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No. 96187-5

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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CERTIFICATION FROM THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT  
IN RE:

SHANNON C. ADAMSON and NICHOLAS ADAMSON,  
husband and wife,

Plaintiffs/Respondents,

vs.

PORT OF BELLINGHAM, a Washington Municipal  
Corporation,

Appellant/Defendant.

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BRIEF OF AMICUS CURIAE  
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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## **I. IDENTITY AND INTEREST OF AMICUS CURIAE**

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus curiae program and has an interest in the rights of persons seeking redress under the civil justice system, including an interest in the common law rules defining the liability of owners and occupiers of land, including landlords and tenants.

## **II. INTRODUCTION AND STATEMENT OF THE CASE**

This case is before the Washington Supreme Court on a certified question of law from the Ninth Circuit Court of Appeals. The facts are drawn from the Ninth Circuit's Order and the briefing of the parties. *See Adamson v. Port of Bellingham*, 899 F.3d 1047 (9th Cir. 2018); Port's Op. Br. at 3-9; Adamson Resp. Br. at 3-13.

The Alaska Marine Highway System (the Ferry) and the Port of Bellingham (the Port) entered into a 15 year lease in 2009, under which the Ferry leased a portion of the Port's Terminal for docking the Ferry's passenger ferry. The lease granted the Ferry "exclusive use" of some parts of the Terminal, and "priority use" of other parts of the Terminal. The lease defined "exclusive use" to mean "sole possession and control... subject only to the terms and conditions of this Lease." *Adamson*, 899 F.3d at 1050. "Priority use" is defined as "superior but not exclusive right of use to the identified areas." *Id.* at 1050. The lease permitted the Port to "allow other

uses of the priority use areas so long as such use does not unreasonably interfere with [the Ferry's] use." *Id.* The areas of the Terminal for which the Ferry was entitled to "priority use" included a ship berth, a car ramp and the passenger ramp. *See id.* at 1049.

The lease provided that:

- the Port "will be solely responsible for keeping the leased premises in good repair," and the term "repair" includes "repairs of any type including but not limited to exterior and interior, structural and nonstructural, routine or periodic," *id.* at 1050;
- the Port shall keep and maintain the leased premises "in good and substantial repair and condition," and "shall make all necessary repairs thereto," Adamson Resp. Br. Appx. at ER 343;
- the Port will provide the Ferry with complete copies of the passenger ramp operations manual, and the Ferry shall operate the passenger ramp in compliance with the procedures and requirements in the operations manual, *see id.* at ER 344;
- "Accident Hazards: The Lessor [i.e., the Port] will maintain the leased premises free of structural or mechanical hazards..." *id.* at ER 345 (brackets added);
- the Ferry will permit the Port to enter upon the premises at all reasonable times to examine the condition of the premises, *see id.* at ER 348.

The Ferry sends one of its vessels to the Terminal approximately six times per month in the spring and summer, and approximately four times per month during the rest of the year. The ship remains in the berth for about twelve hours during each visit. During the rest of the month, the Ferry is not using the leased premises. While the Ferry's vessel was in its berth at the Terminal, no other vessel would be able to use the berth, car ramp or passenger ramp. The Port has not contracted with any other entity to use the premises when the Ferry is not at the Terminal, but retains the right to do so.

In 2008, a Ferry employee was operating the passenger ramp when the ramp abruptly fell 18 inches. The ramp is suspended by steel cables that are used to raise or lower the ramp. Once the ramp is in position, locking pins are extended from the ramp into the supporting structure, which takes the weight off of the steel cables. Following the 2008 incident, it was determined that the ramp abruptly fell because the Ferry employee attempted to lower the ramp without first withdrawing the locking pins. This allowed 18 inches of slack in the cables, and when the Ferry employee removed the locking pins the ramp fell 18 inches.

The Port hired an engineering firm to inspect and repair the ramp. The engineering firm prepared a written report, stating that the accident could have been much worse, as the cables could have snapped if there had been 24 inches rather than 18 inches of slack. It recommended adding an interlock system in the controls which would avoid any future incident by preventing the pins from being removed if there was slack in the cables. The

Port did not add the interlock system to the passenger ramp controls. The Port sent the engineering report to the Alaska Risk Management office (seeking reimbursement for the repair costs), but did not provide Ferry operational staff or other employees with the engineering report. The Ferry operational staff and other employees were unaware of the report.

In 2012, Shannon Adamson, an employee of the Ferry, was severely injured when she was operating the passenger ramp, the ramp collapsed, the supporting cables snapped, and the ramp fell about 15 feet. The cause of the ramp collapse was the same as the cause of the 2008 incident.

Adamson proceeded to trial against the Port in the federal district court for the Western District of Washington. The jury was instructed that the Port owed Adamson, as a business invitee, a duty to exercise ordinary care for her safety. The jury returned a special verdict form, finding: the Port was negligent with regard to the duty it owed Adamson as a business invitee; the Port was negligent as a landlord; the Port was negligent in failing to perform its promise to perform repairs under the contract; Adamson was not negligent; the Ferry was not negligent. The Port appealed and the Ninth Circuit certified a question of law to this Court, listed herein as the Issue Presented. *See Adamson*, 899 F.3d at 1051–52.

### **III. ISSUE PRESENTED**

Is party A (here, the Port) liable as a premises owner for an injury that occurs on part of a leased property used exclusively by party B (here, the Ferry) at the time of the injury, where the lease has transferred only priority usage, defined as a superior but not exclusive right to use that part of the property, to party B, but reserves the rights of party A to allow third-party use that does not interfere with party B's priority use of that part of the property, and

where party A had responsibility for maintenance and repair of that part of the property?

Perhaps stated more broadly, the question of Washington law presented is whether priority use can be considered to give exclusive control, and if so in what circumstances?

#### **IV. SUMMARY OF ARGUMENT**

Under Washington law, the “possessor” of premises owes a duty of care to those who enter the premises. A landlord or a tenant is a possessor of premises who owes a duty of care to entrants upon the premises if the landlord or tenant is in possession and control of the premises. A landlord who agrees under a lease to keep premises in repair and free of hazards, and retains sufficient control to perform repairs and keep the premises free of hazards, is in possession and control of that portion of the premises necessary to perform the agreed upon repairs and maintain the premises free of hazards. Under those circumstances, the landlord has an affirmative legal duty to act reasonably to keep the premises in good repair and free of hazards for use by a tenant and the tenant’s invitees, and the landlord is liable in tort for negligent nonperformance of that duty for injuries sustained by a tenant’s invitee.

Here, the lease retained in the Port sole responsibility to keep the premises in repair and free of hazards, and retained in the Port the right to use the premises so long as that use did not interfere with use by the Ferry. The Ferry’s use of the premises was limited to approximately 12 hours, four to six times per month; the balance of the time the premises were under the control of the Port. These lease provisions, taken together, retained in the

Port sufficient possession and control over the passenger ramp involved in Adamson's injury to allow the Port to perform repairs and maintain the ramp free of hazards. The Port is liable for negligent nonperformance as a premises owner/landlord for its failure to perform necessary repairs and maintain the ramp free of hazards.

## V. ARGUMENT

### A. Overview Of The Liability For Personal Injury On Leased Premises Under Washington Law.

#### 1. Premises Liability Generally

Under Washington premises liability law, a landowner owes an individual a duty of care based on the individual's status upon the land. *See Curtis v. Lein*, 169 Wn.2d 884, 890, 239 P.3d 1078 (2010). While a landowner generally owes to trespassers and licensees only a duty to refrain from willfully or wantonly causing injury, the landowner owes invitees an affirmative duty to use ordinary care to keep the premises in a reasonably safe condition. *See Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 41-42, 846 P.2d 522 (1993). "Reasonable care requires the landowner to inspect for dangerous conditions, 'followed by such repair, safeguards, or warning as may be reasonably necessary for [the invitee's] protection under the circumstances.'" *Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 139, 875 P.2d 621 (1994) (alteration in original) (quoting *Restatement (Second) of Torts* § 343 cmt. b (1965)).

The above rules regarding a landowner's duty of care apply only to areas of the land within the landowner's "possession." *See Pruitt v. Savage*,

128 Wn. App. 327, 331, 115 P.3d 1000 (2005). “[T]he test in a premises liability action is whether one is the ‘possessor’ of property.” *Gildon v. Simon Prop. Grp., Inc.*, 158 Wn.2d 483, 496, 145 P.3d 1196 (2006).

## **2. Shared Use and “Effective Control”**

In *Gildon*, this Court cited *Restatement (Second) of Torts* § 328E (1965) as authority for holding that a “possessor” of property includes a person who occupies, or has occupied, premises with the “intent to control it.” See *Gildon*, 158 Wn.2d at 496. *Restatement (Third) of Torts* § 49 (2012) is similar to *Restatement (Second)* § 328E and supersedes it. This Court has looked to *Restatement (Third)* § 49 to refine the concept of possession. See *Jordan v. Nationstar Mortgage, LLC*, 185 Wn.2d 876, 887, 374 P.3d 1195 (2016). Comment c to § 49 states that “[a] person is in control of the land if that person has the authority and ability to take precautions to reduce the risk of harm to entrants on the land...” (brackets added). The Reporters’ Note to comment c states in part that “[i]f an instrumentality on real property causes harm to another, an actor who is in control of the instrumentality, whether the land possessor or not, owes a duty to those on the land.” (Brackets added; citation omitted.)

*Restatement (Third)* expressly contemplates “multiple possessors.” *Restatement (Third)* § 49 cmt. d notes that control may be shared, either by dividing portions of the property, or by designating portions that are under joint control. In such cases, “each actor is subject to the duties... with respect to the control exercised.” Significantly, the comment recognizes that even

where possessors cede temporary control of the property, they may retain the responsibility of a possessor if the transfer of control is temporally or practically limited, as in that case the transferor may be said to have retained “effective control.” Sec. 49 cmt. d.

**3. *Common Law Rules Regarding Leases: Possession and Control, and the Doctrine of Caveat Emptor***

The traditional common law approach to leases, “shrouded in the feudal, medieval, agrarian property notions of middle England,” turned on the concept of a lease as equivalent to a sale of the premises for the term. *See* 4 Stuart M. Speiser, et al., *The American Law of Torts*, §14:76 at 338 (2015). Absent any covenant in the lease to the contrary, the landlord surrendered both possession and control of the land to the tenant, and once the tenant took possession of the premises the landlord had no duty to look after the premises or to keep them in repair. *See id.*; *see also* Glen Weissenberger, et al., *The Law Of Premises Liability*, §9.01 (4<sup>th</sup> ed., 2018); W. Page Keeton, et al., *Prosser And Keeton On Torts*, §63 at 434 (5<sup>th</sup> ed., 1984).

In *Regan v. City of Seattle*, 76 Wn.2d 501, 458 P.2d 12 (1969), this Court discussed this aspect of landlord-tenant law:

A general rule of landlord-tenant law is that, absent an agreement to repair by the lessor, the lessee takes the property subject to all apparent defects; and, with some exceptions, the lessor is not liable for injuries caused by apparent defects after exclusive control of the property has passed to the lessee... The critical question in determining the existence of [the landlord-tenant] relationship is whether exclusive control of the premises has passed to the tenant.

*Regan*, 76 Wn.2d at 504 (brackets added.)

Closely associated with the concept of exclusive possession and control of leased premises was the doctrine of caveat emptor. *See* W. Page Keeton et al., § 63 at 434-35. Washington decisions have occasionally referred to the doctrine of caveat emptor as the basis for landlord nonliability for personal injuries on leased premises. *See, e.g., Teglo v. Porter*, 65 Wn.2d 772, 773, 399 P.2d 519 (1965) (absent a covenant to repair or concealment of obscure defects, “the maxim caveat emptor applies, and the tenant takes the demised premises as he finds them”); *Hughes v. Chehalis Sch. Dist. No. 302*, 61 Wn.2d 222, 225, 377 P.2d 642 (1963) (absent fraud, misrepresentation or a covenant to repair, “[t]he tenant takes the property as he finds it, with all existing defects which he knows or can ascertain by reasonable inspection,” and “a rule similar to that of caveat emptor applies” (brackets added)). The justification for application of the rule was explained in the early case of *Baker v. Moeller*, 52 Wash. 605, 101 P. 231 (1909):

It would be as unreasonable as it is unjust to hold the owner of manufacturing establishments responsible for all damages that might occur by reason of the machinery not being kept in proper repair by his lessee, when he by the very operations and conditions of the written lease could have no supervision over it.

*Baker*, 52 Wash. at 608 (quoting *Johnson v. Tacoma Cedar Lumber Co.*, 3 Wash. 722, 726, 29 P. 451 (1892)).

Importantly, the rule of caveat emptor is a rule of *contract*, and is not relevant in the determination of tort liability. In *Howard v. Washington Water Power Co.*, 75 Wash. 255, 134 P. 927 (1913), this Court referred to the application of caveat emptor in a lease as “the general rule of nonliability

of the landlord in the absence of a warranty against defects or an agreement to make repairs,” and distinguished the application of the rule in an action on a contract from an action in tort. *Howard*, 75 Wash. at 260. “The rule caveat emptor rests in contract as an implied assumption on the tenant’s part of the risks of all obvious defects or conditions affecting the safety or fitness of the premises. *It can never be invoked to condone a tort.*” *Id.* at 260 (emphasis added).

Other Washington decisions question the continued viability of the caveat emptor rule. *See, e.g., Liebergesell v. Evans*, 93 Wn.2d 881, 892, 613 P.2d 1170 (1980) (“[s]eventy years ago, this court noted that ‘the tendency of the more recent cases has been to restrict rather than extend the doctrine of caveat emptor’”) (brackets added; quoting *Woody v. Benton Water Co.*, 54 Wash. 124, 127, 102 P. 1054 (1909)); *Foisy v. Wyman*, 83 Wn.2d 22, 25, 515 P.2d 160 (1973) (noting that “[t]hroughout the United States, the old rule of caveat emptor in the leasing of premises has been undergoing judicial scrutiny” (brackets added); quoting the Wisconsin Supreme Court’s reference to “that obnoxious legal cliché, caveat emptor” (citation omitted)). In *Foisy*, the Court explained the modern retreat from the rule, stating: “[T]he old rule of caveat emptor has little relevance to the renting of premises in our society. There can be little justification for following a rule that was developed for an agrarian society and has failed to keep pace with modern day realities.” 83 Wn.2d at 28.

#### **4. *Landlord Duties and Liability***

If premises are leased, a person injured on the premises may have a claim for damages against both the landlord and the tenant, and “the landlord-tenant relationship may affect the injured person’s ability to recover from either the landlord or the tenant.” John H. Binns, Jr., Comment, *Liability of Landlord and Tenant to Persons Injured on the Premises*, 39 Wash. L. Rev. 345 (1964). See also *Fletcher v. Sunel*, 19 Wn.2d 596, 599, 143 P.2d 538 (1943) (noting that while a commercial lessee has the duty to provide a safe place for the lessee’s invitee, the lessor had the primary duty to replace a window under a lease covenant to repair).

In *Regan*, this Court stated that a landlord’s status does not shield him or her from liability for acts of negligence:

If a landlord...is otherwise guilty of affirmative negligence on the premises he will not be excused from liability by virtue of the landlord-relationship... “[I]ndependent of the law of landlord and tenant, a landlord is liable to his tenant or the tenant’s guest for his affirmative acts of negligence. The rights and liabilities of the parties under the law of landlord and tenant and negligence are not mutually exclusive.”

*Regan*, 76 Wn.2d at 505 (quoting *Rossiter v. Moore*, 59 Wn.2d 722, 725, 370 P.2d 250 (1962)).

In *Rossiter*, this Court reversed a summary judgment dismissal of a claim brought against a landlord by the tenant’s guest. The Court quoted extensively from the Oregon Supreme Court’s opinion in *Senner v. Danewolf*, 139 Or. 93, 6 P.2d 240 (1932):

Is the landlord liable to... invitees of his tenants upon the demised premises by reason of a dangerous condition of the premises which existed at the time of leasing and of which both landlord and tenant had knowledge, but of which the injured guest or invitee was

ignorant?... The dangerous condition... existed at the time the premises were let and was brought about and entirely produced by the landlord, and he remains liable for injury to third persons, lawfully on the premises, by reason of the dangerous condition which he created, notwithstanding the leasing... “If a landlord lets premises and agrees to keep them in repair, and he fails to do so, in consequence of which any one lawfully upon the premises suffers injury, he is responsible for his own negligence to the party injured.”

*Rossiter*, 59 Wn.2d at 725-26 (quoting *Senner* 6 P.2d at 241 (citations omitted)). A law review author discussed the holding in *Rossiter*:

A landlord’s immunity from liability for personal injuries on the premises may be justified by the fact that he is out of possession and control of the land. If a defect develops during the tenancy and the landlord has neither covenanted to repair nor reserves the right to enter to make repairs he should not be responsible for injuries caused by such defects. In this situation the landlord is not in a position to do anything about the condition even if he has actual knowledge of it. The reasons for affording the landlord immunity disappear, however, if the defect exists at the beginning of the term or is caused by the landlord’s active conduct during the term. An owner who is in a position to make the premises safe for those who might be expected to use them, ought to have the duty to do so.

Binns, Jr., *supra*, 39 Wash. L. Rev. at 360.

A landlord who leases a portion of premises and retains in his or her control any other part which the lessee is entitled to use “has a duty of affirmative conduct, an affirmative obligation to exercise reasonable care to inspect and repair the... portions of the premises for protection of the lessee.” *McCutcheon v. United Homes Corp.*, 79 Wn.2d 443, 445, 486 P.2d 1093 (1971) (regarding a landlord’s duty as to “common areas”); *see also Geise v. Lee*, 84 Wn.2d 866, 871, 529 P.2d 1054 (1975).<sup>1</sup>

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<sup>1</sup> In *McCutcheon*, the Court cited *Restatement (Second) of Torts* § 360 (1965) as authority for the common law rule. *See McCutcheon*, 79 Wn.2d at 445. Restatement § 360 states:

A possessor of land who leases a part thereof and retains in his own control any

A landowner owes the same duty of care to a tenant's employee as the landlord owes to the tenant. *See McCourtie v. Bayton*, 159 Wash. 418, 423–24, 294 P. 238 (1930); *Baker*, 52 Wash. at 608. In Washington, if a landlord breaches a lease agreement to keep and maintain the premises in repair, which exposes a tenant's invitee to an unreasonable risk of harm and the invitee is injured due to the disrepair, the landlord is liable in tort for negligent nonperformance. *See Teglo*, 65 Wn.2d at 774–75; *Meshner v. Osborne*, 75 Wash. 439, 445-46, 134 P. 1092 (1913); William B. Stoebuck, *The Law Between Landlord and Tenant in Washington: Part I*, 49 Wash. L. Rev. 291, 359-61 (1974).<sup>2</sup>

##### **5. *Duty of Repair as Evidence of Control***

*Restatement (Second) of Torts* § 357 cmt. b (1965) lists considerations that justify finding lessor liability where the lessor breaches a covenant to repair the leased premises, including:

The fact that the lessor retains a reversionary interest in the land, and so by his contract may properly be regarded as retaining or resuming

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other part which the lessee is entitled to use as appurtenant to the part leased to him, is subject to liability to his lessee and others lawfully upon the land with the consent of the lessee... for physical harm caused by a dangerous condition upon that part of the land retained in the lessor's control, if the lessor by the exercise of reasonable care could have discovered the condition and the unreasonable risk involved therein and could have made the condition safe.

<sup>2</sup> Washington has adopted a common law and statutory warranty of habitability applicable to residential leases. *See Foisy*, 83 Wn. 2d at 28; chapter 59.18 RCW (the Residential Landlord-Tenant Act of 1973). Otherwise, Washington law regarding landlord liability for personal injuries on leased premises has not distinguished between residential and commercial leases. *See Rossiter*, 59 Wn. 2d at 726 (“there is no distinction stated in any authority between cases of a demise of dwelling-houses and of buildings to be used for business purposes. The responsibility of the landlord is the same in all cases” (citation omitted)); *Fletcher*, 19 Wn. 2d at 600 (owners/lessors of a hotel building liable for injury to lessee's hotel guest for failure to comply with lease provision to keep the building in good repair); *Andrews v. McCutcheon*, 17 Wn.2d 340, 342–46, 135 P.2d 459 (1943) (landlord in commercial lease liable to tenant's invitee for injury arising from landlord's failure to comply with agreement to keep stairway in repair).

the duty and responsibility of keeping his own premises in safe condition, to the extent of his undertaking. This frequently is expressed by the courts as a retention of “control” over the premises by the lessor.

Section 357 cmt. b.3.

Importantly, a landlord’s agreement to repair and maintain leased premises gives rise to a duty and tort liability for breach of that duty, but also informs the issue of control, as the duty to repair includes an element of retaining control over the premises. *See, e.g., Andrews v. McCutcheon*, 17 Wn.2d 340, 345, 135 P.2d 459 (1943) (concluding that a landlord who agreed to maintain and repair a stairway for the exclusive use of a single commercial tenant and her customers “reserves control” over the stairway, and has a duty to maintain the stairway in a reasonably safe condition for the use of the tenant and the tenant’s invitees). In *Teglo*, the Court “adopted portions of the *Restatement of Torts*...: ‘The lessor’s duty to repair... is not contractual but is a tort duty based on the fact that *the contract gives the lessor ability to make the repairs and control over them.*’” *Tucker v. Hayford*, 118 Wn. App. 246, 252, 75 P.3d 980 (2003) (emphasis in original) (quoting *Teglo*, 65 Wn.2d at 774-75) (quoting *Restatement of Torts* § 357 cmt. a (1934)).

**B. A Lease That Retains In The Lessor 1) The Right To Use A Portion Of The Leased Premises So Long As Such Use Does Not Unreasonably Interfere With The Lessee’s Use, And 2) The Sole Responsibility To Keep The Premises In Good Repair And Condition And Maintain The Premises Free Of Hazards, Reserves Sufficient Control In The Lessor To Impose Lessor Liability For Personal Injury To The Lessee’s Invitee.**

The Port complains that Adamson has not addressed the Port’s citation to *Hughes*, 61 Wn.2d 222, and *Barnett v. Lincoln*, 162 Wash. 613,

299 P. 392 (1931), for the proposition that “an agreement that conveys exclusive possession and control creates a landlord-tenant relationship, even when the tenant’s use is periodic and brief.” *See* Port Reply Br. at 15-16. Whether a landlord-tenant relationship exists is not at issue in *Adamson*, and is not the subject of the Ninth Circuit’s certified question. The question, as framed by the Ninth Circuit, is whether the Port retained sufficient control to be liable as a premises owner, where 1) the lease “effectively gave the Ferry exclusive control of the ramp when it was in Port,” but 2) “also gave the Port control over the ramp when the Ferry was not in port,” and 3) the Port “also had responsibilities for maintenance and repair of the ramp, and could have had access to the ramp to make such repairs at any time throughout the lease term when the Ferry was not docked.” *Adamson*, 899 F.3d at 1051.

The Port argues that the “mere inclusion in a commercial lease of two clauses, the first of which describes the tenant’s rights in terms of priority rather than exclusive use, and the second of which provides that the landlord assumes a duty to maintain and repair... is insufficient to deprive the landlord of the protections of the general rule of nonliability.” Port Op. Br. at 41. In Washington, even the Port’s asserted “general rule” of lessor nonliability applies only if the lessor passes *exclusive control* of the premises to the lessee, and in the *absence of an agreement to repair* by the lessor.<sup>3</sup> *See Regan*, 76 Wn.2d at 504.

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<sup>3</sup> As support for this “general rule of nonliability,” the Port relies on decisions from this

Here, the Port did not pass exclusive control of the portion of the premises where the injury occurred (the passenger ramp) to the Ferry. Rather, the Port retained the right to use the passenger ramp so long as its use did not interfere with the Ferry's use, retained the sole responsibility to keep the leased premises in good repair and condition, and agreed to maintain the leased premises free of mechanical hazards. To the extent there remains a "general rule" of lessor nonliability, it is inapplicable to the Port, because the lease retained sufficient control over the passenger ramp in the Port to allow it to perform its lease duties to effect necessary maintenance and repairs and to maintain the passenger ramp free from mechanical hazards.

The Port emphasizes the portion of the Ninth Circuit's certified question that refers to "an injury that occurs on part of a leased property used exclusively by [the Ferry] at the time of the injury," and argues that the Ferry, and not the Port, was the "possessor" that owed Adamson a duty because the Ferry "exercised exclusive control over the passenger ramp where and when Adamson was injured." Port Op. Br. at 35 (brackets added). Control over the passenger ramp where and when the injury occurred is not the determining factor regarding the Port's liability. Adamson's injury occurred as a result of

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Court referencing the caveat emptor doctrine. See Port Op. Br. at 10 (citing *Regan*, 76 Wn.2d at 504; *Hughes*, 61 Wn.2d at 224). This Court has not been presented with the opportunity to revisit the caveat emptor doctrine in the commercial context, but its erosion in the residential context has been well-recognized. See, e.g., *Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 518, 799 P.2d 250 (1990). As discussed *infra* at § A.2, the doctrine has been questioned by this Court. In any case, this Court has recognized the doctrine as a rule of contract that "can never be invoked to condone a tort." *Howard*, 75 Wash. at 259-60.

the Port's failure to fulfill its lease duties to repair and maintain the passenger ramp free of mechanical hazards, and the relevant inquiry is whether the lease reserved to the Port sufficient control over the passenger ramp to allow the Port to perform necessary repairs and maintain the passenger ramp free of mechanical hazards. *See Teglo*, 65 Wn.2d at 774 (“The lessor’s duty to repair insofar as its breach subjects him to liability... *is a tort duty based on the fact that the contract gives the lessor ability to make the repairs and control over them.*” (emphasis added) (quoting *Restatement of Torts* § 357 cmt. a)); *see also Restatement (Third) of Torts* § 49 cmt. d (recognizing that if the transfer of control is temporally or practically limited, the transferor may be said to have retained “effective control”).

The lease allowed the Port use of the passenger ramp area “so long as such use does not unreasonably interfere with [the Ferry’s] use,” and reserved to the Port sole control over repairs and maintaining the Terminal premises free of mechanical hazards. The Ferry’s vessel was in its berth at the Terminal, and using the passenger ramp, for only 12 hours, four or six times each month. A year prior to the commencement of the 2009 lease, an engineering firm hired by the Port advised it of the significant danger presented by the passenger ramp, and recommended adding a simple interlock system which would avoid the hazard. From the inception of the lease in 2009 until Adamson’s injury in 2012, the Port had access (*i.e.*, “control”) when the Ferry’s vessel was not at the Terminal, about six days out of every week, to make repairs and eliminate the hazard presented by the

passenger ramp, which would not have interfered with the Ferry's use of the ramp. The Port argues that "[p]laintiffs fail to grasp that Adamson can be deemed the Port's invitee only if the Port was in possession of the Marine Facilities when she was injured." Port Reply Br. at 20. The Port fails to grasp that Adamson can be deemed the Port's invitee if the Port was in possession and control of the Marine Facilities for a sufficient amount of time to fulfill its contracted duties to perform necessary repairs and maintain the passenger ramp free of mechanical hazards.

The Port cites *Resident Action Council v. Seattle Hous. Auth.*, 162 Wn.2d 773, 174 P.3d 84 (2008), as authority for its claim that a landlord's duty to repair and maintain premises does not amount to the landlord retaining control over the premises. *See* Port Op. Br. at 37-38; Port Reply Br. at 17-18. In *Resident Action Council*, this Court affirmed the superior court's holding that a public housing authority's rule banning signs and similar material from the exterior of residents' apartment doors violated the residents' free speech rights under the U.S. and Washington Constitutions. The Court rejected the housing authority's argument that its maintenance and repair duties established a reservation of control over the exterior surface of the apartment doors, distinguishing its holding in *Andrews v. McCutcheon*, where it found the landlord's agreement to repair a stairway indicated its intent to retain control over the stairs. *See Resident Action Council*, 162 Wn.2d at 780-81.

The Port repeatedly quotes a phrase from this Court’s opinion in *Resident Action Council*: “maintenance is not tantamount to asserting a right of control.” Port Op. Br. at 37, 38; Port Reply Br. at 17 (quoting *Resident Action Council*, 162 Wn.2d at 781). Importantly, that phrase was excerpted from the following statement by the Court:

SHA [Seattle Housing Authority] has a duty to maintain doors under the Residential Landlord-Tenant Act of 1973 and local codes. . . . SHA has a duty to maintain that is a function of statutory responsibilities, so *maintenance is not tantamount to asserting a right of control*.

*Resident Action Council*, 162 Wn.2d at 780-81 (brackets added; emphasis added). In *Resident Action Council*, a landlord’s statutorily mandated duty to maintain and repair leased residential premises did not signal the landlord’s intent to control the outer surface of apartment doors so as to allow the landlord to prohibit its tenants from displaying signs on the doors. In *Adamson*, the landlord’s lease agreement to retain sole responsibility to keep the leased premises in good repair and condition and maintain the leased premises free of mechanical hazards, combined with the landlord’s retention of the right to use the leased premises so long as its use did not interfere with the tenant’s use, established the landlord’s intent to maintain control over the premises to the extent necessary to perform repairs and maintain the premises free from mechanical hazards.

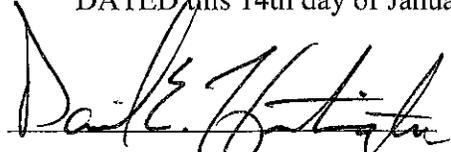
In response to the Ninth Circuit’s certified question, the Port is liable as a premises owner for injuries suffered by the Ferry’s employee caused by the Port’s failure to perform necessary repairs and maintain the passenger ramp free of mechanical hazards. A tort duty arose from the Port’s lease

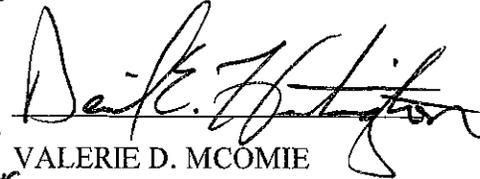
agreement to repair and maintain the Terminal premises free of mechanical hazards. The lease also retained in the Port control over those portions of the Terminal premises leased to the Ferry under the “priority use” provisions of the lease, so long as the Port’s use of the premises did not unreasonably interfere with the Ferry’s use. The passenger ramp which caused Adamson’s injury was included as a part of the premises leased to the Ferry under the “priority use” provisions in the lease. The Port’s control over the passenger ramp extended to those times when the Ferry’s vessel was not using the Terminal facilities, which was during the great majority of each week. These lease provisions combined to retain control in the Port over repairs and the maintenance of the passenger ramp free of mechanical hazards, and provided the Port control over the passenger ramp for sufficient time to perform repairs and maintain the ramp free of mechanical hazards.

## VI. CONCLUSION

The Court should adopt the analysis advanced in this brief in the course of resolving the question certified by the Ninth Circuit Court of Appeals to the Washington Supreme Court.

DATED this 14th day of January, 2019.

  
DANIEL E. HUNTINGTON

  
VALERIE D. MCOMIE

for

On Behalf of WSAJ Foundation

# Appendix

*Restatement of Torts § 357 (1934)*

*Restatement (Second) of Torts § 328E (1965)*

*Restatement (Second) of Torts § 343 (1965)*

*Restatement (Second) of Torts § 357 (1965)*

*Restatement (Second) of Torts § 360 (1965)*

*Restatement (Third) of Torts § 49 (2012)*

## Restatement (First) of Torts § 357 (1934)

Restatement of the Law - Torts | October 2018 Update

Restatement (First) of Torts

Division Two. Negligence

Chapter 13. Liability for Condition and Use of Land

Topic 3. Liability of Lessors of Land  
to Persons Thereon

### § 357 Where Lessor Covenants to Repair

[Comment:](#)

[Case Citations - by Jurisdiction](#)

**A lessor of land is subject to liability for bodily harm caused to his lessee and others upon the land with the consent of the lessee or his sub-lessee by a condition of disrepair existing before or arising after the lessee has taken possession, if**

- (a) the lessor, as such, has agreed by a covenant in the lease or otherwise, to keep the land in repair, and**
- (b) the disrepair creates an unreasonable risk to persons upon the land which the performance of the lessor's agreement would have prevented.**

***Comment:***

*a. Nature of lessor's duty.* The lessor's duty to repair in so far as its breach subjects him to liability for bodily harm caused to the lessee and those upon the land in his right, is not contractual but is a tort duty based on the fact that the contract gives the lessor ability to make the repairs and control over them. The lessor is not liable for bodily harm caused even to his lessee by his failure to make the premises absolutely safe. He is liable only if his failure to do so is due to a lack of reasonable care exercised to that end. Like many other tort duties to keep land in safe condition, the lessor's duty to repair is not delegable, and he is liable as fully where the failure to make the premises reasonably safe is due to the negligence of an independent contractor to whom the lessor has entrusted the performance of his contract as he is where it is due to his own personal negligence. Since the duty arises out of the existence of the contract to repair, the contract defines the extent of the duty. Unless the contract stipulates that the lessor shall inspect the premises to ascertain the need of repairs, a contract to keep the interior in safe condition subjects the lessor to liability if, but only if, reasonable care is not exercised after the lessee has given him notice of the need of repairs.

## Restatement (Second) of Torts § 328E (1965)

Restatement of the Law - Torts | October 2018 Update

Restatement (Second) of Torts

Division Two. Negligence

Chapter 13. Liability for Condition and  
Use of Land

Topic 1. Liability of Possessors of Land to  
Persons on the Land

Title A. Definitions

### § 328E Possessor of Land Defined

[Comment:](#)

[Case Citations - by Jurisdiction](#)

**A possessor of land is**

- (a) a person who is in occupation of the land with intent to control it or**
- (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or**
- (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).**

**See Reporter's Notes.**

**Comment:**

*a.* “Possession” has been given various meanings in the law, and the term frequently is used to denote the legal relations resulting from facts, rather than in the sense of describing the facts themselves. It is used here strictly in the factual sense, because it has been so used in almost all tort cases.

The important thing in the law of torts is the possession, and not whether it is or is not rightful as between the possessor and some third person. Thus a disseisor is a possessor from the moment that his occupation begins, although as between the disseisor and the true owner he is not legally entitled to possession until his adverse possession has ripened through lapse of time into ownership.

## Restatement (Second) of Torts § 343 (1965)

Restatement of the Law - Torts | October 2018 Update

Restatement (Second) of Torts

Division Two. Negligence

Chapter 13. Liability for Condition and Use of Land

Topic 1. Liability of Possessors of Land to Persons on the Land

Title E. Special Liability of Possessors of Land to Invitees

### § 343 Dangerous Conditions Known to or Discoverable by Possessor

[Comment:](#)

[Reporter's Notes](#)

[Case Citations - by Jurisdiction](#)

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

- (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and**
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and**
- (c) fails to exercise reasonable care to protect them against the danger.**

**See Reporter's Notes.**

**Comment:**

*a.* This Section should be read together with [§ 343A](#), which deals with the effect of the fact that the condition is known to the invitee, or is obvious to him, as well as the fact that the invitee is a patron of a public utility. That Section limits the liability here stated. In the interest of brevity, the limitation is not repeated in this Section.

*b.* *Distinction between duties to licensee and invitee.* One who holds his land open for the reception of invitees is under a greater duty in respect to its physical condition than one who permits the visit of a mere licensee. The licensee enters with the understanding that he will take the land as the possessor himself uses it. Therefore such a licensee is entitled to expect

only that he will be placed upon an equal footing with the possessor himself by an adequate disclosure of any dangerous conditions that are known to the possessor. On the other hand an invitee enters upon an implied representation or assurance that the land has been prepared and made ready and safe for his reception. He is therefore entitled to expect that the possessor will exercise reasonable care to make the land safe for his entry, or for his use for the purposes of the invitation. He is entitled to expect such care not only in the original construction of the premises, and any activities of the possessor or his employees which may affect their condition, but also in inspection to discover their actual condition and any latent defects, followed by such repair, safeguards, or warning as may be reasonably necessary for his protection under the circumstances.

As stated in § 342, the possessor owes to a licensee only the duty to exercise reasonable care to disclose to him dangerous conditions which are known to the possessor, and are likely not to be discovered by the licensee. To the invitee the possessor owes not only this duty, but also the additional duty to exercise reasonable affirmative care to see that the premises are safe for the reception of the visitor, or at least to ascertain the condition of the land, and to give such warning that the visitor may decide intelligently whether or not to accept the invitation, or may protect himself against the danger if he does accept it.

As stated in § 342, the possessor is under no duty to protect the licensee against dangers of which the licensee knows or has reason to know. On the other hand, as stated in § 343A, there are some situations in which there is a duty to protect an invitee against even known dangers, where the possessor should anticipate harm to the invitee notwithstanding such knowledge.

*c.* As to invitees who go beyond the scope of the invitation, as to either time or place, see § 332, Comment *l*.

*d. What invitee entitled to expect.* An invitee is entitled to expect that the possessor will take reasonable care to ascertain the actual condition of the premises and, having discovered it, either to make it reasonably safe by repair or to give warning of the actual condition and the risk involved therein. Therefore an invitee is not required to be on the alert to discover defects which, if he were a mere licensee, entitled to expect nothing but notice of known defects, he might be negligent in not discovering. This is of importance in determining whether the visitor is or is not guilty of contributory negligence in failing to discover a defect, as well as in determining whether the defect is one which the possessor should believe that his visitor would not discover, and as to which, therefore, he must use reasonable care to warn the visitor.

*e. Preparation required for invitee.* In determining the extent of preparation which an invitee is entitled to expect to be made for his protection, the nature of the land and the purposes for which it is used are of great importance. One who enters a private residence even for purposes connected with the owner's business, is entitled to expect only such preparation as a reasonably prudent householder makes for the reception of such visitors. On the other hand, one entering a store, theatre, office building, or hotel, is entitled to expect that his host will make far greater preparations to secure the safety of his patrons than a householder will make for his social or even his business visitors. So too, one who goes on business to the executive offices in a factory, is entitled to expect that the possessor will exercise reasonable care to secure his visitor's safety. If, however, on some particular occasion, he is invited to go on business into the factory itself, he is not entitled to expect that special preparation will be made for his safety, but is entitled to expect only such safety as he would find in a properly conducted factory.

*f. Appliances used on land.* A possessor who holds his land open to others must possess and exercise a knowledge of the dangerous qualities of the place itself and the appliances provided therein, which is not required of his patrons. Thus, the keeper of a boardinghouse is negligent in providing a gas stove to be used in an unventilated bathroom, although the boarder who is made ill by the fumes uses the bathroom with knowledge of all the circumstances, except the risk of so doing. This is true because the boardinghouse keeper, even though a man of the same class as his boarders, is required to have a superior knowledge of the dangers incident to the facilities which he furnishes to them.

g. As to the duty of a possessor of business premises to protect his invitees from harm threatened thereon by third persons, see § 344.

### Reporter's Notes

This Section has been changed from the first Restatement by condensing and rewording it. The former Clause (c)(ii) as to public utilities is now covered by § 343A.

*Clause (a)*: The plaintiff invitee has the burden of proving that the defendant possessor either knew or had reason to know of the condition, or that by the exercise of reasonable care he would have discovered it. Where the condition is temporary in its nature, this burden may require proof that it has existed for a sufficient length of time to permit the inference that reasonable care would have led to its discovery. [Oldenburg v. Sears, Roebuck & Co.](#), 152 Cal.App.2d 733, 314 P.2d 33 (1957); [Moran v. Gershow's Super Markets, Inc.](#), 102 Ohio App. 408, 2 Ohio Op.2d 419, 143 N.E.2d 723 (1956), appeal dismissed, 166 Ohio St. 300, 2 Ohio Op.2d 203, 141 N.E.2d 765; [Parks v. Montgomery Ward & Co.](#), 198 F.2d 772 (10 Cir.1952); [F.W. Woolworth Co. v. Goldston](#), 155 S.W.2d 830 (Tex.Civ.App.1941), error refused; [Gold v. Arizona Realty & Mortg. Co.](#), 12 Cal.App.2d 676, 55 P.2d 1254 (1936); [J.C. Penney Co. v. Norris](#), 250 F.2d 385 (5 Cir.1957); [Frank v. J.C. Penney Co.](#), 133 Cal.App.2d 123, 283 P.2d 291 (1955).

*Comment b*: The invitee is entitled to expect reasonable care in the original construction of the premises. [Rose v. Melody Lane of Wilshire](#), 39 Cal.2d 481, 247 P.2d 335 (1952); [Magnolia Petroleum Co. v. Barnes](#), 198 Okla. 406, 179 P.2d 132 (1946); [De Weese v. J.C. Penney Co.](#), 5 Utah 2d 116, 297 P.2d 898, 65 A.L.R.2d 399 (1956).

Also in the present arrangement: [Dean v. Safeway Stores, Inc.](#), 300 S.W.2d 431 (Mo.1957); [Johnston v. De La Guerra Properties, Inc.](#), 28 Cal.2d 394, 170 P.2d 5 (1946); [Kmiotek v. Anast](#), 350 Pa. 593, 39 A.2d 923 (1944); [Donahoo v. Kress House Moving Corp.](#), 25 Cal.2d 237, 153 P.2d 349 (1944).

Also in their present use: [Schwartzman v. Lloyd](#), 65 App.D.C. 216, 82 F.2d 822 (D.C.Cir.1936); [Greenley v. Miller's, Inc.](#), 111 Conn. 584, 150 A. 500 (1930); [Cejka v. R.H. Macy's, Inc.](#), 155 N.Y.S.2d 565 (Sup.Ct.1956), reversed on other grounds, 3 App.Div.2d 535, 162 N.Y.S.2d 207, affirmed, 4 N.Y.2d 785, 173 N.Y.S.2d 24, 149 N.E.2d 525; [Lee v. National League Baseball Club of Milwaukee](#), 4 Wis.2d 168, 89 N.W.2d 811 (1958); [Rowell v. City of Wichita](#), 162 Kan. 294, 176 P.2d 590 (1947); [Philpot v. Brooklyn Nat. League Baseball Club](#), 303 N.Y. 116, 100 N.E.2d 164 (1951).

The possessor's duty includes inspection of the premises to discover possible unknown defects. [Dickey v. Hochschild, Kohn & Co.](#), 157 Md. 448, 146 A. 282 (1929); [Stark v. Great Atl. & Pac. Tea Co.](#), 102 N.J.L. 694, 133 A. 172 (Ct.Err. & App.1926); [Maehlman v. Reuben Realty Co.](#), 32 Ohio App. 54, 166 N.E. 920 (1928); [Durning v. Hyman](#), 286 Pa. 376, 133 A.568, 53 A.L.R. 851 (1926); [Kallum v. Wheeler](#), 129 Tex. 74, 101 S.W.2d 225 (1937).

*Comment e*: As to the difference between the preparation necessary in a private residence and premises open to the public, see [Criterion Theatre Corp. v. Starns](#), 194 Okla. 624, 154 P.2d 92 (1944).

### Case Citations - by Jurisdiction

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- U.S.
  - C.A.1
  - C.A.2
  - C.A.3
  - C.A.4

## Restatement (Second) of Torts § 357 (1965)

Restatement of the Law - Torts | October 2018 Update

Restatement (Second) of Torts

Division Two. Negligence

Chapter 13. Liability for Condition and Use of Land

Topic 3. Liability of Lessors of Land to Persons on the Land

### § 357 Where Lessor Contracts to Repair

[Comment:](#)

[Reporter's Notes](#)

[Case Citations - by Jurisdiction](#)

**A lessor of land is subject to liability for physical harm causee to his lessee and others upon the land with the consent of the lessee or his sublessee by a condition of disrepair existing before or arising after the lessee has taken possession if**

- (a) the lessor, as such, has contracted by a covenant in the lease or otherwise to keep the land in repair, and**
- (b) the disrepair creates an unreasonable risk to persons upon the land which the performance of the lessor's agreement would have prevented, and**
- (c) the lessor fails to exercise reasonable care to perform his contract.**

**See Reporter's Notes.**

**Comment:**

*a.* The rule stated in this Section has thus far been adopted by only a minority of the American courts, and is still rejected by a majority of the courts which have considered it.

*b.* The rule stated here is an exception to the general rules of non-liability of the lessor stated in §§ 355 and 356. The reasons which justify the exception, and which have led the American Law Institute to approve a minority position, rest upon a combination of the following considerations:

1. The lessor's contractual undertaking, for consideration, to repair the premises or to keep them in repair. The rule stated in this Section therefore has no application where the lessor does not contract to repair, but merely reserves the privilege to enter and make repairs if he sees fit to do so. Likewise the rule has no application where there is no contractual obligation, but merely a gratuitous promise to repair, made after the lessee has entered into possession. The contract

need not, however, be a covenant or other term of the lease, and it is sufficient if it is made by the lessor, as such, after possession is transferred.

2. The special relation between the parties, and the peculiar likelihood that the lessee will rely upon the lessor to make the repairs, and so will be induced to forego efforts which he would otherwise make to remedy conditions dangerous to himself and to others who enter the land with his consent.

3. The fact that the lessor retains a reversionary interest in the land, and so by his contract may properly be regarded as retaining or resuming the duty and responsibility of keeping his own premises in safe condition, to the extent of his undertaking. This frequently is expressed by the courts as a retention of “control” over the premises by the lessor. The lessor does not, however, retain any right to exclude anyone from the land, or to control the use of it; and his privilege to enter under his contract differs from that of any other contractor only in that he agrees to repair his own land, and stands in a special relation to the lessee.

4. The social considerations mentioned in § 356, Comment *a*.

*c.* The lessor's duty under the rule stated in this Section is not merely contractual, although it is founded upon a contract. It is a tort duty. It extends to persons on the land with the consent of the lessee, with whom the lessor has made no contract. The lessor is not an insurer of the safety of the premises, and is not liable for harm caused even to his lessee by a failure to make the land absolutely safe. He is liable only if his failure to do so is due to a failure to exercise reasonable care to that end.

Like many other tort duties to keep land in safe condition, the lessor's duty to exercise care to repair is not delegable, and he is liable as fully where the failure to make the premises reasonably safe is due to the negligence of an independent contractor to whom he has entrusted the performance of his contract, as where it is due to his own negligence. See § 419.

*d.* Since the duty arises out of the existence of the contract to repair, the contract defines the extent of the duty. Unless it provides that the lessor shall inspect the land to ascertain the need of repairs, a contract to keep the premises in safe condition subjects the lessor to liability only if he does not exercise reasonable care after he has had notice of the need of repairs. In any case his obligation is only one of reasonable care.

**Illustration:**

1. A leases an apartment to B, and contracts to keep the apartment in good internal repair upon notice from B as to the necessity of doing so. B notifies A that the ceiling of one of the rooms is in need of repairs. The condition does not appear to be such as to threaten an immediate fall of the ceiling. While B, C, his wife, and D, a friend, are eating supper in the room, the ceiling falls and injures them. A is subject to liability to B, C, and D if, but only if, the ceiling falls after A has time, following the notice from B, to make the repairs if he exercises reasonable diligence and care.

## Restatement (Second) of Torts § 360 (1965)

Restatement of the Law - Torts | October 2018 Update

Restatement (Second) of Torts

Division Two. Negligence

Chapter 13. Liability for Condition and  
Use of Land

Topic 3. Liability of Lessors of Land to Persons  
on the Land

### § 360 Parts of Land Retained in Lessor's Control Which Lessee is Entitled to Use

[Comment:](#)

[Reporter's Notes](#)

[Case Citations - by Jurisdiction](#)

**A possessor of land who leases a part thereof and retains in his own control any other part which the lessee is entitled to use as appurtenant to the part leased to him, is subject to liability to his lessee and others lawfully upon the land with the consent of the lessee or a sublessee for physical harm caused by a dangerous condition upon that part of the land retained in the lessor's control, if the lessor by the exercise of reasonable care could have discovered the condition and the unreasonable risk involved therein and could have made the condition safe.**

**See Reporter's Notes.**

**Comment:**

*a. Effect of lessee's knowledge of dangerous condition.* The rule stated in this Section applies to subject the lessor to liability to third persons entering the land, irrespective of whether the lessee knows or does not know of the dangerous condition. The lessee may, for example, know that the common entrance to the apartment or office which he has leased has become dangerous for use because of the lessor's failure to maintain it in safe condition. His knowledge may subject him to liability even to his own licensees, if he fails to warn them of the danger. It will not, however, relieve the lessor of liability for his negligence in permitting the entrance to become dangerous.

**Illustration:**

1. A leases an office in an office building to B, an attorney. C, a client of B, and D, coming to pay B a social visit, are injured by the fall of the elevator while on their way up to B's office. B knows that the elevator is in dangerous condition because of A's negligence in failing to repair it, but B does nothing to warn C or D. A is subject to liability to both C and D.

*b. Effect of knowledge of person injured.* The rule stated in this Section may also apply even though the person injured, whether he be the lessee himself or a third person, has knowledge of the existence of the dangerous condition. His knowledge may put him in contributory fault (as to which see § 463), and in that event he will be disabled from maintaining an action for any harm suffered while using the dangerous premises. But unless the danger is so apparent and so great that it is unreasonable for him to encounter it in view of the purpose of his use, or unless knowing the danger he fails to exercise that caution which a reasonable man would exercise under the same circumstances, the lessor remains liable to him notwithstanding his knowledge of the existence of the condition.

**Illustration:**

2. A leases an apartment in an apartment house to B. A step upon the common stairway by which the apartment of B as well as that of other tenants is reached, is to the knowledge of B and his family in bad condition but not in such a dangerous condition that a reasonable man would regard it as foolhardy to use the stairway. C, the wife of B, while ascending the stairway and exercising reasonable care to avoid harm from the defective step, slips upon it and is hurt. A is subject to liability to C.

*c.* A lessor may be liable to an invitee or even to a licensee of the lessee, although neither he nor the lessee would be able under the same circumstances to their own invitees or licensees. The privilege of the visitor is not based, as is that of the lessor's own invitee or licensee, upon the consent given upon the occasion of the particular visit, but upon the fact that he is entitled to enter by the right of the lessee, who is entitled under his lease to use the part of the land within the control of the lessor not only for himself, but also for the purpose of receiving any persons whom he chooses to admit. This fact is to be taken into account in determining whether the lessor should anticipate harm to the visitor. It follows that the lessor's duty is not always satisfied by warning the lessee or others of the dangerous condition, and that the knowledge of such persons of the danger will not always prevent their recovery. Where, for example, the entrance to an apartment house is dangerously defective, and there is no other available entrance, the third person may be expected to use it

notwithstanding any warning, or even his own knowledge of the danger. Unless he is to be charged with contributory negligence, he may recover notwithstanding such warning, or even knowledge.

*d.* The rule stated in this Section applies not only to the hall, stairs, elevators, and other approaches to the part of the land leased to the lessee as a flat, office, or room in a tenement or boardinghouse, but also to such other parts of the land or building to the use of which by the express or implied terms of the lease the lessee is entitled, usually in common with other lessees, such as a bathroom in a boardinghouse and the roof or yard of a tenement building or apartment house.

*e.* The words “upon the land with the consent of the lessee,” as used in this Section, include two ideas. As in § 355, Comment *b*, the words include those coming upon that part of the land retained in the control of the lessor by the consent of the lessee whether as his invitee or as his licensee, but exclude persons entering in the exercise of a privilege which does not depend upon the lessee's consent. In addition, the lessor is subject to liability to such persons only as the lessee, under the expressed or implied conditions and terms of the lease, is entitled to admit to such part of the land. Stairways, halls, elevators, and other common approaches to an apartment or office, are provided not only for the use of the lessee but also for the use of such persons as the lessee chooses to receive in his apartment or office. On the other hand, the lessee may be entitled to the use of a yard in common with other lessees for a variety of different purposes. If these purposes do not include the reception of licensees therein, a third person entering the yard at the invitation of the lessee is not lawfully there and is not within the protection of the rule stated in this Section.

*f.* If the terms of the lease entitle the lessee to permit third persons to come upon the part of the land retained within the lessor's control, it is immaterial whether they come as invitees of the lessee or as his licensees. It is the lessor's business, as such, to afford his lessee facilities for receiving all persons whom he chooses to admit for any legitimate purpose. Therefore, a person who, as between himself and the lessee, is a licensee enters the land on a matter directly connected with the business of the lessor. He is, therefore, entitled to expect that the lessor will exercise reasonable care to discover and remedy any condition which makes his acceptance of the lessee's license dangerous to him.

*g.* The liability stated in this Section may be affected, so far as the tenant is concerned, by a clause in the lease exonerating the lessor from responsibility for the condition of those parts of the premises retained under his control, unless the clause is found to be ineffective as contrary to the policy of the law. See § 496B. Such a clause does not, however, affect the lessor's liability to third persons, such as invitees or guests of the lessee, who are not parties to the contract nor in privity with it.

### Reporter's Notes

*Comment a:* Illustration 1 is supported by [Gibson v. Hoppman](#), 108 Conn. 401, 143 A. 635, 75 A.L.R. 148 (1928); [Foley v. Everett](#), 142 Ill.App. 250 (1908); [Loucks v. Dolan](#), 211 N.Y. 237, 105 N.E. 411 (1914); [Hunn v. Windsor Hotel Co.](#), 119 W.Va. 215, 193 S.E. 57 (1937).

*Comment b:* Illustration 2 is based on [Idel v. Mitchell](#), 5 App.Div. 268, 39 N.Y.S. 1 (1896), reversed on other grounds, 158 N.Y. 134, 52 N.E. 740. See also [Beitch v. Mishkin](#), 184 Pa.Super. 120, 132 A.2d 703 (1957); [Looney v. McLean](#), 129 Mass. 33, 37 Am.Rep. 295 (1880); [Dollard v. Roberts](#), 130 N.Y. 269, 29 N.E. 104, 14 L.R.A. 238 (1891). Cf. [Roman v. King](#), 289 Mo. 641, 233 S.W. 161, 25 A.L.R. 1263 (1921).

*Comment c:* See [Goodman v. Corn Exchange Nat. Bank & Trust Co.](#), 331 Pa. 587, 200 A. 642 (1938). The difference between the liability of the lessee and that of the lessor is strikingly illustrated by [Taneian v. Meghrigian](#), 15 N.J. 267, 104 A.2d 689 (1954). See also [Socket v. Gottlieb](#), 187 Cal.App.2d 760, 9 Cal.Rptr. 831 (1960); [Snyder v. I. Jay Realty Co.](#), 30 N.J. 303, 153 A.2d 1, 78 A.L.R.2d 95 (1959); [Temple v. Congress Square Garage](#), 145 Me. 274, 75 A.2d 459 (1950).

*Comment d:* Examples of the application of the rule stated in this Section are:

## Restatement (Third) of Torts: Phys. & Emot. Harm § 49 (2012)

Restatement of the Law - Torts | October 2018 Update

Restatement (Third) of Torts: Liability for Physical and Emotional Harm

Chapter 9. Duty of Land Possessors

### § 49 Possessor of Land Defined

[Comment:](#)

[Reporters' Note](#)

[Case Citations - by Jurisdiction](#)

**A possessor of land is**

**(a) a person who occupies the land and controls it;**

**(b) a person entitled to immediate occupation and control of the land, if no other person is a possessor of the land under Subsection (a); or**

**(c) a person who had occupied the land and controlled it, if no other person subsequently became a possessor under Subsection (a) or (b).**

#### **Comment:**

*a. History.* This Section is similar to Restatement Second, Torts § 328E and supersedes it. It also supersedes §§ 383 to 385, the subjects of which are addressed in Comments *e* and *f*. The first and Second Restatements, rather than requiring that an occupier “control” the land in order to be deemed a possessor, stated that “intent to control” coupled with occupation was the standard to be applied. However, intent has not played a role in cases in which there is a dispute over whether the defendant is a possessor; there is no apparent reason to retain *intent* to control as the standard rather than employing the *fact* of control; and it is administratively easier to use control as the standard than to determine an individual's intent.

This Section reverses the order in which Subsections (b) and (c) appeared in § 328E of the Second Restatement of Torts. They are placed in this order so that in the case of a purchaser of property who delays occupation and control after the seller has relinquished control, the purchaser is the possessor of the land rather than the seller.

*b. Owners.* In many instances, the owner of real property will be its possessor for purposes of this Chapter. It is the owner who ordinarily has control over the premises and occupies them. However, the critical issue is occupation and control rather than ownership. Owners who cede exclusive possession and control of the land to others do not have a duty to entrants on the land under this Chapter. Thus, an owner who sells property to another on a long-term contract that provides for the buyer to occupy the land until the full purchase price is paid is not a land possessor and is not subject to the provisions in this Chapter. Although owners who cede control to others do not have a duty under this Chapter

with regard to land that others now occupy and control, these owners may have a duty pursuant to § 7 or pursuant to Chapter 7.

*c. Control.* A person is in control of the land if that person has the authority and ability to take precautions to reduce the risk of harm to entrants on the land, which is the reason for imposing the duties contained in this Chapter on land possessors. Ordinarily, an owner of property who occupies it is in control of the property. However, the owner may permit others to take control of the property. The owner may enter into a lease that provides a tenant with control of the land. An owner may provide control to a contractor for the purpose of making improvements on the land. Valid legal title is not required for control under this Section. An actor who controls land without legal title, such as an adverse possessor, is nevertheless a possessor under this Section.

*d. Multiple possessors.* Possession of land may be divided among several actors, as, for example, when a lessor leases portions of a building to several tenants but retains possession of common areas or when an owner hires a contractor to renovate a portion of the property and cedes control of that area to the contractor. In such cases, each actor has the duty provided in this Chapter with respect to the portion of the premises controlled by that actor. Agents of a principal who are provided and assume possession of a portion of the land are possessors under this Section and thus subject to the same duties as the principal-possessor. See Comment *f*. Similarly, control over some areas may be shared, and each actor is subject to the duties provided in this Chapter with respect to the control exercised. Even a possessor who cedes temporary control of property to another may be responsible as a possessor for conditions on the land that are not in the effective control of the other because of the temporal and practical limits of the other's possession. See, e.g., § 53, Comment *f*.

*e. Nonpossessory actor present on the land.* A nonpossessory actor has a duty of reasonable care under § 7 for conduct that creates risks to others on private property. However, such an actor is not subject to the duties provided in this Chapter, unless engaged as an agent for the possessor and acting for the benefit of the possessor. See Comment *f*. A nonpossessory actor's duties with regard to conditions on the land that were not created by the actor are limited to the affirmative duties provided in Chapter 7.

**Illustrations:**

1. Kyle is a guest in Meeren's home and, after some prompting by other guests, agrees to demonstrate magic tricks. While demonstrating a trick involving an open flame, he ignites the clothing of Sarah, another guest, burning her. Kyle owes Sarah a duty of reasonable care pursuant to § 7; this Chapter is inapplicable to the duty owed by Kyle, because he is not in possession of the premises.
2. Same facts as Illustration 1, except Kyle owns the house where Meeren resides and rents the house to Meeren. While Kyle is demonstrating his magic tricks at Meeren's—but unrelated to the demonstration—an ember in Meeren's fireplace escapes and starts a fire that ignites Sarah's clothing. Kyle sees Sarah's predicament but does nothing. Kyle is not a possessor of the property under this Section. Thus, any duty that Kyle might owe to Sarah is provided in Chapter 7, but none of the affirmative duties contained in that Chapter is applicable. Thus, Kyle has no duty to assist Sarah. Meeren, however, is the possessor of the premises, and thus his duty to Sarah with regard to ensuring the fire remains in the fireplace is provided in this Chapter. See § 51.
3. Same facts as Illustration 1, except Kyle forgets a prop for a magic trick and leaves it at Meeren's house upon departing at the end of the evening. The prop has a concealed, razor-sharp blade that opens when the outer case is squeezed. Kyle has no duty under this Chapter, but he still has a duty of

reasonable care, pursuant to § 7, to anyone at Meeren's home exposed to the risk posed by the prop. Meeren's duty to others at his home with regard to the risk posed by the prop is provided in § 51(b).

*f. Contractors engaged in work on the land.* For purposes of this Chapter, a contractor employed by the possessor to perform work on the land, whether an employee or independent contractor, is treated as a land possessor. A contractor who is provided a possessory interest in the land has the same duties as the possessor with respect to conditions on the land. The limited duty of land possessors to flagrant trespassers on the possessors' land, provided in § 52, is also applicable to those who are engaged in work on behalf of the possessor. That the possessor hires another to perform work on the land does not change the essential character of a trespass that violates the possessor's rights.

*g. Contractors who have completed work on the land.* A contractor who has completed work on the land on behalf of the possessor is subject to liability under Chapters 2-3 of this Restatement and not under this Chapter. Thus, a contractor is subject to the ordinary duty of reasonable care under § 7 for risks created by the work but is not subject to any duty with regard to other conditions or activities on the land because the contractor is no longer a land possessor, having ceased activity on the land and relinquished possession of it.

*h. Former possessors.* A person who has relinquished possession and control of land to another is not subject to the duties provided in §§ 51 to 53 of this Chapter, with one exception. See § 51, Comment *t*. A possessor may relinquish control through a conventional sale of the property or through other means of transferring possession and control.

*i. Mortgage default, abandonment, and foreclosure.* A possessor-owner may abandon the premises or default on a mortgage and suffer a foreclosure sale of the property. Under this Section, neither abandonment nor default, without more, affects the status of the owner as possessor. While the possessor no longer occupies the land, until another person occupies and controls the land, the former occupant remains the possessor under Subsection (c). Possession may be transferred between a possessor-owner and a mortgagee or a third party, such as a receiver. In the case of abandonment, possession is transferred if the mortgagee takes possession of the property.

*j. Members of possessor's household.* Members of the land possessor's household include family members, guests, and domestic workers who reside in the household of the possessor. Section 52, Comment *i*, explains that family members are subject to the same limited duty to flagrant trespassers as is the land possessor with whom the family members reside.

### Reporters' Note

*Comment a. History.* Although courts continue to rely on § 328E of the Second Restatement, which is couched in terms of “intent to control,” actual control rather than intent to control appears to take precedence. An example of this may be found in [Rockafellow v. Rockwell City, 217 N.W.2d 246 \(Iowa 1974\)](#), where the plaintiff fell on icy steps that provided access to defendant utility company's office. The defendant had customarily cleared ice and snow from the steps, but the court concluded that defendant was not a possessor, because the steps were on city property and were available at all times for use by pedestrians other than those accessing defendant's office. In reaching this conclusion, the court did not even advert to whether the utility's undertaking to keep the steps clear evidenced an intent to control them. Another case, turning on possession of a street, is [Lahr v. Lamar R-1 Sch. Dist., 951 S.W.2d 754 \(Mo. Ct. App. 1997\)](#), in which the court held that the local municipality controlled the street where the plaintiff's injury occurred, even though defendant school district owned the street. Although the court paid lip service to intent to control, it relied on the conduct of the municipality in attending to numerous maintenance aspects of the street—e.g., paving, repairing,

removing snow, and erecting signage—as the relevant evidence of that intent. In so doing, the court rejected plaintiff's argument that defendant district had presented no evidence of the city's "intent" to control outside of the aforementioned evidence of actual control. Similarly, in *Mo. Pac. R.R. Co. v. Buenrostro*, 853 S.W.2d 66 (Tex. App. 1993), the court used control to determine whether there was an "intent to possess." Finally, in *Isler v. Burman*, 232 N.W.2d 818 (Minn. 1975), the court applied the Restatement Second's "factual approach" in determining that defendant church was a possessor of the farmland used for a snowmobile party, pointing out that the church had planned the party, invited the snowmobilers, obtained permission from the landowner to have the party, and inspected the land to determine its safety for snowmobiling. Although relying on the church's intent would have been an easier basis for deciding this case, the court instead addressed and resolved the question of whether the church was actually in possession of the land at the relevant time. See also *Kurtigian v. City of Worcester*, 203 N.E.2d 692, 693 (Mass. 1965) (characterizing the test for possessor liability as whether defendant was in control). No explanation of why "intent to control" is employed in either the first or Second Restatement is contained in the Comments or Reporters' Notes of those works.

The change in the order of Subsections (b) and (c) to place the obligation to take reasonable care for conditions on the property on the purchaser rather than the seller after the seller has relinquished control of the premises is based on logic and fairness, not precedent. The Reporters have been unable to find any case that addresses who the possessor is when a seller leaves the premises before the purchaser occupies and asserts control over them.

*Comment b. Owners.* For cases affirming the proposition that ownership is not sufficient to impose a duty when the owner has ceded control of the premises to others, see *Pauley v. Ball Metal Beverage Container Corp.*, 460 F.3d 1069 (8th Cir. 2006) (applying Missouri law); *Bloom v. Waste Mgmt., Inc.*, 615 F. Supp. 1002 (E.D. Pa. 1985), *aff'd*, 800 F.2d 1131 (3d Cir. 1986); *Dixon v. Infinity Broad. E., Inc.*, 656 S.E.2d 211, 213 (Ga. Ct. App. 2007) ("There is no liability from ownership alone, or from joint ownership, or from cotenancy .... Liability depends upon control, rather than ownership, of the premises." (quoting *Davis v. Stone Mountain Mem. Assn.*, 347 S.E.2d 317 (Ga. Ct. App. 1986))); *Jackson v. Scheible*, 902 N.E.2d 807 (Ind. 2009); *Galloway v. Bankers Trust Co.*, 420 N.W.2d 437 (Iowa 1988); *Little v. Howard Johnson Co.*, 455 N.W.2d 390 (Mich. Ct. App. 1990); *Hunt v. Jefferson Arms Apartment Co.*, 679 S.W.2d 875 (Mo. Ct. App. 1984); *Farabaugh v. Pennsylvania Turnpike Com'n*, 911 A.2d 1264 (Pa. 2006); *Prestwood v. Taylor*, 728 S.W.2d 455 (Tex. App. 1987); *Krier v. Safeway Stores 46, Inc.*, 943 P.2d 405 (Wyo. 1997); see also *Brown v. Conrail Corp.*, 717 A.2d 309 (D.C. 1998); *Wemple v. Dahman*, 83 P.3d 100 (Haw. 2004). For a case in which a court appeared to overlook the fact that the landowner had ceded possession to another to manage the property and therefore would not be subject to liability as a possessor, see *Konar v. PFL Life Ins. Co.*, 840 A.2d 1115 (R.I. 2004) (concluding on other grounds that plaintiff had failed adequately to plead a premises liability action without recognizing or remarking on defendant's lack of a possessory interest).

For authority that an actor's status as possessor of land is not affected by an absence of legal title, see *Fitchett v. Buchanan*, 472 P.2d 623, 628 (Wash. Ct. App. 1970) ("It is a general rule that one who assumes to be the owner of real property, and who, as such, assumes to control and manage it, cannot escape liability for injuries resulting from its defective condition by showing want of title in himself."); Annot., *Liability of one exercising the rights of an owner of realty for injuries due to its condition, as affected by want of legal title*, 130 A.L.R. 1525.

*Comment c. Control.* *Rhodes v. Wright*, 805 N.E.2d 382, 385-386 (Ind. 2004), explains the significance of control for purposes of the duty imposed on land possessors:

In premises liability cases, whether a duty is owed depends primarily upon whether the defendant was in control of the premises when the accident occurred. The rationale is to subject to liability the person who could have known of any dangers on the land and therefore could have acted to prevent any foreseeable harm. *Harris v. Traini*, 759 N.E.2d 215, 225 (Ind. Ct. App. 2001) ("Only the party who controls the land can remedy the hazardous conditions which exist upon it and only the party who controls the land has the right to prevent others from coming onto it.").

See also [Hallett v. U.S. Dep't of Navy](#), 850 F. Supp. 874 (D. Nev. 1994); [Publix Super Mkts., Inc. v. Jeffery](#), 650 So. 2d 122 (Fla. Dist. Ct. App. 1995); [Gronski v. Cnty. of Monroe](#), 963 N.E.2d 1219 (N.Y. 2011) (concluding that both written agreement between owner and operator and course of conduct by owner were relevant in determining if owner retained control sufficient to have a duty with regard to recycling plant run by operator).

For cases where courts determined that the defendant did not control the premises, see [McDevitt v. Sportsman's Warehouse, Inc.](#), 255 P.3d 1166 (Idaho 2011) (tenant in multi-tenant shopping center did not control sidewalk in front of store because lease limited leasehold to the store and control of common areas remained with landlord, even though tenant was permitted occasional use of the sidewalk with permission); [Jackson v. Scheible](#), 902 N.E.2d 807, 810-812 (Ind. 2009) (holding that seller under a land-sale contract did not have control of tree that obstructed vision of child bicyclist); [Johnson v. Steffen](#), 685 N.E.2d 1117 (Ind. Ct. App. 1997) (noting that the premises involved part of a city street, which none of the defendants owned or controlled); [Crist v. K-Mart Corp.](#), 653 N.E.2d 140 (Ind. Ct. App. 1995) (concluding that department-store chain had no control over tractor-trailer being unloaded at its store and thus owed no duty to contractor's employee injured in trailer); [Downs v. A & H Constr., Ltd.](#), 481 N.W.2d 520 (Iowa 1992) (noting that general contractor did not control the land because its involvement in overseeing construction project was not substantial enough to impose liability under a safe-premises theory); [Pruitt v. Savage](#), 115 P.3d 1000 (Wash. Ct. App. 2005) (landlords and property manager did not control the premises); cf. [Scarlett & Assoc., Inc. v. Briarcliff Center Partners, LLC](#), 2009 WL 3151089 (N.D. Ga. 2009) (property manager did not exercise sufficient control to be liable under CERCLA as an owner).

If an instrumentality on real property causes harm to another, an actor who is in control of the instrumentality, whether the land possessor or not, owes a duty to those on the land. See [Martin v. Am. Nat'l Can Co.](#), 975 F. Supp. 1153 (N.D. Ind. 1997) (clarifying that a land possessor who assumes control of a contractor's instrumentality is in a position analogous to that of a land possessor who maintains a hazardous instrumentality on its premises and as such is subject to duty imposed on land possessors); [Dunifon v. Iovino](#), 665 N.E.2d 51 (Ind. Ct. App. 1996) (holding that defendants who possessed and controlled area near site of diving accident, as well as instrumentality (pier) from which injured party dove, were subject to premises liability); [Anderson v. Serv. Merch. Co.](#), 485 N.W.2d 170 (Neb. 1992) (concluding, for res ipsa purposes, that store owner was in exclusive control of business premises and thus had exclusive control over instrumentality that injured plaintiff).

*Comment d. Multiple possessors.* If an independent contractor is hired to assume some but less than all of the duties of the land possessor, the independent contractor is subject to the duties provided in this Chapter with respect to the control that it assumes. See [Kay v. Danbar, Inc.](#), 132 P.3d 262 (Alaska 2006) (real-estate agency that rented property and that had a property-management agreement pursuant to which the agency performed certain maintenance tasks, subject to liability for negligently performing maintenance). If the land possessor retains some control, such as control over the safety of the operations conducted by the independent contractor, the land possessor is subject to liability. [Hooker v. Dep't of Transp.](#), 38 P.3d 1081 (Cal. 2002). But see [Martin v. Am. Nat'l Can Co.](#), 975 F. Supp. 1153 (N.D. Ind. 1997) (noting that if a landowner permits an independent contractor to enter his land to perform work on it, Indiana courts have found that the contractor is not in control of that land). An independent contractor may also be liable under § 7 for any negligence committed while working on the land.

*Comment e. Nonpossessory actor present on the land.* For cases in which the special duty rules employed in this Chapter were held inapplicable to a nonpossessory actor, see [Washington v. U.S. Dep't of Hous. & Urban Dev.](#), 953 F. Supp. 762 (N.D. Tex. 1996) (Federal Tort Claims Act case in which Texas law was adopted); [Mount Zion State Bank & Trust v. Consol. Comm'n, Inc.](#), 660 N.E.2d 863 (Ill. 1995) (noting that the special duty rules employed in this Chapter were inapplicable to a nonpossessory actor whose structure contributed to harming another who was trespassing on the land; the defendant was arguably also a trespasser on the land but nevertheless owed a duty of reasonable care to plaintiff); [Rawls v. Marsh Supermarket, Inc.](#), 802 N.E.2d 457 (Ind. Ct. App. 2004) (easement holder subject to duty of reasonable care to invitee on the land possessor's premises); see also [Restatement Second, Torts § 381](#); Ruby B. Weeks, Annotation,

*Status of Injured Adult as Trespasser on Land Not Owned by Electricity Supplier, as Affecting its Liability for Injuries Inflicted upon Him by Electric Wires it Maintains Thereon*, 30 A.L.R.3d 777; cf. *Duffy v. Ben Dee, Inc.*, 651 N.E.2d 320 (Ind. Ct. App. 1995) (noting that the defendant did not owe the plaintiff a duty under premises liability because the defendant was a nonpossessory actor on the land and declining to discuss whether a duty existed under general negligence principles); *Woods v. Qual-Craft Indus., Inc.*, 648 N.E.2d 1198 (Ind. Ct. App. 1995) (similar to *Duffy*); *Smoot v. Am. Elec. Power*, 671 S.E.2d 740 (W. Va. 2008) (utility that was negligent with regard to guy wires on which plaintiff was injured could not assert that no duty was owed to plaintiff due to his trespass, at the time, on land of a third party).

The principle contained in Illustration 3 is supported by *Restatement Second, Torts* § 386. For courts holding that a nonpossessor who creates a risk of harm on the property of another is subject to a duty of reasonable care, see *Allen v. Tex. & P. Ry. Co.*, 430 F.2d 982 (5th Cir. 1970) (applying Texas law) (easement holder subject to duty of reasonable care to trespasser on the property of land possessor); *Blackwell v. Ala. Power Co.*, 152 So. 2d 670, 673 (Ala. 1963) (“The duty of an electric company ... to exercise commensurate care under the circumstances, requires it to insulate its wires, and to use reasonable care to keep the same insulated”); *Rehwalt v. Am. Falls Reservoir Dist. No. 2*, 550 P.2d 137, 139 (Idaho 1976) (“While this Court has recently refused to abolish the legal categories of licensee, invitee and trespasser in favor of a general negligence standard ... we do not favor an expansion of the use and application of the licensee-invitee-trespasser categories, originally developed to protect and immunize the land-owner or occupier, to measure the standard of care owed by an easement owner to the owner of the servient estate.”); *Esser v. McIntyre*, 661 N.E.2d 1138 (Ill. 1996); *Kahn v. James Burton Co.*, 126 N.E.2d 836 (Ill. 1955) (lumber pile at construction site); *Wise v. S. Ind. Gas & Elec. Co.*, 34 N.E.2d 975 (Ind. Ct. App. 1941) (electrical lines over bridge superstructure); *Weber v. Sw. Bell Tel. Co.*, 497 P.2d 118 (Kan. 1972) (public utility that placed utility lines on private property); *Balt. Gas & Elec. Co. v. Flippo*, 705 A.2d 1144 (Md. 1998) (nonexclusive easement holder—electrical utility—could not claim that licensee by invitation on the property was a trespasser as to its electrical lines); *Potomac Elec. Power Co. v. Smith*, 558 A.2d 768, 777 (Md. Ct. Spec. App. 1989) (“[Defendant] owed the decedent the duty commensurate with the danger involved once it knew or should have known of her presence.”); *Sarna v. Am. Bosch Magneto Corp.*, 195 N.E. 328, 330 (Mass. 1935) (“[W]e perceive nothing in [a grant of permission to dump] which ought to absolve the defendant from the ordinary duty of care toward the plaintiffs’ intestates.”); *Bundy v. Holmquist*, 669 N.W.2d 627 (Minn. Ct. App. 2003) (former owners who had sold land to developer but returned to remove property and in the process left behind a dangerous condition created a risk of harm on the property and were held to the ordinary duty of reasonable care); *White v. Miss. Power & Light Co.*, 196 So. 2d 343 (Miss. 1967) (public utility that had license to place high-voltage lines on private property); *Stanton v. Lackawanna Energy, Ltd.*, 886 A.2d 667 (Pa. 2005) (easement owner that exercised sufficient control over easement area entitled to immunity provided to land possessors under state land recreational use act); *Fitzpatrick v. Penfield*, 109 A. 653, 657 (Pa. 1920) (“The duty of defendant, who knew, or had reason to know, that the premises were being used by others than those having a lawful right thereon, was to exercise ordinary care....”); *Musch v. H-D Elec. Coop., Inc.*, 460 N.W.2d 149 (S.D. 1990) (electrical utility with right-of-way easement); *Sutton v. Monongahela Power Co.*, 158 S.E.2d 98 (W. Va. 1967). But cf. *Wagner v. Doehring*, 553 A.2d 684 (Md. 1989) (easement holder with right to exclude others from the easement area in “possession” and subject only to duty owed by land possessor); *Petrak v. Cooke Contracting Co.*, 46 N.W.2d 574 (Mich. 1951) (contractor was not owner or lessee but had lawful “possession” of premises and owed trespassers no duty except that it must not wantonly or intentionally injure them or expose them to injury).

In some jurisdictions, those who transmit electricity are held to a heightened or statutory standard of care. For cases from these jurisdictions holding that this standard of care is not affected by the fact that the injured party trespassed against the third-party property owner, see *Langazo v. San Joaquin Light & Power Corp.*, 90 P.2d 825 (Cal. Ct. App. 1939) (abandoned telephone wire suspended across easement required to be removed by statute despite victim's trespass); *Cole v. Duke Power Co.*, 344 S.E.2d 130, 135 (N.C. Ct. App. 1986) (“[s]ince Cole was not a trespasser on any real property owned by Duke the defendant is not entitled to have its legal duty reduced”); *Earl W. Baker Utils. Co. v. Haney*, 218 P.2d 621 (Okla. 1950) (electrical lines above metal fence).

Section 4.13 of Restatement Third, Property (Servitudes), imposes a duty on an easement holder to maintain the property under the holder's control so as to avoid subjecting the estate holder to liability to others. This Comment imposes an obligation that is both broader and narrower than that imposed by § 4.13. Comment *d* is only applicable to risks created by the easement holder. At the same time, this Comment imposes a duty of reasonable care to all who are subject to risk. While the owner of the estate owes a duty of reasonable care to all save flagrant trespassers, see § 52, the duty of the easement holder to exercise reasonable care would extend to such entrants as well. In addition, in those jurisdictions that retain status-based duties, the easement holder would also owe a duty of reasonable care to licensees, although the estate holder would not. These differences are not problematic, as the Property Restatement reflects contract principles that exist as a result of the intention of the parties to enter into the easement agreement; by contrast, tort law protects the interests of strangers—here those who are entrants on property and not parties to the easement contract.

*Comment f. Contractors engaged in work on the land.* Sections 383-384 of the Second Restatement provide that agents of land possessors who perform work on the premises on behalf of the land possessor are subject to the same duties as the land possessor while performing the work. See [Smithey v. Stueve Constr. Co.](#), 2007 WL 172511 (D. S.D. 2007); [Dzenutis v. Dzenutis](#), 512 A.2d 130 (Conn. 1986) (contractor on the land at owner's behest subject to same rules of liability as are applicable to the owner); [Duggan v. Esposito](#), 422 A.2d 287 (Conn. 1979); [State v. Dolan](#), 256 S.W.3d 77 (Mo. 2008) (when possession and control is relinquished to independent contractor, contractor has duty of care as possessor); [Reformed Church of Ascension v. Theodore Hooven & Sons, Inc.](#), 764 A.2d 1106, 1110 (Pa. Super. Ct. 2000) (“ ‘Under Pennsylvania law, one who constructs a building or creates a condition on behalf of the possessor of land has the same liability as a possessor of land for the physical harm caused to others by the dangerous character of the building or condition while it is in his control.’ ” (quoting [Weiser v. Bethlehem Steel Corp.](#), 508 A.2d 1241 (Pa. 1986))); [Zuniga v. Pay Less Drug Stores, N.W.](#), 917 P.2d 584 (Wash. Ct. App. 1996); 5 FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, THE LAW OF TORTS § 27.2, at 135 (2d ed. 1986).

[Klopp v. Wackenhut Corp.](#), 824 P.2d 293 (N.M. 1992), reflects the proposition that an agent's duties are limited to that portion of the premises for which the agent has been provided control.

A few cases have made some incursions on this rule, rejecting the application of a land possessor's standard of care to its agents in an effort to ameliorate the harshness of the status-based duty rules. Thus, six years before [Rowland v. Christian](#), 443 P.2d 561 (Cal. 1968), which abolished all categories in favor of a duty of reasonable care, the California Supreme Court decided [Chance v. Lawry's, Inc.](#), 374 P.2d 185 (Cal. 1962). In *Chance*, the defendant was a contractor who had left a window box unguarded that injured the plaintiff. The defendant claimed that the plaintiff was a licensee with respect to the contractor. Rejecting that claim, the court stated:

[W]here the defendant is not an owner or occupier the application of these legal distinctions becomes impossible in fact and is without reason. These limitations on the duty of care of the owner or occupier “originated in an overzealous desire to safeguard the right of ownership as it was regarded under a system of landed estates....” For that reason it can be forcefully argued that this immunity should not be extended to others.... Justice will not be served by trying to fit each case involving an independent contractor into a Procrustean bed bounded by the concepts of “invitee” at the head and “licensee” at the foot.

*Id.* at 189-190 (citation omitted). The court concluded that the contractor owed the plaintiff a duty of reasonable care. See also [Simmers v. Bentley Constr. Co.](#), 597 N.E.2d 504 (Ohio 1992) (independent contractor who created open and obvious danger on property not entitled to land possessor's immunity from liability for open and obvious dangers). With the unitary standard adopted in this Chapter, amelioration of the sort involved in *Chance* is no longer necessary. Contractors, like the land possessors who hire them, owe a duty of reasonable care to those on the premises under this Chapter. Their duty to flagrant trespassers is the same as that of the land possessor and is limited to avoiding intentional, willful, or wanton injury. If contractors are held liable to flagrant trespassers, in the long run, it will be their customers, land possessors, who will bear those costs. The rationale behind § 52 is that land possessors should not be required to

compensate those whose presence on the land is offensive to the possessory rights of the defendant. Moreover, there is little concern that deterrence of contractors will be inappropriately diminished by the rare instance in which a negligent contractor is not held liable to a flagrant trespasser pursuant to § 52.

*Comment g. Contractors who have completed work on the land.* Section 385 of the first two Restatements of Torts provide that an agent who has completed work that is accepted by the principal is subject to the same liability as a manufacturer of a chattel who has given up possession of the chattel. This oblique way of imposing a duty of reasonable care on contractors whose work was completed reflects the waning influence of the privity doctrine, which limited a contractor's liability to those with whom the contractor was in privity of contract. After the privity rule was left behind beginning with [MacPherson v. Buick Motor Co.](#), 111 N.E. 1050, 1053 (N.Y. 1916), the liability of a chattel manufacturer extended to others beyond the person who purchased the chattel. Similar to the privity doctrine, the “completion and acceptance” doctrine insulated a contractor who completed construction on real property and turned the completed work over to the owner. With the abrogation of privity, that rule was also replaced. This Comment makes plain that a contractor who has completed work and is no longer in possession of the land is subject to a duty of reasonable care as provided in § 7 for any risk created by the contractor in the course of its work. Numerous modern cases accept the rule of § 385. See, e.g., [Brent v. Unicol, Inc.](#), 969 P.2d 627 (Alaska 1998); [Peters v. Forster](#), 804 N.E.2d 736, 741 n.6 (Ind. 2004) (citing cases); [Torchik v. Boyce](#), 905 N.E.2d 179 (Ohio 2009); [Davis v. Baugh Indus. Contractors, Inc.](#), 150 P.3d 545 (Wash. 2007); [Restatement Third, Agency § 7.01](#); cf. *Comment b*, Illustration 4.

*Comment i. Mortgage default, abandonment, and foreclosure.* [Restatement Third, Property \(Mortgages\) § 4.1\(a\)](#) provides that a mortgagee only has a security interest in the property and is not, simply by virtue of that interest, a possessor of the property. Nevertheless, a mortgagee may obtain possession of the property if: (1) the owner voluntarily provides possession (although not explicit in the black letter, the mortgagee must accept the tender for possession to transfer); (2) the owner abandons the property and the mortgagee occupies the property and takes control; or (3) the mortgagee occupies the property in good faith after an invalid foreclosure sale.

Some jurisdictions have statutes that permit a mortgagee to take possession if the mortgagor abandons the premises. See, e.g., [Colo. Rev. Stat. § 38-39-112\(2\)](#); [Ky. Rev. Stat. Ann. § 426.525](#). Some states permit a mortgagee to take possession after abandonment even in the absence of a statute. See, e.g., [Fisher v. Norman Apartments](#), 72 P.2d 1092, 1096 (Colo. 1937); [Gandrud v. Hansen](#), 297 N.W. 730 (Minn. 1941) (explaining principle that mortgagor may consent to mortgagee possession prior to foreclosure and consent may be implied from fact of abandonment and acquiescence in mortgagee's taking possession). Even if the mortgagee's possession is not lawfully authorized, if the mortgagee exercises control over the property, it is a possessor for purposes of this Section and Chapter.

For a case requiring factual resolution of the circumstances surrounding a mortgagee's assumption of several aspects of administering an apartment house to determine if it was in control after the owners defaulted and apparently abandoned the property, see [Coleman v. Hoffman](#), 64 P.3d 65 (Wash. Ct. App. 2003) (lender under deed of trust had agent collect tenant's rents, paid utility bills, and allegedly hired agent to manage and repair the property, after owners disappeared). For a case concluding that a court-appointed receiver during foreclosure was in possession, rather than the mortgagee, albeit not in the context of land-possessor liability, see [Trustco Bank, Nat'l Ass'n v. Eakin](#), 681 N.Y.S.2d 410 (App. Div. 1998).

*Comment j. Members of possessor's household.* See [Restatement Second, Torts § 382](#), *Comment b*.

## Case Citations - by Jurisdiction

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## CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury, under the laws of the State of Washington, that on the 14<sup>th</sup> day of January, 2019, I served the foregoing document by email to the following:

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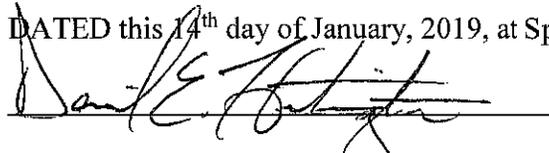
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