Rhode Island Bar Journal

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RHODE ISLAND Bar Association 1898

RHODE ISLAND BAR ASSOCIATION LAWYER'S PLEDGE

As a member of the Rhode Island Bar Association, I pledge to conduct myself in a manner that will reflect honor upon the legal profession. I will treat all participants in the legal process with civility. In every aspect of my practice, I will be honest, courteous and fair.

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Front Cover Photograph
New Narragansett Bay Commission power-generating windmills, Field's Point, Providence, by Brian McDonald

Dangers of the *Pro Se* Explosion

Michael R. McElroy, Esq.
President
Rhode Island Bar Association

I recommend we give serious thought to: 1) effective unbundling of legal services (limited scope representation); and 2) increased early mediation in the courts.

Many internet-based companies make legal forms available at low or no cost. But a legal form is no substitute for the sound advice and counsel of a lawyer, and, without the help of a lawyer, blindly using a legal form can have disastrous consequences. Here is one example.

I represented a wonderful husband and wife. Over the years, I also handled many of their small business transactions.

The husband became ill. His grown, and highly educated, daughters realized he had no will. So, with all good intentions, but wanting to save money, they went online, found a will form, filled it out, had him sign it, and both daughters witnessed it. I did not find this out until the husband died and the wife and daughters brought the will to me.

I had to tell the daughters that they had unintentionally disinherited themselves because under RI Gen. Laws 33-6-1, witnesses to a will cannot inherit under a will. Luckily for them, the wife was still alive, and, because the will first passed everything to the wife, there was no ultimate harm.

Our Bar Association's House of Delegates recently authorized me to convene a Task Force of prominent attorneys, judges, and a Roger Williams School of Law professor to study effectively implementing the unbundling of legal services (limited scope representation) in Rhode Island. The Task Force is hard at work under the leadership of Bar President-Elect J. Robert Weisberger, Jr., and I hope that eventual implementation of the Task Force recommendations will provide new vehicles for more efficient delivery of legal services in Rhode Island that will benefit clients, lawyers, and judges.

The New England Bar Association (NEBA) annual meeting recently featured a roundtable discussion among the Chief Justices of the New England Supreme Courts. The Chiefs were asked to describe what was happening in their states with regard to *pro se* litigants. The first chief to weigh in was our own Chief Justice Suttell, who described what he termed a "*pro se* explosion" in Rhode Island. Not only did all of the other Chiefs wholeheartedly agree with Chief Justice Suttell, two of them stated that 70% of civil cases in their states currently involve *pro se* litigants. Personally, I was astounded at the 70% figure.

This self-representation issue is not restricted to litigation and is becoming the new normal. In addition to forms sites, the internet provides individuals with unprecedented levels of access to legal information, often at low or no cost. For example, Google Advanced Scholar provides free access to state and federal case law, statutes, and other computerized legal research materials. Electronic filing systems, such as those used in federal court, provide access to all documents filed in federal court cases at nominal cost. State courts are also rapidly adopting electronic filing.

But access to this information does not mean that an individual or business is well-served by handling their own legal affairs without a lawyer. It takes a trained lawyer to apply such information to the facts and circumstances of each legal issue.

There is no question that lawyers can be expensive, and I understand the desire to save money. For the poor, hiring a lawyer can be nearly impossible, and, in this difficult economy, we are facing a huge need for attorneys to render *pro bono* assistance.

But I believe we, as lawyers, are in danger of pricing ourselves out of the legal market and almost becoming an irrelevancy for many clients. We could all become dinosaurs if we do not adapt.

Like any other product or service, lawyers must demonstrate that we can provide added value above what a potential client can obtain with a few keystrokes.

The *pro se* explosion also puts an unfair burden on judges. If only one side is represented by counsel, or if neither side is represented by counsel, it falls to the judge to marshal the facts and the law and render a decision. This is not an efficient way to litigate cases.

I therefore recommend that we give serious thought to: 1) effective unbundling of legal services (limited scope representation); and 2) increased early mediation in the courts.

Regarding early mediation, my feeling is that most litigants want their day in court. When I

was chair of the Superior Court Bench Bar Committee, we assisted in the establishment of a successful medical malpractice mediation program, working with then Presiding Justice Rodgers and retired Justice Israel. Our Supreme Court has also implemented a successful mediation program.

I believe that early mediation programs should be expanded into as many of our courts as practicable, and that the mediations should physically be held in our courthouses so that litigants can literally get their day in court.

A combination of effective limited scope representation, expanded early mediation opportunities, and the continued support of our terrific *pro bono* attorneys, should go a long way toward reducing legal costs and helping clients avoid the potentially disastrous dangers of handling their legal affairs without a lawyer. v

House of Delegates Letters of Interest Due February 21, 2013

Involvement in the activities of our Bar Association is a richly rewarding experience. One way to become familiar with Bar Association activities is by serving as a member of the House of Delegates. For those interested in becoming a member of the Bar's Executive Committee and an eventual Bar officer, House of Delegates' membership is a necessary first step. To learn more about Rhode Island Bar Association governance, please click here: https://www.ribar.com/About%20the%20Bar%20Association/GovernanceAndByLaws.aspx

The Nominating Committee will meet soon to prepare a slate of officers and members of the 2013-2014 Rhode Island Bar Association House of Delegates. The term of office is July 1, 2013 – June 30, 2014. If you have not already done so, to be considered for appointment to the House of Delegates, please send a letter of interest no later than **February 21, 2013**.

Letters of interest should include the member's length of service to the Rhode Island Bar Association (i.e., participation in Committees and positions held in those Committees; community service to the Bar Association and outside the Bar Association, and positions held outside the Bar Association). Testimonials and letters of recommendation are neither required nor encouraged. Direct and indirect informal contact by candidates or those wishing to address candidate's qualifications to members of the Nominating Committee is prohibited.

HOD Nominating Committee Chairperson
Rhode Island Bar Association
115 Cedar Street
Providence, RI 02903

Or, you may send your letter of interest to Helen Desmond McDonald, Executive Director by fax: 401-421-2703, or email: hmcdonald@ribar.com

There will be an Open Forum at the Bar Headquarters at a date in February or March to be determined at which candidates for the House of Delegates and for Officer Position(s) may, but are not required to, appear before the Nominating Committee and further explain their candidacy. Candidates for officer positions and candidates for the House at large will be given up to ten minutes each to speak (or as determined by the Chair). Candidates who elect to address the Nominating Committee are encouraged to present their vision of how they would advance the mission of the Bar through their service in the office.

Any member planning to make a presentation at the Open Forum must inform Executive Director Helen McDonald, prior to the Forum via email: hmcdonald@ribar.com or telephone: 401-421-5740

RHODE ISLAND BAR JOURNAL

Editorial Statement

The Rhode Island Bar Journal is the Rhode Island Bar Association's official magazine for Rhode Island attorneys, judges and others interested in Rhode Island law. The *Bar Journal* is a paid, subscription magazine published bi-monthly, six times annually and sent to, among others, all practicing attorneys and sitting judges, in Rhode Island. This constitutes an audience of over 6,000 individuals. Covering issues of relevance and providing updates on events, programs and meetings, the *Rhode Island Bar Journal* is a magazine that is read on arrival and, most often, kept for future reference. The *Bar Journal* publishes scholarly discourses, commentary on the law and Bar activities, and articles on the administration of justice. While the *Journal* is a serious magazine, our articles are not dull or somber. We strive to publish a topical, thought-provoking magazine that addresses issues of interest to significant segments of the Bar. We aim to publish a magazine that is read, quoted and retained. The *Bar Journal* encourages the free expression of ideas by Rhode Island Bar members. The *Bar Journal* assumes no responsibility for opinions, statements and facts in signed articles, except to the extent that, by publication, the subject matter merits attention. The opinions expressed in editorials represent the views of at least two-thirds of the Editorial Board, and they are not the official view of the Rhode Island Bar Association. Letters to the Editors are welcome.

Article Selection Criteria

- The *Rhode Island Bar Journal* gives primary preference to original articles, written expressly for first publication in the *Bar Journal*, by members of the Rhode Island Bar Association. The *Bar Journal* does not accept unsolicited articles from individuals who are not members of the Rhode Island Bar Association. Articles previously appearing in other publications are not accepted.
- All submitted articles are subject to the Journal's editors' approval, and they reserve the right to edit or reject any articles and article titles submitted for publication.
- Selection for publication is based on the article's relevance to our readers, determined by content and timeliness. Articles appealing to the widest range of interests are particularly appreciated. However, commentaries dealing with more specific areas of law are given equally serious consideration.
- Preferred format includes: a clearly presented statement of purpose and/or thesis in the introduction; supporting evidence or arguments in the body; and a summary conclusion.
- Citations conform to the Uniform System of Citation
- Maximum article size is approximately 3,500 words. However, shorter articles are preferred.
- While authors may be asked to edit articles themselves, the editors reserve the right to edit pieces for legal size, presentation and grammar.
- Articles are accepted for review on a rolling basis. Meeting the criteria noted above does not guarantee publication. Articles are selected and published at the discretion of the editors.
- Submissions are preferred in a Microsoft Word format emailed as an attachment or on disc. Hard copy is acceptable, but not recommended.
- Authors are asked to include an identification of their current legal position and a photograph, (headshot) preferably in a jpg file of, at least, 350 d.p.i., with their article submission.

Direct inquiries and send articles and author's photographs for publication consideration to:
Rhode Island Bar Journal Editor Frederick D. Massie
email: **fmassie@ribar.com**
telephone: **401-421-5740**

Bar's Volunteer Lawyer Program Receives Rhode Island Legal Services' Equal Justice Award

Rhode Island Legal Services, Inc. (RILS) honored the Rhode Island Bar Association's Volunteer Lawyer Program (VLP) with an annual Equal Justice Award for the VLP's outstanding *pro bono* legal aid. Bar President Michael R. McElroy accepted the award on behalf of the Bar. Past Rhode Island Bar Association President Justin S. Holden also received an Equal Justice Award for his long *pro bono* service.

I-r: U.S. Senator Sheldon Whitehouse; RILS Award Honoree Justin Holden; Rhode Island Supreme Court Chief Justice Paul Suttell; Bar President Michael McElroy; and RILS Executive Director Robert Barge at the RILS Awards Ceremony.

I-r: RILS Executive Director Robert Barge presented the Equal Justice Award for the Bar's VLP to Bar President Michael McElroy.

I-r: RILS Board President and Past Bar President Robert Oster congratulated RILS Equal Justice Award and Past Bar President Justin Holden. They were joined by the Bar's 2012 Victoria M. Almeida Servant Leader Award winner Michael Jolin.

I-r: Bar VLP Coordinator John Ellis; RILS Executive Director Robert Barge; Bar Public Services Director Susan Fontaine; and Lawyer Referral Service/Elderly Program Coordinator Elisa King get together at the RILS Awards.

LETTER TO THE EDITOR

Response to September/October 2012 President's Message:

First Thing We Do, Let's Kill All the Law Schools

Dear Editor:

Rhode Island Bar Association President Michael McElroy used his fall President's Message, *First Thing We Do, Let's Kill All the Law Schools*, to take aim at the state of legal education: "It is my belief that the law school model is broken. Law schools need to produce practice ready lawyers, but they are not doing so." His indictment is based upon several observations, but, at base, he criticizes law schools for paying too much attention to the traditional aspects of the classic legal education – case analysis and doctrinal mastery – and insufficient attention to developing practical lawyer skills.

President McElroy is by no means the first to make that criticism: two important studies, years apart – the American Bar Association's *McCrate Report* (1992) and the Carnegie Endowment's *Educating Lawyers* (2007) made the same points – and stirred not just a robust debate but also significant curricular change across the nation.

Indeed, Roger Williams University School of Law (RWU Law), which opened just months after *McCrate*, built into its initial curriculum greater attention to skills training than was prevalent at the time, including a graduation requirement of completing two skills classes, with students being able to choose from a simulation course (like Trial Advocacy) and a clinic (representing clients in actual cases). As we now approach the end of our second decade, the number and type of experiential opportunities have dramatically multiplied. Our current students can choose from:

- three clinics (Criminal Defense, Immigration, and Mediation), and a fourth coming on line next fall;
- dozens of externships, working under the close supervision of lawyers and judges in both state and federal courts, with Non-Governmental Organizations, and soon expanding to the offices of corporate counsel;
- our unique Pro Bono Collaborative (which helps many of our students satisfy our graduation requirement of 50 hours of uncompensated pro bono legal work);
- many capstone courses that enable third-year law students to integrate doctrinal knowledge learned earlier into the practical settings that will arise in practice; and
- an array of doctrinal courses that have a very practical focus, like Workers' Compensation and Elder Law.

Finally, RWU Law is one of the founding members of the Alliance for Experiential Learning in Law, organized by Northeastern School of Law.

In short, the RWU Law curriculum, while very traditional in both content (our required courses are Torts, Contracts, Civil Procedure, Criminal Law, Property, Legal Methods, Evidence, Criminal Procedure, Professional Responsibility, and Constitutional Law) and pedagogy (most faculty use a version of the Socratic Method), offers both great breadth and depth in the electives that help ease the transition from the ivory tower to the real world.

Legal education (including Roger Williams Law) is by no means above criticism, but the type of law school that President McElroy (and I) attended in the 1970s, ones that emphasized only what I call book learning, do not exist anymore, at Roger Williams Law or elsewhere.

Respectfully,
David A. Logan
Dean & Professor of Law
Roger Williams University
Bristol, RI

This fall, Roger Williams University School of Law (RWUSL) students and staff worked with the Bar's Volunteer Lawyer Program (VLP) running a family law mediation clinic at the Bar.
[back row l-r]: Will Garrahan; Monique Paquin, Dylan Owens, Laura Attley and Khorey Stephen (RWUSL Students).
[front row l-r]: Kailey Wildenhain (RWUSL Student) Margie Caranci (RWU Clinic Administrator), Jessica Hayward (RWUSL Student), Geralyn M. Cook, Esq. (VLP Lawyer), Erica Janton (RWUSL Student), and Bruce Kogan (RWUSL Professor).

Now Accepting 2013 Nominations

Chief Justice Joseph R. Weisberger Judicial Excellence Award
2013 Dorothy Lohmann Community Service Award
2013 Joseph T. Houlihan Lifetime Mentor Award

All nominations are due March 6, 2013.

Chief Justice Joseph R. Weisberger Judicial Excellence Award

The Rhode Island Bar Association's *Chief Justice Joseph R. Weisberger Judicial Excellence Award*, named in honor of its first recipient, Chief Justice (ret.) Joseph R. Weisberger, is presented to a judge of the Rhode Island State Courts or Federal District Court for exemplifying and encouraging the highest level of competence, integrity, judicial temperament, ethical conduct and professionalism. The nominee is selected by a Bar committee appointed by the President of the Rhode Island Bar Association. The Committee invites suggestions for nominations. To nominate a member of the Rhode Island Judiciary, please postal mail or email your nomination, including supporting information, your name and telephone number and email address, no later than March 6, 2013, to:

2013 Chief Justice Joseph R. Weisberger Judicial Excellence Award Committee
c/o Frederick Massie
Rhode Island Bar Association
115 Cedar Street
Providence, RI 02903
telephone: 401-421-5740
email: fmassie@ribar.com

2013 Dorothy Lohmann Community Service Award

The Rhode Island Bar Association is seeking nominations from non-profit organizations for the *2013 Dorothy Lohmann Community Service Award*. This annual award recognizes and honors attorneys who generously donate their time and legal expertise for charitable work. Nominations are accepted from, and only from, non-profit organizations where Rhode Island attorneys have devoted a significant amount of their time and effort on a strictly voluntary, non-paid basis. The Awards Committee is particularly interested in attorney actions most closely reflecting those of the award's namesake as detailed in the nomination criteria and award entry form accessed on the Bar Association website at **www.ribar.com**, under the **NEWS AND EVENTS** tab on the left side of the Home page. All nominations are due no later than March 6, 2013. Postal mail or email nominations and/or direct questions to:

2013 Lohmann Awards Committee
c/o Frederick Massie
Rhode Island Bar Association
115 Cedar Street
Providence, RI 02903
telephone: 401-421-5740
email: fmassie@ribar.com

2013 Joseph T. Houlihan Lifetime Mentor Award

The *Joseph T. Houlihan Lifetime Mentor Award* is named for the late Joseph T. Houlihan who was known for his generosity of spirit and legal expertise in and out of the courtroom. Mr. Houlihan believed in doing all he could to make lawyers strive to be the best they can be in how they think, speak, write, and represent the legal profession. This award honors individuals who, during their careers, have consistently demonstrated an extraordinary commitment to successfully mentoring in the Rhode Island legal community. The award recognizes an attorney who serves as a role model to other lawyers in Rhode Island, who has significantly contributed to the profession and/or the community, and who, with his or her excellent counsel, has excelled as a mentor and contributed to the ideals of ethics, civility, professionalism and legal skills. The Awards Committee is particularly interested in attorney actions most closely reflecting those of the award's namesake as detailed in the nomination criteria accessed on the Bar Association website at **www.ribar.com**, under the **FOR ATTORNEYS** tab on the left side of the Home page. Please postal mail or email your nomination, including a written report detailing how the nominee meets the criteria and your name and telephone number and email address, no later than March 6, 2013, to:

2013 Joseph T. Houlihan Lifetime Mentor Award Committee
c/o Frederick Massie
Rhode Island Bar Association
115 Cedar Street
Providence, RI 02903
telephone: 401-421-5740
email: fmassie@ribar.com

Modernizing Rhode Island's Premises Liability Laws

Stephen J. Sypole, Esq.
Gidley, Sarli & Marusak, LLP
Providence

Under the present law, the same harsh trespasser rule is applied to persons who are very differently situated. A burglar or a vandal would be denied recovery for their injuries, but so would someone walking their dog who inadvertently wanders onto their neighbor's property.

Introduction

Since the 1970s, the Rhode Island Supreme Court has struggled to develop a system of premises liability laws that properly balances the rights of landowners with the rights of persons injured on their property.[1] Many American jurisdictions today continue to apply traditional common law rules that determine the liability of a landowner to an injured entrant based entirely on the status of the entrant as an invitee, licensee, or trespasser.[2] Other jurisdictions have rejected these common law rules and determine liability using the tort standard of reasonable care for all cases, regardless of the status of the entrant.[3] Rhode Island is one state that has sought a middle ground between these two positions.[4] Rhode Island courts apply a two-category system where all lawful entrants (historically categorized as invitees and licensees) are owed a duty of reasonable care, while trespassers are owed only the duty to refrain from willful and wanton conduct after being discovered in a position of peril by the landowner.[5]

The application of the common law trespasser rule in Rhode Island sometimes leads to unjust and unpredictable outcomes.[6] It is a harsh, bright line rule that denies or limits recovery to all trespassers, regardless of the circumstances surrounding their entry onto the land, and protects negligent landowners from being held responsible for their conduct.[7] The law is intended to protect landowners from liability to people who have come on their land unlawfully and without permission, but it is inherently unfair because it fails to distinguish between truly culpable trespassers, such as criminals, and ordinary trespassers, whose presence on the land may be reasonable and not contrary to the interests of the owner.[8] Under the present law, the same harsh trespasser rule is applied to persons who are very differently situated. A burglar or a vandal would be denied recovery for their injuries, but so would someone walking their dog who inadvertently wanders onto their neighbor's property.

The challenges faced by Rhode Island, and other jurisdictions, in creating premises liability laws that are fair both to injured plaintiffs and defendant landowners have been addressed in the Third Restatement of Torts.[9] The Third Restatement has proposed a system where landowners owe *all* entrants on their property a duty of reasonable care to protect their safety with only one exception: flagrant trespassers.[10] Under this system, regardless of the common law status of an entrant on land, the reasonable care standard is used by the court and by the jury to determine liability, unless the court determines the plaintiff to be a flagrant trespasser, whose presence on the land is antithetical to the rights of the landowner.[11] Once a plaintiff is determined to be a flagrant trespasser by the court, the common law trespasser rule would still be used, in most cases, to prevent them from recovering for their injuries.[12] Using the Third Restatement's new rule for premises liability as a model, the Rhode Island Supreme Court could ensure that ordinary trespassers are treated fairly while landowners are still protected from meritless lawsuits brought by culpable or flagrant trespassers.[13]

Background

Today, most American jurisdictions can be grouped into one of three categories: those retaining the three common law status distinctions;[14] those, like Rhode Island, appling a two-category system;[15] and those that reject common law entirely in favor of the reasonableness test.[16]

The traditional, common law system of premises liability applied in American jurisdictions placed any entrant onto another's land into one of three categories: trespasser, licensee, or invitee.[17] The duty owed by the landowner to the entrant varied depending on the categorical status of the entrant, a decision made by the court.[18] A trespasser was defined as someone who came onto the land of another without permission or right and they were owed the lowest duty of care.[19] A trespasser injured by a dangerous condition on another's land could not recover for ordinary negligence, but only for willful, wanton, or intentional conduct.[20] A licensee was someone who entered another's land with permission, but for his or her own purpose and not for the benefit of the landowner.

The licensee category generally included social guests.[21] A landowner would owe a licensee the duty to take reasonable steps to make their premises safe and to warn the licensee of any known dangers.[22] The "most privileged status gradation is that of the 'invitee.'"[23] An invitee is someone, such as a shopper in a retail store, who has entered another's land with permission and in order to confer a benefit, usually an economic benefit, on the owner.[24] In addition to the duty owed to a licensee, a landowner would also owe an invitee the duty to inspect the premises "and to discover dangerous conditions."[25]

Using the categorical status of the entrant to determine the duty owed by the landowner was "once a fairly uniform system across the states"[26] until the California Supreme Court's decision in **Rowland v. Christian** in 1968.[27] The **Rowland** court rejected the three-category system and held that the liability of landowners would be determined using a reasonableness test, like that applied in a typical negligence case, regardless of the status of the entrant.[28] Following this case, other jurisdictions have completely eliminated the three-category common law system and apply a reasonableness test in all premises liability cases, regardless of the status of the entrant.[29] This approach replaces the formalistic common law rules with a system founded on the traditional tort principle of exercising reasonable care in the circumstances, taking into consideration the foreseeability of the injury and the burden on the defendant to prevent it. Under the reasonableness test, the plaintiff's status as a trespasser is highly relevant to the fact finder's determinations regarding the foreseeability of the injury and whether due care was exercised by the defendant, but it is no longer determinative as a matter of law.[30]

In addition to Rhode Island, more than ten other states have attempted to find a middle ground between these two approaches, eliminating the distinction between licensee and invitee, but maintaining strict rules precluding recovery by trespassers.[31] However, the path Rhode Island has taken to reach this point has been bumpy, and the state's premises liability laws have been overhauled more than once in recent history. Rhode Island has experimented with each of the three approaches. Prior to 1975, Rhode Island courts applied the three-category common law system.[32] During this time, a strict rule regarding trespassers was applied, as the Supreme Court maintained that a defendant landowner "owe[d] no duty to a trespasser except to abstain from willful and wanton injury to him *after* he is discovered in a position of peril."[33] (emphasis added)

Between 1975 and 1993, Rhode Island applied the reasonable care standard – first adopted by the California Supreme Court in **Rowland** – for all premises liability cases.[34] In **Mariorenzi**, the Rhode Island Supreme Court said common law status-based rules were outdated and modern society places more value on preventing injuries and saving lives than it does on protecting a landowner's property rights.[35] The Court also explained that a finding of liability should be based on a violation of community standards of reasonable conduct rather than the arbitrary distinctions drawn by the common law.[36]

The Rhode Island Supreme Court's decision in **Banks v. Bowen's Landing Corp.** provided guidance on how to apply the reasonable care standard in premises liability cases.[37] The plaintiff in **Banks** had been drinking at a restaurant before he jumped off of a railing into shallow

water in Newport Harbor, which resulted in a broken back and "permanent paraplegia."[38] Even though the reasonable care standard was to be applied – and the plaintiff's status was not determinative – the Court said that the trial justice still must make an initial determination of whether a duty was owed.[39] The Court provided a five factor test to guide trial courts in making this determination.[40]

1) [T]he foreseeability of harm to the plaintiff,
2) the degree of certainty that the plaintiff suffered an injury,
3) the closeness of connection between the defendant's conduct and the injury suffered,
4) the policy of preventing future harm, and
5) the extent of the burden to the defendant and the consequences to the community for imposing a duty to exercise care with resulting liability for breach.[41]

After analyzing the facts of the case in light of these five factors, the Court affirmed the grant of summary judgment in favor of the defendant.[42] The **Banks** case is instructive because it shows that even under the more permissive reasonableness test, there were safeguards in place to prevent frivolous cases from reaching juries and burdening defendants whose conduct was reasonable.

In 1994, the Court established the law as it is today, resurrecting the common law trespasser category, but continuing to apply the reasonable care standard for all other entrants.[43] The trespasser rule was restored in **Tantinomico** because the Court found it was unfair to subject the defendant landowner to liability for the injuries of the plaintiffs in that case.[44] The plaintiffs had gone onto the defendant's undeveloped land in order to ride their motorcycles and they were both injured when they crashed head on into one another.[45] Liability in a case like this "is the incarnation of the worst fears of many opponents to the movement away from common-law status categories" and it was the right of property owners "to be free from liability to those who engage in self destructive behavior on their premises" that motivated the Court to bring back the strict rule against trespassers.[46]

While the Supreme Court has worked to develop laws that are fair to both plaintiffs and defendants, there are flaws in each of the approaches. The old common law approach has already been rejected by the Rhode Island Supreme Court as outdated and unjust.[47] The Court has also rejected the no-category or pure reasonable care approach, because it does not adequately protect landowners.[48] The current approach is also unsatisfactory because it fails to distinguish between unintentional trespassers or those with innocent motives and flagrant trespassers whose conduct is culpable or self destructive. Rhode Island must find a new way forward in this area of the law, and the Third Restatement's "flagrant trespasser" rule provides a model that balances the competing interests.[49]

Analysis

A. Problem: Common Law Trespasser Rule is too Broad

The inequitable and harsh results of the common law trespasser rule can be traced to the rule's failure to distinguish between truly culpable trespassers, who are undeserving of a duty of reasonable care, and ordinary trespassers, who should be compensated when injured by a negligent landowner's conduct. The problem of indiscriminately lumping every tres-

passer into the same category was elaborated on by the District of Columbia Circuit Court of Appeals in **Gould v. DeBeve**.[50] In that case, a small child was injured when he fell from the third story window of an apartment building, allegedly due to the negligent maintenance of the window by the landlord.[51] The district court was constrained to decide that the boy had the legal status of a trespasser at the time of the fall, and he could only recover for his injuries in the case of willful or wanton misconduct by the landlord.[52]

The **Gould** court described the categorization of the boy as a trespasser as illogical and characterized the trespasser rule as outdated and unfair.[53] "There are, obviously, trespassers and trespassers" said the court, and "[t]he poacher upon the manorial estate of 18th century England ... about whom revolved so much of the developing law of landowner's liabilities to unauthorized visitors ... defies identification with the child in this case, albeit a common legal label has been affixed to them."[54] The common law trespasser rule is inherently unfair because it fails to take into account the facts and circumstances of the plaintiff's entry onto the land and imposes the same disfavored legal status on a curious child or a lost hiker as it does a burglar or a stalker.[55]

B. Solution: Third Restatement's "Flagrant Trespasser" Approach

A new approach to the landowner's duty toward trespassers has been proposed by The Restatement (Third) of Torts (hereinafter "Third Restatement").[56] It defines the "General Duty of Land Possessors" as follows:

Subject to § 52, a land possessor owes a duty *of reasonable care to entrants on the land* with regard to:

a) conduct by the land possessor that creates risks to entrants on the land;
b) artificial conditions on the land that pose risks to entrants on the land;
c) natural conditions on the land that pose risks to entrants on the land; and
d) other risks to entrants on the land when any of the affirmative duties provided in Chapter 7 is applicable.[57]

At first glance, the Third Restatement appears to advocate abolishing the common law categories altogether. However, § 52 of the Third Restatement introduces the concept of the "flagrant trespasser" and states that "[t]he only duty a land possessor owes to flagrant trespassers is the duty not to act in an intentional, willful, or wanton manner to cause physical harm."[58] The Third Restatement narrows the category of trespassers who should be denied recovery as a matter of law to those whose conduct is especially culpable, or whose presence on the land is "antithetical to the rights of the land possessor or owner."[59]

The protections of the reasonable care standard are extended to ordinary trespassers by this rule for several reasons. First, the unpredictable and unfair results in many cases where courts have difficulty drawing the line between licensees and trespassers.[60] Second, the system of subclassifications and exceptions adopted in many jurisdictions is confusing and has "produced an overall result closer to the reasonable-care duty ... than to a no-duty or limited-duty rule."[61] Third, the drafters of the Third Restatement do not think that extending the duty of reasonable care to ordinary trespassers will impose additional burdens on landowners, because the same precautions owed to

invitees and licensees will apply to ordinary trespassers.[62] The drafters provided an illustration that more fully explains this third point:

> Ed and Margaret ... carpooled together to work one day, parking in a visitors' parking lot at the Viner Hospital because Ed planned to visit his brother at the hospital. Margaret, who had no business at the hospital, worked in a nearby building. While walking across the parking lot, both Ed and Margaret slipped and fell ... on ice. Under applicable law, Margaret is a trespasser, while Ed is an invitee.[63]

This illustration shows that in many cases the defendant landowner would not need to take any additional precautions to protect Margaret, the trespasser, than they would to protect Ed, the entrant who is on the property with permission.

The drafters of the new Restatement rule declined to provide a bright-line definition of "flagrant trespasser," leaving it to the state courts to flesh out rules that best fit their unique geography, population density, legal system, and political and moral values.[64] The Restatement does provide some guidance, however, saying that the justification for "distinguishing particularly egregious trespassers for different treatment is that their presence on another's land is so antithetical to the rights of the land possessor ... that the land possessor should not be subject to liability."[65] The proposed rule is flexible. Some jurisdictions may choose to develop a narrow definition of flagrant trespasser that is limited to trespassing criminals, others may choose to broaden it to "those who enter the land with a malicious motive," and still others may choose a "general standard" such as one "whose entrance is sufficiently egregious as to be antithetical to the rights of the land possessor."[66]

C. Modernizing Rhode Island's Laws

The Rhode Island Supreme Court should consider adopting a new rule for premises liability cases consistent with the Third Restatement's flagrant trespasser rule.[67] This rule strikes a comfortable balance between the conflicting interests that have shaped Rhode Island's premises liability laws over the years, while providing clarity lacking under current precedent. It would extend the class of entrants to whom a landowner owes a duty of reasonable care to include some trespassers, while flagrant trespassers would be denied such protection in most cases.[68] When a plaintiff is determined a flagrant trespasser, courts should continue to deny recovery, absent a showing the injury was caused by the defendant landowner's willful or malicious conduct after discovering the entrant in a position of peril.[69] Such a rule would allow deserving plaintiffs to get their day in court and encourage responsibility by holding negligent landowners accountable for maintaining conditions on their land that could foreseeably cause injury.[70] At the same time, the property rights of landowners would be respected, and they would be exposed to a reasonable amount of liability.[71]

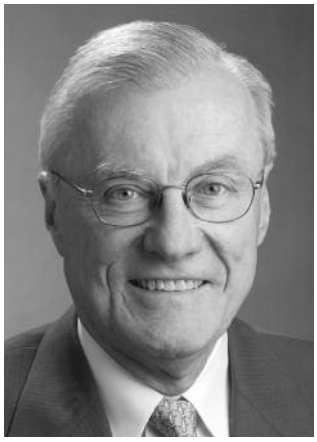
In **Mariorenzi**, the Court explained persuasively why the common law rules regarding the duties owed by a landowner to entrants on the property should be totally abandoned in favor of a duty of reasonable care, even when those entrants were on the property without permission.[72] In this case, a young boy drowned in a pool of water after he entered a residential construction site near his home, and the

continued on page 35

Lunch with Legends:
Trailblazers, Trendsetters and Treasures of the Rhode Island Bar

Matthew R. Plain, Esq. **Elizabeth R. Merritt, Esq.**
Taylor Duane Barton & Gilman, LLP, Providence

Self-described "Pawtucket Boy," Jack Partridge graduated from St. Raphael Academy in 1957 before studying history and art at Providence College and attending Harvard Law School. He gained admission to the Rhode Island Bar in December of 1964, went on active duty as a First Lieutenant in the United States Army on January 2, 1965, shipping off to Vietnam nine months later. After his discharge at the end of 1966, and a cup of coffee at the London School of Economics, Mr. Partridge came back to Rhode Island to join Tillinghast, Collins & Tanner. Taking a brief hiatus from his role as a litigator at Tillinghast he ran Herbert DeSimone's 1970 campaign for governor. Upon his return to Tillinghast, Mr. Partridge began developing his finance law expertise and pioneering mortgage banking law. He helped form Partridge, Snow & Hahn in 1988, which has grown into one of Rhode Island's biggest law firms. Mr. Partridge has made contributions not only to the law, but also his community; a commitment that he and his partners also require from their law firm members. He suggests that any success he's enjoyed can be credited to his family, his colleagues, his willingness to take a chance, and luck. When he's not practicing law, writing a series of published mystery novels, or volunteering for a non-profit, you may catch him as an extra in a movie or a televisions series. We had the pleasure of meeting with Mr. Partridge at his office in Providence. Excerpts from our conversation follow.



Jack Partridge

Can you share one of your most memorable experiences over the course of your legal career? I argued a case [for a local bank] before the full Federal Reserve Board – which never happens – and, with Bill Harvey from Newport, I won the case. I argued that Rhode Island was the only State that permitted this particular practice, and it shouldn't be negated by the Federal Reserve Board's fiat. I thought their eyeballs were going to fall out. "The State of Rhode Island? We are the Federal Reserve Board!" We convinced them. It started off very negative, and it came right around at the end, and I said, "Gee, I think I got one guy out of the whole board." It turned out, I had the whole board. So it was terrific. That was great.

Can you share one of your most inventive or creative legal arguments? I think convincing people that Beacon Mutual Insurance Company could take on 95 percent of the workers' compensation insurance market in 12 months was a victory. That was a whole year of work.

Over the course of your career, who was one of your most formidable opponents? Early on, when I was doing banking, I would say Merrill Sherman. Not necessarily an opponent, because we tried to get the deal done, but she was very formidable.

What has been one of the biggest obstacles in your professional career? I have to tell you something. I am at least somewhat dyslexic, and I didn't know it for a very long time. I thought everybody saw things the way I did, and I never really knew differently. But, when I was about maybe 35 or so, I recognized it. I usually read things correctly, but I cannot translate it. Like the word "third," I will always get the "i" and the "r" in the wrong places. I just thought it was some sloppiness on my part, and I wasn't a good typist, but it was dyslexia. I still have it today. It was a bit of a personal impediment, but it makes me a very good editor because I have to concentrate word for word.

What is the best advice that you've ever received? The one that I don't follow, and that is to be five minutes early for every meeting.

What advice would you give to new lawyers? Don't be discouraged because of the economic circumstances. If you really want to do it, then you'll find your own niche one place or the other. And, I do think it's important for those who are going to be in general practice, they should do one or two things very well and let the other stuff go.

Certainly, Mr. Partridge's interesting life and legal career make him one of the treasures of our Bar.

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Tolling the Statute of Limitations Under the Servicemembers' Civil Relief Act

Michael S. Pezzullo, Esq.
Fay Law Associates, Inc.

You have every reason to believe you are at a dead end with this case. Great facts, but you are time-barred. Not so.

You meet with a prospective client regarding a personal injury claim that, at first glance, appears to be strong on the issue of liability. The client tells you that she was a passenger in her friend's vehicle. Both are Rhode Island residents. They were traveling in downtown Providence, when their vehicle was involved in an intersection accident with another vehicle operated by a Massachusetts resident. It is disputed which operator had the green light. The client was seat-belted, and this is reflected in the ambulance and emergency room reports. She and her friend driving serve in the same unit in the Rhode Island Army National Guard. They have been deployed to both Iraq and Afghanistan. The client injured her back and neck in the accident and underwent approximately three months of treatment, after which she was discharged from her treating physician's care. It sounds like a great case until you look at the police report which indicates that the accident occurred three years and days ago. Your heart drops. The claim is barred by the three year statute of limitations for personal injury actions. Or is it?

We all know that RI Gen. Laws 9-1-14(b) provides that, "actions for injuries to the person shall be commenced and sued within three (3) years next after the cause of action shall accrue, and not after, except as provided for otherwise…" You have every reason to believe you are at a dead end with this case. Great facts, but you are time-barred. Not so.

The client informs you that since the accident, she and her friend (the driver of the host vehicle), were activated and deployed to Afghanistan for a period of thirteen months. The client's overseas active duty service brings her claim within the scope of 50 U.S.C. App. § 526 of the Servicemembers' Civil Relief Act, which provides as follows:

> (a) Tolling of statutes of limitation during military service
>
> The period of a servicemembers' military service may not be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court, or in any board, bureau, commission, department or other agency of a State (or political subdivision of a State) or the United States by or against the servicemember or the servicemember's heirs, executors, administrators, or assigns.

Under U.S.C. App. § 511 (2)(A)(ii), the term "military service" in the case of a member of the National Guard, includes service under a call to active service authorized by the President or the Secretary of Defense for a period of more than thirty consecutive days under 32 U.S.C. § 502(f), for purposes of responding to a national emergency declared by the President and supported by Federal funds. Under 32 U.S.C. § 502(f)(2)(A), this would include, "support of operations or missions undertaken by the member's unit at the request of the President or Secretary of Defense." Under 50 U.S.C. App. § 511(1), the period of military service would include the period during which the servicemember is absent from duty due to "sickness, wounds, leave or other lawful cause." The United States Court of Appeals for the Federal Circuit has held that the statute of limitations again begins to run upon the date of release from active duty, not the date of discharge from military service. See **Curry v. United States**, 60 Fed. Appx. 312 (Fed. Cir. 2003).

It is important to note that 50 U.S.C. App. § 526 is a double-edged sword, since it provides for a tolling of any action, both by *or against*, a servicemember. Hence the client's claim against her friend who was driving the host vehicle is preserved as well, as a result of the host driver's active duty service.

Read together, Sections 511 and 526 of the Act would extend the limitations period thirteen months beyond the three-year limitations period set forth in 9-1-14(b). Take the case. You have over one additional year in which to file suit against the driver of the host vehicle, and the operator of the other vehicle who is a resident of Massachusetts.

You can fully expect that once defense counsel for the insurers of either driver receives the summons and complaint served on their insured, he or she will file an answer and raise the three-year statute of limitations as an affirmative

defense. Under Section 526 of the Act, defense counsel cannot obtain dismissal or summary judgment of the action as to either driver. Regarding the Massachusetts driver, RI Gen. Laws § 9-1-18 entitled, "Effect of absence from state on limitations." provides:

> If any person against whom there is or shall be cause for any action, as enumerated in this chapter, in favor of a resident of the state, shall at the time the cause accrues be outside the limits of the state, or being within the state at the time the cause accrues shall go out of the state before the action is barred by the provisions of this chapter, and does not have or leave property or estate in the state that can be attached by process of law, then the person entitled to the action may commence the action, within the time before limited, after the person has returned into the state in such a manner that an action may, with reasonable diligence, be commenced against him or her by the person entitled to the action; provided, however, that no action shall be brought by any person upon a cause of action accruing outside this state which was barred by limitation or otherwise in the state, territory, or country in which the cause of action arose while he or she resided in the state.

In **Rouse v. Connelly**, 444 A.2d 250 (R.I. 1982), the plaintiff, a Rhode Island resident, brought a personal injury action against a Massachusetts resident. The plaintiff was injured while riding as a passenger in her own vehicle. The Massachusetts resident was driving the plaintiff's vehicle when it struck the rear of a parked vehicle. The plaintiff fractured her right arm and damaged her teeth. The plaintiff filed suit three years and seven days after the accident under §§ 31-7-6 and 31-7-7. It was undisputed that the plaintiff failed to commence her suit within the three-year limitations period. The plaintiff contended that the statute of limitations was tolled by § 9-1-18. The plaintiff further argued that § 9-1-18 was intended to protect Rhode Island plaintiffs, and its protection should not be withheld simply because §§ 31-7-6 and 31-7-7 provided an alternate means of proceeding against a non-resident motorist. The trial justice rejected both arguments. On appeal, the Rhode Island Supreme Court held:

> Since the defendant in this case was amenable to suit through §§ 31-7-6

and 31-7-7, the plaintiff had no need of the special protection offered by § 9-1-18. To toll the statute of limitations when a defendant is amenable to suit by substituted service would permit the unnecessary and indefinite postponement of lawsuits against nonresident motorists, a result clearly contrary to sound principles of judicial administration.

However, the fact that your client's claim is tolled under Section 526, takes the case outside the scope of **Rouse**.

As a practical matter, you should not wait for defense counsel to raise the statute of limitations as an issue by dispositive motion. Obtain an early resolution of this issue by filing a motion to strike that affirmative defense under Rule 12(f) of the Rules of Civil Procedure within twenty days of service of the answer. Rules 12(f) states as follows:

> Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty (20) days after the service of the pleading upon him or her or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense, or any redundant, immaterial, impertinent, or scandalous matter.

Your motion to strike should state as grounds that an insufficient basis in law and fact exists for the statute of limitations defense. Attach as an exhibit to your motion a certified copy of your client's Certificate of Release or Discharge from Active Duty. This document will state the date on which your client entered active duty service, the date of separation from active service and the length of active service in years, months and days. The quickest way to obtain this document is from your client prior to filing suit to avoid delay caused by any bureaucratic red tape. This document will aid the court in determining the additional time your client has in which to bring suit.

Section 526 can also be applied to toll the limitations period during which a servicemember may file a claim for unemployment benefits or an appeal from denial of same, as well as for workers' compensation benefits. This would also toll the time period for bringing any action brought by or against a service member before any other federal, state or municipal board, bureau, commission, department or other agency, as well as any federal civil action. v

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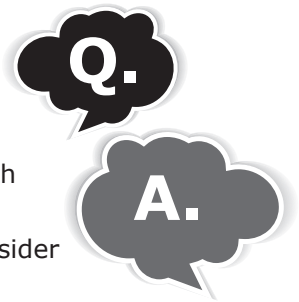

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To sign-up for SOLACE, please go to the Bar's website at **www.ribar.com**, login to the **Members Only** section, scroll down the menu, click on the **SOLACE Program Sign-Up**, and follow the prompts. Signing up includes your name and email address on the Bar's SOLACE network. As our network grows, there will be increased opportunities to help and be helped by your colleagues. And, the SOLACE email list also keeps you informed of what Rhode Island Bar Association members are doing for each other in times of need. These communications provide a reminder that if you have a need, help is only an email away. If you need help, or know another Bar member who does, please contact Executive Director Helen McDonald at hmcdonald@ribar.com or 401.421.5740.

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Immigration Consequences to a Charge of Simple Assault or Battery

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When an alien is convicted of, or has pled to, a charge of simple assault pursuant to R.I. Gen. Laws and placed in removal proceedings, the issue at the immigration court level is whether the alien is removable or inadmissible as a result of having been convicted of a crime of violence and/or a crime of domestic violence or a crime involving moral turpitude.

It is never an easy task determining whether an "alien's"[1] misdemeanor crime of simple assault or battery under RI Gen. Laws § 11-3-5 is an aggravated felony, a crime of moral turpitude or a domestic crime of violence according to the Immigration Nationality Act. This article focuses solely on misdemeanor dispositions,[2] under RI Gen. Laws § 11-5-3/12-29-5, and how these dispositions are viewed in the immigration context, as well as the consequences a client may face based on a conviction or plea pursuant to this statute. Issues reviewed include: 1) the consequences of a conviction or of accepting a plea for simple assault/domestic where the sentence falls outside the purview of a definition of an aggravated felony pursuant to 8 U.S.C. § 1101(a)(43)(F) and even some that do; 2) how Immigration Customs Enforcement (ICE) may consider such a conviction or plea to be a crime of domestic violence (CDV) and/or a crime involving moral turpitude (CIMT); and 3) suggestions as to how a client may fall outside the aggravated felony category even if the client must accept a one-year suspended sentence.

Crime of Domestic Violence pursuant to 8 U.S.C. § 1227(a)(2)(E) or Aggravated Felony pursuant to 8 U.S.C. § 1101(a)(43)(F) as defined in 18 U.S.C. § 16(a)

Section 1227(a)(2)(E)(i) of the Code renders any alien (documented or undocumented) removable if the alien at any time after admission (or entry) was convicted of a CDV, stalking, child abuse, child neglect or child abandonment. The term "domestic violence" means crime of violence as defined pursuant to section 16, Title 18 of the United States Code.[3]

Section 16, title 18 of the U.S.C. defines a crime of violence as: "(a) *an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another* or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." (emphasis added). Here, we will review only title 18 U.S.C. § 16(a), as it focuses on the misdemeanor offense of simple assault or battery/domestic in Rhode Island.[4]

RI Gen. Laws § 11-5-3 states as follows: (a) Except as otherwise provided in § 11-5-2, every person who shall make an assault *or* battery *or* both shall be imprisoned not exceeding one year or fined not exceeding one thousand dollars ($1,000), or both; (b) Where the provisions of "The Domestic Violence Prevention Act," chapter 29 of title 12, are applicable, the penalties for violation of this section shall also include the penalties as provided in § 12-29-5." (emphasis added)

Notably, this section does not charge a defendant with one crime, but with two distinct crimes: assault or battery or both. Although not defined by the statute, the terms assault and battery have different and distinct definitions and elements according to Rhode Island case law. Assault is defined it as "an unlawful attempt or offer, with force or violence, to do corporal hurt to another, whether with malice or wantonness." See **State v. McLaughlin**, 621 A.2d 170, 177 (R.I.1993).[5]

"[B]attery refers to an act that was intended to cause, and does cause, an offensive contact with or unconsented touching of or trauma upon the body of another." See **McLaughlin**, 621 A.2d at 177, citing to **State v. Messa**, 594 A.2d 882, 884 (R.I.1991) (quoting **Proffitt v. Ricci**, 463 A.2d 514, 517 (R.I.1983)).

When an alien is convicted[6] of, or has pled to, a charge of simple assault pursuant to RI Gen. Laws § 11-5-3 and placed in removal proceedings, the issue at the immigration court level is whether the alien is removable or inadmissible as a result of having been convicted of a crime of violence and/or a crime of domestic violence (depending on the charge) or a crime involving moral turpitude.[7]

The issue of what acts constitute a crime of violence (COV) pursuant to 18 U.S.C. § 16 was brought to the United States Supreme Court in **Leocal v. Ashcroft**, 125 S.Ct. 377 (2004).

Josue Leocal, a lawful, permanent resident (LPR), was convicted under the Florida statute for driving under the influence in violation of Fla. Stat. § 316.193(3)(c)(2) (2004). The statute

required a showing of only negligence. The issue in Leocal became whether an offense that does not require a showing of intent is a COV pursuant to 18 U.S.C. § 16. See **Leocal v. Ashcroft**, 125 S. Ct. 377 (2004).

The **Leocal** Court noted that the language "use of physical force against the person or property of another," found in 18 U.S.C. § 16(a), required a higher degree of intent than merely negligent or accidental. **Leocal** 125 S. Ct. at 382. The Supreme Court, however, never defined the term "physical force," until 2010 in **Johnson v. US**, 130 S.Ct. 1265 (2010).

In 2007, the First Circuit in **Lopes v. Keisler**, 505 F.3d 58 (1st Cir 2007) was asked to answer the question of whether a conviction/plea pursuant to RI Gen. Laws § 11-5-3-/12-29-5 is considered a COV pursuant to 18 U.S.C. § 16(a), thereby possibly rendering a foreign national removable as an aggravated felon, pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii).

Lopes, a lawful permanent resident, was charged with violation of RI Gen. Laws § 11-5-3. The criminal complaint stated that Lopes "commit[ted] assault and battery upon the body of [name omitted]." **Lopes**, 505 F.3d at 62. The Department of Homeland Security submitted as evidence the criminal complaint and the criminal docket sheet. The criminal docket sheet listed the charge as "simple assault-domestic," along with the various docket entries and the final disposition.[8] The Court in **Lopes** relied on the criminal docket sheet, holding that "[t]he criminal docket report states that a plea of nolo contendere was entered on a count of simple assault-domestic. On the basis of these two documents, it is clear that Lopes was convicted of assault." **Lopes**, 505 F.3d at 62

The Court in **Lopes** also found that the physical force required to commit an assault, which, as defined in Rhode Island, does not require touching at all,[9] is sufficient to be considered a crime of violence pursuant to 18 U.S.C. § 16(a); and therefore, an aggravated felony for immigration purposes, as an assault in Rhode Island requires a higher degree of intent than negligent or mere accidental conduct. See **Lopes**, 505 F.3d at 63; see also Immigration Nationality Act (hereinafter INA) § 101(a)(43)(F).

As a result of the **Lopes** decision, a charge of removal pursuant to INA's crime of domestic violence statute (8 U.S.C. § 1227(a)(2)(E)(I); INA § 237(a)(2)(E)(i)) likely will be sustained if the alien has a conviction pursuant to RI Gen. Laws § 11-5-3/12-29-3, even if the alien received probation or a filing and no suspended sentence.

In 2010, the US Supreme Court in **Johnson v. US**, 130 S. Ct. 1265 (2010) was tasked with deciding whether the Florida misdemeanor offense of battery of "actually and intentionally touching" another person has as an element "the use…of physical force against the person of another" pursuant to the definition of "physical force" in 18 U.S.C. § 924(e)(2)(B) (i), and whether the Florida conviction constitutes a "violent felony" under the Armed Career Criminal Act, § 924(e)(1).

Violent felony pursuant to 18 U.S.C. § 924(e)(2)(B):

1. *Has an element of use, attempted use, or threatened use of physical force against the person of another*; (emphasis added) or
2. Is burglary, arson or extortion involves use of explosives or otherwise involves conduct that presents a serious potential risk of physical injury to another.

The elements of a "violent felony" pursuant to § 924(e)(2)(B)(i) mirror the elements of a "crime of violence" pursuant to 18 U.S.C. § 16(a), which may or may not necessarily refer to a felony.

The **Johnson** Court then defined the term "physical force" as follows: "'physical'…plainly refers to the force exerted by and through concrete bodies," *id at 1270*; and "force" as power, violence or pressure directed against a person or thing." *Id*. The Court ultimately held that the force required to meet the definition of "physical force" in the context of a violent felony is force that would not be satisfied by a mere touching, which is all that is required for a violation of the Florida battery statute. See Fla. Stat. § 784.03(2), see also **State v. Hearns**, 961 So.2d 211(FL 2007); **Johnson**, 130 S.Ct. 1265 (2010). The Court reiterated that it was interpreting "physical force" in the context of a violent felony and not in the context of a battery. **Johnson**, 130 S.Ct. at 1270, *citing* **Leocal v. Ashcroft**, 543 US 1, 11 (2004).

Unfortunately, the definition of "physical force" in **Johnson** does not resolve the question of what "physical force" means in the context of 18 U.S.C. § 16. In

2011, the First Circuit in **US v. Booker**, 644 F.3d 12 (1st Cir 2011) refused to use the definition laid out in **Johnson**. **Booker** 644 F.3d at 19.

Booker and a second defendant, Wayman, had both been convicted pursuant to the Lautenberg Amendment to the Gun Control Act of 1968 (18 U.S.C. § 922(g)(9)), which makes "unlawful for any person who has been convicted in any court of a misdemeanor crime of domestic violence to … possess… any firearm or ammunition." Both defendants had been convicted of Maine's misdemeanor simple assault statute, which provides that a person "is guilty of an assault if the person intentionally, knowingly or recklessly causes bodily injury or offensive contact to another." Me.Rev.Stat.Ann. Tit 17-A § 207(1); **US v. Booker**, 644 F.3d 12, 16 (1st Cir 2011).

The Lautenberg Amendment defines "misdemeanor crime of domestic violence as: "(1)…;(2) has as an element, the use, attempted use of physical force, or threatened use of a deadly weapon; and (3)...." 18 U.S.C. § 921(a)(33)(A).

The **Booker** court refused the definition of "physical force" set out in **Johnson** because the Supreme Court in **Johnson** had specifically stated that it was only defining a violent felony, not defining the meaning of "physical force" within the context of a misdemeanor. See **Johnson**, 130 S.Ct. at 1270, citing **Leocal v. Ashcroft**, 543 US 1, 11 (2004). The **Booker** court also refused to use the definition of a crime of violence under 18 U.S.C. § 16 or violent felony under 18 U.S.C. § 924(e) of the ACCA, because the Court found that § 922(g)(9) of the Lautenberg Amendment has a distinct focus and singular purpose not covered in any other statute. See **Booker**, 655 F.3d at 19, citing to **US v. Mead** 175 F.3d 215 at 211, 221 (1st Cir 1999).

The **Booker** court noted that Congress expressly rejected § 16's definition of COV, adopting a definition for misdemeanor crime of domestic violence that was "probably broader" than that of COV under § 16. The **Booker** court further held that it would not interchange the use of the definition of COV and physical force between two distinct statutes. See **Booker**, 644 F.3d at 19 citing to 142 Cong.Rec. S11872-01, S11877 (daily ed. Sept. 30, 1996). As such, the practitioner is again left with the rulings in **Leocal** and **Lopes**, which only require that the elements of the crime carry a higher degree of intent than merely negligent. Notably, the court in **Lopes** never reached the question as to whether a battery in Rhode Island is a crime of violence (**Lopes**, 505 F.3d at 62).

As there is no element of physical force in the definition of a battery in Rhode Island, and seeing as the "offensive contact" and/or the "unconsented touching" could be of a negligent or accidental nature, an Immigration Court charged with removing an alien on the basis of a battery conviction in Rhode Island could likely rule in favor of an alien of not having been convicted of a COV or CDV.

Practice Tip: Based on the above, it would behoove a criminal practitioner who is going to have his client plea to a charge of simple assault and battery/domestic to have the prosecution first amend the charge specifically to simple battery/domestic and request that the judge amend the record of conviction to read the charge to be battery and not assault if, of course, the facts support such a finding.

Crime of Moral Turpitude

DHS will charge an individual with removability pursuant to the CIMT statute of INA if the individual has a conviction[10] for simple assault/battery, even where there is no domestic sentence enhancement, especially if the individual has more than one offense on his/her record. DHS can impose several charges of either inadmissibility or removability against an alien on the basis of CIMTs, such as:

- 8 U.S.C. § 1182(a)(2)(A)(i)(I); INA § 212(a)(2)(A)(i)(I) – any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime of moral turpitude is inadmissible;
- 8 U.S.C. § 1227(a)(2)(A)(i)(I); INA § 237(a)(2)(A)(i)(I) any alien who is convicted of a crime involving moral turpitude committed within 5 years ([…]) after the date of admission and (II) is convicted for a crime for which a sentence of one year or longer may be imposed is deportable;
- 8 U.S.C. § 1227(a)(2)(A)(ii); INA § 237(a)(2)(A)(ii) any alien who at any time after admission has been convicted

of two (2) or more crimes involving moral turpitude, not arising from a single scheme of criminal misconduct regardless of whether confined or whether a single trial is deportable.

INA does not define the term "moral turpitude." Moral turpitude is a vague concept referring to conduct which shocks the conscience as being inherently base, vile or deprived, contrary to rules of morality. **Matter of Danesh**, 19 I&N Dec. 669, 670 (BIA 1988).

Prior to 2008, no set methodology existed for determining whether a predicate offense fell within the purview of a CIMT. However, in 2008, the US Attorney set to clarify for the Immigration Judges and the BIA a methodology to be used when determining whether a predicate offense involves moral turpitude. See **Matter of Silva-Trevino**, A13-014-303 (BIA Aug 8, 2006).

Mr. Silva-Trevino, a Mexican, was admitted to the US in 1962. In 2004, Silva-Trevino pled to the criminal offense of "indecency with a child" pursuant to the Texas Penal Code, title 5, Section 21.11(a)(1). This statute makes it illegal for a person to engage in sexual conduct with a child under 17 who is not the spouse. The statute defines sexual conduct as "any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a child, or any touching of any part of the body of a child, including touching through clothing, with the anus, breast, or any part of the genitals of a person if committed with the intent to arouse or gratify the sexual desire of a person." Section 21.11(a)-(c). Mr. Silva-Trevino received five years probation plus fines and counseling.

Mr. Silva-Trevino was placed in removal proceedings and charged as removable pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii); INA § 237(a)(2)(A)(iii), as an alien having been convicted of an aggravated felony. He sought to adjust his status to a lawful permanent resident, but was found to be inadmissible pursuant to 8 U.S.C. § 1182(a)(2)(A)(i); INA § 212(a)(2)(A)(i), as a person who has been convicted of a CIMT.

Silva-Trevino appealed to the BIA. The BIA reversed, finding that the Texas statute involved morally reprehensible conduct, and also some conduct not morally reprehensible. The BIA held that Silva-Trevino had not been convicted of a CIMT. See **Matter of Silva-Trevino**,

A13-014-303 (BIA Aug 8, 2006).

In his opinion, the US Attorney General (AG) in **Matter of Silva-Trevino**, 24 I&N Dec. 687 (AG 2008) reversed the BIA's decision and set out a methodology to analyze these offenses by using three separate, but not distinct, methods. First, the AG states that the court/adjudicator needs to decide if, categorically, the predicate offense is a CIMT[11] using a "realistic probability approach."

The "realistic probability approach" focuses on the actual scope of the criminal statute by asking whether, at the time of removal proceedings, any cases existed where the criminal statute was applied to conduct that does not involve moral turpitude. If there has been a state case that applied the criminal statute to conduct that does not involve moral turpitude, then the inquiry ends and the predicate offense cannot be deemed a CIMT. However, if no such case exists, the AG instructs the adjudicator to use the modified approach. See also **Shepard v. US**, 544 US 13 (2005).[12]

The AG goes a step further than the modified approach, holding that since most criminal statutes do not have moral turpitude as an element, and seeing as though this classification of charge can only be made with additional information, it only makes sense to allow the adjudicator to go beyond the record, transcript and plea agreement, and the adjudicator is allowed to review *all other documents necessary* to determine if the crime is one that involves moral turpitude. **Silva-Trevino**, 24 I&N Dec at _.

The AG clarifies that, whatever the definition of a CIMT, it must involve at the very least both reprehensible conduct and some form of scienter, such as willful or reckless. **Silva-Trevino**, 24 I&N Dec at __ fnt5 (AG 2008).

In summary, the offense must involve both reprehensible conduct and some form of scienter. The methodology used to determine if the offense qualifies as a CIMT is to first use the categorical/realistic probability approach. If that does not answer the question, use the modified categorical approach by reviewing all documents that may help answer the inquiry (such as the police report, witness statements, etc).[13]

As of this writing, at least four circuits have rejected **Silva-Trevino: Prudencio v.**

continued on page 41

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REMINDER
MCLE Annual Reporting Requirements

Active Rhode Island attorneys must now report MCLE credits electronically through the Supreme Court's Attorney Portal located at www.courts.ri.gov. Use your RI attorney ID number to create your account.

Credits may be stored and submitted at any time during the CLE year – July 1-June 30 – rather than waiting until June 30.

If you have questions about this new requirement, please call the MCLE Commission at 401-222-4942.

— SAVE THE DATE —

2013 Annual Meeting

June 13 & 14, 2013
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Reminder: Bar members may complete three credits through participation in online CLE seminars. To register for an online seminar, go to the Bar's website: **www.ribar.com** and click on CONTINUING LEGAL EDUCATION in the left side menu.

Justice Assistance Award Honorees Committed to the Pursuit of Justice

At Justice Assistance's 31st Annual Neil J. Houston, Jr. Memorial Awards, retired Rhode Island Superior Court Associate Justice Francis J. Darigan, Jr. was honored with the *Edward V. Healey, Jr. Lifetime Achievement Award*, reflecting the determined dedication with which a person pursues justice and assists others in achieving justice throughout his or her lifetime. *Neil J. Houston, Jr. Memorial Awards* were presented to four recipients: Rhode Island Superior Court Presiding Justice Alice B. Gibney; U.S. Attorney Peter F. Neronha; Major Stephen J. Lynch, RISP (ret.); and The Center for Prisoner Health & Human Rights for their demonstrated strong commitment to justice throughout their careers.

l-r: Dr. Josiah D. Rich, Brown University Medical School, The Miriam Hospital; Rhode Island State Police Major Stephen J. Lynch (ret.); Rhode Island Superior Court Presiding Justice Alice B. Gibney; Rhode Island Superior Court Associate Justice Francis J. Darigan, Jr. (ret.); The Center for Prisoner Health & Human Rights Executive Director Brad Brockmann; and District of Rhode Island United States Attorney Peter F. Neronha

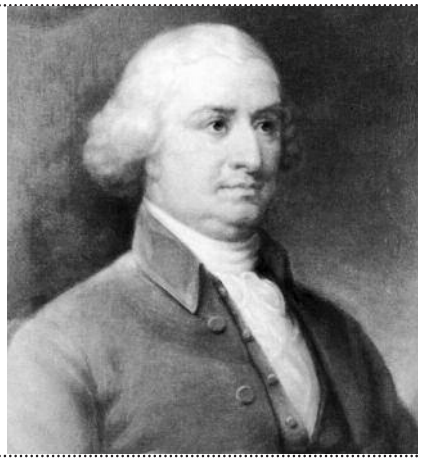
Judge David Howell: An Early Rhode Island Legal Luminary

Patrick T. Conley, Esq.
Rhode Island Bar Journal
Editorial Board

David Howell, a person hitherto overlooked by Rhode Island historians, had a distinguished legal and academic career that extended from the Confederation Era through the Early National Period. He was born in Morristown, New Jersey, on January 1, 1747, the son of Aaron and Sarah Howell. He received his early education at Hopewell Academy in Hopewell, New Jersey, a Baptist school established by clergyman Isaac Eaton. Howell then went to the College of New Jersey (now Princeton University), from which he graduated in 1766. He was preceded at both schools by James Manning, who was nine years older than Howell. When Manning became the founding president of the College of Rhode Island (now Brown University), he asked the young and promising Howell to join him as a member of the faculty. The newly graduated Howell came to Rhode Island in 1766 and began his 58-year association with Brown.

As you go Southward, Government verges towards Aristocracy. In New England alone have we pure and unmixed Democracy, and in Rhode Island & P.P. [Providence Plantations] it is in its Perfection.

Judge David Howell



Howell was a brilliant and versatile academician, who not only taught but also studied.

By 1769 he had been admitted to the bar, earned a master's degree, and attained the position of professor of natural philosophy and mathematics. He also taught French, German, and Hebrew. Such scholarly versatility was essential, because in the early years of the college Howell and Manning were the only full-time members of the faculty.

When instruction was interrupted in 1779 by use of the college's facilities for quartering the French army, Howell became more active in the field of law, serving as a local justice of the peace in 1779 and as a judge of the state Court of Common Pleas in 1780. Two years later, he became a Rhode Island delegate to the Confederation Congress, serving in that capacity until 1785, when he was succeeded by his colleague, the Reverend James Manning. Howell's tenure was sometimes stormy. As a representative of Rhode Island's mercantile interests, he stubbornly opposed the attempt by Congress to enact the Impost of 1781, a proposed five percent national import duty designed to give the general government a degree of fiscal self-sufficiency. Howell's stance so infuriated his congressional colleagues that they attempted to unseat him. Under the provisions of the Articles of Confederation, the impost needed the unanimous approval of all thirteen states, so it never became law.

The significance of Rhode Island's opposition to the impost was later assessed by John Adams, a rather perceptive commentator. In a February 1790 letter to Providence merchant-politician Jabez Bowen during the debate over Rhode Island's ratification of the new Constitution, Adams stated that "the opposition of Rhode Island to the impost seems to have been the instrument which [divine] providence thought fit to use for the great purpose of establishing the present Constitution." By that date Howell was a Federalist supporter of ratification.

Howell's congressional tenure gave him a broader national outlook, prompting his 1782 letter to Providence merchant Welcome Arnold in which he praised his adopted state: "As you go Southward, Government verges towards Aristocracy. In New England alone have we pure and unmixed Democracy, and in Rhode Island & P.P. [Providence Plantations] it is in its Perfection."

In 1786, the General Assembly, dominated by the newly ascendant Country Party, surprisingly elected Howell to the position of associate justice of Rhode Island's Superior (i.e., Supreme) Court. In this capacity, Howell was one of the five judges who heard the argument of James Mitchell Varnum urging the high court to declare unconstitutional the force act passed by

the agrarian-controlled legislature to compel creditors and merchants to accept the state's new issue of paper money or face fines and imprisonment. The court declined to enforce the law on a technicality, and the General Assembly therefore deposed four of the five recalcitrant judges, including Howell, in the 1787 annual election. Howell nonetheless accepted Varnum's theory regarding the power of judicial review and defiantly stated that his "personal view" was that the act, because of its failure to provide trial by jury, "was indeed unconstitutional, had not the force of law, and could not be executed." Amazingly, the resilient Howell secured election as attorney general in 1789, despite the continued dominance of the Country Party, but he was defeated for reelection in 1790.

In February 1789, just prior to becoming attorney general, Howell joined with Moses Brown, Theodore Foster, John Dorrance, Thomas Arnold, and other civic leaders to form the Providence Abolition Society, which they formally incorporated in June 1790. Howell was chosen the society's president and Moses Brown its treasurer. In addition to its role as a moral force against slavery, this organization was authorized to bring court suits on behalf of slaves and to assist in prosecuting actions against illegal slave traders. The most famous of the latter was a suit brought against John Brown in 1796 for violating federal anti-slave-trade laws. Brown's acquittal weakened the society, as did the fact that, in the organization's own words, slavery was "nearly extinct" in Rhode Island. By 1805 the society had become moribund, despite the continuing efforts of Howell and Moses Brown.

After his failed attempt in 1790 to win reelection as attorney general, Howell resumed his teaching duties at Brown with the title of Professor of Jurisprudence. Upon the death of his longtime colleague James Manning in July 1791, Howell became Brown's interim president until the Reverend Jonathan Maxey filled the post in September 1792.

During the negotiation of the Jay Treaty with England in 1794, George Washington appointed Howell as a boundary commissioner. Howell's primary task was to assist in determining the true course of the St. Croix River as the international boundary between Maine and New Brunswick.

During the 1790s, Howell divided his talents among law, teaching, and college

administration, serving as secretary of the Brown corporation from 1780 to 1806. As a practicing attorney he earned a reputation as a skilled litigator. According to one source he was a tall man with an imposing presence, "an excellent public speaker and possessed of a brilliant wit."

Howell gravitated towards the emerging Democratic-Republican Party, and, in 1801, Jefferson appointed him as U.S. attorney for the District of Rhode Island, a position he held for a year. Then, in 1812, Madison selected him as Rhode Island's U.S. District Court judge. Howell served with distinction in this capacity until his death in July 1824 at the age of seventy-seven. During these years he continued to serve Brown as a member of the school's board of fellows.

Howell's September 1770 marriage to Mary Brown, a daughter of Jeremiah Brown, pastor of the First Baptist Church, produced five children prior to her death in 1801. The oldest, Jeremiah (1771-1822), became Rhode Island's U.S. senator in 1811 as a Democratic-Republican. He gained this post just before the Federalist Party took over the reins of state government, a change that came about because of the economic hardship caused in Rhode Island by the commercial restrictions enacted by the administrations of Jefferson and Madison to force England and France to respect America's maritime rights. Jeremiah did not seek reelection when his term expired in 1817, and he died in 1822, predeceasing his father.

David Howell's daughter, Waitstill, married Providence businessman and philanthropist Ebenezer Knight Dexter, and another daughter, Mary, became the wife of Rhode Island Chief Justice Samuel Eddy.

Howell's celebrated brilliance was best described by his Brown colleague, Professor William Goddard: "Judge Howell was endowed with extraordinary talents.… As an able jurist he established for himself a solid reputation. He was, however, yet more distinguished as a keen wit, and as a scholar extensively acquainted, not only with the ancient, but with several of the modern languages. As a pungent and effective public writer he was almost unrivaled; and in conversation, whatever chanced to be the theme, whether politics or law, literature or theology, grammar or criticism, a Greek tragedy or a difficult problem in mathematics, Judge Howell was never found wanting." v

Proposed Practice Form 12, Foreclosure Checklist Open for Bar Member Review and Comment

The Rhode Island Bar Association's Title Standards and Practices Committee, chaired by Michael B. Mellion, Esq., voted unanimously to submit the following Proposed Practice Form 12, Foreclosure Checklist to the Rhode Island Bar Association's Executive Committee for its consideration. Bar members are invited to comment on these proposed changes, no later than February 15, 2013, by contacting Rhode Island Bar Association Executive Director Helen Desmond McDonald by email: hmcdonald@ribar.com.

Proposed Practice Form 12
Checklist for Rhode Island Foreclosures

Property Address: _____

Assessor's Plat: _____ Lot: _____

Mortgage Deed Recording Information:

Book: _____ Page: _____

Date: _____ Time: _____

Mortgagor(s): _____

Mortgagee: _____

Assignee: _____ Date: _____

Assignee: _____ Date: _____

Assignee: _____ Date: _____

I. Mortgage Deed

___ 1. Are all of the current title holders named as mortgagors in the granting clause of the Mortgage Deed?

___ 2. Is the mortgagee clearly identified in the Mortgage Deed?

___ 3. Does the Mortgage Deed incorporate the Statutory Power of Sale by reference?

___ 4. If the Mortgage Deed does not incorporate the Statutory Power of Sale by reference, does it include language that addresses at least the following: (a) the right to hold a non-judicial sale upon default; (b) notice to the mortgagor; (c) place of publication of notice of sale; (d) power to adjourn the sale, and procedure for publishing notice after adjournment; and (e) power to execute a deed to the foreclosure sale purchaser.

___ 5. Is the Mortgage Deed properly executed by all current title holders, and are their signatures properly acknowledged?

___ 6. Does the Mortgage Deed contain a valid, accurate legal description of the mortgaged premises?

___ 7. Is the Mortgage Deed recorded in all cities and/or towns where the property is located?

___ 8. Does the mortgage constitute a first lien on the property?

II. Assignment(s) of Mortgage Deed

___ 1. Are there any assignments of the mortgage?

___ 2. Was the assignor the current holder of the mortgage (either as original mortgagee or subsequent assignee) on the date that the assignment was executed?

NOTE: The actual date of execution is the effective date of the assignment. It cannot be back-dated by reference to an "effective date" that is prior to the date of execution!

___ 3. Is there an unbroken chain of assignments into the assignee that conducted the foreclosure?

___ 4. Is all of the information in each assignment of mortgage correct?

III. Foreclosure Deed/Affidavits/Powers of Attorney

___ 1. If the mortgage was assigned, was the mortgage foreclosed by the last record holder of the mortgage?

___ 2. Is the grantor in the foreclosure deed the same party that conducted the foreclosure?

___ 3. Is the mortgagor/mortgagee/mortgage recording information stated correctly everywhere in the Foreclosure Deed, including the copy of the foreclosure ad?

___ 4. Is the grantee the high bidder or the assignee thereof? If the latter, is an assignment of bid recorded with the Foreclosure Deed?

___ 5. Does the foreclosure deed contain a valid recitation in order to release the lien arising under R.I. Gen. Laws 44-30-71.3?

NOTE: Applies to foreclosure sales occurring on or after January 1, 1992. The language should be substantially similar to the following: "This transfer resulted from a foreclosure, and there were no net proceeds subject to the withholding provisions of R.I. Gen. Laws § 44-30-71.3."

___ 6. Are the foreclosure deed and all affidavits properly executed and acknowledged?

NOTE: Affidavits should be notarized with a jurat, rather than a "free act and deed" acknowledgement format.

___ 7. If executed by an attorney-in-fact, is the power of attorney recorded in the city or town in which the property is located?

___ 8. Are the parties to the power of attorney correctly stated in both the power of attorney and the foreclosure deed?

___ 9. Was the power of attorney executed prior to the execution of the foreclosure deed and accompanying affidavits?

___ 10. Does the power of attorney grant attorney-in-fact the authority to perform the acts undertaken by the attorney-in-fact (e.g., execution of the foreclosure deed)?

___ 11. Was the power of attorney still in full force and effect on the date of the acts undertaken by the attorney-in-fact?

___ 12. Is the legal description the same as in the Mortgage Deed?

___ 13. Does the Affidavit of Sale state that the principal and interest obligations in the mortgage were not paid, tendered or performed when due?

___ 14. If the mortgagor was not an individual consumer mortgagor, does the Affidavit of Sale state that, pursuant to R.I. Gen. Laws §§ 34-11-22 and 34-27-4, notice of the foreclosure was sent to the mortgagor(s) at least 20 days prior to the first publication of notice of the foreclosure?

___ 15. If the mortgagor(s) was an individual consumer mortgagor, does either the Affidavit of Sale, or a separate affidavit of compliance, state that pursuant to R.I. Gen. Laws § 34-27-3.1, a notice was sent to mortgagor(s) at least 45 days prior to initiation of the foreclosure (the "45-Day Notice")?

NOTE: This applies for all foreclosures that were initiated on or after March 6, 2010.

___ 16. Was the correct mortgagee named in the 45-Day Notice?

NOTE: Compare date of mailing of the 45-Day Notice with the date of the assignment(s) listed above to determine correct party. Consult the title insurance company through which title will be insured if a mortgagee other than the record holder of the mortgage on the date the 45-Day Notice was mailed is named as mortgagee in the 45-Day Notice.

___ 17. If the mortgagor(s) was an individual consumer mortgagor, does the Affidavit of Sale state that, pursuant to R.I. Gen. Laws §§ 34-11-22 and 34-27-4, notice of the foreclosure was sent to the mortgagor(s) at least 30 days prior to the first publication of notice of the foreclosure (the "30-Day Notice"), and at least 46 days after the date on which the 45-Day Notice was mailed?

___ 18. If the mortgagor(s) conveyed title to a third party prior to initiation of the foreclosure, does the Affidavit of Sale state that notice of the sale was also sent to that third party? If not, consult the title insurance company through which title will be insured to determine if further inquiry is required.

___ 19. Does the Affidavit of Sale include a statement of compliance with R.I. Gen. Laws § 34-27-4 (c) & (d) regarding notice to servicemembers?

NOTE: This applies to foreclosures initiated on or after June 6, 2012.

___ 20. Have more than six (6) months elapsed between the mailing of the 45-Day Notice and the 30-Day Notice? If yes, consult the title insurance company through which title will be insured to determine whether the recording of a supplementary affidavit regarding the delay will be required.

___ 21. Was the Mortgagee's Sale of Real Estate notice published for three consecutive weeks, the first publication being at least 21 days before the originally-scheduled sale date?

___ 22. Was the notice of sale published in the newspaper prescribed by R.I. Gen. Laws § 34-11-22?

___ 23. Is a legible copy of the newspaper advertisement attached to the Affidavit of Sale?

___ 24. Does the newspaper advertisement contain accurate information relative to:
- ___ a. The address (and possibly plat and lot) of the property?
- ___ b. The book and page of the mortgage deed?
- ___ c. The name of the mortgagor?
- ___ d. The date of sale and any postponements?
- ___ e. The location of the sale?

___ 25. If only a portion of the property described in the mortgage deed was sold, is that portion sufficiently described in the advertisement?

___ 26. Is the date and time of the sale stated in the advertisement consistent with the sale date and time recited in the foreclosure deed and any other notices of recorded with the foreclosure deed?

___ 27. Did the sale occur no less than seven (7) and no more than fourteen (14) after the date of the third publication?

NOTE: Applies to foreclosures initiated on or after July 5, 2008.

___ 28. If the sale was adjourned from the originally scheduled date and time, does the Affidavit of Sale state that the sale was adjourned by public proclamation to a day within the same calendar week as the original sale, and are the date and time of the adjourned sale specifically stated?

___ 29. If the sale was adjourned to a date not within the same calendar week as the original sale, was publication of the advertisement continued once each week commencing with the calendar week following the originally scheduled date of the sale, with the adjourned sale occurring during the same calendar week in which the final notice of the adjourned sale was published?

NOTE: For foreclosure sales initiated on or after July 5, 2008, the sale must occur at least one day after the last notice is published.

___ 30. Does the Affidavit state that an inquiry was made under the Servicemembers Civil Relief Act regarding the military status of the mortgagor(s), and that the mortgagor(s) was not, at the time of the foreclosure sale, or within the correct post-duty period in effect on the date of foreclosure, a servicemember as defined in that Act?

___ 31. If the property is located in a city or town which has enacted a foreclosure conciliation ordinance, does the foreclosure deed contain a certificate of compliance with that city or town's ordinance?

IV. Miscellaneous Considerations

___ 1. If the mortgagor (s) filed a bankruptcy petition, is there on record a copy of the mortgagee's motion for relief from stay and of the order granting such relief, or was the foreclosure commenced after the bankruptcy case was closed?

___ 2. If the property was encumbered by an IRS lien recorded more than 30 days prior to the date of sale, does the affidavit of sale state that the IRS received notice of the sale at least 25-days prior to the date of sale as required by 26 U.S.C. § 7425(c)(1)?

- ___ a. Has mortgagee's counsel provided documentary evidence of the IRS's receipt of the notice?
- ___ b. Was the notice sent to the correct address? See IRS Publication 4235 for correct address.
- ___ c. Have 120 days elapsed since the date of sale? The IRS has 120 days from the date of sale to redeem the property.

___ 3. If the property was encumbered by a mechanic's lien recorded subsequent to the foreclosed mortgage, and the lienor filed a petition to enforce the mechanic's lien, was a certified copy of an order from the Superior Court granting the mortgagee's petition to foreclose recorded? See R.I. Gen. Laws § 34-28-16.1.

___ 4. If your title report lists any undischarged senior lien, has foreclosure counsel provided you with releases, or a copy of the mortgagee's title policy insuring its mortgage as a first lien?

In Memoriam

James F. Clark, Jr., Esq.

James F. Clark, Jr., 65, of Carriage Drive, Lincoln, passed away on October 4, 2012. He was the husband of Mary Sheehan Clark. Born in Providence, he was a son of Marion Duffy Clark of East Providence and the late James F. Clark. Mr. Clark was an attorney for Travelers Insurance Company for the past 23 years. Most recently, he was the managing attorney for Travelers Providence Office. Previously, he was an Assistant Attorney General for the State of Rhode Island. He was a graduate of Providence Country Day School and Boston College, and later received two Master's Degrees from Boston College, in American History and English. He graduated from Western New England School of Law, and he was a member of the American Bar Association. Mr. Clark was very active in the Lincoln Little League, coaching for his sons' teams, and later assisting with administration and legal tasks. Besides his wife and mother, he is survived by two daughters, Nora McAteer and her husband, Shawn of Odenton, MD and Elizabeth Clark and her fiancé, Scott Gerstl of Raleigh, NC; two sons, James and Matthew Clark, both of Lincoln; two sisters, Mary Clarke of Rumford and Kimberly McGowan of Lincoln; and a brother, Robert Clark of Rumford.

Premises Liability Laws

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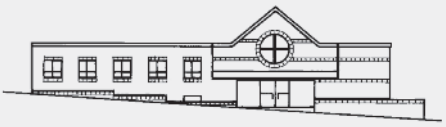
Court was moved by the sympathetic plaintiff in the case, a father who would have been uncompensated for his young boy's wrongful death absent a change in the law.[73] The Court emphasized that determinative rules based on the status of the entrant were too harsh, juries should more often make decisions about liability in these cases, and encouraging safety was more important than unquestionably upholding the rights of landowners.[74]

In **Tantimonico**, the Court made a strong argument for denying the benefits of the duty of reasonable care to trespassers.[75] Here two trespassers in a wooded area were seriously injured when they crashed head-on into one another on their motorcycles – and again the Court was moved by a sympathetic litigant – a defendant who was potentially subject to liability for injuries to two highly culpable trespassers.[76] Fear of unlimited liability and respect for the rights of landowners to be free from liability for injuries to culpable trespassers were the overriding reasons the Court chose to resurrect this limited duty rule.[77]

The flagrant trespasser rule addresses the concerns expressed by the **Mariorenzi** *and* **Tantimonico** Courts. Ordinary trespassers would have an opportunity to have a jury determine whether their injuries were caused by the landowner's negligence.[78] This rule would increase safety because landowners will be incentivized to exercise greater care in the management of their property.[79] The Third Restatement test also addresses the worst fears of many landowners: being subjected to a lawsuit by a culpable trespasser like a criminal or someone engaged in "self destructive" behavior on the property.[80] The continued application of the strict trespasser rule – the duty to refrain from willful or malicious conduct after discovering the *flagrant* trespasser in a position of peril – should assuage the fears of unlimited liability or a flood of meritless lawsuits.[81]

In **Berman**, the most recent effort by the Court to address premises liability issues, the Justices were once again motivated to make a change in the law by the plight of a sympathetic plaintiff.[82] The majority opinion found that the trespasser rule, which it was forced to apply because of the Recreational Use Statute, brought

Senator Jack Reed was presented with an American Bar Association (ABA) Justice Award at ABA Day in Washington. l-r: Rhode Island Bar Association Immediate Past President William J. Delaney, ABA Board of Governors Member, and Past Bar President Joseph J. Roszkowski, Sen. Jack Reed, ABA Day 2012 Vice Chair Paulette Brown and Thomas A. Pyrz of the Indiana State Bar Association.



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about a result that was unacceptably harsh.[83] Both the majority and dissent expressed their dissatisfaction with the trespasser rule and its position of peril requirement when it denied recovery to someone who unfortunately fell within the trespasser category but whose conduct was not culpable.[84] Thus, a synthesis of the Court's reasoning in **Mariorenzi**, **Tantimonico**, and **Berman** reveals the logical solution to the issues the Court has been grappling with since 1975 is to distinguish between ordinary and flagrant trespassers and continue enforcing the harsh rule only against the latter.[85]

Adoption of the Third Restatement's flagrant trespasser rule would necessitate a decision about how to define this new term. The Rhode Island Supreme Court sought to answer a similar question in **Banks**, where it laid out a set of factors judges should use in making the initial duty determination in premises liability cases.[86] The **Banks** Court provided a five factor test based heavily on the *culpability of the landowner*.[87] (emphasis added) This test must be modified because the factors that help define a flagrant trespasser should shift the emphasis to the *culpability of the trespasser*.[88] The following six factors are the most crucial in making this determination:

1) the entrant's reason for being on the property,
2) the entrant's conduct while on the property,
3) the landowner's efforts to prevent trespassing,[89]
4) the entrant's disregard of these efforts,[90]
5) the policy of preventing future harm,[91] and
6) the consequences to the community of characterizing an individual entrant or a class of entrants as flagrant trespassers.[92]

Application of these factors would bring anyone with criminal intentions or persons willfully causing property damage within the flagrant trespasser category.[93] It should also look to include entrants "engaged in self destructive activity" like the plaintiffs in **Tantimonico** who injured themselves while riding their motorcycles in a risky manner.[94] Further refinement of the category would be made over time on a case by case basis. It is necessary to use this type of ad hoc analysis to develop the definition of flagrant trespasser since it will allow juries to take into account

the unique facts of each case. A number of factors such as geography, location, and the age or maturity of the parties will play a role in shaping this new rule.

Conclusion

For more than twenty-five years, the Rhode Island Supreme Court has been trying to satisfactorily balance the interests of injured plaintiffs with the property rights of landowners in premises liability cases. A new rule, which extends the protections of the duty of reasonable care to all entrants on the land with permission as well as ordinary trespassers, protects the interests of plaintiffs without imposing unreasonable new burdens on landowners. It also respects the property rights of landowners and protects them from liability for injuries to persons who have come on their land in a manner that is inimical to their interests. At the next available opportunity, the Rhode Island Supreme Court should consider adopting the Third Restatement and implement the flagrant trespasser rule.[95]

ENDNOTES

1 *This article analyzes the law that applies in premises liability cases that* ***do not*** *fall within the Recreational Use Statute. Since most of the Rhode Island Supreme Court's recent premises liability decisions involve the Recreational Use Statute, those cases are cited,* ***infra****, to provide insight into the application of the common law rules that are the subject of this article. An in-depth analysis of the Recreational Use Statute is beyond the scope of this article.* ***See generally Berman v. Sitrin****, 991 A.2d 1038 (R.I. 2010) for the Court's most recent interpretation of the statute.*

2 ***See*** *Robert S. Driscoll, Note,* THE LAW OF PREMISES LIABILITY IN AMERICA: ITS PAST, PRESENT, AND SOME CONSIDERATIONS FOR ITS FUTURE, *82 NOTRE DAME L. REV. 881, 883-85 (2006).*

3 ***See id.*** *at 885-89.*

4 ***See Tantimonico v. Allendale Mut. Ins. Co.****, 637 A.2d 1056, 1061-62 (R.I. 1994) (Rhode Island Supreme Court adopts reasonable care standard for all entrants on land except for trespassers.).*

5 ***See Berman****, 991 A.2d at 1049;* ***Tantimonico****, 637 A.2d at 1061-62.*

6 ***See Berman****, 991 A.2d at 1054-56 (Suttell, C.J., concurring in part and dissenting in part).*

7 ***See Tantimonico****, 637 A.2d at 1061-62.*

8 ***See id.****;* ***Mariorenzi v. Joseph DiPonte, Inc.****, 333 A.2d 127, 10-31 (R.I. 1975)*

9 ***See*** RESTATEMENT (THIRD) OF TORTS Scope Note *(Tentative Draft No. 6, 2009).*

10 RESTATEMENT (THIRD) OF TORTS §§ 51-52 *(Tentative Draft No. 6, 2009).*

11 ***Id.***

12 RESTATEMENT (THIRD) OF TORTS § 52 cmt. c *(Tentative Draft No. 6, 2009).*

13 RESTATEMENT (THIRD) OF TORTS § 52 cmt. a *(Tentative Draft No. 6, 2009).*

14 ***See*** *Colo. Rev. Stat. § 13-21-115 (2008) (Colorado);* ***Davidson v. Highlands United***

Methodist Church, *673 So. 2d 765, 767 (Ala. Civ. App. 1995) (Alabama);* ***Nicoletti v. Westcor, Inc.***, *639 P.2d 330, 332-33 (Ariz. 1982) (Arizona);* ***Baldwin v. Mosley***, *748 S.W.2d 146, 147-48 (Ark. 1988) (Arkansas);* ***Morin v. Bell Court Condo. Ass'n, Inc.***, *612 A.2d 1197, 1199-1200 (Conn. 1992) (Connecticut);* ***Bailey v. Pennington***, *406 A.2d 44, 47-48 (Del. 1979) (Delaware);* ***Zipkin v. Rubin Const. Co.***, *418 So. 2d 1040, 1042-43 (Fla. Dist. Ct. App. 1982) (Florida);* ***Jones v. Barrow***, *696 S.E.2d 363, 365-66 (Ga. Ct. App. 2010) (Georgia);* ***Evans v. Park***, *732 P.2d 369, 370 (Idaho Ct. App. 1987) (Idaho);* ***Burrell v. Meads***, *569 N.E.2d 637, 639-40 (Ind. 1991) (Indiana);* ***Kirschner v. Louisville Gas & Elec. Co.***, *743 S.W.2d 840, 845 (Ky. 1988) (Kentucky);* ***Baltimore Gas and Elec. Co. v. Flippo***, *705 A.2d 1144, 1148 (Md. 1998) (Maryland);* ***James v. Alberts***, *626 N.W.2d 158, 162 (Mich. 2001) (Michigan);* ***Davis v. Christian Bhd. Homes of Jackson, Miss., Inc.***, *957 So.2d 390, 399 (Miss. Ct. App. 2007) (Mississippi);* ***Harris v. Niehaus***, *857 S.W.2d 222, 225 (Mo. 1993) (Missouri);* ***Moore v. Denune & Pipic, Inc.***, *269 N.E.2d 599, 601 (Ohio 1971) (Ohio);* ***Scott v. Archon Group, L.P.***, *191 P.3d 1207, 1211 (Okla. 2008) (Oklahoma);* ***Taylor v. Baker***, *566 P.2d 884, 889 (Or. 1977) (Oregon);* ***Buchholz v. Steitz***, *463 S.W.2d 451, 454 (Tex. Civ. App. 1971) (Texas);* ***Tjas v. Proctor***, *591 P.2d 438, 441 (Utah 1979) (Utah);* ***Younce v. Ferguson***, *724 P.2d 991, 993-96 (Wash. 1986) (Washington).*

15 ***See Koenig v. Koenig***, *766 N.W.2d 635, 643 (Iowa 2009) (Iowa);* ***Jones v. Hansen***, *867 P.2d 303, 310 (Kan. 1994) (Kansas);* ***Poulin v. Colby Coll.***, *402 A.2d 846, 851 (Me. 1979) (Maine);* ***Mounsey v. Ellard***, *297 N.E.2d 43, 51 (Mass. 1973) (Massachusetts);* ***Peterson v. Balach***, *199 N.W.2d 639, 642 (Minn. 1972) (Minnesota);* ***Heins v. Webster County***, *552 N.W.2d 51, 57 (Neb. 1996) (Nebraska);* ***Nelson v. Freeland***, *507 S.E.2d 882, 883 (N.C. 1998) (North Carolina);* ***O'Leary v. Coenen***, *251 N.W.2d 746, 751 (N.D. 1977) (North Dakota);* ***Tantimonico***, *637 A.2d at 1061-62 (Rhode Island);* ***Mallet v. Pickens***, *522 S.E.2d 436, 446 (W. Va. 1999) (West Virginia);* ***Antoniewicz v. Reszcynski***, *236 N.W.2d 1, 2 (Wis. 1975) (Wisconsin);* ***Clarke v. Beckwith***, *858 P.2d 293, 296 (Wyo. 1993) (Wyoming).*

16 ***See Edenshaw v. Safeway, Inc.***, *186 P.3d 568, 570-71 (Alaska 2008) (Alaska); Rowland, 443 P.2d at 568 (California);* ***Pickard v. City and County of Honolulu***, *452 P.2d 445, 446 (Haw. 1969) (Hawaii);* ***Cates v. Beauregard Elec. Co-op., Inc.***, *328 So. 2d 367, 371 (La. 1976) (Louisiana);* ***Limberhand v. Big Ditch Co.***, *706 P.2d 491, 496 (Mont. 1985) (Montana);* ***Ouellette v. Blanchard***, *364 A.2d 631, 633-34 (N.H. 1976) (New Hampshire);* ***Basso v. Miller***, *352 N.E.2d 868, 873 (N.Y. 1976) (New York).*

17 ***See John Ketchum***, *Note,* Missouri Declines an Invitation to Join the Twentieth Century: Preservation of the Licensee-Invitee Distinction in Carter v. Kinney, *64 UMKC L. REV. 393, 395 (1995).*

18 *See* Restatement (Third) Of Torts § 50 cmt. e *(Tentative Draft No. 6, 2009).*

19 *Mark J. Welter, Comment,* Premises Liability: A Proposal to Abrogate the Status Distinctions of 'Trespasser,' 'Licensee,' and 'Invitee' as Determinative of a Land Occupier's Duty of Care Owed to an Entrant, *33 S.D. L. REV. 66, 67 (1988).*

20 ***Id.***

21 ***Id.*** *at 72-73.*
22 ***Id.***
23 ***Id.*** *at 73.*
24 ***Id.*** *at 72-74.*
25 *Welter,* ***supra*** *note 16 at 75.*
26 *Driscoll,* ***supra*** *note 2 at 881.*
27 ***Rowland v. Christian****, 443 P.2d 561, 568 (Cal. 1968).*
28 ***Id.*** *at 568*
29 *For a list of jurisdictions that adopted this approach, see endnote 16,* ***supra.***
30 ***See Mariorenzi****, 333 A.2d at 133.*
31 *For a list of jurisdictions that adopted this approach, see endnote 15,* ***supra.***
32 ***See Boday v. New York****, N.H. & H.R. Co., 165 A. 448, 448-49 (R.I. 1933) (Rhode Island Supreme Court applies three-category test to plaintiff killed by train on railroad bridge, finds that his status as trespasser was determinative, and orders a nonsuit to be entered in favor of defendant.).*
33 ***Erenkrantz v. Palmer****, 35 A.2d 224, 225 (R.I. 1944) (emphasis in original).*
34 ***Mariorenzi****, 333 A.2d at 133 (Rhode Island Supreme Court adopted the reasoning of the California Supreme Court in Rowland, 443 P.2d at 568, and abolished all three of the common law categories.) overruled in part by* ***Tantimonico****, 637 A.2d at 1061-62.*
35 ***Mariorenzi****, 333 A.2d at 131.*
36 ***Id.***
37 ***Banks v. Bowen's Landing Corp.****, 522 A.2d 1222, 1226 (R.I. 1987).*
38 ***Id.*** *at 1223-24.*
39 ***Id.*** *at 1224-26. (Under the no-category, reasonable care approach, duty is still a preliminary issue of law to be decided by the trial justice. The rejection of the common law categories created a system where the status of the entrant on land was no longer determinative of the duty issue, it did not strip trial judges of the "power to determine whether a duty runs from the defendant to the plaintiff in any given case.").*
40 ***Id.*** *at 1226;* ***Mariorenzi****, 333 A.2d at 133.*
41 ***Banks****, 522 A.2d at 1225;* ***see also Thompson v. County of Alameda****, 614 P.2d 728, 732-33 (Cal. 1980) (Five factor test to guide the duty determination was originally proposed by Supreme Court of California).*
42 ***Banks****, 522 A.2d at 1225-27.*
43 ***Tantimonico****, 637 A.2d at 1062.*
44 ***See Id.*** *at 1059.*
45 ***Id.*** *at 1056.*
46 ***Id.*** *at 1059.*
47 ***See id.*** *at 1057.*
48 ***Id.*** *at 1061-62.*
49 *Restatement (Third) Of Torts §§ 50-52 (Tentative Draft No. 6, 2009).*
50 *Gould, 330 F.2d at 829.*
51 ***Id.*** *at 361-62.*
52 ***Id.*** *at 363 (The boy had the legal status of a trespasser because the apartment was rented to a friend of the boy's mother, and they were living there without the consent of the landlord and in violation of the terms of the lease.)*
53 ***See id.*** *at 363.*
54 ***Id.*** *at 363 (emphasis added).*
55 *See Restatement (Third) Of Torts § 52 cmt. a-b (Tentative Draft No. 6, 2009);* ***Mariorenzi****, 333 A.2d at 130 (Some jurisdictions have attempted to distinguish among different types of trespassers through various exceptions and subclassifications, creating special rules for child trespassers, anticipated trespassers, discovered trespassers, etc. These*

exceptions and subclassifications have proven over the years to be confusing and difficult to apply. The central inquiry into whether or not a landowner owes a duty of reasonable care to a trespasser should be based on the degree of the trespasser's culpability and not on a haphazard system of exceptions.).

56 *Restatement (Third) Of Torts §§ 50-52 (Tentative Draft No. 6, 2009).*

57 *Restatement (Third) Of Torts § 51 (Tentative Draft No. 6, 2009) (emphasis added).*

58 *Restatement (Third) Of Torts § 52 cmt. c (Tentative Draft No. 6, 2009).*

59 ***See*** *Restatement (Third) Of Torts Scope Note (Tentative Draft No. 6, 2009); Restatement (Third) Of Torts § 52 cmt. c (Tentative Draft No. 6, 2009).*

60 *Restatement (Third) Of Torts § 52 cmt. c(1) (Tentative Draft No. 6, 2009).*

61 ***Id.*** *at cmt. c(1-2) (Drafters of the Third Restatement see the subclassifications and exceptions, such as child trespasser doctrine, constant trespasser doctrine, and anticipated trespasser doctrine that many jurisdictions apply to alleviate the harshness of the common law rules have, as their logical end, a duty of reasonable care to all ordinary trespassers and the exclusion of flagrant trespassers.).*

62 ***Id.*** *at cmt. (c)(3).*

63 ***Id.***

64 ***See*** *Restatement (Third) Of Torts § 52 cmt. a (Tentative Draft No. 6, 2009).*

65 ***Id.***

66 ***Id.*** *(The drafters also suggest that the extent of a landowner's efforts to prevent trespassing and whether the entrant defied those efforts should be evaluated in determining if someone is a flagrant trespasser.)*

67 ***See*** *Restatement (Third) Of Torts §§ 51-52 (Tentative Draft No. 6, 2009).*

68 ***See id.***

69 ***See Berman****, 991 A.2d at 1048;* ***Tantimonico****, 637 A.2d at 1057.*

70 ***See Mariorenzi****, 333 A.2d at 131-32.*

71 ***See Tantimonico****, 637 A.2d at 1059, 1061.*

72 ***Mariorenzi****, 333 A.2d at 300-05, 307.*

73 ***See id.*** *at 128-29.*

74 ***See id.*** *at 300-05.*

75 ***See Tantimonico****, 637 A.2d at 1060-62.*

76 ***See id.*** *at 1061.*

77 ***See id.*** *at 1060-62.*

78 ***See Mariorenzi****, 333 A.2d 131-32; see also Basso, 352 N.E.2d at 872 (Standard of reasonable care to be used in premises liability cases is no different from the standard of care applied in an ordinary negligence action.).*

79 ***See Basso****, 352 N.E.2d at 872 (Obligation of owner to maintain property in safe condition should not be dependent on status of entrant. Landowners should always exercise reasonable care in the management of their property); Welter,* ***supra*** *note 22 at 84 (Reasonable care must be used to avoid acts or omissions that could foreseeably cause injury and landowners should be accountable for a lack of reasonable care.).*

80 ***See Tantimonico****, 637 A.2d at 1059, 1061; Restatement (Third) Of Torts §§ 51-52 (Tentative Draft No. 6, 2009).*

81 ***See Tantimonico****, 637 A.2d at 1059 (The Tantimonico case dealt with two plaintiffs who should fall into the flagrant trespasser category. When the Court discussed the "worst fears" of landowners they were referring to lawsuits by culpable entrants seeking a windfall from a non-negligent landowner. This reasoning would not apply where an ordinary trespasser is injured due to the landowner's negligence.)*

82 ***See Berman****, 991 A.2d at 1042 (majority opinion);* ***see also Berman****, 991 A.2d at 1054 (Suttell, C.J., concurring in part and dissenting in part) (Chief Justice Suttell's dissent implies that the majority was swayed by the sympathetic plaintiff in this case.)*

83 *R.I Gen. Laws §§ 32-6-1 to -6 (West 2006 & Supp. 2010);* ***see Berman****, 991 A.2d at 1053.*

84 ***See Berman*** *991 A.2d at 1053 (majority opinion);* ***Berman****, 991 A.2d at 1056 (Suttell, C.J., concurring in part and dissenting in part).*

85 ***See Berman****, 991 A.2d at 1051, 1053;* ***Tantimonico****, 637 A.2d at 1061-62;* ***Mariorenzi****, 333 A.2d at 133.*

86 ***See Banks****, 522 A.2d at 1225 (Citing Thompson, 614 P.2d at 732-33).*

87 ***See Banks*** *522 A.2d at 1225 (The* ***Banks*** *factors are laid out in full in the discussion section of this comment.)*

88 *Restatement (Third) Of Torts § 52 cmt. a (Tentative Draft No. 6, 2009).*

89 ***See id.***

90 ***See id.***

91 ***See Banks****, 522 A.2d at 1225.*

92 ***See id.***

93 ***See Basso****, 352 N.E.2d at 877 (Breitel, C.J., concurring) (Even after adoption of the no-category, reasonable care standard no duty should ever be owed to a criminal trespasser.).*

94 ***See Tantimonico****, 637 A.2d at 1061.*

95 ***See*** *Restatement (Third) Of Torts §§ 51-52 (Tentative Draft No. 6, 2009).* v

Lawyers on the Move

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Immigration Consequences

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Holder, __ F.3d__ (4th Cir. Jan 30, 2012); **Jean-Louis v. Holder**, 582 F.3d 462 (3rd Cir 2009); **Guardado-Garcia v. Holder**, 615 F.3d 900 (8th Cir. 2010); and **Fajardo v. US Attorney General**, 659 F.3d 1303 (11th Cir 2011). The 3rd, 4th and 11th Circuits held that the statute (INA § 212(a)(2)(A)(i)) was not ambiguous. The 8th Circuit held that Attorney General's decision did not merit deference.

The 1st Circuit did not explicitly reject **Silva-Trevino**, but it did so implicitly when it defined whether a conviction of reckless conduct in New Hampshire was a CIMT in **Idy v. Holder**, 674 F.3d 111 (C.A.1 2012), and did not use the methodology set out in **Silva-Trevino**. Most recently, in **Palmeira v. Holder**, the 1st Circuit very specifically stated that that it would not decide whether to follow the third step of **Silva-Trevino**, as the court considers this issue controversial. See **Palmeira v. Holder**, 2012 WL 1648909, fn 6, 7 (C.A.1).

So what does this all mean in the context of a client charged with committing a simple assault/battery pursuant to RI Gen. Laws § 11-5-3? The answer is… we will have to wait and see!

As noted, the IJ will now be able to look at *all* the documents, although maybe not in this Circuit, to determine if the predicate offense is a CIMT, keeping in mind, all the while, that the offense must possess reprehensible conduct and scienter.

In conclusion, if a defendant is facing the charge of simple assault, and what really occurred, based on the facts was a battery, and your client decides to plead to the offense, it behooves the client to plea to the correct offense of battery and to have the record of conviction/criminal complaint amended to read that the defendant is being charged with a battery under the statute and not an assault, and that the defendant is pleading to the battery portion of the statute.

ENDNOTES

1 *The term "alien" in this article does not refer to extra terrestrial beings. It is a term of art used by the Department of Homeland Security to refer to persons who are not citizens of the United States.*

2 *Although the resolution to a criminal charge of a filing and/or probation with no fines is not considered to be conviction in Rhode Island, see RI Gen. Laws §§ 12-10-12, 12-18-3, 12-19-36, these types of dispositions would most definitely be considered "convictions" for immigration purposes. See*

8 U.S.C. § 1101(a)(48)(A), definition of conviction.

3 *8 U.S.C. § 1227(a)(2)(E)(i).*

4 *R.I. Gen. Laws § 11-5-3*

5 *See also,* TOUCH THIS! OVER-CRIMINALIZATION OF OFFENSIVE CONDUCT, *infra ftnt 8*

6 *Conviction as defined by 8 U.S.C. § 1101(a)(48)(A).*

7 *Inadmissibility refers to an alien's undesirability to be granted lawful permanent residence or a non-immigrant visa as a result of some defect as enumerated in the Code § 1182. This is not the same as an alien's entry. Removability refers to Immigration's ability to remove (deport) an alien who has been admitted as a lawful permanent resident or nonimmigrant or an undocumented alien on the basis of a defect as enumerated in the Code § 1227. Again this does not refer to an alien's entry into the United States.*

8 *The criminal docket sheet is not an official document in RI and there is no legal rule as to how a clerk at the District Court inputs the information from a criminal complaint which is an official document. Information obtained by the District Court Clerk's Office on July 30, 2012*

9 *See* ***State v. McLaughlin****, 621 A.2d 170,177 (RI 1993), citing to* ***State v. Pope****, 414 A.2d 781 (RI 2980); see also* TOUCH THIS! OVER-CRIMINALIZATION OF OFFENSIVE CONDUCT, *Jan/Feb. 02:5(50) by David M. Zlonick and Carly Beauvais Iafrate.*

10 *Conviction is defined pursuant to the Code § 1101(a)(48)(A) as a formal judgment of guilt of the alien entered by a court or if adjudication of guilty has been withheld, where (i) a judge or jury has found the alien guilty or the alien entered a plea of guilty or nolo contendere or as admitted sufficient facts to warrant a finding of guilt and (ii) the judge has ordered some form of punishment, penalty or restraint on the alien's liberty to be imposed.*

11 *This categorical methodology is set out in* ***Taylor v. US****, 495 US 575 (1990), which allows the sentencing court under the federal statute to look at the statutory elements, charging document, and jury instructions to determine whether the predicate offense qualifies as a violent felony.*

12 *The modified categorical approach allows the sentencing court to determine if a predicate offense is a violent crime/felony by looking not only at the record of conviction, but also transcript of the colloquy, and the terms of the plea agreement, or some other comparable judicial record.* ***Shepard v. US****, 544 US 13 (2005);* ***Taylor v. US****, 495 US 575 (1990).*

13 *Keep in mind that the Federal Rules of Evidence are VERY relaxed in Immigration Proceedings. See 8 CFR § 1 240.7(a).* V

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