual is liable for harm caused by negligent conduct "unless the court makes a finding of 'no-duty' based on considerations of policy or principle").

25. *Caritas*, 488 N.W.2d at 287.

26. KEETON ET AL., *supra* note 2, § 57, at 387.

27. William Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 12-13 (1953).

28. KEETON ET AL., *supra* note 2, § 57, at 386.

29. *Peterson v. Balach*, 294 Minn. 161, 170-71, 199 N.W.2d 639, 645-46 (1972) (quoting *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630 (1959)). See also William L. Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV.

ownership determined an individual's value in society, the fear of interfering with a landowner's free use of property significantly outweighed the desire to compensate injured plaintiffs.<sup>30</sup>

Over time, case law and societal trends governing a landowner's duty to entrants upon his or her land underwent radical transformation.<sup>31</sup> As societal interest shifted from protection of land to protection of individuals, courts slowly eroded the many protections once afforded to landowners.<sup>32</sup> Over time, landowners gradually became the largest group upon whom the duty of affirmative conduct was imposed.<sup>33</sup>

The duty of landowners, however, differs among jurisdictions. Some jurisdictions hold that the duty of care owed to an entrant depends on the entrant's status, while others hold that landowners owe a duty of reasonable care regardless of the entrant's status.<sup>34</sup> Nevertheless, landowners generally are not liable for physical harm caused by an open and obvious danger resulting from a condition on the land unless the danger of the harm was reasonably foreseeable.<sup>35</sup>

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573, 576-85 (1942) (summarizing the development and transitions of the common law categories in England and the United States).

30. Norman S. Marsh, *The History and Comparative Law of Invitees, Licensees and Trespassers*, 69 LAW Q. REV. 182, 184 (1953).

31. See generally KEETON ET AL., *supra* note 2, §§ 57-64; Prosser, *supra* note 29, at 576-85; GLEN WEISSEBERGER & BARBARA B. MCFARLAND, *THE LAW OF PREMISES LIABILITY* §§ 6.1-6.9 (3d ed. 2001) (noting historical developments and current trends in premises liability actions). Early common law rules held that the duty owed by a landowner to an entrant depended upon the status of the entrant. Entrants were placed into one of three categories: invitee, licensee, or trespasser, with the category determining the extent of the landowner's duty to the entrant. *Gladon v. Greater Cleveland Reg'l Transit Auth.*, 662 N.E.2d 287, 291 (Ohio 1996). The degrees of care owed to entrants gradually changed and in 1972, the Minnesota Supreme Court held that a landowner has a duty "to use reasonable care for the safety of all . . . persons invited upon the premises." *Balach*, 294 Minn. at 174, 199 N.W.2d at 647. By 2000, approximately twenty-five jurisdictions abolished or limited the land entrant categories. DAN B. DOBBS & PAUL T. HAYDEN, *TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY* 327 (4th ed. 2001).

32. See Prosser, *supra* note 29.

33. KEETON ET AL., *supra* note 2, § 56, at 374.

34. See DOBBS & HAYDEN, *supra* note 31, at 327.

35. RESTATEMENT (SECOND) OF TORTS § 343A(1) (1965). See generally W. Page Keeton, *Personal Injuries Resulting from Open and Obvious Conditions*, 100 U. PA. L. REV. 629 (1952) (summarizing aspects of the open and obvious rule and concluding that a defendant's liability should not be limited any more than in the Restatement).

B. *Historical Approach to Duty and Special Relationships*

Although states apply the concept of duty differently, the predominant view is that a duty is owed to protect another individual from harm when a special relationship exists between the parties<sup>36</sup> and when the risk of harm is foreseeable.<sup>37</sup> Often, special relationships are protective in nature<sup>38</sup> and involve a vulnerable individual<sup>39</sup> or are relationships resulting in financial gains to a defendant.<sup>40</sup> Therefore, society subjects individuals within special relationships to greater expectations of care.<sup>41</sup>

Presently, special relationships that typically give rise to a duty to protect include common carriers, innkeepers, possessors of land held open to the public, and persons who have custody of another individual which deprives that individual of the opportunity to protect themselves.<sup>42</sup> Furthermore, even if two parties are not categorized within any of the aforementioned relationships, courts may conclude that there is a special relationship between them as a matter of public policy.<sup>43</sup> By way of illustration, courts have found relationships sufficient to create a duty between employers and

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36. See Jason Asmus, Case Note, *Social Host Duty to Protect Guests: No Need for the Imposition of a Duty to Protect - Gilbertson v. Leininger*, 599 N.W.2d 127 (Minn. 1999), 27 WM. MITCHELL L. REV. 1353, 1358 n.37 (2000). Thirty-nine states recognize a duty to protect when a special relationship exists. See *id.*

37. See 2 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 18.2 (1956) (stating that duty inquiries focus on whether the consequences of the alleged wrongful conduct should have been foreseen by the actor). *But see* Fleming James, Jr. & Roger F. Perry, *Legal Cause*, 60 YALE L.J. 761, 790-91 (1951) (stating that when there is a breach of duty, a defendant may be liable for unforeseeable consequences of his or her actions).

38. Jonathan J. Hegre, *Minnesota "Nice"? Minnesota Mean: The Minnesota Supreme Court's Refusal to Protect Sexually Abused Children in H.B. ex rel. Clarke v. Whittemore*, 15 LAW & INEQ. 435, 444-45 (1997).

39. *Donaldson v. Young Women's Christian Ass'n of Duluth*, 539 N.W.2d 789, 792 (Minn. 1995) (citing KEETON ET AL., *supra* note 2, § 56, at 374). "Typically, the plaintiff is in some respect particularly vulnerable and dependent on the defendant, who in turn holds considerable power over the plaintiff's welfare." *Id.*

40. *Harper v. Herman*, 499 N.W.2d 472, 474 n.2 (quoting KEETON ET AL., *supra* note 2, § 56, at 374). Keeton states that that in situations where the relationship between two individuals involves financial gain for the defendant, fairness requires that the defendant protect the plaintiff if the plaintiff expects protection, "which itself may be based upon the defendant's expectation of financial gain." *Id.*

41. Hegre, *supra* note 38, at 444-45.

42. RESTATEMENT (SECOND) OF TORTS § 314A (1965).

43. See *Erickson v. Curtis Inv. Co.*, 447 N.W.2d 165, 169 (Minn. 1989) (stating that public policy is a significant consideration in identifying duty).

employees,<sup>44</sup> companions on a social venture,<sup>45</sup> and a school and its students.<sup>46</sup>

### III. DUTY IN MINNESOTA

The Minnesota Supreme Court first addressed duty in *Depue v. Plateau*.<sup>47</sup> *Depue* held that regardless of the relationship between two parties, an affirmative duty to avert injury to another person arises in circumstances in which a failure to use reasonable care obviously will result in injury to that person.<sup>48</sup> Although *Depue* imposed an affirmative duty to protect, Minnesota generally adheres to the nonfeasance rule<sup>49</sup> beyond the premises liability realm, mandating a legal duty only when the parties share a special relationship and the risk of harm is foreseeable.<sup>50</sup>

In Minnesota premises liability cases, however, a landowner's affirmative duty to maintain land in a reasonably safe condition accompanies his or her right to possess the land.<sup>51</sup> In 1972, Minnesota abolished the conventional duty doctrines based on entrant status and imposed a duty upon landowners to exercise

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44. See *Anderson v. Atchison, Topeka & Santa Fe Ry. Co.*, 333 U.S. 821, 823 (1948).

45. *Farwell v. Keaton*, 240 N.W.2d 217, 222 (Mich. 1976) (holding a special relationship existed between two males on a social venture, and one had the duty to seek medical assistance or notify someone of the other's condition following an attack that occurred while they were together).

46. See *Mirand v. City of New York*, 637 N.E.2d 263, 266 (N.Y. 1994). "Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision." *Id.*

47. 100 Minn. 299, 303-04, 111 N.W. 1, 2-3 (1907).

48. *Depue*, 100 Minn. at 303, 111 N.W. at 2. The *Depue* court noted that the facts of this case:

bring it within the more comprehensive principle that whenever a person is placed in such a position with regard to another that it is obvious that, if he does not use due care in his own conduct, he will cause injury to that person, the duty at once arises to exercise care commensurate with the situation in which he thus finds himself.

*Id.*

49. KEETON ET AL., *supra* note 2, § 56, at 373 (defining "nonfeasance" as "a passive inaction or a failure to take steps to protect [others] from harm").

50. See *Doe v. Brainerd Int'l Raceway, Inc.* 533 N.W.2d 617, 621 (Minn. 1995); *Donaldson v. Young Women's Christian Ass'n of Duluth*, 539 N.W.2d 789, 792 (Minn. 1995); *Erickson v. Curtis Inv. Co.*, 447 N.W.2d 165, 168-69 (Minn. 1989).

51. See *Louis v. Louis*, 636 N.W.2d 314, 320 n.7 (Minn. 2001) (citing RESTATEMENT (SECOND) OF TORTS, ch. 12, Topic 7 Scope Note (1965)).

reasonable care toward all individuals *invited* on their premises.<sup>52</sup> This newly imposed duty requires the landowner to inspect the premises for hazards, effectuate proper repairs as necessary,<sup>53</sup> and warn entrants of conditions that may present an unreasonable risk of harm.<sup>54</sup> Further, this duty applies to all unreasonable risks of harm, notwithstanding the source of the risk.<sup>55</sup> Minnesota courts currently apply the following factors to adjudge whether a landowner owes a duty to an entrant: (1) the circumstances and purpose for which entry was made; (2) the foreseeability or possibility of harm; (3) the duty to inspect, repair, or warn; (4) the reasonableness of inspection or repair; and (5) the opportunity and ease of repair or correction.<sup>56</sup>

A. *Special Relationships in Minnesota*

In 1979, the Minnesota Supreme Court adopted sections 314 and 315 of the Restatement (Second) of Torts, which pertain to special relationships giving rise to a duty to aid or protect in negligence actions.<sup>57</sup> Pertinent portions of those sections assert that special relationships create a duty to warn, either when a landowner opens his or her land to the public, or when a person has control or custody over another individual (thereby making it impossible for that individual to protect himself).<sup>58</sup> Although the Minnesota Supreme Court adopted these Restatement sections, the court conveyed that a special relationship is not the only circumstance giving rise to an affirmative duty to protect.<sup>59</sup>

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52. Peterson v. Balach, 294 Minn. 161, 174, 199 N.W.2d 639, 647 (1972).

53. See Adeo v. Evanson, 281 N.W.2d 177, 180 n.1 (Minn. 1979) (citing MINN. DIST. JUDGES ASS'N, COMM. ON JURY INSTRUCTION GUIDES, MINNESOTA JURY INSTRUCTION GUIDES (CIVIL) JIG 330 G-S, 332 G-S (James L. Hetland, Jr. & Oscar C. Adamson II, rep.) in 4 MINN. PRACTICE 1, 280, 287 (2d ed. 1974)). See also Louis, 636 N.W.2d at 319 n.4; Balach, 294 Minn. at 174, 199 N.W.2d at 647-48.

54. See Adeo, 281 N.W.2d at 180. See also Louis, 636 N.W.2d at 319 n.4; Balach, 294 Minn. at 174, 199 N.W.2d at 647-48.

55. Sullivan v. Farmers and Merchs. State Bank of New Ulm, 398 N.W.2d 592, 595 (Minn. Ct. App. 1986).

56. Louis, 636 N.W.2d at 322 n.9 (citing Bisher v. Homart Dev. Co., 328 N.W.2d 731, 733 (Minn. 1983)). See also MINNESOTA DIST. JUDGES ASS'N, COMM. ON JURY INSTRUCTION GUIDES, MINNESOTA JURY INSTRUCTION GUIDES (CIVIL) JIG 85.28 (Michael K. Steenson & Peter B. Knapp, rep.) in 4A MINN. PRACTICE 1, 254-58(4th ed. 1999).

57. Delgado v. Lohmar, 289 N.W.2d 479, 483-84 (Minn. 1979).

58. RESTATEMENT (SECOND) OF TORTS § 314A (1965).

59. See, e.g., Delgado, 289 N.W.2d at 483-84 (holding that hunters, who were strangers to the landowner, owed a duty to the landowner despite the lack of a

Historically, duty determinations in premises liability actions differed if the action entailed land conditions as opposed to conduct on the land. The decisions concerning land conditions have *never* mentioned special relationships as a means by which to create a duty to protect against hazardous conditions on premises.<sup>60</sup> Further, the courts consistently distinguish duty concerning conditions on land based on premises liability theories from duty created by a special relationship related to the negligent conduct of the defendant or others on a premises.<sup>61</sup> This distinction is also explicitly maintained in the Second Restatement,<sup>62</sup> as well as other secondary sources.<sup>63</sup>

In summary, the above cases and commentary were the genesis for the court's finding in *Louis* that duty based on a special relationship is "separate and distinct" from duty based on premises liability theories.<sup>64</sup> More importantly, this precedent establishes

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special relationship because they were "engaged in an extremely dangerous activity").

60. *See, e.g.*, *Sutherland v. Barton*, 570 N.W.2d 1 (Minn. 1997) (discussing duty of a landowner to an electrician who sustained injuries while working on the premises, with no mention of a special relationship); *Baber v. Dill*, 531 N.W.2d 493 (Minn. 1985) (discussing duty of a landowner for hazardous conditions on the premises, with no mention of a special relationship); *Peterson v. Balach*, 294 Minn. 161, 199 N.W.2d 639 (1972) (discussing duty of a cabin owner for death of a guest caused by carbon monoxide emanating from a gas refrigerator on the premises, with no mention of a special relationship).

61. *See, e.g.*, *Gilbertson v. Leininger*, 599 N.W.2d 127, 130 (Minn. 1999) (determining that duty can evolve from a special relationship between the parties when defendant fails to seek medical attention for the plaintiff, rather than exploring negligence under premises liability theories based upon conditions on the property); *H.B. v. Whittemore*, 552 N.W.2d 705, 708-09 (Minn. 1996) (holding that because a trailer park manager did not have a special relationship with children residing in the trailer park, she owed no duty to protect them from another resident who sexually molested them).

62. *See* RESTATEMENT (SECOND) OF TORTS, ch. 12, Topic 7 Scope Note (1965) (stating that landowner's duty to maintain land in a reasonably safe condition is specifically addressed in RESTATEMENT (SECOND) OF TORTS §§ 328E-379 rather than the RESTATEMENT (SECOND) OF TORTS sections concerning special relationships).

63. 3 STUART M. SPEISER, ET AL., THE AMERICAN LAW OF TORTS § 14:3, at 830 (1986). "In short, the common law has never seen fit to extend its principles of general negligence (as they came to be fashioned in the last century) to govern harm occasioned on the premises of others." *Id.* *See also* FRANCIS H. BOHLEN, STUDIES IN THE LAW OF TORTS 162-63, 174 (1926) (noting that decisions concerning landowner's liability to entrants injured on his premises are divided into two groups: "those in which the injuries are caused by the owner's acts and those caused by the condition of his premises," and further noting that the courts have frequent difficulty determining whether the entrant's injury is due to "active misconduct" or failure to maintain the premises in a reasonably safe condition).

64. *Louis v. Louis*, 636 N.W.2d 314, 320 (Minn. 2001).

that a special relationship is not essential to create a duty in premises liability actions.<sup>65</sup>

#### IV. THE *LOUIS* DECISION

##### A. *Facts*

In 1995, Robert Louis (“Appellant”) installed an aboveground swimming pool in his backyard and attached a slide to the shallow end of the pool.<sup>66</sup> Appellant did not believe that there was danger in sliding down the slide head or feet first.<sup>67</sup>

On August 2, 1997, Appellant invited family members to his home for a gathering.<sup>68</sup> He gave permission to guests to use his pool and slide, but did not post warnings concerning the slide.<sup>69</sup> Steven Louis (“Respondent”), Appellant’s adult brother, observed children and another adult brother performing headfirst “belly slides” down the slide and decided to slide down the slide headfirst.<sup>70</sup> Before doing so, he consulted a diagram on the slide showing the proper “belly slide” position.<sup>71</sup> When Respondent slid down the slide, he hit the bottom of the pool and sustained a burst fracture of his C6 vertebrae.<sup>72</sup>

Respondent originally sued Appellant for negligence based on premises liability theories.<sup>73</sup> Appellant moved for summary judgment on two grounds.<sup>74</sup> First, Appellant argued that he owed no duty of care to Respondent because a special relationship did not exist between the two men.<sup>75</sup> Second, Appellant argued that Respondent primarily assumed the risk of harm by using the slide.<sup>76</sup> The district court denied Appellant’s motion concerning primary assumption of risk.<sup>77</sup> It did, however, grant his motion concerning duty, reasoning that Appellant did not owe a duty because there

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65. *Id.* at 320 n.7.

66. *Id.* at 316.

67. *Id.*

68. *Id.* at 317.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 317, 320.

74. *Id.* at 317.

75. *Id.*

76. *Id.*

77. *Id.*

was no evidence that Appellant had actual or constructive knowledge of any danger concerning the slide.<sup>78</sup>

Respondent appealed the district court's decision that Appellant did not owe a duty to him.<sup>79</sup> The court of appeals reversed the district court's holding concerning duty, stating that there were disputed issues of material fact.<sup>80</sup> Appellant then petitioned the Minnesota Supreme Court for review concerning the duty issue.<sup>81</sup>

### *B. The Court's Analysis*

The Minnesota Supreme Court affirmed the court of appeals' decision concerning duty and remanded the case to the district court.<sup>82</sup> The Minnesota Supreme Court instructed the district court to determine if Respondent knew of and appreciated the danger of the slide and whether the slide was an obvious danger.<sup>83</sup> If so, Appellant may have owed a duty to Respondent.<sup>84</sup>

Moreover, the Minnesota Supreme Court found no merit in Appellant's argument that he did not owe a duty to Respondent absent a special relationship between them.<sup>85</sup> The court noted that Respondent's claim was based on premises liability theories, rather than a special relationship.<sup>86</sup> The court emphasized that a special relationship duty "is separate and distinct from a duty based on . . . premises liability."<sup>87</sup> When a negligence claim is based on a theory of premises liability, the court reasoned, the existence of duty is not contingent on whether a special relationship exists between the parties.<sup>88</sup>

## V. ANALYSIS OF THE *LOUIS* DECISION

In *Louis*, the Minnesota Supreme Court made a prudent decision when it refused to limit landowners' liability for injuries

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78. *Id.*

79. *Id.* at 318.

80. *Id.*

81. *Id.*

82. *Id.* at 321.

83. *Id.* at 322.

84. *Id.*

85. *Id.* at 320.

86. *Id.*

87. *Id.*

88. *Id.* at 320-21.

resulting from dangerous conditions on their premises.<sup>89</sup> Premises liability actions are based on the condition of a landowner's property.<sup>90</sup> In contrast, duty based upon a special relationship places more emphasis on specific conduct and activities, taking it outside the realm of premises liability.<sup>91</sup> *Louis* is a logical extension of prior cases holding that a landowner owes the same duty to *all* lawful entrants, "regardless of the status of the individuals" in premises liability cases.<sup>92</sup>

In application, the *Louis* decision does not increase the burden of landowners nor will it result in judicial inefficiency.<sup>93</sup> The decision promotes good public policy and allows courts to properly focus on the foreseeability of harm from dangerous land conditions.<sup>94</sup>

#### A. Landowners' Burden Under *Louis*

Increasing the landowner's legal and economic burden greatly concerned those opposed to modifying landowner liability under common law theories.<sup>95</sup> As noted by courts adopting the reasonable care standard, however, such burdens on landowners are more myth than reality.<sup>96</sup> Furthermore, such decisions do not diminish judicial efficiency.<sup>97</sup>

The argument that the reasonable care standard increases a

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89. *Id.* (indicating that the duty of landowners is not limited to situations in which there is a special relationship between the landowner and the entrant).

90. *See id.* at 320 (stating that the cases relied upon by appellant did not discuss duty based on premises liability theories because the cases did not concern a condition on the defendants' land).

91. *Id.*

92. *See Flom v. Flom*, 291 N.W.2d 914, 917 (Minn. 1980) (citing *Peterson v. Balach*, 294 Minn. 161, 174, 199 N.W.2d 639, 647 (1972)).

93. *See* discussion *supra* Part IV.A.

94. *See* discussion *supra* Part IV.B.

95. *See Marsh*, *supra* note 30, at 184-85. Landowners held a privileged position and courts limited the number of cases in which they recognized landowners' responsibility for reasonably foreseen harms. *Id.*

96. *Scurti v. City of New York*, 354 N.E.2d 794, 798 (N.Y. 1976) (stating that adopting the reasonable care standard for all entrants does not pose an unreasonable burden on the use of property because all that is required is reasonable care under the circumstances). *See also Mounsey v. Ellard*, 297 N.E.2d 43, 51 (Mass. 1973) (stating that "in a rural society with sparse land settlements and large estates, it would have been unduly burdensome to obligate the owner to inspect and maintain distant holdings for a class of entrants who were using the property 'for their own convenience,'" but that further immunity for landowners is no longer justified considering that we live in a more "urban industrial society").

97. *See* discussion *supra* Part IV.A.

landowner's legal burden is simply too convoluted to contain any merit. Because landowner liability is rooted in negligence, courts have never suggested that a landowner must ensure the absolute safety of an entrant,<sup>98</sup> nor have they ever held a landowner liable for "trivial imperfections."<sup>99</sup> Instead, courts generally take a common-sense approach in premises liability actions.

First, a landowner clearly has a duty to inspect his or her property,<sup>100</sup> but precedent explicitly states that a landowner is only required to use reasonable care under the circumstances.<sup>101</sup> This is true regardless of the entrant's status. In addition, this duty is modified according to the specific use of the land.<sup>102</sup> Further, entrants are responsible for their conduct and must themselves act with reasonable care under the circumstances.<sup>103</sup>

Second, the Minnesota Supreme Court adopted section 343A of the Restatement (Second) of Torts.<sup>104</sup> Section 343A limits landowner liability by asserting that a landowner is not liable for harm caused by a condition or activity on his or her premises if the danger is "known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness."<sup>105</sup>

Finally, *Louis* did not modify previous decisions concluding

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98. See, e.g., *Zuercher v. N. Jobbing Co.*, 243 Minn. 166, 171, 66 N.W.2d 892, 896 (1964); *Henderson v. Bjork Monument Co.*, 222 Minn. 241, 245, 24 N.W.2d 42, 45 (1946); *Rinn v. Minn. State Agric. Soc'y*, 611 N.W.2d 361, 365 (Minn. Ct. App. 2000) (stating that a landowner is not an insurer of safety).

99. *Helms v. Am. Legion, Inc.*, 213 N.E.2d 734, 735 (Ohio 1966) (stating that a landowner is not liable for trivial imperfections).

100. *Otto v. City of St. Paul*, 460 N.W.2d 359, 362 (Minn. Ct. App. 1990) (citing *Peterson v. Balach*, 294 Minn. 161, 174, 199 N.W.2d 639, 647 (1972)).

101. See *Balach*, 294 Minn. at 174, 199 N.W.2d at 647 (stating that the duty owed by a landowner to lawful entrants is to use reasonable care, which is "no more and no less than that of any other alleged tortfeasor"). See also *Johnson v. Alford & Neville, Inc.*, 397 N.W.2d 591, 593 (Minn. 1986) (holding that a landowner does not breach his or her duty of reasonable care when, "absent extraordinary circumstances, [the] landowner waits a reasonable time after the end of a storm before removing ice and snow").

102. *Otto*, 460 N.W.2d at 362 (quoting *Balach*, 294 Minn. at 174, 199 N.W.2d at 647).

103. *Balach*, 294 Minn. at 174, 199 N.W.2d at 647.

104. See *Peterson v. W.T. Rawleigh Co.*, 274 Minn. 495, 496-97, 144 N.W.2d 555, 557 (1966).

105. RESTATEMENT (SECOND) OF TORTS § 343A (1965). See also *Louis v. Louis*, 636 N.W.2d 314, 319 (Minn. 2001); *Sutherland v. Barton*, 570 N.W.2d 1, 7 (Minn. 1997) (stating that a landowner may have reason to anticipate harm when he or she "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").

that landowners owe a duty of reasonable care to all *invited* persons on land.<sup>106</sup> Although a landowner may owe a duty to an entrant absent a special relationship,<sup>107</sup> a landowner generally does not have a duty to exercise reasonable care toward trespassers who are not reasonably expected to enter his or her property.<sup>108</sup> Thus, the *Louis* decision did not increase the classes and sheer numbers of persons toward whom a landowner must exercise his or her duty of reasonable care.<sup>109</sup>

The above common-sense safeguards rectify what would otherwise result in overly harsh theories requiring landowners to become insurers of safety, which would increase landowners' legal burdens. Notwithstanding relief from liability compelled by these safeguards, a landowner always has the opportunity to demonstrate that taking extra precautions is unduly burdensome.<sup>110</sup>

Regardless of the above safeguards, landowners may depict *Louis* as a source of additional economic burden. This depiction, however, is unrealistic: in the 1970s, courts concluded that a duty to exercise reasonable care regardless of the entrant's status would not reduce the availability or increase the cost of insurance.<sup>111</sup> The

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106. *Louis*, 636 N.W.2d at 318; *Balach*, 294 Minn. at 174, 199 N.W.2d at 647.

107. *Louis*, 636 N.W.2d at 320-21. See also MINNESOTA DIST. JUDGES ASS'N, COMM. ON JURY INSTRUCTION GUIDES, MINNESOTA JURY INSTRUCTION GUIDES (CIVIL) JIG 85.22 (Michael K. Steenson & Peter B. Knapp, rep.) in 4A MINN. PRACTICE 1, 249-50 (4th ed. 1999) (defining an "entrant" as a person who enters or stays on the property of another [and is not a trespasser]").

108. *Croaker v. Mackenhausen*, 592 N.W.2d 857, 860 (Minn. 1999) (stating that landowners generally owe no duty to trespassers); see also *Flom v. Flom*, 291 N.W.2d 914, 917 (Minn. 1980). But see *Hanson v. Bailey*, 249 Minn. 495, 500, 83 N.W.2d 252, 257 (1957) (adopting RESTATEMENT (SECOND) OF TORTS § 335 (1965), which states that a landowner is liable to a trespasser for failure to warn of an artificial condition that he created or maintained if: (1) it is likely to cause death or serious bodily harm; (2) the landowner has actual knowledge of the danger and (3) the danger is concealed or hidden from the trespasser).

109. See *Louis*, 636 N.W.2d at 318 (following the *Balach* holding that a landowner owes a duty of reasonable care for all those invited upon the premises); *Flom*, 291 N.W. 2d at 917 (stating that the duty of a landowner "as to licensees and invitees is no more and no less than that of any other alleged tortfeasor, and that duty is to use reasonable care for the safety of all such persons invited upon the premises, regardless of the status of the individuals").

110. See *Scurti v. City of New York*, 354 N.E.2d 794, 798 (N.Y. 1976). "The defendant can always show that it would have been unduly burdensome to have done more." *Id.*

111. See *Rowland v. Christian*, 443 P.2d 561, 567-68 (stating that although the cost of insurance will depend on the rules of liability adopted, "there is no persuasive evidence that applying ordinary principles of negligence law to the land occupier's liability will materially reduce the prevalence of insurance due to

courts theorized that even if insurance costs increased, commercial landowners would absorb the brunt of the impact and could spread the increased cost of insurance among large sectors of society to minimize the overall impact.<sup>112</sup>

Undisputedly, liability insurance premiums have significantly increased over past years.<sup>113</sup> There is, however, no conclusive empirical evidence determining the degree to which tort litigation influenced changes in premium rates because there are many factors that contribute to the rising costs of insurance.<sup>114</sup> Regardless, well-established tort principles penalize the wrongdoer rather than the injured party.<sup>115</sup> Society should not grant defendants permission to use financial hardship as an excuse to disregard the duty of reasonable care to others.<sup>116</sup>

In summary, although the absence of a special relationship cannot abrogate landowner duty, *Louis* did not create additional obligations for landowners.<sup>117</sup> The *Louis* court merely re-articulated Minnesota precedent concerning landowner duty. *Louis* clearly indicates the direction of future rulings while not increasing landowner burden.

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increased cost or even substantially increase the cost”).

112. *Id.*; Kathryn E. Eriksen, Case Note, *Premises Liability in Texas – Time for a “Reasonable” Change*, 17 ST. MARY’S L.J. 417, 447 (1986) (citing majority opinion in *Smith v. Arbaugh’s Rest., Inc.*, 469 F.2d 97, 101 (D.C. Cir. 1972)). The majority in *Smith* indicates that modern tort law is moving toward enterprise liability, which distributes loss over large sectors of society through insurance to reduce the economic impact of negligence liability. *Id.* See also Mark J. Welter, *Premises Liability: A Proposal to Abrogate the Status Distinctions of “Trespasser,” “Licensee” and “Invitee” as Determinative of a Land Occupier’s Duty of Care Owed to an Entrant*, 33 S.D. L. REV. 66, 89 (1988).

113. MARK C. RAHDERT, *COVERING ACCIDENT COSTS* 115 (Temple University Press 1995).

114. *Id.* at 110. Insurers take the position that courts’ acceptance of the insurance rationale, or loss spreading, produced pro-plaintiff rulings by courts and excessive jury awards. *Id.* at 112-13. Lawyers point to the methods by which insurance companies practice business, and propose fundamental changes in insurance regulation to solve the problem. *Id.* at 113-14.

115. See, e.g., Welter, *supra* note 112, at 87 (arguing that modern tort law supports such allocation of burden); Arthur R. Goodhart, *Unforeseeable Consequences of a Negligent Act*, 39 YALE L.J. 449, 465 (1930) (stating that “if defendant’s act has the quality of wrongfulness and that where one of two persons must lose, it is the wrongdoer who ought to suffer”).

116. *Cooper v. Goodwin*, 478 F.2d 653, 656 (D.C. Cir. 1973).

117. *Louis v. Louis*, 636 N.W.2d 314, 320-21 (Minn. 2001) (reaffirming that landowners are not liable for open and obvious dangers and that a special relationship is unnecessary to create a landowner duty).

### B. *Judicial Efficiency after Louis*

Courts in all jurisdictions are increasingly concerned with mounting caseloads and the increasing capital and court calendar space devoted to jury trials.<sup>118</sup> Critics of the *Louis* holding may allege that the case exacerbates this problem because premises liability actions are now less likely to be subject to summary judgment motions for lack of duty.<sup>119</sup> These critics may further argue that as an inevitable result of *Louis*, juries will hear more cases to determine if landowners exercised reasonable care, thus contributing to increased court dockets and decreased judicial efficiency.<sup>120</sup>

The argument is moot, however, because Minnesota premises liability cases concerning land conditions have never discussed duty in terms of special relationships.<sup>121</sup> In actuality, *Louis*' recitation of precedent will improve judicial efficiency: the decision will deter unnecessary motions and hearings for arguments regarding the presence of a special relationship and commensurate duty in premises liability cases.<sup>122</sup>

## VI. PUBLIC POLICY GOALS AND FORESEEABILITY CONSIDERATIONS BEHIND *LOUIS*

Public policy determines whether plaintiffs' interests warrant legal protection.<sup>123</sup> While good public policy promotes equal

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118. J. Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Dispute Resolution Methods: A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, 103 F.R.D. 461, 465 (1984). "Experimentation with new methods in the judicial system is imperative given growing case loads, delays, and increasing costs." *Id.*

119. See *Louis*, 636 N.W.2d at 318; *Donaldson v. Young Women's Christian Ass'n of Duluth*, 539 N.W.2d 789, 792 (Minn. 1995); *Larson v. Larson*, 373 N.W.2d 287, 289 (Minn. 1985) (stating that duty is a question of law for the court to decide).

120. See KEETON ET AL., *supra* note 2, § 37, at 237 (stating that the question of whether a defendant used reasonable care under the circumstances is generally for the jury to decide).

121. See *supra* note 60 (referencing past decisions that did not apply special relationships to premises liability cases involving the condition of land).

122. *Louis*, 636 N.W.2d at 320-21; see also Comment, *Torts – Landowner's Liability – Traditional Distinctions Between Trespassers, Licensees and Invitees Abolished as Determinative of the Standard of Care Owed a Visitor*, 25 ALA. L. REV. 401, 411 (1973) (stating that if more jury trials resulted, the increase should be offset "by a decrease in litigation and appeals on preliminary questions regarding the entrant's status . . .").

123. *M.H. v. Caritas Family Servs.*, 488 N.W.2d 282, 287 (Minn. 1992).

protection and safety of all individuals entering another's land,<sup>124</sup> safety was not always at the forefront of premises liability actions. Auspiciously, legal philosophy has transformed from demanding immunity for landowners to a more humanitarian focus on compensating the injured.<sup>125</sup> Society now places greater importance on human safety than on landowners' unrestricted freedom.<sup>126</sup> One court zealously extended this position, stating that focus "upon the status of the injured party," rather than on the nature of the injury or the negligence of the landowner, "is contrary to our modern social mores and humanitarian values."<sup>127</sup>

Unquestionably, reasonable landowners use care to diligently protect themselves against injury on their own land.<sup>128</sup> A landowner is just as likely as an entrant on his or her premises to sustain injury caused by a dangerous condition on the premises.<sup>129</sup> Out of consideration for their fellow members of society, landowners should not deduce that injustice occurs because they must maintain their premises in a reasonably safe condition for all lawful entrants; the landowners should do so to protect themselves.<sup>130</sup>

The *Louis* court declined to limit landowner liability by distinguishing individuals with whom a landowner has a special relationship from other entrants.<sup>131</sup> In so doing, *Louis* strives to provide equal protection to all land entrants,<sup>132</sup> consistent with

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124. *Rowland v. Christian*, 443 P.2d 561, 568 (Cal. 1968). "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 . . ." depending upon the reason a person enters a landowner's property. *Id.*

125. *Eriksen*, *supra* note 112, at 440.

126. *O'Leary v. Coenen*, 251 N.W.2d 746, 749 (N.D. 1977). *See also* BOHLEN, *supra* note 63, at 188. The vague legal maxim, "*Sic utere tuo ut alienum non laedas*," ("in the use of one's own rights must not injure others in the exercise of their rights") should apply to those who enter another's property and are injured as a result of a danger on the property. *Id.*

127. *Rowland*, 443 P.2d at 568. *Id.*

128. Charles P. Dribben, Comment, *The Outmoded Distinction Between Licensees and Invitees*, 22 MO. L. REV. 186, 191 (1957).

129. *Id.*

130. *Id.*

Being required by law to use care with respect to those who come for his purposes, he should not be heard to complain or consider himself inconvenienced, should he be required, out of human considerations, to remedy those same danger which will produce that same harm whether the injured person be owner, invitee or social guest.

*Id.*

131. *Louis v. Louis*, 636 N.W.2d 314, 320-21 (Minn. 2001).

132. *See Rowland*, 443 P.2d at 569 (abolishing categories of entrants and substituting the general duty of reasonable care, noting that creating more

public policy goals articulated by past Minnesota Supreme Court decisions.<sup>133</sup>

These goals allow courts to properly focus on the foreseeability of injury.<sup>134</sup> Foreseeability in Minnesota is fundamentally intertwined in modern premises liability law.<sup>135</sup> Despite other issues that may arise, a landowner should not expect duty to hinge on a special relationship if it is equally foreseeable that someone outside of a special relationship will be injured by a condition on the land.<sup>136</sup> Thus, equal protection is supported by *Louis* and previous Minnesota decisions.<sup>137</sup> These decisions have allowed foreseeability to come to the forefront in premises liability decisions.<sup>138</sup>

In summary, requiring a special relationship to create duty in premises liability cases diminishes the importance of foreseeability in creating duty<sup>139</sup> and limits equal protection promoted in past Minnesota Supreme Court decisions.<sup>140</sup> *Louis* avoids both of these outcomes.

## VII. CONCLUSION

In *Louis*, the Minnesota Supreme Court logically clarified that a landowner's duty of reasonable care exists with or without a special relationship. The *Louis* opinion provides predictability and consistency in premises liability cases. In addition, *Louis* promotes the equal protection of all land entrants while emphasizing the importance of foreseeability and avoiding increased burdens upon landowners and our courts. *Louis* thus provides an appropriate balance between landowners' rights and good public policy.

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exceptions to the traditional category rules will lead to equal protection of all entrants).

133. See *Peterson v. Balach*, 294 Minn. 161, 174, 199 N.W.2d 639, 647 (1972). See also *Flom v. Flom*, 291 N.W.2d 914, 917 (Minn. 1980).

134. *Heins v. Webster County*, 552 N.W.2d 51, 57 (Neb. 1996) (stating that changing a landowner's duty to a reasonable care "places the focus where it should be," upon foreseeability of injury rather than on the entrant's status).

135. *Louis*, 636 N.W.2d at 322 n.9 (stating that foreseeability of harm is one of the factors Minnesota courts consider to determine if a landowner owes a duty to an entrant).

136. *Id.*

137. See *Rowland*, 443 P.2d at 569 (advocating for equal protection of all land entrants); see also *Balach*, 294 Minn. at 174, 199 N.W.2d at 647 (stating that all invited land entrants are owed a duty of reasonable care, regardless of status).

138. See *Heins*, 552 N.W.2d at 57 (stating that foreseeability of injury is more important than the entrant's status).

139. *Id.*

140. See *Balach*, 294 Minn. at 174, 199 N.W.2d at 647.