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Owners and Occupiers of Land Now Owe Those Lawfully on Their Premises a Duty of Reasonable Care under *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996)

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Note

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I. INTRODUCTION

Throughout its relatively short history, American law has placed a special value on the rights of real property owners. Often, the law protected these rights in a way that made land use seem more like a civil liberty than a social resource.[1] One way the common law protected property rights was by limiting landowners and occupiers' tort liability when entrants were harmed on the land. Limiting tort liability allowed landowners to use their land in any manner they chose, thus protecting valuable property rights. Yet, as American ideas about the value of property have begun to change,[2] so too have the

1. JAMES H. KUNSTLER, THE GEOGRAPHY OF NOWHERE: THE RISE AND DECLINE OF AMERICA'S MAN-MADE LANDSCAPE 26 (1993).
2. Just v. Marinette County, 201 N.W.2d 761, 768 (Wis. 1972)("An owner of land has no absolute and unlimited right to change the essential natural character of his

laws regarding tort liability of owners and occupiers. Nebraska recognized this tort reform in *Heins v. Webster County*.[3]

In *Heins*, the plaintiff, Mr. Heins, injured his back when he slipped at the front entrance to Webster County Hospital in Red Cloud, Nebraska. Heins was leaving the hospital after visiting his daughter, who was employed as a nurse at the hospital. Because his was merely a social visit, under existing Nebraska law Mr. Heins was a licensee and was denied recovery. The Nebraska Supreme Court held, however, that the distinction between licensees and invitees should be abolished and replaced by a reasonable standard of care for all lawful entrants.

The decision in *Heins* will dramatically affect premises liability law in Nebraska. Under *Heins*, the common law distinction between licensees and invitees is no longer solely determinative of the duty an owner or occupier owes to an entrant upon his land. Instead, licensees and invitees are now entitled to a reasonable standard of care under the circumstances. Trespassers, however, remain subject to the common law classification system.

This Note will examine how the *Heins* decision beneficially changed Nebraska law. Abolishing the common law status distinctions and applying a reasonable standard of care under the circumstances frees the court from the harshness of the common law and the problems of rigid application. A reasonable standard of care also more fully exemplifies modern social values. This Note will further show that the *Heins* decision was merely a step in the right direction for the court. To fully ameliorate the harmful effects of the common law categories, the court also should eliminate the status category of trespasser and should instead apply a single duty of reasonable care under the circumstances in all premises liability situations.

II. BACKGROUND

Although most negligence law is based on the belief that one owes a duty of reasonable care to others,[4] owners and occupiers of land traditionally have not been held to this standard of care. Instead, at common law, owners and occupiers of land owed a duty of care based on the status of the entrant.[5] Entrants historically were classified as invitees, licensees, or trespassers. An invitee is generally defined as a person who is expressly or implicitly invited to enter or remain on the land for a purpose connected with the business dealings of the posses-

land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others.").

3. 250 Neb. 750, 552 N.W.2d 51 (1996).
4. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 31 (5th ed. 1984).
5. *Id.* § 58; 3 STUART M. SPEISER ET. AL., THE AMERICAN LAW OF TORTS § 14:3 (1986).

sor of the land,[6] and is owed a duty of reasonable care.[7] A licensee is generally defined as a person who is privileged to enter or remain on land only by virtue of the possessor's express or implied consent.[8] An owner or occupier owes to a licensee a duty to warn of any unreasonable hidden conditions.[9] A trespasser generally is defined as one who enters or remains upon land in the possession of another without a privilege created by the possessor's consent or otherwise.[10] A trespasser is owed only the duty to refrain from intentional willful or wanton conduct.[11]

These status distinctions originated in England[12] and were incorporated into American common law. The status distinctions likely resulted from the strong emphasis early English society placed on land ownership.[13] The distinctions perhaps also reflect intangible social values inherited from feudal times.[14] The categories reflect the idea that a landowner should have the freedom to use his land in any way he chooses.[15] Modern society, however, is no longer based on landed property or feudal values. In 1957, England recognized the modernization of society and values by abolishing the distinction between licensees and invitees.[16]

American jurisdictions also have questioned the common law categories. In 1959, the United States Supreme Court soundly criticized the distinctions in *Kermarec v. Compagnie Generale Transatlantique* and refused to incorporate the distinctions into admiralty law.[17] The landmark American decision appeared in 1968, when the California

6. RESTATEMENT (SECOND) OF TORTS § 332 (1965).
7. *Id.* § 341A.
8. *Id.* § 330.
9. *Id.* § 341.
10. *Id.* § 329.
11. *Id.* § 333.
12. Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630 (1959); 2 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 27.1 (1956). *See* JOSEPH A. PAGE, THE LAW OF PREMISES LIABILITY § 6.1, at 129 n.1 (1988).
13. 2 HARPER & JAMES, *supra* note 12, § 27.1. *See* Norman S. Marsh, *The History and Comparative Law of Invitees, Licensees, and Trespassers*, 69 L.Q. REV. 182, 184-85 (1953).
14. 2 HARPER & JAMES, *supra* note 12, § 27.1; PAGE, *supra* note 12, § 2.1.
15. 2 HARPER & JAMES, *supra* note 12, § 27.1; FRANCIS H. BOHLEN, STUDIES IN THE LAW OF TORTS 163-90 (1926).
16. Occupier's Liability Act of 1957, 5 & 6 Eliz. 2, ch. 31 (Eng.). *See generally* Douglas Payne, *Occupier's Liability Act*, 21 MOD. L. REV. 359 (1958).
17. Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630-31 (1959) ("Yet even within a single jurisdiction, the classifications and subclassifications bred by the common law have produced confusion and conflict. As new distinctions have been spawned, older ones have become obscured. Through this semantic morass the common law has moved, unevenly and with hesitation, towards 'imposing on owners and occupiers a single duty of reasonable care in all the circumstances.'")(footnote omitted)(quoting Kermeric v. Compagnie Transatlantique, 254 F.2d 175, 180 (2nd Cir. 1957)(Clark, C.J., dissenting).

Supreme Court abolished the distinction between invitees, licensees, and trespassers in *Rowland v. Christian.*[18] *Rowland* went further than the English Parliament; *Rowland* eliminated all three categories, refusing to maintain a separate classification for trespassers. Since 1968, eleven jurisdictions have followed *Rowland* and completely abolished the common law classifications.[19] Another ten jurisdictions have followed the English lead and taken an intermediate position, abolishing the classifications of invitee and licensee while retaining a separate classification for trespassers.[20] Several other jurisdictions have altered the common law categories significantly via case law[21] or legislative act.[22] The majority of American states have, however, either expressly retained the common law distinctions or declined to abolish them.[23]

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18. 443 P.2d 561, 568 (Cal. 1968)("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.").

19. Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir. 1972)(applying District of Columbia law), *cert. denied*, 412 U.S. 939 (1973); Webb v. City & Borough of Sitka, 561 P.2d 731 (Alaska 1977); Mile High Fence Co. v. Radovich, 489 P.2d 308 (Colo. 1971); Pickard v. City & County of Honolulu, 452 P.2d 445 (Haw. 1969); Cope v. Doe, 464 N.E.2d 1023 (Ill. 1984)(eliminating the common law distinctions only as to child entrants upon land); Cates v. Beauregard Elec. Coop., Inc., 328 So. 2d 367 (La. 1976), *cert. denied*, 429 U.S. 833 (1976); Limberhand v. Big Ditch Co., 706 P.2d 491 (Mont. 1985); Moody v. Manny's Auto Repair, 871 P.2d 935 (Nev. 1994); Oullette v. Blanchard, 364 A.2d 631 (N.H. 1976); Basso v. Miller, 352 N.E.2d 868 (N.Y. 1976); Mariorenzi v. Joseph Diponte, Inc., 333 A.2d 127 (R.I. 1975)(*but see* Tantimonico v. Allendale Mut. Ins. Co., 637 A.2d 1056 (R.I. 1994)(restoring status category of trespasser)).

20. Jones v. Hanson, 867 P.2d 303 (Kan. 1994); Ford v. Board of County Comm'rs., 879 P.2d 766 (N.M. 1994); O'Leary v. Coenen, 251 N.W.2d 746 (N.D. 1977); Poulin v. Colby College, 402 A.2d 846 (Me. 1979); Mounsey v. Ellard, 297 N.E.2d 43 (Mass. 1973); Peterson v. Balack, 199 N.W.2d 639 (Minn. 1972); Ragnone v. Portland Sch. Dist. No. 1J, 633 P.2d 1287 (Or. 1981); Hudson v. Gaitan, 675 S.W.2d 699 (Tenn. 1984); Antoniewicz v. Reszczynski, 236 N.W.2d 1 (Wis. 1975); Clarke v. Beckwith, 858 P.2d 293 (Wyo. 1993).

21. For example, Missouri and Kentucky apply a duty of reasonable care once the presence of a visitor is known. Hardin v. Harris, 507 S.W.2d 172 (Ky. 1974); Taylor v. Union Elec. Co., 826 S.W.2d 57 (Mo. App. 1992). Indiana and Maine consider a social guest an invitee. Burrell v. Meads, 569 N.E.2d 637 (Ind. 1991); Ferguson v. Bretton, 375 A.2d 225 (Me. 1977).

22. Connecticut also considers social guest to be invitees. CONN. GEN. STAT. ANN. § 52-557(a) (West 1991). Illinois abolished the status distinctions by legislation. ILL. COMP. STAT. ANN. ch. 740, para. 130/2 (Smith-Hurd 1993 & Supp. 1996).

23. Heins v. Webster County, 250 Neb. 750, 757, 552 N.W.2d 51, 55 (1996). *See* KEETON ET. AL., *supra* note 4, § 58; 3 SPEISER ET. AL., *supra* note 5, § 14:3.

A. Policy Reasons

Jurisdictions retaining common law categories advance various reasons for doing so. One rationale is that the categories are entrenched in our common law and should not be changed on judicial whim.[24] It is also suggested that the categories promote judicial certainty by establishing predictable allocations of liability.[25] Some fear that abrogation of the categories and adoption of one standard of care will eliminate the security that the categories provide for landowners and occupiers. Along this line, it has been argued that "the single standard will hardly be a simplification, but an enigma masked in an elusive generalization, so broad, that there are no articulated exceptions."[26] Jurisdictions that retain the categories also point to the judiciary's ability to carve out exceptions to the rigid common law rules.[27] Additionally, some courts fear giving too much power to juries,[28] while others consider the matter one that is best resolved through legislative efforts.[29]

A number of reasons for abandoning the status categories also exist. One reason often advanced is that the numerous judicial exceptions to the common law rules have resulted in confusion and complexity.[30] This complexity erodes any judicial certainty the categories may promote because it is difficult to determine when an exception might be created or applied. Some argue that the common law rules developed during a time of feudal landed estates, and such laws are no longer beneficial in our modern society.[31] A further argument is that reasonable people do not vary their conduct based on the status of the entrant, and thus a reasonable standard of care under the circumstances should apply.[32] It should be noted that when the common law rules are abandoned in one form or another, the status of the en-

24. *See* Yalowizer v. Huskey Oil Co., 629 P.2d 465 (Wyo. 1981); KEETON ET. AL., *supra* note 4, § 58.
25. Heins v. Webster County, 250 Neb. 750, 757, 552 N.W.2d 51, 55 (1996); 3 SPEISER ET. AL., *supra* note 5, § 14:3.
26. Basso v. Miller, 352 N.E.2d 868, 876 (N.Y. 1976)(Breitel, J., concurring).
27. *See* Heins v. Webster County, 250 Neb. 750, 757, 552 N.W.2d 51, 55 (1996); 3 SPEISER ET. AL., *supra* note 5, § 14:3. *See generally* Vitauts M. Gulbis, Annotation, *Modern Status of Rules Conditioning Landowner's Liability Upon Status of Injured Party as Invitee, Licensee, or Trespasser*, 22 A.L.R.4th 294 (1983).
28. *See* 2 HARPER & JAMES, *supra* note 12, § 15; Carl S. Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions*, 1981 UTAH L. REV. 15, 63.
29. 3 SPEISER ET AL., *supra* note 5, § 14:3.
30. Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 631 (1959); Rowland v. Christian, 443 P.2d 561, 567 (Cal. 1968).
31. Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630 (1959); 2 HARPER & JAMES, *supra* note 12, § 27.1; PAGE, *supra* note 12, § 6.1.
32. Rowland v. Christian, 443 P.2d 561, 568 (Cal. 1968); Mounsey v. Ellard, 297 N.E.2d 43, 51 (Mass. 1973).

trant remains a relevant factor in determining the liability of the landowner or occupier.[33] Status, however, is no longer solely determinative of the duty of care owed.

B. The New Nebraska Position

In *Heins v. Webster County*, Nebraska joined those jurisdictions adopting the "intermediate position"—abolishing the common law distinction between licensees and invitees while retaining a separate category for trespassers.[34] Heins suffered an injury to his back when he slipped on a patch of ice and fell upon the front entrance steps to Webster County Hospital. Heins was at the hospital visiting his daughter, who was employed there as the Director of Nursing. Because Heins was paying his daughter a social visit, under existing Nebraska law he was only a licensee entitled to only a limited duty of care, and the trial court found for the hospital.[35] Heins appealed to the Nebraska Supreme Court, arguing that the common law status distinctions should be abolished.

In the majority opinion written by Justice Connolly and joined by four other justices, the supreme court reviewed the state of premises liability law in other jurisdictions and considered the policy justifications for and against the status distinctions.[36] The court essentially traced the development of the common law status distinctions and the changes made to the distinctions in England and various American jurisdictions. The court then abandoned the distinction between licensees and invitees, while retaining a separate classification for trespassers.[37] The court listed seven factors to be considered to determine whether the owner or occupier of land had exercised reasonable care:

> (1) the foreseeability or possibility of harm; (2) the purpose for which the entrant entered the premises; (3) the time, manner, and circumstances under which the entrant entered the premises; (4) the use to which the premises are put or are expected to be put; (5) the reasonableness of the inspection, repair, or warning; (6) the opportunity and ease of repair or correction or giving of warning; and (7) the burden on the land occupier and/or community in terms of inconvenience or cost in providing adequate protection.[38]

The court further emphasized that the determination of reasonableness is not limited to analysis based solely on these suggested factors.[39]

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33. Gulbis, *supra* note 27, at 299. *See* Webb v. City & Borough of Sitka, 561 P.2d 731 (Alaska 1977); Rowland v. Christian, 443 P.2d 561 (Cal. 1968); Mile High Fence Co. v. Radovich, 489 P.2d 308 (Colo. 1971); Heins v. Webster County, 250 Neb. 750, 552 N.W.2d 51 (1996); Basso v. Miller, 352 N.E.2d 868 (N.Y. 1976).
34. Heins v. Webster County, 250 Neb. 750, 761, 552 N.W.2d 51, 57 (1996).
35. *Id.* at 752, 552 N.W.2d at 52-53.
36. *See id.* at 754-59, 552 N.W.2d at 53-56.
37. *Id.* at 761, 552 N.W.2d at 57.
38. *Id.*
39. *Id.*

The majority's reasoning in *Heins* pointed out that the instant case "illustrates the frustration inherent in the classification scheme."[40] The court noted that had Heins been at the hospital to purchase a soft drink or to visit a patient, he would have been an invitee subject to a reasonable standard of care.[41] Yet, because Heins was visiting an employee, he was "denied the opportunity to recover merely because of his status at the time of the fall."[42] The court further reasoned that modern society creates relationships not covered by the common law status distinctions, and thus the common law categories should not be used to shield an owner or occupier from liability.[43] The majority chose not to abrogate the trespasser distinction because "one should not owe a duty to exercise reasonable care to those not lawfully on one's property."[44] The majority noted that the decision did not make owners and occupiers insurers of their premises.[45]

The dissenting opinion in *Heins,* written by Justice Fahrnbruch and joined by Justice Caporale, argued against abolition of the common law status distinctions. These justices pointed out that the majority of American jurisdictions retain the common law categories.[46] The dissent asserted that the court, in the past, had been capable of assigning liability based on the invitee and licensee distinction[47] and worried that the majority's opinion "socializes the use of privately owned property" by requiring the landowner to exercise the same duty of care to all lawful entrants.[48] The dissent also objected to the majority's position that required property owners to be aware of and liable to unknown and uninvited visitors on their property, thus creating a liability not previously found in Nebraska law.[49]

III. ANALYSIS

A. Rigid Application of Common Law Distinctions

The *Heins* decision dramatically changed Nebraska premises liability law. It was a good case in which to make such a change, as the court was presented with the precise issue of retention or rejection of the common law categories.[50] Also, *Heins* illustrates the possibility of

40. *Id.* at 759, 552 N.W.2d at 56.
41. *Id.* at 760, 552 N.W.2d at 56.
42. *Id.*
43. *Id.* at 760, 552 N.W.2d at 56-57.
44. *Id.* at 761, 552 N.W.2d at 57.
45. *Id.* The majority wanted to clarify that changing the standard does not impose liability in all circumstances.
46. *Id.* at 762, 552 N.W.2d at 57.
47. *Id.*
48. *Id.* at 763, 552 N.W.2d at 58.
49. *Id.*
50. *Id.* at 751, 552 N.W.2d at 52 ("The question presented is whether this court should abolish the common-law classifications of licensee and invitee and require

harsh results when applying the rigid common law rules. Under the common law rules, two parties of different status may be on the premises at a given time, but only one would be allowed recovery. The majority in *Heins* pointed out that had Heins been visiting a patient or purchasing soda from the vending machine, he would have been classified an invitee and thus owed a reasonable standard of care.[51] The hospital escaped liability for its failure to exercise reasonable care only because Heins fell while visiting an employee. Had another visitor, one on the premises to visit a patient, simultaneously fallen on the same spot, the hospital would have been liable for any resulting injuries.[52]

This rigid application of the common law rules has led to harsh results in previous Nebraska decisions. In *Von Dollen v. Stulgies*,[53] the plaintiff was injured when wallboard fell on her ankle while she was visiting the construction site of her sister's new home. The Nebraska Supreme Court concluded that the plaintiff was only a licensee subject to a limited standard of care and found for the defendant.[54] It appears, however, that the plaintiff's sister, who was present at the time of injury, had a business relationship with the defendant builders and therefore would have been classified as an invitee. Thus, had the wallboard fallen on the sister, the builders would have been liable for negligently stacking the wallboard.[55] Because the plaintiff, rather than her sister, was injured, the builders escaped liability for their carelessness. This rigid application denied the plaintiff the opportunity to recover merely because of her status. The *Heins* decision correctly eliminates the common law rigidity in such situations and allows for recovery under our modern value system.

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a duty of reasonable care to all nontrespassers."). Other jurisdictions, in contrast, have stretched to find an opportunity to reexamine the common law status distinctions. *See, e.g.*, Ford v. Board of County Comm'rs., 879 P.2d 766 (N.M. 1994).

51. Heins v. Webster County, 250 Neb. 750, 760, 552 N.W.2d 51, 56 (1996). *See, e.g.*, Syas v. Nebraska Methodist Hosp. Found., 209 Neb. 201, 307 N.W.2d 112 (1981).

52. This is so because a visitor on the premises to visit another patient would be deemed an invitee under Nebraska law due to the business advantage gained by the hospital. *See* Heins v. Webster County, 250 Neb. 750, 552 N.W.2d 51 (1996); Syas v. Nebraska Methodist Hosp. Found., 209 Neb. 201, 307 N.W.2d 112 (1981). Heins, however, was making a social visit and, under existing Nebraska law, was given only licensee status. *See* Blackbird v. SDB Invs., 249 Neb. 13, 541 N.W.2d 25 (1995); Guenther v. Allgire, 228 Neb. 425, 422 N.W.2d 782 (1988); Roan v. Bruckner, 180 Neb. 399, 143 N.W.2d 108 (1966); Von Dollen v. Stulgies, 177 Neb. 5, 128 N.W.2d 115 (1964).

53. 177 Neb. 5, 128 N.W.2d 115 (1964).

54. *Id.* at 12, 128 N.W.2d at 119.

55. *See* Neff v. Clark, 219 Neb. 521, 363 N.W.2d 925 (1985)(defining the duty of care owed an invitee under prior Nebraska law as reasonable care to keep premises safe for the use of the invitee).

B. Defining Licensees/Invitees

The dissenting justices in *Heins* argued against abolition of the common law categories, stating that courts have encountered little trouble in the past when applying the common law status classifications.[56] Upon further examination, this contention may not be wholly accurate. Nebraska case law indicates that the historical distinction between licensees and invitees has sometimes been unclear,[57] and the court has carved out a number of exceptions and limitations. At times the court has confused and even stretched the terms,[58] indicating that adoption of the reasonable standard of care may be the best solution for Nebraska law.

The *Heins* dissent cited recent Nebraska decisions defining licensees and invitees as evidence of the court's ease in applying the common law rules. The dissenters referred to recent decisions defining an invitee as a person who enters the premises of another in answer to the express or implied invitation of the owner or occupant to conduct business, either for the benefit of the owner or occupant or for their mutual advantage.[59] A landowner owes an invitee the duty of reasonable care to keep the premises safe for the use of the invitee.[60] The case law defined a licensee as a person who is privileged to enter or remain upon the premises of another by virtue of the possessor's express or implied consent, but who is not a business visitor.[61] A landowner owes a licensee the duty not to injure by willful or wanton negligence and to warn of hidden danger or peril known to the landowner but unknown or unobserved by the licensee.[62]

Although these definitions of status and duty seem straightforward at first glance, a review of Nebraska law suggests considerable confusion as to application of the definitions. One early problem was defining what was sufficient to constitute an "invitation." In *Haley v. Deer*,[63] a woman entered a tavern to use a pay telephone. After telephoning, she used the restroom facilities provided for customers. As she exited the restroom into a dark hallway, she missed the turn back into the main room of the tavern, fell through an opening into the basement, and suffered substantial injuries. The tavern owner argued that the plaintiff had entered the tavern solely for her own convenience or benefit and thus was only a licensee.[64] The court, however,

56. Heins v. Webster County, 250 Neb. 750, 762, 552 N.W.2d 51, 57 (1996)(Fahrnbruch, J., dissenting).
57. *See infra* notes 63-88 and accompanying text.
58. *See infra* notes 63-88 and accompanying text.
59. *See, e.g.*, McIntosh v. Omaha Pub. Sch., 249 Neb. 529, 544 N.W.2d 502 (1996).
60. *See, e.g.*, Neff v. Clark, 219 Neb. 521, 363 N.W.2d 925 (1985).
61. *See, e.g.*, McIntosh v. Omaha Pub. Sch., 249 Neb. 529, 544 N.W.2d 502 (1996).
62. *See, e.g.*, Blackbird v. SDB Invs., 249 Neb. 13, 541 N.W.2d 25 (1995).
63. 135 Neb. 459, 282 N.W. 389 (1938).
64. *Id.* at 461, 282 N.W.2d at 391.

found the plaintiff to be an invitee, seemingly relying on reasoning that the owner of the tavern implicitly "invited" the plaintiff to make use of the business premises by opening them to the public.[65] Thus, the plaintiff was subject to a reasonable standard of care and was allowed recovery.

The court attempted to further define "invitation" in *Lindelow v. Peter Kiewit Sons', Inc.*[66] In *Lindelow*, the plaintiff was seriously injured when he dove into a lake operated by his employer. The lake was created and maintained by the employer, and use of the lake was resticted to employees only. The plaintiff argued he was an invitee, as the employer had expressly (via letter) invited all of the employees to use the lake and its facilities.[67]

The court stated that a regular invitation may produce either a licensee relationship or an invitee relationship.[68] The real difference lies in the purpose of the invitation.[69] If the purpose relates to the business of the owner or occupier or for the parties' mutual business advantage, then the party receiving the invitation is classified as an invitee. Otherwise, the party receiving the invitation is a mere licensee.[70] Because use of the lake was not mutually advantageous to the business interests of the parties, the plaintiff was classified as a licensee and was denied recovery.[71]

The licensee/invitee word game is further illustrated by *Presho v. J.M. McDonald Co.*[72] In *Presho*, the plaintiff, with the store manager's permission, went into the back room of a store to retrieve a box for a frame she had purchased elsewhere. While in the back room, she slipped and suffered injury. The court ruled that while the plaintiff was in the front of the store, where merchandise was on display, she was an invitee.[73] Once she entered the back room of the store, however, she was "on an errand personal to herself, not in any way con-

65. *Id.* at 465, 282 N.W.2d at 392.
66. 174 Neb. 1, 115 N.W.2d 776 (1962).
67. *Id.* at 11-12, 115 N.W.2d at 782-83. The court found that
> [t]he letters, which plaintiff's counsel treats as invitations making the plaintiff an invitee, appear to welcome the employees to make use of the premises but in none of them is any suggestion that they are urged to use them or that the use of the facilities is particularly sought or desired by the defendant.

Id. at 13, 115 N.W.2d at 783.
68. *Id.* at 9, 115 N.W.2d at 781.
69. *Id.*
70. *Id.*
71. Lindelow v. Peter Kiewit Sons', Inc., 174 Neb. 1, 13, 115 N.W.2d 776, 783 (1962).
72. 181 Neb. 840, 151 N.W.2d 451 (1967).
73. *Id.* at 843, 151 N.W.2d at 454 ("In the store proper, merchandise was displayed to attract plaintiff's attention, and she could not be expected to constantly observe the floor as she moved along the aisles. There can be no question that while plaintiff was in the portion of the store where merchandise was displayed and sold, she was an invitee.").

nected with the business of the defendant."[74] Thus she was only a licensee.

The *Presho* court apparently ignored the plaintiff's testimony explaining that she entered the store to make a purchase *and* retrieve a box.[75] Nor did the court consider that a ladies restroom was located in the back room area.[76] The presence of a restroom in the back area of the store is particularly relevant as any customer in the store who made a purchase and then used the restroom would have been deemed an invitee.[77] Because the store knew that the restroom would be used by customers, it was reasonable to expect that the back room area would be kept safe. The store only escaped liability for its negligence because it happened to be the plaintiff and not a "paying" customer who fell. Applying the *Heins* duty of reasonable care to lawful entrants eliminates from Nebraska law this absurd classification and thus is a beneficial change.

Presho[78] is also interesting in that the majority found that *Haley v. Deer*[79] was "not in any way analogous to"[80] the instant case. That assertion seemingly is based on the court's emphasis in *Presho*[81] that the plaintiff in *Haley*[82] used a pay telephone, from which the tavern owner derived a small revenue. This created a mutual business advantage, and therefore the plaintiff was classified as an invitee and was allowed recovery. Yet, the actual *Haley* opinion[83] contained one line regarding the pay telephone.[84] The rest of the opinion apparently was based on the "implied invitation" reasoning.[85] This wavering, or perhaps rereasoning, suggests that the court indeed had substantial difficulties in accurately delineating between licensees and invitees.

This brief review of Nebraska law indicates that application of the common law status distinctions has been neither easy nor predictable.

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74. *Id.* at 843-44, 151 N.W.2d at 454.
75. *Id.* at 841, 151 N.W.2d at 453.
76. *Id.* at 845, 151 N.W.2d at 455 (McCown, J., dissenting)("There was evidence here that: '. . . we have a thousand people go back there to our restrooms a month.'"). The majority opinion, in contrast, found that "[w]hile the testimony indicates that a ladies' restroom was located in this area, this fact was unknown to her and its use was not the purpose of her trip, so on the facts in this case it is immaterial." *Id.* at 844, 151 N.W.2d at 454-55.
77. *Id.*
78. Presho v. J.M. McDonald Co., 181 Neb. 840, 151 N.W.2d 451 (1967).
79. 135 Neb. 459, 282 N.W. 389 (1938).
80. Presho v. J.M. McDonald Co., 181 Neb. 840, 844, 151 N.W.2d 451, 455 (1967).
81. *See id.*
82. Haley v. Deer, 135 Neb. 459, 282 N.W. 389 (1938).
83. *Id.*
84. *Id.* at 460-61, 282 N.W. at 390 ("However, she decided to telephone to a relative first to come for her, as it was about 6 o'clock in the evening, and went on to the Gold Dust Tavern for that purpose. The defendant, Deer, gets 25 per cent of the excess tolls above $5.50 a month from this pay telephone in his tavern.").
85. *See supra* notes 66-85 and accompanying text.

Historically, the court has struggled to determine classifications in difficult situations[86] and has doggedly retained the categories in situations where their application seemed harsh.[87] Because the common law categories are so difficult to apply, it appears that abolition of the categories and adoption of one reasonable standard of care may be the best solution for modern Nebraska law.

C. Social Guests

While some jurisdictions have stretched to find social guests to be invitees subject to a reasonable standard of care,[88] Nebraska always has defined social guests as licensees.[89] The longevity of this classification fails to make it logical, however. Perhaps a simple example will illustrate the point. Suppose two families live as neighbors for ten years. Over the years, they become friends. When one neighbor invites the other neighbor into his home, under the common law that "social guest" is owed only the limited licensee duty of care.[90] In contrast, however, if one neighbor invited an insurance salesperson to his home, a person he had never even met, that unknown salesperson is owed a general duty of reasonable care.[91] This simple illustration raises the question—why should one owe a lesser duty to a friend than to a stranger?[92] Because the social guest licensee classification is illogical in modern society, adoption of one reasonable standard of care is preferable.

D. What About Trespassers?

The *Heins* decision expressly retained the separate status classification for trespassers because "one should not owe a duty to exercise reasonable care to those not lawfully on one's property."[93] Although England and a number of American jurisdictions have similarly chosen to abrogate only the invitee and licensee common law distinc-

86. *See* McIntosh v. Omaha Pub. Sch., 249 Neb. 529, 544 N.W.2d 502 (1996); Lindelow v. Peter Kiewit Sons', Inc., 174 Neb. 1, 115 N.W.2d 776 (1962); Haley v. Deer, 135 Neb. 459, 282 N.W. 389 (1938).

87. *See* Presho v. J.M. McDonald Co., 181 Neb. 840, 151 N.W.2d 451 (1967); Von Dollen v. Stulgies, 177 Neb. 5, 128 N.W.2d 115 (1964).

88. *See supra* notes 21-22 and accompanying text.

89. *See* Blackbird v. SDB Invs., 249 Neb. 13, 541 N.W.2d 25 (1995); Guenther v. Allgire, 228 Neb. 425, 422 N.W.2d 782 (1988); Lindelow v. Peter Kiewit Sons', Inc., 174 Neb. 1, 115 N.W.2d 776 (1962)(discussing the purpose requirement of an invitation).

90. PAGE, *supra* note 12, § 3.6.

91. This is so because under the "economic benefit" or "mutual benefit" theory of the invitee classification, the insurance salesperson enters for a purpose directly or indirectly connected with the business dealings of the salesperson and the possessor of the property. *See* PAGE, *supra* note 12, § 4.2.

92. *See* Antoniewicz v. Reszcynski, 236 N.W.2d 1 (Wis. 1974).

93. Heins v. Webster County, 250 Neb. 750, 761, 552 N.W.2d 51, 57 (1996).

tions,[94] maintaining a separate category for trespassers may be ill-advised for modern premises liability law.

Of course, one reason the Nebraska Supreme Court may have declined to change the trespasser rule is because it was not asked to do so. The question presented in *Heins* was "whether this court should abolish the common-law classifications of licensee and invitee and require a duty of reasonable care to all nontrespassers."[95] Simply by exercising judicial restraint, the court could have passed on the issue of trespassers and perhaps intended to do so. The court, however, briefly considered the issue of trespassers in its opinion,[96] but expressly refused to abrogate the trespasser category.[97]

The court offered two reasons for refusing to abrogate the status classification for trespassers. First, the law should not restrict the free use of land by requiring landowners to expect or anticipate a trespasser's presence.[98] Second, a trespasser, unlike an invitee or a licensee, enters under no claim of right and thus should not be subject to extended protection.[99] Other jurisdictions also offer these basic reasons for retaining the trespasser category.[100] The reasons, however, fail to support retention of the category.

The first reason, the contention that a landowner would be unfairly burdened by a duty to anticipate trespassers, is unjustified. It must be remembered that the duty owed under the ordinary standard of care is to take care to avoid foreseeable, unreasonable risks.[101] Under *Heins,* the status categories of invitee and licensee are still relevant in determining foreseeability.[102] The status of a trespasser also should be only a factor in the foreseeability of the harm and not solely determinative of the duty owed. Under this method, if the presence of a trespasser is entirely unforeseeable, a landowner will neither violate the standard of care nor be unduly burdened. Furthermore, under *Heins,* a landowner is not an insurer of the premises, but is obligated only to take reasonable precautions.[103] *Heins* expressly lists a number of factors that the jury can consider when determining

94. England abolished the distinctions via the Occupiers Liability Act of 1957, 5 & 6 Eliz. 2, ch. 31 (Eng.). For an overview of the effects of and reasons behind this Act, see Payne, *supra* note 16. For a list of American jurisdictions abolishing the distinction between licensees and invitees, but retaining a separate category for trespassers, see *supra* note 20.

95. Heins v. Webster County, 250 Neb. 750, 751, 552 N.W.2d 51, 52 (1996).

96. *Id.* at 755-56, 761, 552 N.W.2d at 54, 57.

97. *Id.* at 761, 552 N.W.2d at 57.

98. *Id.* at 755, 552 N.W.2d at 54.

99. *Id.*

100. *See supra* note 20.

101. *See generally* RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS (6th ed. 1995).

102. Heins v. Webster County, 250 Neb. 750, 761, 552 N.W.2d 51, 57 (1996).

103. *Id.*

whether an owner or occupier has exercised a duty of care.[104] While hindsight may provide an argument that further precautions would have been more reasonable in a given situation,[105] this hardly substantiates a claim that the landowner is "unfairly burdened" by having to exercise reasonable care to trespassers. Indeed, in many situations, the conduct necessary to satisfy a reasonable standard of care for invitees and licensees will sufficiently satisfy a reasonable standard of care for trespassers.[106]

The second reason offered by the court for retaining the trespasser distinction is that a trespasser by definition does not enter the premises under any color of right.[107] While true,[108] this fails to justify denying a trespasser the protections of general negligence law. Concededly, a trespasser is a wrongdoer. Nevertheless, if a trespasser is exposed to unreasonable risk of harm on a landowner's property, the potential harm to the trespasser far outweighs the potential risk of harm to the landowner arising from the trespass.[109] A minor invasion of a property interest should not cause one to be deemed unworthy of humane treatment in today's society.[110]

The various kinds of trespassers rigidly classified under the common law rule further emphasize the disparate treatment of trespassers under the common law scheme. Under the common law definition of trespasser, the question of whether the entry was intentional, negligent, or purely accidental is immaterial.[111] Thus, many "technical" trespasses are relatively innocent. It is unfair to punish technical wrongdoers by subjecting them to risks of unreasonable harm. Our modern society should recognize that "[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."[112]

The maintenance of a separate category for trespassers also fails to serve the purpose the *Heins* court wished to achieve.[113] In fact, the court contradicts itself in its holding:

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104. *Id.*
105. *See generally* James Fleming, Jr., *Tort Liability of Occupiers of Land: Duties Owed to Trespassers*, 63 YALE L.J. 144 (1953).
106. Rowland v. Christian, 443 P.2d 561, 567 (Cal. 1968).
107. Heins v. Webster County, 250 Neb. 750, 755, 552 N.W.2d 51, 54 (1996).
108. RESTATEMENT (SECOND) OF TORTS § 329 (1965)(defining a trespasser as "a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise").
109. *See* Fleming, *supra* note 105, at 152-53.
110. *Id.* at 153.
111. RESTATEMENT (SECOND) OF TORTS § 329 cmt. c (1965).
112. Rowland v. Christian, 443 P.2d 561, 568 (Cal. 1968).
113. The *Heins* court discussed various reasons for abrogating the distinction between licensees and invitees. First, it wished to eliminate the "frustrations inherent in the classification scheme." Heins v. Webster County, 250 Neb. 750, 759, 552

> We conclude that we should eliminate the distinction between licensees and invitees by requiring a standard of reasonable care for all lawful visitors. We retain a separate classification for trespassers because we conclude that one should not owe a duty to exercise reasonable care to those not lawfully on one's property. *Adopting this rule places the focus where it should be, on the foreseeability of the injury, rather than on allowing the duty in a particular case to be determined by the status of the person who enters upon the property.*[114]

Immediately after retaining a separate category based on status for trespassers, the court acknowledged that the correct focus is not on status, but on foreseeability. Thus, the court itself provided evidence that maintaining a separate category for trespassers is illogical and fails to achieve the purpose of extending the principles of general negligence law to owners and occupiers of land. Foreseeability of the harm, not status of the entrant, should be the prevailing factor in premises liability law.[115]

Not only is maintaining the trespasser category illogical and unrelated to the purpose the *Heins* court wished to achieve, it also further contributes to the confusion inherent in the common law classification system. Retaining the trespasser exception "tends to perpetuate, although on a smaller scale, the kind of tradition-bound and mistaken analysis that . . . the court was aiming to correct."[116] This, in turn, forces courts to make the same rigid classifications necessary under the common law rules.[117] This places on courts a heavy burden to distinguish between trespassers and nontrespassers.

Under *Heins*, an entrant upon land will be entitled to a duty of reasonable care unless the entrant is deemed a trespasser.[118] If classified as a trespasser, the landowner will owe the entrant only the very limited duty not to willfully or wantonly injure.[119] There is a significant discrepancy between these standards of care, and in a close

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N.W.2d 51, 56 (1996). Second, it wanted to avoid the practice of continuing to "pigeonhole" individual entrants into a status category. *Id.* at 760, 552 N.W.2d at 56. Third, the court found "the common-law status classifications should not be able to shield those who would otherwise be held liable to a standard of reasonable care but for the arbitrary classification of the visitor . . . ." *Id.* at 760, 552 N.W.2d at 57.

114. *Id.* at 761, 552 N.W.2d at 57 (emphasis added).

115. Nearly every jurisdiction abolishing the common law distinctions in one form or another accepts this basic contention. For a list of jurisdictions that have altered the categories, see *supra* notes 19-22.

116. Mounsey v. Ellard, 297 N.E.2d 43, 57 (Mass. 1973)(Kaplan, J., concurring).

117. *Id. See* Edward A. Strenkowski, *Tort Liability of Owners and Possessors of Land—A Single Standard of Reasonable Care Under the Circumstances Towards Invitees and Licensees,* 33 ARK. L. REV. 194 (1979).

118. *See* Heins v. Webster County, 250 Neb. 750, 552 N.W.2d 51 (1996).

119. *See* Bosiljevac v. Ready Mixed Concrete Co., 182 Neb. 199, 153 N.W.2d 864 (1967); Maloepszy v. Central Mkt., 143 Neb. 356, 9 N.W.2d 474 (1943); Haley v. Deer, 135 Neb. 459, 282 N.W. 389 (1938). Nebraska requires that two criteria be met for conduct to be willful and wanton: the defendant must have actual knowl-

case, the distinction will be determinative. An example of a Nebraska case involving questions of whether entrants were licensees or trespassers may illustrate the point.[120]

In 1985, several teenage boys were killed when a cave in which they were camping collapsed. The survivors of two brothers killed in the accident brought a wrongful death action against the owner of the premises. Evidence showed that the boys had camped in the cave for as many as two years prior to the accident. The landowner was aware that people entered his cave and that the ceiling occasionally collapsed. "No trespassing" signs were posted on the premises, but the owner knew the signs were ignored. Based on these facts, the court classified the brothers as licensees.[121] However, in *Terry v. Metzger*,[122] another case arising out of the same accident, the district court concluded, arguably based on the same facts, that another boy injured in the collapse was only a trespasser.[123]

These same status distinctions, under *Heins*, would cause a grossly unjust result. As licensees, the two brothers would be entitled to a reasonable standard of care,[124] and their survivors undoubtedly would recover under the facts presented. The boy classified as a trespasser, however, would *not* recover because the duty owed to him would remain the same—to refrain from willful and wanton injury.[125] Thus, although both parties were involved in the same accident, one party would recover and the other would not.[126] Yet, if the traditional trespasser category was abolished, the critical distinction between licensee and trespasser would not be solely determinative in this situation. Rather, a general duty of reasonable care would be applied,[127] and the court could rightly consider all of the circumstances in the identical situations.

At least one jurisdiction asserts that the trespasser category should be retained because exceptions to the trespasser category ame-

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edge of the danger and intentionally fail to prevent harm that was reasonably likely to result. Terry v. Metzger, 241 Neb. 795, 799, 491 N.W.2d 50, 54 (1992).

120. The facts are adapted from *Wiles v. Metzger*, 238 Neb. 943, 473 N.W.2d 113 (1991).

121. Wiles v. Metzger, 238 Neb. 943, 956, 473 N.W.2d 113, 122 (1991).

122. Terry v. Metzger, 241 Neb. 795, 491 N.W.2d 50 (1992).

123. *Id.* at 798, 491 N.W.2d at 53.

124. *See* Heins v. Webster County, 250 Neb. 750, 552 N.W.2d 51 (1996).

125. *See supra* note 120.

126. Allowing one party to recover while the other does not serves to further illustrate the rigidness of the common law rules, as discussed *supra* text accompanying notes 36-45. Failing to eliminate the trespasser category thus returns the court back to what it is trying to avoid—"the frustration inherent in the classification scheme." Heins v. Webster County, 250 Neb. 750, 759, 552 N.W.2d 51, 56 (1996).

127. *See* Heins v. Webster County, 250 Neb. 750, 552 N.W.2d 51 (1996).

liorate the harshness of the common law rules.[128] These subclassifications of trespassers, however, are nothing more than an attempt to recognize that certain classes of trespassers are entitled to a greater standard of care. This illustrates the benefit of applying a general standard of care instead of creating fictional subclassifications.

One Nebraska subclassification is the attractive nuisance doctrine, which developed to protect trespassing children.[129] Nebraska recognized and adopted[130] the Restatement (Second) of Torts version of the attractive nuisance doctrine.[131] The apparent reason for creating a subclassification for children was due to the child's immaturity and the child's inability to anticipate danger and take precautions while trespassing.[132] Policymakers attempted to balance a landowner's right to use his property as he pleased against society's special interest in preserving the welfare of children.[133] The attractive nuisance doctrine is a step in the right direction of requiring a reasonable standard of care, but it falls short of achieving the policy objective. The needs and values of modern society would best be protected by a Nebraska law that applied a reasonable standard of care to all entrants upon land. Modern society values the whole population, not just the welfare of children. All categories of trespassers, whether children or adults, should be subject to a reasonable standard of care under the circumstances.

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128. O'Leary v. Coenen, 251 N.W.2d 746, 751 n.6 (N.D. 1977)("Exceptions to the trespasser category are few in number and are already well developed in North Dakota case law.").

129. *See generally* KEETON ET. AL., *supra* note 4, § 59.

130. Nebraska adopted the Restatement (Second) of Torts version of the attractive nuisance doctrine in *Gubalke v. Anther's Estate*, 189 Neb. 385, 202 N.W.2d 836 (1972).

131. RESTATEMENT (SECOND) OF TORTS § 339 (1965):

> Artificial Conditions Highly Dangerous to Trespassing Children
>
> 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 of 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 intermeddling 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.

132. *See* KEETON ET. AL., *supra* note 4, § 59.

133. *Id.*

E. Effect *Heins* Will Have on Nebraska Law

The *Heins* decision will impact Nebraska law both theoretically and practically. The theoretical implications of the decision have been the primary focus of this Note. The practical effects of the decision should also be considered, for the decision may strike fear into the hearts of property owners and attorneys accustomed to living and practicing under the common law rules.

Our system of law generally subscribes to the precept that questions of law are determined by a judge, while questions of fact are determined by a jury.[134] History has demonstrated that any rule of substantive law or procedure that enlarges the power of juries tends to extend liability.[135] The *Heins* decision essentially shifted a great deal of power away from the judge by enabling the jury to use the enumerated factors to determine whether a reasonable standard of care has been violated. This shift in the law may cause some to fear an increase in the number of cases in which owners and occupiers are found liable for injuries occurring on their land.

However, the factors listed by the court in *Heins* should limit liability of owners and occupiers, thereby dispelling the fears of landowners and their attorneys. The factors provide a framework for determining reasonable care under the circumstances; in turn, this framework can be used by both juries and owners and occupiers of land. While a jury will use the factors to evaluate *after* the fact, landowners can be guided by the factors and take reasonable precautions *before* any liability questions arise. Also, the factors themselves limit the liability of owners and occupiers by forcing the jury to consider the foreseeability of the harm[136] in light of the reason the entrant was on the premises and under the circumstances (purpose, time, place, and manner) the visitor entered the premises.[137] Furthermore, the jury must consider the owner or occupier's attempts to warn, the ordinary use of the premises, and the burden on the landowner or occupier in taking further precautions in terms of inconvenience or cost.[138] These considerations provide substantial protection of the owner or occupier's interest and do not expose the owner or occupier to undue liability. An owner or occupier simply must be able to demonstrate that a reasonable effort was made to protect the visitor from harm under the circumstances.

In addition, one comprehensive study indicates that overruling the common law status categories has not resulted in wholesale abandon-

134. EPSTEIN, *supra* note 101, at 275.
135. 2 HARPER & JAMES, *supra* note 12, § 15.5.
136. Heins v. Webster County, 250 Neb. 750, 761, 552 N.W.2d 51, 57 (1996).
137. *Id.*
138. *Id.*

ment of premises liability cases to jury discretion.[139] Furthermore, while the jury generally determines whether conduct is reasonable, under certain circumstances the court can refuse to submit the issue of reasonableness to the jury.[140] The court can, as a matter of law, rule that a party's conduct was reasonable under the circumstances and deny the jury's consideration of the *Heins* factors. Abolition of the status categories, even of all three categories, thus will not extend liability to landowners if juries accurately apply the *Heins* factors and judges exercise care in deciding whether there is sufficient evidence of negligence to submit the issue to the jury.[141]

IV. CONCLUSION

The *Heins* decision eliminates the common law status distinction between licensees and invitees and requires that a duty of reasonable care be applied to all but trespassers upon land. This approach has been followed by a number of American jurisdictions and is a beneficial change in Nebraska law. To fully eliminate the flaws of the common law classification system, however, the trespasser category also should be abrogated.

Complete abrogation of the common law status categories is consistent with our modern societal values. It must be remembered that the common law categories developed during a time in which the only parties affected by a lawsuit were the plaintiff and the defendant, and any finding of tort liability directly (and adversely) affected the defendant's pocketbook. Thus, perhaps it was justifiable to focus the issue on the status of the parties so that only the party most "morally blameworthy" suffered the consequences.[142] Today, however, the plaintiff and defendant are no longer the only parties involved in a lawsuit due to widespread liability insurance. The existence of liability insurance spreads costs over a large population[143] and eliminates the need to draw rigid lines of liability classification.

Whether only the licensee and invitee categories are abrogated or whether trespassers are also exempt from the common law categories, the fear that liability of owners and occupiers will be extended is unfounded. *Heins* specifically lists a number of factors that juries and landowners can consider in assessing whether reasonable care was exercised. Trial judges, of course, retain the discretion to decline submitting questions of negligence to the jury. In sum, *Heins* was a step in the right direction as it ushered into Nebraska law the idea that

139. Hawkins, *supra* note 28, at 61.
140. 2 HARPER & JAMES, *supra* note 12, § 15.3.
141. Hawkins, *supra* note 28, at 63.
142. 2 HARPER & JAMES, *supra* note 12, § 13.2.
143. *Id.* § 13.4.

modern social values should take precedence over ancient terminology. That idea is the lasting benefit of the *Heins* decision.

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